

Exam Number: _____

GEORGETOWN UNIVERSITY LAW CENTER
EXAMINATION IN INTERNATIONAL LAW I
(2-1/2 HOURS)

Professor Barry E. Carter

December 15, 2006

INSTRUCTIONS:

1. This is an OPEN BOOK examination. You can bring anything to the examination room that you wish. Don't spend all your time looking things up, though.
2. There are 2 Questions. The weight to be given each answer tracks the time suggested for that Question. 80 minutes are suggested for Question 1 and 60 minutes for Question 2. Question 1 has three parts. The suggested time allocations allow an extra 10 minutes for thinking about your answers in advance and then reviewing them.
3. You are encouraged to think through an answer before you start to write. If you feel an answer to a question turns upon facts not given you, explicitly assume the one or two most reasonable factual possibilities and answer accordingly.
4. You are given credit for spotting issues and for how well you develop the issues, particularly the most important issues. Well-written answers can receive extra credit. On the other hand, rambling answers will not serve the student well.
5. I read only what is in the examination books, and not material appearing on scrap paper.
6. For handwritten exams: Please write legibly. Write either on one side of the page only or, if you write on both sides, write on every other line.
7. For laptop users: To write your exam answers, use a blank document screen to access the exam template in Word or Word Perfect as directed by the proctor(s). Laptop users are NOT permitted to access other documents, outlines, notes, files, macros, etc. on their hard drivers and are not permitted to access the Internet. Personal Digital Assistants (PDA) and other electronic devices that store information may NOT be used in the exam room.
8. Important. For handwritten exams: Please start a new answer book(s) for each of the 3 Questions. For laptop users, start a new page for each of the 3 Questions.

This exam consists of 7 pages, including this cover page. Please be sure your exam is complete.

Please use your exam number (not your student ID number or social security number).

PLEASE DO NOT TURN THE PAGE UNTIL THE PROCTOR GIVES THE SIGNAL.

**GEORGETOWN UNIVERSITY LAW CENTER
EXAMINATION IN INTERNATIONAL LAW I
(2-1/2 HOURS)**

Professor Barry E. Carter

December 15, 2006

Question 1 (80 minutes)

(This question bears some similarity to recent stories in the newspapers, but it is not the same. Respond to the facts as provided below.)

North Korea is a very poor, isolated country of about 23 million people under the authoritarian leadership of Kim Jung II. He came to power after the death of his father. Kim Jung II is reclusive and apparently has quirky tastes. Intelligence analysts worry whether he acts rationally in making important decisions.

While poor, North Korea (known formally as the Democratic People's Republic of Korea, or "DPRK") has a large army; well-entrenched artillery that can cause great damage to Seoul, South Korea, at the outbreak of a war; medium-range missiles that could carry non-nuclear warheads that could reach Japan; and probably 2-5 nuclear weapons, with more production underway.

The United States long been concerned about North Korea's plans and programs to build nuclear weapons and also to develop missiles that might be able to carry these weapons. The Clinton administration, for example, engaged in extensive bilateral diplomacy with North Korea. While the Bush administration decided to try new approaches, it has also been following developments in North Korea.

Part A (40 minutes):

Assume it is now June 2006 (yes, you have been transported back in time, though continue to assume the facts above). North Korea's nuclear weapons program appears to be ongoing and there are growing concerns that Korea might some day test a nuclear warhead, both to ensure that the weapons work and to demonstrate convincingly to the world that it possesses nuclear weapons.

The Legal Adviser in the U.S. Department of State is analyzing the legal arguments that he might have ready to use, in one private or public forum or another, against North Korea's continuing to build nuclear weapons and/or test one. He is exploring the legal implications of two past events.

(1) North Korea's Efforts To Withdraw from the Nuclear Non-Proliferation Treaty
(25 minutes)

In January 2003, as tensions between the North Korea and the United States and other states over North Korea's suspected nuclear weapons program grew, North Korea announced that it was withdrawing from the Nuclear Nonproliferation Treaty (NPT). Article X(1) is the NPT's withdrawal clause provides:

“Each party shall in exercising its national sovereignty have the right to withdraw from the Treaty if it decides that extraordinary events, related to the subject matter of this Treaty, have jeopardized the supreme interests of its country. It shall give notice of such withdrawal to all other Parties to the Treaty and to the United Nations Security Council three months in advance. Such notice shall include a statement of the extraordinary events it regards as having jeopardized its supreme interests.”

In announcing its withdrawal from the NPT, North Korea declared that “[a] dangerous situation where our nation's sovereignty and our state's security are being seriously violated is prevailing on the Korean peninsula due to the US vicious hostile policy towards [North Korea].” North Korea's statement included President Bush's characterization of North Korea as a member of states comprising an “axis of evil” and U.S. efforts to pursue resolutions condemning North Korea's non-compliance with the NPT as evidence of as a basis for its “self-defensive” withdrawal from the treaty.

(a) You are a new lawyer in the Legal Adviser's Office. He asks you for a brief memo addressing: Is it for North Korea, or for other states or an international organization, to decide whether North Korea's stated reasons for withdrawing from the NPT satisfy Article X(1) of the treaty? Did North Korea's attempt to withdraw from the NPT without three months' notice nullify the withdrawal effort, or what effect did it have? Was this consistent with the Vienna Convention on the Law of Treaties?

(b) The Legal Adviser also notes that the NPT limited the manufacturing and testing of nuclear weapons to NPT parties who had these weapons prior to 1967 (which predates North Korea's possession).¹ He asks you to address briefly: if North Korea has successfully withdrawn from the NPT, do you think there are any norms of international law that prevent North Korea from developing and testing nuclear weapons?

(2) Joint Statement of the Fourth Round of the Six-Party Talks (15 minutes)

Beginning in August 2003, the United States, Russia, China, Japan, South Korea, and North Korea launched a series of negotiations, known as the Six-Party talks, aimed at addressing concerns about withdrawal by North Korea from the Nuclear Non-Proliferation Treaty and its declared intention to acquire a nuclear weapons capability. In September 2005, after the fourth round of talks, the Chinese government, which hosted the talks, issued a document called a “Joint Statement” memorializing the results of the negotiations. Here is key language from the Joint Statement:

¹ The NPT has over 180 states-parties. The parties are classified into two categories: nuclear-weapon parties (NWS)—consisting of the United States, Russia, China, France, and the United Kingdom—and non-nuclear weapons states (NNWS). India, Israel, and Pakistan are not parties to the treaty. India and Pakistan have made public their possession and testing of nuclear weapons. Israel has not made a public announcement, but almost all experts believe it does possess nuclear weapons.

1. The Six Parties unanimously reaffirmed that the goal of the Six-Party Talks is the verifiable denuclearization of the Korean Peninsula in a peaceful manner.

The DPRK committed to abandoning all nuclear weapons and existing nuclear programs and returning, at an early date, to the Treaty on the Non-Proliferation of Nuclear Weapons and to IAEA safeguards. . . .

The DPRK stated that it has the right to peaceful uses of nuclear energy. The other parties expressed their respect and agreed to discuss, at an appropriate time, the subject of the provision of light water reactor to the DPRK.

The Legal Adviser now asks you: Does this document constitute an international agreement under the Vienna Convention on the Law of Treaties? If so, what are the U.S.'s legal remedies if North Korea continues its nuclear weapons programs and does not return to the NPT? If it is not an international agreement, what is it? Does it provide the United States any remedies or other uses?

Part B (20 minutes):

(Continuing our hypothetical.) North Korea declared that it successfully conducted an underground nuclear weapons test on October 9, 2006. The explosion was fairly small. The North Koreans might have intended this or the test was only partially successful.

In any case, the United States, China, Japan, many other countries, and the United Nations strongly criticized the North Korean step. The U.N. Security Council adopted Resolution 1718 on October 14. It condemned the nuclear test, demanded that the DPRK not conduct any further nuclear test or launch of a ballistic missile [which you can consider a medium or long range missile]; demanded that the DPRK retract its announcement of withdrawal from the NPT; demanded that the DPRK return to the NPT safeguard arrangements; and demanded that the DPRK shall abandon all nuclear weapons and existing nuclear programs in a complete, verifiable, and irreversible manner. The Resolution also imposed a general cutoff of trade with the DPRK in military items and even some luxury goods (but not food and other humanitarian items).

The Legal Adviser asks you: What is the legal basis for the U.N. Security Council to impose economic sanctions on North Korea and demand the end of its weapons testing? Also, does the Security Council have the legal authority to demand that North Korea had to retract its withdrawal announcement from the NPT? Does that not effectively force a country to belong to a treaty?

Part C (20 minutes):

Assume that North Korea ignores world opinion and the U.N. Security Council's resolution. Next week, it tests another nuclear weapon underground with bigger explosive force.

It also conducts the first test of a longer-range ballistic missile with a trajectory that carries it over Japan (though when it is in space) and then to a landing well into the Pacific

Ocean. Analysts estimate that the missile might be operational by 2008 and could reach Alaska and maybe even Hawaii and parts of the western United States. It could carry a nuclear warhead, though it is not clear whether the North Koreans could make an operational warhead small enough to fit on the missile before 2009. Analysts indicate that the North Koreans are busy taking efforts to hide and harden their missile launching sites.

As a result of these tests, the U.N. Security Council tightens its economic sanctions further, but Russia and China threaten to use their vetoes when more forceful action is suggested.

The White House and the U.S. Secretary of State are frustrated by, in their view, the U.N.'s weak response. The Secretary of State is the person who, as National Security Adviser, had taken the lead in drafting the Bush administration's 2002 "National Security Strategy of the United States of America," which talked of possible pre-emptive action.

The Legal Adviser asks you what legal justifications, if any, does the United States have under international law for: (a) a limited conventional (i.e., non nuclear) attack on North Korea's missile launching areas; (b) a limited conventional attack on North Korea's nuclear weapons facilities (to the extent that they can be found), with the likelihood that the attack would scatter some nuclear radiation; or (c) a limited strike with small nuclear weapons against the missile launching sites and nuclear weapons facilities, with the certainty of some radioactive fallout.

* * * * *

[Start of Question 2. Remember to start a new exam book. For computer users, starts on a separate page.]

Question 2 (60 minutes):

Assume the real world facts about Russia that are generally known, plus the new hypothetical information specifically provided later.

Among the real world facts are that, after the breakup of the Soviet Union, Russia emerged as the largest of the resulting countries. Russia has a considerable military, a large arsenal of missiles and nuclear weapons, and extensive oil and mineral resources. It is now a major exporter of oil, which is providing it with huge revenues from abroad.

Russia's President is Vladimir Putin, a former KGB intelligence official. Putin developed good personal relations with President George W. Bush early in the Bush administration. Relations between the United States and Russia, while strained at times, are generally good. The United States is presently working to involve Russia in U.S. and U.N. efforts regarding Iran and North Korea.

A high-visibility story that is keeping many people interested is the poisoning in London of a former Russian spy, Alexander Litvinenko, who was a critic of President Putin.

He made a deathbed accusation that Mr. Putin was complicit in his poisoning (which was by polonium 210). The poisoning occurred in late October or early November. The facts are still unfolding, but there is substantial evidence that the radioactive polonium was transported from Moscow, and that a Russian businessman who had earlier worked for the KGB and who met with Litvinenko at the time of the poisoning was involved.

(Here are additional “facts” for the hypothetical below.)

Patricia Clarke is a British citizen who had been residing in the United States for the past year with her Italian husband and two children. She died three weeks ago.

She had been an outstanding geologist and oil executive, known for helping locate and efficiently develop new oil reserves. She went to work in 2001 as a senior executive at Yukos Oil Company, then a large private Russian oil company, where she helped Yukos develop new fields and generally become a highly profitable, well-respected oil company. However, in 2003, President Putin had a falling out with the Chairman of Yukos because, among other reasons, the Yukos head had supported opposition political candidates. Though tax assessments and various measures (legal and non-legal), the Russian government began an aggressive campaign to force out the Yukos management and sell off its assets.

Fearing for her future and her safety, Ms. Clarke quit her job, left Russia in 2005, and moved to the United States. She became an outspoken public critic of the Russian government’s tactics and its poor management of the nation’s energy resources. (In fact, Russian began lagging in developing new oil fields, largely content with its revenues from the high oil prices for its existing production.)

Last month, Ms. Clarke was visiting friends in London. The day before she was going to return to New York, she received a call from a former Russian colleague, Dimitri, asking her to join him for lunch the next day at the Century Hotel in London. Dimitri was now a very successful oil company executive in what was still a private oil company in Russia and he said he would like her advice about some new opportunities. He said he might be able to offer her some share in the activities. Ms. Clarke agreed to the lunch.

When she arrived at the hotel, she found that Dimitri was accompanied by Boris, who was the #3 diplomat at the Russian Embassy in London. (Boris was also the station chief for a Russian intelligence agency, the Federal Security Service, a KGB successor.)

During the lunch, when Ms. Clarke excused herself to use the bathroom, Boris poured a small vial of liquid into her soup while Dimitri watched. (As the family learned two weeks later, this action was observed by a British intelligence officer who was tailing Boris because of his position in the embassy. The hotel’s surveillance cameras also recorded Boris earlier showing the vial to Dimitri.) Ms. Clarke returned, finished her meal, and then rushed to catch her airplane back to New York.

The next day Ms. Clarke suffered a stroke and was taken to a top-flight New York City hospital. In spite of intensive efforts by the doctors there, she died two days later.

Because death was sudden and she had been in good health, her family asked for an autopsy. Considerable amounts of a poison that causes strokes after a 24-hour period were found. The autopsy determined the poison was the cause of her death.

You are now a lawyer in a major New York law firm. You and a partner skilled in litigation meet with Ms. Clarke's husband, Pietro Plano (P). He is understandably upset by the loss of his wife and the mother to their two children. He also wants justice to be done after hearing the results of the autopsy and obtaining the information above from British intelligence and the hotel. He also questions how quickly the U.S. government might press this matter because of diplomatic considerations. Although he is wealthy himself, he wants to sue for damages whoever might be liable, to make them pay for what they had done.

The partner asks you for a memo that explores the possible reasonable causes of action that Mr. Plano and his children might bring against Dimitri, Boris (as an individual and as a government official), and the Russian government. He says he is not particularly familiar with this area of law, but he does think that relevant statutes might be the Foreign Sovereign Immunities Act, the Alien Tort Statute, the Torture Victim Protection Act, and possibly 18 U.S.C. §2333. He asks that the memo include your assessment of the chances of success on each of the causes of action you discuss.

* * * * *

END OF EXAM

WRITE NOTHING AFTER TIME IS CALLED.

Enjoy Your Holidays!

Exam Number: _____

GEORGETOWN UNIVERSITY LAW CENTER
EXAMINATION IN INTERNATIONAL LAW I
(2-1/2 HOURS)

Professor Barry E. Carter

December 9, 2005

INSTRUCTIONS:

1. This is an OPEN BOOK examination. You can bring anything to the examination room that you wish. Don't spend all your time looking things up, though.
2. There are 3 Questions. The weight to be given each answer tracks the time suggested for that Question. 45 minutes are suggested for each of the three Questions. Question 2 has two parts and Question 3 has three parts. The suggested time allocations allow an extra 15 minutes for thinking about your answers in advance and then reviewing them.
3. You are encouraged to think through an answer before you start to write. If you feel an answer to a question turns upon facts not given you, explicitly assume the one or two most reasonable factual possibilities and answer accordingly.
4. You are given credit for spotting issues and for how well you develop the issues, particularly the most important issues. Well-written answers can receive extra credit. On the other hand, rambling answers will not serve the student well.
5. I read what is in the examination books, and not material appearing on scrap paper.
6. For handwritten exams: Please write legibly. Write either on one side of the page only or, if you write on both sides, write on every other line.
7. For laptop users: To write your exam answers, use a blank document screen in Word or Word Perfect as directed by the proctor(s). Laptop users are NOT permitted to access other documents, outlines, notes, files, macros, etc. on their hard drives and are not permitted to access the Internet. Functions such as Autocorrect, Spell Check and Grammar Check must be disabled. Palm Pilots and other electronic devices that store information may NOT be used in the exam room.
8. Important. For handwritten exams: Please start a new answer book(s) for each of the 3 Questions. For laptop users, start a new page for each of the 3 Questions.

This exam consists of 5 pages, including this page. Please be sure your exam is complete.

Please use your exam number (not your student ID number or social security number).

PLEASE DO NOT TURN THE PAGE UNTIL THE PROCTOR GIVES THE SIGNAL.

**GEORGETOWN UNIVERSITY LAW CENTER
EXAMINATION IN INTERNATIONAL LAW I
(2-1/2 HOURS)**

Professor Barry E. Carter

December 9, 2005

Question 1 (45 minutes):

(This question bears considerable similarity to a recent case and stories in the newspapers, but it is not the same. Respond to the facts as provided below.)

Last Tuesday, December 6, lawyers for Khaled el-Masri filed suit in the U.S. District Court in Alexandria, Virginia, based on allegations that Masri was abducted by Central Intelligence Agency (CIA) agents in December 2003 while vacationing in Macedonia and flown to a prison in Afghanistan. Mr. Masri, a German citizen of Lebanese descent and the father of five children, is suing the CIA; George Tenet, the former CIA director who the complaint alleges authorized the operation; and three CIA-owned companies allegedly involved in the secret flight. (As is well known, the CIA is a large U.S. government intelligence agency.)

Mr. Masri alleges in his complaint that he was taken from a bus in Macedonia (a country next to Greece), that seven or eight black-clad men then blindfolded, handcuffed, beat, photographed him nude, and drugged him, and that he was then flown to Afghanistan and held in a squalid cell, where he was interrogated harshly and denied medical treatment. He was asked repeatedly if he knew Mohamed Atta and another of the September 11 conspirators who had been active in Germany.

Mr. Masri protested his innocence during the whole period. Apparently this was a case of mistaken identity because Mr. Masri had a name similar to a wanted Al Qaeda operative. His innocence was apparently determined by careful examination of the documents he possessed when arrested or by the interrogators. In May 2004, Mr. Masri was flown to Albania and driven to a hilltop late at night, he alleges. There armed men took him to another plane, and he was taken to Germany.

The complaint alleges that Mr. Masri's liberation came two months after a weeks-long hunger strike and after his innocence was known by Mr. Tenet.

On Tuesday, December 7, Chancellor Angela Merkel of Germany said she had received a U.S. apology for the five-month detention of this German citizen wrongly held as a terrorist. At the same press conference, Secretary Rice would only say generally that "when and if mistakes are made, we work as quickly as possible to rectify them." She declined to admit error in the Masri case.

Mr. Masri's lawsuit alleges that he was tortured. His suit is based on the Foreign Sovereign Immunities Act (FSIA), the Torture Victim Protection Act (TVPA), the Alien Tort

Statute (ATS), and the Federal Tort Claims Act (FTCA). The suit seeks unspecified monetary damages “in an amount over \$75,000.”

[Although you are knowledgeable about the first three statutes specified above, you are probably less familiar with the FTCA. Briefly, it is a comprehensive statute allowing suits against the U.S. government for torts of U.S. government employees. Like the FSIA, the FTCA includes some exceptions to the waiver of government immunity, including an exception for any “claim arising in a foreign country.” In part because of this last exception, it is unlikely that Mr. Masari can obtain relief under the FTCA.]

You are a new lawyer in the Office of the Legal Adviser in the U.S. Department of State. After enduring difficult diplomatic discussions and tough press questions during her trip to Europe, Secretary of State Rice asks for a brief memorandum (1) analyzing the strength of Mr. Masri’s legal claims under, specifically, the Foreign Sovereign Immunities Act, the Torture Victim Protection Act, and the Alien Tort Statute, in light of any legal defenses that Mr. Tenet and the three companies might likely raise. She also asks that the memo (2) address the possible impact of the State Department submitting at some point a Statement of Interest to the U.S. district court indicating that the adjudication of the case would risk a potentially serious adverse impact on significant U.S. foreign policy interests, including those related to the war against terrorism.

* * * * *

[Start of Question 2. Remember to start a new exam book. For computer users, start on a separate page.]

Question 2 (45 minutes):

Question 2A (15 minutes):

You have recently joined the Senate staff of a moderate U.S. Senator. Your responsibilities include international and foreign relations law.

Last week some people told the Senator that the immunity from lawsuits enjoyed by foreign government officials, other than diplomats, has expanded rather than contracted in recent years. The relevant law has become more complex. These observers point to the expanded scope of the Foreign Sovereign Immunities Act (FSIA) to protect officials for at least some acts, while the common law head of state doctrine remains, even possibly expanding its protection as well.

The Senator asks you to prepare a brief memo (in the time allocated) analyzing whether this trend does seem to be occurring. She asks you to address the evolution of the relevant law(s) and case law development.

Question 2B (30 minutes):

After reading your first memo, the Senator asks you to assume for now that the immunity of foreign government officials has indeed expanded recently. The Senator is generally concerned by abuses by government officials, both U.S. and foreign. Her immediate concerns regard foreign officials.

She asks you for a brief memo highlighting the changes (in clear terms) that might be proposed in new legislation that would amend, as necessary, the FSIA and possibly the Alien Tort Statute, and that might include new provisions that override existing case law regarding head of state immunity. You do not need to be concerned about questions of diplomatic immunity; she will return to that at some later time.

She says that she wants you to offer reasonable, constructive proposals. As part of this, she does want the provisions to ensure, if new legislation is needed, that the following hypothetical examples are covered and with the results she indicates. Do not be concerned with questions of obtaining personal jurisdiction.

(a) The Deputy Minister of Defense of Malaysia is not immune from appropriate U.S. civil law suits for taking bribes from defense contractors.

(b) The Saudi equivalent of the U.S. Secretary of the Treasury who is also 9th in line to succeed the King of Saudi Arabia should not be immune from appropriate U.S. civil suits if he has knowingly provided material support or resources to terrorist organizations that have attacked the United States, even if his official responsibilities include providing Saudi government funds to charities.

(c) The fourth in line to the British throne should not have immunity from appropriate U.S. civil suits.

In addition, the Senator asks that, for questions about immunity for the heads of states or other very senior officials or their family members, should the courts give serious weight to the foreign policy views of the Executive Branch? Provide your views and a legislative proposal if one would be necessary.

* * * * *

[Start of Question 3. Remember to start a new exam book. For computer users, start on a separate page. This question has three subparts.]

Question 3 (45 minutes):

Question 3A (20 minutes):

Identify and discuss a treaty that the United States has ratified and is now a party to, other than an human rights treaty, which you think has had a very beneficial effect for the

interests of the United States and other countries. Briefly say what the treaty provides and why its provisions are so beneficial.

Question 3B (15 minutes):

Not including any human rights treaties, identify two additional treaties (under U.S. law) that are also very beneficial to the interests of the United States and other countries. Very briefly say what each treaty provides and why its provisions are so beneficial.

Question 4 (15 minutes):

Do you think reprisals, as defined in the *Naulilaa* arbitration, should be a legitimate use of force or the threat of force against another sovereign state? And, should reprisals be viewed as a species of the self-defense explicitly accepted under the U.N. Charter, or as separate, inherent right for a country that is not prohibited by the U.N. Charter?

* * * * *

END OF EXAM

WRITE NOTHING AFTER TIME IS CALLED.

Enjoy Your Holidays!