Marking

Question 1: 16/20
Question 2: 16/20
Question 3: 16/20
Question 4: 16/20
Question 5: 16/20

Total: 80/100

No other comments were made on this paper. [Square brackets] indicate material that was not included on the original exam paper, but are included for ease of reading and comprehension.

Question 1

A is basing its claim upon its use of fisheries, and the fact it is marked as theirs on a British map from 1865. B is basing its claim on their control over the island. Evidence of this includes maintenance of the lighthouse, legislation making it a national park and exercising criminal jurisdiction.

This creates an issue of effectivités, where competing claims must be evaluated based on who has exercised their authority most effectively over the territory, thereby creating a better claim.

A has the option of pursuing terra nullius, from discovery by the British. This provides an inchoate title, but A has failed to act upon it to satisfy subsequent effective occupation, similar to '*Island of Palmas'*. Therefore, this is a weak argument. As for shared fisheries, it is a right enjoyed equally by both parties and does not give A a stronger claim than B.

B by contrast has enacted legislation as an act of power, as mentioned in '*Legal Status of Eastern Greenland*'. They have also exercised criminal jurisdiction similar to '*Miniquers and Ecrehos*', and the maintenance of the lighthouse is similar to the case concerning Singapore, where they had a lighthouse on an uninhabited island [*Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge* (*Malaysia v Singapore*)]. In all of these cases, these [actions] were considered fairly strong claims.

The claim which is the strongest will prevail in effectivités, and does not need to be perfect ('*Clipperton Island*'). Therefore, it is highly likely that B would succeed.

The critical date was in 1995 when the dispute arose during negotiations on the territorial sea. The only act of authority from either State subsequent to this is B exercising criminal jurisdiction in 2005. This strengthens B's argument, as it was still exercising authority after the dispute, whereas A was not ('*Island of Palmas*').

Question 2

Both parties in this dispute are subject to the *International Covenant on Civil and Political Rights* ('*ICCPR'*) and the (*First*) *Optional Protocol of the ICCPR* ('*OP*').

Jurisdiction of the Human Rights Committee (HRC) may be established under art 1 of the *OP*, allowing individuals to bring cases before the HRC. A is a party to the *OP*, and therefore can be called upon as a party to the case, and the HRC will have jurisdiction over them. (Note that the State cannot bring an action because it is a single State).

[For the HRC] To accept jurisdiction, all domestic remedies must have been exhausted. They probably have, as they have been to the Supreme Court and have no further avenues of appeal. [They are] also unlikely to have the possibility of administrative action. The HRC therefore woulc very likely have jurisdiction.

Arguments would centre around art 9 of the *ICCPR* regarding arbitrary detention, which requires detention to be:

- Justified and reviewed (art 9(1))
- Possible to challenge (art 9(4))

Detention must be justified, and the review must be 'real' and not merely for show ('*A v Australia*'). Here it is not justified beyond a mere statement, and there is no form of review, as stated by the Supreme Court. This is almost certainly a breach [of art 9(1)]. Likewise, this statement of Colonel Jones as the rationale behind detention does not allow any form of challenge, violating art 9(4) as determined in '*A v Australia*', as the detention is not 'necessary' or 'proportionate'.

The HRC would likely find a violation and take an action, likely in the form of a request to cease detention. (Note that enforcement may be difficult – for example, Australian detainees still having rights breached [even after *A v Australia*]). Bloggs could also apply for regional enforcement, depending on the precise geographical location of A, and apply to one of the regional human rights courts, such as the European Court on Human Rights. However, this would preclude him from applying to the HRC under the *OP*, as the HRC will not hear matters under consideration in other courts [art 5(2) of the *ICCPR*].

Question 3

A has a subjective territorial jurisdiction as the flight departed from there, and also active nationality jurisdiction as the FFAF members are (most likely) citizens of A. B has objective territorial jurisdiction, as the plane landed in B's jurisdiction, as well as the four passengers being assumedly killed in B's airspace. They also have the advantage of having the 3 remaining hijackers in custody, which makes I easier to exercise jurisdiction if they choose ('*Lockerbie*'). [They] also [have] passive nationality [jurisdiction] as some of B's citizens were killed. C has flag state nationality, as the plane was registered in C. They also have passive nationality [jurisdiction] as they had citizens killed as well (the most, in fact). The US has a small amount of passive nationality [jurisdiction], but not enough to suggest a 'strong interest' as defined in '*US v Yunis*'.

Extradition to C

Usually, extradition would require mutual treaties of extradition between the parties – there is not evidence on the facts that B and C have these. Therefore customary international law must be relied upon.

Customary law is limited regarding extradition to pretty much aut dedare aut judicare. Terrorism is generally accepted as falling into this category. This means that if B is not willing to prosecute, they should extradite.

C is the State with the next strongest claim, particularly as terrorism when targeted at that State provides a strong claim (*Restatement (Third) of the Foreign Relations Law of the United States* § 402). As the plane was going to C, and the majority of those killed on board were nationals of C, this will likely give them a special interest (contrast to *US v Yunis*).

The issue arises however of whether B is failing to prosecute. One argument would be that B is acting to prosecute under unlawful interference with air navigation. Provided charges are laid before the end of 3 months, it might be considered sufficient. If they do not however, then they have quite clearly failed to prosecute. Even if they did prosecute the hijackers under unlawful interference with air navigation though, this is a lesser crime than terrorism and murder that C wants [to prosecute] them for. This failure to apply appropriate charges could be argued to be a failure to prosecute, based on '*Lockerbie*'.

C also has also already applied to the UN Security Council, which may choose to order extradition ('*Lockerbie*').

Question 4

The International Court of Justice ('ICJ') derives its authority from art 92 of the *UN Charter* ('*Charter*'), and art 38(1) of the *Statute of the International Court of Justice* ('*SICJ*'). Under art 96 of the *Charter*, any organ of the UN may be able to seek an advisory opinion. There are several restrictions however on what may be requested of it.

Firstly, the question put to the Court must be fundamentally a legal one (art 96 of the *Charter*, art 65 of the *SICJ*). Political or factual questions without legal aspects to the issue will not be considered ('*Nuclear Weapons Advisory Opinion*'). However, if there is a legal issue, uncertainty of all of the facts ('*Western Sahara*') or political issues ('*Certain Expenses Advisory Opinion*') will not prevent [the production of] an advisory opinion. Secondly, unlike cases, advisory opinions do not require the consent of the parties to be given ('*Namibia*'). Thirdly, aside from the General Assembly, whose scope is so broad they can ask more or less anything, requests from other organs must fall within their area of competence (art 96(2) of the *Charter*). For example, nuclear weapons are much more of an issue for the Security Council than the World Health Organisation ('*Nuclear Weapons Advisory Opinion*').

Ultimately the power to give an advisory opinion is discretionary (art 65(1) of the *SICJ*). However, it is unlikely [that it will be] refused, as long as the above requirements are met. It would take a 'compelling reason' not to provide one ('*Western Sahara*') (also applied in *Namibia*).The ICJ is the primary judicial organ of the UN (art 92 [of the *Charter*]), and to refuse to give an advisory opinion would undermine the authority of the court in light of its importance ('*Western Sahara*').

Therefore it is highly unlikely, unless one of the above has occurred, that an advisory opinion would not be granted.

Question 5

The elements of customary [international] law are set out in art 38(1)(b) [of the *SICJ*] as 'general practice accepted as law'. These are more commonly phrased as State practice and opinio juris, both of which are required [to form customary international law]. State practice consists of acts actually performed by States (domestically and internationally), whereas opinio juris requires some kind of recognition [by the State] that these acts are performed out of legal obligation, rather than habit or coincidence ('*Lotus*', '*North Sea Continental Shelf*').

State practice and opinio juris must be demonstrated by a representative section of States to be accepted as customary. Precisely what constitutes a representative section though can be hard to define. In theory, a representative section should include countries from various legal systems and cultures, and the idea of sovereign equality (art 2(1) of the *Charter*) would suggest that the practice

of small States would bear equal weight to the practice/opinio juris of larger States. Usually however, there is a bias towards large nations' practice/opinio juris, and they tend perhaps to be over-represented in international law.

Where custom is based on certain special features [of States], like geographical features, [which create] specially affected States, it only needs to be representative of those specially affected States. For example, [customary international law on] continental shelves can be determined [by] only considering countries with a continental shelf ('*North Sea Continental Shelf*').

Uniformity over time also supports [the creation of] custom[ary international law] ('*North Sea Continental Shelf*'). However, [this] may still occur in a short period of time where evidence of practice [is] clear an unopposed, eg customary international law relating to satellites was developed quite quickly. Uniformity over time is especially important for regional custom[ary international law] ('*Right of Passage*').

The way in which contrary examples [of State practice] affect customary international law depends on how the State committing the contrary act addresses it. If recognition is given that the act has breached custom, then it will serve to strengthen [the evidence of] opinio juris. [However,] If [it is] denied to be custom, or [there is] an absence of recognition [entirely] of the rule in response to the act, it will weaken the [evidence of] opinion juris ['*Nicaragua*']. Ultimately, how contrary acts are perceived by the State committing them will be the determining factor [in] how they influence customary international law ('*Nicaragua*').