

## **MEMORANDUM: SSA/DEFERRED EXAMINATION (16 JULY 2020)**

**PUBLIC INTERNATIONAL LAW (INL41AO)**

**TOTAL MARKS: 60**

**EXAMINERS: DR M ROUX AND PROF MR PHOOKO**

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### **QUESTION 1**

Identify and describe any two different methods of peaceful dispute settlement. You must also briefly express your opinion whether these methods would be successful in resolving an armed conflict between two states. **[10]**

- *Peaceful settlement of dispute mechanism provided for in article 33 of the UN Charter*
  - Negotiation
  - enquiry,
  - mediation,
  - conciliation,
  - arbitration,
  - judicial settlement

*NB: award 6 marks where a student fully discusses any two of the aforesaid*

- *Measures can be useful to restore peace such as successful negotiations between Sudan and South Sudan*
- *Can also prove to be not working in other situations such as Israel and Palestine*

### **QUESTION 2**

Critically discuss whether Somaliland satisfies the criteria for statehood required under contemporary international law.

- **Requirements of statehood as contained in the Montevideo Convention of 1933**
  - *a defined territory;*
  - *a permanent population;*
  - *a government and*
  - *capacity to enter into relations with other states.*
- **S v Banda**
  - *Whether Bophuthatswana was a State? Yes.*
  - *declaratory approach preferred*
  - *more objective, less politically subjective*
  - *entity becomes a State for the reason that it meets all the international legal criteria for statehood*
- *Somaliland does qualify to be recognised as a state because it meets the requirements of statehood*
- *Fourth requirement debatable because Somaliland is mostly entering into relations with other states mostly in the African continent*
- *However the African Union & international community does not recognise it*

**[15]**

### **QUESTION 3**

What is your understanding of state sovereignty post 1945?

**[5]**

- *No longer based on traditional absolute state sovereignty which required no external interference in the domestic affairs*
- *State has responsibility to protect human rights within and outside its borders*
- *International community through the United Nations Security Council may interfere in the domestic affairs of another state for humanitarian reasons to restore peace (see article 23 of the UN Charter)*
- *States have surrendered a portion of their state sovereignty through the UN Charter*

#### QUESTION 4

Differentiate between the following, and provide an example for each of the terms to illustrate your understanding of the differences (student has to mention an example for each term to receive full marks):

- 4.1. the principles of objective territoriality and subjective territoriality; (4)
- **Objective territoriality:** *the crime commenced within foreign state and it was completed within state that exercises jurisdiction's territory. (2)*
  - **Subjective territoriality:** *a state exercises jurisdiction if a crime commenced in its territory and it is completed in foreign state. (2)*
- 4.2. sanctions and counter-measures; and (6)
- **Sanctions:** *are multilateral enforcement measures not involving the use of armed force, and it 'may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations' (article 41 UN Charter). The purpose is to isolate a state politically, economically and diplomatically. (3)*
  - **Countermeasures:** *unilateral 'self-help' measures that may not involve the use of armed force, which may only be taken to convince a responsible state to comply with its international obligation. (3)*
- 4.3. extradition, deportation and disguised extradition. (9)
- **Extradition** *is the process whereby states provide assistance to each other in criminal matters by the delivery or transfer of an accused or convicted criminal from the territorial state to requesting state. (3)*
  - **Deportation** *is a unilateral act of a deporting state (in terms of the principle of sovereignty) to remove a foreigner who has no right or entitlement to be in its territory. Such a foreigner may only be deported back to their state of nationality. (3)*
  - **Disguised extradition** *the abuse of deportation procedures to circumvent strict requirements and protections afforded by extradition. (3)*

[19]

#### QUESTION 5

Explain whether self-defence would be an appropriate enforcement measure in order to prevent "mass atrocity crimes" such as genocide, ethnic cleansing and serious violations of international humanitarian law. [5]

- *Self-defence: enforcement measure involving the use of armed force which may be taken by a state in terms of article 51 of the UN Charter or in terms of customary international law if an armed attack occurred against a state.*

- *The Nicaragua judgment further described the ‘armed attack’ as an ‘attack against sovereignty, territorial integrity and political independence’ of a state.*
- *As such self-defence would be inappropriate for ‘mass atrocity crimes’, as these are attacks against innocent civilians, not an ‘armed attack’ against another state.*
- *Genocide and ethnic cleansing specifically are committed against certain groups because of their characteristics (religion, race, ethnicity, nationality etc).*
- *Appropriate enforcement measures would include humanitarian intervention and the principle of the responsibility to protect.*

### QUESTION 6

Answer the following questions:

- 6.1. An independent commission of inquiry in Mexico finds that genocide and crimes against humanity is being committed by the Syrian government against Syrian nationals. Can a national Mexican court charge Syrian President Al-Assad and other senior government officials with genocide and crimes against humanity? Substantiate your answer. (3)

*In theory, yes, President Al-Assad and other senior government officials can be charged with genocide and crimes against humanity based on the principle of universal jurisdiction (for example at the International Criminal Court). However, the President and other senior government officials will enjoy immunity rationae personae (absolute personal immunity) before the national court of a foreign state, as they are incumbent/currently in their positions, therefore they may rely on this principle of immunity (as decided by the International Court of Justice in the Arrest Warrant Case).*

- 6.2. Jozi Garden Services was awarded a tender by the South African Department of International Relations and Cooperation (DIRCO) to render gardening services. DIRCO refuses to pay Jozi Garden Services, claiming they enjoy state immunity from civil action. Can Jozi Garden Services institute action at the South Gauteng High Court to claim the outstanding invoice? Substantiate your answer. (3)

*This is an example of acta iure gestionis (commercial act of state), and government departments can be held accountable for commercial transactions. Therefore, Jozi Garden Services can institute a claim for the outstanding invoice against DIRCO at the High Court.*

[6]

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**TOTAL EXAM:**

**[60]**

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