

(L6269) International Law - Final Examination

**Columbia Law School
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1. This is an open-book examination. While the exam is designed to be taken in 3 hours, you have been given 4 hours to complete it. You should have with you all the books and supplemental materials assigned in this course. You may also use outside materials. The exam consists of 4 questions and has 9 pages (including this cover page). **Read through the exam when you first receive it to see if you have any questions and to be sure it is complete.**

2. You are strongly urged to budget your time in light of the recommended times indicated, as points will correspond to those times. You are strongly urged to use the extra time that you have been given to organize or outline your answers before writing. **Please indicate clearly at the outset the number (and subpart, if applicable) of the question that you are answering.**

2. All answers must be written in the blue books. I cannot give credit for an answer that I cannot read. **If you are not typing this exam, write legibly and only on one side of the page. Please double-space your answers.** Make sure your student number appears on the cover of each blue book.

3. If you feel that important facts are missing or that the question is unclear, indicate these or the source of uncertainty within your answer.

Good Luck.

1. (75 minutes total; about 4-5 minutes each)

Short Response. Indicate whether you agree with the statement **in whole or in part** and indicate why in a few short sentences. (If you agree with only parts of a statement, you should clarify which part.) **You will not receive credit for a response that does not come with an explanation and preferably a reference to relevant authority.**

(A) An oral agreement between a state and Amnesty International (the NGO), is not a treaty under customary international law or the Vienna Convention on the Law of Treaties but it would be a binding treaty under international law if it were reduced to writing and consideration were given.

(B) A material breach of a multilateral treaty by one party entitles another party to the treaty that has been directly affected by the breach to suspend the operation of the treaty in response. Other parties to the treaty, not directly affected by the breach, can take no action in response.

(C) Under the UN Charter neither UN members nor the organization itself can intervene in the sovereignty of nations.

(D) A foreign state that engages in a regular course of commercial conduct within the territory of the United States can be sued in U.S. courts, irrespective of the type of claim, since such a course of conduct is bound to mean that the foreign state has opened a bank account in the United States.

(E) Long before the rise of the modern law of international human rights, the international community, or at least the League of Nations, recognized that international law can protect a minority group's rights to speak its own language. Indeed, such a group might in some circumstances assert its right to exercise "external" self determination.

(F) Under the U.S. Constitution as it has been interpreted by the U.S. Supreme Court, the states of the United States cannot conduct their own foreign affairs. This is because the federal government needs to speak "with one voice."

(G) The UN Security Council can order states to take action, including, if necessary, military action, to prevent genocide because the Genocide Convention anticipates this exception to the normal rules prohibiting the use of force.

(H) The International Court of Justice (ICJ) has found, consistent with what the Vienna Convention on the Law of Treaties provides, that a state that files a reservation to a multilateral treaty that violates the object and purpose of that treaty remains a party to the treaty and its invalid reservation simply drops out of its acceptance.

(I) The U.S. Supreme Court has found that international law is not violated when a state abducts individuals from another state so long as the state whose national is abducted does not protest the

action.

(J) All states have the power to conclude any and all treaties; the same cannot be said of all international organizations.

(K) Some forms of state practice, by their very nature, supply the requisite “opinio juris” necessary to determine the existence of a rule of customary international law.

(L) There is judicial authority in U.S. courts suggesting that, as a matter of U.S. constitutional law, either the Congress of the United States or the President of the United States may violate a treaty or a rule of customary international law. Of course, if this were to occur, the United States would still be in violation of international law.

(M) Although the International Court of Justice has repeatedly found the United States in violation of the Vienna Convention on Consular Relations, its decisions have had no effect on outcomes in U.S. courts.

(N) A state that has been coerced, by military threat, into ratifying a bilateral agreement with another state that permits a military occupation has a valid excuse to terminate such a treaty if it so wishes. This is why Iraq can force U.S. troops to withdraw from that country at any time.

(O) When a WTO panel or its Appellate Body finds a state’s law to be in violation of WTO law, as happened with respect to the United States’ section 301 of the U.S. Trade Act of 1974 and has happened to the EU with respect to its regulations on bananas, the state(s) found to be in violation must remove the offending provision from its law and pay remedial or compensatory damages to any traders who suffered harm while the offending law was in place.

(P) The NAFTA contains “checks and balances” that do not exist under the UN Charter. While no one can “check” the ICJ, the NAFTA parties can and have “checked” arbitrators charged with resolving investment disputes under the NAFTA’s investment chapter (Chapter Eleven).

2. (45 minutes)

UN Games

You are the legal adviser to the UN delegation for the State of Angora, a capitalist democracy with a significant interest in continuing business ties with Western corporations that sometimes votes with its fellow developing states and sometimes with the West, including the United States. You are asked for your view of the following **proposed General Assembly Resolution** (only relevant parts attached).

Your client, the Ambassador, a former human rights activist, hands the proposed resolution to you saying “See whether we can vote in favor of this thing since I think most of our closest allies are supporting it. It seems like a feel-good resolution that can do little harm since, of course, the Assembly does not make law and it will please all my friends in Amnesty International and the new batch of liberals elected to the U.S. Congress, while doing little harm to our interests. Of course, if you think it goes against existing law, let me know if we ought to propose some changes.”

Write the requested memorandum, addressing especially whether the proposal reflects in whole or in part **existing** international law.

(Proposed) Declaration on the Norms Regarding the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights

UN General Assembly, Resolution XXX (Draft)(Fall 2006)(Excerpted)

Bearing in mind the principles and obligations under the Charter of the United Nations, in particular the preamble and Articles 1, 2, 55 and 56, inter alia to promote universal respect for, and observance of, human rights and fundamental freedoms,

Recalling that the Universal Declaration of Human Rights proclaims a common standard of achievement for all peoples and all nations...

Recognizing that even though States have the primary responsibility to promote, secure the fulfilment of, respect, ensure respect of and protect human rights, transnational corporations and other business enterprises, as organs of society, are also responsible for promoting and securing the human rights set forth in the Universal Declaration of Human Rights,

Realizing that transnational corporations and other business enterprises, their officers and persons working for them are also obligated to respect generally recognized responsibilities and norms contained in United Nations treaties and other international instruments such as the Convention on the Prevention and Punishment of the Crime of Genocide; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the Convention on the Elimination of All Forms of Discrimination against Women; the International Covenant on

Economic, Social and Cultural Rights; the International Covenant on Civil and Political Rights; the four Geneva Conventions of 12 August 1949 and two Additional Protocols thereto for the protection of victims of war; the Rome Statute of the International Criminal Court; and the Guidelines for Multinational Enterprises of the Organization for Economic Cooperation and Development

Reaffirming that transnational corporations and other business enterprises, their officers - including managers, members of corporate boards or directors and other executives - and persons working for them have, inter alia, human rights obligations and responsibilities...

Solemnly proclaims this Declaration on the Norms Regarding the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights and urges that every effort be made so that they become generally known and respected.

...

1. States have the primary responsibility to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognized in international as well as national law, including ensuring that transnational corporations and other business enterprises respect human rights. Within their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfilment of, respect, ensure respect of, and protect human rights recognized in international as well as national law, including the rights and interests of indigenous peoples and other vulnerable groups.

2. Transnational corporations and other business enterprises shall ensure equality of opportunity and treatment, as provided in the relevant international instruments and national legislation as well as international human rights law, for the purpose of eliminating discrimination based on race, color, sex, language, religion, political opinion, national or social origin, social status, indigenous status, disability, age - except for children, who may be given greater protection - or other status of the individual unrelated to the inherent requirements to perform the job, or of complying with special measures designed to overcome past discrimination against certain groups.

3. Transnational corporations and other business enterprises shall not engage in nor benefit from war crimes, crimes against humanity, genocide, torture, forced disappearance, forced or compulsory labor, hostage-taking, extrajudicial, summary or arbitrary executions, other violations of humanitarian law and other international crimes against the human person as defined by international law, in particular human rights and humanitarian law.

....

12. Transnational corporations and other business enterprises shall respect economic, social and cultural rights as well as civil and political rights and contribute to their realization, in particular the rights to development, adequate food and drinking water, the highest attainable standard of physical and mental health, adequate housing, privacy, education, freedom of thought, conscience, and religion and freedom of opinion and expression, and shall refrain from

actions which obstruct or impede the realization of those rights.

....

15. As an initial step towards implementing these Norms, each transnational corporation or other business enterprise shall adopt, disseminate and implement internal rules of operation in compliance with the Norms. Further, they shall periodically report on and take other measures fully to implement the Norms and to provide at least for the prompt implementation of the protections set forth in the Norms....

16. Transnational corporations and other business enterprises shall be subject to periodic monitoring and verification by United Nations and by other international and national mechanisms already in existence or yet to be created, regarding application of the Norms....

17. States should establish and reinforce the necessary legal and administrative framework for ensuring that the Norms and other relevant national and international laws are implemented by transnational corporations and other business enterprises.

18. Transnational corporations and other business enterprises shall provide prompt, effective and adequate reparation to those persons, entities and communities that have been adversely affected by failures to comply with these Norms through, inter alia, reparations, restitution, compensation and rehabilitation for any damage done or property taken. In connection with determining damages, in regard to criminal sanctions, and in all other respects, these Norms shall be applied by national courts and/or international tribunals, pursuant to national and international law....

3. (40 minutes)

Bliss v. Karpy

You work for a prosecutor in the state of Bliss, a European country known for its picture-perfect villages, chocolate, and its steadfast adherence to international law, including the Geneva Conventions. In late 2006, at the instigation of human rights organizations, five individuals, current residents of Bliss who had formerly been detained in Iraq for varying periods of time, come forward claiming to have been subjected to “waterboarding”¹ or other forms of ill treatment. Their complaint is directed against Glen Karpy, a U.S. national now retired and living in Bliss.

The complainants, 3 Iraqi nationals and 2 Bliss nationals, assert that from 2003 through the end of 2004, Karpy was working for Holybroken, a multinational defense contractor hired by the U.S. military to assist the U.S. military and intelligence services in Iraq. The Iraqi complainants assert that Karpy, who was in charge of a military detention facility in Iraq, submitted all of them to “waterboarding” at this facility. (The facility is located 100 miles from the infamous prison facility of Abu Ghraib.) One of the Bliss nationals asserts that Karpy forced him to play Russian roulette. All of them claim that Karpy, while he was in charge of the portion of the facility in which they were held, “must have known” that at night they, along with many other detainees, were, for reasons that did not appear related to interrogation, (1) stripped naked and photographed; (2) violently “roughed up;” or (3) handcuffed in uncomfortable positions for hours at a time. None of the complainants were ever tried and convicted of any crime. None were ever allowed to receive mail or packages while in detention and all were held for over a year before being released. One of the Iraqi nationals claims that he was held incommunicado for over a year and that no one, including his family, was ever told where he was or even that he had been arrested.

In interviews given to the press, Karpy denies any knowledge of events occurring at night in the facility when he was not there but does not deny that he did strap a number of detainees “briefly” to “waterboards” to ask them a few questions when they first arrived. He claims that he can prove: that he was ordered to do this by his superiors who regarded the process as routine in the case of Iraqi detainees when there was cause to suspect the detainee might have relevant information of possible future terrorist activity, that these orders were determined to be (at least at the time) lawful as determined by the highest executive branch officials in the U.S. government, and that, had he not complied, he would have been severely reprimanded and the detainees would have, in any case, faced the same treatment at the hands of others less kind. He admits that on one occasion, he was, at gunpoint, forced to play a game of Russian roulette with

¹Waterboarding involves strapping individuals to boards that are then submerged into water to simulate the sensation of drowning.

one of the complainants but that fortunately no one was hurt. In his defense, Karpy notes that none of the detainees that he personally handled suffered any lasting physical harm and that on at least one occasion his attempts at waterboarding produced information that prevented a suicide bombing. He also indicates that he was known for his many kindnesses to the prisoners, and that he even managed to get one of the complainants, an Iraqi national, released periodically to reward him for keeping an eye on fellow prisoners and so that he could serve as Karpy's driver and cook. "Thanks to me," Karpy is quoted as saying, "that guy was able to get some fresh air and a lot of home-cooked meals."

You know that the state of Bliss changed its criminal legislation to make it comport with the definition of crimes in the Statute of the International Criminal Court (ICC) when it ratified the ICC Statute back in 2002. Bliss is also a party to every human rights treaty in sight. Your superiors want a preliminary memorandum from you indicating what might occur should Bliss seek to transfer Karpy to the ICC or to attempt a criminal prosecution in Bliss. They ask that you survey the legal issues, venue options, potential criminal charges, and likely defenses -- while leaving political decisions to others. (Someone else at the office has been charged with looking into what would happen should Karpy be handed over to the U.S. authorities so you are **not** asked to look into that possibility or into relevant U.S. laws.)

Your superiors expect you to indicate any assumptions you are making as well as any additional information that will be needed in order to decide whether to proceed with any criminal proceeding, irrespective of venue.

Write the memo.

4. (20 minutes)

Nerdy Elevator Talk

Comment on **ONE** of the following statements. Be sure to indicate clearly at the outset which statement you are responding to.

Statement A:

“Despite their canonical status and appearance in every U.S. international law casebook, the decisions in *S.S. Lotus*, PCIJ (1927)(DRW, at 356) and *Banco Nacional de Cuba v. Sabbatino*, 376 US 398 (1964) (DRW, at 341) have been overtaken by events. Virtually every aspect of these famous opinions, from their respective holdings to the judicial dicta contained in them, is unreliable. Alvarez should not have made us read them.”

Statement B:

“When you look closely at the arbitral decisions concluded to date in the course of NAFTA investor-state dispute settlement, and the fact that the United States Government has never lost a case but Canada and Mexico have, you begin to wonder whether the arbitrators are giving the United States the benefit of the doubt rather than create a political backlash against the NAFTA from the world’s most powerful state that could bring down the whole investment regime (and put its arbitrators out of job). When you look at the results reached in *Loewen* and *Methanex* and compare those to a decision like *Metalclad*, the comparison does not inspire confidence that the turn to investment arbitration has really “leveled the playing field” among all states (or between host states and their foreign investors for that matter) as advertised.”

End of Exam.