

UNIVERSITY OF SWAZILAND
FACULTY OF SOCIAL SCIENCE
DEPARTMENT OF LAW
SUPPLEMENTARY EXAMINATION

JULY 2009

TITLE OF PAPER: PUBLIC INTERNATIONAL LAW

COURSE CODE: L406

TIME ALLOWED: THREE (3) HOURS

- INSTRUCTIONS:**
- (a) ANSWER ANY FOUR (4) QUESTIONS.**
 - (b) EACH QUESTION CARRIES A TOTAL MARK OF 25.**
 - (c) THE CONTENT OF YOUR ANSWERS, CLARITY OF EXPRESSION AND LEGIBILITY OF YOUR HANDWRITING ARE ALL EXTREMELY ESSENTIAL.**

DO NOT OPEN THIS PAPER UNTIL SO PERMITTED BY THE INVIGILATOR.

Question 1

In 1719, the Republic of Azania acquired Penguin Island from State B via a treaty of peace after a war in which Azania was the victor. Penguin Island is a barren rocky place that is uninhabited. It is only desired by Azania for strategic reasons to forestall its fortification by another power. Upon concluding the agreement, Azania held Penguin Island but did not make direct use of it. Meanwhile international morality had so far progressed as to change the previous rule of international law and the new rule is that no territory may be acquired by a victor from a vanquished at the close of a war. In 1899, Azania discovered that a flag belonging to The Republic of Sandora had been flying on the island for almost one hundred years, and that there is a meteorological station belonging to Sandora. Owing to a dispute between Sandora and her neighbour, Zingoland, the armies of Zingoland lead an offensive into Sandora resulting in a week-long armed conflict. In a desperate attempt to end the conflict, and to protect its citizens, Sandora offers Penguin Island to Zingoland by way of treaty. Advise each country as to whether it has good title over Penguin Island.

(25 Marks)

Question 2

On a misty Saturday night, Mr Yo Shin Ming, a Korean national, is driving down the Malagwane Hill in a Kia Sportage registered SD CD 1, when he comes across a one-man road block near the famous Why Not Club. Magoduka, an uncompromising police officer, desirous of making it into the next staff promotions list, pulls the car aside. Inside the car are two of Mr Ming's pubescent daughters and their Mozambican maid. Mr Ming rolls the window halfway and shouts 'diplomat'. Magoduka crashes the glass of the window, and orders Ming in vernacular to come out. Fearing for his and his daughters' lives, Mr Ming locks the car doors while showing Magoduka his diplomatic passport. Magoduka forces the door open and handcuffs Mr Ming to the front bull-bar of the Sportage. Holding the remaining passengers at ransom with his service pistol, Magoduka proceeds to fondle one of Ming's daughters under the guise that he is frisking her. He continues to do this to the maid as well. A fight ensues when he attempts to fondle the second daughter, and in the scuffle, a bullet is discharged. The bullet fatally wounds the maid. You have been retained by the governments of Korea and Mozambique to advise them on this matter, covering all aspects that are pertinent to this case. What advice would you give to each government?

(25 Marks)

Question 3

- (a) Mandla Lubisi's family resides in one of the most impoverished regions of Swaziland, and they rely on wild fruits and vegetables for survival. Lubisi was gunned down by wildlife officers (game rangers) during a raid at his home, situated adjacent to one of the private game

reserves in Swaziland. A search inside Lubisi's grass hut had revealed two rhino horns, one elephant tusk and an AK47 assault rifle. On the fateful morning, Lubisi's assailants were in the company of state police, who failed to arrest the game ranger responsible. When quizzed on the matter by the press, the spokesperson of the state police retorted, '*The police were under fire from an uncompromising Lubisi, and they had to protect all present*'. However, eyewitnesses, including Lubisi's frail mother claim that Lubisi was shot while handcuffed.

Investigations by your NGO, *Save the Poor*, unearthed a systematic violation of fundamental rights, spanning over 25 years. It turns out from your investigations that more than 70 people from Lubisi's area alone have been gunned down by game rangers over the years. Despite this huge number, no records of prosecution exist. When your NGO puts pressure on the police chief to respond, they are told that in terms of section 23 of the Game (Amendment) Act 1991, a game ranger or any person acting on the instructions of a game ranger, is immune from prosecution for any act or omission in the line of duty. That section, it turns out has been a bar to any attempts to prosecute game rangers involved in the deaths of the villagers. Your investigation further unearths information to the effect that the only attempt to prosecute privately was met with barriers from the side of the state.

Swaziland has ratified the International Covenant on Civil and Political Rights, the African Charter on Human and People's Rights, and its Protocol on Women's Rights.

You are now representing your organisation, which seeks to use international law to address these problems.

- (i) Which forum(s) would you approach for a remedy? (8)
 - (ii) What is the admissibility criteria for matters before the African Commission? (7)
 - (iii) Can your NGO take these matters directly to the African Commission? (3)
 - (iv) Can your NGO approach the International Criminal Court for a remedy? (3)
- (b) There are arguments that the complementarity principle of the International Criminal Court means that this court will never have jurisdiction. Discuss (4).

(25 Marks)

Question 4

The state of Somaliland is a semi-autonomous region of Somalia situated in the horn of Africa. It transacts with Ethiopia, Djibouti and Somalia (Mogadishu) quite frequently. Somaliland is an Islamic state in which *Sharia* law reigns supreme. In terms of *Sharia* law, any law (including international law)

that conflicts with the dictates of Islam is null and void. Somaliland has come from a long civil war which ended in 1991, and has managed to establish a fully functional administrative system. All these attributes notwithstanding, no single country in Africa or the world seems interested in recognizing Somaliland as a state. The regional grouping, the African Union, also does not recognize Somaliland. You have been tasked with presenting a case for recognition on behalf of Somaliland. Relying on international law principles, how would you advise the African Union?

(25 Marks)

Question 5

The Republic of Xander is a landlocked state neighbouring two coastal states: the Republic of Fishfull and the Kingdom of Mineralia. The three states have ratified the 1982 United Nations Convention on the Law of the Sea. (NB: For the purposes of this question, assume that the Convention has already entered into force.)

On 15 May 1989, seventeen nationals of Xander were arrested by the authorities of Fishfull while fishing in the exclusive economic zone (EEZ) of the coastal state, without permission. Their vessel was confiscated and its contents (tilapia fish which they have traditionally relied on for food) expropriated. The arresting authorities also claimed that the vessel used by the Xander nationals in their illegal fishing polluted the area through excessive discharge of oil caused by a defect in the vessel. While the Xander nationals in question were released and returned home, their vessel was detained by Fishfull authorities.

The Government of Xander, having been informed of the incident, contacted the Government of Fishfull and suggested a meeting between them to deal with such problems which began to be of a recurring nature. In the Note to Fishfull, the Government of Xander lamented the reluctance of both Fishfull and Mineralia to conclude with it appropriate bilateral agreements, in accordance with article 69 of the Law of the Sea Convention, to enable the nationals of the landlocked state to participate in the appropriate surplus of the living resources of the EEZ of the two neighbouring coastal states.

Xander asserted, in particular, that, while the capacity of Fishfull to harvest tilapia fish in its EEZ was only 20%, the total allowable catch for that particular fish requires a harvesting capacity of over 67% as established by the scientific evidence provided by the Food and Agriculture Organization (FAO). This is to avoid under-utilization of that particular resource. Accordingly, the refusal of Fishfull to declare surplus with respect to tilapia fish and to allow Xander to have access to such surplus was unreasonable and amounted to a violation of articles 61, 62 and 69 of the Law of the Sea Convention (Part V). Xander demanded the immediate release of the vessel. The Government of Fishfull denied

the assertions of Xander regarding the surplus of the living resource and continued to detain the vessel.

Having failed to reach a settlement of these issues through direct negotiations between them, Xander notified Fishfull of its intention to invoke the third-party procedures of Part XV of the Law of the Sea Convention against Fishfull. Both parties have made currently valid declarations under article 287 of the Convention, conferring jurisdiction to two different procedures under the article. Xander conferred jurisdiction upon the International Court of Justice, while Fishfull conferred jurisdiction upon the International Tribunal for the Law of the Sea.

1. Outline how the disputes between Xander (the Applicant) and Fishfull (the Defendant) should be handled under Part XV of the Convention, having regard to the substantive provisions of Part V of the Convention.
2. Which party, in your view, should prevail and on what issues?