

## **HC 10, 13-11-2009, The Use of Force by States**

Professor Brus concluded that the PowerPoint sheets were pretty clear and follow the steps of the book and students would be able to study them by themselves. Therefore, the lecture is not focused on the sheets.

What is a conflict? First, a conflict is a difference of interest. Second, it is a conflict of perception. Third, there is a conflict attitude because an actor takes a position and is willing to act in order to change the situation. In this step, states are really willing to act upon the type of violations concerning the conflict.

There are so many potential conflicts, but the Security Council is only interested in disputes that might endanger the maintenance of the international peace and security (art. 34 UN Charter).

The difference of interests and the perception on conflicts change all the time.

Armed conflicts used to be referred to as 'war'. It is possible to distinct two categories. The first category consists of the more aggressive wars. These wars are used to change the existing rights or status quo. Force is used to conquer and occupy part of a territory. These kinds of wars are against the rules of international law. The second category involves self-help. States can use force in order to compel another state to behave in accordance with international law.

Concept of 'just war' means that the start of the war is justified because of the right of the sovereign or the authorities to war. They must have a just cause and they must have the right intention. The question is who determines these rights. The right of just war was based on natural law and used in the pre-Grotius days. Later on, when modern states developed, the use of force becomes the prerogative of the sovereign, unless it is governed by international law.

Military conflict is used as a means to settle disputes, and these are not limited. A distinction can be made between the several aims of the conflict.

A punitive aspect of war is when a state want to punish a state who did something wrong. The punitive aspect is a characteristic of natural law/Hugo Grotius. The punitive aspect got lost in the positivist approach.

For a long period crimes of state were not discussed. However, in the 20<sup>th</sup> century they became point of discussion because of the fact that more crimes against individuals were committed. In the 50/60s of the punishment of crimes of states became a hot issue.

In case of individual criminal responsibility, force cannot be used to punish the individuals. For a long time the punitive aspect of punishment has been abandoned.

The development occurred that states should always try to solve conflicts by means of peaceful settlement. This was a result of cruel wars, such as the Napoleonic war, that caused so many innocent victims.

The League of Nations provided that if you have a dispute, you should go to an arbitral tribunal or a certain period of time should be taken to let the dispute rest. Nevertheless, the League of Nations was not able to ban the use of force out in international relations. A presumption against the use of force becomes stronger, but not the rules regulating the use of force.

An important question is who has the authority? Is it with individual states or with the United Nations? The right answer would be the United Nations.

Another aspect of the use of force is when it is used as a defence; so when a state is attacked by another state, see art. 51 of the UN Charter. It is possible to make more distinctions than between aggressive and defensive. Think of peacekeeping missions versus peace-creation missions, or international versus internal, or interstate versus state/non-state actors, intended armed conflicts versus unintended armed conflicts. Nowadays, there is a change of focus. The basis was trying to limit interstate conflicts, but now most of the conflicts concern internal disputes.

An important author on international relations, Von Clausewitz once said: “ war is the continuation of politics by other means”.

An example of a state intentionally going into a conflict was Iraq when invading Kuwait in the 90s. Iraq invaded Kuwait and claimed it part of its territory. Many unintended wars occurred in the 70s. There were so many disagreements due to the East-West division and because of the amount of weapons and the availability of the weapons. A small conflict could easily lead to a massive war. Examples are conflicts in Somalia and perhaps the Democratic Republic of the Congo.

The opposite of war is peace. What is peace? Again, a distinction can be made. You can recognize negative peace, which means the absence of war. Negative peace is build upon the idea of separate parties. On the contrary, there is positive peace, meaning associative peace. Positive peace tries to take the roots of conflict away. It should lead to the acceptance of the order that we live in and accept it as a legitimate state of affairs. Positive peace is the aim of the UN Charter. Another aim of the UN Charter is the maintenance of comprehensive security. This is a very wide concept and it does not only involve military involvement, but also economic, environmental and social security. It aims to reach and maintain comprehensive security entailing all these elements. It is important to acknowledge that international law is more than rules. Development is also a very important aspect of international law.

Article 2(4) of the UN Charter contains the prohibition of force. It is necessary to establish what force actually is. Does it contain both armed force and economic measures or not? There is a lot of debate about it. The conclusion is that force refers to armed force and that economic measures could be seen as a form of intervention, but not as armed force.

When talking about the use and threat of armed force it is possible to make distinctions. Military/armed force versus economic measures or direct versus indirect force, grave use of force or less grave use of force. Direct use of force means through regular armed forces, while in case of indirect use of force it concerns the organizing

of the use of force, the provision of weapons, training, transport, intelligence etc. Indirect use of force can be contrary to the art. 2(4) prohibition.

In the Nicaragua case, paragraph 195, the Court made a distinction between grave and less grave use of force. This is important in the context of article 51 of the UN Charter, since only grave use of force gives the right of self-defence. Internal use of force does not fall under the prohibition of article 2(4) of the UN Charter. All use of force against another state does fall under the prohibition. The Court interprets this very broad, so there is not much room for excuse.

Besides the maintenance of international peace and security, one of the purposes of the UN is to help secure human rights and to stimulate development. This raises the question which norm is more important.

The whole mechanism of the UN in case of conflict is built around the power attributed to the Security Council. So when an individual state makes an individual move to solve the conflict and it involves the use of force, the question arises why the state did not discuss it with the Security Council.

In the Nicaragua case self-defence was an important claim. The US argued that Nicaragua supplied some neighbouring countries with weapons and thereby violated international law. The Court decided that this was not sufficient to qualify an attack against the other neighbouring countries. Also an important fact was that the neighbouring countries never asked the help of the US.

A whole different situation is created when taking into consideration that non-state actors are also able of getting involved in armed conflicts. When Hezbollah attacked Israel. Israel claimed to be allowed to prosecute Libanon, because Libanon should have prevented Hezbollah from attacking them, since Hezbollah could be seen as a part of Libanon. This is a different case than what occurred last January, when Israel attacked the Gaza, since the Gaza cannot be seen as a state. The international debate concerning the attack of Israel is not on whether they correctly acted in self-defence, but on whether Israel fulfilled the condition of proportionality.

In the Congo versus Uganda case, Uganda attacked Congo and claimed to be acting in self-defence, because Congo used force against Uganda by supporting certain rebellious groups. However, Uganda did not provide sufficient evidence to link Congo with the rebellious groups and therefore, there was no sufficient reason to attack Congo.

Another disputed topic is whether attacks against a ship or an embassy constitute an armed attack. In the Oil Platform case, the ICJ was not convinced that the US was targeted and it also discussed the question of gravity. If only one ship is attacked, it is probably not enough to constitute an armed attack. However, it is not excluded that the attack of a ship could be seen as an attack under article 51 of the UN Charter.

## **HC 11, 20-11-2009, Collective Security and Peacekeeping**

In international law there are no rules that allow the use of force, except in case of self-defence and under chapter VII of the UN Charter. There is no such provision in the Charter of the United Nations. Humanitarian intervention contradicts with the principle of state sovereignty.

Are there rules of customary law that allow for a unilateral case of humanitarian intervention? Is there a certain practice by states, and is that practice accepted by the international community? Humanitarian intervention has been undertaken quite often. Examples are Vietnam-Cambodia, France-Central Republic of Africa and NATO-Kosovo. The intervening states came up with arguments, such as self-defence, but not with the argument that it was accepted practice and no legal basis was given. Other states did not welcome the intervention of the states, even though it made an end to human suffering. Probably humanitarian intervention is still not agreed upon, however, a number of states claim it is allowed in case of grave humanitarian suffering. One argument could be that the Security Council would endorse intervention; nevertheless, this has not been accepted. There is still a large division and it could be said that in general there is a presumption that it is not allowed. Referring back to the question if there are customary rules of law governing humanitarian intervention, it can be said that the division is too large to say there is state practice.

On the World Summit of 2005, the Heads of State and government came up with the responsibility to protect principle. It looked at all the problems and challenges in society. Then, it turned it upside down. If states have a responsibility to protect their citizens, they have a responsibility towards their citizens. A state is a member of the international community/member of the UN and has committed to the basic principles of international law and as a result they also have a responsibility towards the international community to obey these rules. So if state authorities are not willing or not capable to make prevent violations of human rights or other commitments, the international community is allowed to intervene and even has a duty to intervene. This was agreed upon by a General Assembly meeting. It is possible to discover a trend to look more into internal conflicts.

Can the responsibility to protect lead to an obligation? At this moment, you cannot conclude that states have an individual right to intervene. It is still a relatively unknown question how intervention should be regulated. In the years to come much more responsibility will be given to regional organizations to make sure there is no need to intervene.

So when considering the creation of the responsibility to protect principle by the General Assembly, is it possible to state that there is a right to intervention? This is not the case, since the resolution from the General Assembly is not binding.

There are three factors of the responsibility to protect principle. First, there is a responsibility to prevent. Second there is a responsibility to protect and third there is a responsibility to rebuild. The latter is a very important factor. It is necessary that the society will receive help when rebuilding to make sure that the same violations do not occur again in a couple of years. It is necessary to consider a conflict in its context

and figure out how to reach a situation where the roots of the conflict are taken away. The principle of responsibility to protect is build upon what has been established in international law for the past 50-60 years.

The basis rules related to the use of force are the following. The most important one is that disputes should be settled peacefully. There is a prohibition of force, except in self-defence. By the prohibition of force the international community tries to monopolize the use of force. Under chapter VII of the UN Charter the collective use of force is regulated. Member of the UN have accepted in art 25 UN Charter that they accept and carry out the decisions of the Security Council (hereinafter: the S-C), it has a binding character. Art. 39 UN Charter contains the requirement for the S-C to undertake action. It first has to determine the existence of any threat to the peace, a breach of the peace, or an act of aggression. Following, it will make a recommendation or will decide what measures have to be taken in accordance with articles 41 and 42 of the Charter. Only in very few occasions the S-C claimed there was a breach of the peace, for instance it did so when Iraq invaded Kuwait. The S-C has never determined that an act of aggression occurred. Legally it is relevant which actions the S-C determines, nevertheless, in practice it does not really matter. After they have determined what act has occurred, they act upon it. It is not so important what the S-C determines, but what it in the ends decides.

When Iran was accused of producing nuclear power plants, the S-C imposed binding sanctions, however, it did not qualify the actions of Iran as a threat to the peace because the Soviet Union would not have agreed with that. Nevertheless, the Security Council did impose measures on the basis of art. 41 of the UN Charter, because of the lack of cooperation of Iran with the Atomic Energy Agency. It should be remembered that measures not always reach their goal and often innocent citizens are harmed by them.

If measures meant under art. 41 of the UN Charter fail, art. 42 of the UN Charter can be applied. The S-C can authorize member states to use all necessary means to maintain or restore international peace and security. Resolution 678 is one of the first in which the use of force was authorized. The S-C had to figure out how to apply the use of force. In the first authorizations no time limits were set, so countries could use force long after the resolution was created. Nowadays, resolutions contain time limits for the authorization of the use of force.

Newer challenges for the international community have introduced itself. How do we deal with states that do not comply with the provisions contained in the UN Charter, especially when it concerns members of the S-C? Terrorism does not have an interstate character, but it is all about non-state actors. In the past years, environmental threats have become larger. An important change is the focus on internal conflicts instead of international conflicts. This change of focus has been since the S-C tried to establish relief/assistance in Somalia and failed to do so. Since then, the S-C focuses more and more on internal conflicts, which is a much more difficult case.

On the UN homepage, under peace & security, thematic issue, peacekeeping, principles and guidelines, the Capstone doctrine can be found. The first three

chapters are very instructive. →

[http://pbpu.unlb.org/pbps/Library/Capstone\\_Doctrine\\_ENG.pdf](http://pbpu.unlb.org/pbps/Library/Capstone_Doctrine_ENG.pdf)

Examples of where peace-enforcement missions have been established are Haiti, Somalia, Afghanistan, Rwanda, East-Timor, Iraq and Bosnia. Examples of where peacekeeping missions have been established are Cyprus, Sudan, The Democratic Republic of the Congo, Rwanda and Haiti. Peacekeeping missions have later on replaced the peace-enforcement missions in Rwanda and Haiti.

The main tasks of the Member-States using force when they intervene is to bring stability, e.g. ISAF mission in Afghanistan, end human tragedy or defend democracy. The US invaded Iraq in order to defend democracy, but they only got authorization of the S-C after the invasion in 2003 actually occurred.

The purpose of the interventions in Bosnia, Somalia and Rwanda was to end tragic human suffering. However, these missions obviously failed. The peacekeepers did not have the means and the mandate to use force. In the case of Bosnia, the peacekeepers got a mandate after the tragedy occurred in Srebrenica. The lines between peace-enforcement and peacekeeping have become vague.

Often, it is not clear when the end of an intervention occurs. It is possible to divide the situation in Iraq in different phases. The first phase: 1990-1991: Annexation of Kuwait by Iraq. The S-C intervened by means of embargos. Resolution 687 contained the authorisation to intervene to establish a ceasefire. Phase 2: 1991-2003: Ceasefire, all kinds of conditions for Iraq to comply with (for instance, paying compensation to victims, get rid of weapons of mass destruction, sanctions etc), Kurdish population in Iraq has been threatened and certain states, under the lead of the US, used force to intervene, but not under the lead of the S-C.

Phase 3: 2003: Intervention of the US, UK. They argued that the legal basis is that Iraq did not comply with the obligations made under the ceasefire, and that therefore the ceasefire ended. Resolution 1441 clearly states that Iraq violates resolution 687 and if it continues to do so, Iraq will risk severe consequences. However, the resolution did not say that states were allowed to use force, so no proper legal basis for the invasion by the US and the UK. Phase 4: A transitional government has been installed. Resolution 1511 authorizes its member-states to use all means necessary to re-stabilize the country. Resolution has been renewed until 01-12-2008. Government of Iraq stated they did not want to prolong the foreign troops and the S-C accepted that. The only possibility for states to be present is if they are present with the consent of the government of Iraq.

A peace-enforcement mission is based on a decision of the S-C. Characteristics of a peacekeeping mission, is that the mission has the consent of the state, the mission is impartial and only in the case of self-defence force can be used. Peacekeeping has been invented in the cold war era. However, peacekeeping does not solve the conflict, e.g. situation in Cyprus. Two generations of peacekeeping can be distinguished. The first generation just separates the parties involved. Second generation peacekeeping is more difficult. It happens for instance in conflicts in Africa. The mission has to assist in monitoring the peace or has to help set up elections or de-arm the parties involved, It is much more difficult to get the consent of all groups, e.g. rebels. Another difficult aspect is that peacekeepers can become part of the conflict themselves.

Good examples are Congo and Bosnia where peacekeepers were being sent into an area where the fighting has not stopped yet. In those situations, there was no peace yet and the peacekeepers did not have the mandate to use force. When peacekeepers themselves get a mandate from the S-C that allows them to defend their mandate with force it concerns robust peacekeeping. Robust peacekeeping missions are difficult, since it is not clear what the limits are. Nevertheless, nowadays the use of force is much more accepted. As a result, the differences between peace-enforcement missions and peacekeeping missions are not that big anymore.

Questions that international have to solve are how to fill up the gaps in the S-C and how can the responsibility to protect principle be ensured?

### **HC 12, 27-11-2009, International Humanitarian Law, guest lecture by Miss McDonald**

Last week 'Call of Duty: Modern Warfare' has been launched and set records for the entire entertainment industry. It has come under fire for including one of the most violent scenes ever depicted in a video game (airport scene: no Russia). There is evidence that affirms the link between video games and violence. The same week the video game was launched, 2 NGO's started a study of the effects of videogames. Astonishing was the practically complete absence of rules or sanctions for the perpetrators in the game. The NGO's conclude that the games actually could influence what people believe war is like and how soldiers conduct themselves in the real world.

International Humanitarian law (hereinafter: IHL) used to be called the law of armed conflicts. The law sets limits on armed war on the contrary as in videogames, where there is a complete absence of rules or consequences. People will obey the law since they will otherwise have to face the consequences and be subject to sanctions. Advantages arise if people obey the laws. A UN survey established that at least 740,000 people die directly or indirectly from armed violence. It is very difficult to be accurate, since many different facts are measured by several instances.

Armed conflict does have limits to minimize the violence occurring. Part of the problem of armed conflict is that it exists on two different levels. First there are primary norms that regulate and address most situations. Primary norms are not the problem and there is no lack of regulation. Additionally there are secondary norms that are enforcement norms creating a process or structure for the violator to be held accountable.

Until the 1990s, the international community was not willing to enforce the primary norms. The problem is that most people who commit war crimes are soldiers. Soldiers belong to a structure, the military, which is a tightly organized hierarchy. National military courts try soldiers that commit war crimes. The problem is that it is only done partially and not to the full extent. It is a profession judging their own crimes and sentences/sanctions are usually very inadequate considering the seriousness of the violations.

Main subjects in IHL are states. However, in the law of war there is a third group: the armed forces/militias. IHL gives these third group rights and obligations. The aim of IHL is to limit unnecessary violence. There has been an ongoing discussion that we should ban war, which is a good idea, however, at this moment not realistic. At this moment, limits need to be established. Some of the most extreme positivists argue that there should not be an armed law, because that means, it accepts armed war.

In armed war two main groups can be distinguished. The first group consists of the combatants/fighters and the second group of the people who are not participating in the conflict, so civilians/non-combatants. The law of armed war distinguishes between these two categories. All the rules of armed war rest on this pillar, known as the principle of distinction.

In the past decade, the fighting has become much closer, for instance, the war in Iraq was fought in the middle of Baghdad. The nature of the people who are fighting has also changed. Nowadays, more people from the second group are involved in the fighting. The reason Israel gave for the high number of civilian deaths, it that it was not possible to make a distinction between civilians and Hamas fighters. Investigations have to figure out if this is actually true.

IHL recognises two kinds of armed conflict. The first one is an international armed conflict and the second a non-international armed conflict. Over the last 50 years, wars more and more concern internal conflicts instead of international conflicts. The law of armed conflicts is created to address international conflict, but nowadays there are not so many international conflicts anymore.

There are two categories of non-international armed conflict. In the first category two non-state actors are fighting each other. In the second category a state actors is fighting against a non-state actor.

Conflict is very complicated today. Take the situation in Afghanistan. It is an armed international conflict, where the Taliban is being fought. In Pakistan, the government is also fighting the Taliban and other groups. The United States is also involved in this conflict. It is not clear how to define what kind of conflict you are dealing with. It is important to know what kind of conflict you are dealing with, because the law of armed war distinguishes between the two groups.

All of the law of armed conflict is customary international law. Law of internal armed conflicts is not governed by that many treaties. It is regulated by customary international law, but it has not been codified. The lack of a codification of these rules makes it more difficult to prosecute people who commit certain acts just regulated by customary international law. Wars of liberation or self-determination are a very narrow category, very exceptional.

There is a lot of confusion what non-international armed conflicts are and it is tricky what can be regarded as such a conflict. Additional Protocol 2 to the Geneva Convention regulates rules regarding a non-international armed conflict. An authoritative comment of the International Commission of the Red Cross (hereinafter: the ICRC) can be used as an explanatory comment. (see slide nr. 22). The Red Cross is an important actor in IHL and gives an idea what the creators of the protocol were

thinking about with the article. Of course the article was meant to be vague, so it can be applied broadly. It has been debated at length the past decade.

Can the war on terror be regarded as a non-international armed conflict or not? It concerns a moving target that has different manifestations. Bush stated that “the war on terror does not have any geographical boundaries”. Is the war on terror an armed conflict or not? Obama, Clinton and Gates have changed nothing regarding the war on terrorism, except the name. It is still a war, meaning that force can be used. There is a licence to kill, without further consequences.

Why do we have IHL? Two reasons, the first one is a humanitarian reason, because it is the right thing to do. The second is because of utilitarianism, so the principle of military necessity. The law of war is basically a balancing act of the two principles. The concept goes back to the beginning of civilization. It became a custom that after winning a battlefield they would keep the sick as prisoners, to work for them as slaves. In the past, the utilitarian principle has been more important.

Henri Dunant is the hero of IHL and a utilitarian of the highest degree. At the Battle of Solferino he saw soldiers dying from their wounds and saw that nobody would rescue the injured, because they would get shot. He thought it was a waste of human life and thought it was obvious that the injured soldiers could not do more damage. Dunant initiated the first codification of IHL in 1864, the first Geneva Convention. Today the guardian of IHL are the Federation of Red Cross and Red Crescent Societies, also known as the ‘movement’ and the ICRC.

The law of war does have a restraining influence. The law itself is not going to have a restraining influence, unless you will have an advantage when applying it.

The law of war itself does not often talk about weapons. It regulates the use of weapons by applying the two principles. In general, the use of weapons is regulated through balancing.

Very important treaties of IHL are the 1949 Geneva Conventions (four of them) plus three additional Protocols. The Geneva Conventions itself do not say much about fighting the war. It addresses the second category, the civilians and non-combatants. The main rules on warfare are codified in the Hague Convention 1907. It sets out the rules and the conduct of the hostilities. It has been preceded by identical regulations contained in the 1899 Hague Convention. Hague law regulates the conduct of hostilities and set the limits. In the Iraqi war the 1907 Hague Convention was applied.

For Geneva law you can start in 1949. The four conventions are almost identical in the content. There are some variations, but the core rules are the same. The first one is the Geneva Convention 1 for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Second, there is the Geneva Convention 2 for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Forces at Sea. Third, there is the Geneva Convention 3 Relative to the Treatment of Prisoners of War and last there is the Geneva Convention 4 Relative to the Protection of Civilian Persons in Time of War. Before 1949 there was no treaty regulating the rights and status of civilians. The prisoners of Guantanamo Bay were denied the status of war.

The three Additional Protocols bring in some “Hague law”. Protocol 1 relates to the protection of victims of international armed conflicts (1977). Protocol 2 relates to the protection of victims of non-armed conflict (1977) and Protocol 3 relates to the adoption of an additional distinctive emblem (2005). Much of the Hague law has been codified in the Protocol, however, Hague law still plays an important role today, because some states are not parties to the Additional Protocols, e.g. the US. There are customary international rules that address the regulation of armed conflict that has not been covered by international treaties as well.

Observing the law provides military advantages. Wars are most successful prosecuted on the basis of military economy. This means the goal should be to win the war as quickly as possible with the least possible expenditure of resources. When killing civilians or bombing civilian objects, resources and supplies are wasted. Rules provide cohesion. It is necessary that the armed forces work as a team. The law of war is used to keep the hierarchy in line.

Fundamental principles of IHL can be reduced to humanity and military necessity. The principle of humanity is based upon distinction, precaution, superfluous injury and unnecessary suffering and the Martens Clause. The principle of distinction is the most fundamental principle. Parties to armed conflicts must at all times distinguish between civilians and combatants and between civilian and military objects. However, civilians should not take part in direct hostilities because they will lose their protection for the duration of their participations. Nowadays, it is more and more difficult to distinguish between combatants and civilians, because organized armed groups (e.g. Hezbollah) and civilians get more and more involved in conflicts. The principle prohibits both direct and indiscriminate attacks. The key principle is to distinguish between who are fighting, so who are taking part in hostilities and people who are not. Precaution means that parties should make sure to take the necessary precautions to limit the violence, e.g. warnings. The law of war also states that parties only do what is necessary, so no superfluous injury and unnecessary suffering. Not everything is allowed, even though it is not specifically banned.

The principle of military necessity is based upon proportionality, precaution and no superfluous injury and unnecessary suffering. Proportionality means that even when you carry out a military action and you target an object you have to make sure the damage done to civilians is limited. You have to balance the importance of the target and the number of civilians who are going to die. It is all about the balancing act. Everything depends on the value of your target.

Additional Protocol 1 contains an absolute prohibition against attacking civilians. Additionally, attacks against objects indispensable to the survival of the civilian population are prohibited as well.

### **HC 13, 04-12-2009, Sustainable Development and International Law**

There has been a change of focus from transboundary pollution to climate change.

The first major case concerning sustainable development was the Trail Smelter arbitration. The US was caused injury by pollution created in the territory of Canada.

Both the US and Canada agreed that damages should be paid by Canada, however, it was unclear how much Canada had to pay and on which legal basis it had to do so. Since many questions remained unanswered the tribunal was created. The tribunal came up with a sum that had to be paid etc. The most important question was what should be done in the future. The tribunal established that under international law no state has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence. This rule has become a basic finding in international law.

The problem is that it is usually difficult to find clear and convincing evidence due to the difficulty to establish a causal relation.

In 1992 the Biodiversity Convention was created. It wants to stimulate sustainable development and it wants to create a basis for a cooperative approach.

All the various types of pollution need specific rules dealing with it and many rules have been developed, however, not enough. Elements can no longer be regarded in isolation and as a result finding solutions has become more difficult and complex. It concerns a chain of interrelated aspects. So many elements are involved in the equation when considering creating policies. The topic also became much broader. Sustainable development has been defined by the Brundtland commission and it is not only a problem of environmental law, but also of economic law, human rights law etc. A difficult aspect is the uncertainty, due to a lack of scientific results. Uncertainty creates confusion and it makes it more difficult to get states involved. Additionally, bilateral or regional approaches are often no longer adequate.

The first phase of developments toward sustainable development was in the mid-20th last century, when some first steps in international environmental law were taken.

In the second phase, in the period between 1945 and 1972 there was an large increase in the awareness of the problems of sustainable development in Western States. People first saw the beneficial effects of chemicals but after a while they saw birds dying and the catastrophic effects.

In 1972 the Stockholm Conference was held and a declaration was written up. A number of principles have been adopted, for example on the area of natural resources. The declaration does not make binding law but it is a pronouncement of states. It has been much debated, but nowadays the most principles of the declaration are accepted as the basis of international environmental law.

Principle 21 contains that states cannot pollute other states, but also the high seas and Antarctica. The declaration also includes a list of endangered animals and species, and for the animals on these lists specific rules are applicable. For animals on the list of most endangered species no legal trade is possible. Also the habitat can be protected, e.g. Ramsar convention. The Rhine Conventions contain specific documents discussing every element separately. The only connecting element in these documents is principle 21. In the second phase primarily specific substantive rules were developed.

The third phase was introduced with the 1992 UN Conference on Environment and Development in Rio de Janeiro (hereinafter: the Rio conference). A number of issues were addressed and it was acknowledged that the environment is a part of development and is sustainable. It is important that manners will be found to manage environmental problems instead of just creating prohibitions. It was also acknowledged that it is not a problem of a single state, but a concern of the entire international community. Two important documents have been adopted and it was one of the most important conferences ever organized.

The following principles are the most important relevant legal principles adopted by the Rio Declaration:

Principle 21 of the Stockholm conference is almost literally repeated in principle 2, but now also a developmental aspect is mentioned.

Principle 3 recognizes that there more or less is a right to development. There must be intra+inter generation equity, meaning that the current generation cannot use the planet in such a way that future generations cannot use it anymore.

Principle 7 contains that all states have a responsibility to protect the eco-system. Through this principle, developed states are taking their responsibilities and they have acknowledged that they are to blame for the environmental problems.

Principle 10 focuses on the participation of the public. This is important, since the public has the interest. Cannot be said of governments etc.

Principle 15 is the precautionary principle. It contains that states should take precautionary measures to limit future damage. One of the large problems is scientific uncertainty. It is not clear yet what the exact cause of the problem is. The principle says that uncertainty is not a legitimate reason for governments not to take measures.

Principle 16 is also of importance. It states that those who pollute have to pay the costs for it. It used to be the public. It concerns internationalisation of environmental costs.

Principle 17 contains the duty for states to make an environmental impact assessment.

In 2002 there was a follow-up to Rio in Johannesburg. The most attention was going to the economic aspect. Urbanisation as a result of poverty is a large threat of the environment. There is not only a task for states, but also for international organisations and the private sector. The Global Compact agreement between the UN, companies and states was concluded.

Can the principles of the Rio declaration be seen as binding law and can they therefore be enforced? Some of the principles have been included in binding treaties, e.g. the precautionary principle in the Biodiversity Convention. However, some states have been reluctant to recognise the principles are binding law. There is a debate if the principles have developed into norms of customary international law. Nevertheless, the norms are very open and it depends on the implementation. But the

concern of the environment and development is recognised by the Court as a relevant principle.

The World Trade Organisations panels referred to a principle. They referred to the precautionary principle in the hormone beef case, EU v. US. However, they came to the conclusion it has not yet developed into a binding principle. So there is some doubt about the legal status of the principles. Nevertheless, some national courts/tribunals apply it. Most of the principles need implementations in a specific context.

The UN tries to attack the scientific uncertainty by producing many reports, statistics etc.

An element of the climate change convention 1992 is that it is objective. States seemed to have accepted that climate change is unavoidable. Article 3 recognises common differentiated responsibilities. At the moment the Convention has 192 State parties. The developed states have accepted they should take the lead. Nevertheless, the word 'should' is used, which leaves open room, it is not an obligation of result. The article would be more binding if it used the word 'shall'. Nevertheless it gives states a guideline to work together.

It can be said that article 1(a) creates the obligation for further development and article 12 creates the obligation that all states should use similar scientific measures etc. The Convention makes a distinction between annex 1 and annex 2 countries. Article 4 states that underdeveloped countries do not have to comply if the developed states do not contribute to that, so the developed states have large responsibilities.

The Kyoto protocol was designed to reduce CO<sub>2</sub> in the period 2008-2012. In Copenhagen it will be discussed what will be done after 2012. Clear targets and timetables have been set to reduce the CO<sub>2</sub> output, but only for developed countries. The targets set are by far not enough. Most important element is the necessity to invent ways to move forward and to set new targets. The developed world has to make available the sufficient funds.

At the Copenhagen convention, further targets to reduce emissions should be set and developing states have to provide clarity on the scope and extend of their contributions to reduce emissions. It is necessary that a governance structure will be created to manage and deploy the available money in which all sides can participate equally.