Human Rights in International and Domestic Law & Institutions
U6142Y

2000 Final Exam Model Answer

Question One:

This was a really long question. You really needed to break it down in the different parts that were indicated in the questions. Here Peter was really guiding you as to where you should look. Many of you did not read the question carefully enough and tried to make the Pinochet precedent fit into the question where it did not necessarily do so. Here the goal was to use the Pinochet precedent and show understanding of its logic but only when appropriate.

Be careful, the question was divided into three parts a criminal case, a civil case and international remedies. Many of you were confused when it came to distinguish the criminal from the civil case. Be careful Pinochet is a criminal case.

Remember the IRAC method first identify the issue (eg jurisdiction principles), then state the Rule (restatement 404), then ANALYZE the facts against the rule, then conclude. Many of you did one but not the other.

Part One

Here what seemed logical was to examine procedural issues first i.e. the jurisdiction issue (1), the extradition issue (2), the seizure issue (3) then the law under which crimes were to be judged implementation legislation (4), customary international law (5) and finally the substance of the acts.

1. Jurisdiction issue

Universal jurisdiction. The relevant instruments here you needed to quote were the restatement section 404, you needed to address the issue of lex ferranda and the fact that universal jurisdiction was a principle in the making that was not universally accepted nor geographically nor for all crimes. Certain covenants also expressly pointed to universal jurisdiction such as the torture convention, the convention on hostage taking and terrorism. Here it arguably might apply to torture, hijacking (the modern equivalent of piracy). Good papers used the first judgment of the Pinochet case to show how that could be used in for the case.

Passive personality principle: here the rule was to be found in the restatement #402 (S&A p.1023). You needed to discuss the fact that again this principle was not accepted by all countries and not for ordinary torts or crimes but arguably could be used in the present case. However that would only give the US jurisdiction over the crimes against the US national not the summary execution of the Narnians.
Good papers also noted that for the crime of hijacking the territoriality principle could apply as aircraft like ships are considered to be the territory of their country (Lotus case). Note however that this lives out any crime committed outside of the plane i.e. most of them.

2. Implementation legislation

- Discuss self executing/non self executing treaty in the US
- Note the date 1994 for the torture convention implementing legislation
- Show how that affects which crimes the US might have jurisdiction over i.e. only those committed after 1994 i.e. only against US citizens (Cf. Pinochet ruling II).

3. International Customary law regarding torture, hostage taking, summary executions

You needed to discuss how these norms might apply to the crimes not covered by the implementing legislation i.e. the crimes against the Narnians and crimes that did not constitute torture through the use of *ius cogens*, *opinio iuris*.

Note that customary law is the supreme law of the land and has the status of federal law cf. US constitution and *Paquette Habana*. Discuss how that could be used as a basis for finding relevant law in the US. Arguably however, the US being dualist this argument does not hold, more over courts have shown great resistance to apply these principles.

4. Merits

Define torture (implementation legislation). Discuss whether the acts committed were effectively constitution torture.

5. Extradition issue:

Here the issue at stake was really respecting the human rights of all parties including the criminals and the question of Narnia holding up to its obligation under the ICCPR, the protocols and the Torture Convention.

-Narnia’s argument against extradition:

Extraditing the criminals would potentially violate its obligation under the Protocol 2 of which it is a signatory and also under the ICCPR because of Death row constituting cruel an inhuman treatment #7 ICCPR.

-Response from US:

Death Penalty is not prohibited and not recognized as a ground for non extradition, as far as we know Narnia did not enter any reservation to the extradition
treaty on grounds of death penalty, Narnia might thus be in breach of its extradition treaty if it refuses to extradite.

Response from Narnia:

Arguably there is an emerging norm against Death penalty.

Good papers discussed the likeliness for DP sentencing considering the seriousness of the crime, also raised the question of provision opposing the extradition of its own national and noted the existing double criminality.

6. Forcible seizure:

There is no set norm regarding the legality of forcible seizure.

Precedents however have included Israel in the case of Eichman and US for Noriega. There seem to be some practice of forcible seizure. Also note that most courts have held that trial could proceed even in case of seizure according to the principle of malus ??

Here however the issue was again respecting the human rights of all parties (which the major part of you failed to raise):

#1 CAT
#8 CAT
#9 CAT
also ICCPR article #2 and due process.

Arguably if tried after having been seized, the criminals could challenge the process as lacking due process and call for its dismissal.

You needed to differentiate between seizure by US officials which would arguably make the US in breach of its CAT and ICCPR obligation and seizure by the private non state actor (mercenaries for instance) which would make it harder to establish liability for the rights breached. However, note the Velazquez ruling that stated that states had to ensure that the obligations under the ICCPR were met even by non state actors (No one made that distinction).

PART 2. The CIVIL CASE

There were a variety of ways to organize the answer to this question however you absolutely needed to address the following. Most of you failed to examine the facts in light of both statutes and only stated the rules without analyzing how they applied to the facts and how they applied DIFFERENTLY to the facts.

1. Act of state doctrine

Here the discussion needed to address the issue of whether the acts in question could be considered as an "act of state".

2. Sovereign immunity:

You needed to address the issue at two level, the immunity of the state of Narnia from prosecution, the immunity of Aslan.

[Note that the head of state immunity as seen in Pinochet does NOT apply here as Aslan is definitely not a head of state]

Definition, FSIA 1976

State of Narnia

If Narnia is constructed as liable for the acts is there an exception to the sovereign immunity principle for state for acts of this nature? Cf. Argentina

3. Alien tort

Definition, where? #1350

Discuss that it only applies to aliens, thus provides no cause of actions for Americans thus no basis for crimes against Americans.

Covers ALL torts not only torture but also extrajudicial killing and cruel and inhuman treatment.

Discuss whether the acts constitute torture under the definition of ATS. Here good papers showed that the acts perpetrated might be constructed as violating the laws of nations using again conventions and *ius cogens* analogically to the reasoning in the criminal case. The *Filartiga* precedent gave you a strong basis to for the case of torture to enter in that category (see p.781S&A) also see the judgment in *Forti* (p.796) for a discussion regarding which torts are in violations of the laws of nations.

Note that cruel and inhuman treatment was not constructed as being in violation the laws of nations. Here the issue was then to wonder whether the acts amounted to torture or not.

4. TVPA
Definition note the difference from the ATS show that TVPA at the same time complemented and restricted the ATS insofar as it extended a cause of actions to US citizens but restricted the torts to include only torture and extra-judicial killings (as opposed to all the categories discussed in Forti).

Also note that in this case you can only sue Aslan not the state of Narnia since the statute only allows for INDIVIDUAL liability. Note that in the present case this is helpful insofar as it provides the US citizens with a mean to sue for damages but that it will not allow all the range of crimes committed to be examined.

You needed to examine the acts committed against the definition of torture provided by the statute which is different from the one in ATS or in the criminal implementing legislation (see S&A p.802).

5. **Official v. Non state actor torture** (this could be addressed separately or as part of the above answer.

You needed to examine what status could be given to Aslan in light of the facts and how that would play out to influence the qualifications of the acts under both statutes. Here you needed to pay attention to the wording including in each statute.

**ATS:** Traditionally courts have been unwilling to extend the law of nations as applying to non state actors *cf.* Tel Oren regarding the PLO (S&A p.790). Such a ruling here arguably excludes the acts committed by Aslan because of the need for torture to be "official torture", i.e. carried out as a policy by the state. Whereas Aslan_s actions might have some support in the Narnian government they can hardly be constructed as "official torture" since the government condemns them publicly. More recent judgments, however, have been more progressive and extended the laws of nations to non state actors and provided a basis for individual responsibility.

Under TVPA: you needed to discuss the expression "under actual or apparent authority, or color of law, of any foreign nation" (less restrictive then "official torture") in view of several facts. Arguably the denial of the government of Narnia of any link with Aslan does not give him the color of law however its alleged financial ties and its used of national government control TV shows the opposite and arguably provides for a legal basis.

**Part III.**

Many of you got lost in merely outlining all possible procedures. First, the question points you at only examining the procedures under the ICCPR and the African commission. Second, those of you who referred to 1503 1234, it is simply wrong to say that these isolated acts of terrorism (on less then twenty persons) constitute a systematic pattern of violations. This was a very disappointing part so I suggest you go back to S&A and make sure you master the procedures. There were three parts to this question.
First using #41 of the ICCPR the US could have started a communication against the State of Narnia. Of course, this procedure was highly improbable since this provision although it exists has never been used by any states. States have been reluctant to take cases to any judicial or neo-judicial bodies for human rights matters.

**Individual communication against the state of Narnia.**

**Procedure:**

The optional protocol signed by Narnia authorizes this procedure. The association could then file a communication. Mention the admissibility of the claim: exhaustion of domestic remedies. Good copies noted that nonetheless only Narnians victims could file a communication as the procedure only provides remedy for nationals of party states and the US not having signed the optional protocol its citizens are barred from that resort.

Also interesting to mention that because of the need for the issue not to be in the process of being reviewed by other bodies simultaneously, note that you can’t resort to this procedure while at the same time start a criminal or civil suit in the US. You have to make a choice.

**Issues:**

Article violated include right to life, freedom from torture, freedom from cruel and inhuman treatment, extra-judicial killings

**Evaluation:** (Here are some of the arguments that could be raised)

**In favor**

- looking at the case and facts it self
- Look at the case under international law in an international forum
- Impact on policy of Narnia
- Show light on the ties of the state with the perpetrators
- Recommend actual remedies

**Against:**

Only the crimes against Narnians
Shaming process
Not a real court only written arguments
Not examine issues outside of the ICCPR formulations

**African Commission**

Procedure: see # 45.
Violations Article 4,5,6 of the African charter.

**In favor**

Regional body gives it a less imperialistic taste

**Against**

Not a court
No remedy
No complaint mechanism
No examination of the case as such
No opinion given
Only the African Charter for rights

The African Commission is a treaty-based body established under the African charter; it does not depend on the UN at all.

Many of you still confuse treaty based and charter based bodies. Treaty based means any body established by a treaty other than the UN Charter which is now considered as Customary International Law (Cf. the Nicaragua case). Thus even though it was originally a treaty any body established by the charter is a CHARTER-based body.

**QUESTION II**

The answers to this question were very weak (probably for lack of time or energy at the point you hit this question) so I suggest you read this attentively.

**Part 1**

Most of you completely missed the violation at stake here probably for lack of reading attentively enough the case AND paying attention to the formulation of the questions.

**Issue:**

This was mainly an issue of freedom of association. The rights DIRECTLY at stake in the first question are the rights of the those who want to form this branch and the DIRECT violation here is one of freedom of association and possibly of freedom of speech.

Also the question SPECIFICALLY gave you instruction on what to address. It clearly targeted the issue of limitation of rights by referring grounds for rejection as being "morality, tradition, and public order" which as we discussed in the review sessions are the basis given in the ICCPR to limit rights.
ICDW before Patria courts would claim rights under the Patrian constitution as well as under the ICCPR and other conventions.

#22 ICCPR provides "everyone should have the right to freedom of association with others"  

#21 provides for freedom of speech  

#2.2 provides that state parties "take all necessary steps to adopt such legislative an other measure as may be necessary to give effect "  

#22.2 deal with limitation as no "others than prescribed by law and necessary in a democratic society in the interest of national security or public safety, public order, the protection of public health and morals or the protections of freedoms or rights of others."

It is questionable that the prohibition of establishing a branch was prescribed by law. In any event the limitations are hardly justified. Traditions are not an acceptable ground for limitation according to #22.2. The suggestion that they would contravene to morality is highly questionable and "morality" must have a more restricted definition if the freedom of association is to survive. By analogy, interpreting public order to outlaw publications by