

IX | Resort to Force

§ 1. Intervention and the prohibition on the use of force

THE word intervention is often used quite generally to denote almost any act of interference by one state in the affairs of another; but in a more special sense it means dictatorial interference in the domestic or foreign affairs of another state which impairs that state's independence. A mere tender of advice by one state to another about some matter on which the latter is entitled to decide for itself would not be an intervention in this sense, although it might be popularly so described. For the interference to be illegal intervention it must involve coercion.¹

1. See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA)*, ICJ Rep. (1986) at para. 205; see also GA Res. 2131 Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty (1965) and GA Res. 2625 Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (1970). See further P. Kunig, 'Intervention, Prohibition of', <mpepil.com>.

State practice on this matter has in the past been determined more often by political motives than by legal principles. Moreover, the most extreme form of intervention was always war, and for some time international law made no attempt to distinguish between legal and illegal occasions of making war. As long as this was the attitude of the law to war, it is not surprising that there should have been little agreement on the principles which regulated the less extreme measures of coercion by which one state might assume to dictate a certain course of action to another. For there was a certain unreality in attempting to formulate a law of intervention and at the same time admitting that a state might go to war for any cause, or for no cause at all, without any breach of international law.

How easily international law could be circumvented was shown by Great Britain and Germany in 1901. These two governments were in dispute with Venezuela over its failure to pay compensation claims due to damage done to their nationals during civil strife in Venezuela, and for failure to repay a contractual debt following a loan to build the Venezuelan railway. When the United States objected to certain measures which these states proposed to take against Venezuela under the guise of a 'pacific blockade', Great Britain and Germany then regularized the matter by acknowledging a state of war to exist,² sinking Venezuelan ships and bombarding Puerto Cabello.

Today, all such use of force is prohibited under customary international law and the Charter of the United Nations. Article 2(4), which is the corner-stone of the Charter system, reads as fol-

2. See Moore, *International Law Digest*, vol. vii, at 140-1.

lows: 'All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.'³ Because states can no longer circumvent the rules on intervention by notifying others of a state of war, the contours of any non-interference (or non-intervention) rule have therefore become more significant. The International Court of Justice has found, for example, that providing training and military support to rebels in another state constitutes a violation of the non-interference rule.⁴

Operations to rescue nationals abroad have been seen in the past as exceptions to the rule on non-intervention and the prohibition on the use of force. Waldock's edition of the present book explained: 'Whether the landing of a detachment of troops to save the lives of nationals under imminent threat of death or serious injury owing to the breakdown of law and order may be justifiable is a delicate question. Cases of this form of intervention have not been infrequent in the past and, when not attended by suspicion of being a pretext for political pressure, have generally been regarded as justified by the sheer necessity of instant action to save the lives of innocent nationals, whom the local government is unable or unwilling to protect. Clearly every effort must be made to get the local government to intervene effectively and, failing that, to obtain its permission

3. As we saw in Ch. VIII § 8 one exception to this rule is where states are authorized by the Security Council to use force, the second exception relates to self-defence; both are dealt with below.

4. See *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, ICJ Rep. (2005) at paras 161–5; *Nicaragua v USA* (1986) (above) at para. 246.

for independent action; equally clearly every effort must be made to get the United Nations to act. But, if the United Nations is not in a position to move in time and the need for instant action is manifest, it would be difficult to deny the legitimacy of action in defence of nationals which every responsible government would feel bound to take, if it had the means to do so; this is of course, on the basis that the action was strictly limited to securing the safe removal of the threatened nationals.'⁵

John Dugard, Special Rapporteur on Diplomatic Protection for the International Law Commission, proposed a draft article which would have set down the conditions for a lawful intervention in this context. Modelled on the circumstances surrounding the 1976 Israeli rescue raid in Entebbe airport in Uganda, it read as follows:

The threat or use of force is prohibited as a means of diplomatic protection, except in the case of rescue of nationals where:

- (a) The protecting State has failed to secure the safety of its nationals by peaceful means;
- (b) The injuring State is unwilling or unable to secure the safety of the nationals of the protecting State;
- (c) The nationals of the protecting State are exposed to immediate danger to their persons;

5. 6th edn at 427–8; Waldock goes on to consider the reaction of states to the sending of Belgian troops to the Congo but considered 'no clear conclusions can be drawn as to their attitude on the general legal question'. Subsequent rescue missions and the reactions of states have not really clarified the situation.

- (d) The use of force is proportionate in the circumstances of the situation;
- (e) The use of force is terminated, and the protecting State withdraws its forces, as soon as the nationals are rescued.⁶

Dugard considered that any right to use of force in the protection of nationals abroad had to be narrowly formulated, bearing in mind how states had abused this concept in the past. Dugard had suggested in his commentary: 'From a policy perspective it is wiser to recognize the existence of such a right, but to prescribe severe limits, than to ignore its existence, which will permit States to invoke the traditional arguments in support of a broad right of intervention and lead to further abuse.'⁷ The draft article found no support and was deleted. The issue will now most likely be considered an aspect of the law of self-defence (considered below).

Another question concerning intervention arises from the contemporary focus on the protection of human beings as forming part of the purpose of international law. The independence of states clearly obliges us to consider carefully any exceptions to a general rule of non-intervention. But it will be difficult to limit interventions in practice to those for which a legal justification can be pleaded, unless international law also restrains some of the excesses in which states indulge with regard to their own population. At present, an intervention, which we may be forced to stigmatize as illegal, may even deserve moral approval, as did possibly some of the collective humanitarian interventions which took

6. A/CN.4/506, 7 March 2000, at 16.

7. Ibid para. 59.

place in the nineteenth century in affairs of the former Turkish Empire.⁸ It is probably the realization of this possible contradiction between law and morality that leads some to regard humanitarian reasons as a legal justification for intervention. This tension was evident in the debate surrounding the 1999 NATO intervention over Kosovo, where the Security Council refused to authorize the use of force, and NATO used force anyway.⁹ The United Kingdom stated in its *Manual on the Law of Armed Conflict* that:

cases have arisen (as in Northern Iraq in 1991 and Kosovo in 1999) when, in the light of all the circumstances, a limited use of force was justifiable in support of purposes laid down by the Security Council but without the Council's express authorization when that was the only means to avert an immediate and overwhelming humanitarian catastrophe. Such cases are in the nature of things exceptional and depend on an objective assessment of the factual circumstances at the

8. D. Rodongo, *Against Massacre: Humanitarian Interventions in the Ottoman Empire* (Princeton: Princeton University Press, 2011); for the legality of humanitarian intervention in this context see P.H. Winfield, 'The Grounds of Intervention in International Law', vol. v *BYBIL* (1924) 149–62; I. Brownlie, *International Law and the Use of Force by States* (Oxford: OUP, 1963); see further J.L. Holzgrefe, 'The humanitarian intervention debate', in J.L. Holzgrefe and R.O. Keohane (eds), *Humanitarian Intervention: Ethical, Legal, and Political Dilemmas* (Cambridge: CUP, 2003) 15–52.

9. See in particular the exchange between B. Simma, 'NATO, the UN and the Use of Force: Legal Aspects', 10 *EJIL* (1999) 1–22 and A. Cassese, 'Ex iniuria ius oritur: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community', *ibid* 23–30, and 'A Follow-Up: Forcible Humanitarian Countermeasures and *Opinio Necessitatis*', *ibid* 791–9.

time and on the terms of the relevant decisions of the Security Council bearing on the situation in question.¹⁰

But, for many, any such justification would be political, humanitarian, or moral, rather than legal. Scholars are divided on whether developments since 1945 have left room for a right for states to use force in a humanitarian intervention without explicit authorization from the Security Council. Olivier Corten has incisively revealed how these differences reflect different methodological approaches to international law more generally. The 'restrictive approach,' which he favours, focuses on the customary and treaty rules and strictly applies the International Court of Justice's

10. *UK Manual on the Law of Armed Conflict* (Oxford: OUP, 2004) at para. 1.6, pp. 2–3; see also to the same effect Baroness Symons of Vernham Dean, Parliamentary Under-Secretary of State, FCO, written answer, Hansard, 16 November 1998, WA col 140; UK Foreign Secretary Robin Cook in a speech on 28 January 2000 at Chatham House, explained that the UK had submitted to the UN Secretary-General: 'a set of ideas to help the international community decide when it is right to act: first, any intervention is by definition a failure of prevention. Force should always be the last resort; second, the immediate responsibility for halting violence rests with the state in which it occurs; but, third, when faced with an overwhelming humanitarian catastrophe and a government that has demonstrated itself unwilling or unable to halt or prevent it, the international community should act; and finally, any use of force in this context should be collective, proportionate, likely to achieve its objective, and carried out in accordance with international law.' In 2007 Lord Malloch Brown (Minister of State, FCO) offered a 'set of criteria against which one might want to assess such interventions: first, that they are rule-based; secondly, that we are willing to sustain them over many decades; thirdly, that they are adequately burden-shared with others to allow us to sustain them; and, fourthly—this is what I think Mr Blair had in mind—that they are doable and achievable and that we will not end doing more harm than good and causing more loss of life.' Vol. 696 *Hansard* HL, 15 November 2007, cols 626–30 at 627.

approach to understanding the evolution of those rules. So, 'first, a State must invoke a new right, in other words claim that a modification of the rule occurred; second, this claim must be accepted by other States.'¹¹ If these conditions are fulfilled there is both an evolution of the customary rule and the necessary subsequent practice relevant to prove agreement on an interpretation of the UN Charter. Of course in reality states use a number of arguments and do not articulate their reliance on a particular emerging international law. Nor do other states express their explicit approval using legal vocabulary. Corten highlights this possibility that a state might 'approve an action in the name of a particular moral or political philosophy, while reserving its position in strictly legal terms.'¹² But he then explains that under the restrictive approach, such conduct does not enable one to conclude that the customary rule has evolved; the practice has to be accepted 'as law'.¹³

An 'extensive' approach is said by Corten to be taken by those who begin from the position that: '[p]ositive law can only correspond to objective law, that is, rules considered as necessary in a given social context and at a given historical period'.¹⁴ In this way humanitarian intervention 'is acceptable in the light of the progress of the humanistic values at the heart of the international commu-

11. *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law* (Oxford: Hart, 2010) at 29.

12. *Ibid* 38–9.

13. At 39 referring to the ICJ Statute Art. 38(1)(b) see Ch. II § 4(b) above. Corten examines with great care what states say with regard to humanitarian intervention and concludes that in almost all cases states rely on self-defence or Security Council authorization and not on any new humanitarian exception *The Law Against War* (above) at 495–549.

14. *Ibid* 10.

nity. It is objectively necessary to allow certain unilateral actions in cases in which the collective security mechanisms have not functioned.¹⁵ This last approach reflects the argument made above with regard to the rescue of nationals abroad. Waldock saw the interpretation of the rules on the use of force as inextricably linked to the capacity of the United Nations to act in any one context. The last page of the previous 1963 edition of the present book contained the following passage: 'The "cold war" has imposed severe limits on the possibilities of United Nations action to enforce peace, but the Organization, as we have seen, has developed certain techniques for bringing about a cease-fire and even for providing a limited form of international policing of critically dangerous areas. The more effective the executive arm of the United Nations is made, the stricter, we may be sure, will become the attitude of members to the use of force and their insistence that, except in case of urgent self-defence, lawful use of force is a monopoly of the United Nations itself.'¹⁶

It is suggested that this difference in methodology is the key to understanding the arguments as to the legitimacy of humanitarian intervention. The difference reflects not only separate understandings about *how law is formed*, but also a difference in emphasis with regard to including the *purpose* for which the law exists in a particular context. As the Rwandan genocide unfolded the UN Security Council was paralysed, and even when the Council approved a UN force, the UN Secretary-General was unable to find states willing to contribute troops in time. In such cases it is unlikely that, with the pros-

15. *Ibid* 11.

16. At 432 of the 6th edn. Cf ICJ judgment in *Nicaragua* (above) at para. 188.

pect of imminent massive loss of life, a state engaging in humanitarian intervention in Rwanda would suffer widespread condemnation for breaching the UN Charter. Almost everyone would accept that a better solution than unilateral intervention is approval through the United Nations,¹⁷ and yet the scenario of political stalemate in the Security Council remains a real one. Were a state to engage in a humanitarian rescue mission as just described, whether or not one sees this as a breach of the UN Charter, some, such as Tom Franck, have envisaged a lack of a response from other states as part of a sort of 'international law of mitigation'¹⁸ so that few consequences accrue for the transgressor, even though the law remains unaltered and there may be a formal situation of illegality. Although national analogies are always dangerous, we might allude to the idea that a fire-engine rushing to a fire may run a red light in violation of the law, but should the circumstances have required this there would unlikely be any sanctions. Of course the problem with developing a right of humanitarian intervention is the fear that it will be abused for neo-colonial or other extraneous reasons, but the stakes are too high for us to shut

17. Cf Brierly *The Outlook for International Law*, who writing in 1944 saw that breach of a future human rights treaty could permit intervention where a state treats its own subjects 'with gross inhumanity' but concluded nevertheless: 'The exercise of a right of intervention in such cases should probably be safeguarded against abuse by requiring the authorization of whatever international authority may be set up after the war.' At 117, see also 108.

18. T.M. Franck, *Recourse to Force: State Action Against Threats and Armed Attacks* (Cambridge: CUP, 2002) at 139; Franck also points out that the sentences handed down in the lifeboat cases recounted in the next section of this chapter took into account the pleas of mitigation and were reduced to six months, 'What, ear the cabin boy? Uses of force that are illegal but justifiable' *ibid* ch. 10.

the door on any emerging right to use force as a last resort to prevent imminent loss of life.¹⁹

The concept of humanitarian intervention, however, is not the sole focus in this context. In 1996, the Sudanese scholar Francis Deng and his co-authors had already started to reconceptualize sovereignty as an issue of responsibility.²⁰ The parameters of the debate concerning the right of humanitarian intervention were altered by questioning assumptions about sovereignty, and refocusing the discussion on what is now termed the 'responsibility to protect', 'R2P', or 'RtoP'. Before considering the significance of this emerging *responsibility to protect* (as subsequently enshrined in UN texts), we should briefly consider the background to these developments.

The 1994 Rwandan genocide shocked the world.²¹ Crucially, there was a degree of soul-searching as to why the UN and the international community had failed to intervene to stop the killing

19. For a small sample of writing on this topic see P. Alston and E. Macdonald (eds), *Human Rights, Intervention and the Use of Force* (Oxford: OUP, 2008); G.P. Fletcher and J.D. Ohlin, *Defending Humanity: When Force Is Justified and Why* (New York: OUP, 2008) ch. 7; T.G. Weiss, *Humanitarian Intervention* (Cambridge: Polity, 2007); F.R. Tesón, *Humanitarian Intervention: An Inquiry into Law and Morality*, 3rd edn (Ardley, NY: Transnational, 2005); Holzgrefe and Keohane (above); S. Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law* (Oxford: OUP, 2001); N.J. Wheeler, *Saving Strangers: Humanitarian Intervention in International Society* (Oxford: OUP, 2000); O. Ramsbotham and T. Woodhouse, *Humanitarian Intervention in Contemporary Conflict* (Cambridge: Polity, 1996); for a critical look at humanitarianism more generally see D. Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (Princeton NJ: Princeton University Press, 2004) D. Rieff, *A Bed for the Night: Humanitarianism in Crisis* (London: Vintage, 2002).

20. F.M. Deng, S. Kimaro, T. Lyons, D. Rothchild, and I.W. Zartman, *Sovereignty as Responsibility: Conflict Management in Africa* (Washington DC: Brookings Inst. Press, 1996).

21. P. Gourevitch, *We wish to inform you that tomorrow we will be killed with our families* (London: Picador, 2000).

and defend the defenceless.²² The reasons for this spectacular failure are multifaceted, but it is important to understand the political context. Relevant factors certainly included: the 1993 humiliation of US troops operating as part of a UN peace operation in Somalia, the subsequent development of a more restrictive US policy with regard to the approval of UN peace enforcement operations (Presidential Decision Directive 25), and a feeling that the UN was ill-equipped to cope with the demands already being made with regard to the humanitarian situation in the former Yugoslavia.²³ Nevertheless, attention focused on the legal framework and some sought to blame the UN Charter's provisions on non-intervention.

The unauthorized NATO intervention over Kosovo in 1999 rekindled the sense that the UN Charter was part of the problem rather than a framework for maintaining international peace and security. In the run up to the 60th anniversary of the UN in 2005, the scene was set for the UN Secretary-General to question whether the concept of sovereignty was not getting in the way of the protection of individuals at risk.²⁴

22. S. Power, *A Problem from Hell' America and the Age of Genocide* (New York: Harper Collins, 2003).

23. See further M. Barnett, *Eyewitness to a Genocide: the United Nations and Rwanda* (Ithaca: Cornell University Press, 2002); D. Scheffer *All the Missing Souls: A Personal History of the War Crimes Tribunals* (Oxford: Princeton University Press, 2012) 45–68.

24. See, e.g. K. Annan, 'Two concepts of sovereignty', *The Economist*, 18 September 1999; 'The legitimacy to intervene: international action to uphold human rights requires a new understanding of state and individual sovereignty', *Financial Times*, 10 January 2000; *In Larger Freedom* A/59/2005, 21 March 2005, 'experience has led us to grapple with the fact that no legal principle—not even sovereignty—should ever be allowed to shield genocide, crimes against humanity and mass human suffering'. At para. 129. For detailed examination of the divisions these speeches caused within the UN Secretariat and within the UN member states see R. Zacklin, *The United Nations and the Use of Force in a Unipolar World: Power v. Principle* (Cambridge: CUP, 2010).

The International Commission on Intervention and State Sovereignty, established by the Canadian Government in 2000, entered the debate and sought to provide a set of principles to ensure better protection for civilians whose lives were at risk. The members of the Commission sought to reorient the debate. They eschewed the term humanitarian intervention, in part to avoid a perceived militarization of humanitarian work, and in part due to the mounting opposition among states to the development of any such exception to the prohibition on the use of force. The Commission instead called for recognition of a 'responsibility to protect'. It stressed two principles: first, that sovereignty implies a responsibility of a state towards its people, and second, that the principle of non-intervention yields to the international responsibility to protect where a population is suffering serious harm as a result of internal armed conflict, repression, or state failure, and the state in question is unwilling or unable to stop this.²⁵ Reiterating the rules on the use of force, the Commission went on to leave the humanitarian intervention door slightly ajar, admitting the use of force, even in the absence of a Security Council authorization, in exceptional cases involving large-scale killing or ethnic cleansing. But the Commission set out only two alternative options in this context: consideration of the matter by the General Assembly in Emergency Special Session under the 'Uniting for Peace' procedure; or action by regional organizations acting within their jurisdiction, subject to their seeking subsequent authorization from the Security Council.²⁶

25. *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (Ottawa: International Development Research Centre, 2001) Basic Principles (1)A and B, at xi.

26. *Ibid.* Principles for Military Intervention (3)E., at xiii. On 'Uniting for Peace' see Ch. III § 5 fn 56.

This move towards to a right (or duty) to intervene in the context of humanitarian catastrophe might have been consolidated more widely in the run up to the 60th anniversary of the United Nations. World events took a dramatic turn. The terrorist attacks of 11 September 2001, the subsequent invasion of Afghanistan, and the bombing and occupation of Iraq in 2003 all changed the context. These events, and the accompanying climate, led the majority of states to continue to question the wisdom of opening up a new exception to the established prohibition on the use of force outside the accepted justifications: Security Council authorization and self-defence (both dealt with below). The eventual key paragraphs in the 2005 Summit Outcome, adopted by all UN member states, warrant close reading as they carefully retain the Charter framework for the use of force and recall the role of the Security Council as the entity entitled to authorize force to protect populations from serious harm.²⁷

The significance of the responsibility to protect framework lies therefore not so much in any development in the law on the use of force, but rather in the recalibration of the rule on non-forcible intervention and the generation of an expectation that the international community must act to protect those in danger. In the case of Libya such a concept of the responsibility to protect set the scene for the Security Council authorization of the use of force to protect civilians. What is therefore now clear is that it can no longer

27. 'Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability.'

be claimed that the UN has no business interfering in a situation of civil war or crimes against humanity. Such a situation is not to be considered a matter of exclusive domestic jurisdiction, and gives rise to responsibilities: first on the part of state concerned, and then on the part of all other states, and, most crucially, on the UN itself, to prevent such crimes and to protect the population from serious harm.²⁸

The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out.' At paras 138–9, A/RES/60/1, 24 October 2005. See also paras 5, 6, and 69–80. Reaffirmed by the Security Council in S/RES/1674 (2006), 28 April 2006; see also G. Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and for All* (Washington DC: Brookings Inst., 2008).

28. See further, for the subtle shifts between the UN and its member states, A. Orford, *International Authority and the Responsibility to Protect* (Cambridge: CUP, 2011); Boisson de Chazournes has suggested that R2P helps us to think about the 'collectivisation' of the responsibility to react to grave human rights violations and in turn that this is an expression of 'solidarity'. L. Boisson de Chazournes, 'Responsibility to Protect: Reflecting Solidarity?' in R. Wolfrum and C. Kojima (eds), *Solidarity: A Structural Principle of International Law* (Heidelberg: Springer, 2010) 93–122, at 114.

§ 2. Self-defence

(a) *Self-preservation and the Caroline incident*

A state, like an individual, may protect itself against an attack, actual or threatened. In the nineteenth century, however, there was a tendency, by widening the principle to cover 'self-preservation', to give the principle of self-defence a scope which is quite inadmissible.²⁹ Even Hall (a writer generally moderate in his views) went so far as to say: 'In the last resort almost the whole of the duties of states are subordinated to the right of self-preservation.'³⁰ Such a doctrine would destroy the imperative character of any system of law in which it applied, for it makes all obligation to obey the law merely conditional; and there is hardly any act of international lawlessness which, taken literally, it would not excuse. Self-preservation was, for example, one of the pretexts advanced by Germany in 1914 to justify her attack on Belgian neutrality, although she herself was under no apparent threat or attack either from Belgium or any other state. Nor does the analogy with

29. More recently it has been suggested that the inherent right to self-defence means that any state has the ability to use military force to 'defend what we define to be in our national interests'. J.R. Bolton, 'Is there Really "Law" in International Affairs?', 10 *Transnational Law and Contemporary Problems* (2000) 1–48, at 38; for a similar argument defending the sovereignty of independent states more generally see J.A. Rabkin, *Law Without Nations: Why Constitutional Government Requires Sovereign States* (Princeton: Princeton University Press, 2005).

30. *International Law* (Oxford: Clarendon Press, 1880), at 226. For further examples see P. Haggengmacher, 'Self-Defence as a General Principle of Law and Its Relation to War', in A. Eyffinger, A. Stephens, and S. Muller (eds), *Self-Defence as a Fundamental Principle* (Hague: Hague Academic Press, 2009) 3–49, esp. at 10–13.

national law, which influenced Hall,³¹ in any way support this extensive view of the principle of self-defence.

In English law, for example, a plea of self-preservation will not justify an otherwise criminal use of violence against another person. Thus in *R v Dudley and Stephens*,³² when two men and a boy were cast away at sea in an open boat, and the men, after their food and water had been exhausted for many days, killed and ate the boy, they were actually convicted of murder, although the jury found that in all probability all three would have died unless one had been killed for the others to eat. An American case is to the same effect.³³ The ship *William Brown* struck an iceberg, and some of the crew and passengers took to the boats. The boat was leaking and overloaded, and, in order to lighten it, the accused helped to throw some of the passengers overboard. He was convicted of murder. In both these cases a right of self-preservation, if any such right were known to the law, would have justified the acts committed, but it is equally clear that in neither were the acts truly defensive, for they were directed against persons from whom danger was not even apprehended. The truth is that self-preservation is not a legal right but an instinct, and no doubt when this instinct comes

31. 'Even with individuals living in well ordered communities the right of self-preservation is absolute in the last resort. *A fortiori* it is so with states, which have to protect themselves.' But Hall himself went on to set out conditions for what we now call self-defence which would apply: 'If the safety of a state is gravely and immediately threatened either by occurrences in another state, or aggression prepared there, which the government of the latter is unable, or professes itself to be unable to prevent, or when there is an imminent certainty that such occurrences or aggression will take place if measures are not taken to forestall them.' At 46.

32. *R v Dudley and Stephens* (1884) 14 QBD 273.

33. *U.S. v Holmes* (1842) 26 F Cas 360; (1842) 1 Wallace Junior, 1.

into conflict with legal duty, either in a state or an individual, it often happens that the instinct prevails over the duty. It may sometimes even be morally right that it should do so. But we ought not to argue that because states or individuals are likely to behave in a certain way in certain circumstances, therefore they have a right to behave in that way. Strong temptation may affect our judgment of the moral blame which attaches to a breach of the law, but no self-respecting system can admit that it makes breaches of the law legal; and the credit of international law has more to gain by the candid admission of breaches when they occur, than by attempting to throw a cloak of legality over them.³⁴

Self-defence, properly understood, is a legal right, and as with other legal rights the question whether a specific state of facts warrants its exercise is a legal question. It is not a question on which a state is entitled, in any special sense, to be a judge in its own cause. In one sense a state in international law may always be a judge in its own cause, for, in the absence of a treaty obligation, it is not compulsory for a state to submit its conduct to the judgment of any international tribunal. But this is a loose way of speaking. A state which refuses to submit its case does not become a 'judge'; it merely blocks the channels of due process of law, as, owing to the defective organization of international justice, it is still able to do. This is a defect of general application in international law, which

34. The reference by the International Court of Justice to the use of nuclear weapons in self-defence when the 'very survival of a state would be at stake' cannot be seen as a resurrection of the notion of self-preservation. See further M. Kohen, 'The Notion of "State Survival" in International Law', in L. Boisson de Chazournes and P. Sands (eds), *International Law, The International Court of Justice and Nuclear Weapons* (Cambridge: CUP, 1999) 293-314.

applies, but not in any special sense, to a disputed case of self-defence. There is, however, another circumstance which gives a certain plausibility to the common claim that every state is competent to decide for itself whether a necessity for self-defence has arisen. It is, or may be, of the nature of the emergency which seems to justify defensive action, that action, if it is to be effective, must be immediate. This is equally true of defensive action by an individual. To wait for authority to act from any outside body may mean disaster, either for a state or an individual, and either may have to decide *in the first instance* whether or in what measure the occasion calls for defensive action. With the individual, under any civilized system of law, this initial decision is not final; it may be reviewed later by the law in the light of all the relevant circumstances. There is no reason to believe that the case is different with a state, apart from the procedural difficulty of procuring the submission of the question to judicial review; and fortunately this conclusion does not depend on *a priori* argument. For the practice of states decisively rejects the view that a state need only declare its own action to be defensive for that action to become defensive as a matter of law. It is clear that the defensive or non-defensive character of any state's action is universally regarded as a question capable of determination by an objective examination of the relevant facts.

The principle of self-defence is clear, though its application to specific facts may often be a matter of difficulty. But a particularly well-known example of an intervention justified on grounds of self-defence is afforded by the incident of the steamer *Caroline* in 1837. During an insurrection in Canada the *Caroline* was used to transport men and materials for the Canadian rebels from American territory into

Canada across the Niagara River. The American Government had shown itself unable or unwilling to prevent this traffic, and in these circumstances a body of Canadian militia commanded by the British Royal Navy crossed the Niagara, and, after a scuffle, sent the *Caroline* adrift over the Niagara Falls. Two American citizens were killed including the cabin boy known as 'little Billy'.

In the controversy that followed, the United States did not deny such action by Great Britain could be justified under certain circumstances, and Great Britain for her part admitted that in order to justify such action there needed to be circumstances of extreme urgency. The two states differed only on the question whether the facts brought the case within the exceptional principle.³⁵

The formulation of the principle of self-defence in this case by the American Secretary of State, Daniel Webster, continues to be cited as encapsulating the self-defence exception to the prohibition on the use of the force.³⁶ There must be shown, he said, 'a

35. For a fascinating examination of the facts see R.Y. Jennings, 'The *Caroline* and McLeod Cases', 32 *AJIL* (1938) 82-99; note Jennings highlights how the assumption at the time was that the British action was justified by self-preservation and that was the term generally used in the doctrine at the time rather than the concept of self-defence. 'Yet, there is a considerable difference between the two conceptions, for whereas self-defence presupposes an attack, self-preservation has no such limitation, and broadly applied, would serve to cloak with an appearance of legality almost any unwarranted act of violence on the part of a state.' At 91.

36. See, however, Brownlie's point that using this exchange from 1838-42 'as the critical date for the customary law said to lie behind the United Nations Charter, drafted in 1945, is anachronistic and indefensible'. *Principles of Public International Law*, 7th edn (Oxford: OUP, 2008) at 734. He explains that: '[t]he statesmen of the period used self-preservation, self-defence, necessity, and necessity of self-defence as more or less interchangeable terms, and the diplomatic correspondence was not intended to restrict the right of self-preservation which was in fact reaffirmed'. Ibidem.

necessity of self-defence, instant, overwhelming, leaving no choice of means and no moment for deliberation'; and, further, the action taken must involve 'nothing unreasonable or excessive, since the act justified by the necessity of self-defence must be limited by that necessity and kept clearly within it'. The second of these propositions is as important as the first and more likely to be overlooked, for there is a natural temptation, when force has been resorted to, to continue its use after the needs of defence have been fairly met.

The trials before the Military Tribunals at the end of the Second World War demonstrated the need to keep self-defence within strict limits, for nearly every aggressive act has been portrayed as an act of self-defence. The right of self-defence was pleaded at Nuremberg and Tokyo on behalf of the German and Japanese major war criminals and rejected by the International Tribunals. The Nuremberg Tribunal expressly endorsed the statement of Secretary Webster in the *Caroline* exchange as to the proper limits of the right:

it is clear that as early as October 1939, the question of invading Norway was under consideration. The defence that has been made here is that Germany was compelled to attack Norway to forestall an Allied invasion, and her action was therefore preventive. It must be remembered that preventive action in foreign territory is justified only in case of 'an instant and overwhelming necessity for self-defence, leaving no choice of means, and no moment of deliberation.' (The *Caroline* Case)³⁷

37. *Trial of German Major War Criminals* (1946) Cmd 6964 (London: HMSO) at 28-9.

As we saw above, a state cannot be the sole judge of the need to have recourse to self-defence. But if it must necessarily be left to every state to decide in the first instance whether or in what measure an occasion calls for defensive action, it does not follow that the decision may not afterwards be reviewed by the law in the light of all the circumstances. Here again we might refer to the judgment of the Nuremberg Tribunal, in dealing with the same charge of German aggression against Norway:

It was further argued that Germany alone could decide, in accordance with the reservations made by many of the Signatory Powers at the time of the conclusion of the Briand-Kellogg Pact, whether preventive action was a necessity, and that in making her decision her judgment was conclusive. But whether action taken under the claim of self-defence was in fact aggressive or defensive must ultimately be subject to investigation and adjudication if international law is ever to be enforced.³⁸

We will consider the potential jurisdiction of the International Criminal Court over the international crime of aggression in § 4 below. In order to really understand the contemporary prohibition on the use of force (and whether such a use of force could amount to a manifest violation of the Charter amounting to the individual crime of aggression) we have to examine more closely the two justifications for the use of force accepted under the UN Charter: self-defence and authorization by the Security Council. We now examine these in some detail.

38. Ibid 30.

(b) *Contemporary law of self-defence*

The right to self-defence is expressly affirmed in the Charter of the United Nations, Article 51 of which provides that: '[n]othing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security'. The Article then goes on to provide that any measures of self-defence must be immediately reported to the Security Council, whose general responsibility and authority for taking action remain unaffected. Thus, any exercise of the right of self-defence is expressly made subject to the judgment and control of the Council; and if the veto is used to prevent the Council from intervening, the power of judgment and control can be transferred to the General Assembly under the Uniting for Peace Resolution. While the principle of self-defence is clearly accepted, several controversies surround its application.³⁹

(i) *Anticipatory self-defence*

Most observers would agree that the victim state does not have to wait until the actual attack on its territory has started (notwith-

39. Sometimes these controversies have been expressed as being about whether a party considers that the right of self-defence is an inherent continuing right under customary international law, or whether the right is completely circumscribed by the UN Charter, which in turn now defines customary international law. See the previous edition of the present book at 416–21. These controversies are today more likely to be simply expressed as policy arguments rather than issues that can be resolved by an interpretation of the UN Charter which allows for a parallel customary pre-existing right of self-defence based on *inter alia* the exchange following the *Caroline* incident.

standing that the English text of the Charter says 'if an armed attack occurs').⁴⁰ The problems arise when determining how imminent the attack needs to be before one can resort to force in self-defence. We saw above that the International Military Tribunal rejected the argument advanced by the German defendants in Nuremberg of the need to forestall an Allied attack from Norway, citing the *Caroline* formula, which suggests a degree of imminence. We might recall, however, that in the *Caroline* incident self-defence was not really purely anticipatory as attacks had already been launched on Canada.

More recently in 1981, when Israel used force against the Osirak nuclear reactor in Iraq she was strongly condemned by the UN Security Council for a military attack in 'clear violation of the Charter of the United Nations and the norms of international conduct'.⁴¹ Israel claimed that she had 'performed an elementary act of self-preservation, both morally and legally. In so doing, Israel was exercising its inherent right of self-defence as understood in general international law and as preserved in Article 51 of the UN Charter'.⁴² In his summary of the debate the President of the Security Council stated that it was 'inadmissible to invoke the right to self-defence when no armed attack has taken place. The concept of preventive war, which for many years served as a justification for the abuses of powerful States, since it left to their discretion to

40. Compare the French 'dans le cas où un Membre des Nations Unies est l'objet d'une agression armée'.

41. SC Res. 487 (1981).

42. Debate in the Security Council, S/PV.2280, 12 June 1981, 16–51; ILM (1981) 965 at 970.

define what constituted a threat to them, was definitively abolished by the Charter of the United Nations.⁴³

In debates over the last 30 years states have referred to their readiness to use pre-emptive strikes, particularly in the context of a threat from nuclear weapons, and threats from terrorist organizations in the wake of the September 11 attacks on the United States. In a study of these statements Tom Ruys concludes that while the 'circle of States accepting anticipatory self-defence has expanded since 2002,' even those states that argued for an expansive interpretation allowing for anticipatory self-defence have continued to focus on actual or *imminent* attacks.⁴⁴ Nevertheless, a large number of states, including China and India, would reject any interpretation which allows for pre-emptive self-defence.⁴⁵

Although the International Court of Justice has refrained from expressing its view on the 'lawfulness of a response to an imminent threat of armed attack,'⁴⁶ it did observe in 2005 that the position of the Ugandan High Command had been that the presence of the Ugandan army in the Democratic Republic of Congo was necessary 'to secure Uganda's legitimate security interests.' The Court considered that these security needs were 'essentially preventive,' and focused instead exclusively on the question of whether the

43. Ibid 991.

44. T. Ruys, *'Armed Attack' and Article 51 of the UN Charter: Evolutions in Customary Law and Practice* (Cambridge: CUP, 2010) ch 4 at 336ff; Corten (above) 406–43; C. Gray, *International Law and the Use of Force*, 3rd edn (Oxford: OUP, 2008) at 160–6.

45. Ibid 338–42. See also Y. Dinstein, *War, Aggression and Self-Defence*, 5th edn (Cambridge: CUP, 2012) ch 7. Compare M.W. Doyle, *Striking First: Preemption and Prevention in International Conflict* (Princeton: Princeton University Press, 2008).

46. See *Nicaragua* (above) at para. 194, and *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, ICJ Rep. (2005) at para. 143.

attacks that had actually occurred constituted 'armed attacks' such as would entitle Uganda to use self-defence.⁴⁷

(ii) Armed attack

Next there is the question of an 'armed attack'. The first question is the nature of the attack. States have claimed the right to self-defence not only when there is an attack on their territory, but also when their embassies, nationals, and ships are attacked abroad. In determining what constitutes an armed attack much depends on the context. In the *Oil Platforms Case* the International Court of Justice separated out incidents of the use of force from the 'most grave' form of the use of force amounting to an armed attack. It found that an attack on a merchant ship with a US flag in Kuwaiti waters, which could not be shown to have targeted that ship as opposed to other ships in the area, and the mining of a US flagged ship in an international shipping channel, which again could not be shown to have been aimed in particular at US shipping, did not constitute an armed attack (assuming that the acts could have been shown to be attributable to Iran). Similar problems arose with regard to the evidence needed to attribute to Iran the mining of the warship the USS *Samuel B. Roberts*. The Court, however, did not 'exclude the possibility that the mining of a single military vessel might be sufficient to bring into play the "inherent right of self-defence"'.⁴⁸

In the *Nicaragua v United States* case the International Court of Justice had insisted on this separation between a state's unlawful

47. Ibid paras 143–7.

48. *Oil Platforms (Iran v USA)*, ICJ Rep. (2003) at para. 72.

use of force or intervention and the 'most grave' forms of the use of force that amount to an 'armed attack'. This distinction was drawn in the context of one state supporting rebels in another state, and the Court concluded that the concept of armed attack did not include: 'assistance to rebels in the form of the provision of weapons or logistical or other support. Such assistance may be regarded as a threat or use of force, or amount to intervention in the internal or external affairs of other States.'⁴⁹ The essential difference between this situation and that of armed attack is the distinction between a state *supporting* armed bands and a state *sending* armed bands into another state.

There is, as we have just seen, a separate second question of *who* carries out the attack. While it is fair to say that the drafters of the UN Charter may have had in mind an attack by one state on another, today states have asserted the right to self-defence when attacked by terrorist groups, rebels or insurgents. As we shall see below, the definition of aggression includes in paragraph (g) the situation where a state sends armed bands or irregulars to carry out certain acts which attain a degree of gravity to put them on a par with aggression as defined for state forces. The International Court of Justice considered, not only that such state action is a violation of the Charter by the sending state, but also that these acts could be considered 'armed attacks': 'if such an operation, because of its scale and effects, would have been classified as an armed attack rather than a mere frontier incident had it been carried out by regular armed forces.'⁵⁰ In this case the victim state would be entitled to act in self-defence.

49. Above at para. 195, see also paras 191 and 227–31.

50. *Nicaragua* (above) at para. 195.

Today the controversy now centres on a situation where the armed non-state actor mounts an attack and no state is found to have sent or financed such attackers. Is an attack by such a non-state entity in such circumstances to be considered 'an armed attack' entitling a state to use force in self-defence? Put like this, in the wake of terrorist attacks resulting in hundreds, if not thousands of deaths, many would respond in the affirmative. Few states openly questioned the right of the United States to use self-defence to respond to the attacks of 11 September 2001.⁵¹ In that case Afghanistan was seen as harbouring Al Qaeda, or at least seen as unwilling to cooperate, and there were Security Council resolutions which evoked the right of self-defence. But what of the situation where a government is simply unable to tackle a rebel group launching attacks from its state into another state? Opinion here is divided on the contours of a right to self-defence in international law.⁵² As we shall see, the International Court of Justice has yet to address the issue head on; although the judges have left clues as to considerable differences in approach.⁵³

51. For an interesting analysis of why this was so see S.B. Ratner, '*Jus ad Bellum* and *Jus in Bello* After September 11', 96 *AJIL* (2002) 905–21.

52. See T.M. Franck, 'Terrorism and the Right of Self-Defense', 95 *AJIL* (2001) 839–43, A. Cassese, *International Law*, 2nd edn (Oxford: OUP, 2005) 354–5, N. Lubell, *Extra-territorial Use of Force Against Non-State Actors* (Oxford: OUP, 2010), Gray (above) ch 6; Corten (above) ch 3; and Ruys (above) at 447–72 who provides a detailed analysis of states reactions in particular with regard to the following post-September 11 incidents of states claiming self-defence in response to non-state actor attacks, Israel–Syria 2003, Rwanda–Congo 2004, Ethiopia–Somalia 2006, Israel–Lebanon 2006, Turkey–Iraq 2007–8, Colombia–Ecuador 2008.

53. In *Nicaragua* (above) we saw that the Court did not consider that an 'armed attack' had occurred such as to entitle the US claim to be entitled to use collective self-defence

In the case brought before the ICJ by the Democratic Republic of Congo against Uganda it was claimed that Uganda had the right to act in self-defence in response to attacks by the Alliance of Democratic Forces for the Liberation of the Congo. The Court found in its 2005 judgment that there was no direct or indirect involvement of the Democratic Republic of Congo in these attacks, and therefore 'the legal and factual circumstances for the exercise of a right of self-defence by Uganda against the DRC were not present'.⁵⁴ The Court said it was declining to answer the question 'whether and under what conditions contemporary international law provides for a right of self-defence against large-scale attacks by irregular forces'.⁵⁵ Judge Simma's Separate Opinion complains that the 'unnecessarily cautious way the Court handle[d] this matter ... creates the impression that it somehow feels uncon-

on behalf of El Salvador (due to the alleged Nicaraguan support for armed rebels in El Salvador), the judgment concluded: 'As stated above, the Court is unable to consider that, in customary international law, the provision of arms to the opposition in another State constitutes an armed attack on that State. Even at a time when the arms flow was at its peak, and again assuming the participation of the Nicaraguan Government, that would not constitute such armed attack.' At para. 230. But see the dissenting opinions on this point by Judges Jennings and Schwebel who considered that, although the provision of arms on its own would not constitute an armed attack, there could be situations where the substantial involvement of a state with such non-state actor attacks would rise to the level of armed attacks that entitle the victim state to engage in self-defence. In the *Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory*, ICJ Rep. (2004) p. 136 the Court excluded self-defence where the threat emanates from occupied territory at para. 139, but see the Separate Opinions of Judges Higgins and Kooijmans and the Declaration by Judge Buerghental.

⁵⁴ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, ICJ Rep. (2005) at paras 146–7.

⁵⁵ Ibid para. 147.

fortable being confronted with certain questions of utmost importance in contemporary international relations'.⁵⁶ The Court therefore can be seen as having left for another day a judgment on the conditions for self-defence against large-scale attacks by non-state actors.⁵⁷ For present purposes it is suggested that rather than concentrating on whether self-defence can be used in response to an attack by a non-state actor, the more important interrelated issues will be: against what may the force be directed? Whether the force was necessary? And whether the force was proportionate? We now turn to these questions.

(iii) Appropriate military targets

The use of force in self-defence must obviously respect the laws of armed conflict and international human rights law (considered below). In addition, the targets must relate to the self-defence action. Targeting a military objective must therefore be related to the aim of ending the attack or preventing the next imminent attack. The right to self-defence is not a right to engage in armed retaliation or retribution. The International Court in the *Oil Platforms Case* suggested that the state relying on the right to self-defence will have to show that its use of force against a particular target was necessary to deal with the attacks to which it had been subjected:

In the case both of the attack on the *Sea Isle City* and the mining of the USS *Samuel B. Roberts*, the Court is not satisfied

⁵⁶ At para. 15. See also the Separate Opinion by Judge Kooijmans.

⁵⁷ See further Gray (above) at 132–6 and 198–202; Moir (above) 135–9; Ruys (above) 479–85; Lubell (above) at 30–6.

that the attacks on the platforms were necessary to respond to these incidents. In this connection, the Court notes that there is no evidence that the United States complained to Iran of the military activities of the platforms, in the same way as it complained repeatedly of minelaying and attacks on neutral shipping, which does not suggest that the targeting of the platforms was seen as a necessary act. The Court would also observe that in the case of the attack of 19 October 1987, the United States forces attacked the R-4 platform as a 'target of opportunity', not one previously identified as an appropriate military target.⁵⁸

(iv) Necessity

Necessity is a principle of international law which limits the right to use self-defence. The right to self-defence only extends to those measures that are necessary to respond to the armed attack. Although not mentioned in Article 51, the International Court of Justice states that this rule is 'well established in customary international law'.⁵⁹ The question of necessity is not something to be evaluated by the state concerned according to its own perceptions of the danger being faced. The Court explained in the context of the self-defence claim by Uganda that 'Article 51 of the Charter may justify a use of force in self-defence only within the strict confines there laid down. It does not allow the use of force by a State to protect perceived security interests beyond these parameters.

58. *Oil Platforms* (above) at para. 76. Corten (above) helpfully labels this aspect a question of effectiveness (above) at 488–93.

59. *Nicaragua* (above) at para. 176.

Other means are available to a concerned State, including, in particular, recourse to the Security Council.⁶⁰

There is no reason to believe that self-defence must be instantaneous in order to be legal (notwithstanding the *Caroline* formula). The coalition that was assembled to come to the self-defence of Kuwait in 1990 chose not to react instantaneously. Judith Gardam points out that, in fact 'States regard themselves under a continuing obligation to endeavour to settle their differences by peaceful means. Depending on the circumstances, the failure to acknowledge peaceful overtures could transform a legitimate response in self-defence into an aggressive use of force.'⁶¹

(v) Proportionality

The facts of the *Oil Platforms Case* afforded the World Court the opportunity to explain how it would apply the proportionality rule in the event that a state be entitled to use self-defence.⁶² With regard to one particular incident of the use of force by the United States, the Court said: 'As a response to the mining, by an unidentified agency, of a single United States warship, which was severely damaged but not sunk, and without loss of life, neither "Operation Praying Mantis" as a whole, nor even that part of it that destroyed the *Salman* and *Nasr* platforms, can be regarded, in the circumstances of this case, as a proportionate use of force in self-

60. *DRC v Uganda* (above) at para. 148.

61. J. Gardam, *Necessity, Proportionality and the Use of Force by States* (Cambridge: CUP, 2004) at 155.

62. The Court has also affirmed that the proportionality rule is a rule of customary international law. *Nicaragua* (above) at para. 176.

defence.⁶³ Similarly, with regard to the claims of Uganda, the Court observed that 'the taking of airports and towns many hundreds of kilometres 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'.⁶⁴

Proportionality means evaluating the force used in self-defence against the threat posed. Proportionality is not limited to evaluating what has happened but rather focuses on what needs to happen. Elizabeth Wilmshurst's introduction to the Chatham House Principles on the Use of Force explains: 'because the right of self-defence does not allow the use of force to punish an aggressor, proportionality should not be thought to refer to parity between a response and the harm already suffered from an attack, as this could either turn the concept of self-defence into a justification for retributive force, or limit the use of force to less than what is necessary to repel the attack'.⁶⁵

63. *Oil Platforms (above)* at para. 76.

64. *DRC v Uganda (above)* at para. 147.

65. E. Wilmshurst, 'The Chatham House Principles of International Law on the Use of Force in Self-Defence', 55 *ICLQ* (2006) 963–72 at 968. The Principles also state that '[t]he physical and economic consequences of the force used must not be excessive in relation to the harm expected from the attack'. See also the helpful conclusion by Franck referred to in Ch. VIII in the context of trade, but which he applied in the present context too: 'An aggrieved party is not required to respond only in kind, whether the subject is trade, the use of force, or human rights. In assessing the acceptability of a response, the principle of proportionality allows those affronted by unlawful conduct to respond by taking into account the level of response necessary to prevent recurrences. This latitude may turn on the severity, frequency, and duration of the unlawful behavior. It potentially also invokes a version of the "precautionary approach" so well known from its deployment in environmental law.' 'On Proportionality of Countermeasures in International Law', 102 *AJIL* (2008) 715–67, at 765–6; and with regard in particular to Afghanistan (2001) see Moir (above) at 68–71.

There is a second proportionality rule which has to be respected by all sides whenever there is resort to force. We include it here because it represents a separate rule which needs to be considered in conjunction with the rule just explained. This rule derives from the law of armed conflict and the principle of distinction between combatants and civilians. Once one has identified an appropriate military target and the proposed use of force is both necessary and proportionate under the tests outlined above, one then must determine whether the expected civilian loss of life or damage is proportionate to the anticipated military advantage.

Whether something is a military objective is context-specific. As explained in Protocol I to the Geneva Conventions: 'military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage'.⁶⁶ Again one needs to examine carefully the context. A bridge or a power station may be purely civilian objects, or may be making an effective contribution to military action. Even where it is suggested that such objects represent military objectives, the use of force will only be legal where the proportionality test is satisfied. Whether such objects represent an appropriate target therefore depends on the direct and indirect effects of their destruction as well as the anticipated advantage. Article 51(5)(b) of the Protocol prohibits 'an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage

66. Art. 52(2).

anticipated.⁶⁷ This is the rule that prohibits disproportionate collateral damage. We will examine some of the other laws of armed conflict towards the end of this chapter.

§ 3. Authorization by the Security Council

Having outlined the contours of a state's right to self-defence, we now turn to a second exception to the prohibition on the use of force. It is clearly established that the Security Council can authorize states to use force. We saw in the previous chapter how, in the context of a threat to the peace, breach of the peace, or act of aggression, the Charter foresaw that the Security Council 'may take such action by air, sea, and land forces' as may be necessary to maintain or restore international peace and security.⁶⁸ This was to be done with UN forces placed at the Security Council's disposal. As already mentioned, the current standby arrangements only partially fulfil this idea. In practice the use of force has been either authorized for UN peace-keeping operations assembled on an *ad hoc* basis with personnel from troop contributing countries, or for coalitions of member states acting outside UN command and control.

67. This rule is included in the ICRC Study on Customary International Humanitarian Law as applicable in both international and non-international armed conflicts, Rule 14; J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law—Volume 1: Rules* (Cambridge: CUP, 2005). See also the Statute of the International Criminal Court for a war crime based on this rule, Art. 8(2)(b)(iv).

68. See Chapter VII of the UN Charter, Arts 39–50.

There is no need for the Security Council first to find that there has been an illegal use of force by a particular state. For enforcement action to be authorized it is enough that there should be a breach or threat to the peace. The formula used by the Security Council today, when it authorizes the use of force for states acting outside UN command and control, will be along the lines that it determines that the situation constitutes a threat to international peace and security, that it is acting under Chapter VII of the Charter, and that it authorizes certain member states to 'use all necessary means' or 'take all necessary measures'.⁶⁹

The Security Council's authorization for member states to use force acting outside UN command and control has attracted considerable controversy. First, there has been concern that states (whether acting individually, through regional organizations, or in coalition) may use such authorizations simply to pursue their own interests.

Second, Security Council resolutions have been relied on as a justification for using force even where there had been no explicit authorization of the use of force with respect to the military action being undertaken. In this way the 1999 NATO bombing of the Federal Republic of Yugoslavia in the Kosovo conflict was justified by some participating states as authorized by previous Chapter VII resolutions which had authorized force with regard to the earlier conflicts in the former Yugoslavia. Similarly, the United Kingdom and the United States relied on a Security Council resolution authorizing the use of force in response to Iraq's 1990 invasion of Kuwait to justify the use of force in 2003 involving the bombing, invasion, and occupation of Iraq.

69. See, e.g. Resolutions 678 (1990) (Kuwait) and 1973 (2011) (Libya).

Third, disagreements can quickly develop over whether the limitations in the authorization are being respected. This was most recently the case with regard to the authorization of the use of force with respect to Libya in 2011, which was limited to the protection of civilians. All these developments have led to greater caution in the Security Council, this caution being manifested in extra conditions being imposed on the authorized states, the setting of time limits on mandates, and a reluctance to include references to 'Chapter VII' or the need to use 'all necessary means'.⁷⁰

The reader may be understandably frustrated that, even if individual states remain free to find that other states have violated the UN Charter,⁷¹ UN organs such as the Security Council and the General Assembly have failed to condemn the illegal use of force by big powers, while the International Court of Justice only enjoys jurisdiction in those disputes where states have consented to its jurisdiction. Moreover the controversy over the 2003 Iraq war⁷²

70. See the detailed discussion in Gray (above) ch. 8 and Moir (above) 107–17.

71. The resort to force against the Federal Republic of Yugoslavia and Iraq was widely condemned (see the details in Corten (above) ch. 6 and Gray *ibid* at 354–69). Where a state concludes that such action is not authorized by the Security Council it may be obliged under its law to refuse to allow overflight or other forms of co-operation. In the context of the US/UK armed conflict with Iraq in 2003, Switzerland by law fulfilled its obligations by ensuring that 'conflicting parties were not allowed to fly over Swiss territory before and during this conflict. Moreover the Confederation was forbidden to export arms and services to states involved in the conflict.' 'Neutrality Under Scrutiny in the Iraq Conflict: Summary of Switzerland's neutrality policy during the Iraq conflict' Federal Department of Foreign Affairs, 5 December 2005, at 2.

72. The term 'war' in this section is used in the non-technical sense, in *Amin v Brown* [2005] EWHC 1670 (Ch) the High Court held that there was no war between the UK and Iraq (there was of course an international armed conflict). Mrs Amin, as an Iraqi national, was therefore not prevented under the national law on enemy aliens from

has led to disillusion in some quarters at the impotence of international law to rein in those resorting to force in the absence of a clear mandate from the Security Council. While these sentiments are understandable, there is, however, a real danger that by unduly focusing on the adoption of certain resolutions, we too easily satisfy ourselves of the wisdom or otherwise of the use of force. For many commentators the appropriateness or otherwise of the use of force with regard to Kosovo or Iraq seems to turn on the voting outcome in the Security Council. If nine votes can be found, and there is no veto, then the use of force is seemingly legal, legitimate, and to be supported. But such a limited focus is very dangerous; the appropriateness of any use of force should be debated with regard to the multiple dimensions of the issue.

In the run up to the 2003 Iraq war, Sir Adam Roberts asked us to consider, in addition to the legal dimension, the following questions: 'Has deterrence of Iraq failed so clearly that action must now be taken? Is it wise to start this war when there is so much unfinished business in Afghanistan? Should action be taken against Iraq before there is a further effort to address the Israel-Palestine problem? Is there any viable plan for the future of Iraq?'⁷³ While the question of the legality of any resort to force remains important, we must not forget to question the wisdom of war, and we must remain alert to the prospect that, even if a Security Coun-

bringing a case concerning a house in London before the UK courts. When the term 'war' is used in commercial or insurance contracts courts may take a more pragmatic approach depending on the context and there will be no need for a formal declaration of war. On the uncertain status of the concept of war in international law see C. Greenwood, 'The Concept of War in Modern International Law', 36 *ICLQ* (1987) 283–306.

73. 'The Case for War', *The Guardian*, 17 September 2002.

cil resolution legalizes an attack that would otherwise be an act of aggression, such resort to force may still be very unwise.

As regards UN peace operations, a distinction is often drawn between UN operations established under Chapter VI and those under Chapter VII. But this can be misleading. All UN peace operations have been seen as having the right to use force in self-defence or defence of their mandate. This right is exercised in a state under Chapter VI because that host state has consented to such an operation. Just because an operation is established under Chapter VII does not mean that the UN operation is necessarily entitled to use a greater degree of force. A Chapter VII operation implies international obligations for all UN member states, but any authorization of the use of force will usually be separately addressed in the Security Council resolution in the context of spelling out the mandate. So for example, in 2007 in its Chapter VII resolution on the United Nations Assistance Mission in Darfur (UNAMID) the Security Council *decided*

that UNAMID is authorised to take the necessary action, in the areas of deployment of its forces and as it deems within its capabilities in order to:

(i) protect its personnel, facilities, installations and equipment, and to ensure the security and freedom of movement of its own personnel and humanitarian workers,

(ii) support early and effective implementation of the Darfur Peace Agreement, prevent the disruption of its implementation and armed attacks, and protect civilians, without prejudice to the responsibility of the Government of Sudan....

This wider recourse to force by UN troops is not without controversy, and appeals for a 'robust doctrine' for peace-keeping have so far failed to attract support across the member states of the UN.⁷⁴ In turn the UN Secretariat has been frustrated by the Council's ability to craft ambitious mandates which are then matched with miserly resources and inadequate troop contributions from member states.

The presence of a peacekeeping mission generates high expectations among host populations and international opinion to protect individuals and communities in conflict. Yet, the ability of small numbers of under-equipped peacekeepers to protect civilian populations, often numbering several millions over vast distances, is finite. UN missions are regularly assigned a broad range of tasks that go well beyond providing physical security, including support for the voluntary return of refugees and displaced persons, and protection of civilians from sexual violence. These tasks require the engagement of all parts of the mission, whether military, police or civilian. The mismatch between expectations and capacity to provide comprehensive protection creates a significant credibility challenge for UN peacekeeping.⁷⁵

At present, it would appear that there is little hope that UN peace-keeping operations can play the world-wide role of maintaining

74. Report of the Panel on United Nations Peace Operations (Brahimi Report), A/55/305-S/2000/809, 21 August 2000.

75. Department of Peacekeeping Operations and Department of Field Support, *A New Partnership Agenda: Charting a New Horizon for Peace-Keeping* (2009) at 20.

the peace and protecting those at risk from violence. States have failed to give the UN the means to carry out this function adequately. Although the cold war divisions that prevented the creation of such operations are no longer with us, the world has failed to create the sort of capacity that would enable the UN to react on the ground in an effective way. The Secretariat's perspective again reveals the problems. 'Each new operation is built voluntarily and from scratch on the assumption that adequate resources can be found and is run on individual budget, support and administrative lines. Peacekeeping in its current form requires more predictable, professional and adaptable capacities. It needs a global system to match the global enterprise it has become.'⁷⁶ The momentum for such a system will depend on whether states (and the individuals who represent them) feel a sense of sensibility to everyone in the global community.

§ 4. Aggression in the Statute of the International Criminal Court

As mentioned in Chapter III it is likely that the International Criminal Court (ICC) will have jurisdiction over the crime of aggression from 2017.⁷⁷ The amended Statute excludes jurisdic-

76. *A New Partnership Agenda: Charting a New Horizon for Peace-Keeping* (2009) (above) at iii.

77. Under the amendment to the Statute the new Art. 15bis(3) reads: 'The Court shall exercise jurisdiction over the crime of aggression in accordance with this article, subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute.' For a full discussion see volume 10(1) of the *Journal of International Criminal Justice* (2012).

tion over nationals from states which have not ratified the Statute, unless the situation has been referred by the Security Council.⁷⁸ The crime is defined for the purposes of the Statute of the ICC as 'the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations'.⁷⁹ The crime can therefore be described as a 'leadership crime' and the Statute limits the scope of complicity in this crime to those who can control or direct the armed forces of a state.⁸⁰

In turn an 'act of aggression' is defined as 'the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations'.⁸¹ There then follows a list of acts that may qualify as an act of aggression:

Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression:

- (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, how-

78. Arts 15bis(5), and 15ter. See also the additional procedural steps under Arts 15bis(6) (7)(8) and Ch. III § 4 (above).

79. Art. 8bis(1) ICC Statute.

80. Art. 25bis(3).

81. Art. 8bis(2) ICC Statute.

- ever temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;
- (b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
 - (c) The blockade of the ports or coasts of a State by the armed forces of another State;
 - (d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;
 - (e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
 - (f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;
 - (g) 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 of such gravity as to amount to the acts listed above, or its substantial involvement therein.⁸²

There will be no crime of aggression where the use of force was legal as an exercise of self-defence or because it had been author-

82. Resolution RC/Res.6, adopted 11 June 2010, Annex I, Art. 8*bis* paras 1 and 2.

ized by the Security Council. In such cases there will have been no 'manifest violation of the Charter of the United Nations'.

In 1946 the International Military Tribunal in Nuremberg stated that 'to initiate a war of aggression... is the supreme international crime'.⁸³ The Tribunal found 12 of the defendants guilty on counts related to aggression. The Tokyo Tribunal found 24 of the defendants guilty on similar counts. Since that time there has been little appetite for the prosecution of the international crime of aggression; the Special Tribunal for Iraq was not given jurisdiction of this crime in the context of the trial of Saddam Hussein and others, even though there were calls for prosecutions related to the Iraqi invasion of Kuwait in 1990.⁸⁴ The jurisdictional and procedural hurdles for future trials before the International Criminal Court will be considerable. But the inclusion of the crime of aggression within the Statute of the International Criminal Court will surely give some leaders cause to pause for thought before embarking on military adventures.

§ 5. International law in armed conflict

All parties to an armed conflict are bound to respect the applicable international law. Both the aggressor state and the state acting in self-defence will be bound by the laws of war, now often known as international humanitarian law. A distinction is drawn between

83. *Trial of German Major War Criminals* (1946) Cmd 6964 (London: HMSO) at 13.

84. The Statute did, however, refer to a provision of Iraqi national law that could be used to prosecute a similar crime. See C. Kress, 'The Iraqi Special Tribunal and the Crime of Aggression', 2 *JICJ* (2004) 347–52.

inter-state conflicts and other armed conflicts involving organized non-state armed groups fighting against a state or each other. Certain rules from inter-state armed conflict will be inapplicable to internal armed conflicts.⁸⁵ So for example, in internal armed conflict there is no concept of a prisoner of war who can be detained until the end of the conflict and then must be released. In an internal armed conflict the captured non-governmental forces from the rebel side will usually be considered criminals for having taken up arms against the state, and the state can prosecute and punish them for their actions. By contrast, in an international armed conflict a member of the armed forces of a state captured by another state is not only entitled to be treated as a prisoner of war, but cannot be tried for having used force, even lethal force, against the armed forces of the capturing state. Even where the captured soldier belongs to the forces of an aggressor state, the individual crime of aggression, as we have seen, is a 'leadership crime' limited to those persons in a position to control or direct the armed forces of a state. The members of the armed forces of a state enjoy what is called 'combatant immunity' protecting them from prosecution for having used arms against another state. Of course they will

85. The rules on international armed conflict have enjoyed much greater attention from states as they obviously understand the reciprocal advantage of limiting certain methods and means of warfare. States have been less enthusiastic about limiting their freedom of action in the context of internal armed conflicts. Compare the long list of war crimes in international armed conflicts with the shorter provisions related to internal armed conflicts in the Statute of the International Criminal Court (1998) Art. 8(2). See also the distinctions drawn in the ICRC Customary International Humanitarian Law Study (Henckaerts and Doswald-Beck, above). See further Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, 2nd edn (Cambridge: CUP, 2010); L. Moir, *The Law of Internal Armed Conflict* (Cambridge: CUP, 2002).

remain liable to prosecution for certain violations of the laws of war (war crimes).

The laws of war have a long history and have been developed through a multitude of treaties as well as through customary international law.⁸⁶ The International Committee of the Red Cross seeks to bring a degree of clarity to this branch of international law which has recently taken on new significance with the increasing prospect of war crimes trials for violations of the law of armed conflict.⁸⁷ The topic is complex, and here we can only sketch a few fundamental principles and list some of the war crimes included in the Statute of the International Criminal Court.

In considering the legality of nuclear weapons the International Court of Justice distilled many of the rules down to two cardinal principles:

The first is aimed at the protection of the civilian population and civilian objects and establishes the distinction between combatants and non-combatants; States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian

86. For an overview see M. Sassòli, A.A. Bouvier, and A. Quintin, *How Does Law Protect in War? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law*, 3rd edn (Geneva: ICRC, 2011) 3 vols; R. Kolb and R. Hyde, *An Introduction to the International Law of Armed Conflicts* (Oxford: Hart Publishing, 2008); F. Kalshoven and L. Zegveld, *Constraints on the Waging of War*, 4th edn (Geneva: ICRC, 2011); C. Greenwood, 'International Humanitarian Law (Laws of War)', in F. Kalshoven (ed.), *The Centennial of the First International Peace Conference* (The Hague: Kluwer Law International, 2000) 161–259.

87. See S.R. Ratner, 'Law Promotion Beyond Law Talk: The Red Cross, Persuasion, and the Laws of War', 22(2) *EJIL* (2011) 459–506.

and military targets. According to the second principle, it is prohibited to cause unnecessary suffering to combatants: it is accordingly prohibited to use weapons causing them such harm or uselessly aggravating their suffering. In application of that second principle, States do not have unlimited freedom of choice of means in the weapons they use.⁸⁸

The application of the relevant rules is complicated. As to the first principle, there are multiple controversies surrounding who qualifies as a combatant, when do civilians lose their protection from attack through direct participation in hostilities,⁸⁹ what constitutes a military objective and hence a legitimate target, as well as how to apply the associated rule on proportionality which prohibits excessive damage to civilian objects and lives when targeting a military objective.

In times of conflict the answers to these questions depend on multiple factors which remain quite context-specific. So for example, as suggested in § 2(b)(v), a bridge can be considered a legitimate target depending on the circumstances, and, even where the bridge can make a contribution to the military effort of the opponent, any targeting will have to take precautions to avoid civilian casualties, while the eventual bombing must not result in disproportionate civilian casualties. In order to make such an evaluation one would

88. *Legality of the Threat or Use of Nuclear Weapons*, ICJ Rep. (1996) p. 226, at para. 78.

89. N. Melzer, 'Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities', 42(3) *New York University Journal of International Law and Politics* (2010) 831–916.

need to know the likelihood of civilians being near the bridge at any particular time of day or night, as well as the strategic advantage offered by the destruction of the bridge. The weighing of civilian lives against an abstract future military advantage seems grotesque and unworkable, but the principle forms the basis for calculations related to the legality of targeting in all modern conflicts.⁹⁰

Similar controversies arise with regard to the second principle. Although a number of treaties prohibit certain weapons in the context of the principle prohibiting unnecessary suffering to combatants, states have resisted seeing this principle as leading to a prohibition of weapons that have not been specifically outlawed.⁹¹ The debate may then turn on how the weapons are used rather than on the fact they have been used.⁹²

The principles just outlined, sometimes known as the law on the conduct of hostilities, are complemented by humanitarian rules for the protection of the victims of armed conflicts. Those protected by these rules include the sick, the shipwrecked, prisoners of war and other detainees, and civilians in occupied territories.

90. For the difficulties involved in applying the law to the facts in such situations see Report of the Independent International Fact-Finding Mission on the Conflict in Georgia (2009) vol. II at 321–51; Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia (2000) 39 ILM 1257; Report of the International Commission of Inquiry to investigate all alleged violations of international human rights law in the Libyan Arab Jamahiriya, A/HRC/17/44, 1 June 2011.

91. Consider the detailed listings of prohibited weapons in the International Criminal Court Art. 8(2)(b). For an overview of the international law in this field see W. Boothby, *Weapons and the Law of Armed Conflict* (Oxford: OUP, 2009).

92. See the discussion in the ICJ Opinion and the separate and dissenting opinions in *Legality of the Threat or Use of Nuclear Weapons* (above).

As we saw in previous chapters there may be specific provisions not only regarding the treatment of such persons but also prohibiting any reprisals against them. The provisions of this branch of the law of armed conflict cover several hundred articles mostly found in the four Geneva Conventions of 1949 and their Protocols. Any idea that some people fall outside this protection in times of armed conflict is now discredited.⁹³ A sense of the minimum guarantees can be gleaned from Common Article 3 to the 1949 Geneva Conventions which reads as follows:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

- (1) Persons taking no active part in the hostilities, 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, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or

93. The minimum rules regarding the treatment of those in the hands of the enemy can be found in Common Article 3 to the Geneva Conventions (the Conventions have been universally ratified) and Art. 75 to Protocol I. The United States recently recognized that although it is not a Party to Protocol I 'The U.S. Government will... choose out of a sense of legal obligation to treat the principles set forth in Article 75 as applicable to any individual it detains in an international armed conflict, and expects all other nations to adhere to these principles as well.' The White House, Fact Sheet: New Actions on Guantánamo and Detainee Policy, 7 March 2011.

any other similar criteria. To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
 - (b) taking of hostages;
 - (c) outrages upon personal dignity, in particular, humiliating and degrading treatment;
 - (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.
- (2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

Not only are such provisions binding on the parties to the conflict, but violations can also give rise to individual criminal responsibility as war crimes under international law. These crimes are supplemented by a list of crimes relating to the conduct of hostilities, as

well as a longer catalogue of crimes which apply in times of international armed conflict.⁹⁴

Although crimes against humanity were included in the Statutes of the Nuremberg and Tokyo Military Tribunals, those courts held that they could not examine such crimes unless they were connected to the conflict. Today crimes against humanity can be prosecuted not only where the acts are committed during armed conflict, but also in the absence of an armed conflict. Under the Rome Statute for the International Criminal Court, in order for these violations of human rights to constitute crimes against humanity, the acts must be committed 'as part of a widespread or systematic attack directed against any civilian population, with the knowledge of the attack'. In turn this means 'a course of conduct involving the multiple commission of acts... pursuant to or in furtherance of a State or organizational policy to commit such attack'. The following acts are included: murder; extermination; deportation or forcible transfer of populations; torture; rape, sexual slavery, enforced prostitution, forced pregnancy, and enforced sterilization; persecution on the basis of political or other grounds; and enforced disappearance of persons.⁹⁵

The International Court of Justice has confirmed that international human rights law and environmental law both apply in times of armed conflict in addition to international humanitarian law.⁹⁶ As we saw in Chapter VII, the work of the International Law

94. Art. 8(2) ICC Statute.

95. Art. 7 ICC Statute.

96. See *Nuclear Weapons* (above) at paras 25 and 29; see further E. Brown Weiss, 'Opening the Door to the Environment and to Future Generations', in Boisson de Chazournes and Sands (above) at 338–53.

Commission suggests a long list of the types of treaties whose subject-matter implies that they continue in times of armed conflict. Most importantly, international courts, such as the European Court of Human Rights, have applied human rights treaties in situations of armed conflict and occupation providing a remedy to the victims of human rights violations.⁹⁷

The precise interaction, however, between particular provisions of human rights treaties and the laws of war, has caused considerable confusion and controversy,⁹⁸ with some states claiming that one branch of the law should operate to the exclusion of the other. Although there may be situations where only one of these branches apply, in many situations the different legal orders operate in a complementary rather than an exclusive way. So for example, whereas a provision of human rights law may prohibit the arbitrary deprivation of life or arbitrary detention, in order to determine what constitutes arbitrariness in the context of armed conflict there may be a need to refer to the special rules of armed conflict which explain, for example, what constitutes a military objective (as seen above). In the same way, as we have just seen, the Geneva Conventions refer to 'torture' without further explanation. The

97. See, e.g. *Al-Skeini and others v UK*, 7 July 2011; *Al-Jedda v UK*, 7 July 2011; L. Doswald-Beck, *Human Rights in Times of Conflict and Terrorism* (Oxford: OUP, 2011).

98. For a very thoughtful exposition of the interaction between human rights law and humanitarian law see M. Sassòli, 'The Role of Human Rights and International Humanitarian Law in New Types of Armed Conflicts', in O. Ben-Naftali (ed.), *International Humanitarian Law and International Human Rights Law* (Oxford: OUP, 2011) 34–94; on the recourse to the laws of war in the post-September 11 world see M.E. O'Connell, 'The Choice of Law Against Terrorism', *Journal of National Security Law and Policy* (2010) 343–68, and P. Alston, 'The CIA and Targeted Killings Beyond Borders', 2 *Harvard National Security Journal* (2011) 283–446.

definitions and interpretation of the term 'torture' in human rights law will have to inform the application of the laws of war.⁹⁹

§ 6. The present role of international law

Throughout this book we have discovered tension between states' interests and certain values related to human dignity, we have also encountered emerging notions of international community. *Obligations owed* to the international community (*erga omnes*), *norms accepted and recognized* by the international community of states (*jus cogens*), and now an international community prepared to accept a *responsibility to protect* people from mass atrocities (*R2P*). Developing a community which is more than simply another name for a collection of states is essential to any future further development of international law. It is not enough to appeal to something called the international community, the community has to feel that everyone is included and that everyone's plight is a matter for concern and for action.

Law is not a kind of cement which, by some inherent force of its own, can firmly bind together human beings or states which are otherwise unrelated to one another and ready to fly apart; nor is it something to which methods of mass production can be applied. Its growth can be stimulated, in fact if it is to develop beyond a very rudimentary stage it needs to be stimulated, by the purposive creation of specialized institutions such as courts through which it

99. For further examples and a deeper reflection on the complementary and convergence developing between the two regimes see D. Thürer, 'International Humanitarian Law: Theory, Practice, Context', 338 *RCADI* (2008) 9–370, at 110–63.

can perform its functions; but in the main it is a by-product of the development of a community sense and of the wider, not purely juridical, but also social and political organization in which a feeling of community finds expression.¹⁰⁰

There are two popular but opposite misconceptions about the role of international law. One is the view of cynics, practical people who have shed their illusions, and believe quite simply that international law is a sham. They point to the absence of sanctions, and without troubling to examine whether the facts support them, assume that a law without sanctions is never observed. They note that this or that treaty has been broken, and infer that therefore no treaty is worth the paper it is written on. At the other extreme there is the utopian view of the ultra legalist lawyer who deals in codes and formulas as though they contained a magic of their own, or of the enthusiastic non-lawyer who imagines that earnest aspiration after a better international order can take the place of patient study of the actual problems. And yet international law today is a system in being, and it is possible, though perhaps not very easy, to discover how it is working.

It is not enough to refer to books; the literary history of international law, as well as much that is contained in traditional treatises, is in many respects misleading. We must look for a true picture, not so much at what is being written, but at what is being done, and for that we must go to the courts in which international

100. This last paragraph was originally included by Brierly as part of an address to Chatham House in 1944, 'International Law: Its Actual Part in World Affairs' in *The Basis of Obligation in International Law*, 305–13, at 312; also published in 20 *International Affairs* (1944) 381–9.

legal questions are decided and to the legal departments of foreign offices in which they are discussed. Here we shall find an immense amount of legal business being transacted, most of it practical and (to the non-lawyer) as dull as the work of any other lawyer. It relates largely to matters that receive only cursory mention in books about international law, to the drafting or interpretation of treaties on matters of greater and lesser importance, to the protection of nationals who get into trouble abroad, to conflicts of state jurisdiction, and to a variety of other matters, most of which are remote from high politics and of little interest to the man or woman in the street.

But what is significant about all of this work is that it proceeds on the assumption that states do normally observe their treaties and do respect the rules of international law, and this assumption is justified by experience. The judges and the lawyers involved use the same technique as other lawyers, and nine tenths of their difficulties, like those of other lawyers, arise in the application of accepted general principles to particular facts which are complicated or disputed, and not from any peculiar uncertainty or abstractness of the principles with which international lawyers have to deal. Most of those popular arguments which prove the non-legal or the peculiarly abstract nature of international legal principles are the pseudo-realist arguments of the theorist who, if he or she has examined the subject at all, has seen it in books and not in action.¹⁰¹

101. The last three paragraphs first appeared in similar form in Brierly's 'Law, Justice, and War' *Czechoslovak Year Book of International Law* (1942), reproduced in *The Basis of Obligation*, 265-79 at 265-6.

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