

Principles of International Law, 9.12.2022

Maximum points in the examination: 30 p.

Question 1, maximum points: 10 p.

Question 2: maximum points 10 p.

Question 3: maximum points 10 p.

You can use sanakirja.fi dictionary in the examination.

The following digital documents will be provided for the students in the examination: United Nations Charter, Statute of the International Court of Justice, Vienna Convention on the Law of the Sea & Articles on State Responsibility for Internationally Wrongful Acts.

The Tomile Ocean case – Atilla v. Buntus

The three States of Atilla, Buntus and Caspar are neighbours and all border the Ocean of Tomile which is rich in fish, minerals and, it is presumed, also oil. The three States decide to negotiate a treaty to regulate the use of the natural resources of the Ocean of Tomile, but also to define exactly each State's territorial sea and exclusive economic zone (EEZ), which they considered important in view of the potential discovery of oil and mineral sources. On 30 July 1982, the three States conclude the Treaty on Exploitation of Tomile Resources (TETR). Since Buntus and Caspar do not have the human and financial resources necessary, it is agreed that the task of drawing a map of the Tomile Ocean, including all islands, will be entrusted to the Cartography Service of Atilla (CSA). Based on the map produced by CSA and taking account of all islands belonging to one of the three parties, the three States agreed on the delimitation of the respective territorial seas.

In addition to the provisions fixing sea boundaries and regulating in detail the modalities of exploiting the natural resources of the Tomile Ocean, the TETR also provides for the protection of some rare species of maritime wildlife.

Buntus' ratification document is accompanied by the following reservation: 'The President of Buntus declares the TETR ratified under the condition that the little auk (a species of seabird) is included on the list of protected species at art. 35 of said treaty.'

As the little auk is Buntus' national bird, the country's government had tried to include it in the list during the treaty negotiations but failed because scientists did not consider it an endangered species. Caspar does not react to the reservation, while Atilla declares its

opposition to the inclusion of little auk in the protection scheme. On 1 December 1982, the TETR enters into force between the parties.

A few years later, in 1988, a group of researchers discovers that there is a mistake in the map of the Tomile Ocean produced by the CSA. One of the islands belonging to Buntus is located further to the west than it has been mapped. Changing the border to reflect that would reduce Atilla's territorial waters by several square kilometers while at the same time enlarging the territorial sea of Buntus. The CSA publicly apologizes, acknowledging the mistake. The three governments remain silent and take no action on the matter at this point in time.

Then, in 2005, an oil field is discovered in the Tomile Ocean, located exactly in the area now belonging to Atilla, but that would have been in Buntusian territory had there been no mistake in the map. The government of Buntus immediately sends a letter to Caspar and Atilla, declaring that it considered the TETR terminated as it deprived Buntus of its rightful ownership of the newly discovered oil field on the basis of incorrect maps prepared by Atilla. As a further argument, Buntus stated that in any event the TETR had not been in force between Atilla and Buntus, as a result of Atilla's opposition to Buntus' reservation back in 1982. Atilla and Caspar vehemently protest, declaring Buntus' legal arguments baseless and the TETR still in force.

Further tensions derive from the activities of the Atillan Freedom Movement (AFM), a rebel group opposing the government of Atilla and claiming authority over part of the country's territory. Following the outbreak of the dispute over ownership of the newly discovered oil field, the government of Buntus secretly begins to finance, train and equip the AFM. After a few weeks and unbeknownst to Buntus, the AFM attacks undefended Atillan villages and destroys the nearby oil extraction facilities, taking the Atillan government and its forces completely by surprise. A large number of civilians are killed and the extraction facilities in the area are destroyed, resulting in a significant blow to Atilla's economy. Finding evidence of Buntus' support of the AFM, the government of Atilla accuses Buntus of being responsible for the attack. Buntus rejects the accusation, declaring it had cooperated with the AFM only to appease them from crossing the border and moving into Buntusian territory. Buntus declared that it had nothing to do with the attack and therefore could not be held responsible for any event related to it.

The government of Atilla decides to bring the pending disputes between the two States to the International Court of Justice (ICJ). It introduces the case on the TETR and the issue of state responsibility on 22 July 2010. On 15 August 2010 Buntus files a reply arguing that as the AFM is a private party, its actions could not determine the responsibility of the State of Buntus under international law. Furthermore, on the TETR issue, Buntus declares that the newly discovered oil field is clearly located in its rightful territorial sea and that Atilla has no right to it on the basis of an old treaty that had admittedly drawn the boundaries incorrectly.

You are a clerk for one of the judges of the ICJ. The judge asks you to draft a legal opinion on the key issues of the case and address the following questions:

Question 1

Is the TETR (still) in force between its parties, especially Atilla and Buntus? Address all arguments made by the parties.

Question 2

Can Buntus be held responsible for the AFM's attack on Atilla?

Question 3

Is the ICJ competent to deal with the disputes at issue?

Nota bene:

Atilla, Buntus and Caspar are parties to the Vienna Convention on the Law of Treaties since its entry into force.

All three States are original members of the United Nations.

The TETR in its article 67 provides: 'Reservations cannot be made to Articles 1 to 16 and Articles 25 to 31.'

The TETR has been concluded for an undetermined time and does not contain any clause of denunciation or termination.

Atilla has not made an optional clause declaration under the ICJ Statute. But it has made an optional declaration under the Statute of the Permanent Court of International Justice in 1927 and has never revoked it since. The optional clause declaration contains no reservations.

Buntus has made an optional clause declaration under the ICJ Statute with the following reservation: 'Buntus excludes from the jurisdiction of the International Court of Justice matters which essentially fall within its domestic jurisdiction or related to its national security, as determined by Buntus.'

Maxpoäng i förhöret: 30 p.

Maxpoäng (fråga 1): 10 p.

Maxpoäng (fråga 2): 10 p.

Maxpoäng (fråga 3): 10 p.

Vid tentamen är det tillåtet att använda sanakirja.fi-tjänsten.

Under tentamen har studerandena tillgång till följande digitala material: United Nations Charter, Statute of the International Court of Justice, Vienna Convention on the Law of Treaties & Articles on State Responsibility for Internationally Wrongful Acts.

Mål som berör Tomilehavet – Atila v. Buntus

Staterna Atila, Buntus och Caspar är grannar och samtliga gränisar till Tomilehavet som är rikt på fisk och mineraler samt även förmodas vara rikt på olja. De tre staterna beslutar sig för att förhandla fram ett fördrag gällande regleringen av användningen av naturresurser i Tomilehavet, men också för att exakt definiera varje stats territorialhav samt exklusiva ekonomiska zon (Exclusive Economic Zone, EEZ). Detta ansåg de vara viktigt med tanke på den potentiella upptäckten av olje- och mineralkällor. Den 30 juli 1982 sluter de tre staterna fördraget: Treaty on Exploitation of Tomile Resources (TETR). Eftersom Buntus och Caspar inte har de mänskliga och ekonomiska resurserna som krävs kommer man överens om att Atilas karttjänst (Cartography Service of Atila, CSA) gör upp en karta över Tomilehavet, inklusive alla öar. Baserat på den karta som tagits fram av CSA, och med hänsyn till alla öar som tillhör en av de tre parterna, enades de tre staterna om avgränsningen av respektive territorialhav.

Förutom bestämmelserna som fastställer sjögränserna och regleringen av utnyttjandet av naturresurser i Tomilehavet står TETR även för skydd av vissa sällsynta arter av havsdjur.

Buntus ratificeringsdokument åtföljs av följande förbehåll: "Under förutsättning att lilla auk (en art av sjöfågel) finns med på listan över skyddade arter i artikel 35 i fördraget förklarar Buntus president TETR som ratificerat."

Eftersom lilla auk är Buntus nationalfågel hade landets regering redan under fördragsförhandlingarna försökt inkludera den på listan över skyddade arter men misslyckats eftersom forskare inte ansåg att den var en hotad art. Caspar reagerar inte på förbehållet medan Atila förklarar att de motsätter sig inkluderingen av lilla auk på listan över skyddade arter. Den 1 december 1982 träder TETR i kraft mellan parterna.

Några år senare (1988) upptäcker en grupp forskare att det finns ett misstag i CSA:s karta över Tomilehavet. En av öarna som tillhör Buntus ligger längre västerut än den har kartlagts. Ändringen av gränsen för att återspegla det skulle minska Atilas territorialvatten med flera kvadratkilometer samtidigt som Buntus territorialhav skulle utvidgas. CSA ber offentligt om ursäkt och erkänner misstaget. De tre regeringarna förblir tysta och vidtar vid denna tidpunkt inga åtgärder gällande ärendet.

Ett oljefält upptäcks 2005 i Tomilehavet, beläget exakt i det område som nu tillhör Atila, men som skulle ha tillhört Buntus ifall CSA:s karta inte innehållit något fel. Buntus regering skickar

omedelbart ett brev till Caspar och Atilla och förklarar att de anser att TETR är upphävt, eftersom det berövar Buntus på dess äganderätt till det nyupptäckta oljefältet på grundval av felaktiga kartor som Atilla utarbetat. Som ett ytterligare argument framför Buntus att TETR inte egentligen varit i kraft mellan Atilla och Buntus, som ett resultat av Atillas motstånd mot Buntus förbehåll 1982. Atilla och Caspar protesterar häftigt och förklarar Buntus juridiska argument som ogrundade och att TETR fortfarande är i kraft.

Ytterligare spänningar härrör från ageranden av Atillan Freedom Movement (AFM). De är en rebellgrupp som motsätter sig Atillas regering och gör anspråk på en del av landets territorium. Efter tvisten gällande äganderätten till det nyupptäckta oljefältet brutit ut börjar Buntus regering i hemlighet finansiera, utbilda och utrusta AFM. Efter några veckor och utan att Buntus visste om det attackerar AFM oskyddade byar i Atilla och förstör de närliggande oljeutvinningsanläggningarna, vilket helt överraskar Atillas regering och dess styrkor. Ett stort antal civila mister livet och utvinningsanläggningarna i området förstörs, vilket resulterar i ett betydande slag mot Atillas ekonomi. Efter att ha hittat bevismaterial för Buntus stöd till AFM anklagar Atillas regering Buntus för att vara ansvarig för attacken. Buntus avvisar anklagelsen och förklarar att de bara hade samarbetat med AFM för att blidka dem från att korsa gränsen och ta sig in på Buntus territorium. Enligt Buntus hade de inte något med attacken att göra och kan därför inte hållas ansvarig för någon händelse relaterad till attacken.

Atillas regering beslutar sig för att föra de pågående tvisterna mellan de två staterna till den internationella domstolen (ICJ). Den 22 juli 2010 presenterar regeringen fallet gällande TETR och frågan om statligt ansvar. Den 15 augusti 2010 lämnar Buntus in ett svar i vilket de hävdar att eftersom AFM är en privat aktör kan deras handlingar inte leda till att staten Buntus är ansvarig på grund av internationell rätt. Vidare förklarar Buntus, i relation till TETR-frågan, att det nyupptäckta oljefältet är klart beläget i deras rättmätiga territorialhav och att Atilla inte har någon rätt till det på grundval av ett gammalt fördrag som medgivet dragit gränserna felaktigt.

Du är biträde till en av domarna vid ICJ. Domaren ber dig skriva ett juridiskt utlåtande över målet och svara på följande frågor:

Uppgift 1 (svarsutrymme 800 ord)

Är TETR (fortfarande) i kraft mellan dess avtalsparter, särskilt mellan Atilla och Buntus? Behandla alla argument som parterna har framfört.

Uppgift 2 (svarsutrymme 800 ord)

Kan Buntus anses vara ansvarig för AFM:s attack mot Atilla?

Uppgift 3 (svarsutrymme 800 ord)

Är ICJ behörig att hantera tvisterna i målet?

Nota bene:

Atila, Buntus och Caspar har varit medlemmar i Wienkonventionen om traktaträtten (Vienna Convention on the Law of Treaties) sedan den trädde i kraft.

Alla tre stater är ursprungliga medlemsstater av FN.

Artikel 67 i TETR lyder "Förbehåll kan inte göras mot artiklarna 1–16 och 25–31."

TETR har gjorts upp för en obestämd tid och innehåller inga klausuler om upphörande.

Atila har inte lämnat in en "optional clause"-förklaring enligt ICJ-stadgan. Men 1927 gjorde Atila en "optional declaration" enligt fördraget Statute of the Permanent Court of International Justice och denna förklaring har inte upphävts. "Optional clause"-förklaringen innehåller inga förbehåll.

Buntus har lämnat in en "optional clause"-förklaring enligt enligt ICJ-stadgan. Förklaringen innehåller följande förbehåll: "Buntus utesluter från ICJ:s behörighet frågor som faller inom Buntus nationella behörighet eller är relaterade till dess nationella säkerhet, enligt Buntus definition".

Illustration of Fundamental Elements of Correct Answers

Question 1 – Is the TETR (still) in force between the parties, especially Atila and Buntus? Address all the arguments made by the parties.

Applicable law: Vienna Convention on the Law of Treaties (VCLT). All parties to TETR had been parties to the VCLT since its entry into force in 1980, which is prior to the entry into force of TETR in 1982. Therefore, the VCLT applies to TETR.

Buntus advances two arguments to support its claim that the TETR would not be in force: a) the TETR would be terminated as it deprived Buntus of its rightful ownership of the newly discovered oil field on the basis of incorrect maps prepared by Atila, b) the TETR had not been in force between Atila and Buntus, as a result of Atila's opposition to Buntus' reservation back in 1982.

- a) Buntus is essentially claiming that it gave its consent to be bound in a state of error, on the basis of incorrect maps. According to the VCLT, error is a cause of treaty invalidity, not of termination.

The facts fit the definition of error at art. 48: the incorrect maps led Buntus to assume incorrect facts in relation to the boundary division, which in turn formed an essential basis for the conclusion of the treaty. Buntus can invoke a claim of error also in light of the conditions set by art. 48(2): it did not contribute to the error with its conduct and the circumstances of creation of the map were not such to arise any reasonable suspicion of the error's occurrence.

However, we need to consider also art. 45 VCLT on acquiescence. Art. 45 provides that a State loses its right to invoke a ground of invalidity if, after becoming aware of the relevant factual basis, consents explicitly or implicitly by its conduct to the validity of the treaty.

The mistake in the maps is discovered and made public in 1988. Buntus, the first and only party to invoke the ground of error, does so only 17 years later, in 2005, while continuing to abide to the terms of the treaty in the meantime. By then, Buntus had surely acquiesced to the validity of TETR according to art. 45 VCLT and lost its right to invoke the ground of error.

- b) Buntus had appended a valid reservation to art. 35 of the TETR, permitted by the treaty (which forbade reservations only to art. 1 to 16 and 25 to 31) and which does not go against its object and purpose (addition of a protected species to a treaty primarily concerned with maritime delimitation).

The potential reactions of other treaty parties to a reservation and their legal effects are regulated by art. 20 VCLT. Caspar remains silent which, according to art. 20(5), equals to acceptance of the reservation once a year has passed. The legal consequences are that the treaty enters into force between Caspar and Buntus, with the reservation applicable. Atilla objects to the reservation. According to art. 20(4)(b) VCLT, objection to a reservation does not preclude the entry into force of a treaty between the reserving and the objecting State as long as the latter has not clearly expressed the intention not to enter into treaty relations with the reserving State. Since Atilla has not expressed such intention, the TETR is in force between Atilla and Buntus, with the exclusion of art. 35 to the extent of the reservation. Therefore, also Buntus' claim b) is incorrect.

In sum, the TETR is in force between the parties.

Question 2 - Can Buntus be held responsible for the AFM's attack on Atilla?

There is no doubt that the attack on Atilla, if attributable to a State, constitutes a violation of the prohibition of the use of force as enshrined in art. 2(4) of the UN Charter, and therefore a breach of an international legal obligation under the law of state responsibility. The provision that best reflects the facts of the case with regard to attribution is art. 8 of the Articles on State Responsibility for International Wrongful Acts (ARSIWA), referring to the conduct of

private persons directed or controlled by a State. As the exam taker is requested to take the role of an ICJ clerk, the legal content of art. 8 can be further clarified by the application of the effective control test, consistently applied by the Court and first developed in the Nicaragua case (Nicaragua v. USA, decided 1986). According to the test, only acts under direct and clear instructions can be attributed to the State in question. In the exam case, Buntus did not order the AFM to attack the villages and the oil facilities. This means that the attack by the AFM cannot be attributed to Buntus under the law of State responsibility.

Question 3 – Is the ICJ competent to deal with the disputes at issue?

This question asks about the jurisdiction of the ICJ over the disputes between Atilla and Buntus. Both are members of the United Nations. This indicates that there are no doubts over their statehood and they are eligible to bring claims and appear as parties to contentious cases in front of the Court.

ICJ jurisdiction, though, requires a further declaration of consent by States, which can take various forms regulated in the ICJ Statute. The relevant form of declaring consent for Atilla and Buntus is the so-called optional declaration ex art. 36(2) ICJ Statute.

Atilla has not issued a declaration accepting the jurisdiction of the ICJ, but it did accept the jurisdiction of its predecessor the Permanent Court of International Justice (PCIJ) without limitations of time or scope. According to art. 36(5) of the ICJ Statute, declarations of acceptance of PCIJ jurisdiction shall be considered to be acceptances of ICJ jurisdiction in the same terms set by the original declaration. Therefore, the legal effect is that Atilla has accepted ICJ jurisdiction with no limitations.

Buntus' reservation to its optional declaration is what is known as an 'automatic reservation', that is a declaration excluding from ICJ jurisdiction excluding matters of domestic jurisdiction as determined by the State itself. Automatic reservations are highly controversial because they leave a wide discretion to the reserving State (or its counterpart, given that ICJ jurisdiction operates on the basis of reciprocity) to escape the Court's purview if it so wishes.

In any case, none of the parties to the dispute has invoked the reservation in their submissions and the Court does not consider them *ex officio*. Therefore, the ICJ has jurisdiction over the disputes on the basis of the reciprocal optional declarations by Atilla and Buntus.

Alternatively, one could argue that optional clauses with automatic reservations are invalid as contrary to art. 36(6) ICJ Statute, establishing that the Court decides on its own jurisdiction (this argument was put forward by Judge Lauterpacht in his separate opinion appended to the Norwegian Loans judgment). Even then, the ICJ can affirm its jurisdiction on the basis of *forum prorogatum*, as both parties took part to the proceedings (Atilla brought the case and Buntus filed a reply) without challenging the Court's competence to decide on the matter.

N.B. This document is a mere illustration of the fundamental elements of a correct answer according to the most accepted understandings of international law. It does not elaborate on systematic issues and the authority of relevant legal sources. It is not a full articulation of perfect answers.

Some students have attempted to offer alternative arguments, relying on different forms of legal reasoning or international law provisions and doctrines. These alternative arguments have been graded according to their plausibility and the level of understanding of international law as a system they reflected.

Generally an answer receiving a passing grade (5 points) is one containing at least some fundamental elements of a correct answer and showcases at least a basic understanding of international law.

An answer receiving the full amount of points (10) is one that contains all the fundamental elements of a correct solution to the legal problem posed and connects them in a logically coherent legal reasoning, aware of the systematic functioning of international law and its sources.