

Chapter 6

The Interface between Terrorism and Relevant Aspects of International Law

The first part of this text has focussed upon terrorism and counter-terrorism. It has considered the nature of terrorism and the associated problems with arriving at an internationally agree-upon definition of the term which is both concise and comprehensive. Part I of the text has outlined the international framework for countering terrorism, the means by which those international obligations are received into the domestic law of New Zealand, and a synopsis of New Zealand's corresponding domestic law on counter-terrorism.

This is the first of five chapters in Part II of the text, which consider the relationship of terrorism and counter-terrorism with human rights. This chapter examines, in the main, the relationship between terrorism and human rights. Properly defined, a terrorist act will correspond to proscribed conduct under one of the universal terrorism-related conventions. Such conduct, as will be discussed, attacks the values that lie at the heart of the Charter of the United Nations: respect for human rights; the rule of law; rules of war that protect civilians; tolerance among people and nations; and the peaceful resolution of conflict.¹ Depending on the particular circumstances surrounding any given terrorist act, terrorism thus not only impacts upon human rights and the rule of law but may also amount to an act of aggression or use of force within the meaning of Article 39 of the UN Charter, an act committed during the course of an armed conflict, an international criminal law offence, and/or an act which has the result of precluding the actor's protection under international refugee law. Recognising this dynamic interplay between terrorism and international legal norms, this chapter will therefore also give brief consideration to terrorism and armed conflict, international humanitarian law, and international refugee law.

¹ As identified, for example, in the Report of the High-level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, UN Doc A/59/565 (2004), para 145.

Terrorism, Human Rights and the Rule of Law

States have a duty to protect their societies and to contribute to the maintenance of international peace and security.² Terrorism is something that must therefore be suppressed and countered by all members of the international community. Before turning to the subject of the impact of terrorism upon human rights, it is useful to first provide a brief explanation of what human rights are, and the significance of this at the international level.

What are “Human Rights”?

Human rights are universal legal guarantees which protect individuals and groups against actions and omissions that interfere with fundamental freedoms, entitlements and human dignity. The full spectrum of human rights involve the respect for, and protection and fulfilment of, civil, cultural, economic, political and social rights, as well as the right to development. Human rights are universal, which means that they belong inherently to all human beings, as well as inter-dependent and indivisible.³

1. International human rights law

International human rights law is made up of what is known as the ‘International Bill of Human Rights’, together with a number of further subject-specific human rights treaties, as well as customary international law.⁴ The International Bill of Human Rights is not a treaty itself, but refers to five documents: the Universal Declaration on Human Rights (adopted under a resolution of the General Assembly),⁵ the International Covenant on Economic, Social and Cultural Rights, the International Covenant on

² The latter obligation is set out, for example, within the purposes and principles of the *Charter of the United Nations*, Articles 1 and 2.

³ See, for example, the Vienna Declaration and Plan of Action (Vienna World Conference on Human Rights 1993); the *Universal Declaration on Human Rights*, adopted under General Assembly resolution 217(III) (1948), Article 2; and the Charter of the United Nations, Article 55(c).

⁴ See the list of treaties set out in the website of the Office of the High Commissioner for Human Rights, *International Law*, online: <<http://www.ohchr.org/english/law/index.htm>> (last accessed on 28 November 2006).

⁵ *Universal Declaration on Human Rights*, GA Res 217(III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/Res/3/217 (1948).

Civil and Political Rights, and its two Optional Protocols.⁶ Added to these are the following core universal human rights treaties: the Convention on the Elimination of All Forms of Racial Discrimination; the Convention on the Elimination of All Forms of Discrimination against Women; the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment; the Convention on the Rights of the Child; the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.⁷ Recently adopted are the International Convention for the Protection of All Persons from Enforced Disappearance, and the International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities.⁸ There is a growing body of subject-specific treaties and protocols, as well as various regional treaties on the protection of human rights and fundamental freedoms.⁹

⁶ *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976); *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976); *Optional Protocol to the International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 302 (entered into force 23 March 1976); and *Second Optional Protocol to the International Covenant on Civil and Political Rights*, opened for signature 15 December 1989, 1642 UNTS 414 (entered into force 11 July 1991). See OHCHR Fact Sheet No 2, *The International Bill of Human Rights*, online: <<http://www.ohchr.org/english/about/publications/docs/fs2.htm>> (last accessed on 15 March 2007).

⁷ *Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 7 March 1966, 9464 UNTS 211 (entered into force 4 January 1969); the *Convention on the Elimination of All Forms of Discrimination Against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981); the *Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 112 (entered into force 26 June 1987); and the *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 43 (entered into force 2 September 1990).

⁸ *International Convention for the Protection of All Persons from Enforced Disappearance*, adopted on 13 November 2006 by the Third Committee of the General Assembly; and *International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities*, adopted on 5 December 2006 by the Ad Hoc Committee of the General Assembly on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities.

⁹ Including, for example, the *(European) Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953); the *American Convention on Human Rights*, 1144 UNTS 123 (entered into force 18 July 1978); the *Charter of the Organization of American States*, opened for signature in 1948, 119 UNTS 3 (entered into force 13 December 1951); the *African Charter on Human and Peoples' Rights*, opened for signature 27 June 1981, OAU Doc CAB/LEG/67/3 rev 5, (1982) 21 ILM 58 (entered into force 21 October 1986); and the *Arab Charter on Human Rights*, adopted by the Arab League Council and opened

International human rights law is not limited to the enumeration of rights within treaties, but also includes rights and freedoms that have become part of customary international law. Many of the rights set out within the Universal Declaration on Human Rights are said to hold this character. The Human Rights Committee has similarly observed that some rights within the International Covenant on Civil and Political Rights (ICCPR) reflect norms of customary international law.¹⁰ Furthermore, some rights are recognized as having a special status as norms of *jus cogens* (peremptory norms of customary international law), which means that there are no circumstances in which derogation of those rights is permissible. The prohibitions of torture, slavery, genocide, racial discrimination, crimes against humanity, and the right to self-determination are widely recognized as peremptory norms, as reflected in the International Law Commission's Articles on state responsibility.¹¹ The Committee on the Elimination of Racial Discrimination has said that the principle of non-discrimination has also become a norm of *jus cogens*.¹²

2. The nature of States' obligations under international human rights law

Human rights law obliges States to do certain things and prevents them from doing others. States have a duty to respect, protect and fulfil human rights. Respect for human rights involves not interfering with their enjoyment. Protection entails taking steps to ensure that others do not interfere with the enjoyment of rights. The fulfilment of human rights requires that States adopt appropriate measures, including legislative, judicial, administrative or educative measures in order to fulfil their legal obligations.¹³ A State party may be found equally responsible for attacks by private persons or entities upon the enjoyment of human rights. For

for signature 15 September 1994 (the Charter remains unratified; its unofficial English translation can be found in the *ICJ Review* 56/1996).

¹⁰ Human Rights Committee, *Issues Relating to Reservations*, CCPR General Comment 24 of 1994, reprinted UN Doc HRI/GEN/1/Rev.6 at 161 (2003) para 8; and Human Rights Committee, *States of Emergency (Article 4)*, CCPR General Comment 29 of 2001, reprinted UN Doc HRI/GEN/1/Rev.6 at 186 (2003) para 13.

¹¹ International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts with commentaries, 2001* (United Nations, 2005) 281 (n 675). See also *Prosecutor v Furundzija* Case IT-95-17/1 (judgment of 10 December 1998).

¹² Committee on the Elimination of Racial Discrimination, "Statement on Racial Discrimination and Measures to Combat Terrorism", in *Report of the Committee on the Elimination of Racial Discrimination*, UN Doc A/57/18, para 107.

¹³ See Human Rights Committee, *Nature of the General Legal Obligation on States Parties to the Covenant*, CCPR General Comment 31, UN Doc CCPR/C/21/Rev.1/Add.13 (2004), paras 5-7.

example, under the ICCPR, State parties have an obligation to take positive measures to ensure that private persons or entities do not inflict torture or cruel, inhuman degrading treatment or punishment on others within their power.¹⁴ Human rights law also places a certain responsibility upon States to provide effective remedies in the event of violations.¹⁵

Those human rights that are part of customary international law are applicable to all States.¹⁶ In the case of human rights treaties, those States that are party to a particular treaty have obligations under that treaty.¹⁷ There are various mechanisms for the enforcement of international human rights obligations, including the evaluation by treaty-monitoring bodies of a State's compliance with certain treaties, and the ability of individuals to complain about the violation of their rights to international bodies. In the case of the ICCPR, the Human Rights Committee receives periodic reports from States parties concerning the implementation and enjoyment of Covenant rights within the State's territory.¹⁸ The Committee also issues general comments on the interpretation and application of various provisions of the ICCPR,¹⁹ and receives communications from individuals within the territory of States parties to the ICCPR First Optional Protocol.²⁰

Added to this, and particularly relevant to a number of human rights challenges in countering terrorism, all members of the United Nations are obliged to take joint and separate action in co-operation with the United Nations for the achievement of the purposes set out in Article 55 of the UN Charter, including the universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.²¹

The nature of the general legal obligation of States parties is addressed in Article 2 of the ICCPR. As confirmed by the Human Rights Committee in its General Comment 31, the Article 2 obligation upon States to ensure Covenant rights to all persons within their territory and subject to their jurisdiction means that a State party must ensure such rights to anyone within its power or effective control, even if not situated within the territory

¹⁴ General Comment 31 (*ibid*) para 8.

¹⁵ General Comment 31 (*ibid*) paras 15 and 16. In the case of the International Covenant on Civil and Political Rights, this obligation is set out in Article 2(3)(a).

¹⁶ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, *Merits* (1986) ICJ Reports, paras 172-201.

¹⁷ See the *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980), Article 34.

¹⁸ ICCPR, Article 40.

¹⁹ ICCPR, Article 40(4).

²⁰ *First Optional Protocol to the ICCPR* (n 6).

²¹ *Charter of the United Nations*, Articles 55(c) and 56.

of the State party. This means that human rights obligations under the ICCPR have extra-territorial application. Similarly, the International Court of Justice in its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories* concluded that “the International Covenant on Civil and Political Rights is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory.”²² The Court reached the same conclusion with regard to the applicability of the Convention on the Rights of the Child.²³

The enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers and refugees.²⁴

The Impact of Terrorism upon Human Rights and Society

Terrorism has a direct impact on the enjoyment of a number of human rights, in particular on human life, liberty, and physical integrity. Terrorist acts can destabilise governments, undermine civil society, jeopardise peace and security, threaten social and economic development and may negatively affect certain groups. All of these have a direct impact on the enjoyment of fundamental human rights, something recognised in a long line of General Assembly resolutions beginning in 1993 and entitled “Terrorism and Human Rights”.²⁵ Echoing many of the expressions of concern contained in the General Assembly’s Declarations on Measures to Eliminate International Terrorism,²⁶ the preamble to the first of these resolutions spoke of the serious concern of the General Assembly at the gross violations of human rights perpetrated by terrorist groups. Resolutions since 1995 did the same, adding that terrorism creates an environment that destroys the right of people to live in freedom from fear.²⁷

²² *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, Advisory Opinion (2004) ICJ Reports para. 111.

²³ *Ibid*, para. 113.

²⁴ General Comment 31 (n 13).

²⁵ GA Res 48/122, UN GAOR, 48th Sess, 85th Plen Mtg, UN Doc A/Res/48/122 (1993).

²⁶ See, *infra*, chapter 3.

²⁷ GA Res 50/186, UN GAOR, 50th Sess, 99th Plen Mtg, UN Doc A/Res/50/186 (1995) preambular paras 3, 4, 5 and 11, and operative para 2; GA Res 52/133, UN GAOR, 52nd Sess, 70th Plen Mtg, UN Doc A/Res/52/133 (1997) preambular paras 6, 7, 8 and 10, and operative para 3; GA Res 54/164, UN GAOR, 54th Sess, 83rd Plen Mtg, UN Doc A/Res/54/164 (1999) preambular paras 7, 8, 9 and 12, and operative para 3; GA Res 56/160, UN GAOR, 56th Sess, 88th Plen Mtg, UN Doc A/Res/56/160 (2001) preambular paras 11, 12 and 13; GA Res 58/174, UN GAOR, 58th Sess, 77th Plen Mtg, UN Doc

The preamble to the Assembly's resolution 56/160 (2001) added:²⁸

Noting the growing consciousness within the international community of the negative effects of terrorism in all its forms and manifestations on the full enjoyment of human rights and fundamental freedoms and on the establishment of the rule of law and domestic freedoms as enshrined in the Charter of the United Nations and the International Covenants on Human Rights.

The destructive impact of terrorism upon human rights and security has been recognised by the Security Council, the General Assembly and the Commission on Human Rights alike. Member States have identified terrorism as something which:

- has links with transnational organised crime, drug trafficking, money-laundering, and trafficking in arms as well as the illegal transfer of nuclear, chemical and biological materials;²⁹
- is linked to the consequent commission of serious crimes such as murder, extortion, kidnapping, assault, the taking of hostages, and robbery;³⁰
- endangers or takes innocent lives;³¹

A/Res/58/174 (2003) preambular paras 12, 13 and 14; and GA Res 59/195, UN GAOR, 59th Sess, 74th Plen Mtg, UN Doc A/Res/59/195 (2004) preambular paras 12 and 13.

²⁸ GA Res 56/160 (ibid).

²⁹ For resolutions of the Security Council, see: SC Res 1373, UN SCOR, 4385th Mtg, UN Doc S/Res/1373 (2001), para 4; SC Res 1456, UN SCOR, 4706th Mtg, UN Doc S/Res/1456 (2003), preambular paras 3 and 6; and SC Res 1540, UN SCOR, 4956th Mtg, UN Doc S/Res/1540 (2004), preambular para 8. By the General Assembly, see: GA Res 58/136, UN GAOR, 58th Sess, 77th Plen Mtg, UN Doc A/Res/58/136 (2004), preambular para 8. For resolutions of the Commission on Human Rights, see: CHR Res 2001/37, *Human Rights and Terrorism*, UN Doc E/CN.4/Res/2001/37, preambular para 16; and CHR Res 2004/44, *Human Rights and Terrorism*, UN Doc E/CN.4/Res/2004/44, preambular para 7. See also the report of the Sub-Commission Special Rapporteur, Kalliope Koufa, *Progress Report on Terrorism and Human Rights*, UN Doc E/CN.4/Sub.2/2001/31, paras 104 and 105.

³⁰ For resolutions of the General Assembly, see: GA Res 48/122, UN GAOR, 48th Sess, 85th Plen Mtg, UN Doc A/Res/48/122 (1993), preambular para 7; GA Res 49/185, UN GAOR, 49th Sess, 94th Plen Mtg, UN Doc A/Res/49/185 (1994), preambular para 9; GA Res 50/186 (ibid) preambular para 12 and operative para 2; GA Res 52/133, UN GAOR, 52nd Sess, 70th Plen Mtg, UN Doc A/Res/52/133 (1997), preambular para 11; GA Res 54/164, UN GAOR, 54th Sess, 83rd Plen Mtg, UN Doc A/Res/54/164 (1999) preambular para 13; GA Res 56/160, UN GAOR, 56th Sess, 88th Plen Mtg, UN Doc 56/160 (2001), preambular para 18; and GA Res 58/174, UN GAOR, 58th Sess, 77th Plen Mtg, UN Doc A/Res/ 58/174 (2003), para 12. For resolutions of the Commission on Human Rights, see: CHR Res 2001/37 (ibid) preambular para 16; and CHR Res 2004/44 (ibid) preambular para 7. See also Koufa (ibid) paras 104 and 105.

- creates an environment that destroys the freedom from fear of the people;³²
- threatens the dignity and security of human beings everywhere;³³
- has an adverse effect upon the establishment and maintenance of the rule of law;³⁴
- jeopardises fundamental freedoms;³⁵
- aims at the destruction of human rights;³⁶

³¹ For resolutions of the Security Council, see: SC Res 1269, UN SCOR, 54th Sess, 4053rd Mtg, UN Doc S/Res/1269 (1999), preambular para 1; and SC Res 1377, UN SCOR, 55th Sess, 4413rd Mtg, UN Doc S/Res/1377 (2001), Annex (Declaration), para 6. See also the first operative paragraphs of the following General Assembly resolutions: GA Res 3034 (XXVII), UN GAOR, 27th Sess, 2114th Plen Mtg, UN Doc A/Res/27/3034 (1972); GA Res 31/102, UN GAOR, 31st Sess, 99th Plen Mtg, UN Doc A/Res/31/102 (1976); GA Res 32/147, UN GAOR, 32nd Sess, 105th Plen Mtg, UN Doc A/Res/32/147 (1977); GA Res 34/145, UN GAOR, 34th Sess, 105th Plen Mtg, UN Doc A/Res/34/145 (1979); and GA Res 36/109, UN GAOR, 36th Sess, UN Doc A/Res/36/109 (1981). For resolutions of the Commission on Human Rights, see: CHR Res 2001/37 (n 29) para 2; and CHR Res 2004/44 (n 29) preambular para 7. See also Koufa (n 29) para 109.

³² For resolutions of the General Assembly, see: GA Res 50/186 (n 30) preambular para 5; GA Res 52/133 (n 30) preambular para 8; and GA Res 54/164 (n 30) preambular para 9. For resolutions of the Commission on Human Rights, see: CHR Res 2001/37 (n 29) preambular para 12, and operative para 2; and CHR Res 2004/44 (n 29) preambular para 12. See also Sub-Commission on Human Rights Resolution 2001/18, *Human Rights and Terrorism*, UN Doc E/CN.4/Sub.2/Res/2001/18, preambular para 8.

³³ See SC Res 1377 (n 31) Annex (Declaration), para 6. See also CHR Res 2001/37 (n 29) para 2; and Koufa (n 29) para 107.

³⁴ See GA Res 56/160 (n 30) preambular para 24. For resolutions of the Commission on Human Rights, see: CHR Res 2001/37 (n 29) preambular para 13, and operative para 1; and CHR Res 2004/44 (n 29) preambular para 13. See also Sub-Commission on Human Rights Resolution 2001/18 (n 32) preambular para 9.

³⁵ See the following resolutions of the General Assembly: GA Res 48/122 (n 30) para 1; GA Res 49/185 (n 30) para 1; GA Res 50/186 (n 30) para 2; GA Res 52/133 (n 30) para 3; GA Res 56/160 (n 30) preambular para 24 and para 3; and GA Res 58/174 (n 30) para 1. For resolutions of the Commission on Human Rights, see: CHR Res 2001/37 (n 29) preambular para 23, and operative para 1; and CHR Res 2004/44 (n 29) preambular para 12, and operative para 1.

³⁶ As recognised in the first-stated *Declaration on Measures to Eliminate International Terrorism*, adopted under GA Res 49/60, UN GAOR, 49th Sess, 84th Plen Mtg, UN Doc A/Res/49/60 (1994), operative para 2. For resolutions of the General Assembly, see also: GA Res 48/122 (n 30) para 1; GA Res 49/185 (n 30) para 1; GA Res 50/186 (n 30) para 2; GA Res 52/133 (n 30) para 3; GA Res 56/160 (n 30) preambular para 24 and operative para 3; and GA Res 58/174 (n 30) para 1. For resolutions of the Commission on Human Rights, see: CHR Res 2001/37 (n 29) preambular para 23, and operative para 1; and CHR Res 2004/44 (n 29) preambular para 12 and 23, and operative para 1. See also Report of the High-level Panel on Threats, Challenges and Change (n 1) para 145.

- undermines pluralistic civil society;³⁷
- aims at the destruction of the democratic bases of society;³⁸
- destabilises legitimately constituted governments;³⁹
- has adverse consequences upon the economic and social development of States;⁴⁰
- constitutes a grave violation of the purpose and principles of the United Nations;⁴¹
- jeopardises friendly relations among States;⁴²

³⁷ As recognised in the first-stated *Declaration on Measures to Eliminate International Terrorism* (ibid) operative para 2. For resolutions of the General Assembly, see also: GA Res 48/122 (n 30) para 1; GA Res 49/185 (n 30) para 1; GA Res 50/186 (n 30) para 2; GA Res 52/133 (n 30) para 3; GA Res 56/160 (n 30) preambular para 24 and operative para 3; and GA Res 58/174 (n 30) para 1. For resolutions of the Commission on Human Rights, see: CHR Res 2001/37 (n 29) para 1; and CHR Res 2004/44 (n 29) para 1. See also Report of the High-Level Panel (n 1) para 145.

³⁸ As recognised in the first-stated *Declaration on Measures to Eliminate International Terrorism* (n 36) operative para 2. For resolutions of the General Assembly, see also: GA Res 48/122 (n 30) para 1; GA Res 49/185 (n 30) para 1; GA Res 50/186 (n 30) para 2; GA Res 52/133 (n 30) para 3; GA Res 56/160 (n 30) para 3; and GA Res 58/174 (n 30) para 1. For resolutions of the Commission on Human Rights, see: CHR Res 2001/37 (n 29) preambular para 13; and CHR Res 2004/44 (n 29) preambular para 13, and operative para 1. See also Sub-Commission on Human Rights Resolution 2001/18 (n 32) preambular para 9.

³⁹ For resolutions of the General Assembly, see: GA Res 48/122 (n 30) para 1; GA Res 49/185 (n 30) para 1; GA Res 50/186 (n 30) para 2; GA Res 52/133 (n 30) para 3; GA Res 56/160 (n 30) para 3; and GA Res 58/174 (n 30) para 1. For resolutions of the Commission on Human Rights, see also: CHR Res 2001/37 (n 29) para 1; and CHR Res 2004/44 (n 29) para 1.

⁴⁰ See SC Res 1377 (n 31) Annex (Declaration), para 6. For resolutions of the General Assembly, see: GA Res 48/122 (n 30) para 1; GA Res 49/185 (n 30) para 1; GA Res 50/186 (n 30) para 2; GA Res 52/133 (n 30) para 3; GA Res 56/160 (n 30) para 3; and GA Res 58/174 (n 30) para 1. For resolutions of the Commission on Human Rights, see: CHR Res 2001/37 (n 29) para 1; and CHR Res 2004/44 (n 29) para 1.

⁴¹ For resolutions of the Security Council, see: SC Res 1189, UN SCOR, 3915th Mtg, UN Doc S/Res/1189 (1998), preambular para 2; SC Res 1373 (n 29) para 5; and SC Res 1377 (n 31) Annex (Declaration), para 5. See also GA Res 51/210, UN GAOR, 51st Sess, 88th Plen Mtg, UN Doc 51/210 (1996), para 2. See also Report of the High-level Panel on Threats (n 1) para 145.

⁴² See the first operative paras of the following resolutions of the General Assembly: GA Res 38/130, UN GAOR, 38th Sess, 101st Plen Mtg, UN Doc A/Res/38/130 (1983); GA Res 40/61, UN GAOR, 40th Sess, 108th Plen Mtg, UN Doc A/Res/40/61 (1985); GA Res 42/159, UN GAOR, 42nd Sess, 94th Plen Mtg, UN Doc A/Res/42/159 (1987); GA Res 44/29, UN GAOR, 44th Sess, 72nd Plen Mtg, UN Doc A/Res/44/29 (1989); and GA Res 51/210 (ibid). See also Report of the High-level Panel on Threats (n 1) para 145.

- has a pernicious impact upon relations of co-operation among States, including co-operation for development;⁴³
- threatens the territorial integrity and security of States;⁴⁴
- is a threat to international peace and security;⁴⁵ and
- must be suppressed for the maintenance of international peace and security.⁴⁶

Terrorism and Armed Conflict

The relationship between terrorism and armed conflict, and the applicable norms of international law, is one of the most challenging issues facing international law compliance today. It is first relevant to recognise that, as well as conduct by non-State actors, States can themselves perpetrate or be responsible for acts of terrorism, either within their own territory or against other States. In considering terrorism and armed conflict, it is then necessary to distinguish between two categories of international legal rules: those rules governing the use of force between States (*jus ad bellum*); and

⁴³ See GA Res 38/130 (*ibid*) para 1. See also the third operative paras of the following resolutions of the General Assembly: GA Res 40/61 (*ibid*); GA Res 42/159 (*ibid*); and GA Res 44/29 (*ibid*).

⁴⁴ For resolutions of the Security Council, see: SC Res 1189 (n 41) preambular para 2; and SC Res 1377 (n 31) Annex (Declaration), para 3. See also the first-stated *Declaration on Measures to Eliminate International Terrorism* (n 36) preambular para 3 and operative para 1. For resolutions of the General Assembly, see also: GA Res 48/122 (n 30) para 1; and GA Res 49/185 (n 30) para 1. For resolutions of the Commission on Human Rights, see: CHR Res 2001/37 (n 29) para 1; and CHR Res 2004/44 (n 29) para 1.

⁴⁵ See: SC Res 1189 (n 41); preambular para 2; SC Res 1368, UN SCOR, 4370th Mtg, UN Doc S/Res/1368 (2001) preambular para 1; SC Res 1373 (n 29) preambular para 3; SC Res 1377 (n 31) preambular para 2; SC Res 1390, UN SCOR, 4452nd Mtg, UN Doc S/Res/1390 (2001), preambular para 9; SC Res 1438, UN SCOR, 4624th Mtg, UN Doc S/Res/1438 (2002), preambular para 2; SC Res 1440, UN SCOR, 4632nd Mtg, UN Doc S/Res/1440 (2002), preambular para 2; SC Res 1450, UN SCOR, 4667th Mtg, UN Doc S/Res/1450 (2002), preambular para 4; SC Res 1455, UN SCOR, 4686th Mtg, UN Doc S/Res/1455 (2003), preambular para 7; SC Res 1456, UN SCOR, 4688th Mtg, UN Doc S/Res/1456 (2003), preambular para 1; SC Res 1526, UN SCOR, 4908th Mtg, UN Doc S/Res/1526 (2004), preambular para 3; SC Res 1530, UN SCOR, 4923rd Mtg, UN Doc S/Res/1530 (2004), preambular para 2; SC Res 1535, UN SCOR, 4936th Mtg, S/Res/1535 (2004), preambular para 2; and SC Res 1566, UN SCOR, 5053rd Mtg, UN Doc S/Res/1566 (2004), preambular para 7.

⁴⁶ For resolutions of the Security Council, see: SC Res 1189 (n 41) preambular para 3; and SC Res 1269 (n 31) preambular para 8.

those governing the actual conduct of hostilities (*jus in bello*, also known as international humanitarian law).

The Use of Force between States (Jus ad Bellum)

The Charter of the United Nations contains a general prohibition against the use of force, or threat of the use of force, between States.⁴⁷ This prohibition is recognised by many as representing a peremptory norm of international law, meaning that force between States is only permitted within the limited exceptions contained within the Charter.⁴⁸ The first such exception is where the Security Council authorises the use of military action under Chapter VII of the Charter. The other is the codified and expanded right of inherent and collective self defence, as set out in Article 51 of the Charter. The military intervention in Afghanistan in 2002, following the September 11 terrorist attacks in the United States, for example, was undertaken in reliance upon Article 51.⁴⁹ Contrasting positions are held on the question of whether the pre-Charter right to anticipatory self-defence continues to exist.⁵⁰ Following the events of 9/11, anticipatory self-defence was used as the primary basis, for example, upon which the United States of America adopted its policy of pre-emptive strikes against States harbouring or supporting terrorists.⁵¹

The significance of these rules in the context of terrorism is two-fold. First, States are prohibited from committing acts which constitute a threat to the peace, breach of the peace, or act of aggression.⁵² As noted in the preceding section, terrorism has been identified by the Security Council as a threat to international peace and security, and the commission of acts of international terrorism by States is therefore prohibited. Included within this prohibition is the support by a State of such conduct by a non-State

⁴⁷ *Charter of the United Nations*, Article 2(4).

⁴⁸ See, for example, the judgment of Sir Ivor Jennings in *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States)*, Merits Phase [1986] ICJ Reports 4, 518-524; and Louis Henkin, Richard Pugh, Oscar Schachter and Hans Smit, *International Law Cases and Materials* (St Paul, 1980) 910.

⁴⁹ For an analysis of this intervention and the issues arising from it, see Alex Conte, *Security in the 21st Century: The United Nations, Afghanistan and Iraq* (London: Ashgate Publishing Limited, 2005), chapter 6.

⁵⁰ See, for example: Anthony Arend, 'International Law and the Preemptive Use of Military Force' (2003) 26(2) *The Washington Quarterly* 89; and Ian Brownlie, *International Law and the Use of Force by States* (Oxford, Clarendon Press, 1963) 275.

⁵¹ See the *National Security Strategy* of the United States of America (2002), online: <<http://www.whitehouse.gov/nsc/nss.html>> (last accessed on 9 February 2004). For consideration of the policy and its legality, see Conte (n 49) chapter 5.

⁵² *Charter of the United Nations*, Articles 2(4) and 39.

actor, where that level of support would incur international responsibility.⁵³ The second consequence of the accepted rules on the use of force is that any military action by a State in response to an act of terrorism must either be consequent to an express authorisation by the Security Council, or in response to a terrorist act which is attributable to a State and constitutes an armed attack within the terms of Article 51.

International Humanitarian Law (Jus in Bello)

International humanitarian law contains a set of rules dealing with the protection of persons in armed conflict, as well as the conduct of hostilities. These rules are reflected in a number of treaties, including the four Geneva Conventions and their two Additional Protocols, as well as a number of other international instruments aimed at reducing human suffering in armed conflict.⁵⁴ Many provisions of these treaties are now recognised as forming part of customary international law.⁵⁵

There is no explicit definition of ‘terrorism’ in international humanitarian law. However, international humanitarian law prohibits many acts committed in armed conflict which would be considered terrorist acts if they were committed in times of peace.⁵⁶ For example, deliberate acts of violence against civilians and civilian objects constitute war crimes under international law for which, according to the principle of universal

⁵³ See the *Articles on the Responsibility of States for Internationally Wrongful Acts*, adopted under GA Res 56/83, UN GAOR, 56th sess, 85th plen mtg, UN Doc A/Res/56/83 (2001).

⁵⁴ *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (First Geneva Convention), opened for signature 12 August 1949, 75 UNTS 32 (entered into force 21 October 1950); *Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea* (Second Geneva Convention), opened for signature 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950); *Geneva Convention Relative to the Treatment of Prisoners of War* (Third Geneva Convention), opened for signature 12 August 1949, 75 UNTS 136 (entered into force 21 October 1950); *Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (Fourth Geneva Convention), opened for signature 12 August 1949, 75 UNTS 288 (entered into force 21 October 1950); and *Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts* (First Protocol), opened for signature 8 June 1977, 1125 UNTS 4 (entered into force 7 December 1978); and *Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts*, opened for signature 8 June 1977, 1125 UNTS 610 (entered into force 7 December 1978).

⁵⁵ See Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, 3 Vols, (University Press, Cambridge, 2004).

⁵⁶ See International Committee of the Red Cross, ‘International humanitarian law and terrorism: questions and answers’, online: <www.icrc.org> (last accessed 15 April 2007).

jurisdiction, individuals may be prosecuted by all States. This rule derives from a fundamental principle of international humanitarian law related to the protection of civilians in armed conflict, the principle of distinction. According to this principle, all parties to a conflict must at all times distinguish between civilians and combatants. In essence, this means that attacks may be directed only at military objectives – 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. Civilians may only be targeted for such time as they participate directly in the hostilities.

Indiscriminate attacks are strictly prohibited under international humanitarian law. This includes attacks which are not directed at a specific military objective, employ a method or means of combat which cannot be directed at a specific military objective, or employ a method or means of combat the effects of which cannot be limited as required by international humanitarian law, and consequently are of a nature to strike military objectives and civilians or civilian objects without distinction.

International humanitarian law also specifically prohibits “measures of terrorism” or “acts of terrorism”. These prohibitions aim to highlight the individual criminal accountability and protect against collective punishment and “all measures of intimidation or of terrorism”.⁵⁷ More specifically, “acts or threats of violence the primary purpose of which is to spread terror among the civilian population” are strictly prohibited under international humanitarian law.⁵⁸ According to the International Committee of the Red Cross, while even a lawful attack on a military objective may spread fear among civilians, these provisions seek to prohibit attacks that specifically aim to terrorise civilians, for example campaigns of shelling or sniping of civilians in urban areas.⁵⁹

It is important to note that in addition to international humanitarian law, international human rights law continues to apply during armed conflict, subject only to certain permissible limitations in accordance with the strict requirements contained in international human rights treaties.⁶⁰ In essence,

⁵⁷ *Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (n 54) Article 33.

⁵⁸ *Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts* (n 54) Article 13(2). See further, *infra*, chapter 2.

⁵⁹ See International Committee of the Red Cross, ‘International humanitarian law and terrorism: questions and answers’, online: <www.icrc.org> (last accessed 15 April 2007).

⁶⁰ See, *infra*, chapter 3.

the difference between the two bodies of law is that whilst human rights law protects the individual at all times, international humanitarian law is the *lex specialis* which applies only in situations of armed conflict. In this regard, the Human Rights Committee has stated that the ICCPR:⁶¹

...applies also in situations of armed conflict to which the rules of international humanitarian law are applicable. While in respect of certain Covenant rights, more specific rules of international humanitarian law may be especially relevant for the purpose of the interpretation of the Covenant rights, both spheres of law are complementary, not mutually exclusive.

The International Court of Justice has also affirmed the applicability of ICCPR during armed conflicts, stating that:⁶²

The right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what constitutes an arbitrary deprivation of life, however, then must be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict.

In its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, the Court further considered the applicability of human rights law in times of armed conflict, stating that "the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in article 4 of the [ICCPR]".⁶³ Most recently, the Court applied both human rights law and international humanitarian law to the armed conflict between the Congo and Uganda.⁶⁴

Terrorism and International Criminal Law

International instruments and law concerning crimes at the international level can be thought of on two levels. At a more general level, international criminal law establishes obligations upon States to prosecute and punish certain conduct. International criminal law also requires States to take legislative action to establish offences or mechanisms for international

⁶¹ General Comment 31 (n 13).

⁶² *Military and Paramilitary Activities Case* (n 16) para 25.

⁶³ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories, Advisory Opinion* (2004) ICJ Rep, para 106.

⁶⁴ *Case Concerning Armed Activities on the Territory of the Congo, (Democratic Republic of the Congo v Uganda), Merits* (2005) ICJ Rep, paras 216-220, and 345(3).

cooperation. As considered in chapter 3, the international community has developed 13 conventions relating to the prevention and suppression of terrorism. These instruments illustrate both features of international criminal law. They require States to criminalise specific conduct, ranging from the unlawful seizure of aircraft and the taking of hostages, to the financial support of terrorist and associated entities. The conventions also facilitate international cooperation by requiring States parties to establish certain jurisdictional criteria, including the principle *aut dedere aut judicare* (the ‘extradite or prosecute’ principle), and provide a legal basis for cooperation in the areas of extradition and mutual legal assistance.

Depending upon the context in which a terrorist act occurs, acts of terrorism may also constitute offences under other instruments or norms of international criminal law. During the elaboration of the Rome Statute of the International Criminal Court, several delegations argued for the inclusion of a separate crime of terrorism in the jurisdiction of the International Criminal Court.⁶⁵ The majority of States disagreed, however, precisely because of the issue of the definition. The Final Act of the Diplomatic Conference of Plenipotentiaries on the Establishment of the ICC, adopted in Rome on 17 July 1998, recommended that a Review Conference, which may take place seven years following the entry into force of the Statute, in 2009, should consider the inclusion of several crimes within the jurisdiction of the Court, including terrorism, with a view to arriving at an acceptable definition.⁶⁶

Although the Rome Statute does not include the crime of terrorism as a separate crime, it does contain various offences which may include terrorist conduct, depending on the particular facts and circumstances of each case. A terrorist act might constitute a crime against humanity, an offence defined under Article 7 of the Statute to include certain acts committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.⁶⁷ War crimes, as defined under Article 8 of the Rome Statute, may also be applicable including, for example, the deliberate or indiscriminate killing of (or causing great suffering or serious bodily injury to) a person protected under the Geneva Conventions.

⁶⁵ *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002).

⁶⁶ Reflected within the Rome Statute (*ibid*) Article 123(1).

⁶⁷ Christopher Greenwood, ‘International Law and the “War against Terrorism”’ (2002) 78(2) *International Affairs* 301, 305 (n 15). In 2001, the then UN High Commissioner for Human Rights described the terrorist attacks which occurred in the United States on 11 September 2001 as a crime against humanity.

The international criminal law provisions against terrorism have also been addressed in practice by international tribunals. In 2003, the International Criminal Tribunal for the Former Yugoslavia convicted, for the first time, an individual for his responsibility for the war crime of terror against the civilian population in Sarajevo, under Article 3 of its Statute.⁶⁸ The Court concluded that the crime of terror against the civilian population is constituted of elements common to other war crimes. Drawing from the International Convention for the Suppression of the Financing of Terrorism,⁶⁹ the Court added the following three requirements:⁷⁰

1. Acts of violence directed against the civilian population or individual civilians not taking direct part in hostilities causing death or serious injury to body or health within the civilian population.
2. The offender wilfully made the civilian population or individual civilians not taking direct part in hostilities the object of those acts of violence.
3. The above offence was committed with the primary purpose of spreading terror among the civilian population.

Terrorism and International Refugee Law

International refugee law is the body of law which provides a legal framework for the protection of refugees by defining the term 'refugee', setting out States' obligations to them, and establishing standards for their treatment. Aspects of international refugee law also relate to persons seeking asylum. The 1951 Convention relating to the Status of Refugees and its 1967 Protocol are the two universal instruments in the field of international refugee law.⁷¹ The Convention and its Protocol incorporate a system of checks and balances that are able of taking account of the security interests of States and host communities while protecting the rights of persons who, unlike other categories of foreigners, no longer enjoy the protection of their country of origin.

⁶⁸ See the *Statute of the International Criminal Tribunal for the Former Yugoslavia*, as initially adopted by the Security Council under SC Res 827, UN SCOR, 3217th Mtg, UN Doc S/Res/827 (1993).

⁶⁹ *International Convention for the Suppression of the Financing of Terrorism*, opened for signature 10 January 2000, 2179 UNTS 232 (entered into force 10 April 1992).

⁷⁰ *Prosecutor v Galic*, Case No IT-98-29-T (Judgment of the Trial Chamber, 5 December 2003), para 133.

⁷¹ *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 21 April 1954); and *Protocol relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967).

It has already been mentioned that the Security Council has obliged States, under its resolution 1373 (2001) to take a number of measures to prevent terrorist activities and to criminalise various forms of terrorist conduct.⁷² The resolution touches upon a number of issues related to immigration and refugee status. States are required, for example, to prevent the movement of terrorists by implementing effective border controls and take measures to secure the integrity of identity papers and travel documents (para 2(g)). States are also called upon to take measures to ensure that refugee status is not granted to asylum-seekers that have planned, facilitated or participated in the commission of terrorist acts (para 3(f)), and to ensure that refugee status is not abused by perpetrators, organisers or facilitators of terrorist acts (para 3(g)).

It should be noted that resolution 1373 (2001) did not introduce new obligations into international refugee law. The 1951 Convention, when properly implemented, ensures that international refugee protection is not extended to those who have induced, facilitated or perpetrated terrorist acts. The UN High Commissioner for Refugees (UNHCR) has endorsed the position that those responsible for committing terrorist acts must not be permitted to manipulate refugee mechanisms in order to find safe haven or achieve impunity.⁷³ The framework of international refugee law contains a number of provisions aimed at guarding against abuse and is thus able to respond to possible exploitation of refugee mechanisms by those responsible for terrorist acts.

First, refugee status may only be granted to those who fulfill the criteria of the refugee definition contained in Article 1A of the Convention; that is, those who have a “well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion”. In many cases, persons responsible for terrorist acts may not fear persecution for a Convention reason, but rather may be fleeing legitimate prosecution for criminal acts they have committed.

Secondly, according to Article 1F of the Convention, persons who would otherwise meet the refugee criteria of Article 1A are to be excluded from international refugee protection if there are serious reasons for considering that they have committed a war crime, a crime against humanity, a serious non-political crime outside the country of refuge prior to admission to that country as a refugee, or have been guilty of acts

⁷² See, *infra*, chapter 3.

⁷³ See, for example, the following reports of the UN High Commissioner for Refugees: UNHCR, *Ten Refugee Protection Concerns in the Aftermath of September 11* (October 2001); and UNHCR, *Addressing Security Concerns with Undermining Refugee Protection – UNHCR’s perspective* (November 2001).

contrary to the purposes and principles of the United Nations. Particularly relevant is Article 1F(b), which relates to the commission of a serious non-political crime by an asylum-seeker prior to the person's admission to the country of refuge. Acts which bear the characteristics of terrorism will almost invariably amount to serious non-political crimes.⁷⁴ The UNHCR has issued guidelines on the application of exclusion clauses under the Convention noting, in particular, their exceptional nature and the need for their scrupulous application.⁷⁵

While indications of an asylum-seeker's involvement in acts of terrorism would make it necessary to examine the applicability of Article 1F, international refugee law requires an assessment of the context and circumstances of the individual case in a fair and efficient procedure before any decision is taken. Any summary rejection of asylum-seekers, including at borders or points of entry, may amount to *refoulement*, which is prohibited by international refugee and human rights law. All persons have the right to seek asylum.⁷⁶

Thirdly, persons who have been recognised as refugees, as well as asylum-seekers who are awaiting a determination of their claims, are bound to conform to the laws and regulations of their host country, as reflected within Article 2 of the Convention. If they do not do so, they may be prosecuted to the full extent of the law.

In addition, it is also relevant that exceptions to the principle of *non-refoulement* exist under Article 33(2). Denial of protection from refoulement and return to the country of origin is foreseen in cases where there are reasonable grounds for regarding a refugee as a danger to the security of the country in which the person is, or, if having been convicted of a particularly serious crime, constitutes a danger to the community of the host State. Finally, the Convention provides for the possibility of expulsion to a third country on national security grounds under Article 32. Implementation of either of these articles may only be carried out following a decision taken by a competent authority in accordance with due process of law, including the right to be heard and the right of appeal. The application of either Article 32 or 33(2) is also subject to the various other human rights obligations of the State.

⁷⁴ Provided that such acts do in fact bear such characteristics – see, *infra*, chapters 2 and 16.

⁷⁵ See: UNHCR, *Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, UN Doc HCR/GIP/03/05 (2003); and UNHCR, *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees* (2003).

⁷⁶ See the *Universal Declaration of Human Rights* (n 5) Article 14.

In cases where a person has already been granted refugee status, such status may be cancelled where there are grounds for considering that a person should not have been granted refugee status. This is the case where there are indications that, at the time of the initial decision, the applicant did not meet the inclusion criteria of the Convention, or that an exclusion clause of that Convention should have been applied to him or her. This might include evidence that the person committed terrorist acts.⁷⁷ Cancellation of refugee status is in keeping with the object and purpose of the Convention if it is established, by proper procedures, that person did not fall within the refugee definition at time of recognition.

⁷⁷ See UNHCR, *Note on the Cancellation of Refugee Status*, 22 November 2004.

