In relation to the application of international human rights treaties outside the territory of the state concerned, the UK Manual of the Law of Armed Conflict concluded that: 'Where the occupying power is a party to the European Convention on Human Rights the standards of that Convention may, depending on the circumstances, be applicable in the occupied territories.'[79]

Moving further beyond the traditional and passive approach with regard to the law of occupation,[80] the Security Council adopted resolution 1483 (2003) after the coalition military action against Iraq, reaffirming the position of the UK and US as occupying powers in Iraq under international law but placing upon them (and the Coalition Provisional Authority, which included other states) a range of other powers and responsibilities over and above the international law relating to occupation.[81] These included the obligation 'to promote the welfare of the Iraqi people through the effective administration of the territory, including . . . the creation of conditions in which the Iraqi people can freely determine their own political future' and the relevance of the establishment of an internationally recognised, representative government of Iraq. In addition,

size of the fenced-in enclave projecting into the West Bank. Note that the Court explained that the difference between its judgment and the advisory opinion of the International Court stemmed from the difference in facts laid before the two courts, particularly the paucity of facts relating to the security–military necessity to erect the fence arising from the phenomenon of suicide bombing inside Israel put before the International Court, *ibid.*, pp. 287–8.

[79] At p. 282. See also *Al-Skeini* v. *Secretary of State for Defence* [2007] UKHL 26; 133 ILR, p. 693, where the House of Lords held that the European Convention applied to British military detention facilities but not to soldiers on patrol in Iraq, and *Al-Jedda* v. *Secretary of State for Defence* [2007] UKHL 58, where the House of Lords held that a binding Security Council resolution authorising the maintenance of public order had precedence over the terms of article 5 of the European Convention. See also *Coard* v. *United States*, Report No. 109/99, 29 September 1999; 123 ILR, p. 156, for the view expressed by the Inter-American Commission on Human Rights that the US was bound by relevant rules of humanitarian law and human rights law in the Grenada intervention.

[80] Note the problems posed by long-lasting occupations and the tension between the traditional law of minimal interference with local life and the need to cope with societal changes: see e.g. A. Roberts, 'Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967', 84 AJIL, 1990, p. 44, and Roberts, 'Transformative Military Occupation: Applying the Laws of War and Human Rights', 100 AJIL, 2006, p. 580.

[81] See generally 'Iraq: Law of Occupation', House of Commons Research Paper 03/51, 2 June 2003; E. Benvenisti, 'Water Conflicts During the Occupation of Iraq', 97 AJIL, 2003, p. 860; M. Hmoud, 'The Use of Force Against Iraq: Occupation and Security Council Resolution 1483', 36 *Cornell International Law Journal*, 2004, p. 435, and D. Scheffer, 'Beyond Occupation Law', 97 AJIL, 2003, p. 842.

a Special Representative for Iraq was appointed, whose functions included the promotion of human rights.

The conduct of hostilities[82]

International law, in addition to seeking to protect victims of armed conflicts, also tries to constrain the conduct of military operations in a humanitarian fashion. In analysing the rules contained in the 'Law of the Hague', it is important to bear in mind the delicate balance to be maintained between military necessity and humanitarian considerations. A principle of long standing, if not always honoured in practice, is the requirement to protect civilians against the effects of hostilities. As far as the civilian population is concerned during hostilities,[83] the basic rule (sometimes termed the principle of distinction)[84] formulated in article 48 of Protocol I is that the parties to the conflict must at all times distinguish between such population and combatants and between civilian and military objectives and must direct their operations only against military objectives.[85] Military objectives are limited in article 52(2) to 'those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage'. There is thus a principle of proportionality to be considered. Judge Higgins, for example, in referring to this principle, noted that 'even a legitimate target may not be attacked if the collateral civilian casualties would be disproportionate to the specific military gain from the attack'.[86] Issues have arisen particularly with regard to so-called 'dual use' objects such as bridges, roads and power stations,[87] and care must be taken to

[82] See e.g. Dinstein, *Conduct of Hostilities*; UK, *Manual*, chapter 5; Green, *Armed Conflict*, chapters 7 (land), 8 (maritime) and 9 (air). See also Rogers, *Law on the Battlefield*, and Best, *War and Law*, pp. 253 ff. As to armed conflicts at sea, see also *The San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (ed. L. Doswald-Beck), Cambridge, 1995.

[83] Apart from the provisions protecting the inhabitants of occupied territories under the Fourth Geneva Convention. See also Security Council resolution 1674 (2006) on the Protection of Civilians in Armed Conflicts, and Security Council Presidential Statement of 27 May 2008, 5/PRST/2008/18.

[84] See e.g. Dinstein, *Conduct of Hostilities*, p. 55.

[85] *Ibid.*, chapter 4.

[86] Dissenting Opinion, *Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports, 1996, pp. 226, 587; 110 ILR, pp. 163, 536.

[87] Note that in the Eritrea–Ethiopia Claims Commission, Partial Award, Western Front, Aerial Bombardment and Related Claims, Eritrea's Claims 1, 3, 5, 9–13, 14, 21, 25 and 26, 19 December 2005, paras. 113 ff., it was held that article 52(2) constituted a statement of

interpret these so that such objects are not indiscriminately attacked on the one hand, while ensuring that, on the other, such objects or facilities are not used by opposing military forces in an attempt to secure immunity from attack, with the inevitable result that civilians may be endangered.[88] Much will depend upon whether the military circumstances are such that they fall within the definition provided in article 52(2). This will require a balancing of military need and civilian endangerment.

Article 51 provides that the civilian population as such, as well as individual civilians, 'shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.'[89] Additionally, indiscriminate attacks[90] are prohibited.[91] Article 57 provides that in the conduct of military operations, 'constant care shall be taken to spare the civilian population, civilians and civilian objects'.

Although reprisals involving the use of force are now prohibited in international law (unless they can be brought within the framework of

customary international law. Whether an aerial attack on a power station fell within the term 'military advantage' could only be understood in the context of military operations between the parties as a whole and not simply in the context of a simple attack, *ibid.* See also UK, *Manual*, pp. 55 ff.

[88] See, as to the Kosovo conflict 1999, e.g. J. A. Burger, 'International Humanitarian Law and the Kosovo Crisis', 82 *International Review of the Red Cross*, 2000, p. 129; P. Rowe, 'Kosovo 1999: The Air Campaign', *ibid.*, p. 147, and W. J. Fenrick, 'Targeting and Proportionality during the NATO Bombing Campaign Against Yugoslavia', 12 EJIL, 2001, p. 489. See also the Review of the NATO Bombing Campaign Against the Federal Republic of Yugoslavia by a review committee of the International Criminal Tribunal for the Former Yugoslavia recommending that no investigation be commenced by the Office of the Prosecutor: see www.un.org/icty/pressreal/nato061300.htm, and the attempt to bring aspects of the bombing campaign before the European Court of Human Rights: see *Banković* v. *Belgium*, Judgment of 12 December 2001, 133 ILR, p. 94.

[89] See e.g. the Eritrea–Ethiopia Claims Commission, Partial Award, Western Front, Aerial Bombardment and Related Claims, Eritrea's Claims 1, 3, 5, 9–13, 14, 21, 25 and 26, 19 December 2005, para. 27.

[90] These are defined in article 51(4) as: (a) those which are not directed at a specific military objective; (b) those which employ a method or means of combat which cannot be at a specific military objective; or (c) those which employ a method or means of combat the effects of which cannot be limited as required by Protocol I; and consequently in each such case are of a nature to strike military objectives and civilians or civilian objects without distinction.

[91] See 21(5) *UN Chronicle*, 1984, p. 3 with regard to an appeal by the UN Secretary-General to Iran and Iraq to refrain from attacks on civilian targets. See also Security Council resolution 540 (1983). The above provisions apply to the use by Iraq in the 1991 Gulf War of missiles deliberately fired at civilian targets. The firing of missiles at Israeli and Saudi Arabian cities in early 1991 constituted, of course, an act of aggression against a state not a party to that conflict: see e.g. *The Economist*, 26 January 1991, p. 21.

self-defence),[92] belligerent reprisals during an armed conflict may in certain circumstances be legitimate. Their purpose is to ensure the termination of the prior unlawful act which precipitated the reprisal and a return to legality. They must be proportionate to the prior illegal act.[93] Modern law, however, has restricted their application. Reprisals against prisoners of war are prohibited by article 13 of the Third Geneva Convention, while article 52 of Protocol I provides that civilian objects are not to be the object of attack or of reprisals.[94] Civilian objects are all objects which are not military objectives as defined in article 52(2).[95] Cultural objects and places of worship are also protected,[96] as are objects deemed indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies, and irrigation works, so long as they are not used as sustenance solely for the armed forces or in direct support of military action.[97] Attacks are also prohibited against works or installations containing dangerous forces, namely dams, dykes and nuclear generating stations.[98]

The right of the parties to an armed conflict to choose methods of warfare is not unconstrained.[99] The preamble of the St Petersburg Declaration of 1868, banning explosives or inflammatory projectiles below 400 grammes in weight, emphasises that the 'only legitimate object which states should endeavour to accomplish during war is to weaken the military forces of the enemy', while article 48 of Protocol I provides that a distinction must at all times be drawn between civilians and combatants. Article 22 of the Hague Regulations points out that the 'right of

[92] See above, chapter 20, p. 1131.

[93] See e.g. Green, *Armed Conflict*, p. 123; C. J. Greenwood, 'Reprisals and Reciprocity in the New Law of Armed Conflict' in *Armed Conflict in the New Law* (ed. M. A. Meyer), London, 1989, p. 227, and F. Kalshoven, *Belligerent Reprisals*, Leiden, 1971.

[94] Similarly wounded, sick, shipwrecked, medical and missing persons; also protected against reprisal are the natural environment and works or installations containing dangerous forces: see articles 20 and 53–6.

[95] See above, p. 1176.

[96] See article 53. See also the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, 1954 together with the First Protocol, 1954 and the Second Protocol, 1999. The protections as to cultural property are subject to 'military necessity': see article 4 of the 1954 Convention and articles 6 and 7 of the 1999 Protocol. Under articles 3 and 22 of the Protocol, protection is extended to non-international armed conflicts: see R. O'Keefe, *The Protection of Cultural Property in Armed Conflict*, Cambridge, 2006, and below, p. 1194.

[97] Article 54. [98] Article 56.

[99] See UK, *Manual*, chapter 6, and Dinstein, *Conduct of Hostilities*, chapter 3.

belligerents to adopt means of injuring the enemy is not unlimited',[100] while article 23(e) stipulates that it is especially prohibited to 'employ arms, projectiles or material calculated to cause unnecessary suffering'.[101] Quite how one may define such weapons is rather controversial and can only be determined in the light of actual state practice.[102] The balance between military necessity and humanitarian considerations is relevant here. The International Court in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*[103] summarised the situation in the following authoritative way:

> The cardinal principles contained in the texts constituting the fabric of humanitarian law are the following. The first is aimed at the protection of the civilian population and civilian objects and establishes the distinction between combatants and non-combatants; states must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets. According to the second principle, it is prohibited to cause unnecessary suffering to combatants; it is accordingly prohibited to use weapons causing them such harm or uselessly aggravating their suffering. In application of that second principle, states do not have unlimited freedom of choice of means in the weapons they use.

The Court emphasised that the fundamental rules flowing from these principles bound all states, whether or not they had ratified the Hague and Geneva Conventions, since they constituted 'intransgressible principles of international customary law'.[104] At the heart of such rules and principles lies the 'overriding consideration of humanity'.[105] Whether the

[100] This is repeated in virtually identical terms in article 35, Protocol I.

[101] See article 35(2) of Protocol I and the Preamble to the 1980 Convention on Conventional Weapons: see M. N. Shaw, 'The United Nations Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons, 1981', 9 *Review of International Studies*, 1983, p. 109 at p. 113. Note that 'employment of poisonous weapons or other weapons calculated to cause unnecessary suffering' is stated to be a violation of the laws and customs of war by article 3(a) of the Statute of the International Criminal Tribunal for the Former Yugoslavia: see Report of the UN Secretary-General, S/25704 and Security Council resolution 827 (1993), and see also article 20(d)e of the Draft Code of Crimes against the Peace and Security of Mankind, Report of the International Law Commission on the Work of its Forty-eighth Session, 1996, A/51/10, pp. 111–12.

[102] See e.g. the United States Department of the Army, *Field Manual, The Law of Land Warfare*, FM 27–10, 1956, p. 18, and regarding the UK, *The Law of War on Land*, Part III of the *Manual of Military Law*, 1958, p. 41.

[103] ICJ Reports, 1996, pp. 226, 257; 110 ILR, p. 163. [104] *Ibid.*

[105] ICJ Reports, 1996, pp. 226, 257 and 262–3. See also the *Corfu Channel* case, ICJ Reports, 1949, pp. 4, 22; 16 AD, p. 155.

actual possession or threat or use of nuclear weapons would be regarded as illegal in international law has been a highly controversial question,[106] although there is no doubt that such weapons fall within the general application of international humanitarian law.[107] The International Court has emphasised that, in examining the legality of any particular situation, the principles regulating the resort to force, including the right to self-defence, need to be coupled with the requirement to consider also the norms governing the means and methods of warfare itself. Accordingly, the types of weapons used and the way in which they are used are also part of the legal equation in analysing the legitimacy of any use of force in international law.[108] The Court analysed state practice and concluded that nuclear weapons were not prohibited either specifically or by express provision.[109] Nor were they prohibited by analogy with poisoned gases prohibited under the Second Hague Declaration of 1899, article 23(a) of the Hague Regulations of 1907 and the Geneva Protocol of 1925.[110] Nor were they prohibited by the series of treaties[111] concerning the acquisition,

[106] See e.g. *Shimoda* v. *Japan* 32 ILR, p. 626.

[107] *Ibid.*, pp. 259–61. See e.g. *International Law, the International Court of Justice and Nuclear Weapons* (eds. L. Boisson de Chazournes and P. Sands), Cambridge, 1999; D. Akande, 'Nuclear Weapons, Unclear Law?', 68 BYIL, 1997, p. 165; *Nuclear Weapons and International Law* (ed. I. Pogany), Aldershot, 1987; Green, *Armed Conflict*, pp. 128 ff., and Green, 'Nuclear Weapons and the Law of Armed Conflict', 17 *Denver Journal of International Law and Policy*, 1988, p. 1; N. Singh and E. McWhinney, *Nuclear Weapons and Contemporary International Law*, Dordrecht, 1988; G. Schwarzenberger, *Legality of Nuclear Weapons*, London, 1957, and H. Meyrowitz, 'Les Armes Nucléaires et le Droit de la Guerre' in *Humanitarian Law of Armed Conflict: Challenges* (eds. A. J. M. Delissen and G. J. Tanja), Dordrecht, 1991.

[108] The Court emphasised, for example, that 'a use of force that is proportionate under the law of self-defence, must, in order to be lawful, also meet the requirements of the law applicable in armed conflict', ICJ Reports, 1996, pp. 226, 245; 110 ILR, p. 163. The Court also pointed to the applicability of the principle of neutrality to all international armed conflicts, irrespective of the type of weaponry used, ICJ Reports, 1996, p. 261. See also the *Nicaragua* case, ICJ Reports, 1986, pp. 3, 112; 76 ILR, pp. 349, 446.

[109] ICJ Reports, 1986, p. 247.

[110] *Ibid.*, p. 248. Nor by treaties concerning other weapons of mass destruction such as the Bacteriological Weapons Treaty, 1972 and the Chemical Weapons Treaty, 1993, *ibid.*, pp. 248–9.

[111] E.g. the Peace Treaties of 10 February 1947; the Austrian State Treaty, 1955; the Nuclear Test Ban Treaty, 1963; the Outer Space Treaty, 1967; the Treaty of Tlatelolco of 14 February 1967 on the Prohibition of Nuclear Weapons in Latin America; the Nuclear Non-Proliferation Treaty, 1968 (extended indefinitely in 1995); the Treaty on the Prohibition of the Emplacement of Nuclear Weapons on the Ocean Floor and Sub-soil, 1971; Treaty of Rarotongo of 6 August 1985 on the Nuclear Weapons-Free Zone of the South Pacific; the Treaty of Final Settlement with Respect to Germany, 1990; the Treaty on the

manufacture, deployment and testing of nuclear weapons and the treaties concerning the ban on such weapons in certain areas of the world.[112] Nor were nuclear weapons prohibited as a consequence of a series of General Assembly resolutions, which taken together fell short of establishing the necessary *opinio juris* for the creation of a new rule to that effect.[113] In so far as the principles of international humanitarian law were concerned, the Court, beyond noting their applicability, could reach no conclusion. The Court felt unable to determine whether the principle of neutrality or the principles of international humanitarian law or indeed the norm of self-defence prohibited the threat or use of nuclear weapons.[114] This rather weak conclusion, however, should be seen in the context of continuing efforts to ban all nuclear weapons testing, the increasing number of treaties prohibiting such weapons in specific geographical areas and the commitment given in 1995 by the five declared nuclear weapons states not to use such weapons against non-nuclear weapons states that are parties to the Nuclear Non-Proliferation Treaty.[115] Nevertheless, it does seem clear that the possession of nuclear weapons and their use *in extremis* and in strict accordance with the criteria governing the right to self-defence are not prohibited under international law.[116]

A number of specific bans on particular weapons has been imposed.[117] Examples would include small projectiles under the St Petersburg formula of 1868, dum-dum bullets under the Hague Declaration of 1899 and asphyxiating and deleterious gases under the Hague Declaration of 1899 and the 1925 Geneva Protocol.[118] Under the 1980 Conventional Weapons Treaty,[119] Protocol I, 1980, it is prohibited to use weapons that cannot be detected by X-rays, while Protocol II, 1980 (minimally amended in 1996), prohibits the use of mines and booby-traps against civilians, Protocol III, 1980, the use of incendiary devices against civilians or against military objectives located within a concentration of civilians where the attack is by

South East Asia Nuclear Weapon-Free Zone, 1995 and the Treaty on an African Nuclear Weapon-Free Zone, 1996.

[112] ICJ Reports, 1996, pp. 226, 248–53; 110 ILR, p. 163. [113] ICJ Reports, 1996, pp. 254–5.

[114] *Ibid*., pp. 262–3 and 266. [115] See Security Council resolution 984 (1995).

[116] See also the UK, *Manual*, pp. 117 ff., and the US *The Law of Land Warfare*, 1956, s. 35.

[117] See e.g. Green, *Armed Conflict*, pp. 133 ff.

[118] See also e.g. the 1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological Weapons and the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and Their Destruction. See 21(3) *UN Chronicle*, 1984, p. 3 with regard to the use of chemical weapons in the Iran–Iraq war.

[119] See Shaw, 'Conventional Weapons'. Note article 1 was amended in 2001.

air-delivered incendiary weapons, Protocol IV, 1995, the use of blinding laser weapons and Protocol V, 2003, concerns the explosive remnants of war. In 1997, the Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction was adopted.[120]

Article 35(3) of Additional Protocol I to the 1949 Conventions provides that it is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment.[121] Article 55 further states that care is to be taken in warfare to protect the natural environment against such damage, which may prejudice the health or survival of the population, while noting also that attacks against the natural environment by way of reprisals are prohibited. The Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, 1977 prohibits such activities having widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other state party.

Armed conflicts: international and internal

The rules of international humanitarian law apply to armed conflicts. Accordingly, no formal declaration of war is required in order for the Conventions to apply. The concept of 'armed conflict' is not defined in the Conventions or Protocols, although it has been noted that 'any difference arising between states and leading to the intervention of members of the armed forces is an armed conflict' and 'an armed conflict exists whenever there is a resort to armed force between states or protracted armed violence between governmental authorities and organized armed groups within a state'.[122]

[120] Note the adoption on 30 May 2008 of a Convention banning the use, stockpiling, production and transfer of cluster munitions.

[121] See, for example, the deliberate spillage of vast quantities of oil into the Persian Gulf by Iraq during the 1991 Gulf War: see *The Economist*, 2 February 1991, p. 20. See also Green, *Armed Conflict*, p. 138, and Rogers, *Law of the Battlefield*, chapter 6.

[122] J. Pictet, *Commentary on the Geneva Conventions of 12 August 1949*, Geneva, 1952, vol. I, p. 29. In the *Tadić* case, IT-94-1, Decision on Jurisdiction, para. 70; 105 ILR, pp. 453, 488, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia stated that, 'an armed conflict exists whenever there is a resort to armed force between states or protracted armed violence between governmental authorities and organised armed groups or between such groups within a state'.

A distinction has historically been drawn between international and non-international armed conflicts,[123] founded upon the difference between inter-state relations, which was the proper focus for international law, and intra-state matters which traditionally fell within the domestic jurisdiction of states and were thus in principle impervious to international legal regulation. However, this difference has been breaking down in recent decades. In the sphere of humanitarian law, this can be seen in the gradual application of such rules to internal armed conflicts.[124] The notion of an armed conflict itself was raised before the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia in its decision on jurisdictional issues in the *Tadić* case.[125] It was claimed that no armed conflict as such existed in the Former Yugoslavia with respect to the circumstances of the instant case since the concept of armed conflict covered only the precise time and place of actual hostilities and the events alleged before the Tribunal did not take place during hostilities. The Appeals Chamber of the Tribunal correctly refused to accept a narrow geographical and temporal definition of armed conflicts, whether international or internal. It was stated that:[126]

> International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring states or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place.

This definition arose in the specific context of the Former Yugoslavia, where it was unclear whether an international or a non-international armed conflict or some kind of mixture of the two was involved. This was important to clarify since it would have had an effect upon the relevant applicable law. The Security Council did not as such classify the nature of the conflict, simply condemning widespread violations of international humanitarian law, including mass forcible expulsion and deportation of civilians, imprisonment and abuse of civilians and deliberate attacks upon non-combatants, and calling for the cessation.[127] The Appeals Chamber

[123] See e.g. Green, *Armed Conflict*, chapter 3. [124] See further below, p. 1194.
[125] Case No. IT-94-1-AR 72; 105 ILR, pp. 453, 486 ff. [126] *Ibid.*, p. 488.
[127] See e.g. Security Council resolution 771 (1992). See also C. Gray, 'Bosnia and Herzegovina: Civil War or Inter-State Conflict? Characterisation and Consequences', 67 BYIL, 1996, p. 155.

concluded that 'the conflicts in the former Yugoslavia have both internal and international aspects'.[128] Since such conflicts could be classified differently according to time and place, a particularly complex situation was created. However, many of the difficulties that this would have created were mitigated by an acceptance of the evolving application of humanitarian law to internal armed conflicts.[129] This development has arisen partly because of the increasing frequency of internal conflicts and partly because of the increasing brutality in their conduct. The growing interdependence of states in the modern world makes it more and more difficult for third states and international organisations to ignore civil conflicts, especially in view of the scope and insistence of modern communications, while the evolution of international human rights law has contributed to the end of the belief and norm that whatever occurs within other states is the concern of no other state or person.[130] Accordingly, the international community is now more willing to demand the application of international humanitarian law to internal conflicts.[131] In the *Tadić* case, the Appeals Chamber (in considering jurisdictional issues) concluded that article 3 of its Statute, which gave it jurisdiction over 'violations of the laws or customs of war',[132] provided it with such jurisdiction 'regardless of whether they occurred within an internal or an international armed conflict'.[133] In its decision, the Appeals Chamber noted that,

> It is indisputable that an armed conflict is international if it takes place between two or more States. In addition, in case of an internal armed conflict breaking out on the territory of a State, it may become international (or, depending upon the circumstances, be international in character alongside

[128] Case No. IT-94-1-AR; 105 ILR, pp. 453, 494. [129] *Ibid.*, pp. 495 ff.

[130] See e.g. General Assembly resolutions 2444 (XXV) and 2675 (XXV), adopted in 1970 unanimously.

[131] See e.g. Security Council resolutions 788 (1992), 972 (1995) and 1001 (1995) with regard to the Liberian civil war; Security Council resolutions 794 (1992) and 814 (1993) with regard to Somalia; Security Council resolution 993 (1993) with regard to Georgia and resolution 1193 (1998) with regard to Afghanistan.

[132] An historic term now subsumed within the concept of international humanitarian law. Article 3 states that such violations shall include, but not be limited to, the employment of poisonous weapons or other weapons calculated to cause unnecessary suffering; wanton destruction of cities, towns or villages or devastation not justified by military necessity; attack or bombardment of undefended towns, villages or buildings; seizure of or destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science; and plunder of public or private property.

[133] Case No. IT-94-1-AR 72; 105 ILR, pp. 453, 504. See also the *Furundžija* case, Case No. IT-95-17/1 (decision of Trial Chamber II, 10 December 1998); 121 ILR, pp. 213, 253–4.

> an internal armed conflict) if (i) another State intervenes in that conflict through its troops, or alternatively if (ii) some of the participants in the internal armed conflict act on behalf of that other State.[134]

The Appeals Chamber concluded that until 19 May 1992 with the open involvement of the Federal Yugoslav Army, the conflict in Bosnia had been international, but the question arose as to the situation when this army was withdrawn at that date. The Chamber examined the legal criteria for establishing when, in an armed conflict which is *prima facie* internal, armed forces may be regarded as acting on behalf of a foreign power thus turning the conflict into an international one. The Chamber examined article 4 of the Third Geneva Convention which defines prisoner of war status[135] and noted that states have in practice accepted that belligerents may use paramilitary units and other irregulars in the conduct of hostilities only on the condition that those belligerents are prepared to take responsibility for any infringements committed by such forces. In order for irregulars to qualify as lawful combatants, control over them by a party to an international armed conflict was required and thus a relationship of dependence and allegiance. Accordingly, the term 'belonging to a party to the conflict' used in article 4 implicitly refers to a test of control.[136]

In order to determine the meaning of 'control', the decision of the International Court in the *Nicaragua* case was examined[137] and rejected, the Appeals Chamber preferring a rather weaker test, concluding that in order to attribute the acts of a military or paramilitary group to a state, it must be proved that the state wields overall control over the group, not only by equipping and financing the group, but also by co-ordinating or helping in the general planning of its military activity. However, it was not necessary that, in addition, the state should also issue, either to the head

[134] Judgment of 15 July 1999, para. 84; 124 ILR, p. 96. [135] See above, p. 1172.

[136] Judgment of 15 July 1999, paras. 94 and 95; 124 ILR, p. 100.

[137] In that case it was held that in order to establish the responsibility of the US over the 'Contra' rebels, it was necessary to show that the state was not only in effective control of a military or paramilitary group, but also that there was effective control of the specific operation in the course of which breaches may have been committed. In order to establish that the US was responsible for 'acts contrary to human rights and humanitarian law' allegedly perpetrated by the Nicaraguan Contras, it was necessary to prove that the US had specifically 'directed or enforced' the perpetration of those acts: see ICJ Reports, 1986, pp. 14, 64–5; 76 ILR, p. 349. The International Court in the *Genocide Convention (Bosnia v. Serbia)* case, ICJ Reports, 2007, reaffirmed its decision in the *Nicaragua* case on this point and distinguished the *Tadić* case: see above, chapter 14, p. 791.

or to members of the group, instructions for the commission of specific acts contrary to international law.[138]

Accordingly, the line between international and internal armed conflicts may be drawn at the point at which it can be shown that a foreign state is either directly intervening within a civil conflict or exercising 'overall control' over a group that is fighting in that conflict.

The Appeals Chamber in the *Kunarac* case discussed the issue of the meaning of armed conflict where the fighting is sporadic and does not extend to all of the territory of the state concerned. The Chamber held that the laws of war would apply in the whole territory of the warring states or, in the case of internal armed conflicts, the whole territory under the control of a party to the conflict, whether or not actual combat takes place there, and continued to apply until a general conclusion of peace or, in the case of internal armed conflicts, a peaceful settlement is achieved. A violation of the laws or customs of war may therefore occur at a time when and in a place where no fighting is actually taking place.[139]

Non-international armed conflict[140]

Although the 1949 Geneva Conventions were concerned with international armed conflicts, common article 3 did provide in cases of non-international armed conflicts occurring in the territory of one of the parties a series of minimum guarantees for protecting those not taking an active part in hostilities, including the sick and wounded.[141] Precisely where this article applied was difficult to define in all cases. Non-international armed conflicts could, it may be argued, range from full-scale civil wars to relatively minor disturbances. This poses problems for the state in question which may not appreciate the political implications of the application of the Geneva Conventions, and the lack of the reciprocity element due to the absence of another state adds to the problems of enforcement.

[138] Judgment of 15 July 1999, paras. 131 and 145; 124 ILR, pp. 116 and 121.

[139] Decision of 12 June 2002, Case No. IT-96-23 and IT-96-23/1, para. 57.

[140] See e.g. UK, *Manual*, chapter 15; L. Moir, *The Law of Internal Armed Conflict*, Cambridge, 2002; Green, *Armed Conflict*, chapter 19, and T. Meron, *Human Rights in Internal Strife*, Cambridge, 1987. See also ICRC, *Increasing Respect for International Humanitarian Law in Non-International Armed Conflicts*, Geneva, 2008.

[141] Note that the Court in the *Nicaragua* case, ICJ Reports, 1986, pp. 3, 114; 76 ILR, pp. 349, 448, declared that common article 3 also applied to international armed conflicts as a 'minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts'.

Common article 3 lists the following as the minimum safeguards:

> 1. Persons taking no active part in hostilities to be treated humanely without any adverse distinction based on race, colour, religion or faith, sex, birth or wealth.
>
> To this end the following are prohibited:
>
> a) violence to life and person, in particular murder, cruel treatment and torture;
> b) hostage-taking;
> c) outrages upon human dignity, in particular humiliating and degrading treatment;
> d) the passing of sentences and the carrying out of executions in the absence of due process.
>
> 2. The wounded and the sick are to be cared for.

Common article 3[142] was developed by Protocol II, 1977,[143] which applies by virtue of article 1 to all non-international armed conflicts which take place in the territory of a state party between its armed forces and dissident armed forces. The latter have to be under responsible command and exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and actually implement Protocol II. It does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, not being armed conflicts.[144] The Protocol lists a series of fundamental guarantees and other provisions calling for the

[142] The International Court in the *Nicaragua* case stated that the rules contained in common article 3 reflected 'elementary considerations of humanity', ICJ Reports, 1986, pp. 14, 114; 76 ILR, p. 349. See also the *Tadić* case, Case No. IT-94-1-AR; 105 ILR, pp. 453, 506.

[143] Note, of course, that by article 1(4) of Protocol I, 1977, international armed conflicts are now deemed to include armed conflicts in which peoples are fighting against colonial domination, alien occupation and racist regimes: see D. Forsyth, 'Legal Management of International War', 72 AJIL, 1978, p. 272. Article 96(3), Protocol I, requires the authority representing such peoples to make a special declaration undertaking to apply the Geneva Conventions and Protocol I. The UK made a declaration on ratification of Protocol I to the effect that it would not be bound by any such special declaration unless the UK has expressly recognised that it has been made by a body 'which is genuinely an authority representing a people engaged in an armed conflict': see UK, *Manual*, p. 384. Note also the UK view that 'a high level of intensity of military operations' is required regarding Protocol I so that the Northern Ireland situation, for example, would not have been covered: see 941 HC Deb., col. 237.

[144] See article 1(2), Protocol II and see article 8(2)d of the Rome Statute of the International Criminal Court, 1998. Article 8(2)e of the Rome Statute lists a series of acts which if committed in internal armed conflicts are considered war crimes.

protection of non-combatants.[145] In particular, one may note the prohibitions on violence to the life, health and physical and mental well-being of persons, including torture; collective punishment; hostage-taking; acts of terrorism; outrages upon personal dignity, including rape and enforced prostitution; and pillage.[146] Further provisions cover the protection of children;[147] the protection of civilians, including the prohibition of attacks on works or installations containing dangerous forces that might cause severe losses among civilians;[148] the treatment of civilians, including their displacement;[149] and the treatment of prisoners and detainees,[150] and the wounded and sick.[151]

The Appeals Chamber in its decision on jurisdiction in the *Tadić* case noted that international legal rules had developed to regulate internal armed conflict for a number of reasons, including the frequency of civil wars, the increasing cruelty of internal armed conflicts, the large-scale nature of civil strife making third-party involvement more likely and the growth of international human rights law. Thus the distinction between inter-state and civil wars was losing its value so far as human beings were concerned.[152] Indeed, one of the major themes of international humanitarian law has been the growing move towards the rules of human rights law and vice versa.[153] There is a common foundation in the principle of respect for human dignity.[154]

[145] Note that in non-international armed conflicts the domestic law of the state in which the conflict is taking place continues to apply and that a captured rebel is not entitled to POW status. However, persons captured from either the government or rebel or opposition side are entitled to humane treatment: see e.g. UK, *Manual*, pp. 387 ff.

[146] See article 4. [147] Article 6. [148] Article 15. [149] Article 17. [150] Article 5.

[151] Article 10. Note that the International Criminal Tribunal for Rwanda has jurisdiction to try violations of common article 3 and Protocol II. These are defined in article 4 of its Statute as including: '(a) Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment; (b) Collective punishments; (c) Taking of hostages; (d) Acts of terrorism; (e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault; (f) Pillage; (g) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilised peoples; and (h) Threats to commit any of the foregoing acts.'

[152] Case No. IT-94-1-AR; 105 ILR, pp. 453, 505 ff. But see Moir, *Internal Armed Conflict*, pp. 188 ff., and Meron, 'The Continuing Role of Custom in the Formation of International Humanitarian Law', 90 AJIL, 1996, pp. 238, 242–3.

[153] See e.g. Moir, *Internal Armed Conflict*, chapter 5, and R. Provost, *International Human Rights and Humanitarian Law*, Cambridge, 2002. See also above, p. 1180.

[154] See the *Furundžija* case, 121 ILR, pp. 213, 271.

The principles governing internal armed conflicts in humanitarian law are becoming more extensive, while the principles of international human rights law are also rapidly evolving, particularly with regard to the fundamental non-derogable rights which cannot be breached even in times of public emergency.[155] This area of overlap was recognised in 1970 in General Assembly resolution 2675 (XXV) which emphasised that fundamental human rights 'continue to apply fully in situations of armed conflict', while the European Commission on Human Rights in the *Cyprus* v. *Turkey (First and Second Applications)* case declared that in belligerent operations a state was bound to respect not only the humanitarian law laid down in the Geneva Conventions but also fundamental human rights.[156]

The Inter-American Commission of Human Rights in the *La Tablada* case against Argentina noted that the most difficult aspect of common article 3 related to its application at the blurred line at the lower end separating it from especially violent internal disturbances.[157] It was in situations of internal armed conflict that international humanitarian law and international human rights law 'most converge and reinforce each other', so that, for example, common article 3 and article 4 of the Inter-American Convention on Human Rights both protected the right to life and prohibited arbitrary execution. However, there are difficulties in resorting simply to human rights law when issues of the right to life arise in combat situations. Accordingly, 'the Commission must necessarily look to and apply definitional standards and relevant rules of humanitarian law as sources of authoritative guidance in its resolution' of such issues.[158]

The Commission returned to the issue in *Coard* v. *USA* and noted that there was 'an integral linkage between the law of human rights and the humanitarian law because they share a "common nucleus of non-derogable rights and a common purpose of protecting human life and dignity", and there may be a substantial overlap in the application of these bodies of law'.[159]

However, in addition to the overlap between internal armed conflict principles and those of human rights law in situations where the level of

[155] See e.g. article 15 of the European Convention on Human Rights, 1950; article 4 of the International Covenant on Civil and Political Rights, 1966; and article 27 of the Inter-American Convention on Human Rights, 1969. See also above, chapters 6 and 7.

[156] Report of the Commission of 10 July 1976, paras. 509–10.

[157] Report No. 55/97, Case 11.137 and OEA/Ser.L/V/II.98, para. 153.

[158] *Ibid.*, paras. 160–1.

[159] Case No. 10.951; 123 ILR, pp. 156, 169 (footnote omitted).

domestic violence has reached a degree of intensity and continuity, there exists an area of civil conflict which is not covered by humanitarian law since it falls below the necessary threshold of common article 3 and Protocol II.[160] Moves have been underway to bridge the gap between this and the application of international human rights law.[161] The International Committee of the Red Cross has been considering the elaboration of a new declaration on internal strife. In addition, a Declaration of Minimum Humanitarian Standards was adopted by a group of experts in 1990.[162] This Declaration emphasises the prohibition of violence to the life, health and physical and mental well-being of persons, including murder, torture and rape; collective punishment; hostage-taking; practising, permitting or tolerating the involuntary disappearance of individuals; pillage; deliberate deprivation of access to necessary food, drinking water and medicine, and threats or incitement to commit any of these acts.[163] In addition, the Declaration provides *inter alia* that persons deprived of their liberty should be held in recognised places of detention (article 4); that acts or threats of violence to spread terror are prohibited (article 6); that all human beings have the inherent right to life (article 8); that children are to be protected so that, for example, children under fifteen years of age should not be permitted to join armed groups or forces (article 10); that the wounded and sick should be cared for (article 12) and medical, religious and other humanitarian personnel should be protected and assisted (article 14).[164]

[160] See A. Hay, 'The ICRC and International Humanitarian Issues', *International Review of the Red Cross*, Jan–Feb 1984, p. 3. See also T. Meron, 'Towards a Humanitarian Declaration on Internal Strife', 78 AJIL, 1984, p. 859; Meron, *Human Rights in Internal Strife*, and Meron, 'On the Inadequate Reach of Humanitarian and Human Rights Law and the Need for a New Instrument', 77 AJIL, 1983, p. 589, and T. Meron and A. Rosas, 'A Declaration of Minimum Humanitarian Standards', 85 AJIL, 1991, p. 375.

[161] As to international human rights law, see generally above, chapter 6. Problems centre upon the situation where humanitarian law does not apply since the threshold criteria for applicability have not been reached; where the state in question is not a party to the relevant instrument; where derogation from the specified standards is involved as a consequence of the declaration of a state of emergency, and where the party concerned is not a government: see A. Eide, A. Rosas and T. Meron, 'Combating Lawlessness in Gray Zone Conflicts Through Minimum Humanitarian Standards', 89 AJIL, 1995, pp. 215, 217.

[162] This was reprinted in the Report of the UN Sub-Commission: see E/CN.4/1995/116 (1995) and UN Commission on Human Rights resolution 1995/29 and E/CN.4/1995/81 and 116. See also T. Meron and A. Rosas, 'Current Development: A Declaration of Minimum Humanitarian Standards', 85 AJIL, 1991, pp. 375, 375–7.

[163] Article 3.

[164] See also the Declaration for the Protection of War Victims, 1993, A/48/742, Annex.

Enforcement of humanitarian law[165]

Parties to the 1949 Geneva Conventions and to Protocol I, 1977, undertake to respect and to ensure respect for the instrument in question,[166] and to disseminate knowledge of the principles contained therein.[167] A variety of enforcement methods also exist, although the use of reprisals has been prohibited.[168] One of the means of implementation is the concept of the Protecting Power, appointed to look after the interests of nationals of one party to a conflict under the control of the other, whether as prisoners of war or occupied civilians.[169] Sweden and Switzerland performed this role during the Second World War. Such a Power must ensure that compliance with the relevant provisions has been effected and that the system acts as a form of guarantee for the protected person as well as a channel of communication for him with the state of which he is a national. The drawback of this system is its dependence upon the consent of the parties involved. Not only must the Protecting Power be prepared to act in that capacity, but both the state of which the protected person is a national and the state holding such persons must give their consent for the system to operate.[170] Since the role is so central to the enforcement and working of humanitarian law, it is a disadvantage for it to be subject to state sovereignty and consent. It only requires the holding state to refuse its co-operation for this structure of implementation to be greatly weakened, leaving only reliance upon voluntary operations. This has occurred on a number of occasions, for example the Chinese refusal to consent to the appointment of a Protecting Power with regard to its conflict with India in 1962, and the Indian refusal, of 1971 and subsequently, with regard to Pakistani prisoners of war in its charge.[171] Protocol I also provides for an International Fact-Finding Commission for competence to inquire into grave breaches[172] of the Geneva Conventions and that Protocol or other

[165] See e.g. UK, *Manual*, chapter 16, and Best, *War and Law*, pp. 370 ff.

[166] Common article 1.

[167] See e.g. articles 127 and 144 of the Third and Fourth Geneva Conventions, article 83 of Protocol I and article 19 of Protocol II.

[168] See e.g. articles 20 and 51(6) of Protocol I.

[169] See e.g. Draper, 'Implementation and Enforcement', pp. 13 ff.

[170] See articles 8, 8, 8 and 9 of the Four Geneva Conventions, 1949, respectively.

[171] Note that the system did operate in the Falklands conflict, with Switzerland acting as the Protecting Power of the UK and Brazil as the Protecting Power of Argentina: see e.g. Levie, 'Falklands Crisis', pp. 68–9.

[172] See articles 50, 51, 130 and 147 of the four 1949 Conventions respectively and article 85 of Protocol I, 1977. A Commission of Experts was established in 1992 to investigate violations of international humanitarian law in the territory of the Former Yugoslavia:

serious violations, and to facilitate through its good offices the 'restoration of an attitude of respect' for these instruments.[173] The parties to a conflict may themselves, of course, establish an ad hoc inquiry into alleged violations of humanitarian law.[174]

It is, of course, also the case that breaches of international law in this field may constitute war crimes or crimes against humanity or even genocide for which universal jurisdiction is provided.[175] Article 6 of the Charter of the Nuremberg Tribunal, 1945, for example, includes as war crimes for which there is to be individual responsibility the murder, ill-treatment or deportation to slave labour of the civilian population of an occupied territory; the ill-treatment of prisoners of war; the killing of hostages and the wanton destruction of cities, towns and villages.[176]

A great deal of valuable work in the sphere of humanitarian law has been accomplished by the International Red Cross.[177] This indispensable organisation consists of the International Committee of the Red Cross (ICRC), over 100 national Red Cross (or Red Crescent) societies with a League co-ordinating their activities, and conferences of all these elements every four years. The ICRC is the most active body and has a wide-ranging series of functions to perform, including working for the application of the Geneva Conventions and acting in natural and man-made disasters. It has operated in a large number of states, visiting prisoners of war[178] and otherwise functioning to ensure the implementation of humanitarian law.[179] It operates in both international and internal armed conflict

see Security Council resolution 780 (1992). See also the Report of the Commission of 27 May 1994, S/1994/674.

173 Article 90, Protocol I, 1977.

174 Articles 52, 53, 132 and 149 of the four 1949 Conventions respectively.

175 See e.g. Draper, 'Implementation and Enforcement', pp. 35 ff. Note also that grave breaches are to be the subject of sanction.

176 See further, with regard to the statutes of the various war crimes tribunals, above, chapters 8 and 12. Note also the UN Compensation Commission dealing with compensation for victims of Iraq's invasion of Kuwait in 1990, above, chapter 18, p. 1045.

177 See e.g. G. Willemin and R. Heacock, *The International Committee of the Red Cross*, The Hague, 1984, and D. Forsythe, 'The Red Cross as Transnational Movement', 30 *International Organisation*, 1967, p. 607. See also Best, *War and Law*, pp. 347 ff.

178 See e.g. articles 126 and 142 of the Third and Fourth Geneva Conventions respectively.

179 The International Court in the *Construction of a Wall* case, ICJ Reports, 2004, pp. 136, 175–6; 129 ILR, pp. 37, 94, referred to the 'special position' of the ICRC with regard to the Fourth Geneva Convention, while the Eritrea–Ethiopia Claims Commission in the Partial Award, Prisoners of War, Ethiopia's Claim 4, 1 July 2003, paras. 58 and 61–2, noted that the ICRC had been assigned significant responsibilities in a number of articles of the Third Geneva Convention (with which it was concerned) both as 'a humanitarian organization providing relief and as an organization providing necessary and vital external scrutiny of

situations. One of the largest operations it has undertaken since 1948 related to the Nigerian civil war, and in that conflict nearly twenty of its personnel were killed on duty. The ICRC has since been deeply involved in the Yugoslav situation and indeed, in 1992, contrary to its usual confidentiality approach, it felt impelled to speak out publicly against the grave breaches of humanitarian law taking place. The organisation has also been involved in Somalia (where its activities included visiting detainees held by the UN forces), Rwanda, Afghanistan, Sri Lanka[180] and in Iraq. Due to circumstances, the ICRC must act with tact and discretion and in many cases states refuse their co-operation. It performed a valuable function in the exchange of prisoners after the 1967 and 1973 Middle East wars, although for several years Israel did not accept the ICRC role regarding the Arab territories it occupied.[181]

Conclusion

The ICRC formulated the following principles as a guide to the relevant legal rules:

1. Persons *hors de combat* and those who do not take a direct part in hostilities are entitled to respect for their lives and physical and moral integrity. They shall in all circumstances be protected and treated humanely without any adverse distinctions.
2. It is forbidden to kill or injure an enemy who surrenders or who is *hors de combat*.
3. The wounded and sick shall be collected and cared for by the party to the conflict which has them in its power. Protection also covers medical personnel, establishments, transports and *matériel*. The emblem of the red cross (red crescent, red lion and sun) is the sign of such protection and must be respected.
4. Captured combatants and civilians under the authority of an adverse party are entitled to respect for their lives, dignity, personal rights and convictions. They shall be protected against all acts of violence and

the treatment of POWs' and further emphasised that the provisions requiring scrutiny of the treatment of, and access to, POWs had become part of customary international law.

[180] See e.g. *Challenges of the Nineties: ICRC Special Report on Activities 1990–1995*, Geneva, 1995. Between 1990 and 1994, over half a million prisoners in over sixty countries were visited by ICRC delegates, *ibid.*

[181] See generally *Annual Report of the ICRC*, 1982. See also 'Action by the ICRC in the Event of Breaches of International Humanitarian Law', *International Review of the Red Cross*, March–April 1981, p. 1.

reprisals. They shall have the right to correspond with their families and to receive relief.

5. Everyone shall be entitled to benefit from fundamental judicial guarantees. No one shall be held responsible for an act he has not committed. No one shall be subjected to physical or mental torture, corporal punishment or cruel or degrading treatment.
6. 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.
7. Parties to a conflict shall at all times distinguish between the civilian population and combatants in order to spare civilian population and property. Neither the civilian populations as such nor civilian persons shall be the object for attack. Attacks shall be directed solely against military objectives.[182]

In addition, the ICRC has published the following statement with regard to non-international armed conflicts:

A. General Rules

1. The obligation to distinguish between combatants and civilians is a general rule applicable in non-international armed conflicts. It prohibits indiscriminate attacks.
2. The prohibition of attacks against the civilian population as such or against individual civilians is a general rule applicable in non-international armed conflicts. Acts of violence intended primarily to spread terror among the civilian population are also prohibited.
3. The prohibition of superfluous injury or unnecessary suffering is a general rule applicable in non-international armed conflicts. It prohibits, in particular, the use of means of warfare which uselessly aggravate the sufferings of disabled men or render their death inevitable.
4. The prohibition to kill, injure or capture an adversary by resort to perfidy is a general rule applicable in non-international armed conflicts; in a non-international armed conflict, acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or obliged to accord protection under the rules of international law applicable in non-international armed conflicts, with intent to betray that confidence, shall constitute perfidy.

[182] See *International Review of the Red Cross*, Sept.–Oct. 1978, p. 247. See also Green, *Armed Conflict*, pp. 355–6.

5. The obligation to respect and protect medical and religious personnel and medical units and transports in the conduct of military operations is a general rule applicable in non-international armed conflicts.
6. The general rule prohibiting attacks against the civilian population implies, as a corollary, the prohibition of attacks on dwellings and other installations which are used only by the civilian population.
7. The general rule prohibiting attacks against the civilian population implies, as a corollary, the prohibition to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population.
8. The general rule to distinguish between combatants and civilians and the prohibition of attack against the civilian population as such or against individual civilians implies, in order to be effective, that all feasible precautions have to be taken to avoid injury, loss or damage to the civilian population.[183]

Suggestions for further reading

I. Detter, *The Law of War*, 2nd edn, Cambridge, 2000
Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, Cambridge, 2004
L. Green, *The Contemporary Law of Armed Conflict*, 2nd edn, Manchester, 2000
UK Ministry of Defence, *Manual on the Law of Armed Conflict*, Oxford, 2004

[183] See *International Review of the Red Cross*, Sept.–Oct. 1989, p. 404. See also Green, *Armed Conflict*, p. 356. Part B of this Declaration dealing with Prohibitions and Restrictions on the Use of Certain Weapons has been omitted. It may be found at the above references.

22

The United Nations

The UN system

The United Nations[1] was established following the conclusion of the Second World War and in the light of Allied planning and intentions expressed during that conflict.[2] The purposes of the UN are set out in article 1 of the Charter as follows:

> 1. To maintain international peace and security, and to that end, to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;
>
> 2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;
>
> 3. To achieve international co-operation in solving international problems of an economic, social, cultural or humanitarian character, and in

[1] See e.g. *The Charter of the United Nations* (ed. B. Simma), 2nd edn, Oxford, 2002; J. P. Cot, A. Pellet and M. Forteau, *La Charte des Nations Unies: Commentaire Article par Article*, 3rd edn, Paris, 2005; S. Chesterman, T. M. Franck and D. M. Malone, *Law and Practice of the United Nations*, Oxford, 2008; *La Charte des Nations Unies, Constitution Mondiale?* (eds. R. Chemain and A. Pellet), Paris 2006; B. Conforti, *The Law and Practice of the United Nations*, 2nd edn, The Hague, 2000; *United Nations Legal Order* (eds. O. Schachter and C. C. Joyner), Cambridge, 2 vols., 1995; *Bowett's Law of International Institutions* (eds. P. Sands and P. Klein), 5th edn, London, 2001, chapter 2; *The United Nations and a Just World Order* (eds. R. A. Falk, S. S. Kim and S. H. Mendlovitz), Boulder, 1991; B. Broms, *United Nations*, Helsinki, 1990; E. Luard, *A History of the United Nations*, London, 1982, vol. I; R. Higgins, *The Development of International Law Through the Political Organs of the United Nations*, Oxford, 1963; *United Nations, Divided World* (eds. A. Roberts and B. Kingsbury), 2nd edn, Oxford, 1993; L. M. Goodrich, *The United Nations in a Changing World*, New York, 1974; the *Bertrand Report*, 1985, A/40/988, and L. M. Goodrich, E. Hambro and A. P. Simons, *Charter of the United Nations*, 3rd edn, New York, 1969. See also www.un.org/.

[2] See UNCIO, San Francisco, 15 vols., 1945.

promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and

4. To be a centre for harmonizing the actions of nations in the attainment of these common ends.

While the purposes are clearly wide-ranging, they do provide a useful guide to the comprehensiveness of its concerns. The question of priorities as between the various issues noted is constantly subject to controversy and change, but this only reflects the continuing pressures and altering political balances within the organisation. In particular, the emphasis upon decolonisation, self-determination and apartheid mirrored the growth in UN membership and the dismantling of the colonial empires, while increasing concern with economic and developmental issues is now very apparent and clearly reflects the adverse economic conditions in various parts of the world.

The Charter of the United Nations is not only the multilateral treaty which created the organisation and outlined the rights and obligations of those states signing it, it is also the constitution of the UN, laying down its functions and prescribing its limitations.[3] Foremost amongst these is the recognition of the sovereignty and independence of the member states. Under article 2(7) of the Charter, the UN may not intervene in matters essentially within the domestic jurisdiction of any state (unless enforcement measures under Chapter VII are to be applied). This provision has inspired many debates in the UN, and it came to be accepted that colonial issues were not to be regarded as falling within the article 2(7) restriction. Other changes have also occurred, demonstrating that the concept of domestic jurisdiction is not immutable but a principle of international law delineating international and domestic spheres of operations. As a principle of international law it is susceptible of change through international law and is not dependent upon the unilateral determination of individual states.[4]

In addition to the domestic jurisdiction provision, article 2 also lays down a variety of other principles in accordance with which both the UN and the member states are obliged to act. These include the assertion that the UN is based upon the sovereign equality of states and the principles of fulfilment in good faith of the obligations contained in the Charter, the peaceful settlement of disputes and the prohibition on the use of force.

[3] See Chesterman *et al.*, *United Nations*, pp. 4 ff. [4] See above, chapter 12, p. 647.

It is also provided that member states must assist the organisation in its activities taken in accordance with the Charter and must refrain from assisting states against which the UN is taking preventive or enforcement action.

The UN has six principal organs, these being the Security Council, General Assembly, Economic and Social Council, Trusteeship Council, Secretariat and International Court of Justice.[5]

The Security Council[6]

The Council was intended to operate as an efficient executive organ of limited membership, functioning continuously. It was given primary responsibility for the maintenance of international peace and security.[7] The Security Council consists of fifteen members, five of them being permanent members (USA, UK, Russia, China and France). These permanent members, chosen on the basis of power politics in 1945, have the veto. Under article 27 of the Charter, on all but procedural matters, decisions of the Council must be made by an affirmative vote of nine members, including the concurring votes of the permanent members.

A negative vote by any of the permanent members is therefore sufficient to veto any resolution of the Council, save with regard to procedural questions, where nine affirmative votes are all that is required. The veto was written into the Charter in view of the exigencies of power. The USSR, in particular, would not have been willing to accept the UN as it was envisaged without the establishment of the veto to protect it from the Western bias of the Council and General Assembly at that time.[8] In practice, the veto was exercised by the Soviet Union on a considerable

[5] See e.g. *The United Nations at the Millennium* (eds. P. Taylor and A. J. R. Groom), London, 2000. As to the administration of territory by the UN, see above, chapter 5, p. 230.

[6] See e.g. C. Denis, *Le Pouvoir Normatif du Conseil de Sécurité des Nations Unies: Portée et Limites*, Brussels, 2004; M. Hilaire, *United Nations Law and the Security Council*, Aldershot, 2005; *The UN Security Council from the Cold War to the 21st Century* (ed. D. M. Malone), Boulder, 2004; Cot *et al.*, *Charte*, pp. 867 ff.; S. Bailey and S. Daws, *The Procedure of the UN Security Council*, Oxford, 1998; S. Bailey, *Voting in the Security Council*, Oxford, 1969, and Bailey, *The Procedure of the Security Council*, 2nd edn, Oxford, 1988; *Bowett's International Institutions*, p. 39, and R. Higgins, 'The Place of International Law in the Settlement of Disputes by the Security Council', 64 AJIL, 1970, p. 1. See also M. C. Wood, 'Security Council Working Methods and Procedure: Recent Developments', 45 ICLQ, 1996, p. 150.

[7] Articles 23, 24, 25 and 28 of the UN Charter.

[8] See e.g. H. G. Nicholas, *The United Nations as a Political Institution*, Oxford, 1975, pp. 10–13.

number of occasions, and by the USA less frequently, and by the other members fairly rarely. In more recent years, the exercise of the veto by the US has increased. The question of how one distinguishes between procedural and non-procedural matters has been a highly controversial one. In the statement of the Sponsoring Powers at San Francisco, it was declared that the issue of whether or not a matter was procedural was itself subject to the veto.[9] This 'double-veto' constitutes a formidable barrier. Subsequent practice has interpreted the phrase 'concurring votes of the permanent members' in article 27 in such a way as to permit abstentions. Accordingly, permanent members may abstain with regard to a resolution of the Security Council without being deemed to have exercised their veto against it.[10]

It does not, of course, follow that the five supreme powers of 1945 will continue to be the only permanent members of the Council nor the only ones with a veto.[11] However, the complicated mechanisms for amendment of the Charter,[12] coupled with the existence of the veto, make any change difficult. The question of expansion of Council membership has been before the UN for an appreciable period and various proposals have been made.[13] One proposal would provide for six new permanent seats with

[9] *Repertory of Practice of UN Organs*, New York, 1955, vol. II, p. 104. See also Simma, *Charter*, p. 489.

[10] See e.g. A. Stavropoulos, 'The Practice of Voluntary Abstentions by Permanent Members of the Security Council under Article 27(3) of the Charter', 61 AJIL, 1967, p. 737. See also the *Namibia* case, ICJ Reports, 1971, pp. 16, 22; 49 ILR, pp. 2, 12, recognising this practice as lawful.

[11] Of the ten non-permanent seats, five are allocated to Afro-Asian states, one to Eastern Europe, two to Latin America, and two to Western European and other powers: see General Assembly resolution 1991 (XVIII).

[12] See articles 108 and 109 of the Charter, which require *inter alia* the consent of all the permanent members to any amendment to or alteration of the Charter. It may indeed be suggested that the speed with which Russia was accepted as the continuance of the former USSR with regard to the permanent seat on the Security Council partly arose out of a desire by the Council to avoid opening up the question of membership for general debate: see F. Kirgis, *International Organisations in their Legal Setting*, 2nd edn, St Paul, 1993, pp. 188 ff. See also above, chapter 17, p. 960.

[13] See e.g. the Report of the High Level Panel on Threats, Challenges and Change, 2004, A/59/565, especially paras. 244 ff. detailing the two proposals made (models A and B respectively) and Secretary-General, *In Larger Freedom*, A/59/2005, paras. 167 ff. The General Assembly has also been considering the question of the 'equitable representation on and increase in the membership of the Security Council' and an open-ended working group was established in 1993 to consider the matter further: see General Assembly resolution 48/26. In 2007, the President of the General Assembly appointed five facilitators, who reported that expansion of the Council needed to be based both on the contribution of member states to the maintenance of international peace and security and to the other

no veto and three new non-permanent seats. Another would provide for no new permanent seats but a new category of eight four-year renewable-term seats and one new two-year non-permanent and non-renewable seat. States usually seen as candidates for permanent positions on the Council include Germany, India, Japan and Brazil, but others are also keen to be considered and no consensus is yet in sight.

The Council has currently three permanent committees, being a Committee of Experts on Rules of Procedure, a Committee on Admission of New Members and a Committee on Council meeting away from Headquarters. There are also a number of ad hoc committees, such as the Governing Council of the United Nations Compensation Commission established by Security Council resolution 692 (1991), the Counter-Terrorism Committee[14] and the Committee established by resolution 1540 (2004), which obliges states *inter alia* to refrain from supporting by any means non-state actors from developing, acquiring, manufacturing, possessing, transporting, transferring or using nuclear, chemical or biological weapons and their delivery systems. There are also a number of sanctions committees covering particular states under sanction as well as the committee established under resolution 1267 (1999) concerning persons and bodies associated with Al-Qaida and the Taliban.[15] Further subsidiary bodies include the Peacebuilding Commission, the UN Compensation Commission and the International Criminal Tribunals for the Former Yugoslavia and for Rwanda.

The Security Council acts on behalf of the members of the organisation as a whole in performing its functions, and its decisions (but not its recommendations)[16] are binding upon all member states.[17] Its powers are concentrated in two particular categories, the peaceful settlement of disputes and the adoption of enforcement measures. By these means, the Council conducts its primary task, the maintenance of international peace

purposes of the United Nations and on equitable geographical distribution, while addressing the underrepresentation of developing countries as well as small states, A/61/47, pp. 11 ff. See also Chesterman *et al.*, *United Nations*, chapter 17; A. Blanc Altemir and B. Real, 'La Réforme du Conseil de Sécurité des Nations Unies: Quelle Structure et Quels Membres?', 110 RGDIP, 2006, p. 801, and Y. Blum, 'Proposals for UN Security Council Reform', 99 AJIL, 2005, p. 632.

[14] Established under resolution 1373 (2001). See above, chapter 20, p. 1162.

[15] As amended by a number of subsequent resolutions, including resolution 1735 (2006): see further above, chapter 20, p. 1163, note 225.

[16] Compare, for example, article 36 of the Charter (peaceful settlement) with articles 41, 42 and 44 (enforcement actions).

[17] Article 25 of the Charter.

and security. However, the Council also has a variety of other functions. In the case of trusteeship territories, for example, designated strategic areas fall within the authority of the Security Council rather than the General Assembly,[18] while the admission, suspension and expulsion of member states is carried out by the General Assembly upon the recommendation of the Council.[19] Amendments to the UN Charter require the ratification of all the permanent members of the Council (as well as adoption by a two-thirds vote of the Assembly and ratification by two-thirds of UN members).[20] The judges of the International Court are elected by the Assembly and Council.[21]

Until the end of the Cold War, the Council generally did not fulfil the expectations held of it, although resolution 242 (1967) laid down the basis for negotiations for a Middle East peace settlement and is regarded as the most authoritative expression of the principles to be taken into account.[22] With the development of the *glasnost* and *perestroika* policies in the Soviet Union in the late 1980s, increasing co-operation with the US ensued and reached its highest point as the Kuwait crisis evolved.[23] After the attacks on the US of 11 September 2001, further activities ensued, including the adoption of resolutions 1368 and 1373 of 2001 condemning international terrorism, reaffirming the right of self-defence and establishing a Counter-Terrorism Committee. However, the failure of the Council to agree upon measures consequent to resolution 1441 (2002) concerning Iraq's possession of weapons of mass destruction contrary to resolution 687 (1991) and others precipitated a major division within the Council. The US and the UK commenced military operations against Iraq in late March 2003 without express Security Council authorisation and against the opposition of other permanent members.[24] However, despite this crisis, the Council has begun to assume a more proactive role in

[18] See articles 82 and 83 of the Charter.

[19] See articles 4, 5 and 6 of the Charter. The restoration of the rights and privileges of a suspended member is by the Council, article 5.

[20] Article 108. A similar requirement operates with regard to alteration of the Charter by a General Conference of Members: see article 109.

[21] Article 4 of the Statute of the International Court of Justice.

[22] Reaffirmed in resolution 338 (1973). See generally I. Pogany, *The Security Council and the Arab–Israeli Conflict*, Aldershot, 1984, chapter 5, and A. Shapira, 'The Security Council Resolution of November 22, 1967 – Its Legal Nature and Implications', 4 *Israel Law Review*, 1969, p. 229.

[23] See below, p. 1243. See also *The Kuwait Crisis: Basic Documents* (eds. E. Lauterpacht, C. Greenwood, M. Weller and D. Bethlehem), Cambridge, 1991.

[24] See further below, p. 1255.

certain areas. The effect of resolutions 1373 (2001) and 1540 (2004) with the establishment of monitoring committees with significant authority, together with the increasing use of sanctions against specific states, has led some to talk of legislative activity.[25]

The failure of the Council in its primary responsibility to preserve world peace stimulated a number of other developments. It encouraged the General Assembly to assume a residual responsibility for maintaining international peace and security, it encouraged the Secretary-General to take upon himself a more active role and it hastened the development of peacekeeping operations. It also encouraged in some measure the establishment of the military alliances, such as NATO and the Warsaw Pact, which arose as a consequence of the onset of the Cold War and constituted, in effect, regional enforcement systems bypassing the Security Council.

The General Assembly [26]

The General Assembly is the parliamentary body of the UN organisation and consists of representatives of all the member states, of which there are currently 192. Membership of the UN, as provided by article 4 of the Charter, is open to:

> all other peace-loving states which accept the obligations contained in the present Charter and, in the judgment of the organisation, are able and willing to carry out these obligations,

and is effected by a decision of the General Assembly upon the recommendation of the Security Council.[27] Other changes in membership may

[25] See e.g. J. E. Alvarez, 'Hegemonic International Law Revisited', 97 AJIL, 2003, p. 873, and S. Talmon, 'The Security Council of World Legislature', 99 AJIL, 2005, p. 175. See further as to these resolutions, above, chapter 20, p. 1208.

[26] See e.g. *Bowett's International Institutions*, pp. 27 ff.; Cot *et al.*, *Charte*, pp. 631 ff.; Nicholas, *United Nations*, chapter 5; B. Finley, *The Structure of the United Nations General Assembly*, Dobbs Ferry, 3 vols., 1977, and S. Bailey, *The General Assembly of the United Nations*, London, 1964.

[27] An advisory opinion by the International Court held that only the conditions enumerated in article 4 were to be taken into account in considering a request for membership: the *Conditions of Admission of a State to Membership of the United Nations* case, ICJ Reports, 1948, p. 57; 15 AD, p. 333. See also the *Competence of the General Assembly for the Admission of a State to the United Nations* case, ICJ Reports, 1950, p. 4; 17 ILR, p. 326, where the Court held that the General Assembly alone could not effect membership in the absence of a recommendation by the Security Council. See also Chesterman *et al.*, *United Nations*, chapter 5, and Cot *et al.*, *Charte*, pp. 511 ff.

take place. For example, in 1991, Byelorussia informed the UN that it had changed its name to Belarus, while the Czech and Slovak Federal Republic ceased to exist on 31 December 1992 to be replaced by two new states (the Czech Republic and Slovakia), accepted as UN members on 19 January 1993. The former German Democratic Republic ceased to exist and its territory was absorbed into the Federal Republic of Germany as from 3 October 1990, while 'The Former Yugoslav Republic of Macedonia' was admitted to the UN on 8 April 1993 under that unusual appellation. Russia was regarded as the continuator of the Soviet Union, so no action was required. In November 2000, the Federal Republic of Yugoslavia was admitted as a new member and in February 2003 it changed its name to Serbia and Montenegro. In 2006, Montenegro seceded and became a member of the UN in its own right.[28] Membership of the UN may be suspended under article 5 of the Charter by the General Assembly, upon the recommendation of the Security Council, where the member state concerned is the object of preventive or enforcement action by the Security Council. Article 6 allows for expulsion of a member by the General Assembly, upon the recommendation of the Security Council, where the member state has persistently violated the Principles contained in the Charter.[29]

Voting in the Assembly is governed by article 18, which stipulates that each member has one vote only, despite widespread disparities in populations and resources between states, and that decisions on 'important questions', including the admission of new members and recommendations relating to international peace and security, are to be made by a two-thirds majority of members present and voting.[30]

[28] See as to succession issues, Chesterman *et al.*, *United Nations*, pp. 173 ff. and see further as to Yugoslavia and the UN, above, chapter 17, p. 962.

[29] See article 2. See also as to the question of the refusal of credentials to General Assembly delegations e.g. Chesterman *et al.*, *United Nations*, pp. 191 ff.; Simma, *Charter*, pp. 253 ff.; D. Ciobanu, 'Credentials of Delegations and Representation of Member States at the United Nations', 25 ICLQ, 1976, p. 351, and M. Halberstam, 'Excluding Israel from the General Assembly by a Rejection of its Credentials', 78 AJIL, 1984, p. 179.

[30] See e.g. G. Clarke and L. B. Sohn, *World Peace Through World Law*, Cambridge, 1958, pp. 19–30; *The Strategy of World Order* (eds. R. A. Falk and S. H. Mendlovitz), New York, 1966, vol. III, pp. 272 ff., and L. B. Sohn, *Cases on United Nations Law*, 2nd edn, Brooklyn, 1967, pp. 248 ff. Note also the emergence of bloc voting, whereby, for example, the Afro-Asian states agree to adopt a common stance on particular issues, which has been a constant feature of the work of the Assembly.

Except for certain internal matters, such as the budget,[31] the Assembly cannot bind its members. It is not a legislature in that sense, and its resolutions are purely recommendatory. Such resolutions, of course, may be binding if they reflect rules of customary international law and they are significant as instances of state practice that may lead to the formation of a new customary rule, but Assembly resolutions in themselves cannot establish binding legal obligations for member states.[32] The Assembly is essentially a debating chamber, a forum for the exchange of ideas and the discussion of a wide-ranging category of problems. It meets in annual sessions, but special sessions may be called by the Secretary-General at the request of the Security Council or a majority of UN members.[33] Emergency special sessions may also be called by virtue of the Uniting for Peace machinery.[34] Ten such sessions have been convened, covering situations ranging from various aspects of the Middle East situation in 1956, 1958, 1967, 1980 and 1982 and a rolling session commencing in 1997, to Afghanistan in 1980 and Namibia in 1981.

The Assembly has established a variety of organs covering a wide range of topics and activities. It has six main committees that cover respectively disarmament and international security; economic and financial; social, humanitarian and cultural; special political and decolonisation; administrative and budgetary; and legal matters.[35] In addition, there is a procedural General Committee dealing with agenda issues and a Credentials Committee. There are also two Standing Committees dealing with inter-sessional administrative and budgetary questions and contributions, and a number of subsidiary, ad hoc and other bodies dealing with relevant topics, including the International Law Commission, the UN Commission on International Trade Law, the UN Institute for Training and Research, the Council for Namibia and the UN Relief and Works

[31] Article 17 of the Charter. [32] See further above, chapter 3, p. 114.

[33] Article 20 of the Charter. Such special sessions have been held, for example, to discuss the issues of Palestine in 1947–8, Namibia (South West Africa) in 1967, 1978 and 1986, and to debate the world economic order in 1974, 1975 and 1990. Other issues covered include financing the UN Interim Force in Lebanon in 1978, apartheid in 1989, disarmament in 1978, 1982 and 1988, drug abuse in 1990 and 1998, small island developing states in 1999, women in 2000, HIV/AIDS in 2001, children in 2002 and commemoration of the sixtieth anniversary of the liberation of the concentration camps in 2005.

[34] See below, p. 1272.

[35] See e.g. Broms, *United Nations*, pp. 198 ff. Note that in 1993, the Special Political Committee was merged with the Fourth Committee on Decolonisation: see General Assembly resolution 47/233.

Agency.[36] The Human Rights Council, established in 2006, is elected by and reports to the Assembly.[37]

Other principal organs [38]

Much of the work of the United Nations in the economic and social spheres of activity is performed by the Economic and Social Council (ECOSOC). It can discuss a wide range of matters, but its powers are restricted and its recommendations are not binding upon UN member states. It consists of fifty-four members elected by the Assembly for three-year terms with staggered elections, and each member has one vote.[39] The Council may, by article 62, initiate or make studies upon a range of issues and make recommendations to the General Assembly, the members of the UN and to the relevant specialised agencies. It may prepare draft conventions for submission to the Assembly and call international conferences. The Council has created a variety of subsidiary organs, ranging from nine functional commissions,[40] to five regional commissions[41] and a number of standing committees and expert bodies.[42] The Council also runs a variety of programmes including the Environment Programme and the Drug Control Programme, and has established a number of other bodies such as the Office of the UN High Commissioner for Refugees and the UN Conference on Trade and Development. Its most prominent function has been in establishing a wide range of economic, social and human rights bodies.[43]

[36] See e.g. *2001 United Nations Handbook*, Wellington, 2001, pp. 27 ff. There is also an Investments Committee and a Board of Auditors.

[37] See above, chapter 6, p. 306.

[38] See e.g. *2001 United Nations Handbook*, pp. 83 ff., and Broms, *United Nations*, chapter 11. See also *Bowett's International Institutions*, p. 55; W. R. Sharp, *The UN Economic Council*, New York, 1969, and above, chapter 6, p. 302.

[39] Article 61 of the Charter. Note that under article 69, any member of the UN may be invited to participate in its deliberations without a vote. See also Cot *et al.*, *Charte*, pp. 1581 ff.

[40] These include the Statistical Commission, the Commission on Human Rights which came to an end in 2006, the Commission on the Status of Women and the Commission on Sustainable Development.

[41] On Africa, Asia and the Pacific, Europe, Latin America and the Caribbean, and Western Asia.

[42] These include the Commission on Transnational Corporations; the Commission on Human Settlements; the Committee on Natural Resources; the Committee on Economic, Social and Cultural Rights and the Committee on New and Renewable Sources of Energy and on Energy for Development.

[43] ECOSOC is considering a range of reforms, including holding annual ministerial substantive reviews (AMR) to assess the progress made in the implementation of the outcomes

The Trusteeship Council[44] was established in order to supervise the trust territories created after the end of the Second World War.[45] Such territories were to consist of mandated territories, areas detached from enemy states as a result of the Second World War and other territories voluntarily placed under the trusteeship system by the administering authority (of which there have been none).[46] The only former mandated territory which was not placed under the new system or granted independence was South West Africa.[47] With the independence of Palau, the last remaining trust territory, on 1 October 1994, the Council suspended operation on 1 November that year.[48]

The Secretariat of the UN[49] consists of the Secretary-General and his staff, and constitutes virtually an international civil service. The staff are appointed by article 101 upon the basis of efficiency, competence and integrity, 'due regard' being paid 'to the importance of recruiting the staff on as wide a geographical basis as possible'. All member states have undertaken, under article 100, to respect the exclusively international character of the responsibilities of the Secretary-General and his staff,

of major UN conferences and summits and internationally agreed development goals: see General Assembly resolution 61/16, 2006, and ECOSOC resolution E/2007/274, 2007.

44 See e.g. Cot *et al.*, *Charte*, pp. 1887 ff.; Broms, *United Nations*, chapter 12; *Bowett's International Institutions*, p. 63, and C. E. Toussaint, *The Trusteeship System of the United Nations*, New York, 1956.

45 By article 83 of the Charter, the functions of the UN relating to strategic areas were to be exercised by the Security Council (where each permanent member has a veto) rather than, as normal for trust territories, under article 85 by the General Assembly with the assistance of the Trusteeship Council. The last trust territory was the strategic trust territory of the Pacific Islands, administered by the US.

46 Article 77 of the Charter. 47 See above, chapter 5, p. 225.

48 See e.g. *Basic Facts About the United Nations*, E.95.I.3.1 and Press Release ORG/1211/Rev.1. Note that the UN Secretary-General has called for its formal termination, but this would require an amendment of the Charter: see A/49/1. See also C. L. Willson, 'Changing the Charter: The United Nations Prepares for the Twenty-First Century', 90 AJIL, 1996, pp. 115, 121–2.

49 See e.g. Chesterman *et al.*, *United Nations*, chapter 4; Cot *et al.*, *Charte*, pp. 2023 ff.; S. Bailey, 'The United Nations Secretariat' in *The Evolution of International Organisations* (ed. E. Luard), London, 1966, p. 92, and Bailey, *The Secretariat of the UN*, London, 1962; T. Meron, *The UN Secretariat*, Lexington, 1977; S. Schwebel, *The Secretary-General of the United Nations*, Cambridge, MA, 1952, and Schwebel, 'The International Character of the Secretariat of the United Nations' and 'Secretary-General and Secretariat' in *Justice in International Law*, Cambridge, 1994, pp. 248 and 297 respectively; A. W. Rovine, *The First Fifty Years: The Secretary General in World Politics, 1920–1970*, Leiden, 1970, and generally *Public Papers of the Secretaries-General of the United Nations* (eds. A. W. Cordier and W. Foote, and A. W. Cordier and M. Harrelson), New York, 8 vols., 1969–77. See also Simma, *Charter*, pp. 1191 ff., and below, p. 1222.

who are neither to seek nor receive instructions from any other authority but the UN organisation itself.

Under article 97, the Secretary-General is appointed by the General Assembly upon the unanimous recommendation of the Security Council and constitutes the chief administrative officer of the UN. He (or she) must accordingly be a personage acceptable to all the permanent members and this, in the light of effectiveness, is vital. Much depends upon the actual personality and outlook of the particular office holder, and the role played by the Secretary-General in international affairs has tended to vary according to the character of the person concerned. An especially energetic part was performed by Dr Hammerskjöld in the late 1950s and very early 1960s until his untimely death in the Congo,[50] but since that time a rather lower profile has been maintained by the occupants of that position. The current holder of the office is Ban Ki-Moon of the Republic of Korea.

Apart from various administrative functions,[51] the essence of the Secretary-General's authority is contained in article 99 of the Charter, which empowers him to bring to the attention of the Security Council any matter which he feels may strengthen the maintenance of international peace and security, although this power has not often been used.[52] In practice, the role of Secretary-General has extended beyond the various provisions of the Charter. In particular, the Secretary-General has an important role in exercising good offices in order to resolve or contain international crises.[53] Additionally, the Secretary-General is in an important position to mark or possibly to influence developments. The publication of *An Agenda for Peace*[54] by Dr Boutros-Ghali and of *In Larger Freedom*[55] by Kofi Annan, for instance, constituted particularly significant events.

[50] See e.g. Bailey, 'United Nations Secretariat'.

[51] These include servicing a variety of organs, committees and conferences; co-ordinating the activities of the secretariat, the specialised agencies and other inter-governmental organisations; the preparation of studies and reports and responsibility for the preparation of the annual budget of the UN. Note that the Secretary-General also acts as depositary for a wide range of multinational treaties, and under article 98, submits an annual report on the work of the organisation.

[52] Article 99 was invoked, for example, in 1950 in the Korean war crisis, in 1960 in the Congo crisis and in 1979 with regard to the Iranian hostage issue: see *Yearbook of the UN*, 1979, pp. 307–12. See also S/13646 and S. Schwebel, 'The Origins and Development of Article 99 of the Charter' in *Justice in International Law*, p. 233.

[53] See further below, p. 1222.

[54] The Report of the Secretary-General Pursuant to the Statement Adopted by the Summit Meeting of the Security Council on 31 January 1992, New York, 1992.

[55] A/59/2005.

In many disputes, the functions assigned to the Secretary-General by the other organs of the United Nations have enabled him to increase the influence of the organisation.[56] One remarkable example of this occurred in the Congo crisis of 1960 and the subsequent Council resolution authorising the Secretary-General in very wide-ranging terms to take action.[57] Another instance of the capacity of the Secretary-General to take action was the decision of 1967 to withdraw the UN peacekeeping force in the Middle East, thus removing an important psychological barrier to war, and provoking a certain amount of criticism.

The sixth principal organ of the UN is the International Court of Justice, established in 1946 as the successor to the Permanent Court of International Justice.[58]

The peaceful settlement of disputes[59]

The League of Nations[60]

The provisions set out in the UN Charter are to a large degree based upon the terms of the Covenant of the League of Nations as amended in the light of experience. Article 12 of the Covenant declared that any dispute likely to lead to a conflict between members was to be dealt with in one of three ways: by arbitration, by judicial settlement or by inquiry by the Council of the League. Article 15 noted that the Council was to try to effect a settlement of the dispute in question, but if that failed, it was to publish a report containing the facts of the case and 'the recommendations which are deemed just and proper in regard thereto'. This report was not, however, binding upon the parties, but if it was a unanimous one the League members were not to go to war 'with any party to the dispute

[56] Article 98. See also J. Pérez de Cuéllar, 'The Role of the UN Secretary-General' in Roberts and Kingsbury, *United Nations, Divided World*, p. 125.

[57] See below, p. 1226. [58] See above, chapter 19.

[59] See e.g. M. Raman, *Dispute Settlement through the United Nations*, Oxford, 1977; J. G. Merrills, *International Dispute Settlement*, 4th edn, Cambridge, 2005, chapter 10; United Nations, *Handbook on the Peaceful Settlement of Disputes Between States*, New York, 1992; N. Bar-Yaacov, *The Handling of International Disputes by Means of Inquiry*, London, 1974, chapter 8; B. S. Murty, 'Settlement of Disputes' in *Manual of Public International Law* (ed. M. Sørensen), London, 1968, p. 673; E. Luard, *A History of the United Nations*, London, 1982, vol. I; Falk and Mendlovitz, *Strategy of World Order*, vol. III; *The United Nations* (eds. R. A. Falk and S. Mendlovitz), New York, 1966; Cot *et al.*, *Charte*, pp. 1047 ff.; N. D. White, *Keeping the Peace*, 2nd edn, Manchester, 1998.

[60] See generally, e.g. G. Scott, *The Rise and Fall of the League of Nations*, London, 1973, and Falk and Mendlovitz, *Strategy of World Order*, chapter 1.

which complies with the recommendations of the report'. If the report was merely a majority one, League members reserved to themselves 'the right to take such action as they shall consider necessary for the maintenance of right and justice'. In other words, in the latter case the Covenant did not absolutely prohibit the resort to war by members. Where a member resorted to war in disregard of the Covenant, then the various sanctions prescribed in article 16 might apply, although whether the circumstances in which sanctions might be enforced had actually arisen was a point to be decided by the individual members and not by the League itself. Sanctions were in fact used against Italy in 1935–6, but in a half-hearted manner due to political considerations by the leading states at the time.[61]

The United Nations system

The UN system is founded in constitutional terms upon a relatively clear theoretical distinction between the functions of the principal organs of the organisation. However, due to political conditions in the international order, the system failed to operate as outlined in the Charter and adjustments had to be made as opportunities presented themselves. The Security Council was intended to function as the executive of the UN, with the General Assembly as the parliamentary forum. Both organs could contribute to the peaceful settlement of disputes through relatively traditional mechanisms of discussion, good offices and mediation. Only the Security Council could adopt binding decisions and those through the means of Chapter VII, while acting to restore international peace and security. But the pattern of development has proved rather less conducive to clear categorisation. An influential attempt to detail the methods and mechanisms available to the UN in seeking to resolve disputes was made by the UN Secretary-General in the immediate aftermath of the demise of the Soviet Union and the unmistakable ending of the Cold War.

In *An Agenda for Peace*,[62] the Secretary-General, while emphasising that respect for the fundamental sovereignty and integrity of states constituted the foundation-stone of the organisation,[63] noted the rapid changes affecting both states individually and the international community as a

[61] See e.g. Scott, *Rise and Fall*, chapter 15.

[62] This was welcomed by the General Assembly in resolution 47/120. See also the Report of the Secretary-General on the Implementation of the Recommendations in the 1992 Report, A/47/965.

[63] *Ibid.*, p. 9.

whole and emphasised the role of the UN in securing peace. The Report sought to categorise the types of actions that the organisation was undertaking or could undertake. *Preventive Diplomacy* was action to prevent disputes from arising between states, to prevent existing disputes from escalating into conflicts and to limit the spread of the latter when they occur. This included efforts such as fact-finding, good offices and goodwill missions.[64] *Peacemaking* involves action to bring the hostile parties to agreement, utilising the peaceful means elaborated in Chapter VI of the Charter.[65] *Peacekeeping* is the deployment of a UN presence in the field.[66] *Peacebuilding* is action to identify and support structures that will assist peace.[67] *Peace Enforcement* is peacekeeping not involving the consent of the parties, which would rest upon the enforcement provisions of Chapter VII of the Charter.[68]

The attack on the World Trade Center on 11 September 2001 'dramatised the global threat of terrorism', while focusing attention upon 'reconstructing weak or collapsed states'.[69] The Secretary-General has also emphasised the need to replace the culture of reaction by one of prevention and by developing *inter alia* a thirty to ninety-day deployment capability.[70]

The Security Council

The primary objective of the United Nations as stipulated in article 1 of the Charter is the maintenance of international peace and security and disputes likely to endanger this are required under article 33 to be solved 'by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements or other peaceful means'. Indeed, the Charter declares as one of its purposes in article 1, 'to

[64] *Ibid.*, pp. 13 ff. [65] *Ibid.*, pp. 20 ff. [66] *Ibid.*, pp. 28 ff.

[67] *Ibid.*, pp. 32 ff. See the establishment of the Peacebuilding Commission in 2006, General Assembly resolution 60/180 and Security Council resolution 1645 (2005), intended to bring together all relevant actors, to marshal and sustain resources and advise on the proposed integrated strategies for post-conflict peacebuilding and recovery. See the Report of the Commission on its first session, A/62/137–S/2007/458, 25 July 2007, and Chesterman *et al.*, *United Nations*, chapter 9.

[68] See Report of the Secretary-General on the Work of the Organisation, New York, 1993, p. 96.

[69] See Report of the Secretary-General on the Work of the Organisation, A/57/1, 2002, p. 1. See also the Secretary-General's *Agenda for Further Change*, A/57/387, 9 September 2002.

[70] See the *Road Map Towards Implementation of the United Nations Millennium Declaration*, A/56/326, 6 September 2001. The Millennium Report may be found at www.un.org/millennium/sg/report/.

bring about by peaceful means and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace'. By article 24,[71] the members of the UN conferred on the Security Council primary responsibility for the maintenance of international peace and security, and by article 25[72] agreed to accept and carry out the decisions of the Security Council. The International Court in the *Namibia* case[73] drew attention to the fact that the provision in article 25 was not limited to enforcement actions under Chapter VII of the Charter but applied to '"decisions of the Security Council" adopted in accordance with the Charter'. Accordingly a declaration of the Council taken under article 24 in the exercise of its primary responsibility for the maintenance of international peace and security could constitute a decision under article 25 so that member states 'would be expected to act in consequence of the declaration made on their behalf'.[74] Whether a particular resolution adopted under article 24 actually constituted a decision binding all member states (and outside the collective security framework of Chapter VII)[75] was a matter for analysis in each particular case, 'having regard to the terms of the resolution to be interpreted, the discussions leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining the legal consequences of the resolution of the Security Council'.[76] Under the Charter, the role of the Security Council when dealing with the pacific settlement of disputes specifically under Chapter VI differs from when the Council is contemplating action relating to threats to or breaches of the peace, or acts of aggression under Chapter VII. In the former instance there is no power as such to make binding decisions with regard to member states.

In pursuance of its primary responsibility, the Security Council may, by article 34, 'investigate any dispute, or any situation which might lead to

[71] See e.g. Simma, *Charter*, pp. 442 ff. [72] *Ibid.*, pp. 452 ff.

[73] ICJ Reports, 1971, pp. 16, 52–3; 49 ILR, pp. 1, 42–3.

[74] This approach is controversial and has not, for example, been accepted by Western states: see e.g. Simma, *Charter*, p. 457. See also R. Higgins, 'The Advisory Opinion on Namibia. Which UN Resolutions are Binding under Article 25 of the Charter?', 21 ICLQ, 1972, p. 270.

[75] See below, p. 1235.

[76] ICJ Reports, 1971, pp. 16, 53; 49 ILR, p. 43. The question as to whether relevant Security Council resolutions on East Timor could be regarded as binding was raised in the *East Timor* case, ICJ Reports, 1995, pp. 90, 103; 105 ILR, p. 226, but the Court concluded that the resolutions cited did not go so far as to impose obligations. But cf. the Dissenting Opinion by Judge Weeramantry, ICJ Reports, 1995, pp. 205–8.

international friction or give rise to dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security'. In addition to this power of investigation, the Security Council can, where it deems necessary, call upon the parties to settle their dispute by the means elaborated in article 33.[77] The Council may intervene if it wishes at any stage of a dispute or situation, the continuance of which is likely to endanger international peace and security, and under article 36(1) recommend appropriate procedures or methods of adjustment. But in making such recommendations, which are not binding, it must take into consideration the general principle that legal disputes should be referred by the parties to the International Court of Justice.[78] Where the parties to a dispute cannot resolve it by the various methods mentioned in article 33, they should refer it to the Security Council by article 37. The Council, where it is convinced that the continuance of the dispute is likely to endanger international peace and security, may recommend not only procedures and adjustment methods, but also such terms of settlement as it may consider appropriate.

Once the Council, however, has determined the existence of a threat to, or a breach of, the peace or act of aggression, it may make decisions which are binding upon member states of the UN under Chapter VII, but until that point it can under Chapter VI issue recommendations only.[79] Under article 35(1) any UN member state may bring a dispute or a situation which might lead to international friction or give rise to a dispute before the Council, while a non-member state may bring to the attention of the Council any dispute under article 35(2) provided it is a party to the dispute in question and 'accepts in advance, for the purposes of the dispute, the obligations of pacific settlement provided in the present Charter'.

[77] Note that under article 38, the Security Council may make recommendations to the parties with regard to the peaceful settlement of disputes generally if all the parties to the dispute so request.

[78] For example, when the Security Council recommended that the UK and Albania should take their case regarding the *Corfu Channel* incident to the International Court: see Security Council resolution 22 (1947) and SCOR, 2nd yr, 127th meeting, 9 April 1947, p. 727. See also Luard, *History*, pp. 209–12. However, this example proved to be exceptional. See also Security Council resolution 395 (1976) calling for negotiations between Turkey and Greece over the Aegean Sea continental shelf dispute and inviting the parties to refer the question to the International Court.

[79] However, note that under article 37(2) if the Council deems that a continuance of a dispute is likely to endanger international peace and security, it 'shall decide whether to take action under article 36 [i.e. recommend appropriate procedures or methods of adjustment] or to recommend such terms of settlement as it may consider appropriate'.

It is also possible for third parties to bring disputes to the attention of the Council.[80]

In practice, the Security Council has applied all the diplomatic techniques available in various international disputes. This is in addition to open debates and the behind-the-scenes discussions and lobbying that take place. On numerous occasions it has called upon the parties to a dispute to negotiate a settlement and has requested that it be kept informed. The Council offered its good offices in the late 1940s with regard to the Dutch–Indonesian dispute[81] and has had recourse to mediation attempts in many other conflicts, for example with regard to the Kashmir[82] and Cyprus[83] questions.[84] However, the cases where the Council has recommended procedures or methods of adjustment under article 36 have been comparatively rare. Only in the *Corfu Channel* and *Aegean Sea* disputes did the Council recommend the parties to turn to the International Court. Probably the most famous Security Council resolution recommending a set of principles to be taken into account in resolving a particular dispute is resolution 242 (1967) dealing with the Middle East. This resolution pointed to two basic principles to be applied in establishing a just and lasting peace in the Middle East: first, Israeli withdrawal 'from territories occupied in the recent conflict' (i.e. the Six Day War) and, secondly, the termination of all claims of belligerency and acknowledgement of the right of every state in the area to live in peace within secure and recognised frontiers.[85]

The General Assembly[86]

Although the primary responsibility with regard to the maintenance of international peace and security lies with the Security Council, the

[80] See the succeeding sections as to the General Assembly and the Secretary-General.

[81] See e.g. Luard, *History*, chapter 9, and S/1156. See also S/514 and S/1234, and Murty, 'Settlement', p. 721.

[82] Murty, 'Settlement', p. 721. See also Luard, *History*, chapter 14.

[83] See e.g. Murty, 'Settlement', p. 721. See also T. Ehrlich, *Cyprus 1958–1967*, Oxford, 1974.

[84] Note also the appointment of Count Bernadotte and Dr Jarring as UN mediators in the Middle East in 1948 and 1967 respectively. See Luard, *History*, chapters 10 and 11, and *The Arab–Israeli Conflict* (ed. J. N. Moore), Princeton, 3 vols., 1974.

[85] Various other points were referred to in resolution 242, including the need to guarantee freedom of navigation through international waterways in the area, achieve a just settlement of the refugee problem and reinforce the territorial inviolability of every state in the area through measures such as the use of demilitarised zones. Resolution 242 (1967) was reaffirmed in Security Council resolution 338 (1973).

[86] See e.g. White, *Keeping the Peace*, part II, and M. J. Peterson, *The General Assembly in World Politics*, Boston, 1986.

General Assembly may discuss any question or matter within the scope of the Charter, including the maintenance of international peace and security, and may make recommendations to the members of the UN or the Security Council,[87] provided the Council is not itself dealing with the same matter.[88] Under similar conditions, the Assembly may under article 14 'recommend measures for the peaceful adjustment of any situation regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations'. In the *Construction of a Wall* case,[89] the International Court emphasised that under article 24 the Security Council had a primary and not necessarily an exclusive competence with regard to the maintenance of international peace and security, while the constraint placed by article 12 on the powers of the Assembly to make recommendations for the peaceful adjustment of situations had been interpreted by evolving practice to permit both the Assembly and the Council to deal in parallel with the same matter concerning the maintenance of international peace and security, with the former often taking a broader view.[90]

In practice, the resolutions and declarations of the General Assembly (which are not binding) have covered a very wide field, from colonial disputes to alleged violations of human rights and the need for justice in international economic affairs. The role of the General Assembly increased after 1945 due to two factors: first, the existence of the veto in the Security Council rendered that organ powerless in many important disputes since the permanent members (USA, UK, USSR (now Russia), France and China) rarely agreed with respect to any particular conflict; and secondly, the vast increase in the membership of the UN had the effect of radicalising the Assembly and its deliberations. More recently the increased role of the Security Council has overshadowed that of the Assembly.

The Secretary-General[91]

Just as the impotence of the Security Council stimulated a growing awareness of the potentialities of the General Assembly, it similarly underlined

[87] Articles 10 and 11 of the Charter. [88] Article 12.

[89] ICJ Reports, 2004, pp. 136, 148–9; 129 ILR, pp. 37, 66.

[90] As to the right of the Assembly to deal with a threat to or breach of the peace or act of aggression if the Security Council fails to act because of the exercise of the veto by a permanent member, see resolution 377(V), the 'Uniting for Peace' resolution, below, p. 1272.

[91] See e.g. Rovine, *First Fifty Years*, and Cordier *et al.*, *Public Papers*.

the role to be played by the United Nations Secretary-General. By article 99 of the Charter, he is entitled to bring to the attention of the Security Council any matter which he thinks may threaten the maintenance of international peace and security and this power is in addition to his function as the chief administrative officer of the United Nations organisation under article 79.[92] In effect, the Secretary-General has considerable discretion and much has depended upon the views and outlook of the person filling the post at any given time, as well as the general political situation.

The good offices role of the Secretary-General has rapidly expanded.[93] In exercising such a role, Secretaries-General have sought to act independently of the Security Council and General Assembly, in the former case, in so far as they have not been constrained by binding resolutions (as for example in the Kuwait situation of 1990–1). The assumption of good offices and mediation activity may arise either because of independent action by the Secretary-General as part of the exercise of his inherent powers[94] or as a consequence of a request made by the Security Council[95] or General Assembly.[96] In some cases, the Secretary-General has acted upon the invitation of the parties themselves,[97] and on other occasions, the Secretary-General has acted in concert with the relevant regional

[92] Under article 98, the Secretary-General also performs such other functions as are entrusted to him by the General Assembly, Security Council, Economic and Social Council and the Trusteeship Council.

[93] See e.g. T. M. Franck, *Fairness in International Law and Institutions*, Oxford, 1995, chapter 6; Pérez de Cuéllar, 'Role of the UN Secretary-General', p. 125, and T. M. Franck and G. Nolte, 'The Good Offices Function of the UN Secretary-General' in Roberts and Kingsbury, *United Nations, Divided World*, p. 143.

[94] See e.g. with regard to Abkhazia, Franck, *Fairness*, p. 207, and Central America, *ibid*.

[95] See e.g. Security Council resolutions 242 (1967) regarding the Middle East; 367 (1975) regarding Cyprus; 384 (1975) regarding East Timor; 435 (1978) regarding Namibia and 713 (1991) regarding Yugoslavia.

[96] See e.g. with regard to Afghanistan, General Assembly resolution ES-6/2, 1980, and *The Geneva Accords* published by the United Nations, 1988, DPI/935-40420. As to Cambodia, see Franck, *Fairness*, p. 184.

[97] See e.g. the General Peace Agreement of Rome between the Mozambique government and RENAMO rebels in 1992, which called upon the UN to monitor its implementation. The President of Mozambique called upon the Secretary-General to chair the key implementation commissions and assist in other ways including the dispatch of monitors: see Report of the Secretary-General, S/24635, 1992, and Franck, *Fairness*, p. 188. Note that in his Report on the Work of the Organisation, A/57/1, 2002, the Secretary-General noted that he had used his good offices to facilitate national reconciliation and democratisation in Myanmar (at p. 5), while stating that if requested he 'would positively consider the use of my good offices' in seeking a peaceful solution in Nepal (at p. 4).

organisation.[98] In many cases, the Secretary-General will appoint a Special Representative to assist in seeking a solution to the particular problem.[99]

The development of good offices and mediation activities first arose as a consequence of the severe restrictions imposed upon UN operations by the Cold War. The cessation of the Cold War led to greatly increased activity by the UN and as a consequence the work of the Secretary-General expanded as he sought to bring to fruition the wide range of initiatives undertaken by the organisation. The experiences of Somalia, Rwanda and Bosnia in the mid-1990s and Iraq from 1991 to the 2003 war have been disappointing for the organisation.

Peacekeeping and observer missions[100]

There is no explicit legal basis for peacekeeping activities in the UN Charter. They arose in the absence of the contribution of armed forces and facilities to the UN as detailed in article 43. Accordingly, a series of arrangements and operations have evolved since the inception of the organisation, which taken together have established a clear pattern of acceptable reaction by the UN in particular crisis situations. The broad bases for such activities lie in the general provisions in the Charter governing the powers of the Security Council and General Assembly. The Security Council, for example, may establish such subsidiary organs as it deems necessary for the performance of its functions (article 29) and those functions are laid down in articles 34 (powers of investigation); 36, 37 and 38 (powers to recommend appropriate procedures or methods of dispute settlement); and 39 (powers of recommendation or decision in order to maintain or restore international peace and security). The Security Council may, in particular under article 42, take such action by land, sea or air forces as may be necessary to maintain or restore international peace

[98] See e.g. with regard to the Secretary-General of the Organisation of American States concerning the Central American peace process from the mid-1980s, Report of the UN Secretary-General, A/42/127–S/18688, 1987.

[99] See, for the full list, www.un.org/Depts/dpko/SRSG/index.htm.

[100] See e.g. R. Murphy, *UN Peacekeeping in Lebanon, Somalia and Kosovo*, Cambridge, 2007; United Nations, *United Nations Peacekeeping Operations: Principles and Guidelines*, New York, 2008, and UN, *The Blue Helmets: A Review of United Nations Peacekeeping*, 2nd edn, New York, 1990; D. W. Bowett, *UN Forces*, London, 1964; *The Evolution of UN Peacekeeping* (ed. W. J. Durch), London, 1994; White, *Keeping the Peace*; R. Higgins, *United Nations Peacekeeping*, Oxford, 4 vols., 1969–81; S. Morphet, 'UN Peacekeeping and Election Monitoring' in Roberts and Kingsbury, *United Nations, Divided World*, p. 183; A. James, *Peacekeeping in International Politics*, London, 1990, and Simma, *Charter*, pp. 648 ff.

and security. This is the basis for action explicitly taken under Chapter VII of the Charter.[101]

However, the majority of peacekeeping activities have not been so authorised and it is unlikely that article 42 can be seen as the legal basis for all such activities. The Security Council can entrust functions to the Secretary-General under article 98 and this mechanism has proved significant in practice. The General Assembly has wide powers under articles 10 and 11 to discuss and make recommendations on matters within the scope of the UN Charter, including recommendations concerning the maintenance of international peace and security.[102] Under article 14, the Assembly may recommend measures for the peaceful adjustment of any situation regardless of origin which it deems likely to impair the general welfare or friendly relations among nations. It can, however, take no binding decision in such matters.[103] The Assembly may also establish such subsidiary organs as it deems necessary for the performance of its functions (article 22) and entrust functions to the Secretary-General (article 98). It is because such operations fall somewhat between Chapter VI (peaceful settlement) and Chapter VII (enforcement) of the Charter, that the term 'Chapter Six and a Half' has been used.[104]

Essentially peacekeeping involves the deployment of armed forces under UN control to contain and resolve military conflicts. Although originally intended to deal with inter-state conflicts, more recently peacekeeping forces have been used with respect to civil wars and other intra-state conflicts. Again, primarily military deployments have expanded to include civilian personnel as more and more civil functions have been entrusted to such forces. There have been sixty-three peacekeeping missions to date and there are currently seventeen in operation.[105] Peacekeeping and observer missions operate upon a continuum of UN activities and it is helpful to consider these operations together. Indeed, that continuum has in recent years been extended to incorporate elements of enforcement action.[106]

[101] The power of the Security Council to resort to force under article 42 is dealt with below, p. 1251.

[102] However, under article 11(2), where action is necessary on any question relating to the maintenance of international peace and security, the matter must be referred to the Security Council.

[103] See further below, p. 1271.

[104] See e.g. T. Franck, *Recourse to Force*, Cambridge, 2002, p. 39. It seems to have been first used by Secretary-General Hammarskjöld: see www.un.org/Depts/dpko/dpko/index.asp.

[105] See www.un.org/Depts/dpko/dpko/index.asp (April 2008).

[106] See below, p. 1257.

The origin of peacekeeping by the UN may be traced to truce supervision activities. The first such activity occurred in Greece, where the UN Special Committee on the Balkans (UNSCOB) was created in 1947.[107] The UN Truce Supervision Organisation (UNTSO) was established in 1948 to supervise the truce in the 1948 Middle East War.[108] Peacekeeping[109] as such arose as a direct consequence of the problems facing the Security Council during the Cold War. The first peacekeeping activity took place in 1956 as a result of the Suez crisis. The UN Emergency Force (UNEF) was established by the General Assembly[110] to position itself between the hostile forces and to supervise the withdrawal of British and French forces from the Suez Canal and Israeli forces from the Sinai peninsula. It was then deployed along the armistice line until May 1967. The second crucial peacekeeping operation took place in the Congo crisis of 1960, which erupted soon after Belgium granted independence to the colony and resulted in mutinies, insurrections and much confused fighting. The Security Council adopted a resolution permitting the Secretary-General to provide military assistance to the Congo government.[111] This was

[107] See General Assembly resolution 109. The operation lasted until 1954. See also K. Birgisson, 'United Nations Special Committee on the Balkans' in Durch, *Evolution of UN Peacekeeping*, chapter 5.

[108] See Security Council resolution 50 (1948), and M. Ghali, 'The United Nations Truce Supervision Organisation' in Durch, *Evolution of UN Peacekeeping*, chapter 6. It has expanded to supervise the armistice agreements of 1949 and ceasefire arrangements of June 1967. See also the UN Military Observer Group in India and Pakistan (UNMOGIP) established by Security Council resolution 47 (1948) to supervise the ceasefire in Jammu and Kashmir: see K. Birgisson, 'United Nations Military Observer Group in India and Pakistan' in Durch, *Evolution of UN Peacekeeping*, chapter 16.

[109] This has been defined by the Secretary-General as 'the deployment of a United Nations presence in the field, hitherto with the consent of all the parties concerned, normally involving United Nations military and/or police personnel and frequently civilians as well', *An Agenda for Peace*, p. 11. Another definition was put forward by a former UN Legal Counsel, who noted that peacekeeping operations were 'actions involving the use of military personnel in international conflict situations on the basis of the consent of all parties concerned and without resorting to armed force except in cases of self-defence', E. Suy, 'Peacekeeping Operations' in *A Handbook on International Organisations* (ed. R. J. Dupuy), Dordrecht, 1988, p. 379.

[110] See General Assembly resolutions 997, 998 and 1000 (ES-1). The Security Council was unable to act as two permanent members (the UK and France) were directly involved in the crisis and had vetoed draft resolutions. See e.g. M. Ghali, 'United Nations Emergency Force I' in Durch, *Evolution of UN Peacekeeping*, chapter 7.

[111] S/4387, 14 July 1960. By resolution S/4405, 22 July 1960, the Council requested all states to refrain from action which might impede the restoration of law and order or undermine the territorial integrity and political independence of the Congo. By resolution S/4426, 9 August 1960, the Council confirmed the authority given to the

interpreted by Dr Hammarskjöld, the Secretary-General, as a mandate to set up a peacekeeping force on an analogy with UNEF. The exercise of the veto in the Council left the Secretary-General with little guidance as to how to proceed in the situation. Accordingly, he performed many of the tasks that had in 1956 been undertaken by the General Assembly with respect to the Middle East.[112] The development of the Congo crisis from mutiny to civil war meant that the United Nations force (ONUC) was faced with many difficult decisions and these had in the main to be taken by the Secretary-General. The role that could be played by the Secretary-General was emphasised in the succeeding crises in Cyprus (1964)[113] and the Middle East (1973)[114] and in the consequent establishment of United Nations peacekeeping forces for these areas under the general guidance of the Secretary-General.

The creation of traditional peacekeeping forces, whether in the Middle East in 1967 and again in 1973, in the Congo in 1960 or in Cyprus in 1964, was important in that such forces tended to stabilise particular situations for a certain time. Such United Nations forces are not intended to take enforcement action, but to act as an influence for calm by physically separating warring factions. They are dependent upon the consent of the state upon whose territory they are stationed and can in no way prevent a determined aggression. The various United Nations peacekeeping operations have met with some limited success in temporarily preventing

Secretary-General by earlier resolutions and called on member states to carry out the decisions of the Security Council. See e.g. G. Abi-Saab, *The United Nations Operation in the Congo 1960–1964*, Oxford, 1978; C. Hoskyns, *The Congo Since Independence*, Oxford, 1965; L. Miller, 'Legal Aspects of UN Action in the Congo', 55 AJIL, 1961, p. 1, and W. J. Durch, 'The UN Operation in the Congo' in Durch, *Evolution of UN Peacekeeping*, chapter 19.

[112] See Abi-Saab, *Congo*, pp. 15 ff.

[113] See Security Council resolution 186 (1964). See also Ehrlich, *Cyprus 1958–1967*, J. A. Stegenger, *The United Nations Force in Cyprus*, Columbus, 1968, and K. Birgisson, 'United Nations Peacekeeping Forces in Cyprus' in Durch, *Evolution of UN Peacekeeping*, chapter 13. The force is known as the UN Force in Cyprus (UNICYP).

[114] The Security Council established the UN Emergency Force (UNEF II) to monitor the Israeli–Egyptian disengagement process in 1973: see resolution 340 (1973), and a Disengagement Observer Force with respect to the Israel–Syria disengagement process: see resolution 350 (1974). See generally Pogany, *Arab–Israeli Conflict*, and M. Ghali, 'United Nations Emergency Force II' in Durch, *Evolution of UN Peacekeeping*, chapter 8. Note also the creation of the UN Interim Force in the Lebanon (UNIFIL) established by the Council in resolution 425 (1978) after Israel's incursion into the Lebanon in 1978: see e.g. M. Ghali, 'United Nations Interim Force in Lebanon' in Durch, *The Evolution of UN Peacekeeping*, chapter 10.

major disturbances, but they failed to prevent the 1967 Arab–Israeli war[115] and the 1974 Turkish invasion of Cyprus.[116] One has to be careful not to overestimate their significance in difficult political situations. In addition to the consent of the host state, such forces also require the continuing support of the Security Council and if that is lost or not provided such forces cannot operate.[117] Just as crucial as these factors is the provision of sufficient resources by the UN and its member states in order to fulfil the agreed mandate. Events in Bosnia, for example, demonstrated how the absence of adequate resources impacted severely upon operations.

Nevertheless, peacekeeping and observer operations do have a role to play, particularly as a way of ensuring that conflict situations in the process of being resolved do not flare up as a result of misunderstandings or miscalculations. Some recent UN operations in this area demonstrate this.[118] The UN Good Offices Mission in Afghanistan and Pakistan was established in the context of the Geneva Accords of 14 April 1988 dealing with the withdrawal of Soviet forces from Afghanistan,[119] while the UN Iran–Iraq Military Observer Group was created the same year following the acceptance by the belligerent states of Security Council resolution 598 (1987) calling for a ceasefire.[120] In 1989, in the context of the resolution of the Namibian problem, the UN Angola Verification Mission (UNAVEM I) commenced operation in order to verify the withdrawal of Cuban forces

[115] In fact the hasty withdrawal of the UNEF in May 1967 by the Secretary-General following an Egyptian request did much to precipitate the conflict. See generally Special Report of the Secretary-General on Removal of UNEF from Egyptian territory, A/6669, 1967, and T. M. Franck, *Nation Against Nation*, Oxford, 1985.

[116] See e.g. Security Council resolution 359 (1974) criticising the Turkish invasion.

[117] The Israel–Egypt Peace Treaty of 1979 envisaged the deployment of a UN force such as UNEF to supervise the limited forces zones established by the parties but, due to Soviet action, the mandate of UNEF II expired in July 1979: see e.g. M. Akehurst, 'The Peace Treaty Between Egypt and Israel', 7 *International Relations*, 1981, pp. 1035, 1046, and M. N. Shaw, 'The Egyptian–Israeli Peace Treaty, 1979', 2 *Jewish Law Annual*, 1980, pp. 180, 185. As a result, a special Multinational Force and Observers unit was established by the parties and the United States, independently of the UN: see 20 ILM, 1981, pp. 1190 ff. See also M. Tabory, *The Multinational Force and Observers in the Sinai*, Boulder, 1986, and James, *Peacekeeping*, pp. 122 ff.

[118] See generally White, *Keeping the Peace*.

[119] See S/19836 and Security Council resolution 622 (1988). This activity continued until 1990: see Morphet, 'UN Peacekeeping', p. 213. See also K. Birgisson, 'United Nations Good Offices Mission in Afghanistan and Pakistan' in Durch, *Evolution of UN Peacekeeping*, chapter 18.

[120] This was to monitor the ceasefire and lasted until February 1991: see e.g. Morphet, 'UN Peacekeeping', p. 213, and B. Smith, 'United Nations Iran–Iraq Military Observer Group' in Durch, *Evolution of UN Peacekeeping*, chapter 14.

from Angola,[121] while the UN Transition Assistance Group (UNTAG), although originally established in 1978 in Security Council resolution 435 (1978), commenced operations with the Namibian independence process on 1 April 1989.[122] Efforts to hold a referendum in Western Sahara are being assisted by the UN Mission for the Referendum in Western Sahara (MINURSO),[123] while the UN Iraq–Kuwait Observer Mission (UNIKOM) was set up to monitor the demilitarised zone between these two states following the Gulf War.[124]

Further examples of crucial and complex peacekeeping and/or observer activities include observing Eritrea's plebiscite on secession from Ethiopia[125] and South Africa's elections in 1994,[126] supervising the demilitarisation of Eastern Slavonia, Baranja and Western Sirmium (Croatia) and *inter alia* overseeing the return of refugees, training a police force,

[121] Security Council resolution 626 (1988). This was completed in 1991. The Security Council then established UNAVEM II to monitor the implementation of the peace accords between the Angolan government and the UNITA rebels: see Security Council resolution 696 (1991), and V. P. Fortna, 'United Nations Angola Verification Mission I' in Durch, *Evolution of UN Peacekeeping*, chapter 21, and Fortna, 'United Nations Angola Verification Mission II' in Durch, *Evolution of UN Peacekeeping*, chapter 22. This ended in February 1995.

[122] Security Council resolution 632 (1989). UNTAG monitored the withdrawal of South African troops, confined SWAPO forces to their bases in Angola and Zaire and assisted in the election process. The operation ended in March 1990. See V. P. Fortna, 'United Nations Transition Assistance Group in Namibia' in Durch, *Evolution of UN Peacekeeping*, chapter 20. In 1992, the UN Operation in Mozambique (ONUMOZ) was established in order to monitor the peace agreement between the Government and RENAMO rebels: see Security Council resolution 797 (1992). The mission ended in December 1994. See also the UN Observer Group for the Verification of Elections in Nicaragua (ONUVEN) sent to monitor elections in that country following the 1987 Esquipulas Agreement. This was the first electoral observer mission to monitor elections in an independent state: see Security Council 637 (1989). See also Morphet, 'UN Peacekeeping', pp. 216 ff., and Franck, *Fairness*, pp. 105 ff.

[123] See e.g. Security Council resolution 690 (1991) and W. J. Durch, 'United Nations Mission for the Referendum in Western Sahara' in Durch, *Evolution of UN Peacekeeping*, chapter 23. See also the UN Observer Mission in El Salvador established to verify that the government and rebels in the El Salvador civil war complied with the 1990 peace accord, including human rights provisions: see resolution 693 (1991).

[124] See Security Council resolution 689 (1991). See also the UN Advance Mission in Cambodia (UNAMIC) established pursuant to peace efforts in the civil war in that country and which was followed by the UN Transitional Authority in Cambodia (UNTAC), which exercised governmental functions in that state: see resolutions 717 (1991) and 745 (1992). See further above, chapter 5, p. 231.

[125] See General Assembly resolution 47/114, 1992, and A/47/544.

[126] See Security Council resolution 894 (1994). Over 1,800 electoral observers were sent: see Franck, *Fairness*, p. 107.

organising elections and facilitating the removal of mines from the area,[127] monitoring the demilitarisation of the Prevlaka Peninsula in Croatia,[128] assisting the Haitian government in the professionalisation of the police and maintaining a secure environment.[129]

The UN Mission in Ethiopia and Eritrea is a more traditional operation, aimed at overseeing a ceasefire between the two states and assisting them in delimiting and demarcating the boundary.[130] The UN Observer Mission in Georgia has since 1993 been trying to resolve the Abkhazia conflict in Georgia. Its mandate has been expanded and extended since that time.[131] The UN played an extensive role in the move to Timor–Leste independence. The establishment of the UN Mission in East Timor in 1999 provided a mandate to oversee a transition period pending implementation of the decision of the people of that territory under Indonesian occupation as to their future. After the elections and the vote for independence, pro-Indonesian militias commenced a campaign of violence and, after an agreement with Indonesia, the UN adopted resolution 1264 (1999) establishing a multinational force under Australian command to restore peace and security. The UN Transitional Administration in East Timor was established by resolution 1272 (1999) with powers to administer the territory until independence. At the time of the independence of the territory of Timor–Leste in May 2002, the UN Mission of Support in East Timor was established to replace UNTAET.[132] A more traditional peacekeeping deployment was that in August 2006 in Lebanon, facilitating

[127] The UN Transitional Administration for Eastern Slavonia, Baranja and Western Sirmium (UNTAES): see Security Council resolution 1037 (1996). This mission had both a military and a civilian component.

[128] The UN Mission of Observers in Prevlaka (UNMOP), Security Council resolution 1038 (1996).

[129] The UN Support Mission in Haiti (UNSMIH): see Security Council resolution 1063 (1996). In June 1996, this mission succeeded the UN Mission in Haiti (UNMIH) created by resolution 867 (1993) to assist the military and police forces in that state. However, it was prevented from deploying. In resolution 940 (1994), the Security Council authorised the creation of a Multi-National Force (MNF): see below, p. 1239, and extended the mandate and scope of UNMIH. After the restoration of the ousted President and the subsequent holding of elections, UNMIH took over responsibility from the MNF (March 1995).

[130] See e.g. Security Council resolutions 1312 (2000), 1320 (2000) and 1640 (2005). This mandate has been regularly renewed: see most recently resolution 1798 (2008).

[131] See e.g. Security Council resolutions 849 (1993), 881 (1993), 1077 (1996), 1364 (2001) 1393 (2002), 1427 (2002), 1462 (2003) and 1494 (2003).

[132] See resolution 1410 (2002). See also, with regard to the UN administration of East Timor, above, chapter 5, p. 232. See as to the establishment by the Security Council of a joint UN–African Union force in Darfur in 2007, below, p. 1280.

the withdrawal of Israeli forces and permitting the return of the Lebanese army to southern Lebanon following a period of Hizbollah control in that area.[133]

The legal framework for the actual conduct of peacekeeping and observer activities reflects their status as UN organs, so that they are, for example, subject to the law governing the UN organisations as a whole, such as that concerning the privileges and immunities of UN personnel[134] and responsibility.[135] The UN would be liable for breaches of law committed by members of peacekeeping and observer forces and groups and would, on the other hand, be able to claim compensation for damage and injuries caused to its personnel. Where forces are stationed on the territory of a state, the usual practice is for formal agreements to be entered into between that state and the UN concerning, for example, facilities, logistics, privileges and immunities of persons and property, and dispute settlement procedures. In 1990, the Secretary-General produced a Model Status of Forces Agreement for Peacekeeping Operations,[136] which covers such matters. It notes, for instance, that the peacekeeping operation and its members are to respect all local laws and regulations, while the government in question undertakes to respect the exclusively international nature of the operation. Jurisdictional and military discipline issues are also dealt with. The UN has also adopted the Convention on the Safety of United Nations and Associated Personnel, 1994 in order to deal with the situation where the UN operation is not an enforcement operation authorised under Chapter VII of the Charter, in combat with local forces and operating under the laws of armed conflict.

The Convention lays down that the UN and the host state should conclude as soon as possible an agreement on the status of the UN operation and all personnel engaged in the operation, including privileges and immunities issues (article 4), and stipulates that the UN and its personnel shall respect local laws and regulations and refrain from any action or activity incompatible with the impartial and international nature of their duties (article 6). The Convention provides that the intentional commission of activities such as the murder or kidnapping of UN or associated personnel, attacks on official premises or private accommodation or means of transportation, are to be made criminal offences under

[133] See resolution 1701 (2006).

[134] See in particular the General Convention on the Privileges and Immunities of the United Nations, 1946.

[135] See also Simma, *Charter*, pp. 694 ff.

[136] A/45/594.

national law (article 9), while states parties must take such measures as are necessary to establish jurisdiction in such cases when the crime is committed within their territory (or on board a ship or aircraft registered in that state) or when the alleged offender is a national (article 10). In addition, states parties may establish jurisdiction when the crime has been committed by a stateless person whose habitual residence is in the state concerned or with regard to a national of that state or in an attempt to compel that state to do or abstain from doing any act (article 10).[137]

The question as to whether UN forces are subject to the laws of armed conflict or international humanitarian law[138] has proved controversial. Since the UN is bound by general international law, it is also bound by the customary rules concerning armed conflict,[139] although not by the rules contained only in treaties to which the UN is not a party. Can the United Nations in its various operations involving military personnel in either an enforcement or peacekeeping capacity within states be regarded as subject to international humanitarian law? The problem has arisen in the light of whether such UN activities may be properly classified as 'armed conflicts'.[140] The question of the application of international humanitarian law to operations has been a matter of some concern and a model agreement was put forward in 1991. While the issue proved little of a problem with regard to UN enforcement actions, where it has long been accepted that the rules of humanitarian law applied,[141] although there may be a countervailing pressure since article 2(2) of the Convention on the Safety of United Nations Personnel provides that the Convention will not apply to a UN enforcement operation 'to which the law of international armed conflict applies', difficulties have arisen where the UN has become involved in operations of a mixed peacekeeping/enforcement character. However, the Model Agreement prepared by the Secretary-General in May 1991 specified that 'United Nations peacekeeping operations shall observe and respect the principles and spirit of the general international conventions applicable to the conduct of military

[137] The Convention also deals with extradition (articles 13–15) and the fair treatment of alleged offenders (article 17).

[138] See above, chapter 21.

[139] See e.g. S. Will, 'Occupation Law and Multi-National Operations: Problems and Perspectives', 77 BYIL, 2006, pp. 256, 277.

[140] See L. Green, *The Contemporary Law of Armed Conflict*, 2nd edn, Manchester, 2000, chapter 20.

[141] See e.g. D. W. Bowett, *United Nations Forces*, London, 1964, p. 56.