HC 11, 18-12-2017, International Law

International organisations
We are not talking about NGOs here (which do operate internationally sometimes). We are talking about organisations created under international law.

- **From coexistence to cooperation**

States all claim sovereignty, and because of that they used to just exist next to each other. They tended to communicate through conferences and diplomates, rather than through institutions. This changed in the 19th century, initially through river commissions which could take binding decisions (at least for the states who were a party to it). In the 20th century the League of Nations was created. They had successes in the 1920's but when the World Wars happened they became ineffective and failed. After 1945 the most important organisations were created.

Every state wants sovereignty, they want to be equal to one another. But this does not mean they can just do what they want. States will have to cooperate to get things done. International organisations are cooperations between states. If they can make binding decisions, you could almost see them as a higher authority, which would lead to states not being sovereign anymore. But in most cases the power for making binding decisions is limited to a certain field. The World Trade Organisation (WTO) can take binding decisions for example, but only in the area of trade. And states can always withdraw from such an organisation if they want to.

Slowly states have started to accept more binding dispute settlements. This cooperation is essential because of the developments which make it impossible for states to deal with certain problems on their own (for example with seas and rivers). But they are also important when it comes to international peace and security. This often cannot be dealt with between two countries. The same happens in the areas of migration and pollution. Pollution does not really care about borders.

- **The UN family: specialized agencies**

For an illustration of the system of the United Nations look on the slides on nestor. The principal organs of the UN are:

- General Assembly
- Security Council
- Economic and Social Council (ECOSOC)
- Secretariat
- International Court of Justice
- Trusteeship Council (does not do anything nowadays)

The UN has specialized agencies. They are organisations which have a broad competence. They are brought into relationship through the ECOSOC. Firstly, they must be established by an intergovernmental agreement. Secondly, the organisation must have wide international responsibilities. This also means that we are talking about universal organisations rather than regional ones. The articles in the Charter give more criteria. Organisations which don't meet these criteria do not fall under the Charter.

- **Types of organs**

Within these organisations there have to be certain organs. There is a distinction between principal organs (created by the treaty itself) and subsidiary organs (created by the principal organs). The

General Assembly is allowed to create subsidiary organs for example. This is laid down in the Charter. The Security Council can create them too, they create peacemaking organisations for example.

Another distinction is between political organs and other types of organs. Political organs have as their members the Member States. Those member states can send representatives from the government to the organisation. The representative is subject to instructions from the government, which is why they are political organs. Political organs are plenary organs. All states are entitled to have a seat in the meetings and vote.

Secondly we have executive (limited) organs. They are subordinate to the plenary organs. The plenary one makes the policy, the executive has to follow that policy. Within the UN that works differently. The membership within that organ is limited, only 15 members are in the Security Council. It is not subordinate to the General Assembly.

The third type of organ are administrative organs. They are often called the secretariats. They are relatively big. They do typical secretarial stuff (from a policy perspective), but they have more functions. For example the UN secretariat is the legal representative of the organisation. The whole legal division is part of the secretariat. Peacekeeping organisations also draw partially from the secretariat. There are also judicial organs and expert bodies, the International Law Commission has its own legal advisors.

- **Applicable law, responsibility and immunities**

The applicable law is international law, which includes customary law. Also, domestic/national law applies. The UN, which is located in NY, is also bound by US law, and NY law. They may also bear responsibility for violating both international and domestic law. International organisations, as legal persons, have immunities. The UN has immunity. They cannot be sued at a national level. There is no remedy at the national level.

Competences and powers

What the organisations can do depends on their competences and powers. Competence means the field of operations in which they can act. Important here is the *WHO Nuclear Weapons opinion.*

- **Competences: the principle of speciality**

International organisation do not have a general competence, they have limited competences. This is what the ICJ said by reference to the principle of speciality. The organisations are governed by this principle. Their powers are limited. Organisations, like the WHO, should only deal with public health. The powers conferred on international organisations are normally the subject of an express statement in their constituent instruments. You need to look at the treaty. These powers are called: express powers, powers which are written down in the treaty. Implied powers are not provided for by the treaty. They are conferred upon it by necessary implication as being essential to the performance of its duties.

- **Powers: express and implied**

Implied powers flow from a grant of expressed powers, they are limited to those that are necessary to the exercise of powers expressly granted (*Dissenting Opinion Hackworth*).

- Ultra vires: acting without competence, exceeding its competences.
- Intra vires: within its competences.

You cannot go to the ICJ just because you feel that someone is acting ultra vires. You can try to persuade others to make an advisory opinion.

Decisions; binding or not?

- **Security Council**

Recommendations are not binding. Chapter 6 of the Charter is on peaceful settlement of disputes, it also almost only speaks about recommendations. Chapter 7 is on action with respect to threats of peace, breaches of peace and acts of aggression. Article 39 refers to non-military measures, which the Security Council may decide the members have to apply.

- **General Assembly**

Can the General Assembly adopt binding decisions? It depends. They can, but we don't know when. There is no article on it. We do know they can make binding decisions on internal affairs (household, institutional affairs).

HC 12, 19-12-2017, International Law

Use of armed force

In the 19th century the idea came around that war was an attribute of sovereignty. This changed after WWI. They did not prohibit war but said that you could only start a war after the League of Nations (1919) had written a report, or after an arbitration award. If you went to war in violation of this, the other countries had to take action against you. In the 1930's a number of countries did this, and with that they basically destroyed the ideas of the League of Nations. The US never became part of the League. That was their first big gap. Before WWII there was an attempt to a remedy for the failings of the covenant of the League of Nations with the Kellogg-Briand Pact (1928).

Nowadays we have the prohibition on the use of force, written down in article 2 (4) of the Charter of the United Nations (1945). ´All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations'. The prohibition is absolute. The use of force means the use of armed force. There are different interpretations on this article. Most authors would say it prohibits force in all circumstances. Civil laws do not fall under this prohibition. It is about intrastate wars. To be able to use force you need to show that an exception to this prohibition applies in your case. The prohibition is also part of customary law, which was confirmed by the ICJ in the Nicaragua case.

Right of self-defence

One exception is very clearly laid down in the UN Charter (article 51) which is the right of self-defense. 'Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an **armed attack** occurs against a Member of the UN'. An armed attack is the conditio sine qua non. If there is no armed attack, there cannot be self-defense. When is there an armed attack? Is this when a military ship attacks a ship of another country? The armed attack needs to be against a Member State of the UN. Article 51 does not say who has to commit the armed attack. Most people used to say only states could perform armed attacks.

The status of the right of self-defense is that it is also established under customary law. The same conditions apply in customary law as apply for article 51. There needs to be an armed attack, that is

the basic condition. If you look at article 51 is does not mention necessity and proportionality. Those are (derived) conditions under customary law. This article gives you the right to defend yourself. This includes using armed force (in response to an armed attack) which would otherwise not be allowed under the Charter. Because of this right being an exception to the prohibition on the use of force, it also means that your response can be cross-border. On your own territory you can always use armed force, you are a sovereign state. The armed attack you respond to must be an unlawful use of force under article 2 (4) of the Charter. If the attack is lawful you do not have the right of self-defense.

The ICJ has pointed out (in the Nicaragua case) that the victim state must request you to help them in order for collective self-defense to be available. Before invoking collective self-defense you need to make a report to the Security Council.

The use of force can be almost anything. Article 51 uses the term: 'armed attack', and because of this difference in language with article 2 (which uses the term: 'force') there is the tendency to say that not any use of force is an armed attack. It is a more limited category. The use of force must be a grave use of force. The extent to which other uses of force can be seen as armed attacks is difficult to determine. In the *Oil Platforms Case* the ICJ also talked about a military vessel. It was unclear how many people died, but if an incident with one ship is an armed attack, where is the limit? There is a gravity requirement here.

The sending of armed bans falls under the term: 'aggression'. This is connected to acts of states. The 9/11 attacks were committed by Al-Qaeda and planned by Osama Bin Laden. This group had a basis in Afghanistan. It was unclear what Afghanistan's role in the attack was. Could this be seen as an attack by a non-state actor? The ICJ has been conservative in case-law. When non-state actors are involved, their actions should be attributable to the State.

Conditions for self-defense: necessity and proportionality

The first condition (which is part of customary law) is necessity. An example of the use of self-defense was the *Invasion Falklands by Argentina, UK Response in Self-defense.* When Argentina invaded and occupied Falklands, the UK sent the royal navy. The UK immediately invoked self-defense and then sent the ships as fast as possible. This was accepted as still necessary to regain territory that had been occupied. The action should also be proportional. If there is an armed attack, other options than force can still be available. Because of this proportionality plays a role here as well.

Contested justifications

Two important terms here are anticipatory self-defense and preventive action. Self-defense against imminent attacks is accepted by many people. Can you also use preventive military actions? Many countries want to use this against terrorists planning an attack.

What about humanitarian intervention. It has been debated since decades. There have been situations where many human beings were killed. The UN does not seem to have an exception for humanitarian intervention yet. The debate has been whether state practise and opinio juris are sufficient, as there is no specific exception in any treaty for humanitarian intervention. When NATO intervened in Kosovo, Belgium made a humanitarian intervention argument, but at the time almost none of the NATO states were invoking this concept. They mostly put forward political arguments.

What about the Responsibility to Protect? Next to the state itself, the international community has a secondary responsibility to protect the population of a state. This is first and foremost the UN. The

idea of R2P is that if a state fails to protect its own population, other states have a responsibility to step in. The question is on which conditions could other states intervene, and is this legal. This depends on who is acting. Obviously, the Security Council would be the main body to act.

The General Assembly also debated this issue. They nurtured the concept. They made it unimportant, they took away the sting of the whole project. They said: 'each individual State has the responsibility to protect its population from genocide, war crimes, ethnic cleansing and crimes against humanity'. The Commission limited it to man-made activities. The state itself has the primary responsibility to protect its citizens. But most of the time, it's the state which commits these crimes. So often the state has already failed its responsibility.

Collective security

The first step in a disagreement between states should always be to try and settle the dispute peacefully. The idea is that we collectively enforce peace, through the Security Council. The Member States say they are prepared to take collective actions, through the Security Council. Only on a case-by-case basis, if peaceful means are inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.

Article 39 of the Charter says: 'the Security Council has to determine the existence of any threat to the peace, breach of the peace, or act or aggression and shall make recommendations or decide what measures shall be taken to maintain or restore international peace and security'. The Council now functions more as it's supposed to. The Council may decide to allow the use of measures mentioned in article 41 and 42. Article 41 concerns non-military measures. When using those you want to isolate a certain target. You cut of the radio or economic relations for example. You could even cut of internet access in a state. Nowadays States tend to go for smart and targeted sanctions. They target the people who are causing the violations. They try to hit the people who have power and money.

Article 42 allows for initiation of military action. But you should have an army in order to be able to do so. The Security Council has no army, and the Member States don't want to give it one. Since 1990, the Security Council has used authorizations. They don't take action themselves but authorize States to take action. They authorize States to take all necessary measures.