
International Law

Discussion Questions

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

Chapter 13, Enforcement short of force

Question 1. *'The notion of 'acts of retorsion' creates confusion, as most such acts are in fact reprisals or countermeasures.'* Discuss, with reference to applicable practice and case law.

This question asks students to demonstrate conceptual clarity as to their understanding of three categories of acts of self-help in international law: acts of retorsion; reprisals; and countermeasures. A good answer would begin by identifying the key distinguishing features of each category:

Reprisals. Though not formally defined, historically understood as a range of punitive/retaliatory responses to the acts of other States. A number of criteria were set out in the old *Naulilaa* arbitration in which 'reprisals' described normally unlawful acts that were lawful as a response to another unlawful acts, provided certain conditions were met, notably of proportionality.

Reprisals were armed or unarmed in nature, though armed ('belligerent') reprisals seem now to be banned under the UN Charter and the Geneva Conventions, and 'unarmed reprisals' seem to have become obsolete, replaced by countermeasures.

Countermeasures. Countermeasures were first elucidated in the *Air Services Agreement* and then were found in the ILC ARSIWA (Art 49 *et seq*). The term 'countermeasures' captures acts that would normally be unlawful, but because they are in response to a breach of international obligation by another actor, they are justified or tolerated by international law. Ideally, students can themselves

identify several of the key criteria to be met for an act to be considered a countermeasure: i) they must respond to a breach by another actor and be aimed to induce that State to end its breach; ii) they must be temporary or reversible; iii) they must be proportionate to the injury suffered (*Gabčíkovo-Nagymaros*); iv) they are not forcible; v) they do not breach IHRL, IHL, or norms of *jus cogens*.

Acts of retorsion. Countermeasures and reprisals therefore differ significantly from acts of retorsion in one key regard: the first two categories encompass normally unlawful acts that are justified or excused by the breach of another. An 'act of retorsion' is an unfriendly act taken in response to the act of another, but that is not unlawful as such. An act of retorsion may be taken under any circumstances and its legality does not depend on any breach by any other actor. A number of examples include the suspension of trade relations or the imposition of visas, provided no treaty obligation is breached.

The best responses will go further than just point out the inherent (*a fortiori*) legality of acts of retorsion, and will engage in the debate as to whether there are additional conditions, such as proportionality, on acts of retorsion. Though of course acts of retorsion must comply with customary international law and *jus cogens* as they are by definition lawful, there have been controversial arguments suggesting that acts of retorsion should be limited to 'proportionate' responses to the act of the other State.

Question 2. *Is there a right to be free of economic coercion in international law?*

The notion that States have a right to be free of economic coercion has been suggested to exist. This would be based on the right of States to non-interference in their internal affairs (see e.g. *Nicaragua* judgment of the ICJ, which upheld the right to non-intervention in the context of armed force). A right to be free from coercion through armed intervention is indeed enshrined under the Charter. But what about unarmed coercion?

Some General Assembly Resolutions (e.g. UNGA Res 2131, UNGA Res 3171, UNGA Res 3281) have called for a right to be free from economic coercion. There

is, however, no treaty imposing an obligation to have economic relations with all States. Moreover, many States terminate or suspend trade or economic relations, and impose long-standing embargoes against another State (e.g. the US against Cuba or Arab States against Israel. Provided they are not in breach of an international obligation, such economic acts are not unlawful; States are not obliged to trade with one another. It is true that some economic embargoes can violate human rights or cause devastation, in which case another, concomitant obligation will have been violated. But there does not seem to be a right to be free of strictly economic coercion per se.

Question 3. *'The UN Security Council, as the only body that can bind all UN member States, may impose any form of sanctions against any member State in order to enforce its will.'* Discuss with reference to relevant practice and case law.

Students will first need to consider the nature of UNSC sanctions. It is true that under Article 41 allows the Council to impose a wide range of responses that are binding on all member States. And it is true that, unlike countermeasures, UNSC sanctions can be punitive or retaliatory; they may be irreversible; and they may be imposed in anticipation when a threat to international peace and security exists. See for example the exemplary sanctions imposed against Liberia for breaching the sanctions regime imposed against Sierra Leone. The best answers will also recall that there is no judicial review of Security Council resolutions (see *Lockerbie*, *Namibia*, and *Kosovo* judgments of the ICJ).

There is no treaty or specific instrument that regulates the conditions for sanctions. However, it would seem sensible to presume that UNSC sanctions cannot violate *jus cogens*, for example calling on States to engage in acts of torture or genocide. Moreover, if one looks at UNSC practice for guidance, one can see that after the 'comprehensive' or total sanctions imposed against Iraq and Yugoslavia in the 1990s, which caused much suffering to the civilian population, the UNSC seems to be consistent in exempting humanitarian supplies (such as food or medicines) from sanctions regimes. The very best responses will also analyse, and perhaps take a view as to whether there exist further limits on UNSC sanctions, such as obligations to respect the principles of necessity and proportionality.