

## **International Human Rights**

**22 June 2017**

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**Duration:** 120 minutes

- Please check the number of question sheets both at receipt as well as at submission of the exam. The examination contains three pages (including this one) and four questions.

### **Notes on marking**

- When marking the exam each question is weighted separately. Points are distributed to the individual questions as follows:

Question 1	ca 20% of total points
Question 2	ca 30% of total points
Question 3	ca 20% of total points
Question 4	ca 30% of total points

**We wish you a lot of success!**

Please read the following newspaper article about a newly published report by an NGO carefully before answering the questions at the end of the text:

### **Pipeline threatens indigenous tribes**

The government of Trumpania approved the CrossCut Gas Pipeline without environmental reviews, adequate assessment of cultural properties and sacred sites, or the consent of the affected indigenous population, the Standing Rock Tribe. The Pipeline will go across the Tribe's territory.

The pipeline construction and any potential spills pose significant and direct threats to sacred sites and water supplies for the Standing Rock Tribe, who lives less than a mile downstream, and threaten to cause direct harm to the Grand River, which provides drinking water to millions of people.

The companies responsible for the construction of the pipeline are EnergyFirst (EF) and Lunlar Logistics (LL), who have a deplorable track record of pipeline spills and total disregard for tribal land and water.

EF and LL are rushing to build a pipeline that is economically unnecessary today, since it will become a stranded asset as the world moves away from climate-destroying fuels.

The 17 banks financing the CrossCut Gas Pipeline project have not yet disbursed all the loan funds they have committed. These banks now face a clear opportunity to reconsider further funding a project steeped in controversy and demonstrating material loss.

Public pressure is forcing CrossCut Gas Pipeline's lenders to confront the reality that they are backing companies who are openly defying the rule of law, undermining the regulatory process and authority of Army Corps of Engineers of Trumpania and setting a dangerous precedent. Now these lenders must take a stand.

Trumpania has ratified all the instruments contained in the International Bill of Rights, including the related optional protocols. It is a member of the UN and the OECD.

### **Question 1**

Can you identify any human rights issues in this newspaper article? Which human rights may be an issue and who would be the respective duty-bearer?

### **Question 2**

The NGO which produced the report underlying the newspaper article wants to take action to stop the project and asks you for your advice.

Please explain the different options available to the NGO: Which avenues are available and against whom? Please indicate the legal basis for the different options.

Which course of action would you recommend and why?

### **Question 3**

Lendingcorp is one of the 17 banks which finance the pipeline project. It is concerned about the Standing Rock Tribe not being consulted and the new facts presented in the newspaper article. Lendingcorp asks for your advice on how to proceed. So far, Lendingcorp has not yet disbursed all the loan funds it has committed. However, lending agreements have been signed and are in force. What is your advice? Are there any legal risks that Lendingcorp may face?

### **Question 4**

Macronia is very concerned about the situation in Trumpania. It decides to explore possibilities to bring a complaint against Trumpania for violations of human rights. Like Trumpania, Macronia is a member of the UN and the OECD. It has ratified all the instruments contained in the International Bill of Rights, including the related optional protocols.

Which options are available to Macronia?

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**Question 1 (10 points max.)**

Can you identify any human rights issues in this newspaper article? Which human rights may be an issue and who would be the respective duty-bearer?

Required elements	Points awarded
<p><b><i>Relevant human rights (issues) outlined and explained</i></b></p> <ul style="list-style-type: none"> <li>– Right to life, Art. 6 ICCPR; Right to life and security of person, Art. 3 UDHR</li> <li>– Right to physical and mental health, Art. 12 ICESCR, Art. 25 UDHR</li> <li>– Right to an adequate standard of living, Art. 11 ICESCR, Art. 25 UDHR</li> <li>– Right to water, Art. 11 ICESCR and 12 ICESCR; Art. 25 UDHR</li> <li>– Right to food, Art. 11 ICESCR; Art. 25 UDHR</li> <li>– Right to self-determination, Art. 1 ICESCR; Art. 1 ICCPR (as a collective right. Duty bearer is not only Trumpania but also the international community)</li> <li>– Right to property, Art. 17 UDHR</li> <li>– Right to liberty of movement and freedom to choose residence, Art. 12 ICCPR</li> <li>– Right to freedom of thought, conscience and religion, Art. 18 UDHR; Art. 18 ICCPR</li> <li>– Right to take part in cultural life, Art. 15 ICESCR; Art. 27 ICCPR; 27 UDHR</li> </ul>	<p><b>0.5 point</b> per applicable right mentioned <i>and</i> its link to the case, including the reference to the respective legal source.</p> <p>Up to <b>1 point</b> each for putting the human right into the context of the case in a well elaborated manner.</p> <p>The <b>max. 5 points</b> were only given if the identification of the relevant human rights issues was convincing and well linked to the facts.</p>
	<p><b><u>Subtotal: max. 5 points</u></b></p>
<p><b><i>Respective duty bearer outlined and explained</i></b></p> <p>State of Trumpania</p> <ul style="list-style-type: none"> <li>– <b>duty to respect</b></li> <li>– <b>duty to protect</b></li> <li>– <b>duty to fulfil</b></li> </ul>	<p><b>1 point</b> for stating that Trumpania as a state is the primary duty bearer.</p> <p>Up to <b>0.5 point</b> for each state duty (to respect, to protect, to fulfil) mentioned <i>and</i> its link to the case.</p>
<p>EF, LL and banks</p> <ul style="list-style-type: none"> <li>– EF, LL and banks as non-state actors have a <b>responsibility to respect</b> human rights under the UNGPs and OECD Guidelines for MNEs: act with due diligence to avoid infringing on the rights of others; comply with national laws and respect human rights (UNGP 11 ff. / OECD Guidelines II. A 2. and IV.1.</li> </ul>	<p><b>1.5 points</b> for mentioning the responsibility to respect under the UNGPs and the OECD Guidelines including a reference to the relevant paragraphs and a well elaborated link to the context of the case.</p>

Required elements	Points awarded
EF, LL and banks together with Trumpania <ul style="list-style-type: none"> <li>– EF, LL and banks together with Trumpania have a <b>joint responsibility to provide access to effective remedy</b></li> </ul>	<b>1 point</b> for mentioning joint responsibility to provide access to remedy.
	<b><u>Subtotal: max. 5 points</u></b>

**Question 2 (12 points max.)**

The NGO which produced the report underlying the newspaper article wants to take action to stop the project and asks you for your advice.

Please explain the different options available to the NGO: Which avenues are available and against whom? Please indicate the legal basis for the different options.

Which course of action would you recommend and why?

Required elements	Points awarded
<p><b><i>Relevant potential options and avenues outlined and explained and giving a recommendation</i></b></p> <ul style="list-style-type: none"> <li>– Outlining the problem of the unclear legal personality of EF, LL and banks in international (human rights) law and the difficulties this encompasses</li> </ul>	<p>Up to <b>1 point</b> for giving a recommendation if well explained and linked to the facts of the case.</p> <p>Up to <b>1 point</b> if well explained and put into context (only awarded once).</p>
<ul style="list-style-type: none"> <li>– Possibility to invoke affected human rights in domestic court against Trumpania based on constitution/domestic law</li> <li>– Possibility to invoke affected human rights in domestic courts against EF, LL and banks – only if provided in domestic law</li> <li>– Communications on behalf of the victims to the Committee on Economic, Social and Cultural Rights against Trumpania, Art. 2 OP ICESCR</li> <li>– Communications on behalf of the victims to the Human Rights Committee against Trumpania (Art. 1 OP ICCPR)</li> <li>– Submit a shadow report to the Committees (ICCPR; ICESCR) (Trumpania)</li> <li>– Submit a shadow report to the Human Rights Council within the UPR procedure (Trumpania)</li> <li>– Complaint procedure to the Human Rights Council in UPR procedures according to resolution 5/1, Chapter IV, Art. 87 d (Trumpania)</li> <li>– Raising public awareness via NGO activities, e.g. public campaigns; contact other NGOs in order to increase PR leverage (EF and LL / 17 banks/ Trumpania)</li> </ul>	<p><b>0.5 point</b> for a brief outline of possible avenues, up to <b>1 point</b> for each meaningful avenue if well elaborated, with reference to the legal basis (if applicable) and a clear identification against whom the action is taken. <b>10 points max.</b></p>

Required elements	Points awarded
<ul style="list-style-type: none"> <li>– NGO could try to engage directly with Trumpania or EF, LL or 17 banks</li> <li>– Submitting a specific instance to the National Contact Point of Trumpania (Trumpania is an OECD member) against EF and/or LL or 17 banks (OECD Guidelines, Procedural Guidance, Implementation in Specific Instances, p. 72 ff.)</li> <li>– Considering and outlining a number of regional instruments such as the European Court of Human Rights (Trumpania) with explanation whether an NGO can bring a complaint before the ECtHR or the respective mechanism</li> </ul>	<p>Full point only if issue of NGO being able to bring a complaint before ECtHR or other mechanism is addressed.</p>

**Question 3 (11 points max.)**

Lendingcorp is one of the 17 banks which finance the pipeline project. It is concerned about the Standing Rock Tribe not being consulted and the new facts presented in the newspaper article. Lendingcorp asks for your advice on how to proceed. So far, Lendingcorp has not yet disbursed all the loan funds it has committed. However, lending agreements have been signed and are in force.

What is your advice? Are there any legal risks that Lendingcorp may face?

Required elements	Points awarded
<p><b><i>Reasonable potential short- and long-term measures how Lendingcorp could proceed</i></b></p> <ul style="list-style-type: none"> <li>– Mapping the initial human rights situation: Contact local NGOs to verify the infringements; reach out to the authors of the report to gain more insights beyond what is written within the findings</li> <li>– Specific application of the relevant UN Guiding Principles 11 ff., 15-18; OECD Guidelines Chapter II. A.10. – 12, and Chapter IV <ul style="list-style-type: none"> <li>• Define the (business) relationship between Lendingcorp and EF and LL: Lendingcorp may either cause or contribute to adverse human rights impacts through own activities or be directly linked to EF’s and LL’s activities</li> <li>• Write a policy statement</li> <li>• Conduct human rights impact assessment</li> <li>• Implementation of (human rights) due diligence through internal measures, e.g. setting internal guidelines, drafting a clear human rights strategy, putting into place internal grievance mechanisms; capacity building, training, appointing an independent officer / equivalent to an ombudsperson</li> <li>• Guarantee access to remedy</li> <li>• Track performance of the efforts made and report</li> <li>• Influence EF and LL through (contractual) arrangements: e.g. introduce human rights provisions with EF and LL</li> </ul> </li> </ul>	<p><b>0.5 point</b></p> <p>Up to <b>1 point</b> if detailed <b>and applied to the case</b>. Merely copying general UN Guiding Principles /OECD Guidelines without relating them to the specific case awards less points.</p> <p style="text-align: right;"><b>→ max. 7 points</b></p>

Required elements	Points awarded
<ul style="list-style-type: none"> <li>• Elaborations on Lendingcorp’s leverage considering that Lendingcorp has not yet disbursed all the funds it has committed to. However, lending agreements have been signed and are in force. <ul style="list-style-type: none"> <li>○ Continuation of the relationship</li> <li>○ Temporary suspension of the relationship (wait with the loan funds)</li> <li>○ Last resort: Disengage with EF and LL, i.e. considering not to disburse the remaining loan funds, however this option might be difficult since lending agreements are in force</li> <li>○ Strive to cooperate and collaborate with other 16 banks to increase leverage</li> </ul> </li> </ul>	<p>Up to <b>2 points</b> if specific, linked with the facts of the case and well elaborated.</p>
<p><b>Legal risks</b></p> <ul style="list-style-type: none"> <li>– Increased litigation risk due to worldwide trends of legal accountability – or non-judicial settlements – even if the procedural avenues might not be visible at first glance</li> <li>– Disengagement might pose concrete litigation risks</li> <li>– Foreign law may be applicable, risk of litigation abroad</li> </ul>	<p>Up to <b>1.5 points</b> if well elaborated. No points were given for mentioning non-legal risks.</p>

**Question 4 (13 points max.)**

Macronia is very concerned about the situation in Trumpania. It decides to explore possibilities to bring a complaint against Trumpania for violations of human rights. Like Trumpania, Macronia is a member of the UN and the OECD. It has ratified all the instruments contained in the International Bill of Rights, including the related optional protocols.

Which options are available to Macronia?

Required elements	Points awarded
<p><b>Reasonable options available to Macronia</b></p> <ul style="list-style-type: none"> <li>– Inter-state communication to the ICESCR Art. 10 Ops ICESCR</li> <li>– Inter-state communication to the ICCPR Art. 41 - 42 ICCPR</li>   <li>– Both require declaration of both parties to accept the competence of the ICESCR/ ICCPR</li> <li>– Inquiry procedure (Art. 11 Ops ICESCR)</li>   <li>– Macronia may address questions and comments to Trumpania within the UPR</li> </ul>	<p><b>1.5 points</b> for each element with reference to legal basis</p> <p><b>0.5 point</b></p> <p><b>1.5 points</b>, including legal basis</p> <p><b>1 point</b></p>

Required elements	Points awarded
<ul style="list-style-type: none"> <li>– Bilateral actions: <ul style="list-style-type: none"> <li>• Macronia could engage in diplomatic measures, e.g. engage in a human rights dialogue with Trumpania</li> <li>• Macronia could consider the possibility of creating a cooperation agreement between the two states to coordinate cross-border issues (assuming Macronia is a neighbouring state of Trumpania and dependent on the drinking water of the Grand River)</li> <li>• Macronia could give technical assistance</li> <li>• Macronia could engage in more severe actions, e.g. unfriendly acts / (economic) sanctions</li> </ul> </li> <li>– Invoke obligations erga omnes and/or ius cogens before ICJ, if jurisdiction requirements are met</li> <li>– Engage NGOs in its own country as well as in Trumpania to apply indirect pressure</li> <li>– Introduce domestic law to ensure that companies domiciled in Macronia do not violate human rights law abroad.</li> </ul>	<p>Up to <b>4 points max.</b> if well elaborated</p> <p>Up to <b>1 point</b> if well elaborated</p> <p><b>1 point</b></p> <p>Up to <b>1 point</b> if well elaborated.</p>

**Total: 100% = 46 Points**