

STANFORD UNIVERSITY
School of Law

Final Examination for International Law, Spring 2007
Professor Allen Weiner

30 April 2007
Time: 3 and 1/2 hours

TEN short answer questions and
THREE essay questions
Open Book

INSTRUCTIONS

1. This is a three and one-half (3½) hour in-class exam. It is open book. In answering the questions, you may consult any materials that you have brought into the examination room, but you may not open any electronic documents or materials accessed over the Internet during the exam.
2. There are TEN short answer questions plus THREE essay questions. Answer ALL questions. They will be weighted in proportion to the recommended time allocated to each question (or, for the short answer questions, to the section of questions).
3. Be sure to devote sufficient time to planning and organizing your response. I encourage you to use headings and sub-headings; this will help you organize your thoughts, which is likely in turn to improve the quality of your answers.
4. There is no word limit for any question, but precision and conciseness will be rewarded in grading.
5. If there is any material fact you think is ambiguous or missing, please state what it is and why it matters.

SECTION I: SHORT-ANSWER QUESTIONS (approximately 45 minutes total for all questions)

QUESTION 1: Explain the difference between the immunity under customary international law of a sitting head of state and a former head of state.

QUESTION 2: What are the forms of “reparation” for breaches of international legal obligations?

QUESTION 3: How does the enforcement of rights under the International Covenant for Civil and Political Rights differ from enforcement of rights under the International Covenant for Economic, Social, and Cultural Rights?

QUESTION 4: What are the different approaches or criteria for determining whether a regime is to be recognized as the “government” of a state?

QUESTION 5: Identify three different ways in which jurisdiction over a dispute between states might be conferred on the International Court of Justice.

QUESTION 6: What is the right of collective self-defense? What are the requirements for its invocation?

QUESTION 7: Was the takeover of the American Embassy in Iran on November 4, 1979, legally attributable to, or otherwise a breach of international law on the part of, the Government of Iran?

QUESTION 8: When, if ever, may “regional arrangements or agencies” use force to confront threats to international peace and security in another country?

QUESTION 9: What factors should one consider to ascertain whether a treaty is “self-executing” or not as a matter of domestic U.S. law?

QUESTION 10: What are “internal self-determination” and “external self-determination”? What is the relationship between the two concepts?

PLEASE CONTINUE TO ESSAY QUESTION NO. 1 ON THE FOLLOWING PAGE

SECTION II: ESSAY QUESTIONS

QUESTION 1 (approximately 90 minutes)

Belanon is an oil-rich Middle Eastern country. Although virtually all Belanese citizens share the same ethnicity (they are all Yoris) and the same religion (they are all Zoroastrians), the Zoroastrian religion is comprised of two historically divided sects, the Moonies and the Uni'ites. Between 1955 and 1990, the Belanese Moonies and Uni'ites lived in relative peace under a 1955 constitution providing for a power sharing formula. The division of power was based on the 1951 census, the last official census in Belanon. That constitution guarantees that the President of Belanon must be a Moonie. Sixty percent of the seats in the Parliament must also be held by Moonies, although the Speaker of the Parliament, who has considerable power in setting the Parliament's legislative agenda, is to be a Uni'ite. Since about 1990, the Uni'ites – who claim to have become the majority population in Belanon – have expressed increasingly vocal opposition to the constitutional structure, claiming that it violates their rights. The Uni'ites claim, on the basis of population records compiled by academics at the country's leading university, to have become the majority group in the country, by an estimated majority in a 2006 study of 55% to 45%. In the late 1990s, an extremist Uni'ite group began plotting violent acts against the Belanese government, but the group was quickly discovered by Belanese security forces. The leaders of the group were executed by state security forces after summary trials, and many other Uni'ites seen as sympathetic to the group were exiled or fled to the United Kingdom.

France, a Permanent Member of the Security Council, has long had influence in Belanon. Indeed from the early 18th century until Belanon obtained its independence in 1948, Belanon was a French colony. France historically had close ties to the Moonies, who were as a group more socio-economically advanced than the Uni'ites. The Moonies also have much better French accents.

The United Kingdom is another Permanent Member of the Security Council. The U.K. wishes to expand its influence in the Middle East in the hopes of building relationships that will lead to guaranteed oil supply contracts and long-term energy security. British political leaders began to develop ties with exiled Uni'ites who had sought asylum in the U.K. after the violence of the late 1990s. The British are sympathetic to the Uni'ites' claims that Belanese regime is based on an undemocratic system. U.K. strategists also begin to stress to others in the government the benefits for British strategic and economic interests in the Middle-East if a Uni'ite-dominated government came to power in Belanon.

In January 2007, the Belanese capital Elmroot is rocked by a series of bombings of police stations. A Uni'ite group, the Uni'ite Liberation Organization (ULO), claims responsibility for the attacks. There are reports in both the Belanese and British press that the British Government has secretly provided funding and munitions to the ULO. The Belanese government counters the bombing with a stern security response. Hundreds of Belanese Uni'ites are arrested. Most are not charged, but are merely detained under a late 1990s Belanese law empowering the government to detain persons on "suspicion of sedition." In several parts of the country, Belanese police are attacked by organized units of ULO fighters. As violence escalates, Belanese Interior Ministry officials on at least two occasions attack

villages that are reputed to be ULO strongholds and in the process kill large numbers of villagers, including unarmed men, women, and children.

As the crisis mounts, Britain's Ambassador to the United Nations calls an emergency meeting of the Security Council. "Our heads of state recently declared that the United Nations has a responsibility to protect those suffering humanitarian abuses. We are witnessing such abuses in Belanon right now. We must intervene to stop the bloodshed in Belanon, and to restore representative democracy in that country." In view of its historic ties to Belanon, and suspicious of British intentions, France decides to preempt the British initiative. It launches a major diplomatic effort to broker a cease fire in Belanon. France's Foreign Minister, Nikolas de Vedpan, travels to Belanon and engages in shuttle diplomacy between Belanese President Rami Genoun and Chairwoman Hanna Rabu, the leader of the ULO, who is based in neighboring Burnia. After two weeks of difficult negotiations, de Vedpan holds a press conference in Elmroot and announces a breakthrough. "It is my great honor to release the text of the Elmroot Communiqué, which I have negotiated with President Genoun and Chairwoman Rabu. This agreement ensures that the fighting between the Government and the ULO will cease, which will enable the parties to pursue good faith political negotiations. President Genoun will sign the Communiqué later today, after which I will fly to Burnia where the agreement will be signed by Chairwoman Rabu." The text of the Communiqué, which is produced on the letterhead of the French Embassy in Elmroot, reads in pertinent part:

The Belanese Government and the leadership of the ULO have conveyed to the French government their solemn determination to cease armed conflict. Each side will order its forces to cease all military activities. Thereupon, representatives of the parties agree to meet to discuss a political settlement to the conflict, including embarking on a process leading to a possible amendment of the Belanese constitution.

The British Government wastes little time in criticizing the Elmroot Communiqué as "toothless," and warns that the Belanese Government will "resume its oppression of the Uni'ites" unless the international community "signals its resolve." Accordingly, the British Government sponsors a resolution in the Security Council, which is adopted by the Council. Resolution 1755 (2007), enacted under Chapter VII, reads in pertinent part, as follows:

The Security Council,

Urging the parties to conflict in Belanon to pursue political negotiations to resolve their difference through peaceful means, . . .

1. *Demands* that the parties comply with all their legal obligations regarding the peaceful resolution of disputes, including under the Elmroot Communiqué;
2. *Notes* that the violation of those obligations will entitle the international community to seek redress for such breaches through all appropriate and necessary means; and
3. *Reiterates* the duty of the Security Council to protect victims of international crimes and other serious international human rights violations.

After two weeks of negotiations in Belanon, talks between the Belanese Government and the ULO stall. Violence erupts again after a Belanese Interior Ministry patrol is ambushed in what appears to be an attack by the ULO. The Belanese government launches police raids into Uni'ite villages, arresting and killing dozens of alleged ULO operatives. Uni'ite political leaders claim that the government is arresting and killing young men who have no ties whatsoever to the ULO, but is seeking simply to intimidate and terrorize the Uni'ite population. In one Uni'ite village, Belanese Government forces attack a reputed ULO stronghold with machine guns and grenades. After the assault, international media images from the site reveal that nearly 20 children and unarmed elderly men and women were killed in the attack.

The British Government responds with outrage. It tables a resolution in the Security Council that reads, in pertinent part:

The Security Council,

1. *Finds* that the Belanese Government has breached its obligations under the Elmroot Communiqué;
2. *Acts upon* the Council's previous determination to use force, if necessary, to counter such breaches;
3. *Calls upon* all U.N. Member States to intervene in Belanon to halt the humanitarian law violations taking place there.

The resolution obtains broad support from the non-permanent members of the Council, but fails when the French Government votes against it. The United States and China abstain; Russia votes in favor.

Undaunted, the British Government introduces a comparable resolution in the U.N. General Assembly. That resolution reads, in pertinent part:

The General Assembly,

Acting on the basis of General Assembly Resolution 377 ("Uniting for Peace") (1950),

Noting Security Council Resolution 1755 (2007),

1. *Finds* that the Belanese Government has breached its obligations under the Elmroot Communiqué;
2. *Calls upon* all U.N. Member States to intervene in Belanon to halt the humanitarian law violations taking place there.

Shortly after the General Assembly Resolution is adopted, the British military deploys to Belanon. It drives Belanese Government forces from Uni'ite-dominated villages and marches to Elmroot. In a press conference, British Prime Minister Nigel Flare says that Belanon's President Genoun must call for a constitutional convention to modernize Belanon's political structure. Prime Minister Flare also demands that Genoun, after authorizing the establishment of such a constitutional convention, resign from office. With

his capital occupied by British forces, Genoun resigns. The British forces install a government dominated by Uni'tes, including many who were formerly exiled in the U.K., pending the adoption of a new constitution.

In Britain, Prime Minister Flare's actions are greeted enthusiastically by the public. The Prime Minister, who had only five months left in his final term as Prime Minister, decides to seize upon his party's newfound popularity and calls new elections. Flare's party wins the election handily; one of the London tabloids describes the election results as "Flare's Farewell Gift from a Grateful Nation."

Shortly after leaving office, former Prime Minister Flare travels to the United States to give a series of lectures at Stanford University. While there, U.S. authorities receive an arrest warrant issued by French authorities, seeking Flare's transfer to France to stand trial on charges of "the international crime of aggression."

Tensions between France and the U.K. escalate sharply. The two countries turn to their long-time ally, the United States, for assistance in resolving the growing crisis.

Your Task:

You are the Legal Adviser of the U.S. State Department. The Secretary of State says it would facilitate her efforts to negotiate a resolution of the French-British crisis if she had a better understanding of the underlying legal claims. She asks for your views on the following questions:

1. Was the U.K.'s intervention in Belanon legal under international law? What justifications can the U.K. advance? What are the objections to those justifications? Is the British position, on balance, persuasive?
2. Can France prosecute former Prime Minister Flare for the crime of aggression?

Please prepare a memo for the Secretary answering her questions.

PLEASE CONTINUE TO ESSAY QUESTION NO. 2 ON THE FOLLOWING PAGE

QUESTION 2 (approximately 45 minutes)

In the wake of the September 11 attacks on the United States, various Administration officials have at different times invoked the President's Constitutional authority as Commander-in-Chief in times of armed conflict. Senior Justice Department officials asserted, with respect to 18 U.S.C. § 2340A, the U.S. statute that makes it a crime for a U.S. person to commit torture overseas, that "[i]n order to respect the President's inherent constitutional authority to manage a military campaign against al Qaeda and its allies, Section 2340A must be construed as not applying to interrogations undertaken pursuant to his Commander-in-Chief authority."

The Administration has also reportedly asserted that the President is entitled to authorize the National Security Agency (NSA) to engage in electronic surveillance (wiretapping) of the communications of U.S. persons who are in contact with persons outside the United States suspected of being involved in terrorism without complying with the provisions of the Foreign Intelligence Surveillance Act (FISA), 50 U.S.C. §§ 1801 et seq.

The Administration's positions have been based on the President's inherent authority under Article II of the Constitution and the authority under the Congressional Authorization to Use Military Force (AUMF) Resolution adopted a week after the September 11 attacks. In *Rumsfeld v. Hamdi*, 542 U.S. 507 (2004), the Supreme Court found as follows with respect to the AUMF:

The AUMF authorizes the President to use "all necessary and appropriate force" against "nations, organizations, or persons" associated with the September 11, 2001, terrorist attacks. 115 Stat. 224. There can be no doubt that individuals who fought against the United States in Afghanistan as part of the Taliban, an organization known to have supported the al Qaeda terrorist network responsible for those attacks, are individuals Congress sought to target in passing the AUMF. We conclude that detention of individuals falling into the limited category we are considering, for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war as to be an exercise of the "necessary and appropriate force" Congress has authorized the President to use.

Your Task

Please analyze whether:

1. the President may lawfully engage in interrogations that constitute "torture" under the Convention Against Torture, that constitute "cruel, inhuman, or degrading treatment or punishment" under the Convention Against Torture, or that violate 18 U.S.C § 2340A. Please address both the domestic and international law aspects of this question.
2. the President may authorize NSA surveillance activities directed at U.S. persons without seeking warrants under FISA.

[NOTE: For ease of reference for the students, I had annexed to the original exam a number of the key statutory provisions related to this question, including the AUMF, 18 U.S.C. §

2340A, excerpts from FISA, and 18 U.S.C. § 2511m concerning domestic electronic surveillance for criminal law purposes. I am not including those statutory provisions in this sample exam. – Allen Weiner]

PLEASE CONTINUE TO ESSAY QUESTION NO. 3 ON THE FOLLOWING PAGE

QUESTION 3 (approximately 30 minutes)

There is controversy about how customary international law develops, and about what kinds of acts or statements are sufficient to establish the existence of customary international law rule. During this course, we have considered the “traditional” and “modern” approaches to customary international law. We have also considered the role of General Assembly resolutions in the development of customary international law, and the way in which “soft law” principles can contribute to the development of new international law rules, a phenomenon we observed in the international human rights and international environmental law fields in particular.

What approach should be used in assessing the development of customary international law? Do you favor the “traditional” or “modern” approach? Or some other approach? What are the strengths and weaknesses of the approach you favor, and why is that approach preferable to the alternative(s)?

END OF EXAMINATION