

14:00

31/05/04

S. H. W. W. B

EXAMS OFFICE
USE ONLY

University of the Witwatersrand, Johannesburg

Course or topic No(s)

LAWS355

Course topic names(s)
Paper Number & title

PUBLIC INTERNATIONAL LAW

Examination / Test* to be held during
month(s) of (*delete as applicable)

JUNE 2004

Year of study
(Art & Science leave blank)

Degrees / Diplomas for which this course is prescribed
(BSc (Eng) should indicate which branch)

LLB

Faculty/ies presenting candidates

COMMERCE, LAW AND
MANAGEMENT

Internal examiner(s)
and telephone extension
number(s)

MR K HOPKINS (X 78447)
PROFESSOR C ROEDERER (X 78476)
MS NICOLE FRITZ (X 78444)

External examiner(s)

PROFESSOR H A STRYDOM (RAU)

Special materials required (graph/music/drawing
paper maps, diagrams, tables, computer cards, etc)

Time allowance

Course no: 355 Hours: 2

Instructions to candidates

Examiners may wish to use this space to indicate,
inter alia,
the contribution made by this
examination or test towards the year mark, if
appropriate

STUDENTS ARE REQUIRED TO
ANSWER ANY FOUR QUESTIONS.

TOTAL MARKS FOR THIS PAPER: 100

**Internal Examiners or Heads of
Departments are requested to sign
the declaration overleaf**

STUDENTS ARE REQUIRED TO ANSWER ANY FOUR QUESTIONS; ALL QUESTIONS CARRY EQUAL MARKS; TOTAL NUMBER OF MARKS IS 100.

Question 1

Michelle Jenkins is a widowed woman who was born in Auckland Park, Johannesburg in 1940. She attended both primary school and high school in Johannesburg and in fact lived in Auckland Park until the age of 27. It was at this time (aged 27) that she married, in community of property, a man who was born in Zimbabwe but left there along with his parents shortly after independence (in 1981). They had two lovely children – both of which were also schooled in Johannesburg. In 1998 Jenkins' husband inherited a massive tobacco farm called "Little England" which is about 80km North-East of Harare, Zimbabwe. The couple moved onto the farm that same year and took over the farming operations. Jenkin's husband died shortly thereafter of colon cancer, leaving his share in Little England to her, and effectively making the farm her concern.

In mid-2002 the farm was invaded by a group of about 50 teenaged 'war veterans' who claim to be acting as agents of President Mugabe's ruling Zanu PF party. The government of Zimbabwe deny that the war veterans are acting on its instructions but they also do nothing to compel the mob to vacate the farm. In August 2002 Michelle Jenkins was seriously violated by these so-called war veterans – she is first subjected to a brutal gang-rape before she is forcibly evicted from the farm with instructions never to return. She has complained to Zimbabwe police, but nothing has been done to bring her rapists to justice. She has also approached the High Court in Zimbabwe seeking an eviction order but her application was dismissed without reason.

Michelle Jenkins decided, last week, to leave Zimbabwe and return to South Africa. She does not believe that she will be able to 'get justice' in Zimbabwe would like to know whether international law would permit the South African government to assist her by espousing a claim on her behalf. Jenkins has approached you, as an international lawyer, for your legal opinion on whether this indeed possible and, if so, then what essential requirements South Africa would need to meet in order to assist her. Please advise her in this regard and also advise her on her prospects of success.

Question 2

Recently newspapers and television stations around the world have screened pictures of people believed to be American soldiers abusing detainees in Afghanistan. The abuse appears to amount to torture. The detainees are not only Afghani nationals, but include Pakistani, Malaysian and Saudi Arabian nationals believed to have come to Afghanistan to help the Taliban fight American forces.

After the release of these pictures worldwide, American authorities decide to have the suspected American soldiers returned home, where criminal prosecutions might be initiated. On their way home, the ship carrying these soldiers docks in Malaysia in order to refuel. The soldiers disembark and visit a restaurant where they enjoy a couple of

beers. A local prosecutor, recognizing the soldiers from the photographs, has local police officers arrest them ostensibly for drunk and disorderly conduct.

However, the prosecutor really wants to prosecute them in Malaysia for the abuses committed in Afghanistan. Are there any principles of jurisdiction which would support his efforts. Discuss.

Question 3

This question has two parts:

- a) It is established law that only a recognized state or government enjoys *locus standi* in a South African court. It is very often problematic to determine whether or not a South African court ought to afford *locus standi* to an entity claiming to be a recognized state or government. The courts require proof of recognition. Write a note on how recognition is proved and on the procedure followed by the courts in acquiring this proof.
- b) It is also established law that a South African court can only give effect to the legislative, executive and judicial acts of a foreign government in our domestic courts if that foreign government has been recognized. A rule to this effect was laid down in the leading [British case] on the matter, *Luther v Sagor* in 1921. What was the principle expounded in this case and to what extent can a South African court depart from this principle?

Question 4

Section 232 of the final Constitution says that 'customary international law is law in the Republic...' This essentially means that the common law is now sub-ordinate to international law and old pre-Constitutional common law precedents will have to give way to customary international law where such was not previously considered under the apartheid laws. Knowledge of customary international law is thus relevant to judges, magistrates and practitioners in our domestic courts. Please write a note on how customary international law ought to be established for this purpose – in other words: how should a judge in a South African court decide which rules of customary international law to apply; and how ought the existence of such rules to be established?

Question 5

Write a note on the criteria for statehood in international law. You should deal with the conventional requirements for statehood – in that regard you will need to explain: the source of law from which the four conventional requirements are derived; what those four requirements are; and how it is that these requirements have become binding on all states as a rule of international law. You should also briefly deal with the 'new' requirement which John Dugard *International Law: A South African Perspective* 2ed (2000) at 78-80 suggests has crept into international as a result of the international community's increasing awareness in human rights – in that regard you will need to explain (again) in what source of law this new requirement has its origins; and whether this new requirement is in fact binding under international law.

Question 6

Write a note on the potential clash that may exist between *uti possidetis* and the right to self-determination. During the course of your answer consider (i) briefly what these terms mean in international law, and (ii) what the courts should do in such a case, and why.

[total: 100 marks]