International Law

Discussion Questions

Gleider Hernández, *International Law* (Oxford University Press, 2019)

Chapter 14, Collective Security and the Use of Force

Question 1. *What is 'pre-emptive self-defence', and is it justified under contemporary international law?*

At its heart, the right to self-defence in Article 51 of the Charter arises when there is an 'armed attack', and usually by another State (see e.g. *Construction of a Wall* and *Armed Activities in the Congo*, where the ICJ twice rejected the idea of self-defense against non-State actors). However, after the 9/11 attacks, UNSC Res 1368 recognised the US' right to self-defence against future terrorist attacks emanating from Al Qaeda in the Taliban-ruled parts of Afghanistan. Would this be pre-emptive self-defence? Does UNSC Res 1373 further suggest a right to take anticipatory or pre-emptive measures?

Students should first distinguish between what are termed 'anticipatory' and 'pre-emptive' acts of self-defence. Anticipatory self-defence would refer to acts taken when an armed attack is 'manifestly imminent' (the *Caroline* correspondence between Great Britain and the US), and would seem to be rooted in customary international law rather than the UN Charter, and at least arguable. The best answers might point to how Israel's justification of its anticipatory attacks in the Six-Day War rested on a prior attack (and thus as actual and not anticipatory defence).

Pre-emptive self-defence would refer instead to incidents where a threat is less than imminent. The UN Secretary-General has stated that anticipatory self-defence is distinguishable on this basis from pre-emptive self-defence. Though US President Bush claimed a right of pre-emptive self-defence in 2002, there is

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virtually no actual practice, as even acts of anticipatory self-defence are usually justified on another legal basis. As such, there seems to be little acceptance of pre-emptive self-defence, with even the US-UK invasion of Iraq relying upon a peculiar interpretation of Security Council resolutions.

Question 2. *What is the relationship between 'humanitarian intervention' and the 'responsibility to protect'?*

Students should begin by understanding and describing the doctrines as clearly as possible. Humanitarian intervention is meant to refer to situations where a State or group of States can intervene militarily in situations to protect the inhabitants of another State from a humanitarian catastrophe, such as genocide or war crimes. The idea is that if a State is unwilling or unable to protect its population, or in fact is itself perpetrating the violations, that others can intervene, without the consent of the Security Council.

Because humanitarian intervention allows for an essentially unilateral determination, it is rarely invoked even when the facts on the ground suggest that it has occurred (see e.g. India in Bangladesh, Tanzania in Uganda, Vietnam in Cambodia). Even the Kosovo intervention by NATO members was for the most part justified through other doctrines: only the UK and Belgium actually invoked humanitarian intervention. The doctrine has remained extremely controversial

For this reason, the 'responsibility to protect' (R2P) doctrine arose in 2001-2005, and is now invoked routinely by the Security Council. However, R2P is very distinct from humanitarian intervention in that it focusses on prevention and protection before intervention (the 'three pillars'), but also in that armed intervention still requires approval by the Security Council. In this respect, it may be argued that R2P broadens Security Council competence in respect of humanitarian intervention, but if anything undermines a unilateral right to do so.

The best responses will also reflect on whether interventions based on R2P and authorised by the UNSC themselves have limitations, for example looking at the situation in Libya where regime change took place pursuant to UNSC Resolution 1973.

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Question 3. *What steps must the UN Security Council follow before it can authorise force in the maintenance of international peace and security? Discuss by reference to relevant practice and case law.*

Students would be guided by the procedure laid out in the UN Charter, but supplemented by actual decisions of the Council. Article 39 endows the Council with the power to determine that there has been either a threat or an actual breach of international peace and security. This Article 39 determination is crucial for it to take further measures, as without it the Council might be found to be acting *ultra vires* (though by whom remains an open question). Under Article 40, the Council may indicate provisional measures to mitigate a dispute or reduce tensions—though it does not have to. The question also arises whether the determination under Article 39 can be simultaneously made with the provisional measures under Article 40.

Then, under Article 41, the Council may resort to economic sanctions, embargoes, or other non-forcible measures, all of which bind all UN member States. It has even, under Article 41, created ad hoc tribunals in relation to the former Yugoslavia and Rwanda.

In the settled practice of the Security Council, non-forcible Article 41 measures are a prerequisite to the authorisation of force under Article 42. Though in theory the Council has resort under Article 43 to forces placed at its disposal, there are none, so it resorts to authorising member States under Article 42 to enforce its will. For example, it has done so in respect of Korea (1950), Iraq (1990), Somalia (1993), and Libya (2011). It has pointedly not done so in relation to the situations in Kosovo (1998-1999), Iraq (2002-2003), and Syria (2011-present).

The best responses will also point out the deployment of peacekeeping missions by the General Assembly. These have been frequent: see e.g. the 1960 ONUC operation in Congo in *Certain Expenses*, the 1999 UNMIK in Kosovo, and the 2005 UNMIS in Sudan. Though not Council responses, they have involved the deployment of troops in order to safeguard the peace.

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