

## International Law and the laws of armed conflicts.

GCSP - ITC 19 - Week 6 (Nov. 15<sup>th</sup> -19<sup>th</sup> 2004) summary  
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*The purpose of this week was to examine the role of Law in the international system of relations. This paper summarizes the proceedings and the main findings of the week.*

International law (IL) has sovereign states as its prime subjects. Formally, they are all on the same level, and as there is no super-state and thus there is no superior authority to enforce the law. This leads to the problem of effectiveness. Nonetheless, as in any legal order, the aim is to provide a framework to prevent disputes, and to solve them peacefully. Where war does erupt, it also aims to prevent it worsening and to create conditions for a restoration of peace.

IL has its sources in international conventions, accepted customs and general principles recognized by civilized nations, judicial interpretation from International Courts of Justice and arbitrating bodies.

International law (and its specifications)

- ? defines and limits the powers of state actors; regulates the relationships<sup>a)</sup> among states and<sup>b)</sup> among states and human beings under their control;
- ? establishes a framework to help prevent and peacefully resolve disputes;
- ? regulates the state of war;
- ? defines individual responsibilities for certain conduct;

### 1) Power of States, Human Rights, and Humanitarian Intervention (*Guest speakers: Dr. Pål Dunay, Prof. Neil MacFarlane*)

a) The traditional right and power of the State to use force (*ius ad bellum*) against another state in pursuit of its national interests is greatly limited under the UN Charter.

The use of force may be unilateral or authorized by the Security Council.

However, the unilateral use of force by a State is allowed only in case of self-defence.

The very same definition of *self-defence*, however is under question. The focus of the debate concerns the level of threat to which a State can legally respond with force; what kind of response can be adopted; and if the threat must be real or only menaced. In other words is pre-emptive self-defence (which is an action and not a reaction) legal?

Under Art. 42 of the UN Charter, the Security Council can authorise measures involving the use of armed force, where other measures may be (or may have proven) inadequate, to address any threat to peace.

b) In the *relationship between the state and individuals under its control* (citizen and non-citizen) the state is bound to respect fundamental human rights as defined in the UN Declaration of Human Rights, and embodied in many national legislations.

**Human rights** are defined as the inalienable entitlement every individual enjoys towards the State where he lives or stays, for the sole fact of being human.

3) *Humanitarian intervention*. Another subject of discussion was whether other states may legally intervene in another in the event of a gross violation of human rights.

Humanitarian intervention, particularly after NATO's action in Kosovo, has become a new justification for military action. A humanitarian intervention is an armed intervention which *breaches the sovereignty* of another state, to confront large scale violations of fundamental human rights, committed - or not prevented - by a government or its officials.

The principle of equal sovereignty among states, and the principle that limits the use of force to self-defence presumes non-intervention. However, this principle may be mitigated by some circumstances: <sup>a)</sup> to assure order in the international society; <sup>b)</sup> the protection of human rights; <sup>c)</sup> support for national liberation and self-determination movements; <sup>d)</sup> self-defence when the violation of human rights in one country causes a direct threat to the security of neighbouring countries, for instance causing a flow of refugees.

*The legal basis of Humanitarian Intervention* is Article 24(1) and Chapter VII of the UN Charter which give the Security Council the power to take any measures necessary to "restore international peace and security". The Security Council could authorise action when there is a consensus that a humanitarian disaster is a threat to international peace and security. However, as happened in Kosovo, a State or coalition of states may intervene without explicit Security Council approval. Although not strictly legal, the intervention itself seems to be justified by its political and moral scope (the threat to peace, the need to halt violence and to avert humanitarian catastrophe).

To define an intervention as "*humanitarian*" some criteria have also to be met: <sup>a)</sup> there must be an humanitarian need, <sup>b)</sup> a clear and urgent need; <sup>c)</sup> the use of force should be the last resource, and proportionate to the threat and goals; <sup>d)</sup> there should be a high probability of success. Finally, the intention to address violations of human rights should be the driving force in the decision.

## **2) Peaceful settlement of disputes and the International Court of Justice** (*Guest speaker: Dr. Boldiszar Nagy*)

UN Member states engaged in a dispute likely to *endanger international peace and security* are bound to settle it peacefully. The instruments of pacific resolution of disputes may be diplomatic, para-judicial or judicial, and are listed in Chapter VI Art 33 of the UN Charter. The failure of one method is *not* an excuse to go to war.

Instruments include: direct negotiation; enquiry; mediation; conciliation (a mix of mediation and fact-finding), arbitration, resort to international agencies, judicial settlements, etc. Other States or an International organisation may provide "*good offices*", i.e. a friendly environment where negotiations and mediations can be undertaken.

In arbitration, parties can choose the arbiters, agree rules of procedure, and the law to apply, define the topic under discussion.

The International Court of Justice (ICJ) is a judicial body of the United Nations composed of 15 judges who serve nine-year term in office. The functions of the court are: <sup>1)</sup> to settle legal disputes within the boundaries of international law submitted to it by states; and <sup>2)</sup> to give advisory opinions regarding legal questions referred to it by UN organs and agencies.

The Court has jurisdiction: <sup>a)</sup> in all cases which are referred by the parties; <sup>b)</sup> when there is a clause in a treaty; <sup>c)</sup> when a state unilaterally recognizes the jurisdiction of the Court as compulsory, in all legal disputes with any other State that accepts the same obligation. The proliferation of the number of permanent court leads to a question as to whether political decisions can be decided by legal tools, and if justice is a matter of voting.

### **3) Laws of war, Humanitarian Law and differences and overlaps with Human Right Law** (Guest speaker: Dr. iur. Hans-Joachim Heintze; Group Seminar)

The Law of War is an ancient part of International Law, whose more modern definition, “International Humanitarian Law” (IHL) stresses the need for respect and protection of humanity during conflicts. IHL provides a legal framework applicable to armed conflicts, both international and domestic. Its scope is <sup>a)</sup> to preserve humanity during conflicts ruling out unlimited force or “total war”; <sup>b)</sup> to limit the use of violence in the hope of maintaining the conditions for a return to peace.

The laws of armed conflict: <sup>1)</sup> protects people who are not, or no longer fighting (civilians, military surrendered, POWs) ; <sup>2)</sup> restricts the methods of warfare that the military are legally allowed to use (no: *mines, asphyxiating, poisonous gases or bacteriological warfare*); <sup>c)</sup> provides the legal framework under which people who breach humanitarian law (war criminals) can be brought to justice. As to the relationship between IHL and Human Rights law, it has to be said that while IHL is a law of wartime, regulating the conduct of conflicts and the relationship between parties, obliging both the state and the individual, accepting no exception, and providing obligations regarding enemy civilians and prisoners, the Human Rights law is a very recent development: it is mainly a law of peacetime (*Ius contra bellum*), regulating the relationship between the state and citizens (or non-citizens), accepting exceptions in times of conflict (i.e. because during wartime, under certain conditions, it is legal to kill or jail someone without trial).

The two fields, IHL and HR, originally developed as separate concepts but are now converging.

Unresolved problems: <sup>a)</sup> the scale and frequency of the infractions is greater than in earlier decades; <sup>b)</sup> the rules formally and unquestionably applicable to civil wars are relatively few; <sup>c)</sup> States and non-State bodies that persistently violate HL and then refuse to investigate and punish those responsible; <sup>d)</sup> the fact that UN role towards war crime issues was not foreseen in the UN Charter; <sup>e)</sup> the role of legal prosecution for war crimes, and the pursuit of compensation for victims.

### **4) Law enforcement and individual responsibility** (Guest speakers: M. Guénael Mettraux, Dr. Jürg Lindemann.)

One emerging area of the Laws of War concerns the *individual responsibility* for the conduct of hostilities.

“Ad hoc” International Criminal Tribunals. To try grave war crimes in the Former Yugoslavia, Rwanda and Sierra Leone several international criminal tribunals (ICT’s) have been established. This has led to several achievements:

1. *Contribution to the development of International Law.* This has primarily been achieved by elaborating practical issues such as the kind of law to be applied

during the criminal proceedings as well as contributing to shaping definitions - war crimes, armed conflict, crime against humanity, responsibility for crime. The question of the rules of procedure has also been subject to investigation.

2. *Creation of expectations of justice.*
3. *Relief for victims.* The chance to testify is a Psychological relief for the victims.
4. *Dynamics behind the ICT's*, in some instances leading to the creation of relevant domestic legal bodies (e.g. in post-war Germany).
5. A “*Cordon sanitaire*” function. ICT's provide for drawing a clear border line between the *good guys* (standing on the side of law) and the *bad guys* (violators of law) and the environment of lawlessness.

*International Criminal Court.* The main limitation of ICTs is their ‘*ad hoc*’ nature, which leaves them vulnerable to the criticism that they may be a political rather than a judicial body. Therefore, the establishment of an International Criminal Court represents an important milestone strengthening humanitarian law (HL) because of its permanency and its general jurisdiction.

When describing the structure and functioning of the ICC, the following factors are important: <sup>a)</sup> it is a treaty-based body (the Rome Statute); <sup>b)</sup> its functions are complementary (the ICC comes into play only after domestic tools have been exhausted); <sup>c)</sup> it has general jurisdiction for the following crimes: genocide, human rights violations, war crimes; <sup>d)</sup> it is permanent (not *ad hoc*); <sup>e)</sup> trigger mechanism for a party to the Rome Statute or the UNSC; <sup>f)</sup> the ICC prosecutor can look into a case only after receiving authorisation from a pre-trial chamber; <sup>g)</sup> the ICC cannot hand down a death penalty; <sup>h)</sup> it is financed through by assessed contributions of participating states.

As for the challenges lying ahead for the ICC, the following can be identified:

- impunity gap (only a limited number of core perpetrators will be prosecuted),
- universality;
- managing expectations raised, and
- opposition of the US.

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### Open problems:

- What is the relationship between international law and international politics/international security?
- What are the prospects for the future evolution of international law?
- What are the prospects for the development of international adjudication, including the establishment of international criminal courts and tribunals?