

# Masaryk University Brno

## Selected Issues in International Law: Course Outline

November 2008

**Prof. Ryszard Piotrowicz**  
Law School, Aberystwyth University

### Structure of the course

This is an intensive course: there will be six sessions over three days; each session devoted to a separate topic. Each session will last 90 minutes. I will give an introductory lecture on the topic.

There will be plenty of opportunities for you to ask questions and I hope that you will take advantage of this. It helps me to see what needs to be explained more and also gives me ideas on how best to present the issues.

### Assessment

Assessment will be by essay. The essay must be no longer than 1500 words and must be submitted to me by email ([ryp@aber.ac.uk](mailto:ryp@aber.ac.uk)) attachment.

## 1. The International Legal System

### Fundamental Principles of International Law

- Sovereign equality of States
- Non-intervention
- Prohibition on threat or use of force
- Peaceful settlement of disputes
- Respect for human rights
- Self-determination of peoples

### Structure of the International Legal System

#### *The United Nations System*

Since 1945 the United Nations has played a central role in international affairs. Through the General Assembly it has provided a general forum for the discussion by all States of international disputes and matters of mutual concern. The Security Council has provided a means for attempting to ensure the maintenance of international peace and security; while the International Court of Justice (ICJ) has offered a means for the judicial settlement of legal disputes between States. The effectiveness of these bodies has been in dispute but it seems that the UN now plays a more active role in world affairs than ever before.

We shall consider the role of the Security Council, General Assembly and the International Law Commission, prior to looking more closely at the functions of the ICJ as the premier, and arguably most representative, international court. The ICJ may pass judgment on disputes between States and give Advisory Opinions on legal questions referred to it by authorised bodies. The powers and functions of the ICJ are set out in its Statute, which is an integral part of the UN Charter.

#### **United Nations**

*Reparations Case* (Advisory Opinion), (1949) ICJ Reports 174

*Legality of Nuclear Weapons* (Advisory Opinion) (WHO), (1996) ICJ Reports 66

**Purposes of UN: Art 1**

- Maintain international peace and security
- Develop friendly relations among nations
- Achieve international cooperation in solving international problems
- Co-ordinate and harmonise actions to achieve these ends

**Principles of UN: Art 2**

- Sovereign equality of all members
- Disputes to be settled by peaceful means
- Prohibition on threat or use of force against territorial integrity or political independence of other States

**Membership of UN: Art 4**

Membership open to all peace-loving States which

- Accept obligations in the Charter
- Are willing and able to carry them out

Membership requires

- Decision of General Assembly
- Based on recommendation of Security Council

**UN Institutions**

- Security Council
- General Assembly
- International Court of Justice
- International Law Commission

**1. Security Council**

Art 24: primary responsibility for maintenance of international peace and security

Art 23: membership

- 5 permanent members – UK, USA, France, Russia, China
- 10 rotating members, elected for 2 years by GA
  - 5 Afro-Asian
  - 2 Latin American
  - 1 East European
  - 2 West European and others

**Functions of Security Council**

Ch.6: pacific settlement of disputes

Ch.7: action with respect to threats to the peace, breaches of the peace and acts of aggression

- Power to determine whether there is a threat to international peace and security – Art 39
- Power to employ measures falling short of armed force – Art 41
- Use of force to restore international peace and security – Art 42

Power of Permanent Members: Art 27 – double veto

**2. General Assembly**

Art 9: GA consists of all members of UN

Arts 10 and 11: power to consider, discuss and recommend

Art 18: one vote per member

**Interplay of GA and SC**

*Uniting for Peace Resolution* 1950 (GA Res 377(v)) – residual responsibility of GA to preserve international peace and security

*Certain Expenses of the United Nations* case (1962) ICJ Rep 151

### 3. International Court of Justice

#### Composition

15 members:

- 5 elected every 3 years
- Hold office for 9 years – may be reelected
- Each member of Security Council has a judge of its nationality on the bench

Art 2:

- Bench should represent main forms of civilisation and principal legal systems of the world
- Judges must be of high moral character, possessing qualifications required for appointment to the highest judicial offices, or be of recognised competence as jurists

Contentious cases – only States may appear – Art 34(1)

#### Jurisdiction: Art 36

- no compulsory jurisdiction unless accepted in advance by States
- Art 36(1) – jurisdiction comprises all cases the parties refer to the Court and all matters specially provided for in the UN Charter or in treaties in force
- Art 36 (2) – compulsory jurisdiction
  - *Rights of Passage* case (Preliminary Objections) (Portugal v India) (1957) ICJ Rep 125
  - Reciprocity

**Effect of decisions** – Art 59 – decisions bind only the parties to the dispute

#### Advisory Opinions

- UN Charter, Art 96: GA, SC or other authorised bodies may request Adv. Ops. on any legal question
- ICJ Statute, Art 65: ICJ can give Adv. Op. on any legal question put by any body entitled to do so
- States may not request Adv. Ops.
- Adv. Ops. are not legally binding

Risks of Adv. Ops. – *Nuclear Weapons* Advisory Opinion (1996)

#### Adventurism by the Court

*Case concerning certain criminal proceedings in France* (Republic of the Congo v France): Request for the indication of a provisional measure – Order of 17 June 2003

*Case Concerning Oil Platforms* (Iran v USA, 2003)

*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* Advisory Opinion (2004)

## 2. Subjects of International Law

### Did you hear about the Scotsman, the Welshman and the Transnistrian – Peculiar Entities in International Law

Who are the subjects of International Law?

- States
- International organisations
- Human beings
- NGOs
- corporations

What is a State?

*Montevideo Convention on Rights and Duties of States 1933*

Article 1: a State should possess the following qualifications:

- (a) a permanent population; (b) a defined territory; (c) government; (d) capacity to enter into relations with other States

*Arbitration Commission of the European Conference on Yugoslavia*

Opinion No.1: “the state is commonly defined as a community which consists of a territory and a population subject to an organised political authority”

What about:

- Germany
- German Democratic Republic
- Scotland
- Wales
- Transnistria
- Somalia – failed States
- Republika Srpska
- Chechnya
- Turkish Republic of Northern Cyprus
- Holy See/Vatican City
- McDonalds – Human Rights Council, “Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development.”, 7 April 2008. (Subtitle: Protect, Respect and Remedy: A Framework for Business and Human Rights)<sup>1</sup> (Report). The Report was written by Prof. John Ruggie, the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises.

### **Kosovo**

Kosovo declares independence – 17 February 2008

Czech Republic recognises Kosovo – 21 May 2008

### **Legal issues**

- right of territorial integrity/ duty to respect territorial integrity
- right of self-determination/secession

### **The legal context**

- Security Council Resolution 1244, 10 June 1999
- Statement by the Chairman on the conclusion of the G-8 meeting of Foreign Ministers, Petersburg Centre, 6 May 1999
- Paper presented to, and accepted by, the Yugoslavian Government, Belgrade, 2 June 1999

---

<sup>1</sup> UN Doc. A/HRC/8/5; available at

**SC Res. 1244**

Preamble:

Reaffirming the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia...

Reaffirming the call in previous resolutions for substantial autonomy and meaningful self-administration for Kosovo...

5. Decides on the deployment in Kosovo, under United Nations auspices, of international civil and security presences... and welcomes the agreement of ... Yugoslavia to such presences;

10. Authorizes the Secretary-General... to establish an international civil presence in Kosovo in order to provide an interim administration for Kosovo under which the people of Kosovo can enjoy substantial autonomy within... Yugoslavia, and which will provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions to ensure conditions for a peaceful and normal life for all inhabitants of Kosovo;

11. Decides that the main responsibilities of the international civil presence will include:

(a) Promoting the establishment, pending a final settlement, of substantial autonomy and self-government for Kosovo...

(c) Organizing and overseeing the development of provisional institutions for democratic and autonomous self-government pending a political settlement...

## Annex 1

G-8 Statement, 6 May 1999

- adopted several general principles on a political solution to the Kosovo crisis, including:

A political process towards the establishment of an interim political framework agreement providing for a substantial self-government for Kosovo, taking full account of the Rambouillet accords and the principles of sovereignty and territorial integrity of... Yugoslavia...

## Annex 2

Paper presented to, and accepted by, the Yugoslavian Government, Belgrade, 2 June 1999

- requires agreement to be reached on certain principles to move towards a resolution of the Kosovo crisis:

5. Establishment of an interim administration for Kosovo as part of the international civil presence under which the people of Kosovo can enjoy substantial autonomy within... Yugoslavia...

8. A political process towards the establishment of an interim political framework agreement providing for substantial self-government for Kosovo, taking full account of the Rambouillet accords and the principles of sovereignty and territorial integrity of... Yugoslavia...

1. What is meant by the notion of 'sovereign equality of States'? Is it absolute or limited? Think of examples to justify your view.

2. If you could make one major reform to the United Nations, what would it be, and why?

3. Does the Security Council function effectively? From the perspective of international law, consider the principal reasons for the difficulties encountered by the Security Council.

4. Is Kosovo a State?

### 3. The Use of Force

The legitimacy of the use of force, and the circumstances in which force may be used, are currently amongst the most keenly debated issues in International Law. The threat or use of force is prohibited except in self-defence and/or under the authority of the UN Security Council. Nevertheless there are many examples of apparently unlawful use of force in recent years by one State against another. These lectures set out the law with regard to the use of force and consider some of its recent applications.

#### UN Charter

*Article 2(4)*: 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.

*Article 51*: Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary to maintain or restore international peace and security.

*Article 42*: Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

*Nicaragua Case* (1986)

*Corfu Channel Case* (1949)

*Declaration on Friendly Relations Between States* 1970, GA Res 2625 (XXV)

Definition of Aggression - GA Res 3314

*Nuclear Weapons Advisory Opinion* (1996), paras 37-50

*Caroline Case* (1837)

*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory Advisory Opinion* (2004), paras 138-139

*Oil Platforms Case* (2003), paras 31-78, esp. paras 76-77

*Congo v Uganda* (2005), paras 106-166

#### Prohibition on the use of force

#### Right of self defence – individual and collective

#### Use of force to rescue nationals

#### Humanitarian intervention

1. Did the attacks on the USA on 11 September 2001 trigger a right to use force in self-defence?
2. What are the principal restrictions on the use of force by a State in self-defence?
3. Should a State be entitled to use nuclear weapons in self-defence?
4. What is the legal basis for collective security action through the United Nations?
5. Is the ICJ correct to state, as it did in *The Wall Advisory Opinion*, that Israel had no right of self-defence with regard to the attacks made upon it because they had not been made by a State?

### **The Iraq Conflict**

*UK Foreign Secretary Jack Straw, speaking in the House of Commons on 10 September 2003:*

“This time last year we and our Security Council partners were involved in an intensive dialogue as to how we could enforce the writ of UN resolutions in Iraq. This dialogue became a negotiation which led on 8 November to the unanimous adoption of SCR 1441. It is worth reminding ourselves of the key elements of that resolution. It gave Iraq a ‘final opportunity’ to bring itself into compliance. It spelled out how it was to do so in the clearest possible terms. Iraq had to submit an ‘accurate, full and complete declaration of all aspects’ of its proscribed weapons programmes; and it had to co-operate ‘immediately, unconditionally and actively’ with UN inspectors. If Iraq failed to meet these twin standards, SCR 1441 warned that ‘serious consequences’ would follow. Diplomatic parlance is notoriously ambiguous, but this phrase was clearly understood to have only one meaning – military action.”

The lecture should help you to decide for yourself whether Mr Straw’s analysis is correct. Remember, that we are now looking at these events with the benefit of hindsight.

### **Security Council Res. 678 (1990)**

#### Para 2

The Security Council

“Authorises Member States co-operating with the Government of Iraq, unless Iraq on or before 15 January 1991 fully implements... [relevant SC orders], to use all necessary means to uphold and implement resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area.”

### **Security Council Res. 687 (1991)**

#### Para 8

“...Iraq shall unconditionally accept the destruction, removal, or rendering harmless, under international supervision, of...[its weapons of mass destruction].

#### Para 34

The SC “[d]ecides to remain seized of the matter and to take such further steps as may be required for the implementation of the present resolution and to secure peace and security in the region.”

### **Security Council Resolution 1441 (2002)**

Acting under Chapter VII of the UN Charter, the SC

#### Para 1

“Decides that Iraq has been and remains in material breach of its obligations under relevant resolutions, including resolution 687 (1991), in particular through Iraq’s failure to cooperate with United Nations inspectors and the IAEA, and to complete the actions required under paragraphs 8 to 13 of resolution 687 (1991)...”

#### Para 13

“Recalls...that the Council has repeatedly warned Iraq that it will face serious consequences as a result of its continued violations of its obligations...”

## 4. Historical and Philosophical Foundations of International Humanitarian Law

For a superb resource with primary and secondary sources (in particular, the *International Review of the Red Cross*), please refer to the website of the International Committee of the Red Cross: <http://www.icrc.org/eng>

### Definition of IHL

- principles and rules that limit the use of violence during armed conflicts:
  - o to spare those not directly involved in hostilities
  - o limit the effects of violence to the amount necessary for the purpose of war

### Origins of IHL

- Henry Dunant, Battle of Solferino (1959)
- Lieber Code (Instructions for the Government of Armies of the United States in the Field (1863)
- Foundation of ICRC and first National Red Cross Societies (1963)
- First Geneva Convention (1864)
- St Petersburg Declaration Renouncing the Use, in Time of War, of Certain Explosive Projectiles (1868)
- Oxford Manual on the Laws of War on Land (1880)

### Sources

- Hague Law
  - o Conventions of 1899 and 1907 dealing with the actual conduct of hostilities – regulating the means and methods of warfare
- Geneva Law
  - o Four conventions (1949) and three protocols (1977, 2005) relating to the protection of persons hors de combat or not taking part in hostilities – sick and wounded, prisoners of war, civilians
- more specific treaties
  - o conventions prohibiting or regulating the use of specific types of weapons, eg anti-personnel landmines, or establishing specialised protection regimes, eg for cultural property
- customary international law
  - o *Nuclear Weapons Advisory Opinion* (1996 ICJ Reports)
  - o ICRC study on Customary International Humanitarian Law (2005)
- humanitarian law principles
  - o basic principles underlying IHL

### IHL and Public International law

- IHL protects human rights during armed conflicts – how does it differ from human rights law?
- *jus in bello v jus ad bellum*

### When does IHL apply?

- international armed conflicts (IACs)
- non-international armed conflicts (NIACs)
  - o IACs –
    - Geneva Conventions (1949), common Art 2:
      - o all cases of declared war or of any other armed conflict which may arise between two or more Parties, even if they do not recognise the state of war
      - o all cases of partial or total occupation of the territory of a Party, even where there is no resistance to the occupation
    - Additional Protocol I (1977), Art 1.4



- Armed conflicts where people are fighting against colonial domination and alien occupation and against racist regimes in exercise of their right to self-determination
- 
- NIACs-
  - Geneva Conventions (1949), common Art 3:
    - “armed conflicts not of an international character”
  - Additional Protocol II (1977)
    - NIACs taking place in territory of a party, between its armed forces and dissident armed forces or other organised armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained military operations and to implement the Protocol
    - Note threshold – it does **NOT** apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and similar acts.

### **Fundamental principles of IHL**

*Martens clause* – in cases not covered by treaties, civilians and combatants remain under the protection and authority of the principles of international law derived from custom, from the principles of humanity and from the dictates of public conscience (1899)

*Humanity* – this aims to restrict activities that might otherwise be justified as not contrary to specific treaties and allowed by military necessity

*Necessity* – those measures indispensable for securing the aims of the conflict, and which are not contrary to laws of armed conflict

#### *Distinction*

- parties to a conflict must at all times distinguish between the civilian population and combatants in order to spare civilian population and property.
- Neither the civilian population as such nor civilian persons shall be the object of attack
- Attacks shall be directed solely against military objectives

#### *Proportionality*

- Parties to a conflict and members of their armed forces do not have an unlimited choice of methods and means of warfare: it is prohibited to employ weapons or methods of warfare of a nature to cause unnecessary losses or excessive suffering

## International humanitarian law: the essential rules

**These rules, drawn up by the ICRC, summarize the essence of international humanitarian law. They do not have the authority of a legal instrument and in no way seek to replace the treaties in force. They were drafted with a view to facilitating the promotion of the law.**

The parties to a conflict must at all times **distinguish between the civilian population and combatants** in order to spare the civilian population and civilian property. Neither the civilian population as a whole nor individual civilians may be attacked.

- Attacks may be made solely against military objectives. People who do not or can no longer take part in the hostilities are entitled to respect for their lives and for their physical and mental integrity. Such people must in all circumstances be protected and treated with humanity, without any unfavorable distinction whatever.
- It is forbidden to kill or wound an adversary who surrenders or who can no longer take part in the fighting.
- Neither the parties to the conflict nor members of their armed forces have an unlimited right to choose methods and means of warfare. It is forbidden to use weapons or methods of warfare that are likely to cause unnecessary losses or excessive suffering.
- The wounded and sick must be collected and cared for by the party to the conflict which has them in its power. Medical personnel and medical establishments, transports and equipment must be spared.
- The red cross, red crescent or red crystal on a white background is the distinctive sign indicating that such persons and objects must be respected.
- Captured combatants and civilians who find themselves under the authority of the adverse party are entitled to respect for their lives, their dignity, their personal rights and their political, religious and other convictions. They must be protected against all acts of violence or reprisal. They are entitled to exchange news with their families and receive aid. They must enjoy basic judicial guarantees.

1. "...if international law is, in some ways, at the vanishing point of law, the law of war is, perhaps even more conspicuously, at the vanishing point of international law." (H.Lauterpacht, 1952)  
*What do you think Lauterpacht meant when he wrote this statement?*

## 2. IHL and the soldier's dilemma

In the early morning, a column of tanks and personnel carriers made their way down the road of the heavily populated outskirts of the city. We were hemmed in by the wire fence of an air base on our left and a long narrow hamlet of buildings on our right. We stopped to assess the situation. My mate ducked inside the turret of the tank, saying: "I don't like the look of this". Our radio operator turned to me and said that he'd just heard reports of lots of guerilla soldiers hiding out in the area.

From where I rode, as tank gunner, I had a pretty clear view. Sure enough, through the dust and overcast morning weather, I could see silhouettes darting into positions among the cluster of village houses opposite our platoon of men in the personnel carriers up the road. I could see that the figures were clearly armed. Someone shouted to open fire.

*You are the tank gunner. What do you do?*

3. Could the use of nuclear weapons ever be in conformity with international humanitarian law?

4. In a country where violent clashes are taking place between armed groups, a local group leader suddenly comes face to face with a member of the opposing group. Both are wounded in the ensuing hand-to-hand encounter. The group leader manages to bind up his own wounds. He then gives rudimentary first aid to his adversary, who is *hors de combat*, and drags him into his house.

There his comrades oppose his decision, saying that as he did not leave his enemy to die, that enemy should now be executed, especially as this is the practice of the other side. The leader knows that the command under which he serves has publicly stated that it intends to respect the basic provisions of the Geneva Conventions. What must he do?

5. A soldier is attacked by a boy who looks about twelve years old. The boy fires a gun at him, misses, then turns round to run away. At this point the soldier returns fire, hitting the boy in the back and killing him.

What issues of international humanitarian law arise?

## 5. Trafficking in Human Beings

*No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.*

(Universal Declaration of Human Rights, Article 4)

### I. Introduction

Is there too much law?

#### Examples of trafficking in human beings (THB)

- Prostitution
- Sweat shops
- Domestic labour
- Forced marriage
- Agricultural labour
- Sport (eg camel jockeys)
- Adoption
- Organ transplants

#### Examples of smuggling of human beings (SHB)

- Payment to secure illegal crossing of border
- Political motivation

## II. Concepts

- THB
- Deception, coercion, violence
- Exploitative end purpose: slavery, forced labour
- Violation of victim's rights
- May involve illegal crossing of border

## SHB

### Consent

- Not necessarily exploitation
- Illegal border crossing
- Violation of integrity of state frontiers

### Principal legal issues

- Human rights of those trafficked or smuggled
- Criminal law (international and national)
- Immigration law
- Employment law
- Laws on prostitution

## III. THB and SHB under International Law

### UN Convention Against Transnational Organised Crime 2000

#### Trafficking

#### **Protocol to Prevent, Suppress and Punish Trafficking in Persons, in Particular Women and Children (Palermo Protocol)**

- Entered into force December 2003
- 124 parties (10 November 2008); Czech Republic has signed but not ratified

#### Article 3

- (a) "Trafficking in persons" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs...

#### Three elements:

- the act
- the method
- the motivation
- Consent of victim not relevant where any of above methods are employed
- Where victim is a minor (under 18) it is THB even if none of above methods are used

#### Limitations

- Deals only with transnational THB
- Focus primarily on prevention of crime rather than protection of human rights
- Limited measures addressing rights of victims
- Article 6 – limited obligations of assistance to victims

**Smuggling****Protocol against the Smuggling of Migrants by Land, Sea and Air**

- Entered into force January 2004
- 116 parties (10 November 2008); Czech Republic has signed but not ratified
- Obligation to criminalise smuggling
- Special regime on smuggling by sea

**Article 3**

- (a) “Smuggling of migrants” shall mean the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident...

**Article 5** – migrants not to be prosecuted for having been smuggled

**Article 16** – obligation to take measures to preserve and protect rights of victims

**IV. The Wider International Law Regime**

- focuses more on THB

**Treaties**

- Convention Concerning Slavery (1926)
- ILO Convention No.29 on Forced Labour (1930)
- Geneva Convention Relative to the Protection of Civilian Persons in Time of War (1949) plus Additional Protocols I and II (1977)
- Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (1949)
- Convention on the Elimination of Discrimination Against Women (1979)
- Convention in the Rights of the Child (1989)
- ILO Worst Forms of Child Labour Convention (1989)
- Convention on the Protection of the Rights of All Migrant Workers and Their Families (1990)
- Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (2000)
  - In force January 2002
  - parties
  - national and transnational trafficking
  - Protection of rights of child victims/witnesses during criminal proceedings
- SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution (2002)
- Council of Europe Convention on Action Against Trafficking in Human Beings (2005)
  - Stresses victims’ rights and protection of victims equally with action to combat THB
  - Same definition as Palermo Protocol
  - Obligation to promote “a Human Rights-based approach”
  - Minimum standards set for provision of assistance to victims to promote physical, psychological and social recovery

**Soft Law**

- UN High Commissioner for Human Rights: Recommended Principles and Guidelines on Human Rights and Human Trafficking (2002)
  - Human rights of victims of THB to be *at the centre* of all anti-THB efforts
  - States’ obligations to act against THB and help victims
  - Anti-THB measures must not adversely affect rights of individuals, especially victims of THB, migrants, IDPs and refugees
- EU/IOM: Brussels Declaration on Preventing and Combating Trafficking in Human Beings (2002)
- UNHCR: Guidelines on application of Refugees Convention to victims of THB (2006)
- ASEAN: Declaration Against Trafficking in Persons Particularly Women and Children (2004)
  - Policies on coordination of anti-THB measures

- Limited acknowledgment of human rights of victims
- Council of Europe
- OSCE
  - Action Plan to Combat Trafficking in Human Beings, July 2003
    - National Referral Mechanisms
- Stability Pact for South Eastern Europe

## V. European Union Regime

- EC Treaty (Art.63)
- Tampere Conclusions (No.23) (1999)
- Laeken Conclusions (No.42) (2001)
- Seville Conclusions (No.28) (2002)
- Charter of Fundamental Rights of the European Union, Article 5
  - Prohibition of slavery, servitude, forced or compulsory labour and THB
- Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities
  - Creates common European minimum standards
  - Concrete obligations of States
  - Links assistance/protection to cooperation
  - Residence permit limited by duration of criminal proceedings
  - Inadequate social provision
- Proposal for a Comprehensive Plan to Combat Illegal Immigration and Trafficking of Human Beings in the European Union (2002)
- Council Framework Decision 2002/629/JHA of 19 July 2002 on Combating Trafficking in Human Beings
  - Legally binding
  - Minimum standards
  - Adopts definition of THB similar to Palermo protocol
  - Liability of legal persons – not only people
  - Very limited measures on victim assistance
- Commission Communication on the development of a common policy on illegal immigration, smuggling and trafficking of human beings, external borders and the return of illegal residents (2003), COM (2003) 323 final
- Council Framework Decision 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography
- EU Action Plan on best practices, standards and procedures for combating and preventing trafficking in human beings, December 2005

## VI. International Protection Regime

*Victims of THB have no special entitlement to remain in the destination State.*

*Under the law of international protection, destination States may have an obligation to permit victims of THB to remain on their territory.*

- Victims of THB in a foreign country frequently wish to return to their home country once they are no longer under the control of their traffickers; destination States generally want them to return
- Some victims may fear returning because of danger or threats to which they might be exposed at home
  - Risk of re-trafficking
  - Shame/embarrassment
  - Ostracism
  - Victimisation by national authorities
- Some victims may have given evidence against their traffickers

The principle of non-refoulement obliges States not to return anyone to a territory where they will be killed or at risk of a serious breach of their basic human rights

- Applies to threats posed by the State, or by non-state actors where the State is unable or unwilling to offer effective protection
- Convention Relating to the Status of Refugees 1951, Article 33 – non-refoulement

### **Convention Relating to the Status of Refugees 1951**

#### Article 1A

For the purposes of the present Convention, the term ‘refugee’ apply to any person who... (2)... owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country...

### **Council Directive 2004/83/EC of 29 April 2004 (“Qualification Directive”) - on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection**

- Article 6: Persecution can be by
  - the State
  - parties or organizations controlling the State or a substantial part of its territory
  - non-state actors, where the State or those in control are unable or unwilling to provide protection against persecution or serious harm
- Article 15: Entitlement to subsidiary protection based on following threats:
  - Death penalty or execution
  - Torture or inhuman or degrading treatment or punishment in the country of origin
  - Serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of armed conflict

Where a victim of THB can show a reasonable likelihood that her basic human rights are at serious risk should she be repatriated, the State of destination may have to permit her to remain, although the general view is that repatriation is the preferable option

#### **Possible entitlement of victims of THB to international protection:**

- Palermo Protocol (2000), Article 7(1), 14(1)
- UN High Commissioner for Human Rights: Recommended Principles on Human Rights and Human Trafficking (2002), Principle 11
- EU/IOM: Brussels Declaration on Preventing and Combating Trafficking in Human Beings (2002), Point 13
- United Nations High Commissioner for Refugees: Guidelines on International Protection – Membership of a Particular Social Group (2002), Point 12
- United Nations High Commissioner for Refugees: Guidelines on International Protection – Gender-Related Persecution (2002), Point 18
- United Nations High Commissioner for Refugees: Guidelines on International Protection – Application of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol on the Status of Refugees to Victims of Trafficking (2006)
- Council of Europe Convention on Action Against Trafficking in Human Beings (2005), Article 16(2), 40(1)

#### **Statelessness Issues**

## VII. International Criminal Law

### UNCTOC

Art 15 – obligation to establish jurisdiction with regard to certain offences:

- Participation in organised criminal group
- Laundering of proceeds of crime
- Corruption
- Obstruction of justice

Art 16 – extradition arrangements

Art 18 – mutual legal assistance obligation

### THB Protocol

Art 2 – purposes

- Prevent and combat THB, especially of women and children
- Protect and assist victims of THB
- Promote cooperation amongst states to meet these objectives

Art 5 – obligation to criminalise THB (including attempting or participating as an accomplice, organising or directing others to do so)

Art 9 – obligation to establish comprehensive policies and programmes “to prevent and combat” THB

### SHB Protocol

Art 6 – obligation to criminalize

- SHB
- Organization of false travel or identity documents for those to be smuggled
- Enabling person without entitlement to remain in the State
- Attempting to commit, contributing to or participating in any of above acts

### Convention on the Rights of the Child, Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography

Art 3 – obligation to criminalise

### ICC Statute

*War crimes* – Art 8

- distinction between International Armed Conflicts (IACs) and Non International Armed Conflicts (NIACs)

IACs

Art 8.b.viii - deportation of population

Art 8.b.xxi - outrages upon personal dignity

Art 8.b.xxii – rape, sexual slavery, enforced prostitution

NIACs

Art 8.c.vi – rape, sexual slavery, enforced prostitution

*Crimes against humanity* – Art 7

- must be widespread or systematic attack against the civilian population

- no distinction between IACs and NIACs; does not have to be during armed conflict

Art 7.1.c – enslavement

Art 7.1.d – deportation or forcible transfer

Art 7.1.g – rape, sexual slavery, enforced prostitution

Art 7.2.c – “Enslavement” means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of the trafficking in persons, in particular women and children...



1. What is the difference between smuggling and trafficking of human beings? Give examples to illustrate this.

2. Is THB a breach of human rights, or a crime, or both? Give examples to illustrate your view.

3. A, aged 16, has been brought from Vietnam to the Czech Republic by a distant male relative on the pretext that she could have an extended holiday. However after her arrival in Brno the man made it clear that she would be working for him and that he intended to force her into prostitution. She gave evidence that the man had already bought her the clothes she was to wear while working as a prostitute. He had also told her where she was going to work, confiscated her passport and threatened her with violence if she attempted to escape. He had also said that if she returned to Vietnam then other members of his gang would “take revenge” on her. The evidence gathered by the police when they arrested the man supports Ms A’s statement. Ms A has said that she is afraid to return to Vietnam.

Has Ms A been trafficked?

What, if any, are the Czech Republic’s obligations towards Ms A?

4. Alina is a citizen of Moldova. In January 2006 she went to Dubai to work as a waitress, having been recruited by an agency operating in the capital, Chisinau. She was told that she would earn US\$2000 per month and that she would owe the agency US\$2000 to cover its agency fees and her air ticket. After she arrived in Dubai she was met at the airport and taken to a restaurant, where she was told that she could earn extra money if she agreed to work in the entertainment industry. She was told that this meant dancing with men in private clubs and persuading them to buy exorbitantly priced, foul-tasting sparkling wine from England (although in the brochure it was described as ‘an unforgettable taste experience’).

Alina agreed to do this work, but on the first evening it was made clear to her that she was expected to work as a prostitute. When Alina refused she was taken to a room where she was beaten up then locked in. She was told that she would receive no food till she agreed to work as a prostitute. She was also informed that she would not be allowed to leave the premises until she had earned US\$10,000 for the bar owner.

One day Alina escaped but she had no passport or identification with her. She managed to find the Moldovan Embassy, which fortunately was open. However, as she was unable to produce proof of her nationality (despite speaking the language perfectly) the embassy declined to help her.

What is Alina’s status? What can she do?

## 6. The Practical Application of International Law

### Working in international law

This class will be different from the others. We will look at what international law can actually mean for those of you who wish to pursue a career in the field. There are in fact many options; some people are active in several fields:

- Academia
- International organisations
- Non-governmental organisations
- Private law firms
- Legal aid
- Training programmes
- Government: Ministries of Justice, Interior, Foreign Affairs, Immigration

### Recapping the course

The course is very intensive. For this reason, and in order to help your learning, we will use some of the time to discuss any issues at all that you wish to raise arising out of the topics we have studied during the week. So, it is your chance to set the agenda: you are free to raise any issue at all as long as it is connected to the issues that we have studied.

