

Mock Exam Answers

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General points

- whenever possible, mention the relevant Articles from relevant treaties/custom as well as relevant case law (in particular from the ICJ) and practice of the UN
- try to stick to the question that is asked, i.e. do not write randomly about everything you know about R2P
- Make references to the resolution: this helps to keep the focus
- make clear which question you answering and try to structure your answer
- Questions are deliberately open so that you can focus on areas you know best about; there is not always only one right answer
- in this mock exam, grades are only indications

1. each state's international obligations to protect its own population (I)

- Legal status of the UNGA resolution?: non-binding
- but: many obligations that are listed in the resolution have another legal basis in treaty or customary international law -> we are interested in those
- States' obligations underlying R2P towards own population not limited to the prevention of genocide, crimes against humanity, war crimes and ethnic cleansing

1. each state's international obligations to protect its own population (II)

Relevant obligations:

- a) *International Criminal Law (custom and treaty)*
 - obligations to prevent and punish crimes against humanity, war crimes and genocide
 - Arts.1 and 5 of the 1948 Genocide Convention
 - Art.17 and 98 ICC Statute (complementarity between domestic courts and ICC; obligations to cooperate with ICC)
 - obligations to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed grave breaches of the Geneva Conventions and their Additional Protocols
 - ethnic cleansing is not an international crime in its own right, but acts of ethnic cleansing may constitute one of the other three crimes.

1. each state's international obligations to protect its own population (III)

Relevant obligations

b) International human rights law

- Treaties and custom, e.g. right to life, prohibition of torture, access to justice; ‘positive’ and ‘negative obligations’
- Obligations to cooperate with the UN and support its purposes among which is ensuring respect for and protection of HR (Arts.55/56 UNCh)
- Ask for international assistance for implementation of HR (e.g. Art.2(1) ICESCR): OHCHR, HR Council’s special procedures, other states

1. each state's international obligations to protect its own population (IV)

Relevant obligations

c) *International humanitarian law*

- Grave breaches provisions: require criminalisation of grave breaches of IHL in domestic law
- Train armed forces/police

d) *other*

- General openness to ratify IHL/IHRL/ICL treaties and to adopt effective implementation mechanism
- give consent to the establishment of peace keeping force
- Invite another state to help to protect population from the 4 crimes (no violation of Art.2(4) UN Charter)

1. each state's international obligations to protect its own population (V)

minimum requirements for a good C:

- Discuss legal status of the resolution
- name several treaties and customary provisions that underlie the obligations of states under R2P (ICL, IHRL, IHL)
- note that the obligations under the ICC Statute, the Genocide Convention, IHL and IHRL go beyond to just prevent genocide, crimes against humanity, ethnic cleansing and war crimes

2. rights and obligations of other states to protect human beings under threat (I)

Rights

a) Peaceful means

Res 60/1: 'appropriate diplomatic, humanitarian and other peaceful means in accordance with Chapters VI and VIII'

- bring the matter to the attention of the UN
 - UNSC or GA (Art.35 UNCh)
 - HR Council (special session, UPR process)
 - UN treaty bodies (inter-state procedure)
- Support/initiate peaceful collective action t the UN
 - Contribute to peacekeeping (Chapter VII+ ½);
 - Support 'smart' sanctions (Art.41 UNCh)
 - Support arms embargos (Art.41 UNCh)
- prosecute foreign nationals (universal jurisdiction; hand over to ICC under Art.17 ICC Statute)
- Other: confidential/public suasion; offer education, training in HR, IHL, ICL; technical assistance; encouragement to ratify treaties

2. rights and obligations of other states to protect human beings under threat (II)

Rights

a) Peaceful means

- Limits: what kind of intervention would not be covered?
 - ICJ *Nicaragua* judgment: an intervention is prohibited where it bears upon matters concerning the choice of political, economic, social and cultural systems and the formulation of foreign policy

b) Use of force?

- possible through participation in collective action authorised by the UNSC under Chapter VII UN Charter
- resolution does no legal basis for *unilateral* intervention
 - > discuss whether customary use of force can exist side by side with the Charter as exceptions to Art.2(4) UNCh (*Nicaragua*): state practice and *opinio iuris*?
 - Self-defence
 - Protection of own nationals?
 - Intervention with consent of the state who has difficulties to exercise his R2P
 - But: support for rebels is prohibited (Friendly Relations Declaration/ICJ *Nicaragua* Judgment)

2. rights and obligations of other states to protect human beings under threat (III)

Rights

b) Use of force?

- Humanitarian intervention as exception to the prohibition of the use of force in Art.2(4) UNCh?
 - discuss some existing practice and whether this is sufficient evidence that humanitarian intervention has established itself as a customary exception from the prohibition of the use of force under the UNCh
 - More generally: pros and cons of unilateral intervention

2. rights and obligations of other states to protect human beings under threat (IV)

Obligations

- Implementation of measures ordered by the UNSC (sanctions, embargos)
- ‘support the UN in establishing an early warning capability’ (e.g. ensure timely flow of information to UN, financial support)
- ‘encourage and help’ other states to exercise R2P (e.g. development assistance? ‘extraterritorial’ HR obligations, e.g. under Art.2(1) ICESCR?)
- Protection of refugees

2. rights and obligations of other states to protect human beings under threat (V)

Minimum requirements for a good C:

- note some of the *rights* that states may have: peaceful means, but in particular engage in a discussion as to whether the resolutions gives states a right to unilaterally use of force in situations where the UNSC is blocked and mass atrocities are committed in light of state/UN practice
- obligations: those mentioned in the resolution, e.g. obligation to support the UN to build up its early warning capacity should be mentioned

3. United Nations' rights and obligations to protect human beings under threat (I)

Rights

a) peaceful means

Text of res: 'humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter'

- UNSC
 - Art.24 UNCh: SC's primary responsibility to maintain international peace and security -> Art.39 UNCh -> peaceful measures under Art.41 UNCh
 - Discuss practice: internal conflicts can amount to a 'threat to international peace and security'
 - Common Art.41 UNCh measures: 'smart' sanctions and arms embargos
 - Refer the matter to the prosecutor of the ICC (Art.13(b) ICC Statute)
- UNGA
 - can also take action under Art.10 and 11 UNCh: discuss, give recommendations, alert UNSC
 - but: Art.12 UNCh
- Involvement of other UN bodies
 - OHCHR: technical assistance with implementation of HR treaties
 - HR Council (special procedures, UPR)
 - UN Secretary-General's diplomacy

3. United Nations' rights and obligations to protect human beings under threat (II)

Rights

b) Authorisation to use force

UNSC

- Res refers to Chapter VII measures
- Original idea of the UNCh: standing army of the UNSC for action under Art.39 and 42 UNCh
- Discuss practice of UNSC when it authorises use of force
- deployment of a peacekeeping force
 - No direct legal basis in UNCh
 - Discuss development, including that sometimes 'robust' peacekeeping forces are authorised under Chapter VII UNCh
- Chapter VIII measures: UN activities to reinstate international peace and security can be supplemented by the activities of regional organisations
 - if the actions of the regional organisations are consistent with the aims and purposes UN Charter (Art.52), the SC may choose to utilise regional organisations for enforcement action (Art.53)
 - Examples

UNGA?

- *Uniting for Peace Resolution* (1950) and ICJ, *Certain Expenses Advisory Opinion* (1962)

3. United Nations' rights and obligations to protect human beings under threat (III)

Obligations

Does the resolution pose direct *legal* obligation on the UNSC to act in situations where genocide, war crimes and crimes against humanity are about to be committed?

- GA resolution not directly binding on UNSC
- Discuss recent practice of the UNSC on R2P:
UNSC Res 1674 (protection of civilians); UNSC Res 1769 (Sudan); UNSC Res 1973 (Libya)
- But: Syria

3. United Nations' rights and obligations to protect human beings under threat (IV)

Minimum requirements for a good C:

- Rights: discussion of measures that the UNSC can take: peaceful and authorisation of the use of force; practice of the UNSC
- Obligations: in light of its recent practice, does the UNSC accept that it has a legal obligation to act when in situations where genocide, war crimes and crimes against humanity are about to take place?

Thank you for your attention

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