



KENYATTA UNIVERSITY
UNIVERSITY EXAMINATIONS 2011/2012
FIRST SEMESTER EXAMINATION FOR THE DEGREE OF
BACHELOR OF LAWS

LIL 300: PUBLIC INTERNATIONAL LAW

DATE: Tuesday 13th December 2011 **TIME: 2.00P.M-4.00P.M**

INSTRUCTIONS

1. The exam carries 70% of the marks for this course.
2. Answer a total of THREE Questions: Question ONE and any Other TWO questions
3. You will be penalized for failing to answer question 1
4. Question ONE carries 30 Marks while the others carry 20 marks each.
5. Support your answer with relevant case law, statutes and any other relevant references
6. Write neatly and legibly
7. Your answer sheet must bear your student registration number

QUESTION 1

Congo v. Swagger

You work for a prosecutor in the state of Congo, an African country known for its diamond mining, cocoa exports, and its steadfast adherence to international law, including the Geneva Conventions. In late 2010, at the instigation of human rights organizations, five individuals, current residents of Congo who had formerly been detained in Iraq for varying periods of time, come forward claiming to have been subjected to 'waterboarding' or other forms of ill treatment (Waterboarding involves strapping individuals to boards that are then submerged into water to simulate the sensation of drowning) .

Their complaint is directed against Glen Swagger, a U.S. national now retired and living in Congo.

The complainants, 3 Iraqi nationals and 2 Congo nationals, assert that from 2003 through the end of 2008, Swagger 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 Swagger, 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 kilometers from the infamous prison facility of *Abu Ghraib*.) One of the Congo nationals asserts that Swagger forced him to play Russian roulette. All of them claim that Swagger, while he was in charge of the portion of the facility in which they were held, and 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, Swagger 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 one of the complainants but that fortunately no one was hurt.

In his defense, Swagger 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 kindness 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 Swagger's driver and cook. "Thanks to me," Swagger 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 Congo has 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. Congo is also a party to every human rights treaty in sight. Your superiors want a preliminary memorandum from you indicating what might occur should Congo seek to transfer Swagger to the ICC or to attempt a criminal prosecution in Congo. 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 Swagger 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. **(30 Marks)**

QUESTION 2

AS Principal Legal Advisor to the United Nations Educational, Scientific and Cultural Organization (UNESCO), you have been given the below *Application* extract:

131 EX/INF.7
PARIS, 26 May 2011

UNITED NATIONS EDUCATIONAL,
SCIENTIFIC AND CULTURAL ORGANIZATION
EXECUTIVE BOARD
Hundred and thirty-first Session
Item 9.4 of the agenda
*APPLICATION FOR THE ADMISSION OF PALESTINE AS A MEMBER
STATE OF UNESCO, IN CONFORMITY WITH ARTICLE II,
PARAGRAPH 2, OF THE CONSTITUTION; APPLICATION
FOR THE ADMISSION OF THE STATE OF PALESTINE
TO UNESCO AS A MEMBER STATE PROPOSED BY
ALGERIA, EGYPT, INDONESIA, MAURITANIA,
NIGERIA, SENEGAL AND YEMEN*

and instructed to submit: "a legal analysis of Palestine and the criteria for statehood in International Law to enable the UNESCO to view determine whether Palestine may be accepted into UNESCO as a full member"

Outline succinctly, the contents of your analysis. **(20 Marks)**

QUESTION 3

May a treaty violate international law? If your answer is in the affirmative, explain when such may happen. If your answer is in the negative, explain why.

(20 Marks)

QUESTION 4

Write short explanatory notes for ANY FOUR of the following:

- a. The legal yardstick in determining whether usage has become customary international law is expressed in the maxim *opinio juris sive necessitates* or *opinio juris* for short. What does the maxim mean?

(5 Marks)

- b. Chapter VII of the UN Charter **(5 marks)**
- c. Art. 38 Statute of the International Court of Justice **(5 marks)**
- d. Under international law, differentiate “hard law” from “soft law”. **(5 marks)**
- e. *Jus cogens* AND *ergo omnes* **(5 marks)**

QUESTION 5

What is meant by the “non-intervention principle”? Which provisions of the U.N. Charter pertain most directly to this principle? Provide any significant historical background. **(20 Marks)**

QUESTION 6

“Personal inviolability and diplomatic immunity from criminal jurisdiction still remain among the most problematic issues in modern diplomatic law. Such special privileges have for long effectively protected diplomatic representatives and other foreign officials from interference with their freedom, which may be attendant upon penal proceeding, the objective of which is the curtailment of financial or personal liberty in the interests of punishment or deterrence’

Discuss the above making reference to specific treaties, cases and protocols.

(20 Marks)

