

# MEMORANDUM: WINTER EXAMINATION

<u>MODULE</u>	: PUBLIC INTERNATIONAL LAW
<u>CODE</u>	: INL41AO/ITR0011
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<u>DURATION</u>	: 120 MINUTES
<u>TOTAL MARKS</u>	: 60
<u>EXAMINER</u>	: DR M ROUX

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## SECTION A

### QUESTION 1

Answer the following questions:

- 1.1. The Charter of the United Nations recognises the “self-determination of peoples” as one of its purposes and principles in Articles 1(2) and 55. Provide a brief description of the impact hereof on decolonisation. Substantiate your answer by referring to relevant authority. (5)
- *Both articles 1(2) and 55 states that the UN will be based on ‘respect for the principle of equal rights and self- determination of peoples’.*
  - *Many states used this as a basis for declarations of independence from colonial powers, a lot of political support from former imperialistic states.*
  - *Relevant authority: 1960 General Assembly Declaration on the Granting of Independence to Colonial Countries and Peoples and Western Sahara (Advisory Opinion) ICJ (1975) 12.*
- 1.2. Explain the meaning of the “persistent objector” rule in relation to the formation of a rule of customary international law. (2)
- *Meaning: if a state clearly and persistently objects to a particular practice while the law on the issue in question is still developing, then the objecting state cannot be bound by the customary law rule that may emerge from the practice.*
  - *Exceptions: if it is the formation of a jus cogens norm or erga omnes obligation.*
- 1.3. Article 8 of the ILC Articles: Compare the manner in which this Article was interpreted by various international courts and tribunals. (6)
- *General principle: internationally wrongful conduct of private individuals or groups are not attributed to the state under international law. It is only if one can prove a special relationship!*
  - *NB to examine the conduct of the individual or group and the degree of control the state has over such group or individual.*
  - *ICJ in Nicaragua case: the question was whether violations of international humanitarian law committed by a rebel group operating against the government of Nicaragua might be attributed to the United States? ICJ held that there has to be strong evidence to prove such a special relationship, and stated that ‘effective control’ must be proven. Strict test.*
  - *ICTY in Tadic case: Tribunal decided not to follow the ‘effective control’ test of the ICJ, specifically that it is too strict. The Tribunal held that ‘overall control’ is necessary to prove the special relationship. Controversial decision!*
  - *ICJ in DRC v Uganda case: reaffirmed the Nicaragua ‘effective control’ test.*
  - *ICJ in Bosnia Genocide case: criticised the ICTY Tadic judgment, specifically because it used principles of state responsibility and applied it to an individual criminally prosecuted with international crimes. The ICJ reaffirmed its Nicaragua decision, and held that in instances where a special relationship needs to be proven, the stringent ‘effective control’ test must be used.*

1.4. Discuss the approach followed by South African courts on the question whether a duty to exercise diplomatic protection is placed on states by international law. (4)

- *International law does not recognise a duty on states to exercise diplomatic protection: instead, states have a right to exercise diplomatic protection.*
- *The South African Constitutional Court adheres to this, as decided in both the Kaunda and the Von Abo judgments.*
- *South African nationals have a right to REQUEST government to CONSIDER diplomatic protection. The South African government is under no DUTY to exercise D.P, but duty to consider a reasonable REQUEST.*

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### **QUESTION 2**

Identify which state/s will be able to exercise criminal jurisdiction over the following persons. You must substantiate your answer by explaining upon which principle/s of jurisdiction the state in question can rely in order to exercise criminal jurisdiction. If you do not substantiate your answer you will not receive any marks.

2.1. Shrien Dewani, a British national, is accused of murdering his wife, Anni Dewani, a Swedish national, during their honeymoon in South Africa. (3)

- *United Kingdom: nationality principle (British national is accused of committing a crime abroad).*
- *Sweden: passive personality (Swedish national is harmed abroad).*
- *South Africa: territoriality (crime was committed on South African territory).*

2.2. Twins Brandon-Lee and Tony-Lee Thulsie, South African nationals, are suspected of planning attacks against the American embassy as well as institutions associated with Judaism and Israel in South Africa. (3)

- *South Africa: territoriality (planning of attacks occurred on South African territory).*
- *USA: protective principle (foreign national committed crime abroad that is prejudicial to the safety and security of the state) OR effects principle (state can prosecute upon whom effect or impact of a crime is felt).*
- *Israel: same as USA, also passive personality.*

[6]

### **QUESTION 3**

International law provides for several means of enforcement that are available to states in order to ensure that states fulfil their international legal obligations. Answer the following questions:

3.1. Name the ways in which states may consent to the jurisdiction of the International Court of Justice ("ICJ") as provided for in Article 36(1) of the Statute of the ICJ. (3)

- *State parties refer a case to the ICJ;*
- *A treaty or convention in force refers a case to the ICJ; and*
- *Matters provided for in the UN Charter.*

3.2. Differentiate between countermeasures and sanctions. (4)

- *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 obligations.*
- *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.*

3.3. 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. (6)

- *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.*

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#### **QUESTION 4**

4.1. President Ian Khama is on an official state visit in South Africa. Answer the following questions:

4.1.1. The death penalty can be imposed in terms of Botswanan legislation for certain crimes. Can President Khama be accused of discriminating against the right to life and human dignity in a South African court? (2)

- *No: acta iure imperii – entitles Khama to state immunity because passing and implementing legislation is an official government function or act OR*
- *No: immunity rationae personae – entitles Khama to absolute state immunity as current President of Botswana.*

4.1.2. Assume President Khama stays at the Michelangelo hotel in Sandton, but refuses to pay his bill of R1 million. Can the Michelangelo institute action at the South Gauteng High Court to reclaim the outstanding bill? (2)

- *Yes: acta iure gestionis – commercial transaction do not entitle person to enjoy immunity, must pay bill like everyone else.*

4.1.3. Assume there are strong evidence indicating a policy of genocide has been followed by the Botswanan government against the Kalanga people in North-eastern Botswana. Can President Khama be charged with genocide at a South African court? (2)

- *No: immunity rationae personae – entitles Khama absolute state immunity as current head of state at the national courts of foreign states, even in the instance of international crimes.*

4.2. X, a Namibian national, detonates a bomb at the American embassy in Windhoek, killing 50 people. X flees to South Africa.

4.2.1. Explain the extradition procedure that is followed between South Africa and the United States of America. (4)

- *USA is a foreign state; therefore, the procedure is as follows:*
- *A foreign requesting state sends a request for extradition to South Africa through diplomatic channels: request is sent to the SA Minister of Justice to extradite a person. The Minister then notifies a Magistrate, who will in turn issue a warrant of arrest. The Magistrate may also issue warrant of arrest without the Minister’s request, but must notify Minister immediately!*
- *Enquiry in front of Magistrate – not criminal trial! If the magistrate finds there is sufficient evidence to warrant a prosecution in the foreign state then a certificate must be obtained from foreign requesting stating that there is sufficient evidence to prosecute*

*person. Magistrate then commits person to prison: wait for Minister's decision to surrender. Extradition Act – Sections 5, 9, 11 and 13.*

4.2.2. X hides in the Zimbabwean embassy in Pretoria. Can the South African Police Force enter the premises of the diplomatic mission to arrest X? (2)

- *No, the premises of a diplomatic mission enjoy immunity on the territory of the receiving state.*
- *The national police force of the receiving state may not search the premises or enter it without consent of the head of the mission.*

4.2.3. Assume that the death penalty could be imposed on X if he is extradited to the USA. Assess whether South Africa should follow extradition or deportation procedures with the USA. (5)

- *South Africa should follow extradition procedures, but the fact that the death penalty can be imposed will be a hindrance.*
- *Guarantees can be asked of the USA that, should X be extradited to the USA, the death penalty will not be imposed.*
- *Deportation may only be back to the state of nationality of an individual, and extradition is for instances of accused persons or convicted criminals.*
- *Should X be deported, it will be considered 'disguised extradition' to circumvent the requirements and protection afforded by the extradition procedure.*

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#### SECTION B:

**ANSWER QUESTION 5 OR 6 OR 7 (OR 8 – ADDED AS A RESULT OF STUDENTS MISINTERPRETING THE SCOPE FOR THE EXAM)**

#### QUESTION 5

Differentiate between the “international minimum standard” and the “national standard” required of states in their treatment of foreign nationals. (7)

- *Controversial: different views amongst states.*
- *International minimum standard:*
  - *Developing states support this standard of treatment.*
  - *Entitles an alien to claim a higher standard of treatment when the national standard falls below what is internationally acceptable.*
- *National minimum standard:*
  - *developing states prefer this standard of treatment.*
  - *Alien is not entitled to claim rights that are more extensive than those accorded the nationals of the territorial state.*
- *Case law:*
  - *Neer Claim – put treatment to the test of 'international standards' and treatment should amount to an 'outrage, bad faith, wilful neglect of duty or insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognise its insufficiency'.*
  - *Diallo (ICJ) – diplomatic protection (limited to violations of the minimum standard of treatment of aliens) include internationally guaranteed human rights.*
- *'Fair and equitable treatment'.*
- *Principle of equal treatment: UDHR*

**OR**

**QUESTION 6**

Discuss the requirements that have to be fulfilled for a person to qualify for refugee status in terms of the 1951 United Nations Convention Relating to the Status of Refugees and its 1967 Protocol Relating to the Status of Refugees. (7)

- **'Well-founded fear':**
  - *fear: state of mind and subjective condition.*
  - *Frame of mind is supported by an objective situation*
  - *specific to person being persecuted because of person's race, religion, nationality, membership of particular social group or political opinion.*
  - *Continued stay in country of origin became intolerable.*
- **'Outside the country of his nationality':**
  - *what distinguishes refugee from internally displaced person.*
- **'For reasons of race, religion, nationality, membership of a particular social group or political opinion':**
  - *If person leaves for reasons of war, famine, natural disasters, it will all fall outside the scope of the Refugee Convention.*
  - *Must be PERSECUTION!*
  - *Gap in law re 'war refugees': usually protected under human rights law.*

OR

**QUESTION 7**

Discuss the four core international crimes, namely war crimes, crimes against humanity, genocide, and the crime of aggression. (7)

- **War crimes:**
  - *Take place in time of armed conflict/war (national or international)*
  - *Killing of protected persons (for example civilians);*
  - *Crimes of mistreatment;*
  - *Attacks on buildings dedicated to religion, education, culture etc.*
  - *Use of certain methods of warfare.*
  - *Use of certain weapons that cause unnecessary suffering.*
- **Crimes against humanity:**
  - *Can take place during time of armed conflict or time of peace.*
  - *Inhumane acts against civilian population.*
  - *Discriminatory aspect (including persecution)*
  - *Context: widespread or systematic.*
- **Genocide:**
  - *Can take place during time of peace or time of war.*
  - *Specific intent to destroy, in whole or in part, a national, ethnic, religious or racial group, as such.*
  - *Genocidal intent!!!*
  - *Genocidal acts: killing, causing serious bodily or mental harm, conditions calculated to bring about destruction of group, preventing births, forcibly transferring children.*
- **Crime of aggression:**
  - *Waging of illegal war.*
  - *Act of aggression: limited to individual who is in position of de facto/de jure leadership at the time of commission.*
  - *Use of armed force by state against the sovereignty, territorial integrity or political independence of another state OR manner inconsistent with the UN Charter.*

OR (EXTRA OPTION)

**QUESTION 8**

Discuss the African system for the promotion and protection of human rights. In your answer, pay special attention to the various political organs, norms of the human rights system, as well as available institutions and processes. (7)

- *Answer requires a lot of detail. Students who studied this by mistake did not pay attention during the lectures or did not attend same.*
- *Political organs:*
  - *AU Assembly of Heads of State and Government*
  - *Executive Council*
  - *Peace and Security Council*
  - *Pan-African Parliament*
- *Norms:*
  - *OAU Refugee Convention*
  - *African Charter:*
    - *Rights of 'peoples'*
    - *Justiciable socio-economic rights*
    - *Indigenous peoples' rights*
    - *Right to development*
    - *Individual duties*
  - *African Children's Charter*
  - *Women's Protocol*
  - *Internally displaced persons*
- *Institutions and processes:*
  - *African Commission (promotional and protective elements re human rights)*
  - *African Human Rights Court*
  - *African Children's Rights Committee*
  - *New Partnership for Africa's Development (NEPAD) African Peer Review Mechanism*

**[SECTION B: 7]**

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**TOTAL:**

**[60]**

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