

DECISION 18 - 285

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of the Examination Appeals Board of Leiden University
in the matter of the appeal of

[name] from Leiden, appellant

against

[name], in his capacity as Examiner of the course unit Public International Law of
the Leiden Law School, respondent

1. The course of the proceedings

- On 8 October 2018, the appellant sat the interim examination of the International Relations course unit of the specialisation in Public International Law (hereinafter: the exam).
- In a decision of 25 October 2018, the respondent granted a grade six on a scale of ten to the International Relations exam. The exam consisted of multiple-choice questions and open questions, in a proportion of 60/40.
- The appellant sent a letter on 3 December 2018 to the Examination Appeals Board to lodge an administrative appeal against this decision .
- On 14 December 2018, the parties investigated whether an amicable settlement could be reached. An amicable settlement was reached on two of the grounds for appeal (the assessment of open questions 1 and 4).
- The respondent submitted a letter of defence on 21 December 2018.
- The appeal was considered on 13 February 2019 during a public hearing of a chamber of the Examination Appeals Board. The appellant appeared in person at the hearing. The respondent appeared in person at the hearing, together with [name], of the Board of Examiners of the Leiden Law School.

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2. Facts and circumstances

The appellant studies Public International Law at Leiden Law School. On 8 October 2018, the appellant sat the exam in International Relations.

3. The contested decision

In a decision of 25 October 2018, the respondent assessed the International Relations exam as a grade six on a scale of a ten-point scale. No credits were awarded to multiple-choice question 10 as the appellant had answered the question incorrectly.

4. The grounds for the objection

Initially, the appeal of the appellant pertained to the respondent's assessment of question 10 of the multiple-choice questions (Part A) and questions 1, 2, and 4 of the open questions (Part B).

At the hearing, the appellant restricted his appeal to the assessment of multiple-choice question 10 (Part A). That question was:

"Suppose a state is about to attack and its neighbour decides to strike first. What kind of action are we talking about and is it allowed under international law or not?"

The appellant could choose one of the following answers:

- A. Preventive strike, which is not allowed under international law.
- B. Preemptive strike, which is not allowed under international law.
- C. Preventive strike, which is allowed under international law.
- D. Preemptive strike, which is allowed under international law.

The appellant chose answer C, the correct answer is D according to the response model.

According to the appellant, the answer of the response model (answer D) is incorrect. The term "preventive strike" is the most appropriate answer to the question on anticipatory self-defence. Although this answer is controversial, it has more support than "preemptive self-defence" because "preventive strike" is legal under international law.

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The appellant substantiated the answer he chose to question 10 in his letter of appeal, and referred to the literature he has consulted.

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In addition, the appellant argued at the hearing that the manual that the respondent has prescribed in the course unit also refers to answer C. This answer follows from the manual and the literature to which the manual refers. The appellant consulted that literature. The appellant argues that the question cannot be answered.

Based on the literature that the appellant consulted, he knew that the answer to the question should have been “not allowed”. The appellant holds that this follows from the UN Charter, article 51 (the Carolina case). The self-defence did not meet the requirements of proportionality and necessity: it was therefore illegal.

Upon request, the appellant stated that this appeal is it is important to him to achieve a higher grade for the exam; his current grade is 6.3 when he would like to achieve a grade 7. This would be his only grade 6 for the exams he passed. However, the appellant is also concerned about academic integrity, which is why he insists that the answer to this exam question must be correct.

The appellant stated that he also addressed the respondent in the tutorials with regard to the incorrect explanation - in the view of the appellant - of the terms “preemptive” and “preventive” and what is or is not allowed under international law. This is why the appellant knew that the answer expected by the respondent to this question had to be “allowed”. However, the appellant disputes this. Based on the literature consulted by the appellant, the answer could only refer to the “preemptive strike”. The appellant derived from this that the correct answer to question 10 should be answer C. Consequently, the appellant holds that the question was unclear.

The appellant stated in the documents that he suffers from dyslexia. At the hearing, he stated that this is why he was allowed to sit the exam using a computer with 10 minutes extra time per hour.

5. Defence

The respondent holds that the response model of question 10 is clear. Nevertheless, there may be an academic debate on “anticipatory”, “preemptive” and “preventive” self-defence/attack/war. However, the respondent took a clear position on these differences in the tutorials. The respondent refers to the relevant PowerPoint presentation on this question. The respondent stated that he has even warned students in the tutorials not to mix up the terms “preventive strike” and “preemptive strike”. The PowerPoint presentation clearly shows what the

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respondent intended by both terms and what should have been the correct answer to question 10.

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The PowerPoint presentation on “Preemptive vs. Preventive use of force” states – in so far as is relevant in this respect –:

“Preemption: the use of force to avert an expected attack that is about to occur”.

Prevention: the use of force to avoid an emerging state of affairs in which a threat would be more likely or increasingly dire.”

The PowerPoint presentation on “Anticipatory self-defence” states – in so far as relevant in this respect – :

“Second viewpoint is most accepted: anticipatory self-defence is allowed.”

The respondent holds that this demonstrates that the answer to the question:

“Suppose a state is about to attack and its neighbour decides to strike first”, should be: “preemptive strike, which is allowed under international law.”

Moreover, 76% of the students gave answer D to question 10. Only 8% of the students chose answer C. The respondent holds that this demonstrates that the question was clear and was answered correctly.

The procedure was carried out properly according to the respondent: all multiple-choice questions were submitted to ICLON (Leiden University Graduate School of Teaching).

At the hearing, the respondent explained once again that the question is not difficult to answer in view of the course material that was presented in the tutorials. This does not alter the fact that the topic itself may be open to more than one interpretation and that opinions may differ about it. The respondent stated clearly in the tutorials what the differences are between “preventive strike” and “preemptive strike” and what is and is not allowed in this respect under international law. Consequently, the correct answer to the question was addressed in the tutorials. The appellant should therefore have chosen answer (D).

The respondent does not know what the impact of a different assessment of question 10 would have been on the appellant’s grade. Had question 10 been an open question, more debate or arguments about the correct answer would have been allowed, and the assessment of that question might have been different. However, in this case it was a multiple-choice question, of which the answer was discussed by the respondent in the tutorials.

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6. Relevant legislation

In so far as is relevant, the Course and Examination Regulations of the Master's Programme in Public International Law 2018-2019 (*Onderwijs en examenregeling*, "OER") stipulate:

Article 4.5 Board of Examiners rules and guidelines

4.5.1 Pursuant to Article 7.12b, third paragraph of the Act, the Board of Examiners sets out rules concerning the execution of its tasks and responsibilities and the measures it can take in this respect.

4.5.2 The Board of Examiners ensures that the rights of students to appeal against decisions of the Board of Examiners, or individual Examiners, is guaranteed.

Article 4.6 Decision

4.6.2 Within fifteen working days from the day on which the interim examination or partial test has been sat, the Examiner will determine the assessment of an exam or partial test - either taken in writing or in another manner - and the administrative department of the programme will announce that result by processing the details in the university's student progress monitoring system. Students will receive a notification from the university's student progress monitoring system.

4.6.4 The result of the interim examination will be expressed in a full number or a number with no more than one decimal place, between 1.0 and 10.0, both limits included. The result will not be expressed in a number between 5.0 and 6.0.

4.6.5 The interim examination has been passed if the result is 6.0 or higher.

The Rules and Regulations for Interim and Final Examinations of the Board of Examiners of Leiden Law School with regard to the Master's Programme in Law (hereinafter referred to as "R&R") stipulate the following, in so far as is relevant:

Article 2.2 Tasks and Competences of the Board of Examiners

2.2.1 The Board of Examiners is the body that assesses in an objective and expert manner whether a student meets the requirements set by the OER in respect of knowledge, understanding and skills that are required to obtain a degree.

2.2.2 Without prejudice to the law and regulations based hereon, the Board of Examiners is at least required to:

- a) safeguard the quality of the interim examinations and final examinations;
- a) guarantee the quality of the organisation and procedures in respect of interim examinations and final examinations;
- c) assess guidelines and instructions within the framework of the OER to assess and establish the results of interim examinations and final examinations;

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Chapter 3 Appointment of Examiners

3.1 Prior to the start of each study year, and, further as often as required, the Board of Examiners appoints Examiners to conduct exams and decide on the result thereof.

3.2 An Examiner has expertise in the relevant field and in testing in accordance with the requirements of Article 4.2.

3.6 Examiners will provide the Board of Examiners with any information requested.

Article 4.2 Quality Assurance of Exams

4.2.1 Every examination of a course unit will consist of an investigation of the knowledge, understanding and skills of the student, as well as the assessment of the results of that investigation.

4.2.2 The questions and assignments are clear and unambiguous and contain ample indications for the required level of detail of the answer.

4.2.3 The exam is appropriate and serves only to investigate whether students have acquired the qualities that were established in advance as the objective of the relevant course unit and were included in the description of the topic in the e-Prospectus.

4.2.4 The exam is so specific that only students who master the substance sufficiently will be able to answer the questions correctly. The exam is adapted to the level of the course unit.

4.2.5 Exam questions and assignments are representative and/or spread as evenly as possible over the topics to be tested in an exam.

4.2.6 Questions and assignments of the exam pertain exclusively to the topics to be tested as announced in advance. Students know in advance how and on what they will be assessed.

4.2.7 At least two teachers including at least one Examiner will be engaged to design and compile an exam.

4.2.7a The topics to be tested in the exam will include mandatory literature, the textbook, and the discussions at the lectures, tutorials and during any other types of teaching.

4.2.8 The duration of each exam is such that students have ample time - within reason - to answer the questions and/or complete the assignments.

4.2.9 Marking of written exams will be executed in accordance with standards that have been laid down in writing prior to marking. Without prejudice to the stipulations of Article 4.8 of the OER, the document in which these standards are laid down is not automatically public; disclosure is determined by the Examiner for each course unit.

4.2. The Board of Examiners sets out its working method with regard to the quality assurance of exams in a Manual for Quality Assurance of Testing of Leiden Law School.

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4.2.11 The Board of Examiners will in any event evaluate the validity, reliability, and suitability of the exams by means of random checks. The results of the evaluation will be announced to the relevant Examiners and discussed with them on request. The Board of Examiners may also invite Examiners for an interview at its own initiative.

4.2.12 The Board of Examiners will also investigate the validity, reliability, and suitability of the exam when evaluations or results call for this in the Board's opinion. The Examiner will always be invited for an interview for the benefit of such an investigation. The results of the evaluation will be announced to the relevant Examiner and discussed with him/her on request.

4.2.13 The Board of Examiners may engage experts to provide assistance with regard to the working method and assessment as referred to in 4.2.10 to 4.2.12.

7. Considerations of the Committee

The appellant lodged a timely appeal against the decision of 25 October 2018. Furthermore, the letter of appeal also meets the requirements as stipulated in the General Administrative Law Act ("Awb", *Algemene wet bestuursrecht*) and the Higher Education and Academic Research Act ("WHW", *Wet op het hoger onderwijs en wetenschappelijk onderzoek*). Consequently, the administrative appeal is admissible.

In accordance with article 7.61, paragraph two of the WHW, the Examination Appeals Board must consider whether the contested decision contravenes the law.

The Examination Appeals Board considers that questions and assignments are clear and unambiguous and contain ample clues for the required level of detail of the answer in accordance with article 4.2.4. of the R&R.

It is not disputed that the respondent pointed out the difference between the terms "preventive strike" and "preemptive strike" in the tutorials, and the question of whether these are allowed under international law or not. Nor is it disputed that the respondent took a clear position in the tutorials with regard to these terms, which is supported by the PowerPoint presentations submitted. Article 4.2.7a of the R&R stipulates that the topics to be tested in the exam will include mandatory literature, the textbook, and the discussions at the lectures, tutorials and during any other types of teaching.

The Board of Examiners appointed the respondent as Examiner for the examination in International Relations. This leaves his expertise to design exams and to award the assessments beyond doubt. The respondent followed the correct procedure when designing and assessing the exam. The exam was tested in

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advance by a colleague. Nor can it be derived from the answers of other students that the question was unclear, as 76% of the students chose the correct answer D and only 8% chose answer C.

In view of the above, the Examination Appeals Board holds that the material to which question 10 pertains was sufficiently and sufficiently clearly discussed in the tutorials, that the exam was drawn up and assessed in the correct manner, and that there are no other indications that question 10 was formulated in an unclear or ambiguous manner and that it was impossible for the appellant to answer this question, or rather, to answer it correctly. That the appellant feels that there is room to debate the accuracy of the answer befits the setting of academic training, but does not entail that an incorrect answer to a multiple-choice question must be assessed to be correct.

The documents submitted by the respondent clearly show which answer the appellant should have given to question 10.

Since the Examination Appeals Board has not been informed of any other facts or circumstances that could lead to an alternative decision, the appeal must be held unfounded.

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8. The decision

The Examination Appeals Board of Leiden University,

holds the appeal **UNFOUNDED**,

in view of article 7.61 of the Higher Education and Academic Research Act.

Established by a chamber of the Examination Appeals Board, comprised of H.M. Braam, LL.M., MA (Chair), Dr A.M. Rademaker, Dr K. Beerden, Y.D.R. Mandel, and L.N. Kluinhaar, LL.B. (members), in the presence of the Secretary of the Examination Appeals Board, I.L. Schretlen, LL.M.

H.M. Braam, LL.M., MA,
Chair

I.L. Schretlen, LL.M.
Secretary

Certified true copy,

Sent on: