

## MEMORANDUM

MODULE : PUBLIC INTERNATIONAL LAW  
CODE : INL41AO/ITR0011  
DATE : 31 MAY 2019  
TOTAL MARKS : 80  
EXAMINERS : DR M ROUX  
: PROF MR PHOOKO

MODERATOR : PROF FRANZISKA SUCKER (UNIVERSITY OF THE  
WITWATERSRAND)

---

### SECTION A

#### PLEASE ANSWER ALL THE QUESTIONS IN THIS SECTION

#### QUESTION 1

Answer the following questions:

1.1. Customary international law is recognised as one of the sources of public international law. Explain which requirements must be fulfilled before a rule of international law will be recognised as customary international law. (3)

- **Article 38(1)(b) ICJ Statute:** *evidence of state practice accepted as law.*
- **Usus:** *refers to the actual usage of the legal obligation/ norm through state practise. (the actions of states). The benchmark is that such actions must be widespread and generally applied with. Complete unified practise is not necessary.*
- **Opinio iuris:** *acceptance of the formation of a rule as customary international law/belief that an international obligation is a binding rule of law and indeed has customary international law status. This is also known as the psychological requirement.*

1.2. Explain the role of the African Union Commission on International Law. (6)

- *Established on Feb 2009 under art 5(2) of the Constitutive Act of the African Union.*
- **The purpose is the**
  - *codification and progressive development of international law in the African Union;*
  - *to propose draft framework agreements, model regulations etc;*
  - *to assist in the revision of existing treaties, assist in the identification of areas in which new treaties are required and prepare drafts thereof;*
  - *to conduct studies on legal matters of interest to the Union and its Member States; and*
  - *to encourage the teaching, study, publication and dissemination of literature on international law.*
- **Composition:** *11 members (nationals of AU member states), no two of the same nationality. The AUCIL shall reflect and respect the principles of equitable geographical representation, the principal legal systems of the Continent and equitable gender representation.*

1.3. Identify the legal consequences of an internationally wrongful act of a state. (4)

- *Continued duty to perform the obligation breached;*
- *Obligation to cease the wrongful act (if it continues);*

- *Obligation to offer appropriate assurances and guarantees of non-repetition (if circumstances so require);*
- *Obligation to make full reparation, including: restitution, compensation, and satisfaction.*

[13]

**QUESTION 2**

Differentiate between the following:

2.1. *jus cogens* norms and *erga omnes* obligations;

(4)

- ***Jus cogens***: Article 53 of the VCLT – defines it as ‘a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character’ versus
- ***Erga omnes obligations***: *Barcelona Traction* case – those ‘obligations of a State towards the international community as a whole’, and which ‘are the concern of all States’ and to which ‘all States can be held to have a legal interest in their protection’.
- ***Difference***: JC are norms which prohibit certain conduct (prohibition of genocide, slavery etc), whereas EO obligations are duties owed to all states in the international community (for example the outlawing genocide, and obligation to prevent and prosecute it, the protection from slavery and racial discrimination).

2.2. the principles of (active) nationality and passive personality;

(4)

- ***Active nationality*** is when a state can exercise its jurisdiction (by prosecution) over its own national for committing a crime outside its territory, whereas
- ***Passive personality*** is when a state exercises its jurisdiction over a national of another state that harmed a national of the state exercising (criminal) jurisdiction.

2.3. the peaceful settlement of disputes and non-forcible measures; and

(6)

- ***Peaceful settlement of disputes*** include diplomatic (negotiation, mediation, conciliation, and inquiry) or judicial (arbitration at the PCIJ or contentious/advisory opinions at the ICJ) means of settlement of disputes, whereas
- ***Non-forcible measures*** include countermeasures (unilateral, non-forcible measures taken against a state acting in non-conformity with international obligations) and collective non-forcible measures implemented under an international or regional organisation.

2.4. extradition, deportation and disguised extradition.

(5)

- ***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.
- ***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.
- ***Disguised extradition*** the abuse of deportation procedures to circumvent strict requirements and protections afforded by extradition.

- A person can be **extradited** to any other state, whereas **deportation** can only be to the state of nationality. The latter two are lawful procedures, whereas **disguised extradition** is unlawful in terms of international law.

[19]

### QUESTION 3

Article 8 of the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts provides that the conduct of a person or group of persons can be attributed to a state "if the person or group of persons is in fact acting on the instructions of, or under the direction and control of, that state in carrying out the conduct". Compare the manner in which this Article was interpreted by various international courts and tribunals. (8)

- *Article 8 of the ILC Articles: The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the **instructions** of, or under the **direction or control** of, that State in carrying out the conduct.*
- *The latter is where the difficulty would lie, as the conduct of private persons could not normally be attributed to a state UNLESS there is SPECIAL RELATIONSHIP between the persons and the state. This would include:*
  - *Persons with INSTRUCTIONS to carry out missions abroad or*
  - *Groups acting under the DIRECTION OR CONTROL of the state.*
  - *Degree of DIRECTION OR CONTROL is very important!*
- *Case law:*
  - *THE NICARAGUA CASE ICJ 1986: Effective control test;*
  - *THE TADIC CASE ICTY 1999: Overall control test - ICJ too strict!*
  - *THE BOSNIA GENOCIDE CASE: ICJ examined both Nicaragua (effective control) and the Tadic cases (overall control), and decided to follow Nicaragua.*
  - *DRC v Uganda*
- *Comment: students performed very badly in this question: mostly repeated wording of the question.*

[8]

### QUESTION 4

In February 2011, peaceful protests in the Syrian Arab Republic ('Syria') began relating to poverty, corruption, the right to freedom of expression, and democratic rights. Soon thereafter demands were made for the release of political prisoners, the general respect for fundamental human rights, as well as economic, legal and political reforms. Within a month, more protests occurred after children were detained and tortured after allegedly portraying anti-government graffiti on public buildings. Soon after these events Syrian armed forces responded violently by launching military operations throughout the state. By 2017, more than 13.1 million people required urgent humanitarian and medical assistance, 6.1 million people were internally displaced, 2.9 million people were living in hard-to-reach areas and hundreds of thousands of civilians were trapped in besieged areas. The humanitarian situation in Syria continues to deteriorate, and is becoming more severe and devastating. Since the commencement of the civil war, the Syrian government's persistent stance has been that its use of force is necessary to retaliate against attacks from a number of non-state armed opposition groups and terrorist

organisations such as the Islamic State in Iraq and the Levant (ISIL) and Jabhat Fatah al-Sham. Countless women, girls, men and boys have reported that they were victims of sexual and gender-based violence at the hands of all parties to the conflict, and that it has occurred from the inception of the armed conflict. Strong evidence indicates that sexual and gender-based violence lies central to the conflict, and is deliberately used as a weapon and method of warfare. It has been widely acknowledged that violence against civilians in the Syrian armed conflict amounts to gross human rights violations, specifically genocide, crimes against humanity, and war crimes.

There are clear breaches of various rules and principles of public international law taking place in the ongoing civil war in the Syria. You are a legal advisor to the South African Department of International Relations and Cooperation ('DIRCO'). Write an advisory note to the Minister of DIRCO on appropriate measures of enforcement that South Africa could implement against Syria.

(20)

**[20]**

- *Application very important!!! If student applied the various possible enforcement methods well, reward student with 1 or 2 extra marks.*
- *Peaceful measures: diplomatic means (negotiation; mediation; conciliation; inquiry); and judicial means (ICJ for state responsibility; some students argued for arbitration).*
- *Non-forceful measures: sanctions; counter-measures. Lots of students discussed isolation of state economically, military embargoes, diplomatic sanctions (removal of diplomats etc).*
- *Measures involving the use of force:*
  - *UN: Chapter VII*
  - *NB: NOT self-defence as SA not the victim of an armed attack by another STATE.*
  - *Humanitarian intervention.*
  - *R2P.*
  - *Above two: legality (SC consent) and legitimacy (seriousness of threat; balance of consequences; proportionality; proper purpose; and last resort).*
- *Also: ICC prosecution; universal jurisdiction (SA to prosecute perpetrators in SA).*

### **QUESTION 5**

Define the following international crimes, and provide a historic or current example for each crime:

5.1. genocide; (3)

- *Can take place during time of peace or time of war with the specific intent to destroy, in whole or in part, a national, ethnic, religious or racial group, as such.*
- *Genocidal intent: dolus specialis!*
- *Genocidal acts: killing, causing serious bodily or mental harm, conditions calculated to bring about destruction of group, preventing births, forcibly transferring children.*
- *SGBV can be an act of genocide.*
- *For example: Holocaust, Rwandan genocide, Syria against Yazidi, Myanmar against Rohingya Muslims.*

5.2. crimes against humanity (4)

- *Can take place during time of peace or armed conflict: inhumane acts against the civilian population with a discriminatory aspect, must be widespread and systematic.*
- *For example: apartheid in SA, Yugoslavian atrocities, etc.*

5.3. war crimes. (3)

- *War crimes: take place in time of armed conflict/war(national or international) and consist of killing protected persons (for example civilians); Crimes of mistreatment; Attacks on buildings dedicated to religion, education, culture etc; Use of certain methods of warfare or weapons causing unnecessary suffering.*
- Student must provide examples for each answer.

[10]

---

**SUBTOTAL SECTION A:**

**[70 MARKS]**

**SECTION B**

**PLEASE ANSWER EITHER QUESTION 6 OR QUESTION 7 IN THIS SECTION**

**QUESTION 6**

Identify and briefly define the principle of jurisdiction that the relevant state is relying on to exercise criminal jurisdiction over the following persons:

6.1. A British national is charged in South Africa for allegedly murdering a woman in Cape Town. (2)

- *South Africa is basing their exercise of jurisdiction on territoriality: took place on SA territory.*

6.2. A South African national is charged in South Africa for alleged involvement in human trafficking in the Netherlands. (2)

- *South Africa is basing their exercise of jurisdiction on active nationality: national committed crime in other state.*

6.3. A Turkish national is charged in India for allegedly raping an Indian national in Pakistan. (2)

- *India is basing their jurisdiction on passive personality: own national was harmed in another state.*
- *Some students argued effects principle: India is experiencing the effect of the crime.*

6.4. A Mexican court charges Syrian President Al-Assad for allegedly committing crimes against humanity against Syrian nationals. (2)

- *Mexico is basing their jurisdiction on universal jurisdiction: prosecuting hostis humanis (enemy of mankind) for committing international crimes.*

6.5. A South African national attacks the American embassy in Johannesburg, and is charged in New York for allegedly committing terrorism. (2)

- *The USA is basing their jurisdiction on the protective principle: safety and security of state is at stake.*
- *Also effects principle: the USA is experiencing the effect of the crime.*
- *Also passive personality: mostly US nationals would have died because working at US embassy.*

- *Lots of students argued territoriality: wrongly argued that the US embassy is American territory.*

[10]

OR

**QUESTION 7**

Identify in each of the following instances whether or not the person below will be entitled to rely on immunity. You must substantiate your answer by explaining what type of immunity the person may/may not be entitled to.

7.1. The President of Syria, Bashar al-Assad, is arrested in Germany whilst he is on a state visit there for operating a vehicle above the speed limit. (2)

- *Al-Assad would enjoy immunity ratione personae: absolute personal immunity for incumbent head of state at national courts of foreign states.*

7.2. The International Criminal Court issues a warrant of arrest for the former President of the United States of America, George W. Bush, for allegedly committing crimes against humanity and war crimes in Iraq and Afghanistan. (2)

- *No immunity at the ICC: excludes it in terms of Article 27 of the ICC Statute.*

7.3. James Knox, the leader of the South Africa Freedom Fighters and a member of the South African Parliament, is arrested in England for allegedly inciting war and violence. (2)

- *No immunity: ordinary MPs do not enjoy immunities and privileges.*

7.4. The South African Police Service arrests the Chinese consular agent to South Africa for allegedly being involved in organised crime and human trafficking after intercepting his communication in an effort to gather evidence against him. (2)

- *Will enjoy immunity: communications at consular mission enjoy immunity on the territory of the receiving state and may not be intercepted.*
- *Lots of students argued that he will enjoy immunity, because he is involved in a grave crime. BUT the evidence was gained unlawfully: communications of consular missions enjoy immunity on territory of receiving state.*

7.5. The Namibian prosecuting authority issues a warrant of arrest against Angela Merkel, the president of Germany, for not making an appearance in a colonial reparation case in Namibia after issuing a summons. (2)

- *Immunity ratione personae: excessive universal jurisdiction (Arrest Warrant), absolute personal immunity.*

[10]

---

**SUBTOTAL SECTION B:**

[10]

---

**TOTAL EXAM:**

[80]