armed forces across an international border, but additionally the sending by or on behalf of a state of armed bands or groups which carry out acts of armed force of such gravity as to amount to an actual armed attack conducted by regular armed forces or its substantial involvement therein.[70] In this situation, the focus would then shift to a consideration of the involvement of the state in question so as to render it liable and to legitimate action in self-defence against it.[71]

In order to be able to resort to force in self-defence, a state has to be able to demonstrate that it has been the victim of an armed attack and it bears the burden of proof.[72] The Court has noted that it is possible that the mining of a single military vessel might suffice,[73] but an attack on a ship owned, but not flagged, by a state will not be equated with an attack on that state.[74] However, it is necessary to show that the state seeking to resort to force in self-defence has itself been intentionally attacked. In a series of incidents discussed by the Court in the *Oil Platforms* case, it was noted that none of them appeared to have been aimed specifically and deliberately at the US.[75] In seeking to determine how serious an attack must be in order to validate a self-defence response, the Court in the *Nicaragua* case[76] distinguished 'the most grave forms of the use of force (those constituting an armed attack) from other less grave forms' and this was reaffirmed in the *Oil Platforms* case.[77] It is, nevertheless, extremely difficult to define this more closely.

In many cases, however, it might be difficult to determine the moment when an armed attack had commenced in order to comply with the requirements of article 51 and the resort to force in self-defence. For example, it has been argued that with regard to actions against aircraft,

[70] The Court noted that this provision, contained in article 3(g) of the Definition of Aggression annexed to General Assembly resolution 3314 (XXIX) of 1974, reflected customary international law, ICJ Reports, 1986, p. 103; 76 ILR, p. 437.

[71] See e.g. Gray, *Use of Force*, pp. 108 ff.

[72] The *Oil Platforms (Iran* v. *US)* case, ICJ Reports, 2003, pp. 161, 189 and 190; 130 ILR, pp. 323, 348–50.

[73] *Ibid.*, p. 195. [74] *Ibid.*, p. 191.

[75] *Ibid.* The incidents included missile attack from a distance that meant it could not have been aimed at a particular vessel (the US *Sea Isle City*) as distinct from 'some target in Kuwaiti waters'; an attack on a non-US flagged vessel; the alleged firing on US helicopters from Iranian gunboats that the Court found unproven; and mine-laying that could not be shown to have been aimed at the US, *ibid.*, pp. 191–2. However, this requirement for a deliberate and intentional attack on the target state, rather than merely an indiscriminate attack, is controversial and open to question.

[76] ICJ Reports, 1986, pp. 14, 101.

[77] ICJ Reports, 2003, pp. 161, 187; 130 ILR, pp. 323, 346.

an armed attack begins at the moment that the radar guiding the anti-aircraft missile has 'locked on'.[78] Further, one argument that has been made with regard to Israel's first strike in June 1967 is that the circumstances were such that an armed attack could be deemed to have commenced against it.[79]

Another aspect of the problem as to what constitutes an armed attack is the difficulty of categorising particular uses of force for these purposes. For example, would an attack upon an embassy or diplomats abroad constitute an armed attack legitimating action in self-defence? On 7 August 1998, the US embassies in Kenya and Tanzania were bombed, causing the loss of over 250 lives and appreciable damage to property. On 20 August, the US launched a series of cruise missile attacks upon installations in Afghanistan and Sudan associated with the organisation of Bin Laden deemed responsible for the attacks. In so doing, the US declared itself to be acting in accordance with article 51 of the Charter and in exercise of its right of self-defence.[80]

While it is clear that the right of self-defence applies to armed attacks by other states, the question has been raised whether the right of self-defence applies in response to attacks by non-state entities.[81] Where it is the state itself which has dispatched armed bands to carry out acts of armed force of such gravity as to amount to an actual armed attack conducted by regular armed forces, then force in self-defence can legitimately be used. The difficulties arise in more ambiguous circumstances. In the *Nicaragua* case, the Court did not accept that the right of self-defence extended to situations where a third state had provided assistance to rebels in the form of the provision of weapons or logistical or other support, although this form of assistance could constitute a threat or use of force, or amount to intervention in the internal or external affairs of the state.[82] This lays open the problem that in certain circumstances a state under attack from groups supported by another state may not be able under this definition to respond militarily if the support given by that other state does not reach the threshold laid down. Judge Jennings referred to this issue in his Dissenting Opinion, noting that, 'it seems dangerous to define unnecessarily strictly the conditions for lawful self-defence, so as to leave a large area where

[78] See Gray, *Use of Force*, p. 108, footnote 48. [79] See below, p. 1138.
[80] See 'Contemporary Practice of the United States', 93 AJIL, 1999, p. 161. The US stated that the missile strikes 'were a necessary and proportionate response to the imminent threat of further terrorist attacks against US personnel and facilities', *ibid*., p. 162 and S/1998/780.
[81] See e.g. Dinstein, *War*, pp. 204 ff. [82] ICJ Reports, 1986, pp. 103–4; 76 ILR, pp. 437–8.

both a forcible response to force is forbidden, and yet the United Nations employment of force, which was intended to fill that gap, is absent'.[83]

The line between assistance from a third state to groups (whether characterised as terrorists or rebels or freedom fighters) which would give rise to the legitimate use of force in self-defence against such state and assistance which fell below this is difficult to specify in practice. The International Court in its advisory opinion in the *Construction of a Wall* case[84] appeared to adopt what at first sight is a very restrictive approach by noting that article 51 recognised 'the existence of an inherent right of self-defence in the case of armed attack by one state against another state' and declaring that the provision did not apply with regard to Israel's actions since these were taken with regard to threats originating from within the occupied territories and not imputable to another state. However, this cannot be read to mean that self-defence does not exist with regard to an attack by a non-state entity emanating from a territory outside of the control of the target state. Further, the legal source of Israeli actions in the occupied territories, whether or not they legitimated the construction of the wall or security barrier in whole or in part, would appear to lie rather in the laws of armed conflict (international humanitarian law) and the competence of an occupying state to take action to maintain public order and protect its own forces.[85]

The Court failed to take the opportunity to revisit the ambiguities of the *Nicaragua* decision in *Democratic Republic of the Congo* v. *Uganda*.[86] In this case, the Court found that there was no satisfactory proof of involvement in attacks, direct or indirect, on Uganda by the Congo government and that such attacks did not emanate from armed bands or irregulars sent by or on behalf of the Congo. Such attacks were non-attributable, therefore, on the evidence to the Congo. Since the Court concluded that the legal and factual circumstances for the exercise of a right of self-defence by Uganda against the Congo were not present, 'accordingly' there was no need to address the issue as to whether and under which conditions contemporary international law provides for a right of self-defence against large-scale

[83] ICJ Reports, 1986, pp. 543–4; 76 ILR, p. 877. Franck suggests that Security Council practice following the 11 September 2001 attack on the World Trade Center has followed Judge Jennings' approach: see *Recourse*, p. 63, and below, p. 1159.

[84] ICJ Reports, 2004, pp. 136, 194. Cf. the Separate Opinions of Judge Higgins, *ibid.*, p. 215 and Judge Kooijmans, *ibid.*, p. 230.

[85] See article 43 of the Hague Regulations 1907. See further below, chapter 21, p. 1181.

[86] ICJ Reports, 2005, p. 168.

attacks by irregular forces.[87] Since the Court addressed itself only to actions that Uganda might or might not take against the Congo as such, it did not deal with the increasingly important question as to whether action might be taken in self-defence against an armed attack by a non-state actor as distinct from another state.[88]

This is perhaps surprising in view of evolving state practice with regard to international terrorism and, in particular, whether terrorist acts could constitute an 'armed attack' within the meaning of the Charter or indeed customary law.[89] The day after the 11 September 2001 attacks upon the World Trade Center in New York, the Security Council adopted resolution 1368 in which it specifically referred to 'the inherent right of individual or collective self-defence in accordance with the Charter'. Resolution 1373 (2001) reaffirmed this and, acting under Chapter VII, adopted a series of binding decisions, including a provision that all states shall 'take the necessary steps to prevent the commission of terrorist acts'. Such binding Security Council resolutions declaring international terrorism to be a threat to international peace and security with regard to which the right of self-defence is operative as such lead to the conclusion that large-scale attacks by non-state entities might amount to 'armed attacks' within the meaning of article 51 without the necessity to attribute them to another state and thus justify the use of force in self-defence by those states so attacked.[90]

Further recognition that particular hostile actions by non-state entities could amount to 'attacks' may be found in Security Council resolution 1701 (2006), in which both the 'attacks' by Hizbollah, an armed militia controlling parts of Lebanon, upon Israel (which precipitated the summer 2006 armed conflict) and Israeli 'offensive military operations' were condemned.

On 7 October 2001, the US notified the Security Council that it was exercising its right of self-defence in taking action in Afghanistan against the Al-Qaeda organisation deemed responsible for the 11 September attacks

[87] *Ibid.*, pp. 222–3.

[88] See the Separate Opinions of Judge Kooijmans, *ibid.*, p. 314 and Judge Simma, *ibid.*, pp. 336 ff.

[89] See e.g. Dinstein, *War*, pp. 201 ff.; Franck, *Recourse*, chapter 4, and Gray, *Use of Force*, pp. 165 ff. See also M. Byers, 'Terrorism, the Use of Force and International Law after 11 September', 51 ICLQ, 2002, p. 401, and L. Condorelli, 'Les Attentats du 11 Septembre et Leur Suite', 105 RGDIP, 2001, p. 829. As to terrorism, see further below, p. 1159.

[90] See the Separate Opinions of Judge Kooijmans and Judge Simma in *Democratic Republic of the Congo* v. *Uganda*, ICJ Reports, 2005, pp. 168, 314 and 337 respectively.

and the Taliban regime in that country which was accused of providing bases for the organisation.[91] The members of the NATO alliance invoked article 5 of the NATO Treaty[92] and the parties to the Inter-American Treaty of Reciprocal Assistance, 1947 invoked a comparable provision.[93] Both provisions refer specifically both to an 'armed attack' and to article 51 of the Charter. Accordingly, the members of both these alliances accepted that what had happened on 11 September constituted an armed attack within the meaning of article 51 of the Charter. In fact, neither treaty was activated as the US acted on its own initiative with specific allies (notably the UK), relying on the right of self-defence with the support or acquiescence of the international community.[94]

A further issue is whether a right to anticipatory or pre-emptive self-defence exists. This would appear unlikely if one adopted the notion that self-defence is restricted to responses to actual armed attacks. The concept

[91] See S/2001/946. See also 'Contemporary Practice of the United States', 96 AJIL, 2002, p. 237.

[92] See www.nato.int/terrorism/factsheet.htm. Article 5 provides that: 'The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognised by article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.'

[93] Article 3(1) provides that, 'The High Contracting Parties agree that an armed attack by any State against an American State shall be considered as an attack against all the American States and, consequently, each one of the said Contracting Parties undertakes to assist in meeting the attack in the exercise of the inherent right of individual or collective self-defense recognized by Article 51 of the Charter of the United Nations.'

[94] See e.g. Byers, 'Terrorism', pp. 409–10; E. Cannizzaro, 'Entités Non-étatique et Régime Internationale de l'Emploi de la Force – une Étude sur le Cas de la Réaction Israélienne au Liban', 111 *Revue Générale de Droit International Public*, 2007, p. 333, and K. N. Trapp, 'Back to Basics: Necessity, Proportionality, and the Right of Self-Defence against Non-State Terrorist Actors', 56 ICLQ, 2007, p. 141. The resolution of the Institut de Droit International adopted on 27 October 2007 states in para. 10 that, 'In the event of an armed attack against a state by non-state actors, article 51 of the Charter as supplemented by customary international law applies as a matter of principle.' Note that the Chatham House Principles on International Law on the Use of Force in Self-Defence, 55 ICLQ, 2006, pp. 963, 969, provide that the right to self-defence may apply to attacks by non-state actors where the attack is large-scale; if the right to self-defence is exercised in the territory of another state, then that state is unable or unwilling to deal itself with the non-state actors and that it is necessary to use force from outside to deal with the threat in circumstances where the consent of the territorial state cannot be obtained; and the force used in self-defence may only be directed against the government of the state where the attacker is found in so far as is necessary to avert or end the attack.

of anticipatory self-defence is of particular relevance in the light of modern weaponry that can launch an attack with tremendous speed, which may allow the target state little time to react to the armed assault before its successful conclusion, particularly if that state is geographically small.[95] States have employed pre-emptive strikes in self-defence. Israel, in 1967, launched a strike upon its Arab neighbours, following the blocking of its southern port of Eilat and the conclusion of a military pact between Jordan and Egypt. This completed a chain of events precipitated by the mobilisation of Egyptian forces on Israel's border and the eviction of the United Nations peacekeeping forces from the area by the Egyptian President.[96] It could, of course, also be argued that the Egyptian blockade itself constituted the use of force, thus legitimising Israeli actions without the need for 'anticipatory' conceptions of self-defence, especially when taken together with the other events.[97] It is noteworthy that the United Nations in its debates in the summer of 1967 apportioned no blame for the outbreak of fighting and did not condemn the exercise of self-defence by Israel.

The International Court in the *Nicaragua* case[98] expressed no view on the issue of the lawfulness of a response to an imminent threat of an armed attack since, on the facts of the case, that problem was not raised. The trouble, of course, with the concept of anticipatory self-defence is that it involves fine calculations of the various moves by the other party. A pre-emptive strike embarked upon too early might constitute an aggression. There is a difficult line to be drawn. The problem is that the nature of the international system is such as to leave such determinations to be made by the states themselves, and in the absence of an acceptable, institutional

[95] Contrast Bowett, *Use of Force*, pp. 118–92, who emphasises that 'no state can be expected to await an initial attack which, in the present state of armaments, may well destroy the state's capacity for further resistance and so jeopardise its very existence', and Franck, *Fairness*, p. 267, who notes that in such circumstances 'the notion of anticipatory self-defence is both rational and attractive', with Brownlie, *Use of Force*, p. 275, and L. Henkin, *How Nations Behave*, 2nd edn, New York, 1979, pp. 141–5. See also R. Higgins, *The Development of International Law Through the Political Organs of the United Nations*, Oxford, 1963, pp. 216–21; Franck, *Recourse*, chapter 7, and I. Brownlie, *Principles of Public International Law*, 6th edn, Oxford, 2003, pp. 701 ff.

[96] See generally, *The Arab–Israeli Conflict* (ed. J. N. Moore), Princeton, 3 vols., 1974.

[97] Note that Gray writes that Israel did not argue that it acted in anticipatory self-defence but rather in self-defence following the start of the conflict, *Use of Force*, pp. 130–1. See also Dinstein, *War*, p. 192.

[98] ICJ Reports, 1986, pp. 14, 103; 76 ILR, p. 437. See also *Democratic Republic of the Congo* v. *Uganda*, ICJ Reports, 2005, pp. 168, 222.

alternative, it is difficult to foresee a modification of this. States generally are not at ease with the concept of anticipatory self-defence, however,[99] and one possibility would be to concentrate upon the notion of 'armed attack' so that this may be interpreted in a relatively flexible manner.[100] One suggestion has been to distinguish anticipatory self-defence, where an armed attack is foreseeable, from interceptive self-defence, where an armed attack is imminent and unavoidable so that the evidential problems and temptations of the former concept are avoided without dooming threatened states to making the choice between violating international law and suffering the actual assault.[101] According to this approach, self-defence is legitimate both under customary law and under article 51 of the Charter where an armed attack is imminent. It would then be a question of evidence as to whether that were an accurate assessment of the situation in the light of the information available at the relevant time. This would be rather easier to demonstrate than the looser concept of anticipatory self-defence and it has the merit of being consistent with the view that the right to self-defence in customary law exists as expounded in the *Caroline* case.[102] In any event, much will depend upon the characterisation of the threat and the nature of the response, for this has to be proportionate.[103]

[99] See e.g. the Security Council debate on, and condemnation of, Israel's bombing of the Iraqi nuclear reactor in 1981 on the basis of anticipatory self-defence, 20 ILM, 1981, pp. 965–7. See also A. Cassese, *International Law in a Divided World*, Oxford, 1986, pp. 230 ff., who concludes that a consensus is growing to the effect that anticipatory self-defence is allowed but under strict conditions relating to proof of the imminence of an armed attack that would jeopardise the life of the target state and the absence of peaceful means to prevent the attack, *ibid.*, p. 233. However, in *International Law*, 2nd edn, Oxford, 2005, p. 362, Cassese states that, 'it is more judicious to consider such action [anticipatory self-defence] *as legally prohibited*, while admittedly knowing that there may be cases where breaches of the prohibition may be justified on moral and political grounds and the community will eventually condone them or mete out lenient condemnation' (emphasis in original).

[100] See e.g. the Dissenting Opinion of Judge Schwebel, *Nicaragua* case, ICJ Reports, 1986, pp. 14, 347–8; 76 ILR, pp. 349, 681. But see Dinstein, *War*, pp. 187 ff. Note also the suggestion that attacks on computer networks may also fall within the definition of armed attack if fatalities are caused, e.g. where the computer-controlled systems regulating waterworks and dams are disabled: see Y. Dinstein, 'Computer Network Attacks and Self-Defence', 76 *International Law Studies, US Naval War College*, 2001, p. 99.

[101] See Dinstein, *War*, pp. 191–2.

[102] See above, p. 1131.

[103] However, note that the Report of the UN High Level Panel on Threats, Challenges and Change, A/59/565, 2004, at para. 188, declared that 'a threatened state, according to long established international law, can take military action as long as the threatened attack is *imminent*, no other means would deflect it and the action is proportionate' (emphasis in original). The response of the UN Secretary-General, *In Larger Freedom*, A/59/2005, para. 124, also stated that imminent threats were covered by the right to self-defence. The

Nevertheless, it is safe to conclude that the concept of self-defence extends to a response to an attack that is reasonably and evidentially perceived to be imminent, however that is semantically achieved. The *Caroline* criteria remain critical.[104]

There have, however, been suggestions that the notion of anticipatory self-defence, controversial though that is, could be expanded to a right of 'pre-emptive self-defence' (sometimes termed 'preventive self-defence') that goes beyond the *Caroline* limits enabling the use of force in order to defend against, or prevent, possible attacks. The US note to the UN on 7 October 2001, concerning action in Afghanistan, included the sentence that, 'We may find that our self-defence requires further actions with respect to other organisations and other states.'[105] This approach was formally laid down in the 2002 National Security Strategy of the US[106] and reaffirmed in the 2006 National Security Strategy, which emphasised the role of pre-emption in national security strategy.[107] In so far as it goes beyond the *Caroline* criteria, this doctrine of pre-emption must be seen as going beyond what is currently acceptable in international law.[108]

The concepts of necessity and proportionality are at the heart of self-defence in international law.[109] The Court in the *Nicaragua* case stated that there was a 'specific rule whereby self-defence would warrant only

resolution adopted by the Institut de Droit International on 27 October 2007, para. 3, notes that the right to self-defence arises 'in the case of an actual or manifestly imminent armed attack' and that it may be exercised 'only when there is no lawful alternative in practice in order to forestall, stop or repel the armed attack'.

104 See also the Chatham House Principles on International Law on the Use of Force in Self-Defence, 55 ICLQ, 2006, pp. 963, 964–5.

105 S/2001/946. See also Byers, 'Terrorism', p. 411.

106 41 ILM, 2002, p. 1478. See also M. E. O'Connell, 'The Myth of Preemptive Self-Defence', ASIL, Task Force on Terrorism, 2002, www.asil.org/taskforce/oconnell.pdf; M. Bothe, 'Terrorism and the Legality of Pre-emptive Force', 14 EJIL, 2003, p. 227, and W. M. Reisman and A. Armstrong, 'Past and Future of the Claim of Preemptive Self-Defense', 100 AJIL, 2006, p. 525.

107 See C. Gray, 'The Bush Doctrine Revisited: The 2006 National Security Strategy of the USA', 5 *Chinese Journal of International Law*, 2006, p. 555.

108 See e.g. the Report of the UN High Level Panel on Threats, Challenges and Change, A/59/565, 2004, at paras. 189 ff. and the UN Secretary-General's Report, *In Larger Freedom*, A/59/2005, para. 125, both essentially saying that where a threat is less than imminent, resort should be had to the Security Council. The resolution adopted by the Institut de Droit International on 27 October 2007 notes in para. 6 that, 'There is no basis in international law for the doctrine of "preventive" self-defence in the absence of an actual or manifestly imminent armed attack.' See also the Chatham House Principles on International Law on the Use of Force in Self-Defence, 55 ICLQ, 2006, pp. 963, 968.

109 See e.g. Brownlie, *Use of Force*, p. 279, footnote 2; J. Graham, *Necessity, Proportionality and the Use of Force by States*, Cambridge, 2004; Gray, *Use of Force*, pp. 120 ff., and Dinstein, *War*, pp. 237 ff.

measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law',[110] and in the Advisory Opinion it gave to the General Assembly on the *Legality of the Threat or Use of Nuclear Weapons* it was emphasised that '[t]he submission of the exercise of the right of self-defence to the conditions of necessity and proportionality is a rule of customary international law'.[111] Quite what will be necessary[112] and proportionate[113] will depend on the circumstances of the case.[114] The necessity criterion raises important evidential as well as substantive issues. It is essential to demonstrate that, as a reasonable conclusion on the basis of facts reasonably known at the time, the armed attack that has occurred or is reasonably believed to be imminent requires the response that is proposed. In the *Oil Platforms* case,[115] the Court held that it was not satisfied that the US attacks on the oil platforms in question were necessary in order to respond to the attack on the *Sea Isle City* and the mining of the USS *Samuel B Roberts*, noting in particular that there was no evidence that the US had complained to Iran of the military activities of the platforms (contrary to its conduct with regard to other events such as minelaying and attacks on neutral shipping). Further, the US had admitted that one attack on an oil platform had been a 'target of opportunity'. It has been argued that, 'Necessity is a threshold, and the criterion of imminence can be seen to be an aspect of it, inasmuch as it requires that there be no time to pursue non-forcible measures with a reasonable chance of averting or stopping the attack.'[116]

[110] ICJ Reports, 1986, pp. 14, 94 and 103; 76 ILR, pp. 349, 428 and 437.

[111] ICJ Reports, 1996, pp. 226, 245; 110 ILR, p. 163. The Court affirmed that this 'dual condition' also applied to article 51, whatever the means of force used, *ibid*.

[112] See Judge Ago's Eighth Report on State Responsibility to the International Law Commission, where it was noted that the concept of necessity centred upon the availability of other means to halt the attack so that 'the state attacked ... must not, in the particular circumstances, have had any means of halting the attack other than recourse to armed force', *Yearbook of the ILC*, 1980, vol. II, part 1, p. 69.

[113] Judge Ago noted that the correct relationship for proportionality was not between the conduct constituting the armed attack and the opposing conduct, but rather between the action taken in self-defence and the purpose of halting and repelling the armed attack, so that '[t]he action needed to halt and repulse the attack may well have to assume dimensions disproportionate to those of the attack suffered', *ibid*., p. 69. See also J. G. Gardam, 'Proportionality and Force in International Law', 87 AJIL, 1993, p. 391.

[114] Note that the UK declared that Turkish operations in northern Iraq in 1998 'must be proportionate to the threat', UKMIL, 69 BYIL, 1998, p. 586.

[115] ICJ Reports, 2003, pp. 161, 198.

[116] The Chatham House Principles on International Law on the Use of Force in Self-Defence, 55 ICLQ, 2006, pp. 963, 967.

Quite what response would be regarded as proportionate is sometimes difficult to quantify. It raises the issue as to what exactly is the response to be proportionate to. Is it the actual attack or the threat or likelihood of further attacks? And what if the attack in question is but part of a continuing series of such attacks to which response has thus far been muted or nonexistent? In the *Oil Platforms* case, the Court felt it necessary to consider the scale of the whole operation that constituted the US response, which included *inter alia* the destruction of two Iranian frigates and a number of other naval vessels and aircraft, to the mining by an unidentified agency of a single warship without loss of life.[117] In *Democratic Republic of the Congo* v. *Uganda*,[118] the Court, while finding that the preconditions for the exercise of self-defence did not exist in the circumstances, stated that 'the taking of airports and towns [by Ugandan forces] many hundreds of kilometers from Uganda's border would not seem proportionate to the series of transborder attacks it claimed had given rise to the right of self-defence, nor to be necessary to that end'.

Proportionality as a criterion of self-defence may also require consideration of the type of weaponry to be used, an investigation that necessitates an analysis of the principles of international humanitarian law. The International Court in the *Legality of the Threat or Use of Nuclear Weapons* case took the view that the proportionality principle may 'not in itself exclude the use of nuclear weapons in self-defence in all circumstances', but 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'. In particular, the nature of such weapons and the profound risks associated with them would be a relevant consideration for states 'believing they can exercise a nuclear response in self-defence in accordance with the requirements of proportionality'.[119] One especial difficulty relates to whether in formulating the level of response a series of activities may be taken into account, rather than just the attack immediately preceding the act of self-defence. The more likely answer is that where such activities clearly form part of a sequence or chain of events, then the test of proportionality will be so interpreted as to incorporate this. It also appears inevitable that it will be the state contemplating such action that will first have to make that determination,[120] although

117 ICJ Reports, 2003, pp. 161, 198; 130 ILR, pp. 323, 357–8.
118 ICJ Reports, 2005, pp. 168, 223.
119 ICJ Reports, 1996, pp. 226, 245; 110 ILR, p. 163. See further below, p. 1187.
120 See e.g. H. Lauterpacht, *The Function of Law in the International Community*, London, 1933, p. 179.

it will be subject to consideration by the international community as a whole and more specifically by the Security Council under the terms of article 51.[121]

It is also important to emphasise that article 51 requires that states report 'immediately' to the Security Council on measures taken in the exercise of their right to self-defence and that action so taken may continue 'until the Security Council has taken the measures necessary to maintain international peace and security'.[122]

The protection of nationals abroad[123]

In the nineteenth century, it was clearly regarded as lawful to use force to protect nationals and property situated abroad and many incidents occurred to demonstrate the acceptance of this position.[124] Since the adoption of the UN Charter, however, it has become rather more controversial since of necessity the 'territorial integrity and political independence' of the target state is infringed,[125] while one interpretation of article 51 would deny that 'an armed attack' could occur against individuals abroad within

[121] See e.g. D. Grieg, 'Self-Defence and the Security Council: What Does Article 51 Require?', 40 ICLQ, 1991, p. 366.

[122] Note that the Court pointed out in *Democratic Republic of the Congo* v. *Uganda*, ICJ Reports, 2005, pp. 168, 222, that Uganda did not report to the Security Council events that it had regarded as requiring it to act in self-defence. See Dinstein, *War*, p. 218, who argues that failure to report measures taken in the exercise of the right of self-defence 'should not be fatal, provided that the substantive conditions for the exercise of this right are met'.

[123] See e.g. M. B. Akehurst, 'The Use of Force to Protect Nationals Abroad', 5 *International Relations*, 1977, p. 3, and Akehurst, 'Humanitarian Intervention' in *Intervention in World Politics* (ed. H. Bull), Oxford, 1984, p. 95; Dinstein, *War*, pp. 231 ff.; Gray, *Use of Force*, pp. 126 ff.; Franck, *Recourse*, chapter 6; Waldock, 'General Course', p. 467; L. C. Green, 'Rescue at Entebbe – Legal Aspects', 6 *Israel Yearbook on Human Rights*, 1976, p. 312, and M. N. Shaw, 'Some Legal Aspects of the Entebbe Incident', 1 *Jewish Law Annual*, 1978, p. 232. See also T. Schweisfurth, 'Operations to Rescue Nationals in Third States Involving the Use of Force in Relation to the Protection of Human Rights', German YIL, 1980, p. 159; J. R. d'Angelo, 'Resort to Force to Protect Nationals', 21 Va. JIL, 1981, p. 485; J. Paust, 'The Seizure and Recovery of the *Mayaguez*', 85 *Yale Law Journal*, 1976, p. 774; D. W. Bowett, 'The Use of Force for the Protection of Nationals Abroad' in *The Current Legal Regulation of the Use of Force* (ed. A. Cassese), Oxford, 1986, p. 39, and N. Ronzitti, *Rescuing Nationals Abroad Through Military Coercion and Intervention on Grounds of Humanity*, Oxford, 1985.

[124] See e.g. Brownlie, *Use of Force*, pp. 289 ff.

[125] There is, of course, a different situation where the state concerned has consented to the action or where nationals are evacuated from a state where law and order has broken down: see Gray, *Use of Force*, p. 129.

the meaning of that provision since it is the state itself that must be under attack, not specific persons outside the jurisdiction.[126]

The issue has been raised in recent years in several cases. In 1964, Belgium and the United States sent forces to the Congo to rescue hostages (including nationals of the states in question) from the hands of rebels, with the permission of the Congolese government,[127] while in 1975 the US used force to rescue an American cargo boat and its crew captured by Cambodia.[128] The most famous incident, however, was the rescue by Israel of hostages held by Palestinian and other terrorists at Entebbe, following the hijack of an Air France airliner.[129] The Security Council debate in that case was inconclusive. Some states supported Israel's view that it was acting lawfully in protecting its nationals abroad, where the local state concerned was aiding the hijackers,[130] others adopted the approach that Israel had committed aggression against Uganda or used excessive force.[131]

The United States has in recent years justified armed action in other states on the grounds partly of the protection of American citizens abroad. It was one of the three grounds announced for the invasion of Grenada in 1984[132] and one of the four grounds put forward for the intervention in Panama in December 1989.[133] However, in both cases the level of threat against the US citizens was such as to raise serious questions concerning the satisfaction of the requirement of proportionality.[134] The US conducted a bombing raid on Libya on 15 April 1986 as a consequence of alleged Libyan involvement in an attack on US servicemen in West Berlin.

126 See e.g. Brownlie, *Use of Force*, pp. 289 ff.

127 See M. Whiteman, *Digest of International Law*, Washington, 1968, vol. V, p. 475. See also R. B. Lillich, 'Forcible Self-Help to Protect Human Rights', 53 *Iowa Law Review*, 1967, p. 325.

128 Paust, 'Seizure and Recovery'. See also DUSPIL, 1975, pp. 777–83.

129 See e.g. Akehurst, 'Use of Force'; Green, 'Rescue at Entebbe', and Shaw, 'Legal Aspects'.

130 See e.g. S/PV.1939, pp. 51–5; S/PV.1940, p. 48 and S/PV.1941, p. 31.

131 See e.g. S/PV.1943, pp. 47–50 and S/PV.1941, pp. 4–10, 57–61 and 67–72. Note that Egypt attempted without success a similar operation in Cyprus in 1978: see *Keesing's Contemporary Archives*, p. 29305. In 1980, the US attempted to rescue its nationals held hostage in Iran but failed: see S/13908 and the *Iranian Hostages* case, ICJ Reports, 1980, pp. 3, 43; 61 ILR, pp. 530, 569.

132 See the statement of Deputy Secretary of State Dam, 78 AJIL, 1984, p. 200. See also W. Gilmore, *The Grenada Intervention*, London, 1984, and below, p. 1151.

133 See the statements by the US President and the Department of State, 84 AJIL, 1990, p. 545.

134 In the case of Grenada, it was alleged that some American students were under threat: see Gilmore, *Grenada*, pp. 55–64. In the Panama episode one American had been killed and several harassed: see V. Nanda, 'The Validity of United States Intervention in Panama Under International Law', 84 AJIL, 1990, pp. 494, 497.

This was justified by the US as an act of self-defence.[135] On 26 June 1993, the US launched missiles at the headquarters of the Iraqi military intelligence in Baghdad as a consequence of an alleged Iraqi plot to assassinate former US President Bush in Kuwait. It was argued that the resort to force was justified as a means of protecting US nationals in the future.[136] It is difficult to extract from the contradictory views expressed in these incidents the apposite legal principles. While some states affirm the existence of a rule permitting the use of force in self-defence to protect nationals abroad, others deny that such a principle operates in international law. There are states whose views are not fully formed or coherent on this issue. The UK Foreign Minister concluded on 28 June 1993 that:[137]

> Force may be used in self-defence against threats to one's nationals if: (a) there is good evidence that the target attacked would otherwise continue to be used by the other state in support of terrorist attacks against one's nationals; (b) there is, effectively, no other way to forestall imminent further attacks on one's nationals; (c) the force employed is proportionate to the threat.

On balance, and considering the opposing principles of saving the threatened lives of nationals and the preservation of the territorial integrity of states, it would seem preferable to accept the validity of the rule in carefully restricted situations consistent with the conditions laid down in the *Caroline* case.[138] Whether force may be used to protect property abroad is less controversial. It is universally accepted today that it is not lawful to have resort to force merely to save material possessions abroad.

Conclusions

Despite controversy and disagreement over the scope of the right of self-defence, there is an indisputable core and that is the competence of states

[135] See President Reagan's statement, *The Times*, 16 April 1986, p. 6. The UK government supported this: see *The Times*, 17 April 1986, p. 4. However, there are problems with regard to proportionality in view of the injuries and damage apparently caused in the air raid. One US serviceman was killed in the West Berlin action. The role of the UK in consenting to the use of British bases for the purposes of the raid is also raised. See also UKMIL, 57 BYIL, 1986, pp. 639–42 and 80 AJIL, 1986, pp. 632–6, and C. J. Greenwood, 'International Law and the United States' Air Operation Against Libya', 89 *West Virginia Law Review*, 1987, p. 933.

[136] See Security Council Debates S/PV. 3245, 1993, and UKMIL, 64 BYIL, 1993, pp. 731 ff. See also D. Kritsiotis, 'The Legality of the 1993 US Missile Strike on Iraq and the Right of Self-Defence in International Law', 45 ICLQ, 1996, p. 162.

[137] 227 HC Deb., col. 658; 64 BYIL, 1993, p. 732.

[138] See above, p. 1131.

to resort to force in order to repel an attack. A clear example of this was provided in the Falklands conflict. Whatever doubts may be entertained about the precise roots of British title to the islands, it is very clear that after the Argentinian invasion of the territory, the UK possessed in law the right to act to restore the *status quo ante* and remove the Argentinian troops.[139] Security Council resolution 502 (1982), in calling for an immediate withdrawal of Argentinian forces and determining that a breach of the peace existed, reinforced this. It should also be noted that it is accepted that a state is entitled to rely upon the right of self-defence even while its possession of the territory in question is the subject of controversy.[140]

Collective self-defence[141]

Historically the right of states to take up arms to defend themselves from external force is well established as a rule of customary international law. Article 51, however, also refers to 'the inherent right of . . . collective self-defence' and the question therefore arises as to how far one state may resort to force in the defence of another. The idea of collective self-defence, however, is rather ambiguous. It may be regarded merely as a pooling of a number of individual rights of self-defence within the framework of a particular treaty or institution, as some writers have suggested,[142] or it may form the basis of comprehensive regional security systems. If the former were the case, it might lead to legal difficulties should Iceland resort to force in defence of Turkish interests, since actions against Turkey would in no way justify an armed reaction by Iceland pursuant to its individual right of self-defence.

In fact, state practice has adopted the second approach. Organisations such as NATO and the Warsaw Pact were established after the Second World War, specifically based upon the right of collective self-defence under article 51. By such agreements, an attack upon one party is treated as an attack upon all,[143] thus necessitating the conclusion that collective

[139] See above, chapter 10, p. 532.
[140] See e.g. Brownlie, *Use of Force*, pp. 382–3. See also above, p. 1128.
[141] See e.g. Dinstein, *War*, chapter 9, and Gray, *Use of Force*, chapter 5.
[142] See e.g. Bowett, *Self-Defence*, p. 245, cf. Goodrich, Hambro and Simons, *Charter*, p. 348. See also Brownlie, *Use of Force*, pp. 328–9.
[143] See e.g. article 5 of the NATO Treaty, 1949.

self-defence is something more than a collection of individual rights of self-defence, but another creature altogether.[144]

This approach finds support in the *Nicaragua* case.[145] The Court stressed that the right to collective self-defence was established in customary law but added that the exercise of that right depended upon both a prior declaration by the state concerned that it was the victim of an armed attack and a request by the victim state for assistance. In addition, the Court emphasised that 'for one state to use force against another, on the ground that that state has committed a wrongful act of force against a third state, is regarded as lawful, by way of exception, only when the wrongful act provoking the response was an armed attack'.[146]

The invasion of Kuwait by Iraq on 2 August 1990 raised the issue of collective self-defence in the context of the response of the states allied in the coalition to end that conquest and occupation. The Kuwaiti government in exile appealed for assistance from other states.[147] Although the armed action from 16 January 1991 was taken pursuant to UN Security Council resolutions,[148] it is indeed arguable that the right to collective self-defence is also relevant in this context.[149]

Intervention[150]

The principle of non-intervention is part of customary international law and founded upon the concept of respect for the territorial sovereignty

[144] Note article 52 of the UN Charter, which recognises the existence of regional arrangements and agencies, dealing with such matters relating to international peace and security as are appropriate for regional action, provided they are consistent with the purposes and principles of the UN: see further below, chapter 22, p. 1273.

[145] ICJ Reports, 1986, pp. 14, 103–5; 76 ILR, pp. 349, 437.

[146] ICJ Reports, 1986, p. 110. See also *ibid.*, p. 127; 76 ILR, pp. 444 and 461. This was reaffirmed in the *Oil Platforms (Iran* v. *USA)* case, ICJ Reports, 2003, pp. 161, 186; 130 ILR, pp. 323, 346.

[147] See *Keesing's Record of World Events*, pp. 37631 ff. (1990).

[148] See below, chapter 22, p. 1253.

[149] Note that Security Council resolution 661 (1990) specifically referred in its preamble to 'the inherent right of individual or collective self-defence, in response to the armed attack by Iraq against Kuwait'. See also the *Barcelona Traction* case, ICJ Reports, 1970, pp. 3, 32; 46 ILR, pp. 178, 206.

[150] See e.g. Gray, *Use of Force*, chapter 3; Nguyen Quoc Dinh *et al.*, *Droit International Public*, p. 947; T. Komarknicki, 'L'Intervention en Droit International Moderne', 62 RGDIP, 1956, p. 521; T. Farer, 'The Regulation of Foreign Armed Intervention in Civil Armed Conflict', 142 HR, 1974 II, p. 291, and J. E. S. Fawcett, 'Intervention in International Law', 103 HR, 1961 II, p. 347.

of states.[151] Intervention is prohibited where it bears upon matters in which each state is permitted to decide freely by virtue of the principle of state sovereignty. This includes, as the International Court of Justice noted in the *Nicaragua* case,[152] the choice of political, economic, social and cultural systems and the formulation of foreign policy. Intervention becomes wrongful when it uses methods of coercion in regard to such choices, which must be free ones.[153] There was 'no general right of intervention in support of an opposition within another state' in international law. In addition, acts constituting a breach of the customary principle of non-intervention will also, if they directly or indirectly involve the use of force, constitute a breach of the principle of the non-use of force in international relations.[154] The principle of respect for the sovereignty of states was another principle closely allied to the principles of the prohibition of the use of force and of non-intervention.[155]

Civil wars[156]

International law treats civil wars as purely internal matters, with the possible exception of self-determination conflicts.[157] Article 2(4) of the UN

[151] See the *Corfu Channel* case, ICJ Reports, 1949, pp. 4, 35; 16 AD, pp. 155, 167 and the *Nicaragua* case, ICJ Reports, 1986, pp. 14, 106; 76 ILR, pp. 349, 440. See also the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States, 1965 and the Declaration on the Principles of International Law, 1970, above, p. 1127.

[152] ICJ Reports, 1986, pp. 14, 108; 76 ILR, p. 442. See also S. McCaffrey, 'The Forty-First Session of the International Law Commission', 83 AJIL, 1989, p. 937.

[153] ICJ Reports, 1986, p. 108.

[154] ICJ Reports, 1986, pp. 109–10; 76 ILR, p. 443.

[155] ICJ Reports, 1986, p. 111; 76 ILR, p. 445.

[156] See e.g. Gray, *Use of Force*, pp. 60 ff.; *Law and Civil War in the Modern World* (ed. J. N. Moore), Princeton, 1974; *The International Regulation of Civil Wars* (ed. E. Luard), Oxford, 1972; *The International Law of Civil Wars* (ed. R. A. Falk), Princeton, 1971; T. Fraser, 'The Regulation of Foreign Intervention in Civil Armed Conflict', 142 HR, 1974, p. 291, and W. Friedmann, 'Intervention, Civil War and the Rule of International Law', PASIL, 1965, p. 67. See also R. Higgins, 'Intervention and International Law' in Bull, *Intervention in World Politics*, p. 29; C. C. Joyner and B. Grimaldi, 'The United States and Nicaragua: Reflections on the Lawfulness of Contemporary Intervention', 25 Va. JIL, 1985, p. 621, and Schachter, *International Law*, pp. 158 ff.

[157] Note that the Declaration on Principles of International Law concerning Friendly Relations, 1970 emphasised that all states were under a duty to refrain from any forcible action which deprives people of their right to self-determination and that 'in their actions against, and resistance to, such forcible action' such peoples could receive support in accordance with the purpose and principles of the UN Charter. Article 7 of the Consensus Definition of Aggression in 1974 referred ambiguously to the right of peoples entitled to but forcibly deprived of the right to self-determination, 'to struggle to that end and to seek and receive support, in accordance with the principles of the Charter and in conformity' with the 1970

Charter prohibits the threat or use of force in international relations, not in domestic situations. There is no rule against rebellion in international law. It is within the domestic jurisdiction of states and is left to be dealt with by internal law. Should the rebellion succeed, the resulting situation would be dealt with primarily in the context of recognition. As far as third parties are concerned, traditional international law developed the categories of rebellion, insurgency and belligerency.

Once a state has defined its attitude and characterised the situation, different international legal provisions would apply. If the rebels are regarded as criminals, the matter is purely within the hands of the authorities of the country concerned and no other state may legitimately interfere. If the rebels are treated as insurgents, then other states may or may not agree to grant them certain rights. It is at the discretion of the other states concerned, since an intermediate status is involved. The rebels are not mere criminals, but they are not recognised belligerents. Accordingly, the other states are at liberty to define their legal relationship with them. Insurgency is a purely provisional classification and would arise, for example, where a state needed to protect nationals or property in an area under the *de facto* control of the rebels.[158] On the other hand, belligerency is a formal status involving rights and duties. In the eyes of classical international law, other states may accord recognition of belligerency to rebels when certain conditions have been fulfilled. These were defined as the existence of an armed conflict of a general nature within a state, the occupation by the rebels of a substantial portion of the national territory, the conduct of hostilities in accordance with the rules of war and by organised groups operating under a responsible authority and the existence of circumstances rendering it necessary for the states contemplating recognition to define their attitude

Declaration. Article 1(4) of Additional Protocol I to the Geneva 'Red Cross' Conventions of 1949, adopted in 1977, provided that international armed conflict situations 'include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right to self-determination' as enshrined in the Charter of the UN and the 1970 Declaration. Whether this means that articles 2(4) and 51 of the Charter now apply to self-determination conflicts so that the peoples in question have a valid right to use force in self-defence is controversial and difficult to maintain. However, the use of force to suppress self-determination is now clearly unacceptable, as is help by third parties given to that end, but the provision of armed assistance to peoples seeking self-determination would appear to remain unlawful: see Gray, *Use of Force*, pp. 52 ff.; A. Cassese, *Self-Determination of Peoples*, Cambridge, 1995, p. 193; and H. Wilson, *International Law and the Use of Force by National Liberation Movements*, Oxford, 1988. See as to the principle of self-determination, above, chapter 5, p. 251.

[158] See e.g. H. Lauterpacht, *Recognition in International Law*, Cambridge, 1947, pp. 275 ff.

to the situation.[159] This would arise, for example, where the parties to the conflict are exercising belligerent rights on the high seas. Other maritime countries would feel compelled to decide upon the respective status of the warring sides, since the recognition of belligerency entails certain international legal consequences. Once the rebels have been accepted by other states as belligerents they become subjects of international law and responsible in international law for all their acts. In addition, the rules governing the conduct of hostilities become applicable to both sides, so that, for example, the recognising states must then adopt a position of neutrality.

However, these concepts of insurgency and belligerency are lacking in clarity and are extremely subjective. The absence of clear criteria, particularly with regard to the concept of insurgency, has led to a great deal of confusion. The issue is of importance since the majority of conflicts in the years since the conclusion of the Second World War have been in essence civil wars. The reasons for this are many and complex and ideological rivalry and decolonisation within colonially imposed boundaries are amongst them.[160] Intervention may be justified on a number of grounds, including response to earlier involvement by a third party. For instance, the USSR and Cuba justified their activities in the Angolan civil war of 1975–6 by reference to the prior South African intervention,[161] while the United States argued that its aid to South Vietnam grew in proportion to the involvement of North Vietnamese forces in the conflict.[162]

The international law rules dealing with civil wars depend upon the categorisation by third states of the relative status of the two sides to the conflict. In traditional terms, an insurgency means that the recognising state may, if it wishes, create legal rights and duties as between itself and the insurgents, while recognition of belligerency involves an acceptance of a position of neutrality (although there are some exceptions to this rule) by the recognising states. But in practice, states very rarely make an express acknowledgement as to the status of the parties to the conflict, precisely in order to retain as wide a room for manoeuvre as possible. This means that the relevant legal rules cannot really operate as intended

[159] See e.g. N. Mugerwa, 'Subjects of International Law' in Sørensen, *Manual of Public International Law*, pp. 247, 286–8. See also R. Higgins, 'International Law and Civil Conflict' in Luard, *International Regulation of Civil Wars*, pp. 169, 170–1.

[160] See e.g. M. N. Shaw, *Title to Territory in Africa: International Legal Issues*, Oxford, 1986.

[161] See e.g. C. Legum and T. Hodges, *After Angola*, London, 1976.

[162] See e.g. *Law and the Indo-China War* (ed. J. N. Moore), Charlottesville, 1972. See also *The Vietnam War and International Law* (ed. R. A. Falk), Princeton, 4 vols., 1968–76.

in classical law and that it becomes extremely difficult to decide whether a particular intervention is justified or not.[163]

Aid to the authorities of a state[164]

It would appear that in general outside aid to the government authorities to repress a revolt[165] is perfectly legitimate,[166] provided, of course, it was requested by the government. The problem of defining the governmental authority entitled to request assistance was raised in the Grenada episode. In that situation, the appeal for the US intervention was allegedly made by the Governor-General of the island,[167] but controversy exists as to whether this in fact did take place prior to the invasion and whether the Governor-General was the requisite authority to issue such an appeal.[168] The issue resurfaced in a rather different form regarding the Panama invasion of December 1989. One of the legal principles identified by the US Department of State as the basis for the US action was that of assistance to the 'lawful and democratically elected government in Panama'.[169] The problem with this was that this particular government had been prevented by General Noriega from actually taking office and the issue raised was therefore whether an elected head of state who is prevented from ever acting as such may be regarded as a governmental authority capable of requesting assistance including armed force from another state. This in fact runs counter to the test of acceptance in international law of governmental authority, which is firmly based upon effective control rather than upon the nature of the regime, whether democratic, socialist or otherwise.[170]

[163] But see below, chapter 22, p. 1257, with regard to the increasing involvement of the UN in internal conflicts and the increasing tendency to classify such conflicts as possessing an international dimension.

[164] See e.g. L. Doswald-Beck, 'The Legal Validity of Military Intervention by Invitation of the Government', 56 BYIL, 1985, p. 189, and Gray, *Use of Force*, pp. 68 ff.

[165] See *Nicaragua* v. *USA*, ICJ Reports, 1986, pp. 14, 126, where the Court noted that intervention is 'already allowable at the request of the government of a state'; however, apparently not where the recipient state is forcibly suppressing the right to self-determination of a people entitled to such rights: see above, p. 1148, note 157.

[166] Until a recognition of belligerency, of course, although this has been unknown in modern times: see e.g. Lauterpacht, *Recognition*, pp. 230–3.

[167] See the statement by Deputy Secretary of State Dam, 78 AJIL, 1984, p. 200.

[168] See e.g. J. N. Moore, *Law and the Grenada Mission*, Charlottesville, 1984, and Gilmore, *Grenada*. See also Higgins, *Development of International Law*, pp. 162–4 regarding the Congo crisis of 1960, where that state's President and Prime Minister sought to dismiss each other.

[169] 84 AJIL, 1990, p. 547.

[170] See above, chapter 9, p. 454.

The general proposition, however, that aid to recognised governmental authorities is legitimate,[171] would be further reinforced where it could be shown that other states were encouraging or directing the subversive operations of the rebels. In such cases, it appears that the doctrine of collective self-defence would allow other states to intervene openly and lawfully on the side of the government authorities.[172] Some writers have suggested that the traditional rule of permitting third-party assistance to governments would not extend to aid where the outcome of the struggle has become uncertain or where the rebellion has become widespread and seriously aimed at overthrowing the government.[173] While this may be politically desirable for the third state, it may put at serious risk entirely deserving governments.[174] Practice, however, does suggest that many forms of aid, such as economic, technical and arms provision arrangements, to existing governments faced with civil strife, are acceptable.[175] There is an argument, on the other hand, for suggesting that substantial assistance to a government clearly in the throes of collapse might be questionable as intervention in a domestic situation that is on the point of resolution, but there are considerable definitional problems here.

Aid to rebels[176]

The reverse side of the proposition is that aid to rebels is contrary to international law. The 1970 Declaration on Principles of International Law emphasised that:

[171] Note that article 20 of the International Law Commission's Articles on State Responsibility, 2001, provides that 'Valid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent.'

[172] But in the light of the principles propounded in the *Nicaragua* case, ICJ Reports, 1986, pp. 104, 120–3; 76 ILR, pp. 349, 438, 454–7.

[173] See e.g. Q. Wright, 'US Intervention in the Lebanon', 53 AJIL, 1959, pp. 112, 122. See also R. A. Falk, *Legal Order in a Violent World*, Princeton, 1968, pp. 227–8 and 273, and Doswald-Beck, 'Legal Validity', p. 251.

[174] However, where consent to the presence of foreign troops has been withdrawn by the government of the state concerned, the continuing presence of those troops may constitute (in the absence of any legitimate exercise of the right of self-defence) an unlawful use of force: see e.g. *Democratic Republic of the Congo* v. *Uganda*, ICJ Reports, 2005, pp. 168, 213 and 224. See also article 3(e) of the Consensus Definition of Aggression, 1974.

[175] See, with regard to the UK continuance of arms sales to Nigeria during its civil war, Higgins, 'International Law and Civil Conflict', p. 173. Note also the US policy of distinguishing between traditional suppliers of arms and non-traditional suppliers of arms in such circumstances. It would support aid provided by the former (as the UK in Nigeria), but not the latter: see DUSPIL, 1976, p. 7.

[176] See e.g. Gray, *Use of Force*, pp. 87 ff.

> [n]o state shall organise, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another state, or interfere in civil strife in another state.[177]

The Declaration also provided that:

> [e]very state shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other state or country.

In the *Nicaragua* case,[178] the Court declared that the principle of non-intervention prohibits a state 'to intervene, directly or indirectly, with or without armed force, in support of an internal opposition in another state' and went on to say that acts which breach the principle of non-intervention 'will also, if they directly or indirectly involve the use of force, constitute a breach of the principle of the non-use of force in international relations'. Further, the Court emphasised in *Democratic Republic of the Congo* v. *Uganda*[179] that where such an unlawful military intervention reaches a certain magnitude and duration, it would amount to 'a grave violation of the prohibition on the use of force expressed in article 2, paragraph 4, of the Charter'.

In reality, state practice is far from clear.[180] Where a prior, illegal intervention on the government side has occurred, it may be argued that aid to the rebels is acceptable. This was argued by a number of states with regard to the Afghanistan situation, where it was argued that the Soviet intervention in that state amounted to an invasion.[181]

[177] See also in similar terms the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States, 1965, above, p. 1126. Article 3(g) of the General Assembly's Consensus Definition of Aggression, 1974, characterises as an act of aggression 'the sending by or on behalf of a state of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another state'. See also, with regard to US aid to the Nicaraguan 'Contras', Chayes, *Cuban Missile Crisis*, and the *Nicaragua* case, ICJ Reports, 1986, p. 14; 76 ILR, p. 349.

[178] ICJ Reports, 1986, pp. 14, 108 and 109–10. These propositions were reaffirmed by the Court in *Democratic Republic of the Congo* v. *Uganda*, ICJ Reports, 2005, pp. 168, 227.

[179] ICJ Reports, 2005, p. 168.

[180] See e.g. Syrian intervention in the Jordanian civil war of 1970 and in the Lebanon in 1976 and see Gray, *Use of Force*, pp. 85 ff.

[181] See e.g. *Keesing's Contemporary Archives*, pp. 30339, 30364 and 30385. See also General Assembly resolutions ES–62; 35/37; 36/34; 37/37 and 38/29 condemning the USSR for its armed intervention in Afghanistan. See also Doswald-Beck, 'Legal Validity', pp. 230 ff.

The situation in the Democratic Republic of the Congo

The situation in the Democratic Republic of the Congo in 1999 and after, with intervention against the government by Uganda and Rwanda (seeking initially to act against rebel movements operating against them from Congolese territory and then assisting rebels against the Congo government) and on behalf of the government by a number of states, including Zimbabwe, Angola and Namibia, is instructive.[182] In resolution 1234 (1999), the Security Council recalled the inherent right of individual and collective self-defence in accordance with article 51 and reaffirmed the need for all states to refrain from interfering in the internal affairs of other states. It called upon states to bring to an end the presence of uninvited forces of foreign states.[183] The Council in resolution 1291 (1999) called for the orderly withdrawal of all foreign forces from the Congo in accordance with the Lusaka Ceasefire Agreement.[184] Security Council resolution 1304 (2000) went further and, acting under Chapter VII, demanded that 'Uganda and Rwanda, which have violated the sovereignty and territorial integrity of the Democratic Republic of the Congo, withdraw all their forces from the territory of the Democratic Republic of the Congo without delay'. An end to all other foreign military presence and activity was also called for in conformity with the provisions of the Lusaka Agreement.[185] The UN also established a mission in the Congo (MONUC) in 1999, whose mandate was subsequently extended.[186] The situation demonstrates the UN approach, reflecting international law, to the effect that while aid by foreign states to the government was acceptable,[187] aid to rebels by foreign states was not. Side by side with this, the UN did recognise the problem posed by foreign militias based in the eastern region of the Democratic Republic of the Congo (particularly the Rwanda

[182] See Gray, *Use of Force*, pp. 60–4, 70–1, 247–50 and 258–9. See also P. N. Okowa, 'Congo's War: The Legal Dimension of a Protracted Conflict', 77 BYIL, 2006, p. 203.

[183] Gray, *Use of Force*, pp. 61–2, noting that the Security Council took a clear position that aid to the government was permissible, while intervention or force to overthrow the government was not. The Democratic Republic of the Congo had written to the Security Council accusing Rwanda and Uganda of aggression and justifying its invitation to Angola, Namibia and Zimbabwe as a response to foreign intervention: see *UN Yearbook*, 1998, pp. 82–8 and S/1998/827.

[184] See S/1999/815.

[185] See also Security Council resolutions 1341 (2001) and 1355 (2001). Security Council resolution 1376 (2001) welcomed the withdrawal of some forces, including the full Namibian contingent, from the Congo. See also resolutions 1417 (2002), 1457 (2003) and 1468 (2003). Essentially condemnation was reserved by name for Rwanda and Uganda.

[186] See further below, chapter 22, p. 1264.

[187] See Okowa, 'Congo', p. 224.

Interahamwe who had been involved in the 1994 genocide and the Ugandan Lord's Resistance Army) and called for them to be disarmed.[188]

Humanitarian intervention[189]

This section concerns the question as to whether there can be said to be a right of humanitarian intervention by individual states. The issue of intervention by the UN in situations of humanitarian need and as a consequence of Security Council action is covered in the next chapter.

It has sometimes been argued that intervention in order to protect the lives of persons situated within a particular state and not necessarily nationals of the intervening state is permissible in strictly defined situations. This has some support in pre-Charter law and it may very well have been the case that in the nineteenth century such intervention was accepted under international law.[190] However, it is difficult to reconcile today with article 2(4) of the Charter[191] unless one either adopts a rather artificial

[188] See e.g. Security Council resolutions 1756 (2007) and 1794 (2007).

[189] See e.g. Gray, *Use of Force*, pp. 31 ff.; Dinstein, *War*, pp. 70 ff.; Franck, *Recourse*, chapter 9; Byers, *War Law*, Part Three; N. J. Wheeler, *Saving Strangers: Humanitarian Intervention in International Society*, Oxford, 2002; R. Goodman, 'Humanitarian Intervention and Pretexts for War', 100 AJIL, 2006, p. 107; D. Kennedy, *The Dark Sides of Virtue*, Princeton, 2004; *Humanitarian Intervention* (eds. J. L. Holzgrefe and R. O. Keohane), Cambridge, 2003; S. Chesterman, *Just War or Just Peace: Humanitarian Intervention and International Law*, Oxford, 2001; *Humanitarian Intervention and the United Nations* (ed. R. B. Lillich), Charlottesville, 1973; R. B. Lillich, 'Forcible Self-Help by States to Protect Human Rights', 53 *Iowa Law Review*, 1967, p. 325, and Lillich, 'Intervention to Protect Human Rights', 15 *McGill Law Journal*, 1969, p. 205, and Lillich, 'Humanitarian Intervention Through the United Nations: Towards the Development of Criteria', 53 ZaöRV, 1993, p. 557; T. M. Franck and N. S. Rodley, 'After Bangladesh: The Law of Humanitarian Intervention by Military Force', 67 AJIL, 1973, p. 275; J. P. Fonteyne, 'The Customary International Law Doctrine of Humanitarian Intervention', 4 *California Western International Law Journal*, 1974, p. 203; Chilstrom, 'Humanitarian Intervention under Contemporary International Law', 1 *Yale Studies in World Public Order*, 1974, p. 93; N. D. Arnison, 'The Law of Humanitarian Intervention' in *Refugees in the 1990s: New Strategies for a Restless World* (ed. H. Cleveland), 1993, p. 37; D. J. Scheffer, 'Towards a Modern Doctrine of Humanitarian Intervention', 23 *University of Toledo Law Review*, 1992, p. 253; D. Kritsiotis, 'Reappraising Policy Objections to Humanitarian Intervention', 19 *Michigan Journal of International Law*, 1998, p. 1005; N. Tsagourias, *The Theory and Praxis of Humanitarian Intervention*, Manchester, 1999, and F. Tesón, *Humanitarian Intervention: An Inquiry into Law and Morality*, 2nd edn, New York, 1997.

[190] See e.g. H. Ganji, *International Protection of Human Rights*, New York, 1962, chapter 1 and references cited in previous footnote.

[191] See, in particular, I. Brownlie, 'Humanitarian Intervention', in Moore, *Law and Civil War*, p. 217.

definition of the 'territorial integrity' criterion in order to permit temporary violations or posits the establishment of the right in customary law. Practice has also been in general unfavourable to the concept, primarily because it might be used to justify interventions by more forceful states into the territories of weaker states.[192] Nevertheless, it is not inconceivable that in some situations the international community might refrain from adopting a condemnatory stand where large numbers of lives have been saved in circumstances of gross oppression by a state of its citizens due to an outside intervention. In addition, it is possible that such a right might evolve in cases of extreme humanitarian need. One argument used to justify the use of Western troops to secure a safe haven in northern Iraq after the Gulf War was that it was taken in pursuance of the customary international law principle of humanitarian intervention in an extreme situation. Security Council resolution 688 (1991) condemned the widespread repression by Iraq of its Kurd and Shia populations and, citing this, the US, UK and France proclaimed 'no-fly zones' in the north and south of the country.[193] There was no express authorisation from the UN. It was argued by the UK that the no-fly zones were 'justified under international law in response to a situation of overwhelming humanitarian necessity'.[194]

The Kosovo crisis of 1999 raised squarely the issue of humanitarian intervention.[195] The justification for the NATO bombing campaign, acting out of area and without UN authorisation, in support of the repressed ethnic Albanian population of that province of Yugoslavia, was that of humanitarian necessity. The UK Secretary of State for Defence stated that,

[192] See e.g. M. B. Akehurst, 'Humanitarian Intervention' in Bull, *Intervention in World Politics*, p. 95.

[193] See the views expressed by a Foreign Office legal advisor to the House of Commons Foreign Affairs Committee, UKMIL, 63 BYIL, 1992, pp. 827–8. This is to be compared with the views of the Foreign Office several years earlier where it was stated that the best case that could be made was that it was not 'unambiguously illegal': see UKMIL, 57 BYIL, 1986, p. 619. See also Gray, *Use of Force*, pp. 33 ff., and below, chapter 22, p. 1254.

[194] UKMIL, 70 BYIL, 1999, p. 590. See also UKMIL, 75 BYIL, 2004, p. 857.

[195] See e.g. Gray, *Use of Force*, pp. 37 ff.; N. S. Rodley and B. Çali, 'Kosovo Revisited: Humanitarian Intervention on the Fault Lines of International Law', 7 *Human Rights Law Review*, 2007, p. 275; B. Simma, 'NATO, the UN and the Use of Force: Legal Aspects', 10 EJIL, 1999, p. 1; Kofi A. Annan, *The Question of Intervention: Statements by the Secretary-General*, New York, 1999; 'NATO's Kosovo Intervention', various writers, 93 AJIL, 1999, pp. 824–62; D. Kritsiotis, 'The Kosovo Crisis and NATO's Application of Armed Force Against the Federal Republic of Yugoslavia', 49 ICLQ, 2000, p. 330; P. Hilpod, 'Humanitarian Intervention: Is There a Need for a Legal Reappraisal?', 12 EJIL, 2001, p. 437, and 'Kosovo: House of Commons Foreign Affairs Committee 4th Report, June 2000', various memoranda, 49 ICLQ, 2000, pp. 876–943.

'In international law, in exceptional circumstances and to avoid a humanitarian catastrophe, military action can be taken and it is on that legal basis that military action was taken.'[196] The Security Council by twelve votes to three rejected a resolution condemning NATO's use of force.[197] After the conflict, and after an agreement had been reached between NATO and Yugoslavia,[198] the Council adopted resolution 1244 (1999) which welcomed the withdrawal of Yugoslav forces from the territory and decided upon the deployment under UN auspices of international civil and military presences. Member states and international organisations were, in particular, authorised to establish the international security presence and the resolution laid down the main responsibilities of the civil presence. There was no formal endorsement of the NATO action, but no condemnation.[199] It can be concluded that the doctrine of humanitarian intervention in a crisis situation was invoked and not condemned by the UN, but it received meagre support.[200] It is not possible to characterise the legal situation as going beyond this.[201]

[196] UKMIL, 70 BYIL, 1999, p. 586. A Foreign Office Minister wrote that, 'a limited use of force was justifiable in support of the purposes laid down by the Security Council but without the Council's express authorisation when that was the only means to avert an immediate and overwhelming humanitarian catastrophe', *ibid.*, p. 587 and see also *ibid.*, p. 598. The UK Prime Minister wrote to Parliament in 2004 stating that force may be used by states 'In exceptional circumstances, when it is the only way to avert an overwhelming humanitarian catastrophe, as in Kosovo in 1999', HC Deb., 22 March 2004, vol. 419, col. 561W–562W, UKMIL, 75 BYIL, 2004, p. 853.

[197] SCOR, 3989th meeting, 26 March 1999.

[198] See 38 ILM, 1999, p. 1217.

[199] Note that Yugoslavia made an application in April 1999 to the International Court against ten of the nineteen NATO states, alleging that these states, by participating in the use of force, had violated international law. The Court rejected the application made for provisional measures in all ten cases: see e.g. *Yugoslavia* v. *Belgium*, ICJ Reports, 1999, p. 124, and upheld preliminary objections as to jurisdiction and admissibility: see e.g. *Serbia and Montenegro* v. *UK*, ICJ Reports, 2004, p. 1307.

[200] See also the *Nicaragua* case, ICJ Reports, 1986, pp. 14, 134–5; 76 ILR, p. 349, where the Court stated that the use of force could not be the appropriate method to monitor or ensure respect for human rights in Nicaragua.

[201] Note that the UK produced a set of Policy Guidelines on Humanitarian Crises in 2001. This provided *inter alia* that the Security Council should authorise action to halt or avert massive violations of humanitarian law and that, in response to such crises, force may be used in the face of overwhelming and immediate humanitarian catastrophe when the government cannot or will not avert it, when all non-violent methods have been exhausted, the scale of real or potential suffering justifies the risks of military action, if there is a clear objective to avert or end the catastrophe, there is clear evidence that such action would be welcomed by the people at risk and that the consequences for suffering of non-action would be worse than those of intervention. Further, the use of force should be collective, limited in scope and proportionate to achieving the humanitarian objective and consistent with international humanitarian law, UKMIL, 72 BYIL, 2001, p. 696.

One variant of the principle of humanitarian intervention is the contention that intervention in order to restore democracy is permitted as such under international law.[202] One of the grounds given for the US intervention in Panama in December 1989 was the restoration of democracy,[203] but apart from the problems of defining democracy, such a proposition is not acceptable in international law in view of the clear provisions of the UN Charter. Nor is there anything to suggest that even if the principle of self-determination could be interpreted as applying beyond the strict colonial context[204] to cover 'democracy', it could constitute a norm superior to that of non-intervention.

More recently, there has been extensive consideration of the 'responsibility to protect' as a composite concept comprising the responsibilities to prevent catastrophic situations, to react immediately when they do occur and to rebuild afterwards.[205] Such an approach may be seen as an effort to redefine the principle of humanitarian intervention in a way that seeks to minimise the motives of the intervening powers and there is no doubt that it reflects an important trend in international society and one that is influential, particularly in the context of UN action. Such responsibilities are deemed to fall both upon states and the international community and notably include the commitment to reconstruction after intervention or initial involvement. As they have been broadly and flexibily proposed, emphasising, for example, the obligation of states to protect human rights on their territory and the primary focus upon the UN with regard to any military action, the sharp edges of the humanitarian intervention doctrine have been blunted, but it remains to be seen how influential this approach may be.[206]

[202] See e.g. J. Crawford, 'Democracy and International Law', 44 BYIL, 1993, p. 113; B. R. Roth, *Governmental Illegitimacy in International Law*, Oxford, 1999; Franck, *Fairness*, chapter 4, and Franck, *The Empowered Self*, Oxford, 1999; Gray, *Use of Force*, pp. 49 ff., and O. Schachter, 'The Legality of Pro-Democratic Invasion', 78 AJIL, 1984, p. 645.

[203] See e.g. *Keesing's Record of World Events*, p. 37112 (1989). See also Nanda, 'Validity', p. 498.

[204] See above, chapter 6, p. 289.

[205] See e.g. International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*, Ottawa, 2001; Report of the UN High Level Panel on Threats, Challenges and Change, A/59/565, 2004, at paras. 201–3; UN Secretary-General, *In Larger Freedom*, A/59/2005, paras. 16–22; World Summit Outcome, General Assembly resolution 60/1, 2005, paras. 138–9, and C. Stahn, 'Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?', 101 AJIL, 2007, p. 99.

[206] It should also be emphasised that the documents cited in the previous footnote are ambiguous as to the right of individual states to intervene by force in the territory of other states.

Terrorism and international law[207]

The use of terror as a means to achieve political ends is not a new phenomenon, but it has recently acquired a new intensity. In many cases, terrorists deliberately choose targets in uninvolved third states as a means of pressurising the government of the state against which it is in conflict or its real or potential or assumed allies.[208] As far as international law is concerned, there are a number of problems that can be identified. The first major concern is that of definition.[209] For example, how widely should the offence be defined, for instance should attacks against property as well as attacks upon persons be covered? And to what extent should one take into account the motives and intentions of the perpetrators? Secondly, the relationship between terrorism and the use of force by states in response is posed.[210] Thirdly, the relationship between terrorism and human rights needs to be taken into account.

Despite political difficulties, increasing progress at an international and regional level has been made to establish rules of international law with regard to terrorism. A twin-track approach has been adopted, dealing both with particular manifestations of terrorist activity and with a general condemnation of the phenomenon.[211] In so far as the first is concerned, the UN has currently adopted thirteen international conventions concerning

[207] See e.g. Gray, *Use of Force*, pp. 135 ff.; T. Becker, *Terrorism and the State*, Oxford, 2006; *Legal Aspects of International Terrorism* (eds. A. E. Evans and J. Murphy), Lexington, 1978; R. Friedlander, *Terrorism*, Dobbs Ferry, 1979; R. B. Lillich and T. Paxman, 'State Responsibility for Injuries to Aliens Caused by Terrorist Activity', 26 *American Law Review*, 1977, p. 217; *International Terrorism and Political Crimes* (ed. M. C. Bassiouni), 1975; E. McWhinney, *Aerial Piracy and International Terrorism*, 2nd edn, Dordrecht, 1987; A. Cassese, *Terrorism, Politics and Law*, Cambridge, 1989; V. Lowe, '"Clear and Present Danger": Responses to Terrorism', 54 ICLQ, 2005, p. 185; G. Guillaume, 'Terrorism and International Law', 53 ICLQ, 2004, p. 537; J. Pejic, 'Terrorist Acts and Groups: A Role for International Law', 75 BYIL, 2004, p. 71; J. Delbrück, 'The Fight Against Global Terrorism', German YIL, 2001, p. 9, and A. Cassese, 'Terrorism is Also Disrupting Some Crucial Legal Categories of International Law', 95 AJIL, 2001, p. 993. See also the UN website on terrorism, www.un.org/terrorism/.

[208] The hijack of TWA Flight 847 on 14 June 1985 by Lebanese Shi'ites is one example of this phenomenon: see e.g. *The Economist*, 22 June 1985, p. 34.

[209] See e.g. B. Saul, *Defining Terrorism in International Law*, Oxford, 2006 and articles on the Quest for a Legal Definition, 4 *Journal of International Criminal Justice*, 2006, pp. 894 ff.

[210] See above, p. 1134.

[211] See, with regard to the failed attempt by the League of Nations in the 1937 Convention for the Prevention and Punishment of Terrorism to establish a comprehensive code, e.g. Murphy, *United Nations*, p. 179. See also T. M. Franck and B. Lockwood, 'Preliminary Thoughts Towards an International Convention on Terrorism', 68 AJIL, 1974, p. 69.

terrorism, dealing with issues such as hijacking, hostages and terrorist bombings.[212] Many of these conventions operate on a common model, establishing the basis of quasi-universal jurisdiction with an interlocking network of international obligations. The model comprises a definition of the offence in question and the automatic incorporation of such offences within all extradition agreements between states parties coupled with obligations on states parties to make this offence an offence in domestic law, to establish jurisdiction over this offence (usually where committed in the territory of the state or on board a ship or aircraft registered there, or by a national of that state or on a discretionary basis in some conventions where nationals of that state have been victims) and, where the alleged offender is present in the territory, either to prosecute or to extradite to another state that will.[213]

In addition, the UN has sought to tackle the question of terrorism in a comprehensive fashion. In December 1972, the General Assembly set up an ad hoc committee on terrorism[214] and in 1994 a Declaration on Measures to Eliminate International Terrorism was adopted.[215] This condemned 'all acts, methods and practices of terrorism, as criminal and unjustifiable, wherever and by whomever committed', noting that 'criminal acts intended or calculated to provoke a state of terror in the general public, a group or person or persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them'. States are also obliged to refrain from organising, instigating, facilitating, financing or tolerating terrorist activities and to take practical measures to ensure that their territories are not used for terrorist installations, training camps or for the

[212] See the Conventions on Offences Committed on Board Aircraft, 1963; for the Suppression of Unlawful Seizure of Aircraft, 1970; for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 1971; on the Prevention and Punishment of Crimes against Internationally Protected Persons including Diplomatic Agents, 1973; against the Taking of Hostages, 1979; on the Physical Protection of Nuclear Material, 1980; for the Suppression of Unlawful Acts of Violence at Airports, Protocol 1988; for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1988; for the Suppression of Unlawful Acts against the Safety of Fixed Platforms on the Continental Shelf, Protocol 1988; on the Marking of Plastic Explosives for the Purpose of Identification, 1991; for the Suppression of Terrorist Bombing, 1997; for the Suppression of the Financing of Terrorism, 1999 and for the Suppression of Acts of Nuclear Terrorism, 2005.

[213] See further above, chapter 12, p. 673.

[214] See General Assembly resolution 3034 (XXVII).

[215] General Assembly resolution 49/60.

preparation of terrorist acts against other states. States are further obliged to apprehend and prosecute or extradite perpetrators of terrorist acts and to co-operate with other states in exchanging information and combating terrorism.[216] The Assembly has also adopted a number of resolutions calling for ratification of the various conventions and for improvement in co-operation between states in this area.[217] In September 2006, the General Assembly adopted 'The United Nations Global Counter-Terrorism Strategy',[218] comprising a Plan of Action, including condemnation of terrorism in all its forms and manifestations as it constitutes 'one of the most serious threats to international peace and security'; international co-operation; addressing the conditions conducive to the spread of terrorism; adoption of a variety of measures to prevent and combat terrorism; adoption of measures to build states' capacity to prevent and combat terrorism; and, finally, measures to ensure respect for human rights for all and the rule of law as the fundamental basis of the fight against terrorism.

An Ad Hoc Committee was established in 1996[219] to elaborate international conventions on terrorism. The Conventions for the Suppression of Terrorist Bombing, 1997 and of the Financing of Terrorism, 1999 resulted, as did a Convention for the Suppression of Acts of Nuclear Terrorism, 2005. The Committee is currently working on drafting a comprehensive convention on international terrorism.[220]

The Security Council has also been active in dealing with the terrorism threat.[221] In particular, it has characterised international terrorism as a

[216] A supplementary declaration was adopted in 1996, which emphasised in addition that acts of terrorism and assisting them are contrary to the purposes and principles of the UN. The question of asylum-seekers who had committed terrorist acts was also addressed, General Assembly resolution 51/210. See also resolution 55/158, 2001 and the 2005 World Summit Outcome, resolution 60/1.

[217] See e.g. resolutions 34/145, 35/168 and 36/33.

[218] Resolution 60/288.

[219] General Assembly resolution 51/210.

[220] See e.g. A/59/37, 2004; A/60/37, 2005; A/61/37, 2006; A/62/37, 2007, and A/63/37, 2008 and General Assembly resolutions 57/27, 2003 and 62/71, 2008. See also M. Hmoud, 'Negotiating the Draft Comprehensive Convention on International Terrorism', 4 *Journal of International Criminal Justice*, 2006, p. 1031. Major areas of contention have focused on the definition of terrorism, the scope of the proposed convention and the relationship between the proposed convention and the conventions dealing with specific terrorist crimes, *ibid.*

[221] For example, in resolution 579 (1985), it condemned unequivocally all acts of hostage-taking and abduction, and see also the statement made by the President of the Security Council on behalf of members condemning the hijacking of the *Achille Lauro* and generally 'terrorism in all its forms, whenever and by whomever committed', 9 October 1985, S/17554, 24 ILM, 1985, p. 1656.

threat to international peace and security. This approach has evolved. In resolution 731 (1992), the Security Council, in the context of criticism of Libya for not complying with requests for the extradition of suspected bombers of an airplane, referred to 'acts of international terrorism that constitute threats to international peace and security', and in resolution 1070 (1996) adopted with regard to Sudan it reaffirmed that 'the suppression of acts of international terrorism, including those in which states are involved, is essential for the maintenance of international peace and security'.[222]

It was, however, the 11 September 2001 attack upon the World Trade Center that moved this process onto a higher level. In resolution 1368 (2001) adopted the following day, the Council, noting that it was '*Determined* to combat by all means threats to international peace and security caused by terrorist attack', unequivocally condemned the attack and declared that it regarded such attacks 'like any act of international terrorism, as a threat to international peace and security'.[223] Resolution 1373 (2001) reaffirmed this proposition and the need to combat by all means in accordance with the Charter, threats to international peace and security caused by terrorist acts.[224] Acting under Chapter VII, the Council made a series of binding decisions demanding *inter alia* the prevention and suppression of the financing of terrorist acts, the criminalisation of wilful provision or collection of funds for such purposes and the freezing of financial assets and economic resources of persons and entities involved in terrorism. Further, states were called upon to refrain from any support to those involved in terrorism and take action against such persons, and to co-operate with other states in preventing and suppressing terrorist acts and acting against the perpetrators. The Council also declared that acts, methods and practices of terrorism were contrary to the purposes and principles of the UN and that knowingly financing, planning and inciting terrorist acts were also contrary to the purposes and principles of the UN. Crucially, the Council established a Counter-Terrorism Committee

[222] See also resolution 1189 (1998), concerning the bombings of the US Embassies in East Africa, and resolution 1269 (1999), which reaffirms many of the points made in the 1994 General Assembly Declaration.

[223] See further above, p. 1134, with regard to recognition of the right to self-defence in this context.

[224] Note also the condemnation of the terrorist bombing in Bali in October 2002: see resolution 1438 (2002); of the taking of hostages in Moscow in October 2002 referred to as a terrorist act: see resolution 1440 (2002); and of the terrorist attacks in Kenya in November 2002: see resolution 1450 (2002).

to monitor implementation of the resolution. States were called upon to report to the Committee on measures they had taken to implement the resolution. The Committee was also mandated to maintain a dialogue with states on the implemention of resolution 1624 (2005) on prohibiting incitement to commit terrorist acts and promoting dialogue and understanding among civilisations.

In resolution 1377 (2001), the Council, in addition to reaffirming earlier propositions, declared that acts of international terrorism 'constitute one of the most serious threats to international peace and security in the twenty-first century' and requested the Counter-Terrorism Committee to assist in the promotion of best-practice in the areas covered by resolution 1373, including the preparation of model laws as appropriate, and to examine the availability of various technical, financial, legislative and other programmes to facilitate the implementation of resolution 1373.[225] The Counter-Terrorism Committee was strengthened in 2004 by the establishment of the Executive Directorate, comprising a number of experts and administrative and support staff.[226] A further committee was established by resolution 1540 (2004) to examine the implemention of the resolution, which requires all states to establish domestic controls to prevent access by non-state actors to nuclear, chemical and biological weapons, and their means of delivery, and to take effective measures to prevent proliferation of such items and establish appropriate controls over related materials.[227]

The Counter-Terrorism Committee has now received a large number of reports, and has reviewed and responded to many of them. The Committee has since 2005 been conducting visits to member states.[228]

[225] See also resolution 1456 (2003), which *inter alia* called upon the Counter-Terrorism Committee to intensify its work through reviewing states' reports and facilitating international assistance and co-operation. Note the establishment of a Security Council committee (the 1267 committee) to oversee sanctions imposed upon Al-Qaida and the Taliban and associated individuals and entities, resolution 1267 (1999). In resolution 1566 (2004), the Security Council established a working group to recommend practical measures against individuals and groups engaged in terrorist activities not subject to the 1267 committee's review. See also resolution 1822 (2008).

[226] See resolution 1535 (2004). The mandate of the Executive Directorate has been extended to the end of 2010: see resolution 1805 (2008).

[227] See also resolutions 1673 (2006) and 1810 (2008), extending the mandate of the committee to April 2011.

[228] See the website of the Committee, www.un.org/sc/ctc. Note also the case of *Boudellaa et al.* v. *Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina*, Judgment of 11 October 2002, Human Rights Chamber of Bosnia and Herzegovina, paras. 93–8. See further above, chapter 7, p. 379.

In addition to UN activities, a number of regional instruments condemning terrorism have been adopted. These include the European Convention on the Suppression of Terrorism, 1977;[229] the Council of Europe Convention on the Prevention of Terrorism, 2005; the European Union Framework Decision on Terrorism, 2002, the South Asian Association for Regional Co-operation Regional Convention on Suppression of Terrorism, 1987 and Additional Protocol of 2005; the Arab Convention for the Suppression of Terrorism, 1998; the Convention of the Organisation of the Islamic Conference on Combating International Terrorism, 1999; the Commonwealth of Independent States Treaty on Co-operation in Combating Terrorism, 1999; the African Union Convention on the Prevention and Combating of Terrorism, 1999 and Protocol of 2005; the ASEAN Convention on Counter Terrorism, 2007, and the Organisation of American States Inter-American Convention against Terrorism, 2002.[230] In addition, the Organisation on Security and Co-operation in Europe adopted a Ministerial Declaration and Plan of Action on Combating Terrorism in 2001.[231]

Coupled with the increase in international action to suppress international terrorism has been a concern that this should be accomplished in conformity with the principles of international human rights law and international humanitarian law.[232] This has been expressed by the UN Secretary-General[233] and UN human rights organs.[234] In 2005, the UN

[229] Note that a Protocol amending the Convention was adopted by the Committee of Ministers of the Council of Europe in February 2003. This incorporates new offences into the Convention, being those referred to in the international conventions adopted after 1977.

[230] Note also the establishment of the Inter-American Committee Against Terrorism in 1999, AF/Res. 1650 (XXIX-0/99).

[231] See www.osce.org/docs/english/1990–1999/mcs/9buch01e.htm.

[232] See e.g. H. J. Steiner, P. Alston and R. Goodman, *International Human Rights in Context*, 3rd edn, Oxford, 2008, chapter 5, and D. Pokempner, 'Terrorism and Human Rights: The Legal Framework', in *Terrorism and International Law* (eds. M. Schmitt and G. L. Beruto), San Remo, 2003, p. 39.

[233] See Report of the Secretary-General on the Work of the Organisation, A/57/1, 2002, p. 1, where the Secretary-General stated that, 'I firmly believe that the terrorist menace must be suppressed, but states must ensure that counter-terrorist measures do not violate human rights.'

[234] See e.g. the statement of the Committee on the Elimination of Racial Discrimination of 8 March 2002, A/57/18, pp. 106–7, and the statement by the Committee against Torture of 22 November 2001, CAT/C/XXVII/Misc.7. Note also that on 27 March 2003, the legal expert of the Counter-Terrorism Committee briefed the UN Human Rights Committee: see UN Press Release of that date. See also the report on Terrorism and Human Rights by Special Rapporteur K. K. Koufa to the UN Sub-Commission on the Promotion and Protection of Human Rights, 2004, E/CN.4/Sub.2/2004/40. Note that the Security

Commission on Human Rights, for example, appointed a Special Rapporteur on the 'promotion and protection of human rights and fundamental freedoms while countering terrorism'.[235] Particular concerns have focused on 'shoot to kill' policies in the context of combating suicide bombings reportedly adopted by some states[236] and the practice of secret detention and illegal transfer of detainees across international boundaries ('extraordinary rendition').[237] The situation of detainees in the US military base in Guantanamo Bay, Cuba, has been a matter of particular concern.[238] All of these issues have demonstrated the tension between

Council's Counter-Terrorism Committee has emphasised that states in adopting measures to counter terrorism must comply with all their international law obligations, including those relating to human rights law, refugee law and humanitarian law, and issued policy guidance to the Executive Directorate noting that human rights should be incorporated into its communications strategy: see S/AC.40/2006/PG.2.

[235] See resolution 2005/80. This mandate was assumed by the Human Rights Council: see General Assembly resolution 60/251 and see Council resolution 6/28. See further on the Human Rights Council, above, chapter 6, p. 306. The Special Rapporteur produced a report on terrorist-profiling practices and human rights in 2007: see A/HRC/4/26.

[236] See e.g. A/HRC/4/26, pp. 21 ff. and the report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, A/CN.4/2006/53, paras. 44 ff. In particular, the need for resort to force as a last resort and the requirement of proportionality were emphasised: see also the Code of Conduct for Law Enforcement Officers, General Assembly resolution 34/169.

[237] See e.g. L. N. Sadat, 'Ghost Prisoners and Black Sites: Extraordinary Rendition under International Law', 37 *Case Western Reserve Journal of International Law*, 2005–6, p. 309, and J. T. Parry, 'The Shape of Modern Torture: Extraordinary Rendition and Ghost Detainees', 6 *Melbourne Journal of International Law*, 2005, p. 516.

[238] See e.g. Lord Steyn, 'Guantanamo Bay: The Legal Black Hole', 53 ICLQ, 2004, p. 1; F. Johns, 'Guantanamo Bay and the Annihilation of the Exception', 16 EJIL, 2005, p. 613, and T. Gill and E. van Sliedregt, 'Guantanamo Bay: A Reflection on the Legal Status and Rights of "Unlawful Enemy Combatants"', 1 *Utrecht Law Review*, 2005, p. 28. Note in particular the joint report by the five UN Special Rapporteurs respectively on arbitrary detention, on the independence of judges and lawyers, on torture, on freedom of religion or belief and on the right of everyone to physical and mental health, 16 February 2006, and the reports by the Council of Europe's Committee on Legal Affairs and Human Rights on secret detentions and illegal transfer of detainees involving Council of Europe members of 22 January 2006, AS/Jur (2006) 03 rev. and of 7 June 2007, AS/Jur (2007) 36. The Inter-American Commission on Human Rights granted precautionary measures in favour of detainees in Guantanamo Bay requesting the US to take 'urgent measures necessary to have the legal status of the detainees at Guantanamo Bay determined by a competent tribunal': see Annual Report of the IACHR, 2002, chapter III(C)(1), para. 80, first precautionary measures reiterated and amplified in 2003, 2004 and 2005: see B. D. Tittemore, 'Guantanamo Bay and the Precautionary Measures of the Inter-American Commission on Human Rights: A Case for International Oversight in the Struggle Against Terrorism', 6 *Human Rights Law Review*, 2006, p. 378. See also with regard to US courts and Guantanamo Bay, above, chapter 4, p. 164, note 178.

combating international terrorism and respecting human rights and the need to accomplish the former without jettisoning the latter.

Regional organisations have also been concerned by this dilemma. The Council of Europe adopted international guidelines on human rights and anti-terrorism measures in July 2002,[239] seeking to integrate condemnation of terrorism and efficient combating of the phenomenon with the need to respect human rights. In particular, guideline XVI provides that in the fight against terrorism, states may never act in breach of peremptory norms of international law (*jus cogens*) nor in breach of international humanitarian law. The Inter-American Commission on Human Rights adopted a Report on Terrorism and Human Rights in October 2002.[240]

Suggestions for further reading

I. Brownlie, *International Law and the Use of Force by States*, Oxford, 1963

Y. Dinstein, *War, Aggression and Self-Defence*, 4th edn, Cambridge, 2005

T. M. Franck, *Recourse to Force*, Cambridge, 2002

C. Gray, *International Law and the Use of Force*, 2nd edn, Oxford, 2004

[239] Supplemented in March 2005 by guidelines concerning the protection of victims of terrorist acts.

[240] OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr.

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International humanitarian law

In addition to prescribing laws governing resort to force (*jus ad bellum*), international law also seeks to regulate the conduct of hostilities (*jus in bello*). These principles cover, for example, the treatment of prisoners of war, civilians in occupied territory, sick and wounded personnel, prohibited methods of warfare and human rights in situations of conflict.[1] This subject was originally termed the laws of war and then the laws of armed conflict. More recently, it has been called international humanitarian law. Although international humanitarian law is primarily derived from a number of international conventions, some of these represent in whole or in part rules of customary international law, and it is possible to say that a number of customary international law principles exist over and above conventional rules,[2] although international humanitarian law

[1] See e.g. Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, Cambridge, 2004; *Les Nouvelles Frontières du Droit International Humanitaire* (ed. J.-F. Flauss), Brussels, 2003; T. Meron, *The Humanization of International Law*, The Hague, 2006; UK Ministry of Defence, *Manual on the Law of Armed Conflict*, Oxford, 2004; L. Green, *The Contemporary Law of Armed Conflict*, 2nd edn, Manchester, 2000; I. Detter, *The Law of War*, 2nd edn, Cambridge, 2000; G. Best, *Humanity in Warfare*, London, 1980, and Best, *War and Law Since 1945*, Oxford, 1994; A. P. V. Rogers, *Law on the Battlefield*, Manchester, 1996; *Handbook of Humanitarian Law in Armed Conflict* (ed. D. Fleck), Oxford, 1995; *Studies and Essays on International Humanitarian Law and Red Cross Principles* (ed. C. Swinarski), Dordrecht, 1984; *The New Humanitarian Law of Armed Conflict* (ed. A. Cassese), Naples, 1979; G. I. A. D. Draper, 'The Geneva Conventions of 1949', 114 HR, p. 59, and Draper 'Implementation and Enforcement of the Geneva Conventions and of the two Additional Protocols', 164 HR, 1979, p. 1; F. Kalshoven, *The Law of Warfare*, Leiden, 1973; M. Bothe, K. Partsch and W. Solf, *New Rules for Victims of Armed Conflict*, The Hague, 1982, and J. Pictet, *Humanitarian Law and the Protection of War Victims*, Dordrecht, 1982. See also *Documents on the Laws of War* (ed. A. Roberts and R. Guelff), 3rd edn, Oxford, 2000; Nguyen Quoc Dinh, P. Daillier and A. Pellet, *Droit International Public*, 7th edn, Paris, 2002, p. 962; T. Meron, 'The Humanisation of Humanitarian Law', 94 AJIL, 2000, p. 239, and C. Rousseau, *Le Droit des Conflits Armés*, Paris, 1983.

[2] See e.g. T. Meron, 'Revival of Customary Humanitarian Law', 99 AJIL, 2005, p. 817, and *Customary International Humanitarian Law* (eds. J.-M. Henckaerts and L. Doswald-Beck), Cambridge, 2005. See also G. H. Aldrich, 'Customary International Humanitarian

is one of the most highly codified parts of international law. Reliance upon relevant customary international law rules is particularly important where one or more of the states involved in a particular conflict is not a party to a pertinent convention. A good example of this relates to the work of the Eritrea–Ethiopia Claims Commission, which noted that since Eritrea did not become a party to the four Geneva Conventions of 1949 until 14 August 2000, the applicable law before that date for relevant claims was customary international humanitarian law.[3] On the other hand, treaty provisions that cannot be said to be part of customary international law[4] will bind only those states that are parties to them. This is particularly important with regard to some provisions deemed controversial by some states contained in Additional Protocols I and II to the Geneva Conventions, 1949. One additional factor that has emerged recently has been the growing convergence between international humanitarian law and international human rights law. This is discussed below.[5]

Development

The law in this area developed from the middle of the nineteenth century. In 1864, as a result of the pioneering work of Henry Dunant,[6] who had been appalled by the brutality of the battle of Solferino five years earlier, the Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field was adopted. This brief instrument was revised in 1906. In 1868 the Declaration of St Petersburg prohibited the use of small explosive or incendiary projectiles. The laws of war were codified at the Hague Conferences of 1899 and 1907.[7]

Law – An Interpretation on Behalf of the International Committee of the Red Cross', 76 BYIL, 2005, p. 503, and J. M. Henckaerts, 'Customary International Humanitarian Law – A Rejoinder to Judge Aldrich', *ibid.*, p. 525.

[3] See e.g. Eritrea–Ethiopia Claims Commission, Partial Award, Prisoners of War, Eritrea's Claim 17, 1 July 2003, paras. 38 ff. It was, however, accepted that the Conventions 'have largely become expressions of customary international law', *ibid.*, para. 40. See also Eritrea–Ethiopia Claims Commission, Partial Award, Civilian Claims, Eritrea's Claims 15, 16, 23 and 27–32, 17 December 2004, para. 28.

[4] As to which, see above, chapter 3, p. 93.

[5] See below, p. 1180.

[6] See e.g. C. Moorehead, *Dunant's Dream*, London, 1998.

[7] See e.g. Green, *Contemporary Law*, chapter 2, and *The Centennial of the First International Peace Conference* (ed. F. Kalshoven), The Hague, 2000. See also Symposium on the Hague Peace Conferences, 94 AJIL, 2000, p. 1. The Nuremberg Tribunal regarded Hague Convention IV and Regulations on the Laws and Customs of War on Land, 1907 as declaratory of customary law: see 41 AJIL, 1947, pp. 172, 248–9. See also the Report of the UN Secretary-General on the Statute for the International Criminal Tribunal for the Former Yugoslavia,

A series of conventions were adopted at these conferences concerning land and naval warfare, which still form the basis of the existing rules. It was emphasised that belligerents remained subject to the law of nations and the use of force against undefended villages and towns was forbidden. It defined those entitled to belligerent status and dealt with the measures to be taken as regards occupied territory. There were also provisions concerning the rights and duties of neutral states and persons in case of war,[8] and an emphatic prohibition on the employment of 'arms, projectiles or material calculated to cause unnecessary suffering'. However, there were inadequate means to implement and enforce such rules with the result that much appeared to depend on reciprocal behaviour, public opinion and the exigencies of morale.[9] A number of conventions in the inter-war period dealt with rules concerning the wounded and sick in armies in the field and prisoners of war.[10] Such agreements were replaced by the Four Geneva 'Red Cross' Conventions of 1949 which dealt respectively with the amelioration of the condition of the wounded and sick in armed forces in the field, the amelioration of the condition of wounded, sick and shipwrecked members of the armed forces at sea, the treatment of prisoners of war and the protection of civilian persons in time of war.[11] The Fourth Convention was an innovation and a significant attempt to protect civilians who, as a result of armed hostilities or occupation, were in the power of a state of which they were not nationals.

The foundation of the Geneva Conventions system is the principle that persons not actively engaged in warfare should be treated humanely.[12] A number of practices ranging from the taking of hostages to torture, illegal

Security Council resolutions 808 (1993) and 823 (1993), S/25704 and 32 ILM, 1993, pp. 1159, 1170, and the Advisory Opinion of the International Court of Justice in *Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports, 1996, pp. 226, 258; 110 ILR, p. 163.

8 See S. C. Neff, *The Rights and Duties of Neutrals*, Manchester, 2000.

9 Note, however, the Martens Clause in the Preamble to the Hague Convention concerning the Laws and Customs of War on Land, which provided that 'in cases not included in the Regulations . . . the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilised peoples from the laws of humanity and the dictates of the public conscience'.

10 See e.g. the 1929 Conventions, one revising the 1864 and 1906 instruments on wounded and sick soldiers, the other on the treatment of prisoners of war.

11 Note that as of May 2008, 194 states are parties to the Geneva Conventions.

12 See, for example, article 1(2) of Additional Protocol I, 1977, which provides that, 'In case not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.'

executions and reprisals against persons protected by the Conventions are prohibited, while a series of provisions relate to more detailed points, such as the standard of care of prisoners of war and the prohibition of deportations and indiscriminate destruction of property in occupied territory. In 1977, two Additional Protocols to the 1949 Conventions were adopted.[13] These built upon and developed the earlier Conventions. While many provisions may be seen as reflecting customary law, others do not and thus cannot constitute obligations upon states that are not parties to either or both of the Protocols.[14] Protocol III was adopted in 2005 and introduced a third emblem to the two previously recognised ones (the Red Cross and the Red Crescent) in the form of a red diamond within which either a Red Cross or Red Crescent, or another emblem which has been in effective use by a High Contracting Party and was the subject of a communication to the other High Contracting Parties and the International Committee of the Red Cross through the depositary prior to the adoption of this Protocol, may be inserted. This allows in particular for the use of the Israeli Red Magen David (Shield of David) symbol.[15]

The International Court of Justice has noted that the 'Law of the Hague', dealing primarily with inter-state rules governing the use of force or the 'laws and customs of war' as they were traditionally termed, and the 'Law of Geneva', concerning the protection of persons from the effects of armed conflicts, 'have become so closely interrelated that they are considered to have gradually formed one single complex system, known today as international humanitarian law'.[16]

The scope of protection under international humanitarian law

The rules of international humanitarian law seek to extend protection to a wide range of persons, but the basic distinction drawn has been between combatants and those who are not involved in actual hostilities. Common

[13] See e.g. Swinarski, *Studies and Essays*, part B, and Draper, 'Implementation and Enforcement'. See also B. Wortley, 'Observations on the Revision of the 1949 Geneva "Red Cross" Conventions', 54 BYIL, 1983, p. 143, and G. Aldrich, 'Prospects for US Ratification of Additional Protocol I to the 1949 Geneva Conventions', 85 AJIL, 1991, p. 1.

[14] For example, article 44 of Protocol I: see below, p. 1173.

[15] The Red Lion and Sun that used to be used by Iran was also included as a Geneva Convention emblem: see e.g. Detter, *Law of War*, p. 293.

[16] See the Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports, 1996, pp. 226, 256; 110 ILR, p. 163. The Court also noted that '[t]he provisions of the Additional Protocols of 1977 give expression and attest to the unity and complexity of that law', *ibid.*

article 2 of the Geneva Conventions provides that the Conventions 'shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties even if the state of war is not recognised by them . . . [and] to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance'. The rules contained in these Conventions cannot be renounced by those intended to benefit from them, thus precluding the possibility that the power which has control over them may seek to influence the persons concerned to agree to a mitigation of protection.[17]

The wounded and sick

The First Geneva Convention concerns the Wounded and Sick on Land and emphasises that members of the armed forces and organised militias, including those accompanying them where duly authorised,[18] 'shall be respected and protected in all circumstances'. They are to be treated humanely by the party to the conflict into whose power they have fallen on a non-discriminatory basis and any attempts upon their lives or violence to their person is strictly prohibited. Torture or biological experimentation is forbidden, nor are such persons to be wilfully left without medical assistance and care.[19] The wounded and sick of a belligerent who fall into enemy hands are also to be treated as prisoners of war.[20] Further, the parties to a conflict shall take all possible measures to protect the wounded and sick and ensure their adequate care and to 'search for the dead and prevent their being despoiled'.[21] The parties to the conflict are to record as soon as possible the details of any wounded, sick or dead persons of the adversary party and to transmit them to the other side through particular means.[22] This Convention also includes provisions as to medical units and establishments, noting in particular that these should not be

[17] See article 7 of the first three Conventions and article 8 of the fourth. Note that Security Council resolution 1472, adopted under Chapter VII on 28 March 2003, called on 'all parties concerned' to the Iraq conflict of March–April 2003 to abide strictly by their obligations under international law and particularly the Geneva Conventions and the Hague Regulations, 'including those relating to the essential civilian needs of the people of Iraq'.

[18] See article 13. See also UK, *Manual*, chapter 7.

[19] Article 12. See also Green, *Armed Conflict*, chapter 11.

[20] Article 14. Thus the provisions of the Third Geneva Convention will apply to them: see below, p. 1172.

[21] Article 15.

[22] Article 16 and see article 122 of the Third Geneva Convention.

attacked,[23] and deals with the recognised emblems (i.e. the Red Cross, the Red Crescent and, after Protocol III, the Red Diamond).[24]

The Second Geneva Convention concerns the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea and is very similar to the First Convention, for instance in its provisions that members of the armed forces and organised militias, including those accompanying them where duly authorised, and who are sick, wounded or shipwrecked are to be treated humanely and cared for on a non-discriminatory basis, and that attempts upon their lives and violence and torture are prohibited.[25] The Convention also provides that hospital ships may in no circumstances be attacked or captured but respected and protected.[26] The provisions in these Conventions were reaffirmed in and supplemented by Protocol I, 1977, Parts I and II. Article 1(4), for example, supplements common article 2 contained in the Conventions and provides that the Protocol is to apply in armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes as enshrined in the UN Charter and the Declaration on Principles of International Law, 1970.

Prisoners of war[27]

The Third Geneva Convention of 1949 is concerned with prisoners of war, and consists of a comprehensive code centred upon the requirement of humane treatment in all circumstances.[28] The definition of prisoners of war in article 4, however, is of particular importance since it has been regarded as the elaboration of combatant status. It covers members of the armed forces of a party to the conflict (as well as members of militias and other volunteer corps forming part of such armed force) and members of

[23] Article 19, even if the personnel of the unit or establishment are armed or otherwise protected, article 22. Chapter IV concerns the treatment of medical personnel.

[24] Chapter VII. [25] Articles 12 and 13. See also Green, *Armed Conflict*, chapter 11.

[26] Chapter III. See, with regard to the use of hospital ships in the Falklands conflict, H. Levie, 'The Falklands Crisis and the Laws of War' in *The Falklands War* (eds. A. R. Coll and A. C. Arend), Boston, 1985, pp. 64, 67–8. Chapter IV deals with medical personnel, Chapter V with medical transports and Chapter VI with the emblem: see above, p. 1170.

[27] See e.g. Dinstein, *Conduct of Hostilities*, pp. 29 ff., and UK, *Manual*, Chapter 8. Note that the Eritrea–Ethiopia Claims Commission in its Partial Award, Prisoners of War, Ethiopia's Claim 4, 1 July 2003, para. 32, has held that this Convention substantially reflected customary international law.

[28] See also the Regulations annexed to the Hague Convention IV on the Laws and Customs of War on Land, 1907, Section I, Chapter II.

other militias and volunteer corps, including those of organised resistance movements, belonging to a party to the conflict providing the following conditions are fulfilled: (a) being commanded by a person responsible for his subordinates; (b) having a fixed distinctive sign recognisable at a distance; (c) carrying arms openly; (d) conducting operations in accordance with the laws and customs of war.[29] This article reflected the experience of the Second World War, although the extent to which resistance personnel were covered was constrained by the need to comply with the four conditions. Since 1949, the use of guerrillas spread to the Third World and the decolonisation experience. Accordingly, pressures grew to expand the definition of combatants entitled to prisoner of war status to such persons, who as practice demonstrated rarely complied with the four conditions. States facing guerrilla action, whether the colonial powers or others such as Israel, objected. Articles 43 and 44 of Protocol I, 1977, provide that combatants are members of the armed forces of a party to an international armed conflict.[30] Such armed forces consist of all organised armed units under an effective command structure which enforces compliance with the rules of international law applicable in armed conflict. Article 44(3) further notes that combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. When an armed combatant cannot so distinguish himself, the status of combatant may be retained provided that arms are carried openly during each military engagement and during such time as the combatant is visible to the adversary while engaged in a military deployment preceding the launching of an attack. This formulation is clearly controversial and was the subject of many declarations in the vote at the conference producing the draft.[31]

[29] These conditions appear in article 1 of the Hague Regulations and have been regarded as part of customary law: see G. I. A. D. Draper, 'The Status of Combatants and the Question of Guerilla Warfare', 45 BYIL, 1971, pp. 173, 186. See also the *Tadić* case, Judgment of the Appeals Chamber of 15 July 1999, IT-94-1-A; 124 ILR, p. 61.

[30] Article 1(4) of Protocol I includes as international armed conflicts 'armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination'. Note that there is no provision for prisoner of war status in non-international armed conflicts: see below, p. 1194.

[31] See e.g. H. Verthy, *Guérrilla et Droit Humanitaire*, 2nd edn, Geneva, 1983, and P. Nahlik, 'L'Extension du Statut de Combattant à la Lumière de Protocol I de Genève de 1977', 164 HR, 1979, p. 171. Where a person is a mercenary, there is no right to combatant or prisoner of war status under article 47. See also the International Convention against the Recruitment, Use, Financing and Training of Mercenaries, 1989: Green, *Armed Conflict*,

Article 5 also provides that where there is any doubt as to the status of any person committing a belligerent act and falling into the hands of the enemy, 'such person shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal'.[32] This formulation was changed somewhat in article 45 of Protocol I. This provides that a person who takes part in hostilities and falls into the power of an adverse party 'shall be presumed to be a prisoner of war and therefore shall be protected by the Third Convention'. The term 'unlawful combatant', therefore, refers to a person who fails the tests laid down in articles 43 and 44, after due determination of status, and who would not be entitled to the status of prisoner of war under international humanitarian law. Such a person, who would thus be a civilian, would be protected by the basic humanitarian guarantees laid down in articles 45(3) and 75 of Protocol I and by the general principles of international human rights law in terms of his/her treatment upon capture. However, since such a person would not have the status of a prisoner of war, he would not benefit from the protections afforded by such status and would thus be liable to prosecution under the normal criminal law.[33]

pp. 114 ff. However, such persons remain entitled to the basic humanitarian guarantees provided by Protocol I: see articles 45(3) and 75. See also UK, *Manual*, p. 147.

[32] See also the *British Manual of Military Law*, Part III, *The Law of Land Warfare*, London, 1958, para. 132, note 3, and the US Department of Army, *Law of Land Warfare*, Field Manual 27–10, 1956, para. 71(c), (d) detailing what a competent tribunal might be. In the case of the UK, the competent tribunal would be a board of inquiry convened in accordance with the Prisoner of War Determination of Status Regulations 1958: see UK, *Manual*, p. 150. See as to the question of persons captured by the US in Afghanistan in 2001–2 and elsewhere, and detained at the US military base at Guantanamo Bay, Cuba, *Rasul* v. *Bush* 124 S. Ct. 2686 (2004); US Military Commissions Act 2006, 45 ILM, 2006, p. 1246; and *Hamdan* v. *Rumsfeld* 126 S. Ct. 2749 (2006) and see *Boumediene* v. *Bush* 553 US _ (2008). See also above, chapter 12, p. 658 and chapter 20, p. 1165.

[33] See e.g. A. Cassese, *International Law*, 2nd edn, Oxford, 2005, pp. 409–10, cf. Dinstein, *Conduct of Hostilities*, pp. 29 ff.; M. Finaud, 'L'Abus de la Notion de "Combattant Illégal": Une Atteinte au Droit International Humanitaire', 110 RGDIP, 2006, p. 861, and T. M. Franck, 'Criminals, Combatants, or What – An Examination of the Role of Law in Responding to the Threat of Terror', 98 AJIL, 2005, p. 686. Accordingly, captured Taliban fighters who formed part of the army of Afghanistan at the relevant time would have the status of POWs, while captured Al-Qaida operatives would be subject to relevant national criminal law, including war crimes and crimes against humanity. Note that once a civilian takes part in hostilities, he/she loses the protection of the prohibition of attacks upon him/her: see article 51(3), Protocol I. See also *Public Committee Against Torture in Israel* v. *Government of Israel*, Israeli Supreme Court, 13 December 2006, 101 AJIL, 2007, p. 459, *A and B* v. *State of Israel*, Israeli Supreme Court, 11 June 2008 and D. Kretzmer, 'Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?', 16 EJIL, 2005, p. 171.

The framework of obligations covering prisoners of war is founded upon 'the requirement of treatment of POWs as human beings', while 'At the core of the Convention regime are legal obligations to keep POWs alive and in good health.'[34] Article 13 provides that prisoners of war must at all times be humanely treated and must at all times be protected, particularly against acts of violence or intimidation and against 'insults and public curiosity'.[35] This means that displaying prisoners of war on television in a humiliating fashion confessing to 'crimes' or criticising their own government must be regarded as a breach of the Convention.[36] Measures of reprisal against prisoners of war are prohibited. Article 14 provides that prisoners of war are entitled in all circumstances to respect for their persons and their honour.[37]

Prisoners of war are bound only to divulge their name, date of birth, rank and serial number. Article 17 provides that 'no physical or mental torture, nor any other form of coercion, may be inflicted . . . to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind.' Once captured, prisoners of war are to be evacuated as soon as possible to camps situated in an area far enough from the combat zone for them to be out of danger,[38] while article 23 stipulates that 'no prisoner of war may at any time be sent to, or detained in, areas where he may be exposed to the fire of the combat zone, nor may his presence be used to render certain points or areas immune from military operations'.[39] Prisoners of war are subject to the

[34] See the Eritrea–Ethiopia Claims Commission in its Partial Award, Prisoners of War, Ethiopia's Claim 4, 1 July 2003, paras. 53 and 64, where the Commission declared that 'customary international law, as reflected in Geneva Conventions I and III, absolutely prohibits the killing of POWs, requires the wounded and sick to be collected and cared for, the dead to be collected, and demands prompt and humane evacuation of POWs'. See also Best, *War and Law*, p. 135, and Y. Dinstein, 'Prisoners of War' in *Encyclopaedia of Public International Law* (ed. R. Bernhardt), Amsterdam, 1982, pp. 146, 148.

[35] See also article 11 of Protocol I.

[36] See e.g. the treatment of allied prisoners of war by Iraq in the 1991 Gulf War, *The Economist*, 26 January 1991, p. 24, and in the 2003 Gulf War: see the report of the condemnation by the International Committee of the Red Cross, http://news.bbc.co.uk/1/hi/world/middle_east/2881187.stm.

[37] See also article 75 of Protocol I.

[38] Article 19.

[39] Thus the reported Iraqi practice during the 1991 Gulf War of sending allied prisoners of war to strategic sites in order to create a 'human shield' to deter allied attacks was clearly a violation of the Convention: see e.g. *The Economist*, 26 January 1991, p. 24. See also UKMIL, 62 BYIL, 1991, pp. 678 ff.

laws and orders of the state detaining them.[40] They may be punished for disciplinary offences and tried for offences committed before capture, for example for war crimes. They may also be tried for offences committed before capture against the law of the state holding them.[41] Other provisions of this Convention deal with medical treatment, religious activities, discipline, labour and relations with the exterior. Article 118 provides that prisoners of war shall be released and repatriated without delay after the cessation of hostilities. The Convention on prisoners of war applies only to international armed conflicts,[42] but article 3 (which is common to the four Conventions) provides that as a minimum 'persons . . . including members of armed forces, who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely'.

Protection of civilians and occupation

The Fourth Geneva Convention is concerned with the protection of civilians in time of war and builds upon the Hague Regulations (attached to Hague Convention IV on the Law and Customs of War on Land, 1907).[43] This Geneva Convention, which marked an extension to the pre-1949 rules, is limited under article 4 to those persons, 'who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a party to the conflict or occupying power of which they are not nationals'. The Convention comes into operation immediately upon the outbreak of hostilities or the start of an occupation and ends at the general close of military operations.[44] Under article 50(1) of Protocol I, 1977, a civilian is defined as any person not a combatant,[45]

[40] Article 82, Geneva Convention III.
[41] Articles 82 and 85. See Green, *Armed Conflict*, p. 210. See also *US* v. *Noriega* 746 F. Supp. 1506, 1529 (1990); 99 ILR, pp. 143, 171.
[42] See below, p. 1190.
[43] See e.g. Green, *Armed Conflict*, chapters 12 and 15; UK, *Manual*, Chapters 9 and 11; E. Benvenisti, *The International Law of Occupation*, Princeton, 2004 (with new preface), and S. Wills, 'Occupation Law and Multi-National Operations: Problems and Perspectives', 77 BYIL, 2006, p. 256. The Hague Regulations have become part of customary international law: see *Construction of a Wall*, ICJ Reports, 2004, pp. 136, 172; 129 ILR, pp. 37, 91.
[44] Article 6.
[45] As defined in article 4 of the Third Geneva Convention, 1949 and article 43, Protocol I, 1977, above, p. 1172. Note, however, the obligation contained in the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, 25 May 2000, to ensure that children under the age of eighteen do not take part in hostilities.

and in cases of doubt a person is to be considered a civilian. The Fourth Convention provides a highly developed set of rules for the protection of such civilians, including the right to respect for person, honour, convictions and religious practices and the prohibition of torture and other cruel, inhuman or degrading treatment, hostage-taking and reprisals.[46] The wounded and sick are the object of particular protection and respect[47] and there are various judicial guarantees as to due process.[48]

The protection of civilians in occupied territories is covered in section III of Part III of the Fourth Geneva Convention,[49] but what precisely occupied territory is may be open to dispute.[50] Article 42 of the Hague Regulations provides that territory is to be considered as occupied 'when it is actually placed under the authority of the hostile army' and that the occupation only extends to the territory 'where such authority has been established and can be exercised',[51] while article 2(2) of the Convention provides that it is to apply to all cases of partial or total occupation 'of the territory of a High Contracting Party, even if the said occupation meets with no resistance'. The International Court in the *Democratic Republic of the Congo* v. *Uganda* case[52] noted that in order to determine whether a state whose forces are present on the territory of another state is an occupying power, one must examine whether there is sufficient evidence to demonstrate that the said authority was in fact established and exercised by the intervening state in the areas in question. The Court understood this to mean in practice in that case that Ugandan forces in the Congo were stationed there in particular areas and that they had substituted their own authority for that of the Congolese government.

The military occupation of enemy territory is termed 'belligerent occupation' and international law establishes a legal framework concerning the legal relations of occupier and occupied. There are two key conditions for the establishment of an occupation in this sense, first, that the former government is no longer capable of publicly exercising its authority in

[46] See articles 27–34. The rights of aliens in the territory of a party to a conflict are covered in articles 35–46.

[47] Article 16. [48] See articles 71–6. See also article 75 of Protocol I, 1977.

[49] See also the Hague Regulations, Section III.

[50] Iraqi-occupied Kuwait in 1990–1 was, of course, a prime example of the situation covered by this Convention: see e.g. Security Council resolution 674 (1990).

[51] See the *Construction of a Wall* case, ICJ Reports, 2004, pp. 136, 167 and *Democratic Republic of the Congo* v. *Uganda*, ICJ Reports, 2005, pp. 168, 229, reaffirming article 42 as part of customary international law.

[52] ICJ Reports, 2005, pp. 168, 230.

the area in question and, secondly, that the occupying power is in a position to substitute its own authority for that of the former government.[53] An occupation will cease as soon as the occupying power is forced out or evacuates the area.[54] Article 43 of the Hague Regulations provides the essential framework of the law of occupation. It notes that, 'The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.'[55] This establishes several key elements. First, only 'authority' and not sovereignty passes to the occupier.[56] The former government retains sovereignty and may be deprived of it only with its consent. Secondly, the basis of authority of the occupier lies in effective control. Thirdly, the occupier has both the obligation and the right to maintain public order in the occupied territory. Fourthly, the existing laws of the territory must be preserved as far as possible.

The situation with regard to the West Bank of Jordan (sometimes known as Judaea and Samaria), for example, demonstrates the problems that may arise. Israel has argued that since the West Bank has never been

[53] See e.g. UK, *Manual*, p. 275.

[54] *Ibid.*, p. 277. See also *R* v. *Civil Aviation Authority* [2006] EWHC 2465 (Admin), at para. 15; 132 ILR, p. 713, noting that 'The state of Israel has withdrawn from Gaza [in 2005] so that it is not an occupied Palestinian Territory.' Note that Israel handed over certain powers with regard to parts of the West Bank to the Palestinian Authority following the Oslo agreements of 1993: see generally J. Crawford, *The Creation of States*, 2nd edn, 2006, pp. 442 ff.; *New Political Entities in Public and Private International Law* (eds. A. Shapira and M. Tabory), The Hague, 1999; E. Benvenisti, 'The Israeli–Palestinian Declaration of Principles: A Framework for Future Settlement', 4 EJIL, 1993, p. 542, and P. Malanczuk, 'Some Basic Aspects of the Agreements Between Israel and the PLO from the Perspective of International Law', 7 EJIL, 1996, p. 485. Since one assumes that the Palestinian Authority is not an occupying power, the fact that Israel is not in effective day-to-day control over the whole area must impact upon its responsibilities, but it is unlikely that this has affected its legal status as such as belligerent occupant.

[55] Note that the International Court has emphasised that 'international humanitarian law contains provisions enabling account to be taken of military exigencies in certain circumstances' and that 'the military exigencies contemplated by these texts may be invoked in occupied territories even after the general close of the military operations that lead to their occupation', *Construction of a Wall*, ICJ Reports, 2004, pp. 136, 192. See also M. Sassòli, 'Legislation and Maintenance of Public Order and Civil Life by Occupying Powers', 16 EJIL, 2005, p. 661.

[56] See e.g. *Prefecture of Voiotia* v. *Germany (Distomo Massacre)*, Court of Cassation, Greece, 4 May 2000, 129 ILR, pp. 514, 519 and *Mara'abe* v. *The Prime Minister of Israel*, Israel Supreme Court, 15 September 2005, 129 ILR, pp. 241, 252. See also Benvenisti, *International Law of Occupation*, pp. 5-6, and UK, *Manual*, p. 278.

recognised internationally as Jordanian territory,[57] it cannot therefore be regarded as its territory to which the Convention would apply. In other words, to recognise that the Convention applies formally would be tantamount to recognition of Jordanian sovereignty over the disputed land.[58] However, the International Court has stated that the Convention 'is applicable in any occupied territory in the event of an armed conflict arising between two or more High Contracting Parties' so that with regard to the Israel/Palestine territories question, 'the Convention is applicable in the Palestinian territories which before the conflict lay to the east of the Green Line [i.e. the 1949 armistice line] and which, during that conflict, were occupied by Israel, there being no need for any enquiry into the precise legal status of those territories'.[59] The Eritrea–Ethiopia Claims Commission has pointed out that 'These protections [provided by international humanitarian law] should not be cast into doubt because the belligerents dispute the status of territory . . . respecting international protections in such situations does not prejudice the status of the territory'.[60] Further, the Commission emphasised that 'neither text [the Hague Regulations and the Fourth Geneva Convention] suggests that only territory the title of which is clear and uncontested can be occupied territory'.[61]

[57] It was annexed by the Kingdom of Transjordan, as it then was, in 1949 at the conclusion of the Israeli War of Independence, but this annexation was recognised only by the UK and Pakistan. See e.g. A. Gerson, *Israel, the West Bank and International Law*, London, 1978.

[58] Note that Israel does observe the Convention *de facto*: see e.g. *Mara'abe* v. *The Prime Minister of Israel*, Israeli Supreme Court, 15 September 2005, 129 ILR, pp. 241, 253. This was noted by the International Court in the *Construction of a Wall* case, ICJ Reports, 2004, pp. 136, 174. See also D. Kretzmer, *The Occupation of Justice*, New York, 2002; M. Shamgar, 'The Observance of International Law in the Administered Territories', *Israel Yearbook on Human Rights*, 1977, p. 262; T. Meron, 'West Bank and Gaza', *ibid*., 1979, p. 108; F. Fleiner-Gerster and H. Meyer, 'New Developments in Humanitarian Law', 34 ICLQ, 1985, p. 267, and E. Cohen, *Human Rights in the Israeli-Occupied Territories*, Manchester, 1985.

[59] *Construction of a Wall* case, ICJ Reports, 2004, pp. 136, 177. It should be noted that Israel has long asserted that it applies the humanitarian parts of the Convention to the occupied territories: see e.g. Shamgar, 'Observance of International Law in the Administered Territories'; and Meron, 'West Bank and Gaza', and *Mara'abe* v. *The Prime Minister of Israel*, Israeli Supreme Court, 15 September 2005, 129 ILR, pp. 241, 252–3. See also M. N. Shaw, 'Territorial Administration by Non-Territorial Sovereigns' in *The Shifting Allocation of Authority in International Law* (eds. Y. Shany and T. Broudie), Oxford, 2008, pp. 369, 385 ff.

[60] Partial Award, Central Front, Ethiopia's Claim 2, 28 April 2004, para. 28.

[61] *Ibid*., para. 29. Note that article 4 of Protocol I provides that, 'The application of the Conventions and of this Protocol, as well as the conclusion of the agreements provided for therein, shall not affect the legal status of the Parties to the conflict. Neither the occupation of a territory nor the application of the Conventions and this Protocol shall affect the legal status of the territory in question.'

Article 47 provides that persons protected under the Convention cannot be deprived in any case or in any manner whatsoever of the benefits contained in the Convention by any change introduced as a result of the occupation nor by any agreement between the authorities of the occupied territory and the occupying power nor by any annexation by the latter of the whole or part of the occupied territory. Article 49 prohibits 'individual or mass forcible transfers' as well as deportations of protected persons from the occupied territory regardless of motive, while the occupying power 'shall not deport or transfer parts of its own civilian population into the territory it occupies'.[62] Other provisions refer to the prohibition of forced work or conscription of protected persons, and the prohibition of the destruction of real or personal property except where rendered absolutely necessary by military operations, and of any alteration of the status of public or judicial officials.[63] The occupying power also has the responsibility to ensure that the local population has adequate food and medical supplies and, if not, to facilitate relief schemes.[64] Article 70 provides that protected persons shall not be arrested, prosecuted or convicted for acts committed or opinions expressed before the occupation, apart from breaches of the laws of war.[65]

In addition to the traditional rules of humanitarian law, international human rights law is now seen as in principle applicable to occupation situations. The International Court interpreted article 43 of the Hague Regulations to include 'the duty to secure respect for the applicable rules of international human rights law and international humanitarian law, to protect the inhabitants of the occupied territory against acts of violence, and not to tolerate such violence by any third state'.[66] Further, the Court has stated that the protection offered by human rights conventions

[62] The International Court has stated that this provision prohibits 'any measures taken by an occupying power in order to organize or encourage transfers of parts of its own population into the occupied territory' and that 'the Israeli settlements in the Occupied Palestinian Territory (including East Jerusalem) have been established in breach of international law', *Construction of a Wall*, ICJ Reports, 2004, pp. 136, 183–4. See also criticisms of Israel's policy of building settlements in territories it has occupied since 1967, UKMIL, 54 BYIL, 1983, pp. 538–9. Note also Kretzmer, *Occupation of Justice*, chapter 5.

[63] Articles 51, 53 and 54. Article 64 stipulates that penal laws remain in force, unless a threat to the occupier's security, while existing tribunals continue to function. See also Security Council resolution 1472 (2003) concerning the March–April 2003 military operation by coalition forces in Iraq.

[64] Articles 55, 56, 59 and 60.

[65] Section IV consists of regulations for the treatment of internees.

[66] *Democratic Republic of the Congo* v. *Uganda*, ICJ Reports, 2005, pp. 168, 231 and 242 ff.

does not cease in case of armed conflict, unless there has been a relevant derogation permitted by the convention in question. The Court has also emphasised that many human rights treaties apply to the conduct of states parties where the state is exercising jurisdiction on foreign territory[67] and that in such cases the matter will fall to be determined by the applicable *lex specialis*, that is international humanitarian law.[68] In *Democratic Republic of Congo* v. *Uganda* the Court reaffirmed that 'international human rights instruments are applicable "in respect of acts done by a state in the exercise of its jurisdiction outside its own territory", particularly in occupied territories'.[69] It was concluded that Uganda was internationally responsible for various violations of international human rights law and international humanitarian law, including those committed by virtue of failing to comply with its obligations as an occupying power.[70]

As part of this general approach, the Court has noted that the principle of self-determination applies to the Palestinian people,[71] and that the construction by Israel of a separation barrier (sometimes termed a wall or a fence) between its territory and the occupied West Bank was unlawful to the extent that it was situated within the occupied territories.[72]

67 *Construction of a Wall*, ICJ Reports, 2004, pp. 136, 178 ff. See also Wills, 'Occupation Law', pp. 265 ff.

68 *Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports, 1996, pp. 226, 240.

69 ICJ Reports, 2005, pp. 168, 242–3. A series of international human rights instruments was listed as being applicable with regard to the Congo situation, including the International Covenants on Human Rights, the Convention on the Rights of the Child and the African Charter on Human and Peoples' Rights, *ibid.*, pp. 243–4.

70 *Ibid.*, pp. 244–5. Reference was also made to the violation of Article 47 of the Hague Regulations and Article 33 of the Fourth Geneva Convention and of the African Charter on Human and Peoples' Rights with regard to the exploitation of the natural resources of Congo, *ibid.*, pp. 252 ff.

71 The Court relied primarily upon the terms of the Israeli–Palestinian Interim Agreement, 1995 and the reference therein to the 'legitimate rights' of the Palestinian people, which the Court held included the right to self-determination 'as the General Assembly has moreover recognized on a number of occasions (see, for example, resolution 58/163 of 22 December 2003)', *Construction of a Wall*, ICJ Reports, 2004, pp. 136, 183.

72 This was partly because the Court saw this as creating a fait accompli on the ground which might become permanent and would then be tantamount to *de facto* annexation, and partly because it was seen as severely impeding the exercise by the Palestinian people of its right to self-determination, *ibid.*, p. 184. The Court also noted that it appeared that the construction of the wall was contrary to provisions in the Hague Regulations and the Fourth Geneva Convention concerning requisition of property and liberty of movement, *ibid.*, pp. 185 ff. Israel's argument was that the construction of the barrier commenced after a series of suicide car bombings within its territory emanating from the occupied territories and that the barrier was a temporary security measure, *ibid.*, p. 182. See generally the articles on the case collected in 'Agora', 99 AJIL, 2005, p. 1.

Further, although an occupying power can plead military exigencies and the requirements of national security or public order in the framework of the international law of occupation, the route of the wall could not be so justified.[73]

The Israeli Supreme Court in a judgment rendered shortly before the International Court's advisory opinion emphasised that the authority of a military commander to order the construction of each segment of the separation barrier could not be founded upon political as distinct from military considerations and that the barrier could not be motivated by annexation wishes nor in order to draw a political border. Such military authority was inherently temporary since belligerent occupation was inherently temporary.[74] In a further case, decided one year after the International Court's advisory opinion, the Israeli Supreme Court referred to the balance to be drawn between the legitimate security needs of the state, its military forces and of persons present in the occupied area in question on the one hand, and the human rights of the local population derived from international humanitarian law on the other.[75] The Court also proceeded on the assumption that the international conventions on human rights applied in the area.[76] In addressing the question as to how to achieve what was termed the 'delicate balance' between military necessity and humanitarian considerations, the Court referred to the application of general principles of law, one of these being the principle of proportionality. This principle was based on three sub-tests, the first being a call for a fit between goal and means, the second calling for the application of the least harmful means in such a situation, and the third being that the damage caused to an individual by the means employed must be of appropriate proportion to the benefit stemming from it.[77] Each segment of the route of the barrier had to be assessed in the light of the impact upon the Palestinian residents and whether any impingement was proportional.[78]

[73] ICJ Reports, 2004, pp. 192 and 193.

[74] *Beit Sourik* v. *Government of Israel*, Israeli Supreme Court, 30 June 2004, 129 ILR, pp. 189, 205–6.

[75] *Mara'abe* v. *Prime Minister of Israel*, Israeli Supreme Court, 15 September 2005, 129 ILR, pp. 241, 264–5. See also Y. Shany, 'Capacities and Inadequacies: A Look at the Two Separation Barrier Cases', 38 *Israel Law Review*, 2005, p. 230.

[76] *Mara'abe* 129 ILR, pp. 241, 266, but without formally deciding the matter, *ibid.*

[77] *Ibid.*, pp. 266 and 268, reaffirming the decision in *Beit Sourik* v. *Government of Israel*, Israeli Supreme Court, 30 June 2004, 129 ILR, pp. 189, 215 ff.

[78] *Mara'abe* 129, ILR, pp. 241, 286. The Court held that the route of the barrier in the area in question in the case had to be reconsidered as it was not shown that the least injurious means test had been satisfied, *ibid.*, pp. 316 ff. The effect of this would be to reduce the