

TERRORISM
AND INTERNATIONAL LAW:
CHALLENGES AND RESPONSES

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Contributions presented at the
**“Meeting of independent experts on Terrorism and International Law:
Challenges and Responses. Complementary Nature of Human Rights
Law, International Humanitarian Law and Refugee Law”**

organized by
the International Institute of Humanitarian Law

Sanremo, 30 May - 1 June 2002

and the
“Seminar on International Humanitarian Law and Terrorism”

organized by
the International Institute of Humanitarian Law
in co-operation with the George C. Marshall Center

Sanremo, 24 - 26 September 2002.

Many thanks to Mrs. Shirley Morren
who contributed to the realization
of this book by revising the final draft

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INTRODUCTORY REMARKS

Jovan PATRNOGIC (*)

Addressing the terrorism phenomenon is a very complex and challenging task. While condemnation of terrorist activities by the international community has been unanimous and unequivocal, efforts to regulate this phenomenon have been marred by differences of approach and competing concerns. A number of key issues remain unresolved and the solution has been further complicated by the emergence of new forms of terrorism. The challenge facing the international community is translating the statements and well-elaborated declarations of condemnation of terrorism into concrete measures (legal, political, military) that can effectively address the very negative effects and consequences of terrorist activities. There is a clear need for further discussion not only at UN and/or governmental levels but also within NGOs.

The negative impact of terrorism should be analysed in an objective and impartial way. The existing legal framework should be reaffirmed and interpreted by competent legal authorities, first of all, within the UN system.

Terrorism is one of the threats against which the international community, above all States, must protect their citizens. They have not only the right but also the duty to do so. But States must also take the greatest care to insure that counter-terrorism does not become an all-embracing concept, anymore than sovereignty, used to block or justify violations of human rights and recognised humanitarian standards. We are faced with desperate situations in some regions of the world that have become an insult to the conscience of mankind. But we are also confronted with the aftermath of what happened in the U.S. on September 11th last year and has happened in many countries since then - as a direct or indirect consequence.

We must be aware that on September 11th, thousands of human beings, innocent civilians, were brutally deprived of the most fundamental of all human rights - the right to life - by a very premeditated act of terror which we should consider as a crime against humanity. It is very difficult to grasp the reasons of the people who are prepared for this kind of crime, but we cannot achieve security by sacrificing human rights. If we did, we would be handing the terrorists a victory beyond all their expectations. On the contrary, a greater respect for human rights, democracy and social justice, which is well-established and elaborated in most important international instruments, such as the UN Charter, international covenants on human rights, and the Geneva Conventions for the protection of war victims, will in the long-term prove the only effective cure against terror.

Certainly, we must continue our struggle to give everyone in the contemporary world a reason to value their own rights and to respect those of

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others. At the same time, we must constantly confirm and reaffirm the primacy of the rule of law and the principle that certain acts are so evil that no cause whatsoever can justify their use.

But this fight for democracy and social justice must be led in accordance with the law. There should be an objective and impartial interpreter of the most fundamental humanitarian standards to be respected and implemented in everyday life. Our security measures must be firmly founded in law. In defending the rule of law, we must ourselves respect and be bound by law.

But we must also be careful not to place whole communities under suspicion and subject them to harassment because of acts committed by a few of their members. Nor must we allow the struggle against terrorism to become a pretext for the suppression of legitimate opposition or dissent. The right to national sovereignty cannot justify violations of human rights or fundamental freedoms of people.

Promotion, dissemination, and teaching of human rights law and humanitarian law have become the main tools in our battle for the respect of fundamental humanitarian standards. Our Institute has a very rich experience in this regard, particularly through the organisation of different humanitarian law and human rights law courses for military people, as well as refugee law courses for governmental officials.

Unfortunately, the competent international organisations do not pay special attention to the adoption of a clear policy for the dissemination and teaching of human rights law, international humanitarian law, and refugee law. We need a kind of mobilisation, first of all, of public opinion, to acquire more knowledge and to be conscious of the importance of the respect of humanitarian standards. It would be very useful to have a form of steering committee composed of competent, international organisations for a co-coordinated policy in the promotion and dissemination of humanitarian standards. In my view, this is also a key factor for the elimination of one of the root causes of the phenomenon of terrorism.

In this regard, I would like to quote Mrs. Mary Robinson, United Nations High Commissioner for Human Rights in her Report at the 58th session of the United Nations Commission on Human Rights: “At the same time, building a durable global human rights culture, by asserting the value and worth of every human being, is essential if terrorism is to be eliminated. In other words, the promotion and protection of human rights should be at the centre of the strategy to counter terrorism.” (p.15, para. 55 of the Report).

I suggest we concentrate our debate on the legal framework of the phenomenon of terrorism and on how we can combat this scourge by legal and humanitarian means and methods. As we mentioned before, we already have a legal framework in most important international instruments, that is, human rights covenants and the Geneva Conventions, but we can add that we have more than 13 international conventions and 7 interregional conventions that elaborate different aspects of terrorism including the proposals on its definition. Our discussions should concentrate on how to establish international standards and common denominators

in order to identify terrorism in all its dimensions. But we must always bear in mind that our main goal should be to reinforce responsibility (individual and/or collective) and to avoid impunity.

Since September 11, American policy on the law of war and/or humanitarian law and human rights has evolved in a generally sensible direction. But this policy has not shown a clear understanding of how international law should be applied, above all, to military, counter-terrorist operations.

What is certain today is that we cannot abandon the existing legal framework. For the moment, we do not have alternative detailed rules. The existing laws of war, in spite of some lacunas, are irreplaceable. As I said before, we need more clarity concerning the interpretation and observances of the existing law, and the principles to be followed.

What kind of legal instruments can we recommend for counter-terrorist operations?

Do military operations involving action against terrorists constitute a new or a wholly distinct category of war, conduct of armed operations?

In our battle against terrorism, we need an elaborated and stable structure, a “command structure” in military terms, at international and regional levels. Unity at political, legal, humanitarian and, if necessary, military levels is an issue which should be urgently resolved if our fight against terrorism is to be effective. Certainly, this kind of unity can be obtained by competent recognised bodies that are already engaged in counter-terrorist campaigns and operations. To my mind, this unity is an essential factor for the successful conduct in counter-terrorist policy and operations.

In accordance with the tradition of our Institute, let us begin an open and friendly dialogue at this meeting. Let us speak, not only as experts, but also as human beings and place ourselves in the position of those people, victims of all kinds of terrorism, who are exposed to conflict and violent situations.

MESSAGE

Jakob KELLENBERGER (*)

Mr. President, Ladies, and Gentlemen,

Terrorism negates the most basic principles of humanity that underlie international humanitarian law, human rights law, and refugee law.

The international community must strive to eradicate terrorism. Acts of terrorism which, by their very nature, strike innocent victims are not a new phenomenon and they have always posed a challenge to bodies of law whose objective is the protection of the safety and dignity of individuals.

A newer phenomenon - or at least a phenomenon which is particularly marked in the aftermath of the devastating attacks of 11 September - is the fact that doubts have been raised about the adequacy of existing law to respond to the threat of terrorism today - or, indeed, about its applicability to the fight against terrorism.

International law - the rules of the Charter of the United Nations, international humanitarian law, refugee law and human rights law - if correctly applied is one of the strongest tools which the international community has at its disposal in the efforts to re-establish international order and stability.

Several bodies of law, including national and international rules of criminal law, are relevant in the struggle against terrorism. International humanitarian law is the body of rules that applies whenever this struggle is waged by means of armed conflict. There is no question that its rules are adequate to deal with security risks in war because its provisions were developed to deal specifically with the exceptional situation of armed conflict. Its provisions are a careful balance between considerations of State security and the preservation of human life and dignity, even in times of conflict.

The protection afforded to individuals by international humanitarian law must not be seen as an obstacle to justice. The Geneva Conventions and their Additional Protocols do not prevent justice. They require that due process of law be applied when dealing with persons accused of violating their norms. Indeed, the application of international humanitarian law brings with it categorical obligations to repress violations. The Conventions and Protocols oblige States to bring perpetrators of war crimes to justice, including by means of the exercise of universal jurisdiction of national courts.

I wish the group of experts the best of luck in its deliberations in the coming days. A frank discussion of the threats posed by terrorism to these complementary bodies of law aimed at protecting human dignity is timely and important.

(*) President of the International Committee of the Red Cross, to the “*Meeting of Independent Experts on Terrorism and International Law: Challenges and Responses. Complementary Nature of Human Rights Law, International Humanitarian Law and Refugee Law,*” organized by the International Institute of Humanitarian Law in Sanremo, 30 May – 1 June 2002.

MESSAGE

Mary ROBINSON (*)

If strengthening the linkage connecting human rights law, humanitarian law and refugee law was important before 11 September, how much more significant did it become with the horrific attacks on the U.S. and their aftermath? I thank the San Remo Institute of Humanitarian law for its timely initiative in holding this meeting of experts. It is of great relevance to my office. Human rights law, humanitarian law and refugee law are not only connected conceptually by their ultimate aim of protecting the individual, but also operationally through the solid relations that their three Geneva-based guardians: the International Committee of the Red Cross, the UN High Commissioner for Refugees and my Office, enjoy.

In the aftermath of the criminal terrorist attacks of 11 September, I characterized what had occurred as a crime against humanity. The attacks have darkened the human rights horizon. What has worried me most is that the standards of protection embodied in our three branches of international law are at some risk of being undermined. Independent human rights reports have documented excessive measures in some countries that target particular groups such as human rights defenders, migrants, asylum-seekers and refugees, religious and ethnic minorities, political activists and the media.

We certainly need to respond to the scourges of terrorism. There is no doubt that there should be no avenue for those who plan, support or commit terrorist acts to find safe haven, avoid prosecution, secure access to funds, or carry out further attacks. Security Council Resolution 1373 creates an important framework for the prevention and punishment of terrorism. My Office has co-operated with the counter-terrorism committee established by the Security Council to assist States in complying with Resolution 1373. We have urged that States' implementation of Resolution 1373 also have full and good faith account of their international human rights obligations.

The world community needs, however, to go beyond security measures to provide an effective answer to terrorism. We need to give every person on this globe a reason to cherish his or her own rights, and to respect those of others. We need also to ensure that innocent people do not become the victims of counter-terrorism measures. We need commitment to a unifying framework that is grounded in the harmony of common values, common standards, and common obligations to uphold universal rights. It is that framework which defines us as one global community and which enables us to reach beyond our differences.

International law, particularly human rights law, humanitarian law, and

(*) High Commissioner for Human Rights, to the *“Meeting of Independent Experts on Terrorism and International Law: Challenges and Responses. Complementary Nature of Human Rights Law, International Humanitarian Law and Refugee Law,”* organized by the International Institute of Humanitarian Law in Sanremo, 30 May – 1 June 2002.

refugee law provides that framework. These three branches of law are particularly tailored to address the rights of individuals during difficult times such as a public emergency, challenges to national security, and periods of violent conflict. They define the boundaries of permissible measures, even military conduct, and strike fair balances between legitimate security and military concerns and fundamental freedoms. We need to understand, uphold, and give effect to these branches of law. This is the best long-term guarantor of security.

I look forward to learning about the results of your meeting and in particular how in practical terms we can enhance the respect of human rights, humanitarian law and refugee law as a meaningful response to the serious challenges posed by terrorism.

I wish you all success in your deliberations.

MESSAGE

Rudd LUBBERS^(*)

Friends, Colleagues, Ladies and Gentlemen,

The events of September 11 last year brought to the international limelight the dangers of extremist terrorist groups, as well as the need for States to unite in the effort to combat them. As High Commissioner for Refugees, I support all efforts, at both the national and international levels, aimed at eradicating terrorism and at punishing those responsible for terrorist acts. My Office stands ready to participate actively in these efforts, wherever they fall within the scope of its mandate.

At the same time, the fight against terrorism must also be firm on the need to ensure full respect for the fundamental rights and freedoms of law-abiding citizens. Those who are themselves the victims of violence - such as refugees - must find the protection they need, and should not be victimized twice.

As is made clear in the UNHCR report that will be shared with you, there have been some positive and encouraging examples of measures adopted to combat terrorism that fully respect the rights of *bona-fide* asylum seekers and refugees. There have, however, also been examples of measures that - even though they may have been adopted in good faith - have negatively affected people in need of international protection. In some cases, carefully built refugee protection standards may have been eroded by the application of unduly restrictive legislative or administrative measures.

As I have repeatedly stressed, no unwarranted linkages should be made between refugees and terrorism. Indeed, any discussion on security safeguards should start from the assumption that refugees are themselves escaping persecution and violence - including terrorist acts - and are not the perpetrators of such acts.

I would also like to emphasize once again that international refugee instruments do not provide a safe haven to terrorists, and do not protect them from criminal prosecution. On the contrary, they foresee their exclusion from refugee status and do not shield them against either criminal prosecution or expulsion, including to their country of origin.

There has been a disturbing trend in recent years of increasing criminalization of asylum-seekers and refugees. While there may be some persons in both categories who may be associated with serious crime, this does not mean that the majority should be damned by association with the few. Asylum-seekers are facing growing difficulties in a number of States, either accessing procedures

^(*) United Nations High Commissioner for Refugees, to the "Meeting of Independent Experts on Terrorism and International Law: Challenges and Responses. Complementary nature of Human Rights Law, International Humanitarian Law and Refugee Law," organized by the International Institute of Humanitarian Law in Sanremo, 30 May - 1 June 2002.

or overcoming presumptions about the validity of their claims, which stem from their ethnicity or mode of arrival. The fact that asylum-seekers may have arrived illegally does not invalidate the basis of their claim. Likewise, the fact that they have a certain ethnic or religious background, which may be shared by those who have committed grave crimes, does not mean they should also be excluded.

If we fail to uphold human rights in our responses to terrorist acts, then the terrorists will have won. That is precisely what they aim at: destabilizing countries and destroying democratic values and principles. I am confident that your discussions and recommendations will be of great help in ensuring the protection of human rights in the context of the global fight against terrorism, and I wish you a fruitful and productive meeting.

THE EVENTS OF SEPTEMBER 11: POSSIBLE REPERCUSSIONS ON REFUGEE PROTECTION

Office of the United Nations High Commissioner for Refugees (*)

Further to the disastrous and heinous incidents of 11 September 2001 in the United States, UNHCR is aware that a number of States are currently examining additional security safeguards to prevent terrorists from gaining admission to their territory through the asylum channel. Clearly, we endorse all efforts, multilateral or national, directed at rooting out and effectively combating international terrorism. Hence, and although there is reportedly no evidence that the suspects of the attacks in the U.S. were asylum-seekers or refugees, UNHCR believes that this is a reasonable examination to undertake and the Office is looking at what might be termed the "better practices" of States in this regard. Our purpose in so doing is to avoid wrong answers being given to this inherently reasonable question. Put another way, the concern is to see any additional security-based procedural safeguards striking a proper balance with the refugee protection principles at stake.

General

UNHCR's main concern is twofold: that *bona fide* asylum-seekers may be victimized as a result of public prejudice and unduly restrictive legislative or administrative measures, and that carefully built refugee protection standards may be eroded. Any discussion on security safeguards should start from the assumption that refugees are themselves escaping persecution and violence, including terrorist acts, and are not the perpetrators of such acts. The second starting point is that the international refugee instruments do not provide a safe haven to terrorists and do not protect them from criminal prosecution. On the contrary, they render the identification of persons engaged in terrorist activities possible and necessary, foresee their exclusion from refugee status and do not shield them against either criminal prosecution or expulsion, including to their country of origin. It is unfortunate that there seems to be an increasing trend towards the criminalisation of asylum-seekers and refugees. While there are some persons in both categories who may be associated with serious crime, this does not mean that the majority should be damned by association with the few.

Asylum-seekers increasingly have a difficult time in a number of States, either accessing procedures or overcoming presumptions about the validity of their claims, which stem from their ethnicity, or their mode of arrival. Because asylum-seekers may have arrived illegally does not vitiate the basis of their claim. Because they have a certain ethnic or religious background, which may be shared

(*) This paper, which represents the official position of the UNHCR, was presented by Dr. Guillermo Bettocchi to the "Meeting of Independent Experts on Terrorism and International Law: Challenges and Responses. Complementary Nature of Human Rights Law, International Humanitarian Law and Refugee Law," organized by the International Institute of Humanitarian Law in Sanremo, 30 May – 1 June 2002.

by those who have committed grave crimes, does not mean they, themselves, are also to be excluded.

Of particular concern for UNHCR are measures that may directly affect asylum seekers in the following areas:

Admission/Access to Refugee Status Determination

Concern: Legislation may be enacted which leads, in effect, to denial of access to refugee status determination, or even rejection at the border, of certain groups or individuals, based on religious, ethnic or national origin or political affiliation, on the assumption of links to terrorism.

UNHCR'S Position: Rejection at the border or point of entry may amount to refoulement. This would risk sending people back to danger, contrary to international, refugee legal obligations. All persons have the right to seek asylum and to undergo individual refugee status determination. Each claim must be determined on its own merits, and not against negative and discriminatory presumptions deriving from personal attributes of the claimant having nothing to do with the notion of refugee. The refugee definition, properly applied, will lead to the exclusion of those responsible for terrorist acts, and may further assist in the identification and eventual prosecution of these individuals. The Convention does not extend protection to the non-deserving.

Treatment of asylum seekers

Concern: States might be inclined to resort to mandatory detention of asylum-seekers, or to establish procedures not complying with the due process standards.

UNHCR's position: Detention of asylum seekers should be the exception, not the rule. Detention would only be acceptable when circumstances surrounding the individual case so justify, including where there are solid reasons for suspecting links with terrorism. However, it should always comply with due process, including that it be subject to judicial revision according to domestic legislation.

Similarly, refugee status determination procedures in place to deal with suspected terrorists must comply with minimum standards of due process, ensuring that decisions are taken by those knowledgeable and qualified to make refugee determination, with review possibilities built in.

Exclusion

Concern: States may be inclined to automatic or improper application of exclusion clauses or criteria to individual asylum-seekers, based on religious, ethnic or national origin or political affiliation, on the assumption that they may be terrorists.

UNHCR's position: Genuine refugees are the victims of terrorism and persecution, not its perpetrators. Those responsible for serious crimes are excluded from refugee status by virtue of the terms of the international refugee instruments, and UNHCR encourages States to use those clauses rigorously where appropriate.

The application of any exclusion clause must, though, be individually assessed, based on available evidence, and conform to basic standards of fairness and natural justice. The assessment has to be located within the status determination process.

Withdrawal or Refugee Status

Concern: States may be inclined to withdraw the refugee status of individuals in their country, based on religious, ethnic or national origin, or political affiliation, on the assumption that they may be terrorists.

UNHCR's Position: Withdrawal of refugee status can only follow evidence of fraud or misrepresentation as regarding facts central to the refugee decision. The ethnicity or origin of a refugee cannot be bases in themselves either for denying or withdrawing status. The facts are what count.

Deportation

Concern: States may be inclined to deport groups or individuals based on religious, ethnic or national origin or political affiliation on the assumption that they may be terrorists.

UNHCR's Position: The 1951 Convention allows expulsion of a refugee on grounds of national security or public order, but only in pursuance of a decision reached in accordance with due process of law. In this case, measures to allow the refugee to provide evidence to counter the allegations against him/her should be afforded.

Extradition

Concern: States may be inclined expeditiously to grant extradition of groups or individuals based on religious, ethnic or national origin or political affiliation, on the assumption that they be terrorists.

UNHCR's Position: Extradition should be granted only after the corresponding legal proceedings have been completed, and where it has been shown that the extradition is not being requested as a means to return a person to a country for purposes which in fact amount to persecution.

Resettlement

Concern: States may be inclined not to maintain their resettlement programs at the promised levels, particularly for certain ethnic or national groups, on the assumption that they may be terrorists.

UNHCR's Position: Resettlement remains imperative, not least in the context of the Afghan refugee situation, in which the main beneficiaries of the programs, including women at risk, are still caught up. Continued support for resettlement is of vital importance, and thankfully has been forthcoming from some of the major resettlement countries. DIP is maintaining its efforts to diversify the number of resettlement countries and to strengthen its programmes, from

emergency processing through to more systematic and elaborate use of resettlement to address durable solutions needs of refugees.

Security Council Resolution 1373

Concern: The resolution makes certain unwarranted linkages between terrorists and asylum seekers/refugees. The vagueness of the language is an additional problem in that it could lead to the application of the resolution in a manner that deprives bona-fide asylum seekers and refugees of basic rights under cover of a claimed necessity to take anti-terrorist measures. Fulfillment of the requirements of the resolution could lead States to take any or all of the foregoing envisaged measures.

UNHCR's Position: SC Resolution 1373 must be applied, but in full respect of the requirements of international refugee law. Legitimate measures adopted by States to prevent abuse of the asylum system by terrorists must not victimise bona-fide asylum-seekers and refugees.

Comprehensive Convention against Terrorism

Concern: The terms of the Convention may in effect give legal force to unwarranted linkages made between asylum-seekers/refugees and terrorists, as for example the above-mentioned Security Council Resolution makes. In addition, the Convention should not be able to be read as implying that the 1951 Convention is inadequate to exclude terrorists from refugee status, or that it offers safe haven to terrorists.

UNHCR's position: UNHCR would welcome the development and the swift adoption of a comprehensive Convention against Terrorism. UNHCR is ready to participate in the drafting process of such a Convention and to provide comments and inputs on ways and means to respond to the terrorist threat without prejudice to the proper application of the 1951 Convention.

Racism and Xenophobia

Concern: The tendency to link asylum-seekers and refugees is provoking serious protection concerns through inciting racism and xenophobia.

UNHCR's Position: Equating asylum with a safe haven for terrorists is not only legally wrong and unsupported by the facts, but it serves to vilify refugees in the public mind and promotes the singling out of persons of particular races or religions for discrimination and hate-based harassment. Resolute leadership is called for at this particularly difficult time to de-dramatise and de-politicise the essentially humanitarian challenge of protecting refugees and to provide better understanding of refugees and of their right to seek asylum.

TERRORISM AND HUMAN RIGHTS: THE LEGAL FRAMEWORK

Dinah POKEMPNER (*)

This paper examines the basic relationship between international human rights law and the phenomenon of terrorism, with particular attention to the inter-relation between human rights law and military responses to terrorism. The boundaries between international human rights law and international humanitarian law are not contiguous, but rather overlapping, and often poorly understood. Responses to terrorism, whether understood as “war” or law enforcement, involve choices that have implications for the rule of law, its development, and its reciprocal observance.

1. What are human rights, and what is their relation to international humanitarian law?

The law of human rights is a subset of international law that deals with the obligations of States with respect to the observance and guarantee of fundamental rights of individuals. In its classical conception, States, not individuals, are the subjects of this law, although individuals are the beneficiaries, and under its terms individuals should have remedies for violation of these legal obligations.¹ International human rights law is embodied in the standard forms of international law: treaties, other international agreements, customary law including *jus cogens* or peremptory norms, and soft law such as General Assembly resolutions, declarations, etc. It is often implemented through domestic legislation, including constitutional law.

There is a misconception that in time of war, international human rights law no longer applies and is supplanted by international humanitarian law (IHL). This is inaccurate; human rights law co-exists with humanitarian law, but is subject to derogation in times of declared national emergency. When such a national emergency is declared, the existence of an armed conflict, human rights law, with permissible derogations, is then supplemented by the guarantees of IHL. Another way to articulate the relation is that IHL functions as *lex specialis*, elaborating general guarantees of human rights law under the special condition of a state of armed conflict.

To understand this relation, it is useful to examine the scope of permissible restrictions on human rights guarantees, including derogation, in some detail. Most civil and political rights allow in their terms for limitation, quite apart from the issue of derogation. An example is the right to peaceful assembly, recognized in most regional human rights covenants and in Article 21 of the International Covenant on Civil and Political Rights (ICCPR). Article 21 provides (emphasis added):

(*) General Counsel, Human Rights Watch.

“The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*) the protection of public health or morals or the protection of the rights and freedoms of others.”

Quite substantial restrictions on public gatherings may be allowed, so long as they are grounded on a legal authorization and serve one of the five enumerated interests. Any restriction, however, must be one that is also “necessary” in a “democratic” society, qualifications that impose a requirement of strict proportionality on the proposed restrictions in view of the importance of free assembly to pluralism and other democratic rights such as freedom of speech or association.² While it might be reasonable on this basis for the authorities, having attempted less restrictive solutions, to prohibit or break up a demonstration that appears aimed at inciting acts of racial hatred or terrorism, it would not be reasonable to enact a ban on all meetings of a given political group that propounds extremist views.

Derogation is an extraordinary restriction of the right beyond what is normally allowed by its terms. As derogations allow a severe limitation of a treaty right that otherwise would constitute a violation, derogation clauses tend to be restrictive, and as a matter of legal interpretation, strictly construed. Most human rights instruments specify rights that are non-derogable. Among these are the right to life; freedom from torture and cruel, inhuman and degrading punishment; slavery and servitude; debt imprisonment; *ex post facto* criminal liability and punishment; recognition as a person before the law; and freedom of conscience and religion.³

The United Nation’s Human Rights Committee has noted that the enumerated list of non-derogable rights is not exhaustive; there are additionally non-derogable aspects of rights that in other respects may be subject to derogation. Avenues of redress and safeguards of non-derogable rights may not be diminished, even in states of emergency. For example, although Article 14 of the ICCPR, which enumerates fair trial guarantees, is not among the list of non-derogable rights, the Committee has found that:

“Fundamental requirements of fair trial must be respected during a state of emergency. Only a court of law may try and convict a person for a criminal offence. The presumption of innocence must be respected. In order to protect non-derogable rights, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention, must not be diminished by a State party’s decision to derogate from the Covenant.”⁴

It is useful to examine closely the contours of the derogation clause of the ICCPR in light of the commentary put forth by the United Nations’ Human Rights Committee, a panel of experts charged with interpreting the treaty and receiving

and evaluating State Party reports made thereunder. ICCPR, Article 4 (emphasis added) provides:

“In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.”

War is the standard illustration of a national emergency that can justify derogation. The Committee, in General Comment 29, has noted, however, that “the Covenant requires that even during an armed conflict measures derogating from the Covenant are allowed only if and to the extent that the situation constitutes a threat to the life of the nation.”⁵ Can terrorist acts “threaten the life of the nation”? Surely, co-ordinated, high-casualty assaults or those aimed at the political leadership might qualify. Even more isolated acts involving limited casualties, if co-ordinated and planned for cumulative effect, might reach this standard.

Yet, even if the life of the nation is threatened, derogation can only be justified to the extent “strictly required by the exigencies of the situation.” The Committee parses this requirement as relating “to the duration, geographical coverage and material scope of the state of emergency and any measures of derogation resorted to because of the emergency.”⁶ This is essentially the principle of proportionality at work, similar to what we saw in the analysis of restrictions on rights “necessary in a democratic society.” We would need to distinguish between restrictions necessary in light of a specific threat, of limited geographic and temporal scope - more likely legitimate - and those predicated on an indefinite, limitless “war” on terrorism or the hypothetical threat of future attack - unlikely to meet this requirement.

Two other limitations on derogation are important to understand. First is the requirement that derogating measures not discriminate on the grounds of race, colour, sex, language, religion, or social origin. (Discrimination on the grounds of political opinion is not included, although the core supporters for many separatist or political movements would fit into one of the other categories). A campaign of indiscriminate arrests against fundamentalist Muslims, such as Uzbekistan has undertaken, is clearly violative of this standard.

The other limitation is that there may be no derogation where inconsistent with a State Party’s other obligations under international law. The Committee has noted that among such international legal obligations is IHL.⁷ It is not accidental that the list of non-derogable rights to some degree reflects core IHL principles such as civilian immunity, the prohibition of torture and inhuman treatment, and the prohibition on sentencing persons without the previous judgment of a regular court affording all the judicial guarantees “recognized as indispensable by civilized peoples”

(e.g. no *ex post facto* judgments). IHL is one baseline below which derogation of rights may not go, although it is not the only one.

Other international law obligations might also include other human rights treaties, as well as customary law including other peremptory norms. The list of peremptory norms is not identical to the list of non-derogable rights. Such peremptory norms that limit the availability of derogation from human rights include the prohibitions on collective punishments, hostage taking, and arbitrary deprivations of liberty, including abductions.⁸ All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person, a peremptory norm that is pertinent to prison conditions, even in a state of war. The Committee also considers that the non-discrimination principle has a peremptory character as well, notable in the European context as the European Convention does not contain this explicit qualification in its derogation clause. Nor would derogation be lawful in case of State propaganda for war, or advocacy of national, racial, or religious hatred that would constitute incitement to discrimination, hostility, or violence.

2. *Terrorism: a crime, a human rights violation, or revolution by another name?*

What is the relationship between “terrorism” and “human rights”? The general conception, grounded in international law, is that States, as the subjects of that law, are the guarantors and violators of human rights. Terrorism, as understood very generally as unlawful, co-ordinated, politically motivated violence against “innocents” or “civilians” with the effect of terrorizing the population, is increasingly ascribed to non-State actors. Do these two terms bear any relation?

The term “terrorism” was coined originally to describe State action, specifically that of the revolutionary regime in France of 1793-4, designed to consolidate the new government’s power against all perceived subversives and dissidents. The term “State terrorism” still has currency in some circles. In this paper, however, I use the term exclusively with reference to non-State actors because State action usually fits into the well-established framework of human rights and humanitarian law. There are so many other descriptors for State attacks that instill terror in civilians, from legal terms (war crimes, crimes against humanity) to political terms (authoritarianism, totalitarianism, fascism, racism), that applying the term “terrorism” to State action obscures more than it illuminates.

“Terrorism,” when defined in reference to non-State actors, runs a range of groupings. There is the saying that one man’s terrorist is another’s freedom fighter. In the case of armed conflict, rebel forces are subject to IHL. At another end of the spectrum are global terrorist networks that resemble loose criminal cartels more than armies, a sort of entrepreneurial model, where it is less clear whether or what IHL applies, though criminal law does. This is an aspect of the Al-Qaeda phenomenon that complicates the notion of a “global” war on terror, where the enemy has a nebulous geographic and political identity, and the campaign is worldwide, with no clear delimitation of victory, defeat, or conclusion.

Terrorist acts are always a crime, but usually not, strictly speaking, a human

rights violation, heinous though they may be. Human rights advocates intend no trivialization of terrorism when they state the problem this way; it is simply that under the structure of international law, States, not people, commit human rights violations. It may be appropriate to speak of such violations where a State fails to suppress terrorists, or is complicit with terrorist networks. Al-Qaeda seems to have been intimately linked to the Taliban government, with some even describing the relationship as devolving into one of patron-client - Al Qaeda the patron, the Taliban the client. This is also known as State “support” for terrorism.

There is little doubt that terrorism has a profound and damaging effect on human rights, however. Beyond the loss of life, injury and torture that are immediate products of terrorist attacks is a web of other rights that suffer. Terrorism usually has repercussions on the economy of States affected, either through discouraging trade and investment or shifting State resources to counter-terrorism measures, and, as a consequence, economic and social rights such as health care and education may suffer. Civil and political rights, such as privacy and security of correspondence and home, may be abridged. The exercise of freedom of speech may be inhibited or repressed in an atmosphere of crisis, and intolerance of groups associated with the “enemy” may flourish, sometimes reaching the level of violent reprisal.⁹

Another facet to the relationship between human rights and terrorism worthy of more systematic exploration is to what degree systematic State violation of human rights feeds terrorism. There is no lack of organizations espousing terrorism that justify their tactics on the basis of State repression. Systematic State violation of basic human rights can degrade social norms more generally, and make terrorist acts seem more publicly acceptable. This has been a constant thread running through Palestinian rationales for terrorism.¹⁰ Measures of State repression can also promote militancy in the public, swelling the ranks of terrorist recruits.

3. State responses to terrorism and the overall impact on human rights

While terrorist acts may damage human rights, it is equally true that State counter-terrorism responses may have a degrading effect, though sometimes less visibly. The impact of any given terrorist act is usually limited in time, but restrictive State responses may have long duration, and affect many more than the attacks that prompted the response. Fortunately, public tolerance of restrictive measures tends to diminish once immediate effects of terrorism recede. The impact of restrictive measures may include the arbitrary deprivation of life or liberty, curtailment of due process guarantees, privacy incursions, limits on speech, and restrictions on the rights of aliens, among others.

Certainly, many national leaders have lost no time in justifying questionable policies in terms of September 11. Ariel Sharon has designated Yassir Arafat as “our Bin Laden.” China has termed both peaceful and insurrectionist Uigher separatists in Xinjiang as “terrorists.” Once the U.S. Government linked a particular Muslim organization to the Al-Qaeda network, Uzbek President Islam Karimov

used this act to further justify his Government's crackdown on peaceful believers in the name of counter-terrorism.¹¹

Human Rights Watch kept a running list of instances of post-September 11 “opportunism” in restricting human rights in the name of terrorism. For example, in December 2001, the Belarusian Parliament approved the “Law of the Republic of Belarus on Fighting Terrorism.” In a country already saddled with one of the worst human rights records in the region, the new law opens the door to further limitation of free expression and privacy, and reinforced impunity for government forces engaged in antiterrorist operations. Authorities on counter-terrorist missions may appropriate private means of communication for their own purposes, and enter at will homes, property, and mosques for inspection without prior warrant. Participants in counter-terrorist operations are exempt from responsibility for “inflicting damage” during a counter-terrorist operation, and are authorized to “cause harm to the lives, health and property of terrorists.”¹²

Of course, one does not have to go as far as Belarus to find questionable counter-terrorism measures. In the aftermath of September 11, the United States Department of Justice sought legislation that would permit it to detain indefinitely, without charge and without judicial review, non-citizens certified by the Attorney General as possible terrorists. The United States Congress refused to grant the Attorney General such unprecedented powers. In the USA PATRIOT Act, which became law on October 26, 2001, Congress instead granted the Department of Justice the power to keep certified suspected “terrorists” in custody for seven days without charge. At the end of this period, the Attorney General must charge the suspect with a crime, initiate immigration procedures for deportation, or release him or her. Six months after the USA PATRIOT Act was passed, the Department of Justice declared that it had not certified any non-citizen as a terrorism suspect under the act.¹³

Non-citizens are instead being held without charge under the provisions of a new rule that the Immigration and Naturalization Service issued quietly and without a public comment period on September 20, 2001. Prior to the new rule, the INS had to charge a detained non-citizen within twenty-four hours of detention or release him or her; there was no exception for emergency situations. The new rule extended the permissible period of detention without charge to forty-eight hours. But it also contained a loophole by which the forty-eight hour limit could be ignored: “[I]n the event of an emergency or other extraordinary circumstance,” the agency can hold non-citizens without charge for “an additional reasonable period of time.” The rule, which has no expiration date, contains no criteria as to what constitutes an emergency or other extraordinary circumstance, nor does it set any limits on the period of time a non-citizen can be held without charge in such circumstances.¹⁴

4. Counter-terrorism and the choice between human rights and IHL regimes

Many of the more interesting and difficult problems of human rights and counter-terrorism measures relate to how the fight against terrorism is conceived.

Is the State engaged in “war” or “law enforcement”? The choice between these paradigms has profound implications for human rights—namely, whether we have entered the territory of derogation or not. There are implications for the use of force, powers of arrest and detention, and administration of justice. Over the long run, easy resort to the institutions and rules of war has a debilitating effect for civil institutions and norms that protect human rights. It is important, wherever possible, to avoid the easy rhetorical resort to “war talk” and defend the character of democratic societies. The remainder of this paper surveys a handful of issues that straddle these legal regimes, including the lawful use of lethal force against individuals, detention of those not charged with a crime, military vs. civilian courts, and responsibility for the behaviour of proxies.

In war, combatants are legally entitled to use lethal force against enemy combatants. They may not be punished for intentionally killing the enemy, nor are they even necessarily subject to reporting or review. This is known as “combatant’s privilege.” The question as to whether a killing was lawful, therefore, usually centres on whether the person attacked was a combatant or not, and if not, whether the person was killed incidentally to an attack on a legitimate military objective and whether that death was proportionate to the military objective to be gained or preventable through taking feasible precautions. Although the right to life is understood as non-derogable, armed conflict presents this important and universally recognized qualification.

Outside of war, there is no “combatant’s privilege.” Police, as well as military personnel acting in a law enforcement capacity, are held to strict standards on the use of lethal force. These are most clearly articulated in the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials,¹⁵ and are common to most legal systems. One may only shoot in self-defence, to defend others against “the imminent threat of death or serious injury,” to prevent a “particularly serious crime involving grave threat to life,” or to arrest such a perpetrator and only when less extreme measures will not suffice. One may shoot to kill only “when strictly unavoidable in order to protect life.”¹⁶ Every incident of firearm use by officers in performance of their duty must be reported¹⁷ and subject to review, particularly where death, injury, or other grave consequences result.¹⁸

This divergence is of plain relevance to the practice of targeting individuals for assassination. In armed conflict, it is legal, if not always prudent, to target officials who are in the chain of command, either formally or functionally, up to and including the commander-in-chief, even when they are sleeping or undefended (but not when they lay down arms and surrender). Apart from war, the deliberate killing of a public enemy is unlawful except under the above exigent circumstances, and in any event, such a killing must be thoroughly investigated. In the seminal *McCann* case, the European Court of Human Rights, in a closely split decision that reversed a split decision of the European Commission, upheld the killing of IRA operatives by a British SAS unit in Gibraltar. But while the particular circumstances and information at the time justified the resort to lethal force by the shooters, the Court held Britain in violation for the planning of the operation,

which did not show sufficient preparation for apprehension as a preferred option, nor adequate investigation subsequently.¹⁹

There are likewise gaps between the two regimes with respect to detention. Under human rights law, anyone arrested or detained on a criminal charge must be brought promptly before a judicial officer and is entitled to trial within a reasonable time or to release.²⁰ Those detained for other purposes are entitled to have a court review the legality of their detention.²¹ Indefinite detention, even under an administrative detention regime, is arbitrary and violative of international human rights law.²²

In time of war, the prohibition of “arbitrary” detention is supplemented and interpreted through reference to the *lex specialis* of IHL, under which captured enemy combatants may be detained, and civilians of an occupied territory may be interned. With respect to privileged combatants, such as the regular forces of the opposing party, the Third Geneva Convention governs their treatment as prisoners of war. The treatment of protected persons in the hand of the occupying enemy is governed by the Fourth Geneva Convention.²³ It is currently a matter of debate and research what law governs captured combatants who are not “privileged” with the status of POWs, but at a minimum they are covered by customary international law guarantees of humane treatment, non-discrimination, fair trial standards and protection against unlawful detention. These norms find articulation in common Article 3 to the Geneva Conventions, and Article 75 of Protocol I, the latter of which was substantially derived from corresponding provisions of the ICCPR.²⁴

The U.S. is detaining one of its citizens, Jose Padilla, as an “enemy combatant” (i.e., an unprivileged combatant) based on secret information that he proposed to Al-Qaeda to build and detonate a radioactive device (a second U.S. citizen, Yaser Hamdi, was captured in Afghanistan and is also being detained in the U.S. as an enemy combatant). Secretary of Defense Rumsfeld initially stated that the objective was not to try Padilla for any crime, but to hold him indefinitely for questioning.²⁵ A month after he was arrested as a “material witness,” the President designated him an enemy combatant and had him transferred from civilian to military custody. On December 4, a federal district court held that Padilla could consult his counsel to further his petition for *habeas corpus*, but that the President could lawfully detain persons as enemy combatants so long as there was “some evidence” to do so. The Padilla case is interesting, because it highlights the lack of any alternate legal basis to hold a citizen indefinitely, in contrast to the use of immigration rules to detain aliens suspected of terrorist connections.

Were Padilla indeed an unprivileged combatant, he could be held without access to an attorney until the end of hostilities.²⁶ Yet, Padilla was not captured on a battlefield, but arrested at an airport, allegedly for having had contact with senior Al-Qaeda officials. In Padilla’s case, the connection to the war in Afghanistan is questionable. If there is no connection other than his association with Al-Qaeda figures, then the most directly applicable international law is that of human rights, including its guarantee of the right to be formally charged and permitted access to

counsel, as well as the prohibition of indefinite detention as arbitrary. Padilla's status, as a combatant or a criminal, should be determined by an independent court, and not executive fiat, lest the door be opened to indefinite detention of anyone on the basis of unsubstantiated accusations of collaboration with terrorists.

The resort to military tribunals to try persons who are not combatants is also of questionable wisdom and dubious legality. Military tribunals, as opposed to courts-martial, are a relatively unusual phenomenon, generally established in occupied territory to try cases that the civilian courts of the enemy cannot be entrusted to do reliably. President Bush's conception that military tribunals should be established to try non-U.S. nationals suspected of terrorism finds its justification in different interests, namely the evasion of rules imposed by the Constitution on domestic civilian courts. The effort is to be able to close trials to public view, loosen the rules of evidence, place limitations on defence counsel, and generally exert more control over the process on behalf of the executive branch of government, which would have exclusive right to final review of judgments. The Human Rights Committee has stated, however, that the trial of civilians by military tribunals should be exceptional and only under conditions that afford full due process rights.²⁷ It is particularly difficult to justify the resort to military tribunals when the civilian court system of the prosecuting nation is fully available and functional.

The Bush administration's decision to try Zacarias Moussaoui, accused as one of the plotters of the September 11 attacks, in a civilian court rather than a military tribunal was widely praised by human rights advocates. However, there has been ominous speculation the Moussaoui case may be moved from civilian courts to a military tribunal to defeat Moussaoui's demand to question one of the government's witnesses against him, a suspected Al Qaeda operative named as a key member of the terrorist cell that carried out the September 11 attacks. This witness is now being held for questioning at a secret military base overseas.²⁸ The right to call and confront witnesses in one's defence is firmly entrenched in international human rights law,²⁹ as well as the due process and confrontation clause guarantees of the U.S. Constitution.

Finally, both IHL and human rights law have principles for liability for the behaviour of proxies. In crimes of war, this is the law of command responsibility. An officer may be charged with responsibility for the crimes of irregular forces that are under his or her effective command and control. While "control" must mean something more than influence over the proxy, it does not have to be perfect control. If the officer has control over who is deployed, and knowingly deploys undisciplined forces with a record of abuse, crimes that result may be foreseeable and imputed to him, particularly if he is in a position to take action subsequently and fails. This is a sobering consideration for those who endorse the trend of using Special Forces to direct operations with local forces.

In human rights law, strong norms against sending persons back to territories in which they may be persecuted (the customary international law norm against *refoulement*) or tortured (the *jus cogens* norm) forbid handing suspects

over to allies who are less than scrupulous about interrogation techniques.³⁰ The European Court, in the *Soering* case, found Britain would be in potential violation of the prohibition against torture and cruel, inhuman and degrading treatment if it were to extradite a suspect to the United States, where he might face an indefinite stay on death row,³¹ a result also supported by the Convention against Torture.³² The norm against torture is of peremptory character, non-derogable and strongly asserted in IHL. There can be no justification for relying on allies to conduct impermissible interrogations or to imprison terrorism suspects in violative conditions with the expectation of escaping responsibility.

These issues, and many more, are the subject of intense debate and legal evolution. What is clear, however, is that human rights norms do not disappear on mention of war, much less the ill-defined “war on terror.” Attempting to evade human rights obligations through resort to ill-defined notions of derogation or usurpation can ultimately damage both systems of international law.

¹ See, e.g., the “*Universal Declaration of Human Rights*”, Art. 7; the “*International Covenant on Civil and Political Rights*”, Art. 3; the “*European Convention on Human Rights*”, Art. 6.1; the “*American Convention on Human Rights*”, arts. 1.1, 2 & 25.

² See Manfred NOWAK, “*U.N. Covenant on Civil and Political Rights: CCPR Commentary*”, N.P. Engel, Publisher, Kehl am Rhein, Strasbourg, Arlington, Va., 1993, p. 379 [hereinafter NOWAK].

³ This list is based on the “*International Covenant on Civil and Political Rights*”, Art. 4.2. Similar sets of rights are described as non-derogable under the regional human rights covenants. See the “*European Convention for the Protection of Human Rights and Fundamental Freedoms*”, Art. 15 (right to life, freedom from torture and cruel, inhuman and degrading treatment, slavery and servitude, *ex post facto* laws); the “*American Convention on Human Rights*”, Art. 27.2 (rights to life, religious freedom, juridical personality, name, nationality, participation in government, rights of the child, freedom from slavery, *ex post facto* laws, torture and inhumane treatment, as well as judicial guarantees essential for the protection of these rights); *cf.* the “*African Charter on Human and People’s Rights*” (no derogation clause, but many rights subject to limitation by municipal law).

⁴ U.N. Human Rights Committee, General Comment No. 29, States of Emergency (Article 4), para. 16, CCPR/C/21/Rev.1/Add.11, 31 August 2001.

⁵ *Ibid.*, para. 3.

⁶ *Ibid.*, para. 4.

⁷ *Ibid.*, para. 9.

⁸ *Ibid.*, para 13. See also “*Restatement (Third) of the Foreign Relations Law of the United States*”, Vol. 2, sec. 702, comment, American Law Institute: Washington, D.C. 1987 [hereinafter “*Restatement*”].

⁹ See, HRW, “*We are not the Enemy: Hate Crimes Against Arabs, Muslims, and Those Perceived to be Arab or Muslim after September 11*”, in A Human Rights Watch Short Report, Vol. 14, No. 6, November 2002.

¹⁰ See generally, HRW, “*Erased In A Moment: Suicide Bombing Attacks Against Israeli Civilians*”, Human Rights Watch, New York, October 2002.

¹¹ The examples in this paragraph, and others, are set out on the web page “*Opportunism in the Face of Tragedy*”, <http://www.hrw.org/campaigns/september11/opportunismwatch.htm>.

¹² *Ibid.*

¹³ HRW, “*Presumption of Guilt: Human Rights Abuses of Post-September 11 Detainees*”, in A Human Rights Watch Short Report, Vol. 14, No. 4, August 2002, text at footnotes 175-177.

¹⁴ *Ibid.*, text at footnotes 178-181.

¹⁵ “*Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*”, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, U.N. Doc. A/CONF.144/28/Rev.1, p. 112 (1990).

¹⁶ *Ibid.*, principle 9.

¹⁷ *Ibid.*, principle 11(f).

¹⁸ *Ibid.*, principle 22.

¹⁹ “*McCann and Others vs. the United Kingdom*”, Judgement, European Court of Human Rights, September 27, 1995, Series A, No. 324, Application number 00018984/91.

²⁰ ICCPR, Art. 9(3). The prohibition on “arbitrary” detention is considered a *jus cogens* norm. “*Restatement*”, supra n. 9.

²¹ For example, the detention of minors in State custody arrangements or the protection of the mentally ill. ICCPR Art. 9(4) and NOWAK, *supra* n. 3, at 169.

²² There are numerous pronouncements of the UN Working Group on Arbitrary Detention to this effect in the context of compulsory labour, immigration detention, and other situations. See, e.g., Report of the Working Group on Arbitrary Detention, Question of the Human Rights of all Persons Subjected to Any Form of Detention or Imprisonment, Deliberation 04, sec. III, E/CN.4/1993/24, 12 January 1993.

²³ The presumption is that protected persons are civilians. Article 5 of the convention provides that those protected persons who are “definitely suspected of or engaged in activities hostile to the security of the State” are not entitled to claim such rights and privileges under the convention as would be prejudicial to the security of the State, although such persons must be treated with humanity and “in case of trial, shall not be deprived of the rights of fair and regular trial.”

²⁴ See Robert K. GOLDMAN and Brian D. TITMORE, “*Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law*”, in The American Society of International Law, Task Force on Terrorism, pp. 35-39 and particularly fn. 124, 134-135, <http://www.asil.org/taskforce/goldman.pdf>.

²⁵ CNN.com, “Lawyer: dirty bomb suspect’s rights violated,” 11 June 2002, <http://www.cnn.com/2002/US/06/11/dirty.bomb.suspect/>.

²⁶ However, some authorities argue that where duration of hostilities or occupation becomes extremely prolonged or uncertain, rendering IHL safeguards such as the services of the International Committee of the Red Cross inadequate, human rights mechanisms such as *habeas corpus* may be required to adequately protect the rights of detainees. See GOLDMAN and TITMORE, *supra* n. 25, at 46-47 and related citations.

²⁷ Human Rights Committee, General Comment 13, Article 14, para. 4 (Twenty-first session, 1984), “*Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*”, U.N. Doc. HRI/GEN/1/Rev.1 at 14 (1994), <http://www1.umn.edu/humanrts/gencomm/hrcom13.htm>.

²⁸ CBSNEWS.com, “*A Secret Trial for Moussaoui?*”, 7 November 2002, <http://www.cbsnews.com/stories/2002/11/07/news/opinion/courtwatch/main528515.shtml> .

²⁹ ICCPR, Art. 14.3(e).

³⁰ See “*Convention relating to the Status of Refugees*”, Art. 33, 189 U.N.T.S. 150, entered into force April 22, 1954, and “*Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*”, Art. 3, G.A. res. 39/46, [annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984)], entered into force June 26, 1987 [hereinafter “*Convention against Torture*”].

³¹ “*Soering vs. the United Kingdom*”, Judgement, European Court of Human Rights, July 7, 1989, Series A, No. 161, Application number 00014038/88.

³² “*Convention against Torture*”, Art. 3.

HUMAN RIGHTS AND THE “WAR” AGAINST INTERNATIONAL TERRORISM

Peter HOSTETTLER (*)

On September 11, Mohammed Atta and his fellow believers attacked symbols of the free western world - the World Trade Center, symbolized by its twin towers; the Congress, the centre of democratic political decision-making;¹ and the Pentagon, the apex of military power. Why did a relatively small group of people choose to attack the most powerful nation of the world, and why did it choose such targets? A multitude of articles and reports, including much speculation, has been published about those terrible attacks and the potential motives behind them. It is quite obvious that the terrorists sent by Osama bin Laden wanted to challenge the free world's core values: democracy, the rule of law and individual freedom. Their credo of religious intolerance, coupled with brutality and hatred, constituted the right mindset to commit crimes against humanity.

Democracy, rule of law and individual freedom are closely interlinked. Without individual freedom and the rule of law, real democracy cannot exist.² Without rule of law, individual freedom and democracy lead to chaos. And rule of law and individual freedom are inconceivable with an anti-democratic regime. These values are thus interdependent; in a modern democracy, each is equally developed.

Human rights are a guarantee and a precondition for individual freedom. But they will only be respected in a society where the State upholds the rule of law, even under difficult circumstances. Observance and realization of human rights by States is one of the major achievements of the second half of the twentieth century, although, as we all know, the concept has not yet been realized globally. The annual reports of the UN High Commissioner for Human Rights and the Human Rights Committee, as well as the reporting of non-governmental organizations such as Human Rights Watch and Amnesty International, reveal how much still needs to be done.

Systematic and protracted violations of basic human rights are one of the main sources of contemporary armed conflicts. Respect for human rights by States therefore affects our common security, in particular when they are fighting international terrorism. When States violate human rights for shortsighted advantages, e.g., by allowing torture during the interrogation of suspects, they surrender the moral high ground, as well as the State's underlying constitutional

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legal foundation. The winner will always be the terrorists, not the State's security organs, because human rights violation can be used by the media to demonstrate the ruthlessness of a government, which in turn increases the number of direct or indirect supporters of terrorist organizations. Human rights must therefore be defended against the temptation to limit their application when derogation is inappropriate.

The phenomenon of terrorism is certainly not new, although the scale of the September 11 attacks, the international connections behind them and the visibility of the events reached new dimensions. Terrorism has been shaking society for decades. For instance, Germany struggled against the terrorists of the *Rote Armee Fraktion* (RAF) in the late 1970s, the conflict in Northern Ireland started in the 1960s (and continues) and Spain combats *ETA*, a phenomenon inherited from the Franco dictatorship.

It would be worthwhile to study the lessons learned in these contexts. We would discover that the three aforementioned States always tried to maintain public order within the framework of national and international law; although some violations of human rights did occur, they were the exception. And, even more importantly, individuals or families affected by purported overreactions of State officials were able to bring their complaints before an international court, the European Court for Human Rights in Strasbourg, which had (and still has) an important influence on State practice in Europe. The mere fact that the practices of State officials with regard to the use of force were potentially subject to the supervision of an international juridical body had a moderating effect. This again led to a secondary positive effect, the enhanced willingness and capacity of States bound by equal human rights standards to co-operate when prosecuting suspects for acts of terrorism. *Ex contrario*, States with totally differing human rights standards (and records) will have much greater difficulty co-operating in the struggle against international terrorism.³

1. A Short Look at the History of Human Rights

The history of internationally codified human rights law begins with the Universal Declaration of Human Rights of 1948. "All human beings are born free and equal in dignity and rights," proclaims Article 1 of the Declaration. Article 28 adds "everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized."⁴

The codification of international human rights instruments began after World War II, rather late compared to international humanitarian law. However, essential elements of modern human rights are found much earlier and in various cultures: Democracy developed in Athens in the 6th Century B.C., while the Magna Charta, French Declaration of the Rights of Man and American Declaration of Independence were milestones in the struggle for individual freedom and democracy. Many national constitutions have integrated various provisions based on principles contained in those fundamental sources.

And yet in the 20th Century, totalitarian regimes were able to establish

reigns of terror without being challenged by free nations. The Nazi prosecution of Jews, communists, and gypsies began immediately after their conquest of power in 1933, which, by the way, was realized in full observance of the democratic rules of the German Weimar Republic. Non-interference in internal affairs as a principle of international politics ultimately led to the reality that modern democracies stood by as the Nazis prosecuted certain groups within their own population according to a horrific political and racist ideology.

That is why the Preamble of the Universal Declaration states that the “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is *the foundation of freedom, justice and peace in the world.*” Respect for basic human rights by all members of the international community is relevant to the security of the entire world.

Totalitarian regimes, based on discrimination, torture, and other absences of justice, ultimately constitute a threat to the security of mankind because they are a source of armed conflicts and terrorism. Failed States may also threaten security because in such situations law no longer controls the use of force. As arms or money create a base to exert unlimited power, failed States are ideal breeding grounds for international terrorism and crime. The threats posed by totalitarian regimes and failed States are significantly increased by a global environment in which modern communication technology, including air travel, permits crossing cultural and geographic barriers without difficulty and in which the availability of weapons of mass destruction permits modern society to be terrorized at a time and place of the terrorists’ choosing.

A set of common basic rules and values for the entire world has therefore become essential. So too have unified efforts by the international community to challenge those who refuse to abide by the rules.⁵ To successfully restore international peace and security, an overwhelming majority of States must participate. The right forum for this endeavour is the United Nations system. Respect of basic human rights, and the quest to realize them throughout the world, has never been more important than today. It is the moral basis for efficient and effective international co-operation against terrorism.

2. State Responsibility: Respecting and Promoting Human Rights

Who is responsible for respecting and promoting human rights law? The answer to this question reveals one of the major differences between international humanitarian law (IHL) and human rights. IHL binds States and individuals, including non-State actors (at least partially). By contrast, it is an exclusive State responsibility to respect and promote human rights. The reason for this apparent paradox lies in the origin of human rights, which were primarily developed to create international minimum standards of rights designed to protect individuals against a State’s excessive exercise of its legitimate monopoly of force. To a certain extent, human rights limit a State’s freedom of action, especially regarding the promulgation of laws and regulations that bind individuals in their mutual relations and in their relations with the State. However, such limitations apply mainly in

fundamental areas, e.g. the right to life or the prohibition on torture and inhumane or degrading treatment by State organs such as the police or armed forces. Human rights function as a safeguard against the arbitrary use of force that characterizes dictatorships and totalitarian systems. Human rights law is further set forth as civil and political rights (of major interest to our subject), e.g., as contained in the 1966 International Covenant on Civil and Political Rights. Analogous economic and social rights, which define the conditions States should create to allow individuals to develop as free human beings, will not be elaborated on in this article.⁶

Human rights treaty law contains several instruments issued by the United Nations system.⁷ A network of regional treaties covering Africa, the Americas, and Europe complements them.⁸ The fact that Asia and Oceania have not yet developed a similar regional system illustrates the regional discrepancies in realizing human rights standards. Note that all States have not yet ratified the universal pacts.

There are differences in the way the major treaties are implemented. While the U.N. system relies mainly on periodic reporting by specialized commissions (e.g., the Human Rights Commission, the Sub-Commission on Prevention of Discrimination and Protection of Minorities or the Commission on the Status of Women), regional treaty systems also provide implementation and arbitration mechanisms through courts that deal with inter-State and individual complaints (e.g., the European Court for Human Rights, the Inter-American Court of Human Rights and the African Commission on Human and Peoples' Rights). All such mechanisms are intended to compel States that violate human rights treaties to change their practices and compensate their victims. The courts work in a subsidiary way to the national justice system; only after the exhaustion of all national legal procedures may a complaint be brought before the international courts.

Gross human rights violations or violations of IHL have increasingly created concern with the U.N. Security Council, which has concluded that they may constitute a threat to international peace and security. Such a finding at times has motivated peacekeeping, and in a few cases peace enforcement, operations. In several other instances, special international tribunals have been established.⁹ The decisions of the Council demonstrate the existence of a link between human rights instruments and the U.N. Charter. Sanctions under Chapter VII of the Charter can be used, for instance, to exert pressure on States that constantly and seriously violate their human rights obligations. However, a consistent practice has not yet developed. At times, neither universal nor regional instruments and mechanisms have successfully changed a State's practice.¹⁰

3. Human Rights and the "War" on International Terrorism: Potential Dilemmas

The format of this brief article forces us to limit our attention to the following core questions:

- Are there any dilemmas between the non-derogatory human rights provisions and requirements of anti-terrorism operations?
- If derogations to the other human rights provisions are necessary, what

would be the conditions for introduction of such limitations?

- What are the specific problems of operations in the “grey zone” between armed conflict and situations short of armed conflict?

a. Non-derogatory Human Rights Provisions at Odds with the War against International Terrorism Right to Life

The first obligation of a State is to ensure that all persons present on its territory benefit from this fundamental right. States are obliged to create a safe environment where the rule of law and public order create favourable conditions. Inactivity in the face of known threats, e.g. an imminent terrorist attack uncovered by intelligence sources, would constitute a violation of the right to life. However, the literature has so far focused more on the way State organs such as police, security forces and the military have respected the right to life of persons who were in some way affected by their operations.

The European Convention on Human Rights (ECHR) specifies in Articles 2 and 15 those situations involving the death of a person during an action by State organs that do not constitute a violation to the right to life. Article 2 provides that:

“Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:

- a) in defence of any person from unlawful violence;
- b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
- c) in action lawfully taken for the purpose of quelling a riot or insurrection.”

Article 15 (2) links the human rights system to IHL: “No derogation from Article 2, except in respect of deaths resulting from lawful acts of war (...) shall be made under this provision.”

The Charter also mentions the following basic principles governing the use of force by State organs.

- Principle of legality - the use of force must be based on the law.
- Principle of necessity and minimum use of force - use of force must be restrained to the absolute minimum, and there are only four situations where lethal use of force is justified:
 - i. defence of any person against unlawful violence (includes inherent right to self defence);
 - ii. effecting a lawful arrest or preventing the escape of a person lawfully detained;
 - iii. action lawfully taken for the purpose of quelling a riot or insurrection; and
 - iv. engaging in lawful acts of war during armed conflict.

Although the other relevant Human Rights treaties do not contain similarly detailed provisions, it may be argued that the ECHR reflects customary international law.

The distinction between the situation of armed conflict and that of no armed

conflict is very important. During armed conflict, combatants (international armed conflict) and fighters (non-international armed conflict) may be attacked without notice, even when they are sleeping. In situations outside an armed conflict, all other measures to neutralize the opponent, such as arrest or non-lethal use of force, must be considered first. The ways forces are equipped and trained, as well as the rules of engagement they operate under, differ fundamentally.

It is therefore crucial in the battle against terrorism to carefully distinguish between operations amounting to an armed conflict (e.g. the operations in Afghanistan starting on 7 October 2001) and other forms of struggle where police and security forces clearly operate outside of an armed conflict. Political use of the term “war” is not helpful. War implies the notion of combatants, and the use of force against them without restrictions, something totally inappropriate in many situations. Extrajudicial killings without the necessity for self-defence or defence of others, as outlined in Article 2(a) of the ECHR, or unrestricted and disproportionate use of force in a civilian environment are not permissible under today’s human rights law.¹¹

i. The Prohibition of Torture, Inhuman, or Degrading Treatment

This prohibition is absolute; there are no exceptions on any grounds whatsoever. It is contained in both universal and regional treaties,¹² and there is a specific convention against torture. It is backed by a similar provision in Article 3 common to the Four Geneva Conventions of 1949. As a result, torture and inhuman or degrading treatment are prohibited in all situations.

Conflicts emerge with regard to questioning detainees, in particular in exceptional situations when a detained person allegedly could provide evidence on a planned terrorist attack. Some would like to construct a dilemma between the right to life of persons endangered by the attack and the prohibition on torture of the detained person. But the binding legal instruments do not leave any space for interpretation; the prohibition on torture and inhuman or degrading treatment is absolute. It is simply not possible to draw a line between a general practice of torturing or treating detainees inhumanely and exceptional single cases. It is also not possible to torture “a little.” Investigators are required to use interrogation techniques similar to civil police forces without making use of physical or psychological coercion. If the results are unsatisfactory, it is forbidden to go further down the road of extracting information from a person unwilling to confess.

ii. Right to recognition everywhere as a person before the law

At first, it may be strange to mention these provisions as potentially being in conflict with the struggle against terrorism. Given the discussions surrounding the detainees in Guantanamo Bay, it may be worthwhile to have a closer look at this provision. Some lawyers argued that the detainees do not fall under the protection of the Geneva Conventions of 1949 because they do not fulfil the standards as combatants set forth in Article 4 (2) of the Third Convention protecting Prisoners of War. In that case, so they contend, the detainees should be treated as

civilians who have violated the obligation to abstain from hostilities, something for which they might be tried and punished. Geneva law prohibits deportation of civilians from their native country, a provision that would not apply to non-Afghan fighters such as Al-Qaeda. Being held outside of the United States, they do not benefit from U.S. constitutional rights, including *habeas corpus*. This would then allow their detention without providing an opportunity to determine their status before a competent court or having to try them for any offences respecting the procedural guarantees. Such interpretation stands - in the case of the Guantánamo detainees denied Prisoner Of War status under IHL - in contradiction to the non-derogatory right of recognition as a person before the law. Respect for the procedures set out in international law - both in IHL and human rights law - in no way hampers the struggle against international terrorism.

b. Derogation from Other Human Rights Provisions: When and How?

The conditions for derogation are set out in Article 4 (1) of the ICCPR¹³: “In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.”

The test would therefore be:

- Was a State of Emergency declared?
- If so, was it immediately communicated to the other States Party to ICPR?
- Is the derogation limited in space and time, and are there periodic reassessments as to whether the conditions still exist which led to the declaration of the State of Emergency?
- Are the measures taken in a non-discriminatory way?

Derogations may be limited to a certain part of the national territory or cover the entire country, according to the gravity of the situation. They should be limited in duration; at a minimum, there should be a regular review of the necessity for prolonging the derogation provided. The reasons and the extent of the derogations under a State of Emergency must be communicated to the other State Parties.

Questions may arise whether a State Party in effective control of a foreign territory should be bound by its human rights treaty obligations. The *Bankovic* case¹⁴ held that the use of air power does not suffice to constitute effective control. In the *Loizidou* case,¹⁵ however, the European Court of Human Rights decided that military occupation of foreign territory by a State Party to the ECHR triggers the applicability of its provisions for the occupied territory. As similar judgements related to Turkish operations in Northern Iraq show, occupation includes the simple presence of troops on foreign territory without consent of that State. At least for States Party to ECHR, the Convention applies where troops exercise some (or all) State functions on foreign territory, even during peace support operations. However,

it is not clear whether this includes the obligation to declare derogations from certain provisions to the other State Parties.

c. Specific Problems of “Grey Zone Operations”

The definition of the beginning and end of an armed conflict is a difficult issue even for lawyers. Politicians are not very eager to admit that a situation amounts to an armed conflict. An exception occurred in the aftermath of September 11, when a crime against humanity committed by an international terrorist network was declared a war.

We have already discussed the treatment of persons detained in relation to the war against international terrorism.

A further topic of interest is brief military operations on foreign territory conducted to apprehend suspects or to battle a group suspected of terrorism. Military experts sometimes use the term *snatch operations*. I do not intend here to address the difficult *ius ad bellum* questions related to the use of force in international relations. However, for the duration of the use of force, those military operations are governed by the rules and principles of international law of armed conflict applicable to international armed conflict, the *ius in bello*. Human rights treaties also cover such operations. The use of force is thus governed by the same criteria as operations inside national territory because the country where the action takes place is not at war. Violations of certain treaty provisions are subject to the human rights implementation mechanisms (e.g. the European Court of Human Rights for States Party).

4. Conclusions

1. International crime and terrorism pose a threat to individual freedom, democracy, and rule of law. States are obliged to control criminals and terrorists and maintain law and order.

2. Human rights should not become the first victim in the war against terrorism. States should rather endeavour to adjust human rights to the best standards available. They should also improve their human rights records, e.g. by co-operating with international specialized organizations. In doing so, States will thus increase their ability to co-operate internationally in the struggle against terrorism.

3. The war against international terrorism takes place in very different strategic situations, ranging from peace to international armed conflict. Best practice guides and rules of engagement should clearly instruct State agents on the means and methods available at a given time in a given environment to fight against international terrorists. Lawyers must be available to military commanders, to help to clarify situations.

4. The non-derogatory rights (right to life and prohibitions on torture and inhuman or degrading treatment) must be respected under all circumstances; torture to facilitate interrogation and extrajudicial killings of suspects are crimes under international law.

¹ Although the fourth hijacked aircraft failed to reach its target on September 11 due to the resistance of the passengers, there are strong indications that it was directed against Capitol Hill in Washington.

² History provides many examples of democracies without rule of law (e.g., the self-declared republics of Serbs, Croats and Muslim entities in Bosnia-Herzegovina during the war 1992-1995, where discrimination and ethnic cleansing of minorities occurred with support of the ethnic majority), of States where an authoritarian regime perfectly enforces law and order without respecting individual freedom and democracy (e.g., the Franco regime in Spain, 1939-1976) and of States where neither democracy nor law exist and the right of the stronger rules (e.g., Somalia since the departure of Siad Barrè).

³ Recently, Algeria accused the Swiss government of providing a safe haven for a leader of the GIA group that is known for its terrorist activities in Algeria. Switzerland denied an Algerian request for extradition because of Algeria's very negative human rights record.

⁴ We may therefore conclude that the international terrorist group around Osama Bin Laden is fundamentally opposed to the values and rights expressed by the international community in the Universal Declaration of Human Rights. Therefore, 9/11 was not only an attack against the United States but against the entire civilized world.

⁵ Rogue States are not only known for catastrophic human rights records, but also for their possible cooperation with criminal or terrorist organizations resulting in uncontrolled spread of conventional, and possibly also non-conventional, weapons of mass destruction. They therefore pose a latent danger to the international community. The controversy around Iraq, however, shows that we had not yet discovered a general recipe on how rogue States may be forced to respect international law, including human rights standards.

⁶ A short introduction explaining the difficulties in implementation of economic and social standards is contained in Thomas BUERGENTHAL, "International Human Rights in a Nutshell", St. Paul/Minnesota, West Publishing, 2/1995, pp.51-57.

⁷ The most important are the "International Covenant of Civil and Political Rights (1966)" with two "Optional Protocols", <http://www.hrweb.org/legal/cpr.html>; the "International Covenant on Economic and Social Rights (1966)"; "The Convention on the Prevention and Punishment of the Crime of Genocide (1948)"; the "International Convention on the Elimination of All Forms of Racial Discrimination"; the "International Convention on the Suppression and the Punishment of the Crime of Apartheid"; the "Convention on the Elimination of All Forms of Discrimination Against Women"; the "Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment"; the "Convention on the Rights of the Child".

⁸ The "European Convention of Human Rights and Fundamental Freedoms" (1950) with 11 facultative Protocols, <http://www.echr.coe.int/Eng/BasicTexts.htm>; the "American Convention on Human Rights (1970)", <http://www.oas.org/juridico/english/Treaties/b-32.htm>; the "African Charter on Human and Peoples Rights (1986)", <http://www1.umn.edu/humanrts/instreet/z1afchar.htm>.

⁹ The *International Criminal Tribunal for the former Yugoslavia (ICTY)* was established by Security Council Resolution 827 of 25 May 1993. See <http://www.un.org/icty/>. The International Criminal Tribunal for Rwanda (ICTR) was created by Security Council Resolution 955 of 8 November 1994. See <http://www.icttr.org/>.

¹⁰ Annual reports of the UN Human Rights commission as well as those provided by international non-governmental organization such as Amnesty International or Human Rights Watch all too clearly show how far away we are from a systematic approach by the international community towards human rights violations. See: <http://www.unhcr.ch/huridocda/huridoca.nsf>; <http://www.amnesty.org/>; <http://www.hrw.org/>.

¹¹ The European Court of Human Rights has produced interesting case law. See, e.g., the case of "McCann and Others vs. The United Kingdom", app. NR. 00018984/91 of 27/09/1995; case of "Güleç vs. Turkey", app. NR. 54/1997/838/1044 of 27/07/1998. See: <http://hudoc.echr.coe.int/hudoc/default.asp>.

¹² "United Nations Covenant on Civil and Political Rights", Art. 7; "American Convention on Human Rights" Art. 5; ECHR Arts. 3 & 15; indirect mention in the "African Charter on Human and Peoples Rights", Art. 4.

¹³ A similar clause in ECHR, Art. 15.

¹⁴ The case of "Bankovic, Stojadinovic, Stoimenovski, Joksimovic, Sukovic vs. Belgium, Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, The Netherlands, Norway, Poland, Portugal, Spain, Turkey and the United Kingdom" (App. NR. 52207/99, Decision of 19 December 2001).

¹⁵ See <http://www.cyprus.com.cy/on.htm>.

DECONSTRUCTING OCTOBER 7TH: A CASE STUDY IN THE LAWFULNESS OF COUNTERTERRORIST MILITARY OPERATIONS

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It is my task at this seminar to address the *ad bellum* issues surrounding terrorism, particularly those involving counter-terrorism operations. In order to do this, I would like to deconstruct the events of October 7, 2001. It is on this day that the United States and the United Kingdom launched the first airstrikes against al-Qa'ida and Taliban targets in Afghanistan. These strikes present an excellent case study in the legality of counter-terrorist actions against both non-State actors, such as terrorist groups, and their State sponsors. I have addressed the issue in detail in a forthcoming article, from which much this lecture is drawn, for the *Israel Yearbook on Human Rights*.

The Facts

The facts that motivated the October 7th airstrikes are well known. On September 11th, terrorists conducted four well-co-ordinated attacks against targets in the United States that resulted in over 3,000 civilian deaths and property damage measured in the billions of dollars. Investigation quickly led to al-Qa'ida, an organization headquartered in the Taliban controlled territory of Afghanistan, but which operated, and still operates, from scores of other countries. Al-Qa'ida was tied to many terrorist attacks over the past decade, some carried out, others merely planned. Osama bin Laden, a nefarious Islamic fundamentalist, who had previously called on all Muslims to “comply with God’s order to kill Americans and plunder their money whenever and wherever they find it,” led the group.¹

In response to the attacks, President George Bush placed the United States on a war footing. Moreover, he demanded that the Taliban turn over bin Laden and other al-Qa'ida lieutenants and allow the United States to verify that terrorist camps based in Afghanistan were no longer in use.

The President did this both publicly and through the government of Pakistan, which maintained diplomatic relations with the Taliban. When the Taliban quibbled, the United States and United Kingdom launched the airstrikes of October 7th. Not long thereafter, follow-on air, land, and maritime operations were conducted by a coalition of the willing.

Pursuant to Article 51 of the United Nations Charter, the U.S. and U.K. notified the Security Council that they had conducted the operations in accordance with to their right to self-defence.² Specifically, the United States asserted that it had “clear and compelling information that the al-Qa'ida organization, which is

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supported by the Taliban regime in Afghanistan, had a central role in the attacks” and that there was an “on-going threat” made possible “by the decision of the Taliban regime to allow the parts of Afghanistan that it controls to be used by [al-Qa’ida] as a base of operations.”²³ The notification stated that the military operations were intended to “prevent and deter further attacks on the United States” and warned that the United States may find our self-defence requires further actions with respect to other organizations and other States.”²⁴

In assessing the lawfulness of the response, it is critically important to survey the international community’s reaction thereto. In “New Haven School speak,” this survey of the “normative expectations of politically relevant actors” provides an indication of where the international community judges the lines of lawfulness to lie.

It is normatively significant that the international community treated the attacks of September 11th as meriting a response in self-defence. Consider the steps taken by the Security Council. On the day after the attacks, it issued Resolution 1368, which characterized them as a “threat to international peace and security” and reaffirmed “the inherent right of self-defence.”²⁵ Just over two weeks later, on September 28, the Council issued Resolution 1373. That resolution not only mandated measures to combat terrorism, but again reaffirmed the “inherent right of self-defence.”²⁶

Post-October 7th Security Council resolutions continued to treat the circumstances as implicating the right of self-defence. They condemned the Taliban for allowing Afghanistan to be used as a base for terrorist operations, expressed support for the efforts of the Afghan people to replace the Taliban, encouraged the “rooting out” of terrorism, and reaffirmed Resolutions 1368 and 1373. Such reaffirmation indicates that the Council viewed the U.S. and U.K. operations as appropriate exercises of the right to self-defence.⁷

Other international reactions tracked those of the Security Council. On October 7th, NATO invoked Article V of the North Atlantic Treaty, which provides for collective self-defence.⁸ Likewise, the Organization of American States invoked its self-defence provision, Article 3.1 of the Rio Treaty,⁹ while Australia offered troops in accordance with Article 4 of the ANZUS Treaty.¹⁰ In addition to these multilateral actions, individual States provided varying degrees of support to the counter-terrorist effort. In the days immediately following the September attacks, Russia, China, and India agreed to share intelligence with the United States, while Japan and South Korea offered logistic support. The United Arab Emirates and Saudi Arabia broke off diplomatic relations with the Taliban, and Pakistan, which maintained relations in order to provide the United States a conduit for dialogue with the Taliban, agreed to co-operate fully with the United States. More than 30 Nations granted overflight and landing rights and some 46 multi-lateral declarations of support were issued.¹¹

Reactions to the counter-attacks of October 7th were similarly supportive. Georgia, Oman, Pakistan, the Philippines, Qatar, Saudi Arabia, Tajikistan, Turkey, and Uzbekistan granted airspace and facilities access. China, Egypt, Russia, and

the European Union publicly backed the operations, while the Organization for the Islamic Conference simply asked the U.S. to limit its campaign to Afghanistan. The Asia Pacific Economic Co-operation Forum condemned terrorism of all kinds and Australia, Canada, the Czech Republic, Germany, Italy, Japan, the Netherlands, New Zealand, Turkey, and the United Kingdom offered ground troops.¹²

To recapitulate, in the days preceding October 7th, there was nearly universal consensus that the September attacks justified a forceful response in self-defence. Correspondingly, the international community clearly considered the response that began on October 7th an appropriate exercise of that right.

The Law

International law provides a relatively straightforward framework for the use of force. Article 2(4) of the United Nations Charter prohibits Member States from using force against other States.¹³ There are two textual exceptions to this prohibition. The first encompasses uses of force authorized by the Security Council. Under Article 39, the Council may determine that a situation amounts to a "threat to the peace, breach of the peace, (or) act of aggression" and determine what steps are necessary in response thereto to restore international peace and security.¹⁴ Specifically, under Article 42, it may authorize the employment of military force to resolve the situation.¹⁵ In the past, the Council has repeatedly characterized terrorist acts as threatening international peace and security. For instance, it cited the 1998 Lockerbie bombing,¹⁶ the 1999 UTA 722 bombing¹⁷ and the 1998 attacks against U.S. embassies in East Africa¹⁸ as incidents threatening international peace and security. Indeed, before 9/11, the Security Council had labelled the presence of terrorists in Afghanistan to be such a threat and condemned the Taliban's inactivity in policing its territory.¹⁹ Following the attacks, the Council branded the situation in Afghanistan as a threat to international peace and security on multiple occasions.

There is little doubt that the Security Council could have responded to the attacks of 9/11 and the continuing presence of al-Qa'ida on Afghan territory by mandating the use of force under Article 42. However, the United States did not seek the assistance of the Security Council and no basis exists for ascribing to the U.S. such an obligation.

Instead, the United States elected to respond in individual and collective self-defence. The UN Charter provides for the right to self-defence in Article 51, which permits a defensive response to an "armed attack." The article expresses three requirements. First, the defensive response may occur only in the face of an armed attack. We shall look at that issue in a moment. Second, the Member State acting in self-defence must immediately report its actions to the Security Council. Both the United States and the United Kingdom complied with this requirement on the very day they commenced the strikes into Afghanistan. Finally, the article expresses a preference for a community response when it provides that States may act in self-defence *until* the Security Council has taken the necessary steps to restore international peace and security. In this case, the Security Council did take

steps in response to the attacks, for example, by authorizing measures necessary to suppress terrorist financing and later mandating the international security assistance force deployment to Kabul.²⁰ However, because such measures cannot completely restore peace and security, States acting in collective self-defence continue to retain the right to conduct military operations against those who committed the armed attacks of 9/11.

Although there was virtually no significant criticism of the U.S./U.K. assertion of self-defence as the normative basis for their October 7th airstrikes, it is instructive to assess them against the criteria of self-defence that were widely accepted prior to October 7th. Doing so provides a glimpse of how the concept of self-defence is evolving through international practice.

The first question is whether *terrorist* attacks may amount to an "armed attack," such that States have the right to reply in self-defence. It is instructive to recall the judgment of the International Court of Justice in the *Nicaragua* case. There the court held that acts of violence must be of a particular "scale and effects" before amounting to an armed attack (as that term is understood in the law of self-defence).²¹ The court distinguished acts by armed bands on a "significant scale" from both border incidents and the provision of assistance to rebel groups. Acts not rising to this level might constitute a prohibited use of force under Article 2(4), but not be an armed attack justifying a forceful response.

If there is an armed attack, the victim State may respond in self-defence. However, any act in self-defence must meet certain requirements set forth in the 19th century *Caroline* case, and cited approvingly by the International Court of Justice in the *Nicaragua* judgment²² and the *Nuclear Weapons* advisory opinion.²³ Pursuant to the *Caroline* standard, there must be a "necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation" and the acts must not be "unreasonable or excessive."²⁴ Over time, this standard has been construed as mandating necessity, proportionality, and immediacy.

Necessity requires that the resort to force occur only when no reasonable other options remain to frustrate continuation of the armed attack. Obviously, an armed attack that is underway fulfils the necessity criterion.

Proportionality requires that defensive responses be limited to those actions necessary to defeat the armed attack. It is sometimes wrongly argued that they must be proportional to the initial attack. This is clearly an inaccurate statement of law, for to successfully defend against an armed attack may require more force than used against the victim. Similarly, it is sometimes asserted that the victim State is limited to a response of the same nature as the armed attack or that the collateral damage and incidental injury caused by the defensive response be limited to that caused during the initial armed attack. Again, such assertions are incorrect statements of law, for the right to self-defence is limited only by the requirement that the force used not exceed that necessary to viably defend oneself.

The third criterion of self-defence is immediacy. This requirement derives from the "instant and overwhelming" verbiage of the *Caroline* standard. The customary debate over immediacy is whether it admits an anticipatory action in

self-defence. When assessing this question, it is useful to recall that two community interests underlie the right to self-defence...and the limitations thereon. In the first place, States have a valid interest in protecting themselves from wrongful attack. However, the international community has a corresponding interest in limiting uses of force, for they are disruptive to international peace and security. An appropriate balancing of these interests permits self-defence only if the potential victim has to react immediately to defend itself in a meaningful way once the potential aggressor has irrevocably committed itself to an attack. This standard combines an exhaustion of remedies with a requirement for high confidence in the imminency of a future attack. In the case of terrorism, this standard, because of the difficulty in countering it, may be met well in advance of an actual attack.

In the context of counter-terrorism operations, the more pressing issue is that of response, rather than anticipation. This is because it is extraordinarily difficult to anticipate a terrorist response and pre-emptively strike the attackers. More commonly, victim States strike back at terrorists after the terrorist act has taken place. The question to ask in such cases is whether the armed attack in question was part of an overall campaign, i.e., part of a related series of acts that will continue to unfold. Although this might seem a novel standard, in fact it is consistent with the nature of traditional armed conflict, in which hostilities occur in a series of phased engagements.

How do the October 7th strikes against al-Qa'ida and the Taliban measure up against the aforementioned criteria? First, the September 11th attacks were clearly of sufficient scale and effects to amount to an armed attack. The better query with regard to "armed attacks" is whether they can be committed, as a matter of law, by non-State actors such as terrorists. Professor Antonio Cassese has suggested that terrorism is "disrupting some crucial legal categories" in international law.²⁵ In particular, he notes that the right of self-defence had not previously been understood as applicable to attacks by non-State actors. However, a review of the Charter text would suggest the appropriateness of applicability to terrorists. Article 51 makes no mention whatsoever of the source of an armed attack. By contrast, Article 2(4) forbids the use of force by "Member states." Thus, by negative implication, it is apparent that the source of an armed attack does not bear on maturation of the right of self-defence. The fact that the post 9/11 Security Council resolutions citing the right to self-defence came when no one was suggesting that any State was involved in the attacks further supports this interpretation. That States also viewed the attacks as meriting a response in self-defence provides additional support. In other words, it is reasonable to interpret Article 51 as applying to armed attacks, regardless of the source thereof. Certainly, the politically relevant international actors seem comfortable with this interpretation.

As to necessity, in the immediate aftermath of 9/11 some opined that the appropriate response was one based in law enforcement. It is self-evident that the attacks constituted crimes. But that does not deprive a State of its right of self-defence unless law enforcement options render defensive actions unnecessary.

Self-defence would only be unnecessary if it appeared that law enforcement authorities were highly likely to apprehend those expected to continue the terrorist campaign before they could mount further attacks.

With al-Qa'ida, that was clearly not the case. The organization had been the target of a massive, and unsuccessful, law enforcement effort for an extended period, particularly after the 1998 American embassy bombings in East Africa. Moreover, it operates from scores of countries that possess differing law enforcement capabilities. Finally, on October 7th, al-Qa'ida remained headquartered in Afghan territory under Taliban control, and the Taliban showed no propensity to do anything to put a halt to al-Qa'ida activities. Therefore, law enforcement was a necessary, but not sufficient, tool in the fight against the organization.

Concerning proportionality, it would be absurd to suggest that the operations against al-Qa'ida were disproportionate. That would have required them to be excessive with regard to the degree of force necessary to put an end to the al-Qa'ida campaign. We know that is not the case, for al-Qa'ida has conducted multiple terrorist attacks since October 7th.

Finally, as to the immediacy criterion, clearly there is an ongoing campaign by al-Qa'ida against the United States. September 11th did not represent a single, isolated incident, but rather one in a series of attacks that stretched back for nearly a decade and may be expected to continue for a number of years to come.

An additional issue raised by the October 7th coalition airstrikes involves the violation of Afghan territory. Recall that Article 2(4) of the United Nations Charter prohibits the use of force against the territorial integrity of another State. Indeed, such a use of force may constitute an act of aggression.²⁶ Therefore, two conflicting rights were counter-poised on October 7th - territorial integrity and self-defence.

International law imposes a duty on States to keep their territory from being used to commit violent acts against other States. This principle appears, *inter alia*, in the *Lotus* case,²⁷ the Declaration of Friendly Relations,²⁸ the Declaration on Measures to Eliminate Terrorism,²⁹ and multiple pre-9/11 Security Council resolutions demanding that the Taliban not allow terrorists to operate from territory it controlled.³⁰ If a State cannot or will not comply with this duty, the victim may cross into its territory for the limited purpose of putting an end to the threat. It must first ask that State to resolve the matter and it must withdraw as soon as its mission is accomplished.

There have been numerous examples of States asserting this right to defensive self-help. Indeed, recall that the *Caroline* case involved precisely this issue. Rebels against the British crown were operating from the U.S. side of the border with Canada, the British asked the United States to put an end to the activities and, when the United States failed to do so, British soldiers crossed into New York to capture the *Caroline*, a vessel being used to support the rebels, set it ablaze and sent it over Niagara Falls. In ensuing dialogue between the U.S. and British governments, there was no controversy about whether crossing the border was proper. Instead, the dispute centred on whether the British actions were

excessive in the circumstances.

The facts underlying the October 7th attacks against al-Qa'ida are very similar. Terrorists were operating from Taliban-controlled Afghan territory, the Taliban were told on repeated occasions by both the United States and the Security Council to put an end to such activities, it failed to do so, and the United States and the United Kingdom launched strikes in defensive self-help. Crossing into Afghan territory in this case was an appropriate and legal action.

More problematic were the attacks against the Taliban. Recall that the Taliban had been warned by the United States in June of 2001 that if it did not put an end to al-Qa'ida activities it would be held responsible for any terrorists acts the organization committed. The United States carried out this threat on October 7th, citing the Taliban's decision "to allow the parts of Afghanistan it controls to be used by al-Qa'ida to be used as a base of operations."³¹ In fact, there were very close ties between the two organizations. Al-Qa'ida provided weapons, troops, and money to the Taliban for use against the Northern Alliance. In exchange, the Taliban provided safe haven to al-Qa'ida and free reign to do as it pleased.

When analysing the strikes against the Taliban, much discussion has surrounded the issue of State responsibility. It is incontrovertible that "every state has an obligation to not knowingly allow its territory to be used in a manner contrary to the rights of other states."³² Clearly, the Taliban breached the tenets of State responsibility by allowing its territory to be used contrary to the interests of all States who were victimized by al-Qa'ida. However, the countermeasures available to respond to breaches of State responsibility do not generally include force. Article 50 of International Law Commission's Articles on State Responsibility makes this point explicit.³³

State responsibility is a red herring. Instead, the question is whether there was an "armed attack" by the Taliban on September 11th. In other words, can al-Qa'ida's actions be attributed to the Taliban such that the Taliban have constructively committed an armed attack?

Nicaragua articulates the traditional standard of immutability. In that case, the United States argued that Nicaragua had conducted an armed attack against El Salvador through support of guerrillas. Therefore, the U.S. was entitled to come to the aid of El Salvador pursuant to the right of collective self-defence. The International Court of Justice held that an armed attack included "the sending by or on behalf of the 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 "an armed attack conducted by regular forces".³⁴ It also held that substantial involvement in such an attack met the standard, one not only articulated in the General Assembly's Definition of Aggression resolution, but also reflective of customary international law.

There is no evidence that the Taliban "sent" al-Qa'ida to attack U.S. targets on 9/11 or that it was otherwise substantially involved in the actions. On the contrary, the weight of evidence suggests that the Taliban provided al-Qa'ida the bulk of support, not vice versa. Thus, by the then existing standard of attributability,

the Taliban did not conduct an “armed attack” justifying U.S./U.K. strikes against Taliban targets in self-defence. Were they, therefore, illegal?

The striking aspect of the attacks against the Taliban is that nobody seemed to mind. This suggests a dramatic evolution in the normative expectations of the international community. Such evolution is part of the normal process of the development of international law, which continuously evolves to fit new circumstances. This phenomenon is particularly important in *international* law because of the lack of highly developed international constitutive entities and processes.

With respect to terrorism, this evolution has been remarkable. When the United States bombed Libyan targets in 1986 in response to a terrorist attack against U.S. personnel in Berlin, it was roundly condemned. However, seven years later, when the United States conducted cruise missile attacks against Iraqi intelligence facilities after uncovering a plot against George Bush, Sr., there was very little serious criticism. And when the United States responded to attacks against its embassies in East Africa in 1998 by striking targets in Afghanistan and the Sudan, there was virtually no criticism that the United States had acted; rather, the strikes against the Sudanese pharmaceutical plant (allegedly tied to the production of chemical weapons) were criticized because it was felt that the United States had acted precipitously on insufficient evidence. Finally, there was widespread support of U.S. and coalition responses to the events of 9/11.

These and other incidents signal a shift in the law of self-defence against terrorism. Permit me to summarize the direction I believe that law is headed. It would now appear clear that terrorists can conduct "armed attacks," as that term is understood in the law of self-defence. However, they must rise to a particular scale and effect before being so characterized. The nature and capabilities of the organization conducting the attack, the scale and scope of human injury and physical damage caused, the degree to which it represents part of an overall campaign, and the method or means used to conduct the attack will all bear on whether it is deemed to have acquired the requisite level of intensity.

At least for the near future, the principle of necessity will continue to require a sound basis for expecting further attacks. If it is reasonably possible to foil the attacks through law enforcement, then the necessity criterion will not be met. However, the mere fact that law enforcement operations and military operations occur in parallel has no bearing upon the necessity assessment. The proportionality principle will continue to prohibit the use of any force in excess of that necessary to put an end to the attack or the threat of imminent attack. It is important to understand that proportionality must be gauged not against individual attacks, but against the terrorist campaign *in toto*.

The principle of imminency will be met when the potential victim must immediately act to defend itself from the potential aggressor and that aggressor has irrevocably committed itself to attack. It is important to understand that imminency is not measured by the time differential between the defensive act and the moment when the armed attack was to occur. Instead, it inquires into the

extent to which the defensive action occurred during the last window of opportunity. Moreover, with regard to imminency, it is essential to ascertain whether an individual act is part of an overall campaign. If it is, then there is no question of imminency because the campaign is ongoing.

As to crossing into another State in self-defence, such steps are appropriate if the State from which the terrorists operate does not put an end to their wrongful activities. A request to remedy that situation must precede any non-consensual intrusion and any forces penetrating the territory must withdraw as soon as their mission is complete.

The area of greatest deviation involves self-defence against a State sponsor of terrorism. Previously, a high degree of control over the attack and attackers was necessary to attribute an armed attack by a non-State actor to a State. However, the *Nicaragua* holding is badly out of step with the times, illogical in the current geo-political context. Although it is hard to enunciate a black-letter standard, certain factors will play a significant part in the case-by-case assessment of strikes against State sponsors. Foremost among these will be the extent to which the State sponsors have been warned, who has issued the warning, the dangerousness of the terrorist group in question, the severity of the terrorist attacks that have been conducted or are "threatened", the nature of the relationship between the terrorist and the State sponsor, and the extent to which the State in question is deemed as law abiding.

Finally, the experience with the 1998 strikes into Afghanistan and the Sudan inform us that the international community's assessments of lawfulness will depend heavily on the quality of evidence adduced to them. This lesson has not been lost on the United States, which briefed the North Atlantic Council, the United Nations Security Council, and important allies on the nature of the evidence it possessed *vis-à-vis* al-Qa'ida and Taliban culpability before it acted. In the future, the international community will require clear and compelling "evidence of culpability" in terrorist attacks before a State may conduct counter-terrorist operations involving the use of force. This was the standard suggested in the U.S. notification to the Security Council and the standard used to describe the evidence presented to the North Atlantic Council.

In conclusion, it would appear that we are witnessing the emergence of new understandings of international law regarding the use of force in response to terrorism. It is important to understand that this is not new law as much as it is new interpretation in light of changed circumstances. Obviously, there are dangers in lowering the threshold for using force in defence against terrorists and their State sponsors. States will inevitably abuse liberalized standards. Nevertheless, the trend is generally positive in light of the present global security environment.

¹ UK Press Release, "*Responsibility for the Terrorist Atrocities in the United States*", 10 Downing Street Newsroom, Oct. 4 2001, <http://www.number10.gov.uk/news.asp?NewsId=2686>.

² UN Charter Art. 51. "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the

Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.”

³ “*Letter from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council*”, (Oct. 7, 2001), UN Doc. S/2001/ <http://www.un.int/usa/s-2001-946.htm> [hereinafter “*US Letter*”].

⁴ *Id.*

⁵ S.C. Res. 1368, Pmbl. (Sept. 12, 2001).

⁶ S.C. Res. 1373, Pmbl. (Sept. 28, 2001).

⁷ See S.C. Res. 1378 (Nov. 14, 2001); S.C. Res. 1383 (Dec. 6, 2001); S.C. Res. 1386 (Dec. 20, 2001); S.C. Res. 1390 (Jan. 20, 2002).

⁸ Lord ROBERTSON, NATO Secretary General, “*Statement at NATO Headquarters*”, Oct. 2, 2001, <http://www.nato.int/docu/speech/2001/s011002a.htm>, <http://www.nato.int/docu/speech/2001/s011002a.htm>.

⁹ “*Terrorist Threat to the Americas*”, Res. 1, Twenty-Fourth Meeting of Consultation of Ministers of Foreign Affairs Acting as Organ of Consultation In Application of the Inter-American Treaty of Reciprocal Assistance, OEA/Ser.F/II.24, RC.24/RES.1/01 (Sept. 21, 2001).

¹⁰ Prime Minister John HOWARD, “*Government Invokes ANZUS Treaty*”, Press Conference, Sept. 14, 2001, <http://australianpolitics.com.au/foreign/anzus/01-09-14anzus-invoked.shtml>.

¹¹ White House, *Fact Sheet: Operation Enduring Freedom Overview*, Oct. 1, 2001, <http://www.state.gov/s/ct/rls/fs/2001/5194.htm>. For a general description of events, see S.D. MURPHY, “*Terrorism and the Concept of ‘Armed Attack’ in Article 51 of the U.N. Charter*”, 43 *Harv. Int’l L.J.* 41, 2002; S.D. MURPHY, “*Contemporary Practice of the United States Relating to International Law*”, 96 *Am. J. Int’l L.* 237, 2002.

¹² MURPHY, “*Contemporary Practice*”, *supra*, p.248.

¹³ UN Charter Art. 2(4). “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”

¹⁴ UN Charter Art. 39. “The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.”

¹⁵ UN Charter Art. 42. “Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.”

¹⁶ S.C. Res. 731 (Jan. 21, 1992).

¹⁷ *Id.*

¹⁸ S.C. Res. 1189 (Aug. 13, 1998).

¹⁹ See, e.g., S.C. Res. 1267 (Oct. 15, 1999).

²⁰ S.C. Res. 1373 (Sept. 28, 2001); S.C. Res. 1386 (Dec. 20, 2001).

²¹ “*Military and Paramilitary Activities in and against Nicaragua*” (Merits), [1986] I.C.J. Rep., para. 195 [hereinafter “*Nicaragua Case*”].

²² *I d.*, para. 176.

²³ “*Legality of the Threat or Use of Nuclear Weapons*” (Advisory Opinion), [1996] I.C.J. Rep. para. 41.

²⁴ Letter from Daniel WEBSTER to Lord ASHBURTON (Aug. 6, 1842), 29 Brit. & Foreign State Papers 1129, 1138 (1840-1).

²⁵ A. CASSESE, “*Terrorism is also Disrupting Some Crucial Legal Categories of International Law*”, Eur. J. Int’l L. Discussion F., http://www.ejil.org/forum_WTC/ny-cassese.html.

²⁶ “*Definition of Aggression*”, annex, Art. 1, G.A. Res. 3314 (XXIX), UN GAOR, 29th Sess., Supp. No. 31, at 142, UN Doc. A/9631 (1975), 13 *I.L.M.* 710 (1974).

²⁷ The “*S.S. Lotus*” case (1927), (Ser. A/10) 4, 88 (MOORE, J., dissenting).

²⁸ “*Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations*”, G.A. Res. 2625 (XXV), U.N. GAOR, 25th Sess., annex, U.N. Doc. A/Res/2625 (1970), reprinted in 65 *Am. J. Int’l L.* 243 (1971).

²⁹ “*Declaration on Measures to Eliminate International Terrorism*”, G.A. Res. 49/60, U.N. GAOR 6th Comm., 49th Sess., 84th plen. mtg., U.N. Doc. A/49/743 (1994); “*Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism*”, G.A. Res. 51/210, U.N. GAOR 6th Comm., 51st Sess., 88th plen. mtg., U.N. Doc. A/51/631 (1996).

³⁰ See, e.g., S.C. Res. 1267 (Oct. 15, 1999); S.C. Res. 1363 (July 30, 2001); S.C. Res. 1368 (Sept. 12, 2001); S.C. Res. 1373 (Sept. 28, 2001).

³¹ “*U.S. Letter*”, *supra* note 51.

³² “*Corfu Channel*” case (Merits), [1949] I.C.J. Rep. 4, 22.

³³ J. CRAWFORD, “*The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries*”, text of Art. 50 (2002).

³⁴ “*Nicaragua Case*”, *supra* note 69, para. 195.

THE COMPLEMENTARY NATURE OF HUMAN RIGHTS LAW, INTERNATIONAL HUMANITARIAN LAW AND REFUGEE LAW

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Terrorism negates the most fundamental principles of humanity, which underlie international humanitarian law (IHL), human rights and refugee law. The challenge it poses is obvious and immediate and the response of IHL is something to which I will turn in a minute. Tragically, this challenge is nothing new. Terrorism is a scourge to which the international community has been striving to respond for decades. But I wonder whether we would be having this meeting at all if there had not been a new element to this debate. What is new is the challenge posed to international law - our three bodies of law, but also the rules on the use of force - by the recent response of the international community to terrorist acts.

In the past months, IHL has come under an important challenge, both in terms of violations and of rhetoric. I do not propose to discuss the actual violations that may have been committed. Instead, I wish to focus on the rhetorical challenge to which IHL has been subjected.

Paradoxically, perhaps, a denial of the application and relevance of the law is much more damaging to a body of law than its violation. This damage is not just an abstract concern for lawyers. Undermining the law in this manner is an unfortunate precedent that can very easily lead to its violation in practice in the future. We are thus also witnessing a second challenge to international law - that posed by the response to terrorism.

A. Terrorism - The challenge of terrorism to IHL

I will start with the more traditional aspect of the problem - the challenge which terrorism itself poses to IHL. I am fortunate that Hans-Peter Gasser, formerly senior legal adviser at the ICRC, is here with us today and will be able to complement my presentation.

1. Application of IHL

First, it is useful to offer a few words about the scope of the application of IHL. This law applies in armed conflict - be it international or non-international. Hence, acts of terrorism that are committed in times of peace, although they violate the humanitarian principles that underlie IHL and which are applicable *a fortiori* in times of peace, are not addressed by IHL.

Although this seems simple enough, there is immediately a complication. When does an armed conflict exist? While the position may be simple enough for international armed conflict - IHL is applicable to any use of force - the state of affairs is more complex with regard to non-international armed conflicts.

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Hostilities must factually reach the application threshold of IHL, i.e., protracted armed violence between the government and an organised armed group or between such groups. This of itself raises the issue of the law that is applicable in situations of unrest falling short of this threshold, human rights law, and national law. However, even where the threshold is met, one is often faced with a denial by the State involved of the existence of a conflict and the consequent denial of the application of IHL. “This isn’t a conflict. This is ... terrorism!”

An initial challenge is persuading parties that - whatever the tactics adopted - a particular situation amounts to an armed conflict in which IHL applies. Both parties must respect its provisions, even during responses to “terrorism.” In particular, certain protections must be granted to captured fighters.

A point which must be emphasised - and which will be my mantra today - is that this application of IHL will not amount to impunity for those who have committed these so-called terrorist acts. It is very probable that most of the terrorist acts in question violate IHL and are thus subject to its measures of repression.

2. *The “acts of terror”*

Let us now turn to the acts of terror themselves. If I had to identify the two cornerstones of IHL, these would be the principle of distinction and the prohibition of attacks on civilians. Since violations of these two rules are the cornerstone of terrorism, it is obviously a threat to IHL.

If these acts are committed in times of armed conflict, what does IHL say about, and how does it respond to, them? In answering this, I have to confess that I take the path of least resistance. In my view, IHL adopts a very categorical and very simple approach. Without going down the thorny road of attempting to find a definition for terrorism - which IHL does not contain - IHL lays down categorical prohibitions of the acts which form the very essence of terrorism. In particular, it prohibits:

- attacks against civilians;
- indiscriminate attacks;
- the taking of hostages;
- murder;
- attacks on places of worship; and
- attacks on installations containing dangerous forces.

Furthermore, all the basic minimum prohibitions laid down in Common Article 3 of the Geneva Conventions apply to acts of terrorism in non-international armed conflict.

So, what is the response of IHL? First, it prohibits those acts that are commonly considered terrorism. Second, most of these acts are in fact grave breaches of the Geneva Conventions and war crimes; thus, the stringent rules of IHL regarding their repression apply. These are much more developed and binding (as they form part of customary law) than the rules on repression found in the various international treaties on terrorism. In particular, States are under an obligation to prosecute or extradite persons accused of these offences, if necessary,

due to the existence of universal jurisdiction. Moreover, in terms of mechanisms for such repression, there are both national courts and international tribunals, specifically the two *ad hoc* tribunals and the International Criminal Court (ICC).

A brief mention with regard to the ICC is merited. The ICC currently does not have jurisdiction over acts of terrorism as a distinct category of international crime, although discussions on their inclusion are foreseen for a review conference. So, if committed in times of peace, acts of terrorism can only be brought under the Court's jurisdiction as crimes against humanity. But then they must meet the crimes against humanity requirement that the acts be committed as part of a widespread or systematic attack directed against a civilian population. However, if committed in time of armed conflict, as we have just seen, the very same acts would constitute war crimes and therefore fall within ICC jurisdiction.

3. *Additional prohibitions under IHL*

For the sake of completeness, I must mention two more prohibitions under IHL. The first prohibits acts aimed at spreading terror among the civilian population. Found in both Additional Protocols [Article 51(2) of Additional Protocol I (AP I) and Article 13(2) of Additional Protocol II (AP II)], it specifically contains the word "terror." But what exactly does it mean, for armed conflict, by its very nature, spreads terror among the civilian population?

The prohibitions cover acts of violence whose primary purpose is to spread terror among civilians without offering substantial military advantage - for example, the aerial carpet-bombing of cities during the Second World War designed to undermine morale. Attacks on lawful military targets in civilian areas may well cause terror, but would not fall foul of this prohibition because they result in a military advantage.

Interestingly, this provision has been recently examined on two occasions by the International Criminal Tribunal for the former Yugoslavia (ICTY), thereby providing some insight into what acts are covered. The mere fact the prohibition is being considered by ICTY is interesting in and of itself, as violations of this provision are not war crimes under AP I nor the Statute of the ICC.

In its review of the indictment in the *Martić* case, the ICTY considered the cluster bomb attacks on the city of Zagreb. It found that the use of the rockets was not intended to hit military targets, but rather to terrorise the population of Zagreb in violation of the prohibition. The prohibition was also invoked in the *Galić* indictment in relation to the campaign of shelling and sniping against the civilian population in Sarajevo.

Finally, I turn to the one provision of IHL that specifically mentions "terrorism." I have kept it for last because although it uses the word, it provides no definition and, in my view, covers acts that are not quite acts of terrorism as that term is commonly understood. That said, some argue that they are in fact acts of State terrorism.

Article 33 of Geneva Convention IV and Article 4(2) of AP II expressly prohibit terrorism. However, nowhere is a definition provided for this "terrorism."

Moreover, if one looks at the location of these provisions in the instruments, they are among the rules relating to individual responsibility and the prohibition on collective penalties. The *Commentaries* support the view that, rather than covering acts of terrorism as commonly understood, these measures aim to prohibit acts during past conflicts where a belligerent attacked civilians in order to forestall breaches of the law.

4. Conclusion: Response of IHL to terrorism

Regardless of how one interprets this latter express prohibition on terrorism, the other prohibitions are of direct relevance to acts that amount to terrorism as commonly understood, and their violation brings into play IHL's strict obligations to repress violations. But before I move to the next issue, and despite having said how happy I was to steer well clear of having to define terrorism, I will share with you one suggested definition which I find quite compelling and which highlights the interface with IHL. It was suggested by Marco Sassoli: terrorist acts are those acts that would be unlawful even if committed by parties to an armed conflict.

B. Terrorism - The challenge posed by the international community's response to terrorism

Let us turn now to the second challenge to IHL, that posed by the international community's response to terrorism.

1. International conventions for the prevention and punishment of terrorism

First, at a legal level, a number of conventions exist to prevent and punish terrorism. The General Assembly is currently negotiating the text of a comprehensive convention. Why are these a challenge to IHL?

This question takes me back to my first point about non-international armed conflicts and IHL. There are certain acts of warfare that are not prohibited by IHL - attacks against military targets, such as barracks or military personnel - which are often nonetheless labelled as terrorism by the State against which they are committed. This is much more likely to occur in non-international armed conflicts.

In practical terms, the fact these acts are not a violation of IHL is probably of little relevance in the State experiencing the armed conflict because mere participation in the hostilities is likely to be a criminal offence. (Query whether labelling such acts as "terrorist" in nature dissuades the person or group committing them from even attempting to comply with IHL because regardless of whether it respects the IHL prohibition or not it is still condemned).

How does this relate to the terrorism conventions? The relationship between terrorism and lawful and unlawful acts under IHL must be properly articulated in the convention. A risk exists that acts that are not unlawful under IHL might nevertheless be included in the definition of the offences falling within the scope of a particular convention. The very practical consequence of this would be that Third States would be under an obligation to prosecute or extradite persons who have not in fact committed an unlawful act under IHL.

Many of us here today faced this very problem in the recent negotiations for the Comprehensive Convention. This problem can be avoided by carefully drafting the crimes covered by the Convention to avoid including acts that are not unlawful under IHL in situations of armed conflict. Another approach is to include a safeguard clause excluding acts covered by IHL - i.e., committed in the course of an armed conflict - from the scope of the Convention. Of course, care must be taken when drafting such safeguard clauses to ensure the exclusion of acts committed in either international or non-international armed conflict. Similarly, if the exclusion clause uses the term “armed forces,” it must be made clear this covers the forces of government *and* organised armed groups. Obviously, excluding acts covered by IHL from the scope of the terrorism conventions does not grant impunity to those who commit them. It merely regulates the applicable body of law. The repression provisions of IHL would address violations of that body of law.

A proper articulation between instruments for the punishment of terrorism and IHL is extremely important, but it is by no means a new development and I am not sure I would call it a challenge to IHL. Instead, it is just something for which to keep an eye open.

2. Assertions that IHL is inadequate or not applicable to the “war against terror”

What is new and what is definitely a challenge are the allegations made in recent months that IHL is not appropriate or adequate to deal with the “war against terror.” I sometimes wonder if these allegations would have been made if a different term had been adopted instead of the *war* against terror, reserving the term “war” for the point when the struggle or fight against terror actually took the form of an armed conflict.

The struggle against terror can take different forms. These forms include judicial co-operation and punishment of those responsible for acts of terrorism; freezing of assets used to finance terrorism; and, as in the wake of the attacks of 11 September - armed conflict.

When the struggle takes the form of an armed conflict, the position is uncontroversial: IHL is applicable. Factually, if an armed conflict exists, whatever the causes, whatever the aim, whatever the name, IHL is applicable. And when I say “applicable,” I mean applicable in its entirety - the rules regulating the actual conduct of hostilities and the rules protecting captured combatants. It is not possible to pick and choose which of the rules are applicable.

I do not propose to go into questions of the status and rights of persons captured in the course of hostilities in any detail now, other than to make a few basic points:

First, these persons cannot exist in a legal vacuum. If captured in the context of hostilities, they are protected by IHL, either under the Third or Fourth Geneva Convention, or, failing all else, under Article 75 of AP I, which is accepted as reflecting customary law.

And this is just when speaking of the protection afforded by IHL. As the title of our meeting indicates, there is complementary protection from human rights law, as well as national law. A legal vacuum cannot exist.

The protection afforded to these persons by IHL does not amount to impunity from persecution. Captured persons can be brought to justice both for violations of IHL committed during the hostilities and any prior involvement in terrorist acts.

When prosecuted, these individuals are entitled to certain fundamental rights. Again, these are found in the complementary norms of IHL, human rights law, and national law. These rights cannot be taken away.

Finally, the law is applicable as a matter of obligation and not as a gesture of courtesy. The rules of IHL as a whole are binding and it is not possible to pick and choose those to apply.

IHL is thus applicable to the “war against terrorism” when it is fought by means of armed conflict. However, as indicated, this struggle can take other different forms. IHL is not relevant to those approaches and does not purport to be. That does not make IHL inadequate. It is merely inapplicable.

3. Assertions that IHL is outdated

The second allegation that has been raised is that IHL is outdated or inadequate. Even assuming this claim in the context of a “war against terror” fought by means of armed conflict, we have not found a single indication that the law is inadequate or outdated. It is therefore difficult to respond to these assertions. I would be interested to hear from you if there are any specific examples of how IHL is outdated.

Terrorism involving non-State actors is an eventuality that has long been foreseen by IHL. If the struggle against terror takes the form of an armed conflict against a non-State actor, the rules of Additional Protocol II and Common Article 3 to the Geneva Conventions apply. The fact that terrorist groups may not have a territorial base does not pose a problem. Common Article 3 of the Geneva Conventions would regulate the hostilities, for it contains no territorial requirement.

C. Ius ad bellum

While it is not expressly mentioned in our programme, there is another body of law that has recently come under challenge: the rules regulating the use of force. Although it has not come under attack by rhetoric, this is the body of law placed under possibly the greatest strain in practice.

I am thinking in particular of the interpretation of the right to self-defence, specifically the notion that an armed attack gives rise to this right, as well as application of the limits on it, such as necessity and proportionality. In terms of being outdated, it is probably this body of law that sits most uncomfortably with modern reality. The rules relating to the use of force regulate relations between States. They do not take into account the possibility that a State may be the victim of an armed attack by a non-State actor that is acting wholly independent of any

State; nor do they regulate the response to such an attack.

It is not for the ICRC to comment on the rules regarding the use of force, either abstractly or as to their specific application in any particular case. Regardless of the lawfulness of the attacked State's response, if it takes the form of military action, IHL regulates that response.

TERRORISM, COUNTER-TERRORISM AND THE JUS IN BELLO

Avril McDONALD^(*)

I. INTRODUCTION

The September 11 2001 attacks by Al Qaeda operatives¹ on the Twin Towers and the Pentagon² were the most devastating acts of terrorism ever perpetrated on U.S. soil. The U.S. response was swift. President George Bush declared a “global war on terror,” led by the United States but supported by many States with varying roles.

The consequences for international law and the international polity of both the actual and perceived terrorist threat, and the response of the United States and other States, are already far-reaching, and the medium and long-term effects on the fragile edifice that is international law, on the concepts and institutions of global governance and the international community, remain unpredictable. Early indicators are worrying. The September 11 terrorist attacks and the events that have followed in their aftermath have accentuated the exceptionalist tendencies that have long characterised U.S. foreign policy. They have not only provided the U.S. administration with a political and legal context and cover (at the very least, a state of emergency) for its preexisting rejection of multilateralism, but also weakened the institutions of global governance and security to the extent that their very existence and *raison d'être* have been called into question.

The rejection of multilateralism, while it does not completely support and affirm U.S. foreign and domestic policy, affects every branch of international law. It is not just a question of rejecting new attempts at international law making, of improving the law we have; it is more worryingly either a rejection of preexisting legal norms (in fact, the rule of international law) where they do not dovetail with or further U.S. policy aims or a denial of their applicability in particular cases, resulting in a pick n'mix approach to international law.

This contribution takes a brief look at some *jus in bello* aspects of the September 11 Al Qaeda terrorist attacks and the threat from international terrorists generally, as well as the U.S. response to those attacks and threat, and addresses how the clear meaning ascribed to certain aspects of the *jus in bello* has been called into question.

The legal qualification of the Al Qaeda attacks of September 11 and the terrorist threat in general reveals a confusion or blurring of *jus ad bellum* and *jus in bello*, and well as between *jus ad bellum*, *jus in bello*, and other rules of international law. The response of the U.S. and its allies - the global war on terror

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- is equally muddled from the legal perspective. Counter-terrorism has been assimilated with armed conflict. Where actually applicable, the laws of armed conflict have not been fully *or properly* applied.

If we listen closely to the language from the Pentagon and Whitehall, what we are hearing from these quarters is that the global war on terror is a war to which international humanitarian law could apply. Indeed, part of international humanitarian law might usefully be applied (even where there is no actual armed conflict) - those parts, that is, that further the interests of those fighting the “war”. The parts that do not “fit” can, however, be ignored. And the fact that they do not fit only proves their irrelevance and unsuitability to this new form of warfare. There is also a growing sense that the “war on terror” is a unique challenge, which cannot be faced in the normal way. To the extent that it is a war in the normal, or even new, sense, there is a feeling that in a war this challenging, international humanitarian law may be a luxury that cannot be afforded, or at least, the principles may be conceded, but the detailed rules need not be applied. And why should the “party” with “right on its side” have to observe the law anyway when faced with a cunning, ruthless and entirely unscrupulous enemy which has clearly no intention of observing the law? By being legally obliged to observe international legal standards, the U.S. and its allies are increasingly seeing themselves as penalized and as having to fight the war with an unfair *disadvantage*. The grumbings of having to fight this “war” with one hand tied before one’s back are becoming louder,³ as are the arguments that since this is a “just war” the ends (winning it) are more important than the means (how).

2. CHARACTERISATION OF THE AL QAEDA THREAT AND THE U.S. RESPONSE

2.1 *The Al Qaeda Attacks of September 11, 2001*

2.1.1 *An armed attack and an international armed conflict*

The U.S. has taken the view that the hijacking of airplanes by Al Qaeda operatives and crashing them into the Twin Towers and the Pentagon constituted an armed attack by Al Qaeda on the United States, and that this armed attack was on such a scale as to constitute an international armed conflict. Addressing Congress on 20 September 2001, President Bush said: “On September 11th, enemies of freedom committed an act of war against our country.”²⁴ In a similar vein, the U.S. War Crimes Ambassador, Pierre Prosper, has said: “These aggressors initiated a war that under international law they had no legal right to wage And their conduct, in intentionally targeting and killing civilians in a time of international armed conflict, constitutes war crimes.”²⁵

The U.S. Military Order of November 13, 2001, establishing military commissions to try persons detained on the battlefield in Afghanistan as well as elsewhere,⁶ also characterises the attacks by Al Qaeda *et al* on U.S. diplomatic

and military personnel as being an armed conflict. Specially, Section 1 states:

“International terrorists, including members of al Qaida, have carried out attacks on United States diplomatic and military personnel and facilities abroad and on citizens and property within the United States on a scale that has created a state of armed conflict that requires the use of the United States Armed Forces.”

However, the Order later goes on to describe the September 11 attacks as “grave acts of terrorism and threats of terrorism.” The Order also states, at Section 1 (e) that it is “necessary for individuals subject to this order pursuant to Section 2 hereof to be detained, and, when tried, to be tried for violations of the laws of war and other applicable laws by military tribunals.”

It is interesting that Section 1 of the order refers not only to members of Al Qaeda, but also to other terrorists, and does not differentiate between them for the purposes of the provision. This approach begs several questions, including whether all the separate terrorist and Al Qaeda attacks committed all over the world are somehow linked and together constitute a single continuing armed attack, thereby justifying a continuing global use of armed force, or whether there are several armed attacks, one occurring each time there is a terrorist attack of a certain scale. Does each terrorist attack, even by non-Al Qaeda members, against U.S. interests constitute a separate armed attack amounting to an armed conflict, each one, in U.S. eyes, justifying the use of armed force in response? By characterising terrorist attacks on U.S. targets as armed attacks (actually, as the undeclared initiation of international armed conflict), the U.S. is recognising in Al Qaeda and other terrorist organisations a higher legal status than they actually possess under international law, and serving to give them legitimacy.

The language of the UN Security Council, in its Resolution 1368 adopted on 12 September 2001, is rather ambiguous and leaves some questions about how the Council legally characterised the attacks of September 11.

Resolution 1368 condemned the September 11 attacks, and referred to them as “horrificing terrorist attacks” which were “like any act of international terrorism, a threat to international peace and security.”⁷⁷ It is interesting that the Council considered that a terrorist attack, not being an attack by a State, could constitute a threat to international peace and security. More significant is the fact that the resolution affirmed the inherent right to individual or collective self-defence and the need to combat by any means the threats to international peace and security caused by the terrorist attacks. Since the general view has always been that only armed attacks by a State trigger the right of self-defence, does this mean that the Council was now recognising that attacks by terrorist groups are also armed attacks which trigger the right of self-defence? Are the *jus ad bellum* rules now also applicable to armed attacks by non-State actors? If so, this would be a clear and rare example of a so-called instant custom.

The response of the General Assembly further clouds the legal characterisation of the attacks. It condemned them as “heinous acts of terrorism,”

but did not describe them as attacks or invoke the right of self-defence in response.⁸

NATO's North Atlantic Council, in its response to the September 11 attacks, also characterised them as an armed attack. It invoked Article 5 of the Washington Treaty,⁹ which provides that "an armed attack against one or more of the Allies in Europe or North America shall be considered an armed attack against them all." The NATO Council also stated clearly that it considered that the September 11 attacks were armed attacks within the meaning of Article 5.¹⁰

As this writer has pointed out elsewhere, according to international law, at least as it stood on 10 September 2001, as a non-State, Al Qaeda could not be considered legally competent to declare war on a State, so the attacks of September 11 could not have initiated an international armed conflict.¹¹ According to common Article 2 of the 1949 Geneva Conventions, the least that is required for an international armed conflict is two States.¹² Moreover, under the UN Charter, only States are legally entitled to resort to force against other States, and even then, under very restricted conditions. Al Qaeda is therefore simply not competent to launch an armed attack on a State within the meaning of the UN Charter. We have not yet reached the point in international law where armed groups or terrorists enjoy equal status with States. Characterising the Al Qaeda terrorists attacks as an international armed conflict also gives at least the attacks on the Pentagon some legitimacy. As the headquarters of the U.S. armed forces, it can certainly be considered as a military objective. If this was an armed conflict, then the Al Qaeda attack on the Pentagon could be legal.

The only circumstance in which the Al Qaeda attacks could be considered as an armed attack, initiating an international armed conflict on 11 September 2001, is if Al Qaeda could be considered as having acted on behalf of a State. While the U.S. response to the attack by Al Qaeda included an armed attack on a State—Afghanistan—on 7 October 2001, the U.S. did not attack Afghanistan because it considered it to be legally the author of, and responsible for, the September 11 attacks. Instead, it attacked Afghanistan because Afghanistan was harbouring Osama bin Laden and Al Qaeda members and training camps, and providing support to Al Qaeda.¹³ Moreover, Afghanistan had resisted U.S. demands to hand over Bin Laden and other Al Qaeda leaders present on Afghan territory and dismantle the training camps,¹⁴ saying that it first needed to see proof of Bin Laden's involvement in the attacks on the United States.¹⁵ It has not yet been shown that Afghanistan is legally responsible for the September 11 attacks. If it could be, then the Al Qaeda attacks could be considered as attacks by Afghanistan, and therefore an attack by a State that initiated an international armed conflict.

2.1.2 A non-international armed conflict

Could the Al Qaeda attacks be characterised as non-international armed conflict? The attacks were after all launched from within U.S. territory, so there was no breach of U.S. sovereignty. They could certainly not be considered as a non-international armed conflict within the meaning of 1977 Additional Protocol II

of the Geneva Conventions, which, according to Article 2(1) applies only to conflicts “which take place in the territory of a High Contracting Party between its armed forces and dissident armed groups or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.”

In this case, there was no control over territory by Al Qaeda and certainly no willingness to implement the Protocol. Al Qaeda may function under an organized and responsible command, but it is not a command structure of a type contemplated by the Protocol. In any event, Article 4(2)(d) of Protocol II explicitly prohibits acts of terrorism during non-international armed conflicts.

What about common Article 3? The provision provides no definition of a non-international armed conflict. It simply states that it applies in “case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties.” The U.S. is a High Contracting Party to the four Geneva Conventions, and the attack occurred on its territory. While precisely because common Article 3 is so vague, and because it is the residual provision, it is interpreted to apply to all situations that can be considered as constituting armed conflicts. Can the Al Qaeda attacks be considered as an act of war committed during a common Article 3 conflict? The ICRC Commentary on common Article 3 notes that the question of what constitutes an armed conflict not of an international character:

“was the burning question which arose again and again at the Diplomatic Conference. The expression was so general, so vague, that many of the delegates feared that it might be taken to cover any act committed by force of arms—any act of anarchy, rebellion, or even plain banditry.”¹⁶

While the delegates shied away from defining conflict, they did discuss certain criteria that could be considered as relevant. These are set out in the Commentary, and as it notes, they “are useful as a means of distinguishing genuine armed conflict from a mere act of banditry or an unorganized and short-lived insurrection.” However, the Commentary goes on to state that:

“it must be recognized that the conflicts referred to in Article 3 are armed conflicts, with armed forces on either side engaged in hostilities—conflicts, in short, which are in many respects similar to an international war, but take place within the confines of a single country. In many cases, each of the Parties is in possession of a portion of the national territory, and there is often some sort of front.”¹⁷

It is obvious that by no stretch of the imagination can one construe the Al Qaeda attacks of September 11 as an armed conflict within the meaning set out in

the Commentary to common Article 3. Perhaps if we reach the point where Al Qaeda has actually formed militia or organised armed forces (combatants) within U.S. territory, and engages the U.S. armed forces in military battle, then we can speak of a non-international armed conflict between Al Qaeda and the U.S. But in that case, Al Qaeda would also have to satisfy at least some of the other criteria set out in the Commentary for distinguishing genuine armed conflict from banditry, or terrorism, for that matter.

The plain fact of the matter is that the Al Qaeda attacks of September 11 are not an armed attack within the meaning of the UN Charter or an armed conflict, international or non-international, within the meaning of international humanitarian law. They are simply an international crime. The attacks can be considered as a breach of various international conventions against terrorism, as a crime against humanity, or as an act of piracy. Since the September 11 attacks were not carried out during an armed conflict, they cannot be considered war crimes.

2.2 Characterisation of the Al Qaeda Terrorist Threat Generally

Since the threat posed by terrorists, particularly by terrorists with access to weapons of mass destruction, is genuine, rather than folding all terrorist attacks by Al Qaeda and other terrorists into the category of armed attack, possibly requiring the use of armed force, it may be more helpful to unpack the terrorist threat. Clearly, Al Qaeda is not the only terrorist organization in the world. While many terrorist organizations have the United States and its allies in their sights, many are pursuing completely different agendas, not affecting U.S. interests. Do such terrorist attacks, as, for example, the detonation of a bomb by ETA or the FARC, now also constitute armed attacks and armed conflicts under this new interpretation of international law? The British Government never recognized the situation in Northern Ireland as an armed conflict precisely because it did not want to recognize in the IRA any international legal status. One of the problems with the war on terror is that it remains unclear who the enemy is. Nor will it ever become completely clear, because new threats can emerge at any time, and many threats remain simply unknown. If there is a global war on terror, is there also a global war *of* terror? Have terrorists the world over been transformed into unwitting co-conspirators?

It seems clear that it is ridiculous to characterize what is obviously international criminality, committed for the most part in peacetime, as armed attacks or armed conflict. Al Qaeda and other terrorist organizations must be defeated for the most part by detection (good intelligence) and by prosecution, among other techniques. This can be (and is being) achieved successfully for the most part under domestic criminal legislation. It may be necessary to set new standards to fight terrorism at the international level, for example, by the adoption of a new Comprehensive Convention on Terrorism, and by better enforcement of the existing international law on terrorism. Amendment of the ICC Statute to include a provision giving the court jurisdiction to prosecute international terrorists would be another possibility.

2.3 *The Legal Nature of the Global War on Terror*

The description of this global campaign to fight terrorism (with the avowed and serious intention of extinguishing it) as a “war on terror” is no mere rhetorical flourish,¹⁸ although it is more propagandist than normative.¹⁹ It reflects the sense in both the Pentagon and Whitehall, *inter alia*, that this is truly a war. In a statement to the House of Commons on 15 October 2002, British Prime Minister Tony Blair said: “The War on Terror is a war, but of a different sort than the ones we’ve been used to.” It is war in the sense that the United States believes itself to be fighting for its very survival, and perceives the terrorist threat as potentially apocalyptic.

Since the language and imagery of war is drawn upon by politicians and military persons alike, an obvious question is, is this a war to which the laws of war apply, that is, international humanitarian law as contained in the Geneva Conventions and other relevant instruments? The answer may seem equally obvious: the “war on terror” may well at times and in different places assume the characteristics of an armed conflict as understood by the laws of war. For example, the phase of the war on terror that saw the U.S. attack Afghanistan, which it considered to be harbouring Al Qaeda operatives, was clearly an international armed conflict. If the U.S. attacks against Iraq can be considered as the most recent phase in the war on terror (and clearly Saddam Hussein’s alleged possession of weapons of mass destruction, and the links to Al Qaeda ascribed to him, albeit in the absence of any evidence, was used by the Bush administration to link the attack to the war on terror), then this too is clearly an aspect of the war on terror which fits within the framework of the laws of war and which we can clearly understand as being an international armed conflict, involving *at least* two States. Equally obviously, there are strands of the war on terror, such as counter-intelligence operations, which can hardly be described as being an armed conflict, in the sense that is generally understood. They are more in the way of law enforcement operations. One might therefore take the initial view that the use of the term “war” to describe coordinated global counter-terrorist measures is misleading, and that while avowedly counter-terrorist actions may be taken by one or more States which assume the characteristics of armed conflict, the laws of war do not generally apply to the “war on terrorism,” unless it assumes the clear characteristics of armed conflict. Some commentators take a different view, however. Judge George Aldrich believes that there is an armed conflict with Al Qaeda, which is not limited to the territory of one State.²⁰ However, it is difficult to agree that this is an armed conflict within the meaning of international humanitarian law.

2.4 *The Legal Character of the U.S. Actions Against Afghanistan and Iraq*

Since the *jus ad bellum* aspects of the war against Afghanistan are treated elsewhere in this book, they are not discussed herein. Suffice to note that in launching the strikes, the U.S. informed the UN Security Council that it was acting in accordance with its “inherent right of individual and collective self-defence following the armed attacks that were carried out against the United States on 11

September 2001.”²¹ In declaring the U.S.’s intention to use force against Afghanistan for its support of Al Qaeda, President Bush stated:

“The attacks on 11 September 2001 and the ongoing threat to the United States and its nationals posed by the Al-Qaeda organization have been made possible by the decision of the Taliban regime to allow the parts of Afghanistan that it controls to be used by this organization as a base of operation. Despite every effort by the United States and the international community, the Taliban regime has refused to change its policy. From the territory of Afghanistan, the Al-Qaeda organization continues to train and support agents of terror who attack innocent people throughout the world and target United States nationals and interests in the United States and abroad.”²²

He further noted that the United States “may find that our self-defence requires further actions with respect to other organizations and other States.”²³ As Byers has pointed out, the fact that the U.S. relied solely on self-defence as a legal basis for the strikes does not mean that other possible legal basis are excluded: “There were . . . at least four possible legal justifications for the use of force against Afghanistan: Chapter VII of the UN Charter, intervention by invitation, humanitarian intervention and self-defence.”²⁴

While in launching the strikes, the main target of the U.S. may have been Al Qaeda, doubtless the use of force initiated an international armed conflict between the U.S. *et al* and Afghanistan. One can ask whether there was just an international armed conflict or an international armed conflict alongside an internal armed conflict between the Taleban and the Northern Alliance. Another possibility is that it was not an international armed conflict at all, but rather an internationalized internal armed conflict, with the United States fighting on the side of the Northern Alliance. One could accept that this is the correct reading only if one considered that Afghanistan was a failed State, with no legitimate government. There could be no armed attack against Afghanistan if the State of Afghanistan effectively did not exist. If there was no government, and the Taleban and the Northern Alliance were simply opposing warlords or armed groups, then one might be able to argue that this was intervention in an internal armed conflict at the request of one of the armed groups. However, this would be to ignore the real situation. While the Taleban government had only been recognized by three States, it appeared to be the *de facto* government of the State of Afghanistan. The State of Afghanistan was centralized and all the institutions of State functioned, including the armed forces. The Taleban government also controlled approximately 95 percent of the territory. Further, the United States tacitly recognized the Taleban as the government of Afghanistan by engaging in dialogue with them post-September 11, albeit it through the diplomatic intermediary of Pakistan. Since this was an intervention on the side of an armed opposition group, the Northern Alliance, against the State of Afghanistan, the situation cannot therefore be characterized as an internationalized internal armed conflict. On the other hand, one must recognize that the question of

whether the Taliban or Northern Alliance or some other group was the legitimate government was never conclusively settled. Byers notes that “delegates from both sought accreditation as representatives of their country to the UN General Assembly. The Assembly repeatedly deferred its decision.”¹⁰⁷

If the war between the armed forces of Afghanistan—the Taliban—and U.S. armed forces constituted an international armed conflict, what about the U.S. conflict against Al Qaeda on Afghan territory? Is this also an international armed conflict? As noted, since Al Qaeda is not a State, it cannot engage in any international armed conflict against the U.S.. Could it be an internal armed conflict alongside the international armed conflict? To consider members of Al Qaeda as engaged in an internal armed conflict against U.S. forces taking place on Afghan territory would be to recognize their status as combatants, instead of merely being terrorists. It would also require the application of common Article 3 of the Geneva Conventions. However, and as will be discussed more fully *infra*, the U.S. has denied combatant and POW status to Al Qaeda members captured on the battlefield of Afghanistan and now detained at Guantanamo Bay and elsewhere. More likely, it is a criminal law enforcement operation carried out in the course of an international armed conflict.

As for the war against Iraq, under the *jus in bello* it is clearly an international armed conflict between two or more States.

3. THE APPLICABLE LAW

What law applies? The answer may seem immediately obvious, although one would first have to qualify the question: what law applies to what? If a situation is an international armed conflict, then that part of international humanitarian law applicable in times of international armed conflict applies. If it is not an armed conflict, then international humanitarian law does not apply. Instead, the international law applicable in peacetime is applicable, that is, the full complement of human rights law. If the situation constitutes a state of emergency, then all but the non-derogable human rights that are applicable at all times can be derogated from for the duration of the emergency. Following the September 11 attacks, the United States declared a national emergency,²⁶ and has subsequently adopted anti-terrorist legislation,²⁷ although it has not specifically derogated from its human rights obligations. Britain has declared that it is facing a public emergency threatening the life of the nation. This has allowed it to derogate from Article 5(1) of the ECHR guaranteeing the right to liberty and security of nations, the only State of the Council Europe to do so. Britain has not stated that it is in a situation of armed conflict, but it has adopted new anti-terrorist legislation.²⁸ Many other States have also adopted draconian anti-terrorist or some sort of emergency legislation that strictly curtail human rights and fundamental freedoms.

As mentioned, since there has been a misrepresentation of various legal aspects of the terrorist threat and the various responses of States, including the U.S., there has been disagreement, particularly between lawyers and policymakers, but also between lawyers themselves, as to the applicable law. Even where there

is agreement as to the legal environment, there have been differences as to what law applies and how it applies in practice. And the fact remains that, whatever the actual legal situation at any given time, the superpower increasing tends to behave as if a different legal situation existed. Below, just a few examples of this attitude are noted.

3.1 The Law Applicable to Conduct of Hostilities

As has been discussed, the U.S. claims that aspects of the terrorist threat and the war on terror, which do not actually constitute armed conflict, are in fact armed conflict. And it claims that part of international humanitarian law applies to the war on terror, *per se*. For example, a senior legal official of the Pentagon, in an interview with the Crimes of War Project, expressed the view that the law relating to the use of lethal force is the same in the war against terrorism as in a conventional war.²⁹ What this would mean in practice, according to Charles Allen, Deputy General Counsel for International Affairs, is that U.S. forces have the right to shoot to kill members of Al Qaeda or other terrorists at any time unless they were actually in custody. “When we have a lawful military target that the commander determines needs to be taken out, there is by no means a requirement under the law of armed conflict that we must send a warning to these people, and say, “You may surrender rather than be targeted.” According to Allen, enemy combatants are “those who are part of the [terrorist] enterprise and/or threaten the United States.” Defense Department lawyers have also concluded that the killing of selected individuals would not be illegal under the Army’s Law of War if the targets were “combatant forces of another nation, a guerrilla force, or a terrorist or other organization whose actions pose a threat to the security of the United States.”³⁰ On 22 July 2002, Secretary of Defense Donald Rumsfeld issued a secret directive ordering Air Force General Charles Holland, the four-star commander of Special Operations, “to develop a plan to find and deal with members of terrorist organizations.” He added, “The objective is to capture terrorists for interrogation or, if necessary, to kill them, not simply to arrest them in a law-enforcement exercise.”³¹

A vivid practical demonstration of this view was provided on 3 November 2001, when an unmanned American Predator drone operating out of a U.S. base in Djibouti fired a Hellfire missile at an automobile in Yemen which was believed to be carrying an Al Qaeda leader named Qaed Salim Sinan al-Harethi. Al-Harethi and five other passengers were killed.³²

This view that the U.S. may target persons who are not directly participating in hostilities, and are not in fact involved in armed conflict at all but in terrorist activities, is completely at odds with the law relating to the conduct of hostilities. That law is not only not applicable to the situation in Yemen, for example, but it is being wrongly applied incorrectly. Even if it was applicable, it does not permit the targeting of persons who are not directly participating in hostilities, persons, who are in this case, moreover, civilians. Since this was not a situation of armed conflict to which the law relating to conduct of hostilities is applicable, human rights law

applies, and that prohibits extra-judicial executions. And in fact, assassinations of this nature are even prohibited under U.S. law. In 1976, U.S. President Gerald Ford signed an executive order banning political assassinations, which remains in force today.³³ The proper course would have been to seek their arrest by Yemen and handing over to U.S. jurisdiction if there was evidence that they had committed or planned to commit a specific crime.

3.2 The Law Regarding Prisoners of War

The U.S. has taken the view that neither captured Taleban nor captured Al Qaeda can be considered as prisoners of war, enjoying the projection of the Third Geneva Convention of 1949. While conceding that in principle the Third Convention applies, the U.S. asserts that by associating themselves with Al Qaeda, by failing to adhere to the conditions of combatancy and by violating humanitarian law, the Taleban have forfeited their right to protection under that Convention. They are thus deemed “unlawful combatants.”³⁴ Neither are Al Qaeda detainees considered prisoners of war. They are also simply “unlawful combatants.”

This blanket denial of POW status to all battlefield detainees—an executive decision—has not been reviewed by the competent authorities. Most importantly, tribunals of the kind envisaged by the Third Convention, which are competent to make a final determination of the status of detainees, have not been established.

3.2.1 The status of Taleban detainees

The U.S. has reached the wrong conclusion in deciding that members of the Taleban armed forces are per se not POWs, and it has reached it the wrong way. Article 5 of the Third Convention clearly provides that: “Should any doubt arise as to whether persons having committed a belligerent act and having fallen into the hands of the enemy, belongs to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.” The point is that the presumption of POW status rests with the detainee, and if any doubt arises, the onus is on the detaining power to establish the proper procedures for making a final determination of the matter.

As members of the armed forces of the State of Afghanistan, Taleban who have been captured on the battlefield are prima facie prisoners of war. The U.S. grounds for denying them this status are legally incorrect and at odds with U.S. domestic law.³⁵ The four conditions of belligerency set out in Article 4(2) of the Third Convention only apply to militias and volunteer corps that do not form part of the armed forces. Even if Taleban soldiers allied or associated themselves with members of Al Qaeda, per se this would not be enough to deny them their presumptive status of POW. In any event, a determination of status is supposed to be made in each case, not in a blanket fashion.

The United States cannot deny the Taleban detainees their presumptive

POW status based on the fact that it refused to recognise the Taleban government. Article 4(2)(3) of the Third Convention provides that those benefiting from POW status include: “Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.”

One reason for the refusal of the U.S. to recognise the POW status of the Taleban may be because, under Article 102 of the Third Convention, captured combatants have to be treated to the same conditions of trial and sentencing as a State’s own armed forces, and this would make it illegal to, for instance, try them before military commissions of a type contemplated by the President’s Military Order of 13 November 2001, and which have jurisdiction only over non-nationals. Furthermore, under Article 103 of the Third Geneva Convention, prisoners of war should be tried as soon as possible. Once the conflict ends, they should be released unless they are being prosecuted for a war crime or some other crime committed in hostilities. They should not, of course, be tried merely for the fact of having engaged in hostilities. Since it seems that the conflict between the U.S. and its allies and Afghanistan is now over, captured Taleban should be released or tried. On the other hand, President Bush and other members of the U.S. administration have made it clear that they are really not being held so much in connection with the international armed conflict in Afghanistan, but instead with the global war on terror, a war—we have been warned—of possibly infinite duration. In the eyes of the U.S., they can therefore apparently be held until the end of time, or until the terrorist threat is finally crushed, whichever is sooner. Indeed, the U.S. has indicated that while it may try some of the captured Taleban, their detention is not really as a prelude to trial, but more in the way of internment. Even if some of them were prosecuted and acquitted, they would continue to be held as long as they are deemed to constitute a potential terrorist threat, or as long as they might have some use intelligence information.

On 12 March 2002, the Inter-American Commission on Human Rights issued its Decision on Request for Precautionary Measures (Detainees) at Guantanamo Bay, Cuba, in which it asked the United States “to take the urgent measures necessary to have the legal status of the detainees at Guantanamo Bay determined by a competent tribunal.”³⁶ The Decision on Request defended its own competence to refer to international humanitarian law for the purposes of interpretation as the *lex specialis*. It pointed out that:

“doubt exists as to the legal status of the detainees. This includes the question of whether and to what extent the Third Geneva Convention and/or other provision of international humanitarian law apply to some or all of the detainees and what implications this may have for their international human rights protections. ... The information available suggests that the detainees remain entirely at the unfettered discretion of the United States government. Absent clarification of the legal status of the detainees, the Commission considers that the rights and protections to which they may be entitled under international or domestic law cannot be said to

be the subject of effective legal protection by the State.”

In United States (U.S.): Response of the United States to Request for Precautionary Measures - Detainees in Guantanamo Bay, Cuba,³⁷ the United States rejected the competence of the Inter-American Commission to apply Geneva Law or customary international humanitarian law. Moreover, it stated that even if the Commission was competent to apply international humanitarian law, which it is not, the precautionary measures sought by the Inter-American Commission were not appropriate in this case. This is because, in the U.S. view, the legal status of the detainees in Guantanamo Bay is already clear ... and even if unclear, there is no risk, let alone an immediate risk, of irreparable harm to the detainees. Finally, the U.S. rejected the competence of the Inter-American Commission to make requests for precautionary measures in respect of non-States Parties to the American Convention.

A number of cases have been brought in U.S. courts on behalf of persons detained at Guantanamo Bay. So far, they have all been decided against the applicants. In *Coalition of Clergy v. Bush*,³⁸ the District Court of California rejected a petition for *habeas corpus* filed on behalf of the Guantanamo detainees. The court found, first, that the petitioners lacked a sufficiently close relationship with the detainees and therefore did not have standing to bring a claim. Second, relying on the decision in *Johnson v. Eisenrager*,³⁹ it found that Guantanamo Bay is not a part of U.S. territory but a part of Cuban territory, and that it had therefore no jurisdiction over the detainees, as they are not present on U.S. sovereign territory. Third, since no other court has jurisdiction, the case could not be remitted.⁴⁰ However, it is not insignificant that, in its conclusions, the court had this to say:

“The Court understands that many concerned citizens, here and abroad, believe this case presents the question of whether the Guantanamo detainees have *any* rights at all that the United States is bound, or willing, to recognize. That question is *not* before this Court and nothing in this ruling suggests that the captives are entitled to no legal protection whatsoever. For this Court is not holding that these prisoners have no right which the military authorities are bound to respect. The United States, by the [1949] Geneva Convention . . . concluded an agreement upon the treatment to be accorded captives. These prisoners claim to be and are entitled to its protection. It is, however, the obvious scheme of the Agreement that responsibility for observance and enforcement of these rights is upon political and military authorities. Rights of alien enemies are vindicated under it only through protests and intervention of protecting powers as the rights of our citizens against foreign governments are vindicated.”

Recognition that the U.S. is not correct in asserting that the Guantanamo detainees have no legal rights whatsoever has also come indirectly from the U.K. Court of Appeals. The *Abassi* case,⁴¹ before the Court of Appeals, concerned a

judicial review of an earlier decision of the High Court that denied the applicant—who is detained without charge in Guantanamo Bay—a legal remedy before the British courts. The case concerned questions of diplomatic protection. Abassi had asked the court to order the Foreign and Commonwealth Office to make representations on his behalf to the U.S. Government regarding his detention.

While not granting the relief sought, including on the grounds that appeals on the question of the rights of the detainees were still pending before U.S. courts, the court expressed concern over the possibility of his indefinite detention without the possibility of challenging its legality, and went so far as to state that “in apparent contravention of fundamental principle recognised by both jurisdictions and by international law, Mr. Abbasi is at present detained in a “legal black-hole.”⁴²

3.2.2. *The status of captured Al Qaeda*

George Aldrich has argued that detained members of Al Qaeda are clearly not entitled to POW status. They are illegal combatants. If captured while accompanying Taleban forces, once they have been identified, they may be “lawfully prosecuted and punished under national laws for taking part in the hostilities and for any other crimes, such as murder and assault, that they may have committed.”⁴³ While prima facie this is correct, it is also the case that Al Qaeda captured in Afghanistan may not be considered as combatants at all, unlawful or otherwise. Unless they were somehow affiliated with Taleban armed forces, they can simply be considered as criminals, under either international law or the domestic law of most States. To make an across the board determination that they are “unlawful combatants” is to obscure the reality that many of them took no role in combat per se and were not part of or linked with the armed forces.

If members of Al Qaeda captured in Afghanistan should in the main be considered as civilian criminals, rather than unlawful combatants, the absurdity of applying the legally vacuous expression of unlawful combatant to members of Al Qaeda captured outside of Afghanistan, in conditions of peacetime, as part of the ongoing war on terror, is even more obvious. For example, regarding the defendant Abdullah al Mujahir (Jose Padilla), the so-called “dirty bomber”,⁴⁴ at a special Department of Justice/Department of Defense Press Conference to announce his arrest, Deputy Attorney General Larry Thompson stated that Padilla was being detained under the laws of war as an enemy combatant and that there was clear Supreme Court and circuit court authority for such a detention.⁴⁵ He cited the cases of *ex parte Quirin*⁴⁶ and *In re Territo*⁴⁷ as legal authority. According to Paul Wolfowitz: “Under the laws of war, Padilla’s activities and his association with al-Qaida make him an enemy combatant. For this reason, Jose Padilla has been turned over to the Department of Defense.”⁴⁸

In *Ex Parte Quirin*, a U.S. citizen, part of a group of German nationals secretly put ashore in the United States from German U-boats during World War II for the purpose of engaging in acts of sabotage on behalf of Nazi Germany, was

captured and then held, tried, and convicted by the armed forces. The Court noted:

“By universal agreement and practice, the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.”⁴⁹

In *In Re Territo*, a U.S. citizen fighting in the Italian Army against the United States during World War II was captured by American forces and held as a prisoner of war. Territo sought a writ of *habeas corpus*, claiming that his incarceration as a prisoner of war was unlawful. The court found that “all persons who are active in opposing an army in war may be captured and except for spies and other non-uniformed plotters and actors for the enemy are prisoners of war.”⁵⁰ U.S. citizenship was no bar to being treated as an enemy combatant. The court held that “Territo upon capture was properly held as a prisoner of war.”⁵¹

Al Mujahir is a U.S. national who has never left U.S. territory. These cases are not relevant *vis-à-vis* him since they deal with legal issues arising during an international armed conflict, whereas he was not a member of a party to an armed conflict, nor were his alleged actions committed during a time of international armed conflict.

4. CONCLUSION

This contribution has sought to highlight some “through the looking glass” effects of September 11, 2001, on the *jus in bello*. Since that date, due to what we are informed is a unique threat of monumental proportions, the rule of international law has been called into question. The *jus in bello* has not escaped this fate. What are clear and binding rules are being willfully misread, misapplied or not applied at all. That the laws of war are adequate to the phenomenon of terrorism in war has been rightfully defended.⁵² Where terrorism poses a threat outside situations of armed conflict, national and international criminal law are the appropriate legal tools for responding to it. International humanitarian law does not provide a menu of options for States Parties to select from: it is binding in its entirety on High Contracting Parties. Nor can the law be applied in situations where it is not applicable. To do so risks opening a debate about the meaning of armed conflict that may not produce the result intended by those initiating it and which could in fact give legitimacy to terrorists.

¹ Criminal investigation in the U.S., U.K. and elsewhere following the hijackings revealed that the 19 hijackers were affiliated with the organisation known as Al Qaeda, believed to be controlled by the Saudi expatriate, Osama bin Laden, who was based in Afghanistan. “Bin Laden himself, however, did not publicly and expressly claim responsibility for the attacks.” See Sean D. Murphy, “Legal Regulation of Use of Force”, *Contemporary Practice of the United States Relating to International Law*, 96 AJIL (2002) pp. 237 at 238-242, 241.

² A fourth hijacked plane crash-landed in the Pennsylvania countryside after the hijackers were overpowered by passengers. All on board died.

³ See generally Roger Barnett, *Asymmetrical Warfare: Today's Challenges to U.S. Military Might* (Washington, Brassey's 2003).

⁴ Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11, 37 Weekly Comp. Pres. Doc. 1347, 1347 (September 20, 2001).

⁵ Pierre-Richard Prosper, Ambassador-at-Large for War Crimes Issues, Status and Treatment of Taliban and al-Qaida Detainees, Remarks at Chatham House, London, United Kingdom, 20 February 2002. <http://www.state.gov/s/wci/rls/rm/2002/8491.htm>.

⁶ The legal status of detainees is discussed *infra*.

⁷ UN Security Council Resolution 1368 of 12 September 2001, para. 1.

⁸ UN GA Resolution 56/1, 18 September 2001.

⁹ The North Atlantic Treaty, 24 August 1959, 34 UNTS 243.

¹⁰ See NATO Press Release No. 124, Statement by the North Atlantic Council of 12 September 2001, <http://www.nato.int>. For a detailed discussion of the NATO response, see Tom Lansford, *All for One: Terrorism, NATO and the United States* (Aldershot, Ashgate 2002) at pp. 70 et seq.

¹¹ Avril McDonald, “Defining the War on Terror and the Status of Detainees: Comments on the Presentation of Judge George Aldrich”, 4 *Humanitäres Völkerrecht* (2002) pp. 206 at 207.

¹² Article 2 provides: “...the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them. ...” 1977 Additional Protocol I of the Geneva Conventions, “which supplements the Geneva Conventions of 12 August 1949 for the protection of war victims, shall apply in situations referred to in Article 2 common to those Conventions.” (Article 1(3)).

¹³ It also indicated that “any nation that continues to harbour or support terrorism will be regarded by the United States as a hostile regime”, and presented those nations with a stark choice, which has since become known as ‘the Bush doctrine’: ‘Either you are with us, or you are with the terrorists.’ See Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11, 37 Weekly Comp. Pres. Doc. 1347, 1347 (September 20, 2001).

¹⁴ The U.S. demands were set out by President Bush during an address to the Congress. See Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11, 37 Weekly Comp. Pres. Doc. 1347, 1347 (September 20, 2001).

¹⁵ See Elizabeth Bumiller, “President rejects offer by Taliban for negotiations”, *New York Times*, 15 October 2001, p. A1.

¹⁶ Commentary IV Geneva Convention relative to the protection of civilian persons in time of war (Geneva, International Committee of the Red Cross 1958) p. 35, para. 1.

¹⁷ *Ibid.*, p. 36.

¹⁸ The use of the term “war” to describe rolling campaigns to eradicate perceived threats to U.S. security and national interests is not new but has been used before, for example, in the context of ‘the war on drugs’.

¹⁹ Antonio Cassese has pointed out that “[w]hile it is obvious that in this case ‘war is a misnomer’, ‘the use of the term ‘war’ has a huge psychological impact on public opinion. It is intended to emphasize both that the attack is so serious that it can be equated in its evil effects with a state aggression, and also that the necessary response exacts reliance on all resources and energies, as if in a state of war.” “Terrorism is Also Disrupting Some Crucial Legal Categories of International Law”, 12 *European Journal of International Law* (2001) p. 993.

²⁰ George H. Aldrich, “The Taliban, al Qaeda, and the Determination of Illegal Combatants”, 4 *Humanitäres Völkerrecht* (2002) pp.202 at 203.

²¹ Letter dated 7 October 2001 from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council, UN Doc. S/2001/946 (7 October 2001).

²² Ibid.

²³ Ibid.

²⁴ Michael Byers, “Terrorism, the Use of Force and International Law After September 11”, 51 *International and Comparative Law Quarterly* (2002) pp. 401.

²⁵ Ibid. at 403.

²⁶ Proclamation 7463, 66 Federal Register 48, 199 (18 September 2001).

²⁷ USA’s Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act) of 2001, Public Law 107-56, page 115 STAT 272. approved 26 October 2001.

²⁸ Britain’s Anti-terrorism, Crime and Security Act, 2001, c. 24, <http://www.legislation.hmso.gov.uk/acts2001/20010024.htm>. For commentary, see Virginia Helen Henning, “Anti-terrorism, Crime and Security Act 2001: Has the United Kingdom Made a Valid Derogation from the European Convention on Human Rights”, 17 *American University International Law Review* (2002) p. 1263.

²⁹ Interview with Charles Allen, www.crimesofwar.org/onnews/news-pentagon.html.

³⁰ See S.M. Hersh, “Manhunt: The Bush administration’s new strategy in the war against terrorism”, *The New Yorker*, 23 and 30 December 2002.

³¹ Ibid.

³² Ibid.

³³ Ibid.

³⁴ See White House Fact Sheet on Status of Detainees at Guantanamo Bay, 7 February 2002, <http://www.whitehouse.gov/news/releases/2002/02/20020207-13.html>. See also U.S. Department of Defense News Transcript, Secretary Rumsfeld Media Availability on Route to Camp X-Ray, 27 January 2002., http://www.defenselink.mil/news/Jan2002/t01282002_t01227sd2.html.

³⁵ Including the U.S. Army’s Operational Law Handbook (2002) p. 22, and Department of Defense’s Directive 5100.77 on the Law of War Program. See Sean D. Murphy, “Contemporary Practice of the United States Relating to International Law”, 93 *AJIL* (1999) p. 476.

³⁶ 41 ILM 532 (2002).

³⁷ 41 ILM 1015 (2002).

³⁸ No. CV 02-570 AHM (JTLX), 2002 WL 272428 (C.D. Cal. Feb. 21 2002).

³⁹ 339 U.S. 763 (1950).

⁴⁰ Ibid. at pp. 3-7.

⁴¹ Court of Appeal (civil division), *The Queen on the application of R. (Abbasi & Another) v. Secretary of State for Foreign and Commonwealth Affairs & Secretary of State for the Home Department*, 6 November 2002, [2002] EWCA Civ. 1598.

⁴² Ibid. at para. 64.

⁴³ See George Aldrich, “The Taliban, Al Qaeda, and the Determination of Illegal Combatants”, 96 *AJIL* (2002) pp. 891 at 893.

⁴⁴ According to the U.S., Muhajir was engaged on a mission for *al-Qaeda* to build and detonate a radiological explosive device somewhere in the United States in order to inflict serious casualties and to spread terror.

⁴⁵ See DOD News Briefing/Department of Justice, Deputy Secretary of Defense Paul Wolfowitz, Deputy Attorney General Larry Thomson, and FBI Director Robert Mueller, June 10, 2002, <http://usinfo.state.gov/topical/rights/law/02061001.htm>.

⁴⁶ 317 US 1 (1942). 317 US 1 87 L.Ed. 7.

⁴⁷ 156 F.2d 142, 145 (9th Cir. 1946).

⁴⁸ See DOD News Briefing/Department of Justice, Deputy Secretary of Defense Paul Wolfowitz, Deputy Attorney General Larry Thomson, and FBI Director Robert Mueller, 10 June 2002, <http://usinfo.state.gov/topical/rights/law/02061001.htm>. Ibid.

⁴⁹ At pp. 37-38.

⁵⁰ At p. 145.

⁵¹ At p. 146.

⁵² See for example Jordan J. Paust, “There is no Need to Revise the Laws of War in Light of September 11th”, Prepared for the American Society of International Law Task Force on Terrorism, November 2002.

COMBATING TERRORISM: LAW ENFORCEMENT OR WAR?

William K. LIETZAU (*)

Few would disagree that the world on September 12th, 2001, was very different from that to which we awoke on September 11th of that same year. The world has changed substantially, and the legal landscape is no exception—perhaps it is not only “not” an exception, but also rather the quintessential example of the lasting impact of that attack. The response to September 11th has presented a number of challenges that together have invoked a confluence of legal regimes and norms; as a result, the landscape will never again be quite the same.

Many of the changes in our legal landscape are only now beginning to take form, and many were completely unanticipated. What national security lawyers, criminal lawyers, and military lawyers thought would be key legal issues were not, and what we failed to anticipate as crucial legal concerns became so.

One relatively unforeseen legal issue, the initiation of military tribunals, aptly illustrates this incongruity.¹ In November of 2001, this author spoke at a human rights and humanitarian law conference sponsored by Harvard University. When asked the question “is there any chance that military tribunals could be used to try war criminals from other States?” the response given was, “It is only possible in a theoretical sense. Courts-martial technically have jurisdiction over war crimes and military commissions could be created to try war criminals, but neither of these things will happen. Adapting courts-martial procedures for war crimes trials would be simply too difficult, and military commissions are a thing of the past.”² Several days later, headlines reported the President’s Military Order of November 13th.³ The Department of Defense has spent the last 9 months attempting to implement that order.⁴

The law has changed in ways that highlight both the confluence of what might previously have been viewed as disparate legal regimes and the lacunae that reveal themselves when we attempt to overlap the boundaries of different legal disciplines. Acknowledging these phenomena as consequences of our response to September 11 and to terrorism in general, this comment addresses two of the more controversial decisions of the President of the United States: his determination with respect to the status of detainees, and his decision to establish military commissions. This comment argues that his decisions in these areas have adeptly navigated the confluence, and at the same time filled gaps in our legal landscape in a principled way that furthers the interests of the rule of law.

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Two paradigms

Although there has occurred a confluence of several legal regimes, the primary focus of this comment is on the two major paradigms that have met, and to an extent merged, in a particularly notable way as a result of September 11: that associated with law enforcement, and that associated with war. The potential conflict between these paradigms is not really a function of September 11 *per se*, but rather a consequence of terrorism; the global war on terrorism clearly straddles the line between law enforcement and national security. For years, the United States' strategy in responding to terrorism was grounded primarily in law enforcement.⁵ This strategy is changing, however, and with that change is required a recognition that the new paradigm taking shape incorporates elements of both. We are clearly at war, but the stated objective of that war is, at least in part, to bring wrongdoers to justice.⁶

Law enforcement

There are numerous examples of past United States law enforcement responses to terrorist acts. In the 1988 bombing of Pan American Flight 103, 259 people were killed in the plane and 11 on the ground.⁷ The first Bush administration treated the problem of apprehending suspects as one of diplomacy and extradition.⁸ This was clearly a law enforcement matter.

In the 1993 World Trade Center Bombing, six people were killed and over 1000 injured.⁹ Law enforcement officials conducted an extensive investigation, resulting ultimately in the apprehension, extradition, trial and conviction in United States District Court of most of the suspects of the bombing, including Sheik Omar Abdel Rahman.¹⁰ Again, we observe what was unquestionably a law enforcement response.

The 1998 Embassy Bombings in Nairobi, Kenya, and Dar es Salaam, Tanzania, claimed the lives of 12 Americans and over 200 Kenyans and Tanzanians.¹¹ The U.S. conducted a one-strike military response,¹² and indictments issued against 15 individuals, four of whom were apprehended by foreign governments, extradited to the United States and tried and convicted in United States District Court.¹³ This was a mixed military and law enforcement response, but a response still primarily grounded in law enforcement.

International initiatives to address the terrorist threat also have resided in the arena of criminal law enforcement. The United States responded to the Khobar Towers attack both by launching a law enforcement investigation and by initiating an international initiative that later resulted in the Terrorist Bombing Convention.¹⁴ We attempted to shore up weaknesses in the law enforcement model through treaties establishing a regime of *aut dedere aut punire* (extradite or prosecute) for terrorism offences; an example of this is the Terrorist Financing Convention.¹⁵

War

The events of September 11th and the military response that followed mark the most significant use of military force in response to terrorist acts to date. The

magnitude of the September 11 attacks demonstrated that the almost exclusive law enforcement responses to past terrorist attacks were no longer sufficient and that the use of military force had become not just a legitimate option, but a necessity. The severity of the 9/11 attacks was such that they are widely recognized as having risen above mere criminal conduct; they are instead deemed to amount to an act of war. Similarly, the need to respond via the armed conflict model is manifest—primarily as a preventive measure, but undoubtedly attended by punitive aspects that traditionally are associated with law enforcement concepts. The use of military force in response to September 11 has been well received both internationally and domestically.¹⁶ Support for the idea of military commissions—an extension of the President’s authority as commander-in-chief of the armed forces as opposed to an exercise of law enforcement authority—should be commensurate with the support for engaging in armed conflict.¹⁷

Ramifications

Where are the hiatuses in this new paradigm? They reveal themselves primarily in the least developed field of law—the law of armed conflict.

Others may argue that a substantial gap mars our criminal law enforcement system—that there exists no rubric under which terrorists can be held to account for their crimes. This so-called “gap,” is perhaps more accurately characterized as systemic “ineffectiveness”—in this situation, the standard “extradite or prosecute” model simply will not work. Even should it, one may question our ability to prosecute any substantial number of terrorists in the context of an expensive and over-laden U.S. federal court system.

Jus ad bellum

In 1986, President Reagan launched an attack, Operation El Dorado Canyon, in response to the terrorist bombing of a Berlin discothèque.¹⁸ The attack was initially described as a reprisal; later, upon advice of counsel, the President clarified that the attack was an exercise of anticipatory self-defence consistent with Article 51 of the United Nations Charter.¹⁹ The environment mandating such parsing of words has all but vanished. Today, terrorist acts are acts of war. In the changed, post-9/11 environment, the concept of anticipatory self-defence requires no explanation or justification.

In days past, the first task of a national security law attorney when the deployment of U.S. troops was contemplated was to assess the legal authority for the use of force. Do we have a Chapter VII mandate?²⁰ Is there a claim of self-defence consistent with Article 51?²¹ A careful analysis of the legal debate associated with the use of force in pre- September 11 military engagements and the fact that in the past, the U.S. has been pilloried in its application of the doctrine of anticipatory self-defence²² would together portend significant controversy on this issue in the instant case. Such was not the case, however.

Indeed, following 9/11, Pentagon lawyers quickly went to work on the legal justification for an armed response, but their work really was not needed to

the same degree as it had been in other military engagements. The international community readily embraced the United States' right to respond with armed force, obviating the need for national security lawyers to play the role of apologist. On the 12th of September, the Security Council passed a resolution expressly recognizing the United States' right to self-defence.²³ Days later, NATO took the unprecedented step of passing a resolution citing Article 5 of the NATO Charter,²⁴ and on September 18th the U.S. Congress enacted a joint resolution authorizing the President to use "all necessary and appropriate force."²⁵ What had for years been viewed and addressed as a criminal act now had started a war.

The very nature of terrorism precludes the execution of a traditional contemporaneous defence, but the right to act pre-emptively to prevent future attacks is now well accepted as a necessary self-defence measure.

Jus in bello

Arguably, *jus in bello* has not advanced or been clarified to the same extent as has *jus ad bellum*. Where Nation-States dominated previous conflicts, private organizations such as al Qaeda now possess the capability to wage war. In contrast to most criminals who are driven by private gain, terrorists generally are motivated by political ideology or religious extremism. This distinction renders it difficult for law enforcement agents to exploit a suspect's selfish motives as an inducement to turn on fellow conspirators, leaving terrorists less susceptible to law enforcement techniques that have proven successful in combating organized crime and other traditional criminal activity. Neither are terrorist attacks readily characterized under international law. The Geneva Conventions speak to the circumstances of "international armed conflict" and "internal armed conflict" or "conflict not of an international character."²⁶ But this new era of terrorist activity ill fits either moniker - it is likely that attacks will be perpetrated by an organization like al Qaeda - an entity that crosses international borders -excepting the conflict from designation as an "internal armed conflict." Yet, neither is the war on terrorism a war between Nations; there are no clashes of armies, navies, and air forces. Rather, this is a war prosecuted against nebulous networks of secret cells - not found on maps - with no capitals to destroy. The "international" category is accordingly inapt. Moreover, despite their acute effects, the sporadic incidence of terrorist attacks calls into question the "ongoing nature" of any such armed conflict.

This war begs the question, "What body of law applies?"

Status of Detainees

Over the past year, the Department of Defense General Counsel's office has faced the challenge of attempting to apply the existing laws of war to the conflict in Afghanistan. In so doing, they perhaps have come better to appreciate the truth in the remark by Hersch Lauterpacht, "*If international law is, in some ways, at the vanishing point of law, the law of war is, even more conspicuously, at the vanishing point of international law.*"²⁷ Given our recent experience, one could add to Lauterpacht's assessment the observation that if the law of war is at

the vanishing point of international law, the war with al Qaeda, and more broadly the global war on terrorism, raise issues that are at the vanishing point of the law of war.

Conspicuous among many challenges has been the need to determine how to apply the law of war to enemy belligerents captured in Afghanistan who do not qualify as members of any particular national armed force. The difficulty arises in that the Geneva Convention Relative to the Treatment of Prisoners of War, and more generally the customary international law of armed conflict, were not designed to apply to the current situation - at their core, they presume conflicts between nation-States.²⁸ A number of humanitarian lawyers from non-governmental organizations have articulated the argument that the international law of armed conflict does not govern the 9/11 attacks, because at that time there did not yet exist a state of international armed conflict. Such a perspective misses the nature of our changed landscape. Acknowledging both the altered global circumstance and that such does not neatly fit existing paradigms of international law, Paul Grossrieder, the Director General of the International Committee of the Red Cross, asserted, “with the September 11 terrorist attacks, the nature of war is changing. With al Qaeda, we face an emerging new type of belligerent, transnational network. To cope with this change, [the international law of armed conflict] must adapt itself for fear of being marginalized.”

During the initial stages of the war against terrorism, the United States government engaged in an exhaustive analysis of applicable international norms to ascertain the appropriate characterization of detainees being held at the U.S. Naval Base in Guantánamo Bay, Cuba and elsewhere.²⁹ At the outset, it became clear that the 1949 Third Geneva Convention Relative to the Treatment of Prisoners of War was written for a different kind of war.³⁰ An attempt to apply the Geneva Conventions to the war on terrorism revealed not only that they were intended to apply to armed conflicts between “High Contracting Parties” to the Conventions, but that, even when applicable, none of the categories of persons who might be granted Prisoner of War status appropriately reflected the nature of Taliban or al Qaeda belligerents.³¹ After much analysis and deliberation, the President determined that the Geneva Conventions simply could not be stretched to apply to our conflict with al Qaeda. And, while applicable to our conflict with the Taliban, the undisciplined clusters of armed men comprising the Taliban did not qualify for Prisoner of War status under any reasonable interpretation of the Third Geneva Convention.³²

The principles of the Geneva and Hague Conventions, however, have been the mainstay of the international law of armed conflict for decades. The President recognized that, while the rules may not technically apply, the principles at their core must remain at the foundation of future articulations of the law of war. Therefore, the United States decided to apply to the treatment of the detainees the principles of the Third Geneva Convention.³³ Accordingly, those detained by the United States have always been and will continue to be treated humanely. Detainees receive, among other things, adequate shelter, exceptional and sometimes extensive

medical care, and nutritious, culturally appropriate meals.

In making these and related decisions about the treatment accorded our terrorist enemies, we are reminded daily that the current international law templates do not provide guidance clearly applicable to present circumstance. Simply put, we are operating in areas not addressed by applicable treaties and thus are participating in the development of customary international law. Some are not happy with the change. They have suggested that in an effort to preserve the sanctity of international humanitarian law - in an effort to define clearly the limits of that body of law - we should treat this venture as a law enforcement matter, applying only domestic jurisprudence.³⁴ The problem, of course, is that domestic criminal law simply has not evolved in such a way as to contemplate a situation such as that with which we now are confronted.³⁵

Obviously, the United States could not, as a practical matter, detain for law enforcement action, hundreds of enemy combatants while engaged simultaneously in armed conflict. Under our domestic criminal law, we would have 48 hours to establish probable cause to believe that the suspect had committed a crime.³⁶ A soldier on the battlefield, then, might be faced with the unacceptable choice of killing an enemy combatant or capturing him on the battlefield, only to see his avowed enemy released two days later, free to engage in more so-called "crime."³⁷ Domestic criminal procedure can accommodate this scenario, but the law of war neither can nor should. In applying the principles of international law of armed conflict to this war, the President acted precisely as he should. The law of war, not our domestic criminal law, is the appropriate bridge to span the gaps in these bodies of law. This new kind of war cannot be forced into the mold of existing international law; rather, as Grossrieder suggests, the law of war must adapt and advance to accommodate the metamorphosis in the nature of conflict.

In this regard, it is worth noting that the law of armed conflict always has served as a gap-filler. Historically, in the absence of another applicable body of law, the law of armed conflict has occupied the void. While we may prefer a clearer definition of and greater adherence to the established boundaries of the law of war, the value of our efforts must be weighted in favour of preserving the sanctity of the human lives that the law of war was developed to protect as opposed to the sanctity of the body of law itself.

Military Commissions

With this discussion as a backdrop, it is useful to revisit the question asked in New England a year ago regarding the viability of military commissions. The response was the natural outgrowth of adherence to a law enforcement paradigm; it neglected to consider the war-fighting function of military commissions and viewed them only as unlikely options in the narrow context of domestic law enforcement.³⁸ At the time, it appeared that federal criminal law, both in its substantive and procedural aspects, was the jurisprudence that had evolved to be most applicable to and available for the criminal prosecution of an individual foreign terrorist. Missed was recognition of a new paradigm that arose from

addressing the terrorist attacks of September 11 as an act of war—the paradigm in which any criminal justice response must take account of the law of armed conflict and the practical exigencies associated with our military response—the paradigm deriving from the confluence of several bodies of law.

In this regard, military commissions should be viewed not simply as another forum for trial, but as an extension of the President’s authority as commander-in-chief of the armed forces. This is not only the legally appropriate way to conceive commissions, but it is logically fitting as well. In authorizing the use of commissions to try enemy combatants, the President eliminated that potentially absurd dilemma for the U.S. soldier on the battlefield—whether to capture or kill an enemy who clearly will continue to pose a threat to the United States, and who, in this case, maintains no affiliation with a parent organization that, in a more conventional war, could direct a surrender.

Almost 50 years ago, Israeli Ambassador to the United States, Abba Eban described international law as the law that “the wicked do not obey and the righteous do not enforce.”³⁹ For years, the international law of armed conflict has lacked an enforcement mechanism. The Security Council attempted in recent years to fill part of this void *ad hoc*—but the International Criminal Tribunals for the former Yugoslavia and Rwanda never were intended to replace the sovereign exercise of national jurisdiction to bring wrongdoers to justice. The International Criminal Court (ICC), which the United States does not view as an appropriate permanent international forum for addressing violations of the laws of war, has been praised as inaugurating an end to the “era of impunity.”⁴⁰ But even its proponents agree that the benefit of the ICC lies primarily in encouraging the exercise of national jurisdiction.

President Bush’s Military Order of November 2001 created a framework for military commissions and set in motion a process to fill the void regarding enforcement of the laws and customs of war. This Order directed the Secretary of Defense to issue rules of procedure to ensure the conduct of “full and fair” trials.⁴¹ Equally important, the Military Order sparked a vigorous public debate that proved extraordinarily useful in informing the creation of these rules of procedure. The rules provide an appropriate balance—a balance that, on one hand, recognizes the exigencies associated with warfare: that evidence seized on the battlefield is unlikely to be accompanied by a chain of custody or to have been seized pursuant to a judicially approved warrant; that flexibility is required to bring criminals to justice while concurrently accommodating the prosecution of a war; and that war is attended by concomitant operational security concerns and the imperative to protect intelligence information, methods, and sources.⁴² On the other hand, the rules reflect faithful adherence to the principles of fairness and due process that animate our domestic criminal jurisprudence.⁴³

The procedures Secretary Rumsfeld issued in March of 2002 are designed to provide justice in the context of the war against terrorism. They recognize the national security-related difficulties associated with war-time prosecutions while at the same time affording any defendants the important protections associated

with full and fair trials—protections such as the presumption of innocence, the ability to confront witnesses, and a standard of proof beyond a reasonable doubt.⁴⁴ Perhaps even more notable is the fact that the rules achieve this balance in the novel application of the international law of armed conflict in its historical role as a “gap-filler.” It is this confluence in the law that calls for a tool that better fits this new arena. An oft-repeated aphorism states, “if you want a new idea, go read an old book—it has all been done before.” What we now have in our military commissions is something both old and new.

Conclusion

The devastating terrorist attacks of September 11 and the successive global war on terrorism require us to rethink both the role and limitations of the law in defending our Nation. The task before us is not to reject precedent, but rather to build on the foundation of existing law - national security law, criminal law, and the law of armed conflict - as we seek justly to apply their principles to the new, heretofore inappreciable challenges of the war on terrorism. While change never takes place without a bit of anguish and perhaps a few missteps, we can make the adaptations necessary to ensure the continued relevance of these bodies of law, and more importantly, to maintain unwaveringly our commitment to the pre-eminence of the rule of law.

¹ On November 13, 2001, the President of the United States issued a Military Order entitled, “*Detention, Treatment, and Trial of Certain Non-Citizens in the War against Terrorism*”. It directed, “Any individual subject to this order shall, when tried, be tried by military commission,” Military Order of November 13 2001, 66 FR 57, 833.

² William K. LIETZAU, “*Conference Address, Program on Humanitarian Policy and Conflict Research*”, Harvard University, in “*International Humanitarian Law and Current Conflicts: New Dilemmas and Challenges for Humanitarian Organizations*”, November 1 2001.

³ See e.g., Anne GEARAN, “*Terrorists Could Face Military Trial*”, A.P. Online, Nov. 14, 2001, available at LEXIS News, US News, Combined; Elisabeth BUMILLER & David JOHNSTON, “*A Nation Challenged: Immigration; Bush Sets Option of Military Trials in Terrorist Cases*”, The New York Times, Nov. 14 2001 p. A1.

⁴ Several law review articles written nearly a decade ago recommended the use of military commissions to combat terrorism. While their prescience is remarkable in hindsight, the general perception that military commissions were a thing of the past is closer to the norm. See Spencer J. CRONA & Neal A. RICHARDSON, “*Justice For War Criminals of Invisible Armies: A New Legal and Military Approach to Terrorism*”, 21 Oklahoma City U.L. Rev. 349, 1996 (advocating the adoption of the military tribunal to try accused of terrorists); Daniel M. FILLER, “*Values We Can Afford-Protecting Constitutional Rights in an Age of Terrorism: A Response to Crona and Richardson*”, 21 Oklahoma City U.L. Rev. 409, 1996 (arguing that accused terrorists should be tried in civilian courts);

⁵ E.g. “*United States vs. Bin Laden*”, 92 F. Supp. 225, 2000 (stating that the U.S. charged Usama Bin Laden and others with criminal charges stemming from the bombing of the U.S. embassies in Nairobi, Kenya and Dar es Salaam, Tanzania); “*United States vs. Rahman*”, 837 F. Supp. 64, 1993 (stating that the U.S. charged Omar Ahmad Ali Abdel Rahman with charges stemming from the 1993 bombing of the World Trade Center).

⁶ President George W. BUSH, “*State of the Union Speech*”, January 29, 2002, <http://www.whitehouse.gov/news/releases/2002/01/20020129-11.html>, stating, “We will ... bring terrorists to justice.”

⁷ “U.S. Issues Warning on Terrorist Attacks; State Department’s Concern Partly Based on Seizure of Explosives, Arrests in Spain”, Los Angeles Times, Dec. 15, 1989, at p.2, available at LEXIS News, Major Newspapers.

⁸ Neĵla SAMMAKIA, “Libya Starts Parliamentary Process That Could Give Gadhafi Way Out”, The Associated Press, May 8 1992, available at LEXIS News, Wire Service Stories (stating that the UN had instituted sanctions on Libya until two Libyan suspects in the bombing were turned over to either the U.S. or the U.K.).

⁹ “Death Toll From Bomb Rises to 6; Searchers Sifting the Wreckage at World Trade Center Uncover the Body of a Missing Man”, Orlando Sentinel Tribune, Mar. 16 1993, at A5, available at LEXIS News, Major Newspapers.

¹⁰ Larry NEUMEISTER, “Verdict: Sheik, All Co-defendants Guilty in Terror Trial,” The Associated Press, October 2, 1995, available at LEXIS News, Wire Service Stories.

¹¹ John DIAMOND, “U.S. Hits Suspected Terrorist Sites”, Associated Press Online, Aug. 21 1998, available at LEXIS News, Wire Service Stories.

¹² *Ibidem*.

¹³ Greg B. SMITH, “Osama’s Tech-Thug Pal Bombings Planner in Jail, Report Says”, Daily News (New York), Mar. 18, 2002, at 9, available at LEXIS News, Major Newspapers.

¹⁴ “International Convention for the Suppression of Terrorist Bombings”, Jan. 12, 1998, 1998 U.S.T. LEXIS 204.

¹⁵ “International Convention for Suppression of Financing Terrorism”, Jan. 10, 2000, Art. 10, para. 1, 2000, U.S.T. LEXIS, p. 131.

¹⁶ Susan PAGE & Tom KENWORTHY, “If War Drags on, Patience Becomes a Critical Asset”, USA Today, Nov. 8, 2001, p. 1A, available at LEXIS News, Major Newspapers; Alan SIPRESS & Vernon LOEB, “U.S. Welcoming Allies’ Troops”; “Despite Pentagon’s Concerns, Taliban War is Multi-Country”, The Washington Post, Nov. 11, 2001, p. A38, available at LEXIS News, Major World Newspapers.

¹⁷ Richard MORIN & Claudia DEANE, “Most Americans Back U.S. Tactics: Poll Finds Little Worry Over Rights”, The Washington Post, Nov. 29, 2001, p.A01, available at LEXIS News, Major Newspapers.

¹⁸ Eleanor CLIFT & Jack NELSON, “Official Tells of Decision-Making; Reagan OKd Plans for Earlier Attacks”, Los Angeles Times, April 16, 1986, p. 1.1, available at LEXIS, News, Major Newspapers.

¹⁹ Art. 51 of the United Nations Charter. The Charter states, “Nothing in the present Charter shall impair the right of individual or collective self-defense.” *Id*.

²⁰ Art 39-51 of the United Nations Charter. Chapter 7 of the U.N. Charter is titled, “Action With Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression” and sets forth the situations in which military action is authorized. *Id*. A “Chapter 7 mandate” is the common term for a resolution from the Security Council stating what measures it is authorizing to ensure security and peace. *Id*. at Art. 39.

²¹ *Supra* n. 153.

²² Romana SADURSKA, “Threats of Force”, 82 AJIL 239, 256-257 (1988).

²³ S.C. Res 1368, U.N. SCOR, 4370th mtg., 40 ILM. 1277 (2001). The Resolution recognized, “[T]he inherent right of individual or collective self-defense in accordance with the Charter.” *Id*.

²⁴ North Atlantic Treaty Organisation (NATO), Lord ROBERTSON, “Statement by NATO Secretary General”, 40 ILM. 1268 (2001). The resolution, quoting Article 5 of the NATO charter, stated that the attack on the U.S. “shall be considered an attack on all NATO members.” *Id*.

²⁵ “Joint Resolution to Authorize the use of United States Armed Forces Against Those Responsible for the Recent Attacks Launched Against the United States”, Pub. L. No. 107-40, 115 Stat. 224 (2001).

²⁶ “Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949”, open for signing, Aug. 12, 1949, 6 U.S.T. 3516.

²⁷ Hersch LAUTERPACHT, “The Problem of the Revision of the Law of War”, 29 Brit. Y.B. Int’l L.360 (1952).

²⁸ The “Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949”, opened for signature, Aug. 12, 1949, Art. 2, para. 1, 6 U.S.T. 3316. The Convention states that it applies to “all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties.” *Id.* “The “High Contracting Parties” and all parties represented at the Convention were the governments of nation-states. *Id.* at preamble.

²⁹ *Id.* at Art. 4 (laying out six categories of Prisoners of War).

³⁰ *Supra* and accompanying text (stating that the Convention envisioned a war between Nations).

³¹ The “Geneva Convention for Treatment of Prisoners of War” at Art. 4, para. 2. This article states that members of militias only qualify as POWs if they: 1) are commanded by someone responsible for their acts, 2) bear distinctive insignia, 3) openly carry arms, and 4) follow the “laws and customs of war.” *Id.*

³² *Id.*

³³ *Id.* at Art. 13 (stating that POWs must be treated humanely and protected).

³⁴ “Bad Example: Military Tribunals for Afghanistan Prisoners Turn the U.S. into Judge, Jailor, Prosecutor”, *Newsday*, April 24, 2002, p. A34, available at LEXIS News, Major Newspapers.

³⁵ *Infra* n. 37 and accompanying text (stating our strict criminal law rules).

³⁶ “County of Riverside vs. McLaughlin”, 500 U.S. 44, 58-59 (1991).

³⁷ Of course, there may be many circumstances on the battlefield where the law of armed conflict requires the capture of those deemed *hors de combat*. Nevertheless, the reality is such that there will be many occasions where split-second choices must be made.

³⁸ *Supra* n. 136 and accompanying text.

³⁹ “Person to Person” (CBS television broadcast, Sept. 20, 1957).

⁴⁰ Barbara CROSSETTE, “Long-Range Justice Raises Fears for Sovereignty”, *N.Y. Times*, July 1, 2001, p. 1.8 (quoting William Pace, convenor of the Coalition for an International Criminal Court).

⁴¹ *Supra* n. 135 at § 4(c)(2).

⁴² Military Commission Order No. 1, § 6.D(1) (allowing for the introduction of evidence if it is of “probative value to a reasonable person); *Id.* at § 6.D(2)(d) (providing, “The Presiding officer may authorize any methods appropriate for the protection of witnesses and evidence”).

⁴³ *Id.* at § 6.B(1) (stating that the commission must give “a full and fair trial”); *Id.* at § 5.B (stipulating that the defendant “shall be presumed innocent until proven guilty”).

⁴⁴ *Id.*

PROSECUTING INTERNATIONAL TERRORISTS

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I. Introduction

There is no doubt that the international community has a vested interest in the prosecution of individuals suspected of committing acts of international terrorism. Pursuing this worthy goal actually raises many issues, however, not the least of which is the fact that there is no internationally recognized definition of terrorism *per se*.¹ Prior to the large-scale crimes that were committed in the United States on September 11, 2001, the typical terrorist crimes included offences against aircraft, such as hijacking; bombings of government buildings or facilities, such as the U.S. Embassies in Africa or U.S. military installations in the Middle East; or civilian buildings, such as the 1993 bombing of the World Trade Center. All of this changed after September 11, however, due both to the scale of the crimes committed and the methods by which the perpetrators carried them out. The objectives of this brief paper are to:

- explore the possible forums for the prosecution of international terrorism;
- analyse the applicable substantive law concerning the crime of terrorism;
- discuss procedural issues arising from terrorism trials; and
- discuss evidentiary issues concerning such trials.

II. Choice of Forum

In the wake of the terrorist attacks on the United States in September 2001, the issue of where the alleged perpetrators of these crimes should be tried was among the hottest topics of discussion among international lawyers.² The following legal fora might have jurisdiction over such cases: the International Criminal Court (ICC)³; an *ad hoc* International Criminal Tribunal for the Prosecution of Acts of Terrorism, similar to the *ad hoc* International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR); some other type of Special Court, like those in Kosovo, East Timor or Sierra Leone; national civilian courts, including “regular” or special courts; or military courts-martial or tribunals. Each of these options will be discussed.

A. International Criminal Court

The ICC does not have specific jurisdiction for crimes considered acts of terrorism. However, the underlying criminal act could provide the basis for one of the crimes for which the ICC *does* have subject matter jurisdiction, such as war crimes or crimes against humanity. With respect to war crimes pursuant to Article

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8 of the ICC Statute, such acts must be committed *during* an armed conflict. Under the ICC Statute, the elements of war crimes do *not* include a plan or policy to commit the offence and the scale of the alleged criminal acts does not form part of the offence.⁴ Article 7 of the ICC Statute governs crimes against humanity and in accordance with the jurisdictional elements of that offence, the attack must be directed against a civilian population and be part of a widespread or systematic attack,⁵ committed pursuant to or in furtherance of a State or organisational policy.⁶

B. Ad Hoc International Criminal Tribunal for the Prosecution of Acts of Terrorism

It would be possible for the UN Security Council to establish an *ad hoc* International Tribunal for the Prosecution of Persons Responsible for Committing Terrorism, similar to the ICTY and ICTR. Based on the experience of the Security Council in establishing the ICTY and ICTR, however, such international criminal tribunals have historically been used only when national courts have completely broken down, which is not the case in most of the States that are likely to prosecute alleged terrorists. Moreover, building such tribunals is slow, costly and requires a significant level of political will.

C. Special Courts

Special Courts, similar to the models used by the international community in Sierra Leone, Kosovo, or East Timor, could be established to prosecute crimes of international terrorism.⁷ Such a court or courts could be located where the crimes were committed, with the local judiciary and prosecution supplemented by international involvement, including international judges and prosecutors. The Special Court could be structured in such a way as to include members of specific ethnic or other groups, such as Muslim judges or prosecutors in the case of the September 11 attacks. Special Courts typically receive significant international financial and logistical assistance.

D. National Courts

Concerning prosecution of alleged terrorist acts in national courts, two issues arise: which nation's courts would have jurisdiction (and perhaps which State is best suited to pursue the prosecution), and once that issue is determined, which court within that State? The first issue concerns jurisdiction and may raise issues concerned with extradition. States have historically asserted jurisdiction under international criminal law on one or more of the following bases:⁸

- Territorial Jurisdiction (location where the crime was committed);
- Active Personality Principle (crime committed by a national of the State seeking to assert jurisdiction);
- Passive Personality Principle (the victim was a national of the State seeking to assert jurisdiction); and/or
- Protective Principle (the criminal conduct affects the security or other important interests of the State seeking to assert jurisdiction).

In the event that more than one State could assert jurisdiction, other issues may surface, including which State is best suited to conduct the prosecution. Moreover, if the accused is in custody, issues concerning extradition may arise if the State seeking to assert jurisdiction does not have custody of the accused. These issues are beyond the scope of this article. However, suffice it to say that they may raise significant hurdles to prosecution and in fact may actually preclude prosecution. For example, the accused may avoid trial if the custodial State is unable to exercise jurisdiction, and unwilling or unable⁹ to extradite the individual to a State which may impose the death penalty, and other States that do not impose the death penalty are similarly unable to exercise jurisdiction.

Assuming that the jurisdictional issues (and any other issues concerning choice of forum and extradition) are resolved, the next issue concerns the choice of which national court is the appropriate forum to conduct the prosecution. There are essentially three options, depending on the State concerned: “regular” civilian courts, special courts, and military courts.¹⁰ Each of these options has pros and cons and will be discussed in turn.

1. *“Regular” Civilian Courts*

The primary advantages of proceeding in “regular” civilian courts are that because such courts pre-date the acts of terrorism, there are generally no human rights or due process concerns, and they afford public trials. On the other hand, trial in such courts can be problematic for several reasons. First, the prosecution may be hindered in presenting evidence due to the source of that information. When derived from the intelligence community, national authorities may be reluctant to allow certain evidence (or its sources) to be disclosed in court. Second, significant security concerns arise with respect to the witnesses, victims, jurors, judges, and court personnel. Third, many national criminal procedure and evidentiary codes do not contain provisions allowing for variations in certain types of trials. For example, problems relating to evidentiary exclusions, prohibitions on hearsay evidence or evidentiary chains of custody may prove fatal to successful prosecution of terror charges.

2. *Special Courts*

To alleviate these problems, many States have tailored provisions permitting certain types of offences, such as terrorism, to be prosecuted in special courts, with special procedural and evidentiary rules. For example, witnesses may be permitted to testify anonymously or judges may be permitted to preside over such trials anonymously. In some instances, the right of the accused to confront the witnesses or evidence against him or her may be curtailed. Many of these special courts have failed to meet international necessary process standards with respect to the rights of the accused.

3. *Military Courts*

To alleviate some of these concerns, some States use military courts, a term which may include courts-martial, military tribunals or military commissions.¹¹

Military courts tend to have several significant advantages over civilian courts. First, trials may be conducted expeditiously. Second, trials before military courts may be held virtually anywhere in the world, with no need for significant physical infrastructure or resources. Third, because the legal bases for such courts typically pre-date the alleged crimes, they are usually free from the criticism that they were created for specific purposes.¹² Finally, military courts usually have procedures, such as various forms of protective measures, for adducing evidence from intelligence sources.

On the other hand, military trials may raise human rights concerns, particularly where the accused is a civilian, or when the court's assertion of personal jurisdiction may not be solidly grounded. Moreover, such proceedings may tend to be conducted without full public access, with all the problems inherent in such secret proceedings. Finally, trial by military courts may raise constitutional issues, such as separation of powers.

III. Substantive Law

One of the most challenging problems for prosecutors in facing terrorism trials is the lack of a clear definition of the crime and a total absence of case law under international law.¹³ Several international treaties cover acts that fall under the general category of terrorism, although, as noted above, the general practice is to prosecute individuals for the underlying criminal acts, not for the undefined crime of "terrorism." In addition, there are several regional efforts, particularly within the European Union, to define and prosecute crimes of terror.

A. Substantive Law: International Agreements

Several multinational treaties criminalize specific offences as falling under the rubric of terrorism. Clifton M. Johnson, an attorney-adviser in the U.S. State Department and formerly the Department's primary attorney on terrorism issues, has identified seven provisions that are common to recent antiterrorism conventions.¹⁴ These treaty provisions:

1. Apply only to crimes with an international element;
2. Obligate States Parties to criminalize the covered offences irrespective of the motivation of the perpetrators;
3. Obligate States Parties to take into custody offenders found on their territory;
4. Facilitate the extradition of offenders;
5. Require States Parties to afford one another the greatest measure of assistance in connection with criminal investigations or proceedings related to the enumerated crimes;
6. Prohibit the political offence doctrine being the grounds for the refusal of an extradition or request for mutual legal assistance;
7. Provide for the transfer of prisoners in order to assist the investigation or prosecution of covered offences.¹⁵

The following international treaties have provisions outlawing crimes that

have come to be considered acts of terrorism, and, as such, provide the substantive law bases for prosecuting acts of terrorism.¹⁶

Convention for the Suppression of Unlawful Seizure of Aircraft (“Hijacking Convention”) (1970).¹⁷ Article 1 of this treaty provides that any person on board an aircraft in flight who unlawfully, by force or threat thereof (or by any other form of intimidation), seizes or exercises control of the aircraft or attempts to do so or acts as an accomplice to anyone who performs such acts, commits the offence of hijacking.¹⁸

Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, the “Safety of Aircraft Convention” of 1971.¹⁹ This Treaty prohibits several acts,²⁰ including:

- acts of violence against other persons on board the aircraft if such acts are likely to endanger the safety of the aircraft;
- destruction of the aircraft rendering it incapable of flight or which is likely to endanger its safety in flight;
- placing a device or substance on board the aircraft that is likely to destroy the aircraft, render it incapable of flight or which is likely to endanger its safety in flight;
- destruction of or interference with air navigation facilities or their operation if such acts are likely to endanger the safety of aircraft in flight; or
- communication of information known to be false which endangers the safety of an aircraft in flight.

Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons Including Diplomatic Agents, the “Convention on Protection of International Persons” of 1973.²¹ This Treaty prohibits the murder, kidnapping, or attack upon the person or liberty of an “internationally protected person,” including diplomats.²² Moreover, it also proscribes a violent attack on the official premises, private residence, or means of transport of such persons, if the attack is likely to endanger their safety or liberty.²³ The Convention also forbids threats²⁴ and attempts to commit these offences,²⁵ and includes a provision setting forth accomplice liability.²⁶

International Convention Against the Taking of Hostages, the “Hostage-Taking Convention” of 1979.²⁷ Article 1 of this Convention provides that:

- Any person who seizes or detains and threatens to kill, to injure or to continue to detain another person (hereinafter referred to as the “hostage”) in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offence of taking of hostages (“hostage-taking”).²⁸

The Convention on the Physical Protection of Nuclear Materials of 1980.²⁹ This Treaty seeks to safeguard nuclear material³⁰ and requires States Parties to enact national legislation prohibiting the following offences:³¹

- unlawful receipt, possession, use, transfer, alteration, disposal or dispersal of nuclear material which causes or is likely to cause death or injury to any person or substantial damage to property;
- theft, robbery, embezzlement or fraudulent obtaining of nuclear material;
- acts constituting a demand for nuclear material by threat, use of force or other means of intimidation;
- threat to use nuclear material to cause death, serious injury or substantial property damage; and
- attempts to commit any of the above acts or any act that constitutes participation in any of the above acts.³²

The Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving Civil Aviation of the International Airport Security Convention of 1988.³³ This Convention supplements the Safety of Aircraft Convention of 1971 by extending that treaty to cover similar acts committed at airports.³⁴

Convention and Protocol from the International Conference on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, the “Maritime Navigation Safety Convention” of 1988.³⁵ This convention prohibits a wide range of activities that endanger the safe navigation of ships at sea, including:

- seizure or the unlawful exercise of control over a vessel;
- acts of violence against persons on-board the vessel;
- destruction of the ship or its cargo;
- the placing of a device or substance on the ship that it likely to endanger the vessel;
- destruction of maritime navigation facilities;
- false communication likely to endanger the safe navigation of the vessel; and
- killing or injuring any person during the attempted commission of any of these offences.³⁶

Article 2 of this treaty, like many of the other treaties referred to in this section, proscribes attempts to commit any of these offences and sets forth accomplice liability.³⁷ Article 2(c) also makes it an offence to threaten another person to commit certain of the enumerated acts.³⁸

The Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf of the “Safety of Fixed Platforms on Continental Shelf Convention” of 1988.³⁹ This agreement, which supplements the Maritime Navigation Safety Convention, imports many of the provisions of that treaty for the protection of crimes committed on board or against fixed platforms located on the continental shelf.

The International Convention for the Suppression of Terrorist Bombings of 1997.⁴⁰ Article 2 of this important convention provides that any person commits an offence under this treaty if that person:

- unlawfully or intentionally delivers, places, discharges or detonates an explosive or other lethal device in, into or against a place or public use, a State or government facility, a public transportation system or an infrastructure facility with the intent to cause death or serious bodily harm;⁴¹ or
- with the intent to cause extensive destruction of such a place, facility or system, where such destruction results in or is likely to result in major economic loss.⁴²

The treaty also provides for the criminalization of attempts to commit any of the offences listed above⁴³ and for broad accomplice liability.⁴⁴

The International Convention on Suppression of Financing Terrorism of 1999.⁴⁵ The principal purpose of this treaty is to require States Parties to criminalize and establish jurisdiction over the enumerated offences and reaffirms the *aut dedere aut judicare* principle concerning these crimes.

B. Substantive Law: Regional Efforts

Regional organizations, such as the European Union, are also working on common legal frameworks to define terrorist offences and several provisions of the Treaty on European Union⁴⁶ pertain to terrorism and mutual assistance in combating the problem. For example, Article 29 specifically lists terrorism as a crime requiring common position, while Article 30 provides for police co-operation in combating terrorism and Article 31 sets forth measures governing judicial co-operation. The European Commission has also proposed a Council Framework Decision on combating terrorism to strengthen inter-European co-operation on this issue.⁴⁷

C. Substantive Law: Galic Trial at the ICTY

General Stanislav Galic, the former commander of the Sarajevo Romanija Corps of the Bosnian Serb Army is being prosecuted before the ICTY for his alleged role with respect to the Siege of Sarajevo, during a 23-month period from September 1992-August 1994. In its Pre-Trial Brief,⁴⁸ the Prosecution has stated that “the principal objective of the campaign of sniping and shelling of civilians was to terrorize the civilian population.”⁴⁹ The Pre-Trial Brief elaborates upon this objective in the following terms:

The intention to spread terror is evident, *inter alia*, from the widespread nature of civilian activities targeted, the manner in which the unlawful attacks were carried out, and the timing and the duration of the unlawful acts and threats of violence, which consisted of shelling and sniping. The nature of the civilian activities targeted demonstrates that the attacks were designed to strike at the heart, and be maximally disruptive, of civilian life. By attacking when civilians were most vulnerable, such as when seeking the necessities of life, visiting friends

or relatives, engaging in burial rites or private prayer, or attending rare recreational events aimed precisely at countering the growing social malaise, the attacks were intended to break the nerve of the population and to achieve the breakdown of the social fabric.⁵⁰

With respect to the legal elements required to prove the charge of inflicting terror, the Prosecution, in its Pre-Trial Brief, argued that this offence contains the following essential elements:

- unlawful acts or threats of violence;
- which caused terror to spread among the civilian population;
- the acts or threats of violence were carried out with the primary purpose of spreading terror among the civilian population;
- there is a nexus between the acts or threats and an armed conflict, whether international or internal in character; and
- the Accused bears individual criminal responsibility for the acts or threats under either Article 7(1) or 7(3) of the Statute.⁵¹

The trial is expected to last into the spring of 2003, with the judgement to be rendered in mid-2003.

IV. Procedural Issues

Concerning procedural issues, the most important are those surrounding the due process rights of the accused and will obviously depend on choice of forum. Perhaps the foremost issue is whether the defendant can get a fair trial. In light of the events of September 11th, it is not unreasonable to ask if any defendant could get a fair trial before a U.S. jury for these crimes. Moreover, in preparing a defence for such crimes, it would be necessary to ensure that the accused has access to exculpatory information and the right to compel witnesses on his or her behalf. Although these rights are enshrined in the international human rights conventions concerning due process, in practice they may be extremely difficult to provide in practice.

V. Evidentiary Issues

Issues concerning evidence may also be problematic in prosecuting terrorism cases.⁵² The gathering and safekeeping of evidence is the first potential problem. Although many of these problems are not unique to prosecuting terrorist cases, the problems raised are typically more significant than in other types of prosecutions, in part because the stakes are often much higher in terrorist cases. For example, many witnesses may be unwilling or unable to testify in such cases, and it is extremely difficult to locate the “insider” witnesses who may be crucial to obtaining a conviction. Second, there are usually significant difficulties in collecting evidence in the field, especially in cases involving bombings. Although these problems may be overcome, think of the inherent difficulties in extracting evidence from the site of the World Trade Center or in the wake of the Lockerbie crime,

where evidence was strewn over miles of the Scottish countryside. In addition, there are often cultural and language difficulties to be surmounted when interviewing witnesses or suspects, a problem that may be exacerbated by the use of codes or ambiguous language among the suspects.

Similar problems result at the trial stage, when it comes time to adduce the evidence in court. One of the most difficult hurdles to be overcome is the use in court of protected sources, such as intelligence officers and informants. Governments are often hesitant to permit testimony from intelligence sources, who may be questioned about the methods used to obtain information. The same may be said of electronic intercepts and other classified forms of information. It may be necessary to fashion unique forms of protection to allow such evidence to be used in court, depending on the forum. In those instances where established rules and jurisprudence do not permit such deviations, the prosecution of such cases may need to be abandoned or shifted to another forum.⁵³ It may also be difficult to obtain certified court interpreters who are fluent in the nuances of dialects or are attentive to certain linguistic characteristics displayed by the witnesses or co-accused in the event that they testify.

VI. Conclusions

There are many options for bringing such perpetrators to justice, although there is no preferred method of achieving this goal, since the various types of courts all face evidentiary and procedural hurdles. Without clear legal definitions of the crimes involved, this task becomes all the more difficult. While the law may be limited in terms of the assistance that it plays in the fight against global terrorism, it nevertheless has an important role to play. As important as the prosecution of terrorists is to the international community, it is equally important to ensure that such trials are fair to the accused, because without fairness - and the perception of fairness - such trials may actually encourage other terrorists to strike.

¹ Rather, as will be discussed *infra*, many international crimes fall within the rubric of “terrorism” and the choice of prosecutorial forum may determine which specific offence to charge the accused with.

² See for example, the articles published in “*Agora: Military Commissions*”, 96 *AJIL* 320 *et. seq.* (2002); Jordan J. PAUST, “*Antiterrorism Military Commissions: Courting Illegality*”, 23 *Mich. J.I.L.* (No. 1, Fall 2001), pp. 1-29; Kenneth ANDERSON, “*What to do with Bin Laden and Al-Qaeda Terrorists?: A Qualified Defense of Military Commissions and United States Policy on Detainees at Guantanamo Bay Naval Base*,” 25 *Harvard J. Law & Pub. Pol.* (No. 2, Spring 2002), pp.591-634.

³ Hereinafter, ICC. The ICC was discussed as a possible forum for prosecution notwithstanding the fact that the ICC came into establishment on 1 July 2002 and, pursuant to Article 11(1) of the Rome Statute of the International Criminal Court, July 17, 1998, [UN Doc. A/CONF.183/9*, corrected in UN Doc. PCNICC/1999/INF/3*, reprinted at 37 *ILM* 999 (1998)] (hereinafter ICC Statute), only has jurisdiction from that date forward. Consequently, the ICC has no jurisdiction over the events occurring prior to 1 July 2002. Nevertheless, the ICC will be discussed *infra*, since it is possible that future acts of terrorism may be prosecuted in that court.

⁴ ICC Statute Article 8(1) states: «The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.» The deliberate use of the phrase “in particular” is a prosecutorial guideline, not a limitation on jurisdiction. See

the commentary on ICC Statute Article 8(1), William J. FENRICK,, “*Commentary on the Rome Statute of the International Criminal Court*”, Otto TRIFFTERER, ed., (Nomos Verlagsgesellschaft, 1999), p.181, margin 4.

⁵ ICC Statute Article 7(1).

⁶ ICC Statute Article 7(2)(a).

⁷ For a description of such courts, see Daryl A. MUNDIS, “*New Mechanisms for the Enforcement of International Humanitarian Law*”, 95 AJIL, No. 4, October 2001, pp. 934 *et. seq.*

⁸ See Kriangsak KITTICHAISAREE, “*International Criminal Law*”, Oxford UP, 2001, pp.38-39.

⁹ Due to national legislation or human rights obligations, for example.

¹⁰ Use of the term “military courts” includes courts-martial, military commissions and military tribunals.

¹¹ Unless specifically noted, the use of the term “military courts” in this paper refers to all three types of mechanisms. The differences between these types of courts vary depending on national legislation. Concerning the use of courts martial and military commissions under U.S. law, see Daryl A. MUNDIS, “*The Use of Military Commissions to Prosecute Individuals Accused of Terrorist Acts*” 96 AJIL, No. 2 April 2002, pp. 320-328; PAUST, *supra* note 180; ANDERSON, *supra* note 180.

¹² The proposed use of military commissions by the United States was criticized not on the basis of the proposal to try alleged terrorists by such commissions *per se*, but rather due to the unilateral decision by the Bush Administration to label scores of individuals as “unlawful combatants.” This distinction over the source of the criticism for the proposed use of military commissions by the United States is significant. At any rate, through 1 May 2003, the United States has not conducted any trials by military commission.

¹³ The discussion *infra* of the trial of General Stanislav Galic before the ICTY provides a good example of an on-going international trial where the accused is charged *inter alia* with inflicting terror. Although not a prosecution for “terrorism” *per se*, this case could have important ramifications for future international prosecutions.

¹⁴ Clifton M. JOHNSON, “*Introductory Note to the International Convention for the Suppression of the Financing of Terrorism*”, 39 ILM 268, 2000.

¹⁵ *Id.*

¹⁶ Of course, these treaties provide the legal basis for States Parties to amend their criminal codes, as required pursuant to their national constitutions, in order for these treaties to provide the bases for criminal prosecution.

¹⁷ 10 ILM 133 (1971).

¹⁸ *Id.*, Art. 1 (emphasis added).

¹⁹ 10 ILM 1151 (1971).

²⁰ Article 2 of this treaty also criminalizes attempts and aiding and abetting in the form of accomplice liability.

²¹ UN Doc. A/RES/3166 (1974), 13 ILM 41 (1974).

²² *Id.*, Art. 1(a).

²³ *Id.*, Art. 1(b).

²⁴ *Id.*, Art. 1(c).

²⁵ *Id.*, Art. 1(d).

²⁶ *Id.*, Art. 1(e).

²⁷ UN Doc. A/C.6/34/L.23 (1979), 18 ILM 1456 (1979).

²⁸ *Id.*, para. 1. Paragraph 2 of this treaty criminalizes attempts and aiding and abetting in the form of accomplice liability.

²⁹ Reprinted in “*International Criminal Law: A Collection of International and European Instruments*”, Christine VAN DEN WYNGAERT and Guy SESSIONS, eds. Kluwer, 1996, p.55 *et seq.*

³⁰ See *id.*, preambular paragraph (a) for a definition of this term.

³¹ *Id.*, Art. 7(2).

³² *Id.*, Art. 7(1).

³³ 27 ILM 627 (1988).

³⁴ *Id.*, Art. 1.

³⁵ 27 ILM 668 (1988).

³⁶ *Id.*, Art. 1. It must be stressed that in order for any of these acts to be offenses under the treaty, the safe navigation of the vessel in question must be hindered by the act.

³⁷ *Id.*, Arts. 2(a) and (b).

³⁸ *Id.*, Art. 2(c). This provision provides: “Any person also commits an offense if that person threatens with or without a condition, as is provided for under national law, aimed at compelling a physical or juridical person to do or refrain from doing any act, to commit any of the offenses set forth in paragraph 1, subparagraphs (b), (c) and (e), if that threat is likely to endanger the safe navigation of the ship in question”

³⁹ 27 ILM 685 (1988).

⁴⁰ U.N. Doc. A/Res/52/164 (1988). See also U.N. Doc. A/Res/51/210 (1996).

⁴¹ *Id.*, Art. 2(1).

⁴² *Id.*

⁴³ *Id.*, Art. 2(2).

⁴⁴ *Id.*, Art. 2(3).

⁴⁵ 39 ILM 268 (2000).

⁴⁶ “*Official Journal of the European Communities*”, No. C 191, 29 July 1992, p. 1 *et seq.* as amended, see “*Official Journal of the European Communities*”, No. C 340, 10 November 1997, p. 1 *et seq.*

⁴⁷ See Commission of the European Communities, “*Proposal for a Council Framework Decision on combating terrorism*” (presented by the Commission), Brussels, 19 September 2001, COM(2001) 521 final, 2001/0217 (CNS).

⁴⁸ “*Prosecutor vs. Stanislav Galic*”, Case No. IT-98-29-PT, “*Prosecutor’s Pre-Trial Brief Pursuant to Rule*” 65 *ter (E)(i)*, 23 October 2001.

⁴⁹ *Id.*, para. 22.

⁵⁰ *Id.*, paras. 23-24.

⁵¹ *Id.*, para. 142.

⁵² Obviously, depending on the forum, the evidentiary and procedural issues (described in the following section) will vary.

⁵³ This may, of course, have a serious impact on either the fairness of the trial or in the public confidence of any judgement rendered, particularly if the shift in forum comes in mid-trial.

ISRAELI COUNTER-TERRORISM MEASURES: ARE THEY “KOSHER” UNDER INTERNATIONAL LAW?

Yuval SHANY (*)

I. Introduction

The Israeli struggle against terrorism is unique in several ways. First, Israel is facing one of the fiercest terror campaigns a democracy has ever faced. As a result, it confronts an unusually difficult dilemma. The sheer scope and number of Palestinian terror attacks against Israeli citizens creates significant pressures on Israeli decision makers to resort to extraordinary counter-terrorism measures deemed necessary to re-establish national security. At the same time, Israel, as a democracy subject to the rule of law, which includes international law, and vulnerable to international pressures, normally strives to abide by its international obligations. This fierce struggle between security needs and the constraints of legality has so far produced mixed results. As will be discussed below, the lawfulness of some of the tactics employed by Israel in the current conflict with the Palestinians is at best controversial under existing international law.

Second, Palestinians are fighting a war of national liberation against Israel, and both terror attacks and counter-terror measures have to be analysed in light of this political and legal context. Most significantly, this context influences the manner in which the legitimacy of such measures is perceived by the international community, in general, and the international legal community, in particular.

Third, Israel is an Occupying Power in most, if not all, of the West Bank and Gaza Strip. As a result, its ability to undertake counter-terrorism measures is constrained by the laws of belligerent occupation, which introduce restrictions upon the Occupying Power in its relations with protected persons in the Occupied Territories. This further complicates the prevailing legal issues.

Fourth and last, the Israeli legal system is structured in a way that enables legal issues to reach the Supreme Court - Israel's highest judicial instance - almost immediately and without meaningful *jus standi* limitations. This form of high-profile judicial supervision over counter-terrorism events in “real time” accentuates the role of law in the decision-making process within Israel and empowers human rights groups, by enabling them to effectively challenge the policies and actions of the Israeli Defence Force (IDF). It is the purpose of the present lecture to discuss

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some of the most conspicuous Israeli counter-terrorism measures in the light of these unique legal features.

II. Background

It is impossible in the course of the presentation to review the entire history of the Israeli-Palestinian conflict. It will suffice to recount certain key facts and events. The State of Israel was created in 1948¹ in an area comprised of just over 70% of mandatory Palestine. Two other pieces of mandatory Palestine, the Gaza Strip and the West Bank, were conquered in the 1948-49 war (Israel's war of independence) by Egypt and Jordan. While Egypt maintained a military occupation of the Gaza Strip until 1967 (and had never presented a claim to the territory), Jordan annexed the West Bank in 1950. This act of annexation was deemed, at the time, illegal by most of the international community²; however, in 1988 Jordan renounced all of its claims over the area in favour of the Palestinians.³ As a result of the 1967 War (The Six Days War), Israel became the Occupying Power in both the West Bank and Gaza Strip. It also conquered the Sinai Peninsula from Egypt and the Golan Heights from Syria. I will not address the status of these latter two areas since they have no immediate bearing on the topic of our discussion.

Since 1967, Israel has exercised control over a large Palestinian population - now estimated to consist of 3.5 million persons. The immediate question that ought to be addressed is what law governs these relations, since the answer will influence our discussion regarding the lawfulness of measures undertaken by both parties during the present conflict. I would like to submit that the body of law most intimately connected to the relations between occupying forces and occupied persons (as well as to the current relations between the parties to the ongoing armed hostilities) is international humanitarian law. Thus, while other normative frameworks might also be relevant (most notably, human rights law and, as will be explained below, terror-related instruments), analysis will concentrate primarily on the application of international humanitarian standards to the Israeli-Palestinian conflict.

From the Israeli perspective, the legal situation after 1967 was that with the exception of East Jerusalem, which was annexed to Israel immediately after the war⁴ (and, as is well known, the vast majority of the international community has so far rejected the legality of this move⁵), Israel exercised its powers of control throughout the West Bank and Gaza Strip via military commanders, in accordance with the international law of belligerent occupation. However, Israel has only been willing to apply the provisions of the 1907 Hague Regulations⁶ in the Occupied Territories and had consistently refused to apply the Fourth 1949 Geneva Convention (Geneva IV)⁷ (notwithstanding the fact that Israel is a party to that Convention). The official explanation underlying this position is that the provisions governing the laws of occupation found in Geneva IV apply, according to Article 2(2), only in situations involving the "occupation of the territory of a High Contracting Party." According to Israel, the illegality of the occupation of the West Bank and Gaza Strip by Jordan and Egypt, respectively, in the 1948-49 conflict, leads to the conclusion

that the occupation of these territories by Israel in 1967 did not qualify as an occupation of the territory of any High Contracting Party. Thus, Geneva IV should not apply.⁸

This rather formalistic approach is still officially maintained by Israel, although it has eroded in recent years. First, since the early 1970s Israel has repeatedly undertaken to respect the “humanitarian provisions” of Geneva IV.⁹ This statement can be viewed both as a “unilateral declaration” under international law, which constitutes a source of a legal obligation¹⁰, and a “governmental undertaking,” which is semi-binding under Israeli domestic administrative law. Second, in a number of court cases, including some recent ones,¹¹ the State Attorneys did not raise serious objections to the application of Geneva IV as a yardstick by which the legality of IDF actions ought to be examined. Third, Military Order 33.0133 (1982) obligates all Israeli military personnel to respect the terms of all of the Geneva Conventions and the Hague Convention for the Protection of Cultural Property. Although this Order cannot create a legal obligation to apply Geneva IV if it is deemed inapplicable, it strengthens awareness of IDF service-members to the contents of international humanitarian law standards, in general, and to basic principles governing situations of occupation, in particular. Finally, even if the Israeli position concerning the inapplicability of the Fourth Convention had been legally accepted, one could argue that given the strong indications that Geneva IV is nowadays reflective of customary international law,¹² its central principles should also apply, consistent with the 1995 ICTY *Tadić* decision,¹³ to non-international cases of military occupation. These most certainly include the case of the Palestinian Occupied Territories.

In any event, I am of the opinion that the Israeli position on the applicability of Geneva IV is misguided and should be rejected. In line with the law of treaties, the convention should be construed in a manner that gives effect to its central goal - the protection of civilians who find themselves in the hands of an adversary.¹⁴ Protecting Palestinians clearly falls within the scope of its object and purpose. Further, since Israel neither claims sovereignty over the Occupied Territories (with the previously noted exception of East Jerusalem) nor offers their inhabitants rights associated with citizenship, its refusal to apply Geneva IV leads to the undesirable result of depriving Palestinians of most protections available to individuals under national and international law. Still, the need for legal protection is underscored by the ongoing hostilities between Palestinians and Israel, and by the immense human suffering that ensues therefrom.

The applicability of Geneva IV could be maintained through two alternative interpretative constructions. One possibility is to construe Articles 2(1) and 2(2) as alternative clauses governing the conditions for application. Thus, it could be argued that Geneva IV applies in the case of occupation brought about as the result of any interstate-armed conflict [pursuant to Article 2(1)], notwithstanding the non-international nature of the occupation itself. The fact that the West Bank and Gaza Strip were occupied by Israel following an armed conflict between Israel, on one hand, and Jordan and Egypt, on the other hand, thus renders irrelevant the

invalidity of the title of these last two countries over the Territories. In the alternative, one could argue that the term “territory of” in Article 2(2) encompasses not only formal sovereignty over land, but also the concept of possession (whether legal or illegal). Thus, the fact that Israel conquered the territories from the hands of other States, should lead to application of the laws of occupation, especially since Israel itself has not so far claimed sovereignty in the Occupied Territories (with the exception of East Jerusalem). In light of these arguments, I believe it is fair to hold that the legality of Israeli measures taken in the Territories should be evaluated, *inter alia*, in accordance with Geneva IV law.

The next significant episode in our short historical survey is the Oslo Process. This process began in 1993 with the signing of a Declaration of Principles between Israel and the Palestinian Liberation Organization (PLO), which laid out the outlines of future peace negotiations between the parties.¹⁵ In essence, the Oslo Process envisioned a five-year interim period during which a Palestinian Authority (PA) would be created that would exercise self-rule in areas of the Occupied Territories ceded to it by Israel. During that period, permanent status talks intended to bring about a final peace agreement between the two parties were to take place. In 1994, the Authority was established in most of the Gaza Strip and in the West Bank city of Jericho. By the year 2000, the Palestinians had direct control over all major cities of the West Bank (“Area A” - about 10% of the West Bank) and administrative control (without total security control) over most West Bank villages (“Area B” - about 20% of the West Bank). Israel retained full control of most unpopulated areas of the West Bank and around military outposts and Israeli settlements in the Gaza Strip and West Bank (“Area C” - some 70% of the territory of the West Bank).

The legal question that arises in this context pertains to the status of areas ceded to the Palestinians under the Oslo Accords. The answer is unclear. Israel has sometimes claimed that it no longer has the responsibility of an Occupying Power over territories administered by the PA.¹⁶ At other times, Israel has treated these territories as occupied for certain purposes (e.g. for assigning the residence of certain individuals within the Occupied Territory).¹⁷ Some NGOs and UN human rights expert bodies have noted that Israel had maintained under the Oslo Accords certain supervisory powers over PA legislation (although these powers have never been actually put to use), and that therefore the occupation continued despite the creation of the PA.

The sensible position is that, on the one hand, Israel still has certain obligations *vis-à-vis* the inhabitants of PA-controlled areas, in light of its ability to influence the lives of Palestinians living in these areas and in accordance with Article 47 of the Geneva IV.¹⁸ However, on the other hand, given the fact that Israel lacks effective control over areas ceded to the PA, which were not recaptured by Israel in the present conflict, these are obligations of a more limited scope than the ones applicable in “typical” occupation situations. They consist only of the powers and authorities *actually* maintained by Israel over the Palestinian inhabitant of these Territories (a notable example is the power to introduce restrictions on

movement of persons and goods to and from PA-controlled areas, and between the various PA-controlled enclaves). My position is consistent with the text of Article 6 of Geneva IV, which provides that at the end of one year from the end of military operations the Occupying Power will be required to fulfil only a small number of key provisions, enumerated in the article, and even these apply only “to the extent that such Power exercises the functions of government in such territory.” In other words, Israel has only limited legal responsibilities with regard to PA-controlled areas.

As is well known, the peace process failed miserably, though it is beyond the scope of the present lecture to address the reasons for this unfortunate development. It suffices to note that the basic premise underlying the process—that trust between the parties would be built over time - proved to be a misconception, and, as time went by, the parties became more wary of each other’s true motives. The Israelis blamed the Palestinian Authority for not cracking down on Islamic terrorists, who were responsible for a string of suicide bombing attacks in Israel between 1994-98 that left more than a 150 Israelis dead, and for tolerating, and sometimes even encouraging, popular campaigns inciting hatred of Israel. The Palestinians blamed the Israelis for continuing the policy of expanding what they deem to be illegal settlements in the Occupied Territories (the position that the Israeli settlements in the Occupied Territories are unlawful is also generally shared by the rest of the international community¹⁹), and for lagging in ceding territory under the Agreements.

In July 2000, Chairman Arafat and Israeli Prime Minister Barak were invited by U.S. President Clinton to Camp David to try and work out the outlines of the final status agreement. Two months after the collapse of the summit, riots broke out across the Occupied Territories. It is unclear what exactly sparked the uprising. However, many commentators have cited two provocations by Israel. The first was the September 28th visit by the then opposition leader, Ariel Sharon, to the Temple Mount (Haram al Sharif). The holiest site for Jews and one of the three holiest Muslim sites, the visit was perceived by Palestinians as an attack upon the holy symbols of Islam. The second was the excessive use of force by Israeli police to quell violent demonstrations that took place around the Temple Mount mosques on September 29th, which resulted in the death of five demonstrators.²⁰ Still, Israeli sources have blamed the Palestinian Authority for pre-planning and encouraging the riots, and using Sharon’s visit as a pretext to initiate violence, in the hope of improving the PA’s bargaining position vis-à-vis Israel in the permanent status negotiations²¹.

In any event, the September 2000 riots have deteriorated into a prolonged conflict between Israel and the Palestinians whose end is still not in sight. More than 1,700 Palestinians and over 600 Israelis have been killed since then.²² Thousands more have been injured. By April 2002, Israel has re-occupied most of the West Bank and has, in effect, rendered the Palestinian Authority (which Israel views as legally responsible for the attacks against it) largely incapacitated. The scope and duration of the violence, including the use of heavy weaponry by both

sides (tanks, fighter planes and helicopter gun ships by the Israelis; rockets, mortars, and large explosive charges by the Palestinians), leave no doubt in my mind that the conflict should be viewed as a *non-international* armed conflict. This is because the most stringent threshold requirements for application of Common Article 3 of the Geneva Conventions, as well as other customary rules of warfare which may apply in such situations (i.e., a high-intensity conflict between organized groups controlling pieces of territory), has clearly been met²³ (in fact, the Second Additional Protocol to the Geneva Conventions would also have been applicable, had Israel been a party thereto).

Still, Israel does not accept the view that the conflict should be viewed as an *international* armed conflict because the Palestinian Authority is not an independent State, and Israel has never accepted the 1977 First Additional Protocol to the Geneva Conventions (Protocol I), which extends the laws of international warfare to wars of national liberation (if it had, the Palestinian uprising would seem to qualify as a national liberation conflict under the terms of the Protocol²⁴). In Israel's view, Protocol I's scope of application does not represent customary international law.²⁵ But even if it did, Israel is a persistent objector to the application of its norms in any conflict other than an inter-State one. So, the rules governing the Palestinian uprising should be, in Israel's view, the laws of non-international armed conflict (Common Article 3 and other customary standards). In addition, with regard to areas that remained under, or were subsequently returned to, Israeli control, Israel also concedes the relevance of the laws of belligerent occupation (consisting, according to it, mainly of the 1907 Hague Regulations).

The current Palestinian uprising (*intifada*) has presented very difficult security and legal challenges for the IDF. The first stage of the uprising (the initial few months of the *intifada*) consisted mainly of violent demonstrations and mass marches against IDF positions on the outskirts of Palestinian cities. The demonstrators included non-armed civilians, stone-throwing (and sometime Molotov-bottle-throwing) youth and, increasingly over time, armed militants who used live weapons against Israeli soldiers. According to Israeli sources, they also used civilian demonstrators as human shields. During this stage, IDF forces suffered very minor losses, while dozens of Palestinians were killed. One should note in this regard that doubts have been cast on the lawfulness of some demonstration-quelling measures employed by Israeli forces. Critics have focused especially on the legality of the use of rubber-coated-bullets by the IDF in order to disperse demonstrators. This is because of the deadly impact of this type of ammunition when used at close range (as has arguably occurred on numerous occasions during the present conflict).²⁶

The second stage of the uprising (beginning in November 2000) was mainly characterized by drive-by shooting of Israelis travelling in the Occupied Territories and by the firing of gun bullets, mortars and (later) rockets on Israeli settlements in the Occupied Territories and within Israel proper. It was also characterized by armed attacks on army outposts. In response to these acts of violence, most of which Israel characterizes as terrorists attacks, the IDF imposed severe travel

restrictions upon the population of the Occupied Territories. It also reoccupied strategically located areas from which fire was opened and conducted a variety of short-term mopping-up operations in PA-controlled areas. These incursions, and the fighting tactics used in them, have raised serious legal questions, which I will deal with in the next part of this lecture.

The third stage of the *intifada* (beginning in early 2001) consists of an unprecedented wave of Palestinian suicide bombing attacks. They are responsible for most Israeli casualties in the current conflict. Israel views these attacks as unjustifiable terror attacks (Amnesty International and Human Rights Watch have characterized them as crimes against humanity)²⁷ which warrant extreme responsive self-defence measures. I will discuss them immediately.

I would like to conclude this background survey with a few additional words on the legal framework and on the incorporation of considerations of international legality in the IDF decision-making process. As is well known, there is an ongoing discussion as to the definition of terrorism. Recall the maxim “one man’s terrorist is another man’s freedom fighter.” Still, a strong case could be made in favour of the position that any act of politically motivated violence deliberately targeting civilians is an act of terror. Therefore, most, if not all, Palestinian attacks directed against Israeli citizens are terrorist attacks, regardless of their cause (while attacks by persons who distinguish themselves from the civilian population and direct their actions against IDF soldiers are generally permissible under international law).²⁸ However, the lawfulness of Israeli counter-terrorism actions has been addressed by the Israeli authorities, the Israeli courts, and most experts in the field under the ordinary laws of armed conflict. This seems to be the most appropriate legal paradigm for appraising the legality of acts committed in the context of the present *conflict*. Indeed, the well-established principles of international humanitarian law provide a much more comprehensive normative framework to examine the legality of measures employed during the present conflict than the still nascent body of norms governing the fight against terror. Thus, the debate concerning the characterization of Palestinian attacks as terror attacks (or for that matter, the characterization of the Israeli response as a form of terror) is largely irrelevant for the purposes of this lecture.

As for the place of legal considerations in IDF decisions, one has to make a distinction between theory and practice. In theory, international law occupies a paramount position under Israeli military law. All soldiers are subject to international law and must observe the laws of war. This obligation has just been restated by the Israeli Supreme Court in the *Ajouri* case.²⁹ Legal advisors are also consulted, on a regular basis, with relation to target selection and with respect to the choice of specific war tactics. Thus, for example, the IDF’s initial recommendation to deport families of suicide bombers was rejected by the State Attorney General, and a less radical approach - the assigned residence of family members whose involvement in their relative’s terror acts had been established - was opted for. It should also be noted that the IDF’s actions are supervised by the Supreme Court, which serves as a first and last-instance administrative court, and

oversees, *inter alia*, the compliance of the army with international legal standards. Given the broad right of access to the Court, which can be invoked almost instantly, this procedural avenue presents a unique form of legal supervision in “real time.” Finally, there is also growing awareness of the possibility of international prosecution of IDF personnel. Several proceedings have already been initiated against Israeli officers in Belgium and other European countries following complaints made by Palestinians. Israel is also apprehensive about the jurisdiction that the ICC might choose to exercise over the Occupying Territories.³⁰ All of these developments contribute to increased appreciation of the need to comply with international legal standards

However, in practice, it seems that given the scarcity of criminal investigations undertaken by the military legal authorities, many soldiers operate in the Occupied Territories with a sense of impunity. Although the IDF Chief of Staff has recently issued stricter orders mandating internal investigations of all events involving the loss of life of Palestinian civilians,³¹ it looks as if more vigorous prosecutorial action is still needed. Further, several measures taken recently, involving the use of heavy bombs and other heavy weaponry in densely populated areas (most notably the targeted killing of Sheikh Shehada on 23 June 2002, about which I will elaborate later), raise questions regarding the quality of the legal advisory services provided to the military, or introduce the possibility that these services are sometimes ignored.

III. Specific Counter-Terrorism Policies employed by Israel

I will move on now to discuss some specific controversial policies adopted by Israel to counter what it perceives as an unprecedented wave of terrorism directed against its population.

Targeted Killings

The policy of targeted killings is perhaps the most controversial new policy employed by Israel in the present conflict and its adoption has given rise to intensive debate inside and outside Israel, in both legal and political circles. Under the policy of targeted killings, the IDF has been authorized by the government to kill specific Palestinians if there is clear evidence that suggests they are involved in terrorism and no other means for neutralizing them is available. So far, Israel had acknowledged killing more than 30 Palestinian activists under this policy. Israeli NGOs put that figure much higher - over 80 persons deliberately targeted and of about 40 innocent bystanders inadvertently hit in the course of targeted killing operations. Targeted killing have been executed until now using three main techniques - sniper shooting, bomb laying (especially placing bombs in cars and phone booths) and pinpoint airstrikes by fighter planes and helicopter gunships. To date, almost all operations have taken place in PA-controlled territories and most targets have been mid to high-level officials of various Palestinian militant organizations involved in military operations and terrorist attacks against Israeli targets.

The main legal argument levelled against the Israeli policy is that it amounts to extra-judicial execution of protected persons. According to the critics, which include a number of Israeli NGOs and various international human rights agencies,³² Geneva IV restricts the choice of measures that an Occupying Power may employ in order to maintain order in the Occupied Territories. Thus, the Occupying Power may handle threats to its security posed by protected persons only by way of preventive detentions (under Article 78) or the institution of criminal proceedings (under Articles 68-71). The Convention does not permit the killing of protected persons under any circumstances.

The crux of the Israeli position, to which I generally subscribe, is that the *lex specialis* governing the lawfulness of targeting Palestinian militants is not Geneva IV, but rather the law of warfare (what used in the past to be dubbed “Hague Law”). According to this view, individuals who take up arms and participate as combatants in armed activities against Israelis are legitimate military targets, as this term is defined in Article 52 of the Protocol I³³ (which reflects, in relation to target selection issues, customary international law)³⁴. This is because such militants effectively contribute to the Palestinian military effort against Israel, and their neutralization offers a definite military advantage. Their targeting should be thus viewed, according to Israel, as a legitimate act of war. Israel further contends that Article 51(3), which provides that civilians taking part in the hostilities can only be targeted “for such times as they take a direct part in hostilities,” should be broadly construed to imply that civilians who participate in hostile acts remain legitimate targets for the entire duration of their active involvement in the conflict, not just during the preparation or execution of attacks. Arguably, a person who leads a double life as a civilian and a militant should not be allowed to benefit from the protections afforded to civilians under the Convention as long as he or she remains in this “schizophrenic” status.

I agree that an overly narrow definition of the status of a combatant would give terrorists *de facto* immunity and might lead to undesirable consequences. For example, a rule permitting the targeting of heads of terrorists organizations only during their “office hours” - while they are actually present in their organization’s facilities - might result in extensive collateral damage, since the facilities might be purposefully located within dense population centres. It would make more sense to allow the targeting of such persons when travelling in remote roads or while at home, where no collateral damage to civilians is expected to occur. It seems to me that, all in all, this construction is more consistent with the principles of distinction and proportionality, as well as with the practical difficulties of combating terror.

Another issue directly related to the legality of targeted killings is the question of whether targeted persons are indeed protected persons under Geneva IV. The official Israeli position on the issue seems to be that persons engaged in armed hostilities are not entitled to any protections under the Convention.³⁵ In support of this position, one could cite Article 5 of Geneva IV, which deprives militants of many protections ordinarily conferred upon protected persons. On top of this, one should recall that Israel argues Geneva IV applies neither to the Occupied Territories,

nor to areas ceded to the Palestinian Authority under the Oslo Accords.

Here, I beg to adopt a more nuanced position than the one taken by the Israeli government. As I have explained before, it is my position that Geneva IV applies in the Occupied Territories. As a result, Palestinians continue to be legally protected from any unlawful exercise of the powers remaining in Israel's hands (obviously, the ability to kill individuals living in the Occupied Territories ought to be viewed as a remaining power). While I agree that Israel is not bound in its fight against Palestinian militants to resort exclusively to measures prescribed by Geneva IV, I would argue that militants operating in the West Bank and Gaza Strip are still entitled to the status of protected persons under Geneva IV and that, consequently, there are significant limitations upon Israel's ability to target them lawfully.

It should be realized that, in reality, Israel does not have the material ability to employ, in what are still PA-controlled areas, the principal measures prescribed by Geneva IV in order to curb the activities of persons engaged in hostilities (i.e. arrest and trial of suspected militants). The assertion that Geneva IV is a self-contained legal regime is thus unrealistic, as it is detached from the circumstances of the Israeli-Palestinian conflict, which is first and foremost a war of national liberation. Indeed, it seems that the measures stipulated in Geneva IV are essentially law and order (police-like) powers, and that it would be erroneous to insist upon their application to armed conflicts, which ought to be governed by the laws of armed warfare. In addition, I accept that Article 5 of the Geneva IV is an important source of inspiration for determining the relations between the laws of occupation and the laws of warfare. However, I draw from the text and rationale of Article 5 somewhat different conclusions than the ones that the Israeli Authorities seem to have drawn.

Article 5(1), which is *not* directly applicable to most situations of belligerent occupation,³⁶ provides that individuals present in the territory of a State party who are suspected of, or engage in, hostile activities lose Geneva IV protections to the extent that the grant of rights and privileges compromise the security of the concerned State party. This formulation seems to be in line with the general formula that ought to balance laws of occupation and the laws of warfare, which should apply to all cases of armed conflict taking place in the context of a pre-existing belligerent occupation. As a result, individuals who engage in hostile activities against a State party should lose their protections under the Convention - but only to the extent warranted by security considerations. Applied to the Israeli-Palestinian conflict, this would mean that Palestinian militants remain protected persons under Geneva IV, but can be lawfully targeted if they present a threat to Israel's security that cannot be coped with in any other manner. This position stands in contrast with the ordinary situation of combatants under the rules of warfare, which permit the targeting of all enemy combatants, regardless of the degree of risk they personally present. They also generally sanction the killing of enemy soldiers, even when they could be neutralized in some alternative manner (e.g. there is no obligation to ask enemy troops to surrender before targeting them). In sum, Israel does not

have the right to target protected persons actually engaged in hostilities if it has the practical ability to arrest them. Thus, targeted killing operations in areas controlled by Israel or of persons moving between PA and Israeli controlled areas are *prima facie* illegal.

Indeed, it is the official policy of Israel, supported by practical³⁷ as well as by legal considerations, that it prefers to arrest rather than kill Palestinian militants, unless such arrest operations unduly endanger the lives of Israeli service members. In practice, there have been several incidents that raise concerns about whether the “last resort only” standard had been observed. For example, there have been allegations that Dr. Thabat, one of the first Palestinian “targeted persons,” could have easily been captured by the Israeli Authorities instead of killed.³⁸

I would like to succinctly address two other problematic aspects of the policy. The first aspect is the manner and degree of proof of the targeted individual’s involvement in armed hostilities. With regards to Dr. Thabat, as well as to several other targeted persons (such as Abu Ali Mustafa, leader of the Popular Front for the Liberation of Palestine), there have been assertions of their lack of involvement in military affairs.³⁹ The absence of due process before the carrying out of targeting missions is, of course, one of the most problematic aspects of the policy. Indeed, it would be desirable for the IDF to release some information implicating the targets, either beforehand (e.g. in the context of a request for extradition from the PA) or after the fact in a press release or other publicly available method. This would allow public scrutiny of the decision to target a particular individual. It would be even better if decisions to undertake targeted killing operations were reviewed beforehand by a judge. However, it must be acknowledged that in wartime situations, and especially given the need to protect the confidentiality of intelligence sources, public disclosure is not always feasible. It should also be noted that each targeted killing operation is subject to approval by high-ranking legal advisers and policy-making officials. While this decision-making procedure is far from perfect, it at least seems to offer some procedural safeguards against abuse of the policy.

Finally, there is the question of proportionality. Here, I regret to say that there are serious concerns whether all targeted killing operations have satisfied this basic principle of international humanitarian law. A strong indication to the contrary is the high number of innocent civilians killed as collateral damage during these operations (over 40).

An example is the assassination of Sheikh Salah Shehada on 23 June 2002. Sheikh Shehada was the head of the military wing of the Hamas, and, as such, responsible for the death of dozens of Israelis. Given his contribution to the campaign of Hamas terrorism, he was, in my view, a legitimate target. However, Shehada was killed by a one-ton-bomb dropped from an F-16 at nighttime on his private residence in Gaza. According to the Israeli media, there were intelligence reports that only two persons might be with Shehada in the house - his wife and a fellow Hamas aide. What had not been taken into consideration was the collateral damage effect of a bomb of this magnitude upon surrounding buildings. Indeed,

the operation resulted in the death of 12 residents of nearby dwellings, including nine children. Thus, the operation appears to be *prima facie* disproportionate (although it is not clear whether criminal intent can be attributed to the IDF service members given the official explanation that a mistake had occurred in calculating the bomb's impact). It also looks as if the Shehada operation failed to conform to the IDF's obligation to take the necessary precautionary measures to minimize the risk of civilian casualties.⁴⁰

Before moving on, I would like to note that a petition challenging the legality of the policy of targeted killings is currently pending before the Supreme Court of Israel. A previous petition has been dismissed for lack of justiciability.⁴¹

House Demolitions

I will now address two controversial measures undertaken by Israel in a direct attempt to combat the phenomenon of suicide bombing. These horrific acts of terror create serious practical problems for the Israeli security apparatus, especially since it is impossible to deter would-be attackers through the threat of punitive legal measures. In light of the futility of ordinary deterrents, the kinds of measures that the IDF and the Secret Service regard most likely to inhibit potential suicide bombers entail the infliction of various inconveniences upon their family members following terrorist acts. The common wisdom is that such punitive measures might prompt family members to pressure their relatives to refrain from carrying out an attack and might encourage potential bombers to reconsider the implications of their actions (in fact, in recent months several Palestinians have turned would-be suicide bomber relatives in to the Israeli authorities, at least partly out of fear of retributive measures directed against them). The problem, of course, is that the policy of applying sanctions against family members of terrorists is *prima facie* in breach of Article 33 of Geneva IV, which prohibits collective punishment and underlines the principle of personal responsibility.

One type of retaliatory measures undertaken by the IDF is the policy of punitive house demolitions. According to this policy, which has received the Supreme Court's approval, family houses where proven terrorists dwelled may be demolished. This approach is grounded in the Jordanian and Egyptian Emergency Regulations (both sets of Regulations were legislated in the mid-1940s during the period of British rule over Jordan and Egypt),⁴² which were in force in the West Bank and Gaza Strip at the time they were occupied by Israel. They have remained in force ever since.⁴³

From an international law perspective, the legal premise is that destruction of property under such circumstances has a deterrent effect, and that it therefore serves a military necessity (under Article 53 of Geneva IV). Another underlying, though not always explicitly stated, supporting argument is that a rebuttable evidentiary presumption exists that family members who had lived with a terrorist were aware of his or her criminal designs and nevertheless failed to take measures to prevent them. Thus, according to this line of argument, demolition of family members' homes should not be viewed as a collective punishment, but rather as an

administrative sanction against persons guilty of some degree of criminal complicity.

In 1995, the Supreme Court rendered the leading precedent on the legality of demolishing dead terrorists' houses, the *Nazal* opinion.⁴⁴ The case involved the demolition of the house of a suicide bomber responsible for the death of 23 Israelis in a bus in Tel Aviv. The Court held that military necessity considerations ought to prevail and that, given the unique challenge presented by suicide bombers, these considerations even justify the harm sustained by innocent family members. I find it regrettable that the Court refused to examine the lawfulness of house demolition measures, citing the existence of specific legislation authorizing such actions, under the prohibition against collective punishment found in the Geneva IV.

In the present conflict, the policy of house demolitions has been re-introduced by the IDF after a hiatus of several years, and since July 2001, more than 100 houses have been demolished. While the *Nazal* holding that no personal guilt of family members needs to be established remains valid, it is somewhat encouraging that the recent case law suggests greater inclination on the part of the Supreme Court to investigate the personal culpability of the terrorists' family members.⁴⁵

Another aspect of the house demolition cases is the right of hearing, which derives from Israeli administrative law. The rule under Israeli law is that adversely affected family members have the right to appeal against the decision to demolish their house before the military authorities, and that they may subsequently challenge this decision before the Israeli Supreme Court. Still, the Supreme Court has recently accepted the IDF's position that advance warning of demolition operations might jeopardize the safety of troops assigned the mission. It therefore held in one case that where operational considerations so merit, no advance warning need be given.⁴⁶ This represents a significant erosion of the right of hearing, for it does not provide family members with the opportunity to mount a legal challenge before the demolition takes place. However, the Court noted with approval a statement made by IDF attorneys that family members who fear that their house might be targeted by future demolition operations would be entitled to raise their objections at any time prior to the execution of the demolition, and that their petition would be considered in any decision taken with regard to their house.

I would only comment that this decision represents, in my view, an additional regrettable withdrawal from the notion of personal responsibility as the basis for sanctions applied against protected persons in the Occupied Territories. Specifically, the weakening of the right to be heard cuts against the aforementioned tendency to consider whether family members incur any level of personal guilt.

In sum, while suicide bombers clearly represent a challenge that the current law has great difficulties meeting, I believe that certain fundamental human rights notions, such as the prohibition against collective punishment, must be preserved at all times. Thus, a more legally sound approach, in line with that taken with regard to our next topic of discussion, assigned residence, should be adopted.

Assigned residence

Another proposed method to exert pressure upon family members of terrorists, raised by the IDF in discussions held in July 2002 at cabinet level, was deportation of family members from the Occupied Territories. The more cautious policy eventually adopted was based upon a legal opinion issued by the State Attorney General. It permits the IDF to transfer family members from the West Bank to the Gaza Strip (i.e., within the Occupied Territories), but only if sufficient evidence exists that they were personally involved in their relative's terror activities. Further, in light of the prohibition against deportations found in Article 49 of Geneva IV (which also strictly limits transfers within the territory),⁴⁷ the legal framework that was selected for such "deportations" is Article 78, which authorizes the Occupying Commander to intern or assign the residence of a person presenting a threat to the security of the region.

The Supreme Court approved the new "assigned residence" policy in the *Ajourri* case.⁴⁸ In that case, the IDF sought the removal of three Palestinians - the sister and brother of one terrorist and the brother of another - from the West Bank to the Gaza Strip. The Court held that the first two siblings should be deported, since they had been aware of their brother's activities and provided him with assistance (the sister helped to prepare "explosive belts" and the brother both served as a look-out while his brother prepared explosive devices and helped hide them in the trunk of a car). However, the Court barred the deportation of a third Palestinian who merely knew of his brother's activities, but took no active part in them.

Is the decision legally correct? I have some serious doubts. While the *Ajourri* judgment is more consistent with the notion of personal guilt than the house demolition judgments, since it insists upon actual involvement of family members in terrorist activities, there are several problems with the decision.

First, the "personal guilt" paradigm dominating the judicial discourse in the case is a problematic exercise in legal fictions. The basic motivation of the Israeli authorities in deciding to deport terrorists' family members was to deter future terrorists; the personal threat deriving from the family members was, at best, a secondary consideration. Yet, in the Court proceedings, the priorities were reversed, and the measure's deterrent effect was deemed almost irrelevant to the review of its legality under Article 78 of Geneva IV. Thus, it looks as if Article 78 was taken out of context, detached from the realities of the situation and in a manner totally different than was anticipated by its framers.

Second, it is questionable whether there is rational link between the measure taken and the *raison d'être* of Article 78. This is because the removal of allegedly dangerous persons from the West Bank, where Israel now exercises almost total control, to Gaza City, where such individuals find themselves outside the reach of the Israeli authorities, does not make much sense. One would imagine that if they were a continuing security threat, Israel would want to keep them under close watch, rather than transfer them to Gaza City, where they may freely engage in terror activities (Gaza is a notorious hotbed of militant activities against Israel).

Finally, I believe it is erroneous (and certainly inconsistent) to maintain that Gaza City is an occupied area for the purposes of applying Article 78 measures (which permits assignments *within* the Occupied Territory). Since Israel does not have effective control in Gaza City and cannot come and go as it pleases, this area seems to fall outside the Occupied Territory - at least as that term is construed with regard to the power to intern individuals. Thus, we are actually dealing not with assigned residence within the Occupied Territories, but rather with deportation under Article 49 (which is, of course, generally impressive).

IV. Operation Defensive Shield

I would like to turn to some of the legal issues raised before the Israeli Supreme Court during and immediately after Operation “Defensive Shield,” which took place between 29 March and 21 April 2002. This was the largest operation undertaken so far by Israel in the present conflict, and the scope of the hostilities raised some difficult legal questions relating to the laws of war. Remarkably, some were addressed by the Supreme Court in real time - during the actual fighting itself.

Operation Defensive Shield was undertaken in response to a string of Palestinian suicide bombing attacks, culminating in the killing of 29 Israeli in the dining room of a hotel in Netanya during a Passover meal. The purpose of the operation was to re-occupy most PA-controlled territories in the West Bank (Area A), and to conduct mopping-up operations in areas where suspected terrorists and weapons might be found. Some 30,000 Israeli soldiers participated.

Since Palestinian militants tend to conduct their operations from densely populated areas, such as the Jenin refugee camp, the IDF primarily relied in Operation Defensive Shield on infantry forces, which engaged in door-to-door fighting - a tactic resulting in the death of almost 30 soldiers (the Palestinians lost some 130 persons during the same period of time). This fighting practice contrasts with the inclination of several Western armies in recent years to refrain, as far as possible, from using ground forces in military operations and to heavily rely on their air superiority.⁴⁹ Still, despite the adoption of combat tactics generally consistent with the principle of distinction,⁵⁰ Palestinians sometimes accused the IDF of unlawfully targeting civilians during the operation. Indeed, in one case brought before the Supreme Court, a Palestinian NGO asked the Court to issue a general order instructing the army to refrain from targeting civilians. In rejecting the petition, the Court held that to the extent it invites the Court to review operational measures during combat, the petition is non-justiciable. Still, it noted with approval the IDF’s declaration that it does whatever is within its powers to minimize losses to the civilian population.⁵¹

In order to minimize Israeli casualties during the fighting in the refugee camps, and other similar locations, several special, sometimes controversial, measures have been embraced by the IDF. First, in an attempt to minimize exposure to street fire, soldiers used explosives to create “mouse holes” in building walls. This allowed them to move from one house to another through walls rather than

streets. This seems a perfectly reasonable safety measure consistent with the principle of military necessity, although Palestinians have often regarded it as the cause of excessive property damage.

Second, heavy bulldozers often assisted in mopping-up operations. When a house in which terrorists were believed to be hiding was identified, the IDF surrounded it. The residents were then asked to leave (the order being delivered by megaphones). Thereafter, the house was demolished. Suspected terrorists thus faced the alternative of turning themselves in or being buried under the rubble, and the IDF forces were spared from the need to storm many houses (and undoubtedly incur heavy casualties in the process). This again seems like a permissible safety measure that falls within the scope of reasonable military necessity. However, there were certain Palestinian accusations, supported to some degree by media interviews with Israeli soldiers, that the warning time given by the IDF to the residents was sometimes insufficient, and that this resulted, at least in one case, in the death of a handicapped person.⁵² In a case before the Supreme Court, the army stated that it usually gave residents 1-1.5 hours to evacuate houses before their demolition, and that all efforts to prevent injury to innocent civilians were being made. In any event, the Court rejected the petitioners' position that demolitions during military operations are subject to a right of hearing, as in ordinary case of house demolitions.⁵³

The third, and most controversial measure used in Operation Defensive Shield has been dubbed the "neighbour procedure." This involves sending one or more Palestinians, who live in proximity to dwellings where militants are suspected to be hiding, to the "suspected" houses in order to ask all occupants to surrender. In some cases the "neighbours" were also asked to enter the suspected house and to examine whether it was occupied or not. This practice seems to be in contravention of the prohibition against the use of "human shields,"⁵⁴ since the underlying rationale of the procedure is that the Palestinian militants are less likely to shoot at their fellow Palestinian neighbours than at IDF service members. The "neighbours" thus serve as *de facto* shields for IDF troops. The procedure is also in violation of the principle of distinction, since it deliberately introduces civilians into the combat zone. In light of the criticism this practice engendered, the Supreme Court has ordered the IDF to issue clear orders barring the use of this procedure until a full hearing takes place concerning its legality.⁵⁵ However, there have been media reports that the Court's order has been recently violated at least once, resulting in the "neighbour's" death⁵⁶.

Another topic which has surfaced in the context of operation Defensive Shield, pertains to the privileges enjoyed by humanitarian services providers - most notably medical personnel and vehicles. There have been a number of accusations by Palestinians and NGOs that Israel targeted medical service providers and habitually stopped and searched Palestinian ambulances - a practice which resulted in serious delays in medical treatment (according to Palestinian sources, some 30 patients have died as result⁵⁷).

In two consecutive cases, the Supreme Court was asked to instruct the

IDF to honour the medical immunity of Palestinian ambulances.⁵⁸ The Court noted that the IDF considers itself indeed to be under such an obligation, but that it might inspect Palestinian ambulances, in light of the fact that these have been used in the past by Palestinians to transfer wanted terrorists and explosives. In a more recent development, media reports have asserted that the IDF has made a pledge, in response to American inquiries, that inspections of Palestinians medical vehicles would not normally exceed 45 minutes.

Another problematic issue that arose in the aftermath of the conquest of the Jenin refugee camp was the reluctance of IDF authorities to allow the entry of medical teams and rescue workers into the camp to search and treat survivors of the battle. This decision to prevent such entry, formally justified by the need to guarantee the safety of the aid workers (there had been fears that booby traps were laid throughout the camp), was heavily criticized by the UN Secretary-General report on the Jenin events⁵⁹ and by human rights NGOs.⁶⁰ One should note that some Israeli sources deny that access was prevented and insist that Israel was willing to allow the entry of humanitarian aid teams to Jenin, but introduced certain security restrictions which the said teams were reluctant to accept (such as limitation of movements on roads not searched for explosive charges, search of ambulances, etc.).⁶¹ Furthermore, it should be noted that Israel sent its own rescue team into Jenin in order to search for survivors.⁶²

A somewhat related case, brought by a Palestinian member of the Israeli Parliament (the *Knesset*), dealt with the need to remove Palestinian bodies from the scene of combat in the Jenin refugee camp.⁶³ Specifically, the petitioner asked the Supreme Court to order the IDF to refrain from burying Palestinian bodies (in order to allegedly hide evidence of a massacre). The Court rejected the petition and held that the position adopted by the IDF - that Palestinian Red Crescent workers would be granted access to the body removal process, subject to the prevailing military conditions - was a reasonable one. The Court also noted that the army's position is indicative that it has nothing to hide and that this confirms other pieces of information made available to the Court suggesting that no massacre took place in Jenin. In fact, the Court held that the evidence suggested overwhelmingly that there had been an intense battle in Jenin in which both sides incurred heavy casualties (eventually, this was also the conclusion reached in the UN Secretary-General's Report on Jenin).⁶⁴

In the *Almadani*⁶⁵ and *Custodia*⁶⁶ cases, the Supreme Court was confronted with legal issues arising from the IDF siege of the Church of the Nativity in Bethlehem during Operation Defensive Shield. The Church was taken over by Palestinian militants, who kept some 150 civilians (including the church clergy) inside the compound. While the IDF maintained that Palestinian civilians were being held in the Church against their will, this allegation was strongly denied by the Palestinian side. In any event, the legal question presented before the Supreme Court was whether the army could lawfully prevent the entry of food, water, and medical services into the Church compound in order to pressure the militants to

surrender. The IDF maintained that any person could leave the Church and receive food, water and medical treatment and that any civilian wishing to return to the Church would not be barred from doing so (this was evidently a ploy designed to “call the bluff” that civilians who remained at the Church did so out of their own free will). The IDF also agreed that the besieged people would be supplied with medical drugs, as needed, and that members of the clergy who felt obligated to remain in the Church in order to protect its sanctity would be provided with food, water, and drugs upon request.

The Court held that given the fact that there was evidence that basic quantities of food and water were still available inside the Church compound, and that the IDF offered to allow all non-combatants to peacefully leave the compound, the army’s refusal to allow the introduction of additional food and water was not in violation of Article 23 of Geneva IV, as far as the army had legitimate suspicions that items earmarked for use by civilians would be diverted to use by the militants, to whom the army was under no obligation to provide basic products and services.

Another legally controversial aspect of Operation Defensive Shield is the resort by the IDF to mass arrests. B’tselem (an Israeli NGO) estimates that some 7,000 Palestinians were arrested during the three-week operation - most of whom were released shortly thereafter.⁶⁷ This was indicative, according to B’tselem, of a “fishing expedition” and thus of the illegitimacy of the arrest policy. By contrast, the Israeli’s position is that large-scale arrests for short periods of times in the immediate aftermath of military operations is a legitimate security measure, necessary to enable the IDF to sort out Palestinian militants from the innocent civilian population within which they tried to blend.

It should also be noted in this context that the IDF issued a new military order on 5 April 2002 - Military Order no. 1500 - which authorized military officers to detain Palestinian suspects for 18 days without judicial review or access to legal representation. Bowing to public pressure and facing a court petition on the subject,⁶⁸ the order was subsequently revised to allow shorter periods without judicial review and access to counsel - 12 and 4 days, respectively. The question that remains open is whether the revised order meets the *least possible delay* test of Article 78 of Geneva IV. Still, it is notable that the Court already held that the IDF’s policy of introducing restrictions upon the right of detainees to meet with their lawyers during the course of hostilities is reasonable. This is because the authorities should be given the chance to review each individual case and evaluate whether attorney-client meetings would threaten security in a way that justifies the issuance of orders of postponement.⁶⁹

For reasons of space, I will not address other interesting and problematic issues - such as the legality of the extensive travel restriction and curfews imposed upon the Palestinian residents of the West Bank and Gaza Strip, the conditions of detention in internment camps set out in the aftermath of Operation Defensive Shield,⁷⁰ incidents of pillage, accusations of unlawful choice of targets and physical mutilation of Palestinian detainees in detention camps.

V. Concluding remarks

I believe that the survey of cases and procedures set forth above demonstrates the centrality of international law in the public discourse within Israel - at least that involving legal institutions - pertaining to military policies and tactics. On the basis of this survey, it is my view that the IDF generally strives to conduct its operations in compliance with international humanitarian law, despite the extraordinary challenges presented by the Palestinian adversary, such as the use of suicide bombers and the flagrant violation of the principle of distinction *vis-à-vis* the Palestinian civilian population. Still, the legal basis underlying some of the army's specific policies, such as house demolitions and the policy of targeted killing, as actually implemented on the ground, is, at best, shaky. Furthermore, the implementation of the policies often leads to results that are *prima facie* illegal. For instance, the grim fact that some 300 Palestinian children have died in the recent conflict is hard to reconcile with the principle of legality.⁷¹

One can only hope that the parties to the conflict will regain their senses and return to the negotiating table. In the meantime, it is crucial that both sides strictly adhere to their obligations under international humanitarian law, so as to minimize human suffering and pave the way for future reconciliation. At the same time, it is important for the international legal community to construe international humanitarian law in a realistic and flexible manner, so that it adapts itself to changing realities and to new challenges. Otherwise, international humanitarian law faces the risk of a decline in influence and legitimacy, until it becomes marginalized in the decision-making process during armed conflicts.

¹ The independence of the State of Israel was proclaimed on 14 May 1948, a day before the official termination of the British Mandate over Palestine. A UN Plan to divide the Mandatory territory between three political entities – a Jewish State, an Arab State and international administration for the Jerusalem area (UN G.A. Res. 181 (II), 29 Nov. 1947), collapsed over Arab opposition to the plan.

² Only two countries accepted the lawfulness of the Jordanian act of annexation – the U.K. and Pakistan. See e.g., Charles B. BARON, “*The International Legal Status of Jerusalem*,” 8 *Touro Int'l L. Rev.*, 1998, 1, 13-20; Yehuda Z. BLUM, “*The Missing Reversioner: Reflections on the Status of Judea and Samaria*” 3 *Israel L. Rev.* (1968) 279, 290; Michael EISNER, “*Jerusalem: An Analysis of Legal Claims and Political Realities*,” 12 *Wis. Int'l L.J.* (1994) 221, 230.

³ HUSSEIN, King of Jordan, “*Statement concerning Disengagement from the West Bank and Palestinian Self-Determination*”, 31 July 1998, 28 *ILM* (1988) 1637.

⁴ Executive and Legal Procedures Decree (no. 1), 1967, K.T. 2690.

⁵ See, e.g. Security Council Resolution 478 (1980), 20 Aug. 1980, UN Doc. S/RES/478 (1980); General Assembly Resolution 56/31 on Jerusalem, 3 Dec. 2001, UN Doc. A/RES/56/31 (2001).

⁶ *Hague Regulations Respecting the Laws and Customs of War*, 18 Oct. 1907, T.S. 539 [hereinafter “*Hague Regulations*”].

⁷ *Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War*, 12 Aug. 1949, 75 U.N.T.S. 287 [hereinafter *Geneva IV*].

⁸ For a good restatement of the Israeli position, see M. SHAMGAR, “*The Observance of International Law in the Administered Territories*”, 1 *Israel Yearbook on Human Rights* (1971) 262.

⁹ *Ibid.* at 265. However, it must be realized that this undertaking has failed to specify which provisions of Geneva IV are regarded as of a humanitarian nature.

¹⁰ See, e.g., “*Nuclear Tests (Australia vs. France)*”, 1974 I.C.J. 253; “*Nuclear Tests (New Zealand vs. France)*”, 1974 I.C.J. 457.

¹¹ H.C.J. 7015/02, “*Ajouri vs. IDF Commander in the West Bank*” (not yet published)(an English translation of the decision is available at <http://62.90.71.124/mishpat/html/en/verdict/1.rtf>); H.C.J. 2936/02, “*Doctors for Human Rights vs. IDF Commander in the West Bank*”, 56(3) P.D. 3 (an English version of the decision is available at <http://62.90.71.124/mishpat/html/en/verdict/ambulans.rtf>).

¹² See, e.g., “*Legality of the Threat or Use of Nuclear Weapons*”, 1996 I.C.J. 226, 258.

¹³ Case IT-94-1-AR72, “*Prosecutor vs. Tadić*”, 35 ILM, 1996, 32, Interlocutory Appeal on Jurisdiction, Appeals Chamber, 1995.

¹⁴ “*Vienna Convention on the Law of Treaties*”, 23 May 1969, Art. 31(1), 1155 U.N.T.S. 331. *Cf.*: “*Delalic vs. Prosecutor*”, Case No. IT-96-21-T, ICTY App. Ch., 20 Feb. 2001.

¹⁵ “*Declaration of Principles on Interim Self-Rule Arrangements*” (Israel-PLO), 13 Sept. 1993, 32 ILM. (1993) 1525.

¹⁶ See, e.g., “*Second Periodic Report of the State of Israel under the International Covenant on Civil and Political Rights*”, para. 8, UN Doc. CCPR/C/ISR/2001/2 (2001); “*Second Periodic Report of the State of Israel under the International Covenant on Economic, Social and Cultural Rights*”, para. 6-8, UN Doc. E/1990/6/Add.32 (2001).

¹⁷ H.C.J. 7015/02, *supra* note 242.

¹⁸ Article 47 of Geneva IV reads: “Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory.”

¹⁹ The position of the international community on this matter is restated in numerous UN Resolutions. See, e.g. General Assembly Resolution 51/133 on Israeli Settlements in the Occupied Palestinian Territory, Including Jerusalem, and the Occupied Syrian Golan, 13 Dec. 1996, UN Doc. A/51/592 (1996); General Assembly Resolution ES-10/9 on Illegal Israeli actions in Occupied East Jerusalem and the rest of the Occupied Palestinian Territory, 20 Dec. 2001, UN Doc. A/RES/ES-10/9 (2001).

²⁰ See, e.g., Paul WOOD, “*Rabbis Urge Temple Mount Visit*”, BBC News, 19 July 2001, <http://news.bbc.co.uk/1/hi/world/middle-east/1447194.stm>; Dana ROSENBLATT, “*In a matter of weeks, rage replaced romance in Gaza*”, CNN, 4 Oct. 2000, <http://www.cnn.com/2000/WORLD/meast/10/04/gaza.scene/index.html#1>. See also, Human Rights Inquiry Commission, “*Report on the Question of Violation of Human Rights in the Occupied Arab Territories*”, including Palestine, UN Doc. E/CN.4/2001/121 (2001); Sharm El Sheikh Fact Finding Committee, Final Report (2001), <http://usinfo.state.gov/regional/nea/mitchell.htm>.

²¹ See, e.g., Jeff JACOBY, “*The Settlement Myth*” Israel Insider, 31 May 2001 <http://www.israelinsider.com/views/Articles/views-0056.htm>.

²² According to data gathered by B’TSELEM (an Israeli-based NGO), the death toll in the present conflict has reached 1,768 Palestinians and 647 Israelis by 28 Dec. 2002.

²³ While Article 3 itself does not specify a threshold of intensity, there is significant support in subsequent practice that only high-intensity non-international conflicts should lead to the application of international humanitarian law over non-international conflicts. See, e.g. Case IT-94-1-AR72, “*Prosecutor vs. Tadić*”, 35 ILM. (1996) 32, Interlocutory Appeal on Jurisdiction, Appeals Chamber, 1995; Case ICTR-96-4-T, “*Prosecutor v. Akayesu*”, Case No. ICTR-96-4, T. Ch. I, 2 Sept. 1998; *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977, Art. 1, 1125 U.N.T.S. 609 [hereinafter – “*Protocol II*”]; *Rome Statute of the International Criminal Court*, 17 July 1998, Art. 8(2)(d) and (f), UN Doc. A/Conf.183/9, 37 ILM. (1998) 999 [hereinafter “*Rome Statute*”].

²⁴ *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, Art. 1(4), 1125 U.N.T.S. 3 [hereinafter "Protocol I"].

²⁵ For a different position, see Michael .P. SCHARF, "The United States and the International Criminal Court: The ICC's Jurisdiction over the Nationals of Non-Party States: A Critique of the U.S. Position", 64 *Law & Contemp. Prob.* (2001) 67, 93.

²⁶ See, e.g., B'tselem, "Illusions of Restraint: Human Rights Violations During the Events in the Occupied Territories", 29 Sept - 2 Dec 2000, Jerusalem, 2000), http://www.btselem.org/English/Publications/Full_Text/Illusions_of_Restraint/Report.asp.

²⁷ Amnesty International, "Israel and the Occupied Territories and the Palestinian Authority: Without Distinction: Attacks on Civilians by Palestinian Armed Groups" (London, 2002); Human Rights Watch, "Erased in a Moment: Suicide Bombing Attacks Against Israeli Citizens" (New York, 2002) 52.

²⁸ *Cfr.* "Protocol I", Arts. 44, 48.

²⁹ H.C.J. 7015/02, *supra* note 242, at para. 13, Opinion of President BARAK: "Indeed, every Israeli soldier carries in his pack both the rules of international law and also the basic principles of Israeli administrative law that are relevant to the issue."

³⁰ See, e.g., Yuval SHANY, "Israelis on the Bench of the Accused? The Implications of the Entry into Force of the Statute of Rome for the State of Israel", 15 *Hamishpat Law Review*, forthcoming in 2003, in Hebrew.

³¹ Amos HAR'EL, "IDF Expands Civilian Death Inquiries", Ha'aretz, 8 Nov. 2002, in Hebrew.

³² See, e.g., B'tselem, "Israel's Assassination Policy: Extra-judicial Executions", Jerusalem, 2001, http://www.btselem.org/Download/Extrajudicial_Killings_Eng.doc; Amnesty International, "Israel and the Occupied Territories: State Assassinations and other Unlawful killings", London, 2001; Human Rights Inquiry Commission, *supra* note 251, at pp. 17-20.

³³ Article 52(2) of Protocol I defines military objectives as «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».

³⁴ See, e.g., Dieter FLECK (Ed.), "The Handbook of Humanitarian Law in Armed Conflict" (Oxford, 1999) 120.

³⁵ See, e.g., Ministry of Foreign Affairs, "Targeting Terrorists" Background Paper, 1 Aug. 2001, <http://www.mfa.gov.il/mfa/go.asp?MFAH0k9d0>.

³⁶ Article 5(1) seem to apply only to situations covered by Part III, Section II of Geneva IV – aliens present in the territory of a party to a conflict. Article 5(2), which deals with situations of occupation provides that individuals who are suspected spies, saboteurs or otherwise involved in hostile acts threatening the security of the Occupying Power, only permits the limiting of detainees' rights of communication. Still, the failure of the Convention to permit *any* use of force by the Occupying Power (including force used by soldiers of the Occupying Power in self-defence) would seem to be supportive of my position that Geneva IV did not purport to create a self-contained regime and that in situations of armed conflict (such as those envisioned by Article 5(1)) other rules of international humanitarian law could be invoked.

³⁷ The common wisdom is that arrested Palestinians are more valuable to Israel than dead Palestinians, since only the first can volunteer information to the Israeli security authorities relating to the activities of the groups to which they are associated. This, is, according to Israeli media reports, an important check against frivolous use of the targeted killings policy.

³⁸ Human Rights Inquiry Commission, *supra* note 251, at 19.

³⁹ See, e.g., *ibid.*, at 18;

⁴⁰ See Protocol I, Arts. 57-58.

⁴¹ H.C.J. 5872/01, "*Barakeh vs. Minister of Defence*", 56(3) P.D. 1. The pending case is H.C. 769/02, "*The Public Committee Against Torture in Israel vs. The Government of Israel*". The course of proceedings up until now suggests that the Court has decided this time to review the merits of the petition.

⁴² Defense (Emergency) Regulations, 1945, Reg. 119.

⁴³ In conformity with Article 43 of the 1907 Hague Regulations, Israel has maintained largely intact the Jordanian and Egyptian law which had been in force in the Occupied Territories by 1967.

⁴⁴ H.C.J. 6026/94, "*Nazal vs. IDF Commander in Judea and Samaria*", 48(5) P.D.338.

⁴⁵ See, e.g., H.C.J. 7473/02, "*Baher vs. Commander in the West Bank*" (not yet published). The Hebrew text of the decision is available at the Court's website http://62.90.71.124/mishpat/html/verdict/index_23.html.

⁴⁶ H.C.J. 6696/02, "*Amer vs. IDF Commander in the West Bank*" (not yet published). The Hebrew text of the decision is available at the Court's website http://62.90.71.124/mishpat/html/verdict/index_23.html.

⁴⁷ See also "*Rome Statute*", Art. 8(2)(b)(8).

⁴⁸ H.C.J. 7015/02, *supra* note 242.

⁴⁹ On the humanitarian law implication of recent air campaigns, see, e.g., Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia (2000), <http://www.un.org/icty/pressreal/nato061300.htm>; Amnesty International, "*Afghanistan: Accountability for Civilian Deaths*", London, 2001, <http://web.amnesty.org/ai.nsf/Index/ASA110222001?OpenDocument&of=COUNTRIES\AFGHANISTAN>.

⁵⁰ See, e.g., "*Protocol I*", Art. 48.

⁵¹ H.C.J. 3022/02, "*Cannon (Law) – The Palestinian Human Rights and Environmental Protection Organization vs. IDF Commander in the West Bank*", 56(3) P.D. 9.

⁵² See, e.g., Human Rights Watch, "*Jenin: IDF Military Operations*", New York, 2002, http://hrw.org/reports/2002/israel3/israel0502-10.htm#P887_156446.

⁵³ H.C.J. 2977/02, "*Adala – The Legal Center for Arab Minority Rights in Israel vs. IDF Commander in Judea and Samaria*", 56(3) P.D. 6.

⁵⁴ See Protocol I, Art. 51; "*Rome Statute*", Art. 8(2)(b)(xxiii).

⁵⁵ H.C.J. 3799/02, "*Adala – The Legal Center for Arab Minority Rights in Israel vs. IDF Chief of Central Commander*", (not yet published). The Hebrew text of the decision is available at the Court's website - http://62.90.71.124/mishpat/html/verdict/index_23.html. Officially, Israel has renounced this procedure, and, in fact, there is no official admission that it had ever been used.

⁵⁶ B'tselem, "*Human Shield: Use of Palestinians as Human Shields in Violation of High Court Order*", Jerusalem, 2002, http://www.btselem.org/English/Publications/Full_Text/Human_Shield/index.asp.

⁵⁷ B'tselem, "*Deaths of Palestinians following Delay in Obtaining Medical Treatment because of Restrictions on Movement during the al-Aqsa Intifada*", Jerusalem, 2002, http://www.btselem.org/english/Freedom_of_Movement/A1_Aqsa_Death_after_Delay.asp.

⁵⁸ H.C.J. 2936/02, *supra*, note 242; H.C.J. 2117/02, "*Doctors for Human Rights vs. IDF Commander in the West Bank*", 56(3) P.D. 26.

⁵⁹ See Report of the Secretary-General prepared pursuant to General Assembly Resolution ES-10/10, UN Doc. A/ES-10/186 (2002).

⁶⁰ Human Rights Watch, "*Israel/Occupied Territories: Jenin War Crimes Investigation Needed*", New York, 2003, <http://www.hrw.org/press/2002/05/jenin0503.htm>.

⁶¹ In another case, involving the request of an Israeli NGO engaged in the supply of medical services to Palestinians to enter the Gaza strip, the Court accepted the position of the IDF that the entry would unnecessarily increase the operational burden to which the army is subject. H.C.J. 727/02, “*Doctors for Human Rights vs. IDF Commander in the Gaza Strip*” (not yet published). The Hebrew text of the decision is available at the Court’s website http://62.90.71.124/mishpat/html/verdict/index_23.html.

⁶² The entry of an IDF search unit into the Jenin refugee camp was notified to Supreme Court in the course of proceedings designed to order the IDF to do so. H.C.J. 3117/02, “*Center for the Defense of the Individual vs Minister of Defense*”, 56(3) P.D. 17 (an English version of the decision is available at <http://62.90.71.124/mishpat/html/en/verdict/center%20for%20the%20defence.doc>).

⁶³ H.C.J. 3114/02, “*Barakeh vs. Minister of Defense*”, 56(3) P.D. 11 (an English version of the decision is available at <http://62.90.71.124/mishpat/html/en/verdict/barakeh.doc>).

⁶⁴ Report of the Secretary-General, *supra* note 290, at para. 56-57.

⁶⁵ H.C.J. 3451/02, “*Almadani vs. Minister of Defense*”, 56(3) P.D. 30 (an English version of the decision is available at http://62.90.71.124/mishpat/html/en/verdict/church_of_the_nativity.rtf).

⁶⁶ H.C.J. 3436/02 “*La Custodia Internazionale di Terra Santa vs. The Government of Israel*”, 56(3) P.D. 22.

⁶⁷ B’tselem, “*Operation Defensive Shield: Soldier Testimonies*”, Jerusalem, 2002, http://www.btselem.org/Download/Defensive_Shield_Eng.pdf.

⁶⁸ H.C.J. 3239/02, “*Mar’ab vs. IDF Commander in the West Bank*”, (not yet published). The Hebrew text of the decision is available at the Court’s website http://62.90.71.124/mishpat/html/verdict/index_23.html.

⁶⁹ H.C.J. 2901/02, “*The Center for the Defense of the Individual vs. IDF Commander in the West Bank*”, 56(3) P.D. 19.

⁷⁰ A recent judgment of the Supreme Court criticized the conditions prevailing in detention facilities which were used during Operation Defensive Shield, but held that most (though not all) deficiencies have been since rectified. H.C.J. 3278/02, “*The Center for Defense of the Individual vs. IDF Commander in the West Bank*” (not yet published). The Hebrew text of the decision is available at the Court’s website http://62.90.71.124/mishpat/html/verdict/index_23.html.

⁷¹ Amnesty International, “*Israel and the Occupied Territories: Killing the Future: Children in the Line of Fire*”, London, 2002.

DETAINEES IN THE HANDS OF AMERICA: NEW RULES FOR A NEW KIND OF WAR

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Following the terrorist attacks of September 11, 2001 on the World Trade Center and Pentagon, the United States government began arresting and detaining hundreds of persons inside the United States on the theory that they were involved with the Al Qa'ida terrorist network. Later, after military operations began in Afghanistan, American forces detained additional persons captured on the battlefield or elsewhere outside the United States who were believed tied to Al Qa'ida. The United States has been criticized for these arrests and detentions, and accused of undermining international and U.S. domestic law by these actions.¹ This paper briefly surveys the categories of persons whom the United States has detained as part of the war on terror, the facts surrounding the most prominent arrests and detentions, the resulting criticisms, the justifications offered for the arrests and detentions under international and domestic law, and the rulings of U.S. courts in these cases. This paper will also discuss the status of various legal proceedings regarding certain of the detainees.

In using a variety of legal mechanisms to justify these detentions, the United States has implied that they are an extraordinary response to an extraordinary situation. International law provides only a partially adequate mechanism to deal with the global terror threat posed by the Al Qa'ida terror network. Although universally agreed upon, the key aspects of international law that address terrorism are incomplete. The United States faces the challenge of meshing established law enforcement approaches to terrorism with war-fighting needs. Significant disagreement exists internationally over whether this paradigm shift from law enforcement to war-fighting is warranted. In the attempt to shift, however, it makes sense for the United States to use a variety of methods to determine which legal procedures are most effective and acceptable. Accused by critics of creating new law out of whole cloth, the American government has primarily relied on "tried-and-true" provisions of domestic and international law, although occasionally applying them in novel ways. It appears to be experimenting with the most effective approach to handling suspected Al Qa'ida members and sympathizers, consistent with a primary emphasis on the intelligence needs of effective war-fighting. While the United States must provide better procedural safeguards to protect the rights of persons who may be falsely accused of having ties to Al Qa'ida, its basic approach furthers the development of international humanitarian law.

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I. The Basic Framework of International Law

When a government detains persons under its control, that detention is subject to both international law and the government's own domestic law. More specifically, government detentions are at a minimum subject to international human rights law, which derives from customary international law and treaties. In particular, the United States is a party to the International Covenant on Civil and Political Rights² and the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment.³ Each instrument contains provisions concerning the treatment of persons held in detention within the United States.⁴ For example, under the International Covenant on Civil and Political Rights, a government may not arbitrarily deprive a person of his life, subject him to torture, or hold him in slavery. International human rights law applies in both war and peace, although some key rights may be derogated during wartime.⁵

During armed conflict, government detentions are also subject to the law of armed conflict, or international humanitarian law. The Geneva Conventions of 1949,⁶ to which the United States is a party, are the principal international law agreements comprising international humanitarian law. They are based on a fundamental distinction between combatants and non-combatants, with an underlying principle of attempting to reduce unnecessary suffering during armed conflict. They explicitly address the detention of combatants - persons privileged to inflict violence during armed conflict - and non-combatants (civilians and medical personnel).

Under the Geneva Conventions and customary international law, combatants (belligerents) can legally inflict violence to kill other combatants, and, if captured by the other side, are entitled to combatant immunity for such acts (although they can be detained for the duration of hostilities). As a general principle, however, combatants are not privileged to inflict violence on non-combatants, or otherwise violate established principles of the law of war. If they do, and are captured, they may be tried and punished for their violations of the laws of war.

Under the Conventions and Protocol I thereto, non-combatants may not legally participate in combat; those who do can be tried and punished.⁷ If captured, however, non-combatants are entitled to certain protections. For instance, they may not be held past the point when "the circumstances justifying the arrest, detention or internment have ceased to exist."⁸ If accused of committing war crimes, non-combatants are also entitled to certain procedural rights, including the right to be informed of the charges and the right to examine witnesses. Together, however, the Conventions, as supplemented by the 1977 Protocols, erect baseline requirements for entitlement to their protections. A person who does not meet those requirements is not entitled to the full protections accorded to prisoners-of-war.

The Geneva Conventions provide that a person captured by the other side must be accorded a recognized status as a prisoner of war, civilian, or medical worker. Status determines the specific treatment to which a person is entitled.

The International Committee of the Red Cross has stated that during a conflict between two or more High Contracting Parties, the general principle of the Geneva Conventions is that everyone must have some sort of status - as a prisoner of war, civilian, or member of the medical profession. "There is no intermediate status; nobody in enemy hands can be outside the law."⁹ Thus, a person captured on the battlefield in an armed conflict between States is often presumed to hold prisoner-of-war status until it is determined that he is not entitled to such status.

If there is doubt as to someone's status, the Third Geneva Convention requires that a competent tribunal, called an "Article 5 tribunal," hold an individualized hearing on the issue - but only if there is doubt.¹⁰ In cases where doubt exists, the convention sets out standards for making this determination. The United States last held such tribunals in the Persian Gulf War of 1990-91. It has not convened them to determine the status of Al Qa'ida members because the United States does not consider them lawful combatants fighting as members, or under the authority, of an enemy State. Accordingly, President Bush has decided that because Al Qa'ida members cannot even arguably meet the criteria of Article 4 of the Fourth Geneva Convention, there is no legal obligation to convene an Article 5 proceeding.

This latter position illustrates a key point that has not yet been resolved by the international community. The United States takes the position that a lawful combatant - a belligerent legally entitled to fight in combat, and, if captured, to be treated as a prisoner of war - is a soldier in a regular army, or a member of a militia or volunteer group that meets the four conditions of Article 4(A)(2) of the Geneva Convention Relative to the Treatment of Prisoners of War.¹¹ Thus, the Conventions implicitly create a distinction between "lawful combatants" and "unlawful combatants,"¹² such as Al Qa'ida members, who take up arms, but do not do so on behalf of a recognized nation-State and do not comply with the requirements of international law with regard to being recognized as a lawful combatant. The United States further argues that lawful combatants, if captured, are entitled to the privileges of the Geneva Conventions, while unlawful combatants are not entitled to such privileges. In its view, all Al Qa'ida and Taliban members are such "unlawful combatants."¹³

Critics of the American position state that there is no such category as "unlawful combatant" in the Geneva Conventions, and that the United States has created the status of "unlawful combatant" to justify its treatment of Al Qa'ida members. They argue that a captured person must be either a prisoner-of-war (and hence a lawful combatant entitled to combatant immunity) or a civilian non-combatant (who may have violated the law, but is then subject to being tried by a military court-martial, with the same due process protections accorded members of the U.S. military).

Technically, the critics are correct that there is no such category as "unlawful combatant" within the Geneva Conventions. The Conventions, however, are agreements between sovereign States, and nothing within them even contemplates the existence of a global terror network operating entirely

outside the control of any State. At the time they were signed, the signatories had no concept of a global organization such as Al Qaeda, and therefore did not plan for such an organization or include it within the ambit of the Conventions. Thus, it is not particularly surprising that their rules do not quite seem applicable to a terrorist network. This being so, it is misleading to assert that America is in breach of international law by failing to apply conventions that do not address an organization such as Al Qaeda.

II. The Domestic Law Background

To date, U.S. courts have generally agreed with the position of the Executive Branch¹⁴ by recognizing the status of “unlawful combatant,” and holding that persons so designated are outside the protections of the Geneva Convention Relative to the Treatment of Prisoners of War.

U.S. courts must also apply domestic laws to the conduct of the armed forces or other agents of the government. Domestic laws that potentially apply to Al Qaeda detainees include the United States Constitution as well as laws passed by Congress. For example, the Fifth Amendment to the United States Constitution provides for certain “due process” rights,¹⁵ while the Sixth Amendment sets forth a right to legal counsel in a criminal proceeding.¹⁶ Additionally, under U.S. law, no citizen can be detained or imprisoned by the federal government unless authorized by Congress.¹⁷ Finally, the Uniform Code of Military Justice, a Congressional statute, governs the behaviour of U.S. military members and prisoners held in U.S. military custody.

a. Basic Framework for Detentions under U.S. Domestic Law

Under U.S. law, different rules apply to persons detained inside and outside the United States. The Fourth,¹⁸ Fifth¹⁹ and Sixth²⁰ Amendments to the Constitution have been interpreted by U.S. courts to require certain protections for most citizens and non-citizens arrested or detained inside the United States. American courts have held that outside the country, however, the special protections of the Constitution apply only to U.S. citizens.²¹ Thus, in reviewing the terrorism-related detentions, U.S. courts will consider (1) whether the arrest and initial detention took place inside or outside the United States, (2) whether the person arrested or detained was a citizen, and (3) whether the person is being held inside or outside the country. Additionally, when ruling on whether a war-related detention is lawful, American courts are often deferential to the Executive Branch.²² In cases where President and Congress have both authorized a particular detention, courts will likely uphold the detention under U.S. law.

b. The Detainee Controversy

Detention of Al Qaeda members and suspects, both inside and outside the United States, has stirred a firestorm of criticism, both domestically and internationally. Why is the status of detainees causing so many to criticize the United States? Why have so many commentators accused the United States of

eroding international law?

There is no doubt that the United States is in a state of armed conflict. What is different is that the external enemy is not an easily identifiable State, nor is it a force that can be easily linked to a particular State-sponsor. Instead, it is an international terror organization with members in nearly all countries, and without a controlling State-sponsor. Most international law dealing with armed conflicts assumes the existence of a system of States which can agree on the ways and means of conducting armed conflict, and which can, to some extent, control the forces that they commit to such a conflict. Reflexively, then, critics of the United States argue that international humanitarian law should be applied to the detainees as if an inter-State armed conflict were being fought. Conversely, they argue that only U.S. domestic law enforcement authorities should have custody of detainees because they more closely resemble common criminals than members of an armed force.

It is natural that some confusion should exist on this issue. The war on terror differs from prior international conflicts in that Al Qa'ida has the ability to inflict mass destruction, yet is divorced from the State system. It is not a United Nations member, has no treaty-signing authority, and is not a party to any international agreement. Until the fall of the Taliban, it did operate closely with the Taliban, but the Taliban did not appear to control it. Since the Taliban's fall, Al Qa'ida has survived quite well; indeed, it is apparently spreading its tentacles worldwide.

Al Qa'ida's global reach poses a serious challenge to the existing framework of international law, in particular human rights law and the law of armed conflict. Premised on the idea that States or nascent States are the ultimate actors in armed conflicts, there is little in this law that contemplates a global non-State army. In the view of the United States, then, the law has a gap - the "old rules" simply do not work. If Al Qa'ida refuses to acknowledge international law or participate in the system of rules governing relations between sovereign States, then why should it be granted the benefits of those laws?

Posing this question reveals another key reason the United States argues that the Geneva Conventions cannot be applied to Al Qa'ida members. It believes that applying the Conventions to terrorists can harm the war effort by providing Al Qa'ida members with a helpful tool. The U.S. position is roughly this: international humanitarian law is premised on the idea that both sides should generally treat each other equally, fight fairly, and minimize suffering. But because Al Qa'ida utterly rejects the rule of law, its fighters are provided with a tremendous advantage *vis-à-vis* nations applying the Geneva Conventions. For example, Al Qa'ida fighters would be privileged to inflict violence on American armed forces (at the very least), and the attacks on the Pentagon and perhaps even the World Trade Center towers would have been privileged. Captured Al Qa'ida members would be protected under the Geneva Conventions and recognized as prisoners-of-war. They would be free to organize, permitted to claim pay and continue their war efforts in a manner not possible for typical prisoners-of-war. Under

existing international law rules, a prisoner-of-war tried by the U.S. government for war crimes or crimes against humanity would be entitled to the same procedural protections as a member of the American military.²³ This poses both an intelligence collection and a security problem because the military justice system provides exceptional procedural protections to accused soldiers - often providing more protections than the equivalent U.S. civilian justice system would provide to a civilian court defendant.²⁴ The military justice system was not designed with the idea that it would be used to try international terrorists who have rejected the rule of law and are engaged in a “no holds barred” war against America.

Accordingly, the United States argues that it must adopt different legal tactics in dealing with Al Qa’ida; it cannot blindly apply laws intended to govern relations between sovereign States. In arresting and detaining persons who are suspected of involvement with Al Qa’ida, the United States has thus adopted several new interpretations of old laws. Rather than violating the rule of law, however, the U.S. has adapted existing legal mechanisms to deal with the threat posed by Al Qa’ida. Everything done has been a plausible development of international or domestic law.

For example, under international humanitarian law, prisoners of war and other enemy captives may be held in detention until the “cessation of active hostilities.”²⁵ Al Qa’ida has proclaimed publicly that it continues to wage war on the United States, and promises to attack the United States unexpectedly at long intervals. When interviewed, its members have sworn that they will continue to attack and kill Americans - any kind of Americans, even children and other non-combatants - if they are released from detention. Faced with this situation, the U.S. has adapted the principle of “cessation of active hostilities” beyond its traditional meaning of a negotiated end to conflict between two or more States, or a State and a recognized insurgent movement. Since Al Qa’ida will never negotiate an end to its war with the United States, the U.S. must take it upon itself to determine when hostilities have ceased. Although criticized for this approach, no other option appears to meet U.S. security requirements. While this interpretation poses the possibility that some detainees might be held for life, nothing in international law prohibits a war from lasting longer than an individual lifetime.

i. Enemy Combatants

Captured lawful enemy combatants are, under U.S. law, provided with prisoner-of-war protection under the Geneva Conventions. So far in the war on terror, however, the United States has not detained any lawful combatants, as the Al Qa’ida do not meet the requirements outlined above for lawful combatant status. Because their refusal to comply with international humanitarian law has placed Al Qa’ida members outside the protections offered by that law, Al Qa’ida members who are captured can lawfully be denied the privileges granted to lawful combatants (i.e., prisoners-of-war). Enemy combatants, whether lawful

or unlawful, can be held for the duration of hostilities, and there is no restriction on where they can be held, i.e., there is no requirement that they must be detained inside the United States. If brought within the geographic boundaries of the United States, they can test the legality of their detention by filing petitions for writs of *habeas corpus*. If held outside the United States, however, it appears that no U.S. district court (federal civilian trial court) has jurisdiction to hear such petitions.²⁶ When the United States has primarily been interested in obtaining intelligence information from a detainee, it appears to have chosen to treat the person as an unlawful combatant. As a combatant, he can be interrogated at length; without an attorney who might inform the person that he has a right to remain silent in the face of such interrogations, the United States is more likely to obtain useful intelligence information.

ii. Military Tribunal Defendants

Although intelligence information may have been obtained from an Al Qaeda member, the possibility remains that the United States will want to punish him for committing crimes. Options include pursuing such punishment through its regular court system, or invoking the war-fighting paradigm of convening a wartime tribunal. Under the Constitution (because the President and Congress share power with respect to armed conflicts), a Congressional war declaration or resolution of some sort is necessary for the President to exercise war powers fully on behalf of the nation. Shortly after the September 11 attacks, Congress passed a joint resolution authorizing him to use “all necessary and appropriate force” against “Nations, organizations, or persons” that the President determines are responsible for the attacks.²⁷ Given this authorization, the President signed an order on November 13, 2001, creating special military tribunals to try members of Al Qaeda and their supporters.²⁸ Congress effectively ratified the action by appropriating money and providing resources for these tribunals. In the order, the President specifically stated that citizens would not be tried by the tribunals. As of the date of this writing, no one has yet been tried. The details, then, of precisely how these tribunals might be used as a means or method of trying enemy combatants remains unresolved.

iii. Detainees inside the United States

Many Al Qaeda detainees captured in Afghanistan have been held outside the United States. Some, however, have been detained inside the country. When the government arrests or detains a person inside U.S. borders, it has several options on how to treat the person. First, a detainee can be treated as an enemy combatant, either lawful or unlawful. Second, the person can be treated as a common criminal, subject to either state or federal criminal prosecution. Third, the person can be treated as a material witness. Fourth, if the person is not a citizen and has violated immigration law, he can be detained as an immigration law violator. The United States government makes the decision on the category to place the person based on a variety of factors, with primary attention to war-

fighting intelligence needs.

1) *Federal Criminal Defendants*: One option is prosecution in a domestic criminal court. The United States appears to have pursued this option in cases where it can prove a criminal violation of U.S. law, and it (1) has little expectation of gaining usable intelligence from the person, or (2) expects that the person will co-operate in providing intelligence information to the government in the context of a plea bargain or reduction in sentence. When pursuing this course of action, the government must provide qualified defence counsel; there is, of course, always the risk that this attorney may advise his or her client not to provide information. As discussed later, however, the government has apparently been very successful in obtaining the co-operation of defendants in federal criminal prosecutions.

2) *Material Witnesses*: Another option involves use of the “material witness statute.”²⁹ The statute permits federal authorities to detain a witness in a criminal prosecution and detention is necessary to ensure that his testimony can be taken. Following the September 11 attacks, U.S. federal authorities used this statute extensively to detain individuals when they could not prove a crime or immigration violation, but the detainee was thought to be connected to Al Qa’ida (however remotely). Under the statute, material witnesses are entitled to representation regarding the detention. As discussed later, the government found that using this statute was not always useful in uncovering intelligence about terrorism. Its use also appears to have resulted in some serious abuses of detainees; similar abuses apparently did not take place in the more structured process of federal criminal prosecutions.

3) *Immigration Status Violators*: The United States has also detained suspected Al Qa’ida sympathizers pursuant to immigration laws. The complexity of these laws makes it relatively easy to charge a foreigner with a violation. The U.S. has been enforcing, for example, a law that requires all foreigners to notify the INS within ten days of an address change. Although few complied in the past, failure to do so constitutes a ground of deportability, thereby allowing the government to hold the foreigner in detention pending immigration court proceedings. Immigration proceedings allow only an exceedingly limited right to counsel in that the individual must find and retain an attorney by himself.

A foreigner may also be detained and removed under U.S. immigration laws for engaging in terrorist activity. The terrorist-related grounds are very broad, and include planning terrorist activities, fundraising, soliciting membership, or providing material support.³⁰ A person is also removable if he has engaged in “any other criminal activity which endangers public safety or national security,” regardless of whether he has been convicted of a crime.³¹ Lastly, a person can be denied asylum in the United States if he is a threat to national security or a terrorist or suspected terrorist; once denied asylum, he can be deported.³²

As reported in the media, the U.S. Immigration & Naturalization Service (INS) has extraordinarily broad immigration detention powers. INS can arrest and hold a person in administrative detention for at least forty-eight hours - and often longer - if suspected of even a minor immigration violation.³³ While many

can eventually seek release by posting a bond, those charged with deportability for terrorist activity or certain violent crimes are ineligible to apply for release from custody while awaiting removal from the United States.³⁴ Even if a person is eligible to seek bond pending a hearing before an immigration judge, bond may be denied altogether if the person is a threat to national security, a danger to the community or a flight risk.³⁵

Shortly after the September 11 attacks, Congress passed a new law, the USA PATRIOT Act.³⁶ Section 412 grants the Attorney General or the Deputy Attorney General the power to certify an alien as a terrorist based on “reasonable grounds” to believe that the alien is a terrorist or has committed a terrorist act.³⁷ INS must detain a person so certified³⁸; detention may last for seven days before immigration or criminal charges are brought.³⁹ Aliens can get review of their detention under this section by filing a petition for a writ of *habeas corpus* in federal court, but their only appeal is to the Court of Appeals for the District of Columbia Circuit.⁴⁰ If a person has a final order of removal but has been certified as a terrorist, and cannot be removed, the Attorney General can detain the person but must review the detention every six months. He may order continued detention past six months if he can show that “the release of the alien will endanger the national security of the United States or the safety of the community or any person.”⁴¹ Based on past experience with similar provisions in other laws, this sixth-month review can be relatively perfunctory.

4) *Alien Terrorist Removal Court*: In 1996, in response to the Oklahoma City federal building bombing, Congress enacted new procedures and created a new court to hear terrorist cases and to remove terrorists from the United States.⁴² This action expanded the government’s power to conduct deportation hearings using secret evidence against suspected terrorists.⁴³

The Alien Terrorist Removal Court is composed of five United States district court justices appointed by the Chief Justice of the Supreme Court. Its rules require special protection for the rights of those brought before it. To date, however, the United States has not used the court, apparently because it is easier to use secret evidence in the context of existing deportation or removal proceedings.⁴⁴ In this regard, the government has not hesitated to detain suspected terrorists or terrorist sympathizers and use secret evidence to try to deport them.⁴⁵

iv. *Habeas Corpus as a Remedy to Test Detention*

The United States Constitution provides that “[t]he Privilege of the Writ of *Habeas Corpus* shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”⁴⁶ *Habeas corpus* (the “Great Writ”) allows persons in the custody of the United States government to challenge detention. Once a *habeas corpus* petition is filed, the government is required to explain why detention is justified. If the explanation is acceptable, the petition is dismissed. If unacceptable, the petition is granted and the person must be released. *Habeas corpus* is considered by Americans to be a fundamental Constitutional right.

The Supreme Court has held that all citizens held in detention by the government have the right to test the legality of their detention through the writ regardless of where they are being held. Non-U.S. citizens have a more limited right - file a petition only if held inside the United States.⁴⁷

v. Litigations

In most of the legal proceedings involving Al Qa'ida, the U.S. government has chosen to use domestic courts to prosecute the accused. The following section briefly reviews some of the more prominent cases.

1) United States Civilian Federal Criminal Court Cases

Zacarias Moussaoui: Zacarias Moussaoui, a French citizen born in Morocco, was arrested on U.S. immigration charges less than a month before the attacks of September 11. After he aroused suspicions at a Minnesota flight school, the staff contacted the Federal Bureau of Investigation (FBI). FBI and INS agents determined that Moussaoui had violated U.S. immigration law by overstaying his visa. Moussaoui was then arrested and held in administrative detention by the INS pending FBI investigation of a possible criminal case; he was in federal custody on September 11. Shortly thereafter, the government announced that Moussaoui was the "twentieth hijacker," i.e., the fifth member of the four-man team that hijacked one of the aircraft. Moussaoui was charged with several counts of violating domestic U.S. criminal statutes and provided a public defender. After firing his public defender, he proclaimed membership in Al Qa'ida, allegiance to Osama Bin Laden, and a hope that the United States (and Israel) would be destroyed. Moussaoui's case is pending in the United States District Court for the Eastern District of Virginia, where he is being held in a federal pre-trial holding facility. Trial is scheduled to start in June 2003.

John Walker Lindh: John Phillip Walker Lindh, an American citizen born in the United States, was captured on the battlefield in Afghanistan where he was fighting as a member of the Taliban forces. After his capture, Lindh was immediately taken to the United States where he was charged in federal criminal court with various violations of U.S. domestic criminal law. Lindh argued that certain counts of the indictment should be dismissed because as a Taliban soldier, he was a lawful combatant entitled to combatant immunity under international law.⁴⁸ Following a plea bargain, Lindh was sentenced to twenty years in prison.⁴⁹ Although the government did not officially label him an "unlawful combatant," as part of his plea agreement, Lindh agreed to co-operate fully with U.S. officials and provide them with information about his activities and connections to the Taliban and Al Qa'ida.

Richard Reid: Born in the United Kingdom, Richard Reid is a British citizen. Reid boarded an American Airlines jet in Paris, bound for Miami, Florida. While the flight was over the Atlantic, he attempted to light a fuse attached to his shoes. Nearby passengers and the flight crew stopped him and subdued him. Reid had placed explosives in his shoes, which he apparently intended to detonate

in hopes that the plane would crash. The plane was diverted to Boston, where Reid was arrested at Logan International Airport. Charged in federal criminal court in Massachusetts, two public defenders were appointed to represent him. The government imposed special administrative measures on his defence team, including restrictions on who Reid was allowed to communicate with while in custody. Reid's lawyers argued that the special administrative measures violated their client's right to counsel. In October 2002, Reid pled guilty to eight counts of violating U.S. domestic criminal laws, affirming that he was an enemy of the United States and a disciple of Osama Bin Laden. He received a life sentence.

Osama Awadallah: Osama Awadallah is a Jordanian citizen who was a college student in San Diego, California, when arrested shortly after the September 11 attacks. He was taken into custody as a material witness in a New York grand jury proceeding investigating the terrorist attacks. Awadallah was subsequently charged with perjury after allegedly making conflicting statements to FBI agents and the grand jury. Represented by a public defender, the judge ruled that his statements were inadmissible because government agents misused the material witness statute to detain individuals to testify before grand juries, when the statute only applies to witnesses detained after charges have been filed.⁵⁰ The criminal indictment against Awadallah was then dismissed because he had been detained unlawfully. His case is pending appeal. Interestingly, in a similar case before a different judge in the same court, the court ruled that the material witness statute does allow the government to hold witnesses in order to secure their testimony before a grand jury.⁵¹

James Ujaama: James Ujaama is a U.S. citizen arrested in Denver, Colorado, and initially held as a material witness in a federal terrorism investigation. Later, after detention without charges for more than a month, he was indicted on one count of conspiring to set up an Al Qa'ida training camp inside the United States and one count of violating U.S. weapons laws. Federal officials initially told media sources that Ujaama had supplied computer equipment to Al Qa'ida members, and may have trained in an Al Qa'ida camp; later, they alleged that Ujaama had met with fellow conspirators to discuss plans to stockpile weapons and use them to attack Americans. Ujaama's arrest sparked interest because he had been a prominent community leader and had published several entrepreneurial books. Critics asserted that Ujaama had been targeted because of his political views, and that his case represented a misuse of the material witness statute. His case is pending in federal court in Seattle, Washington.

The Michigan Cases: Karim Koubriti, Ahmed Hannan, Farouk Ali-Haimoud and "Abdella" were indicted on terrorism-related charges in U.S. District Court in Detroit, Michigan. One is Algerian, two are Moroccan, and one is of unknown citizenship. Three are in detention, while the fourth remains at large. The men are accused of being an Al Qa'ida terrorist cell. While it is not entirely clear yet what the charges against them involve, their cases (which remain pending) are examples of how the government has prosecuted non-citizens who are suspected Al Qa'ida sympathizers using domestic U.S. criminal laws.

The Lackawanna Six: The “Lackawanna Six” are six U.S. citizens of Yemeni descent - Sahim Alwan, Mukhtar al-Bakri, Faysal Galab, Yahya Goba, Shafal Mosed, and Yasein Taher - arrested in the United States and charged in Buffalo, New York with various violations of domestic criminal laws relating to their support of Al Qaeda. The six allegedly trained in an Al Qaeda training camp, although at least one of them does not admit to being a member of Al Qaeda. Another has already pled guilty, and faces a ten-year prison term, but has agreed to cooperate with law enforcement and testify against the other defendants. This case also demonstrates how the government has used domestic courts, and domestic criminal laws, to prosecute Al Qaeda suspects. Even where the government has evidence linking suspects to Al Qaeda training camps overseas, it has not necessarily chosen to treat them as “unlawful combatants.”

2) *The “Enemy Combatant” Cases*

To date, all of the persons designated “unlawful combatants” have actively engaged in attacks on the United States, or in combat against U.S. forces, and appear to have valuable intelligence information that would be useful in the war-fighting effort.

Yaser Hamdi: Yaser Esam Hamdi was born in the United States, although both parents were Saudi citizens. Under the Fourteenth Amendment to the United States Constitution,⁵² he is thus a native-born American citizen. Captured on the battlefield in Afghanistan where he was fighting as a member of the Taliban forces, Hamdi was transferred to the American-operated detention facility in Guantanamo Bay, Cuba. Upon processing, U.S. officials learned that he was a citizen. He was then transferred to the Navy’s confinement facility in Norfolk, Virginia.

Shortly after the Department of Defense released information about his transfer, several *habeas corpus* petitions were filed on Hamdi’s behalf, arguing that detention was unconstitutional because he was being held without charges, access to an attorney, or the ability to challenge his detention.⁵³ A petition filed by Hamdi’s father was allowed to proceed to a hearing; the District Court for the Eastern District of Virginia subsequently appointed a lawyer to represent Hamdi, and ordered the government to allow the attorney to meet with Hamdi. On January 8, 2003, the Court of Appeals for the Fourth Circuit - an intermediate U.S. federal appellate court - reversed the lower court, ruling that Hamdi could be detained indefinitely without access to an attorney because it was undisputed that he was captured in a combat zone overseas and was being held as an enemy combatant.⁵⁴ In other words, the court found that American citizenship alone does not give a person any right to be treated differently from other prisoners captured in a combat zone. The Court ordered the petition dismissed.

José Padilla: Also known as Abdullah al Muhajir, José Padilla was born in the United States. He was convicted of murder before turning eighteen, but following release was arrested again on a weapons charge. He then moved to Egypt, changed his name, and later contacted the Al Qaeda network, allegedly

offering to assist with an attack on the United States involving a radiological “dirty bomb.” The Department of Justice arrested Padilla at Chicago O’Hare Airport after arrival from Pakistan in May 2002. He was first held on a material witness warrant to enforce his appearance before a grand jury investigating terrorism charges in the U.S. District Court for the Southern District of New York. Although initially provided a lawyer, after investigation of his case, the government designated Padilla an unlawful combatant and transferred him to the custody of military officials in Charleston, South Carolina. At that point, Padilla was denied access to counsel.

To date, Padilla has not been charged with a crime, and has no prospect of being released in the foreseeable future, although his attorney has filed a petition for a writ of *habeas corpus*. The court has ruled that the President has the authority to designate as an enemy combatant an American citizen captured within the United States, and can legally detain him in a military detention facility for the duration of the conflict with Al Qaeda.⁵⁵ The Court has not yet determined whether the evidence is sufficient to justify Padilla’s detention. Padilla has also apparently provided valuable intelligence information.

Guantánamo Bay detainees: perhaps the most prominent detainees are the more than 500 men held by the U.S. military at Guantánamo Bay Naval Base, Cuba. All were transported by the military to Guantánamo Bay after being detained outside the United States (primarily in Afghanistan). Interested parties in the United States have attempted to challenge their detention through petitions for writs of *habeas corpus*; each attempt has been rebuffed by U.S. courts. Because the majority - if not all - of these detainees are being held outside the United States, District Courts initially determined that they had no jurisdiction to hear the cases.

For example, a coalition of clergy, lawyers and law professors, in a petition with the District Court for the Central District of California,⁵⁶ argued that the detainees were being denied certain rights under the Constitution and international law, including the right to counsel. Initially, the judge held that the coalition was not the proper party to bring the action and that no federal district court could have jurisdiction over the case. On appeal, the Ninth Circuit Court of Appeals (the intermediate appellate court) upheld this decision on the issue whether the coalition was the proper party. However, it left open the issue whether any federal court had jurisdiction over detainees held at Guantanamo Bay.

In a second case, family members of some of the detainees filed a lawsuit in Washington, DC, seeking release.⁵⁷ The District Court for the District of Columbia ruled that it had no jurisdiction because Guantánamo Bay Naval Base is leased from Cuba and, therefore, is not U.S. sovereign territory. The court stated that it was powerless to extend the writ of *habeas corpus* to non-U.S. citizens held outside the sovereign territory of the United States. Additionally, said the court, enemy non-citizens held outside the United States do not have a right of access to United States courts. It then dismissed the petitions with prejudice. Presently, there is no immediate likelihood of any U.S. court reviewing

the status of the Guantánamo Bay detainees.

3) *Immigration detainees*

Immigration detainees are persons, of unknown number, held in custody solely on immigration charges. The media initially reported that there were some 1,200 such individuals in custody after September 11; more recently, the government has announced that most have been released from immigration detention, transferred to the custody of another branch of the government (i.e., to face criminal charges) or deported. It has not said how many (if any) have connections to Al Qa'ida. The number of detainees with terrorist connections appears to be very small.

As discussed previously, the United States has very broad powers to detain persons for immigration violations. The government has used those powers extensively in connection with the war against terror. In some cases, it has detained people for long periods prior to giving them hearings before an immigration judge; in others, people have been subjected to lengthy detention after a decision has been made to deport them.

Several lawsuits have been filed challenging various aspects of these detentions. One, *Turkmen vs. Ashcroft*, filed in March 2002, is a class action on behalf of persons who have been ordered deported, but who claim that they were detained in abusive conditions.⁵⁸ Another, *Center for National Security Studies vs. United States*,⁵⁹ was filed to appeal the denial of a request under the Freedom of Information Act for information about the immigration detainees; the lower court judge in this case ruled that some information about the detainees must be released, but stayed her order while the government appealed. Yet another case, *American Civil Liberties Union of New Jersey vs. County of Hudson*,⁶⁰ was filed to force New Jersey state officials to reveal the names of immigration detainees whom they were holding. In March 2002, a state court judge ordered New Jersey authorities to reveal the names of the detainees, but this decision was reversed on appeal. Finally, in *Detroit Free Press vs. Ashcroft*⁶¹ and *New Jersey Media Group, Inc. vs. Ashcroft*,⁶² members of the media argued that they have a First Amendment right to attend and report on immigration hearings. Because the United States Supreme Court may still review these cases, it is not possible to draw any final conclusions about them, other than to say that they raise important issues about the extent to which authorities can use administrative immigration detentions in the war on terrorism. A trend in these cases, however, is a high degree of deference by U.S. courts to the war-fighting needs of the Executive Branch. It is highly unlikely that the Supreme Court will reverse that trend, given the dominance of judicial conservatives on the current Court.

III. Conclusion

As a result of its efforts to fight terrorism after the September 11 attacks, the U.S. government has held several thousand people in various forms of detention,

both inside and outside the United States. The variety of justifications used to justify them speaks to the confused nature of both international and domestic law when governmental authorities confront a violent non-State actor such as the Al Qaeda terror network. Because Al Qaeda is not a State and its members do not conform to the international law requirements for formal recognition as lawful combatants, however, the Geneva Conventions do not apply to them. Therefore, treating them as unlawful combatants or dealing with them under domestic law are both appropriate solutions. In detaining Al Qaeda members both inside the country and abroad, the United States government has adopted a flexible approach, using a variety of methods that are generally consistent with a need for accurate intelligence from Al Qaeda members and sympathizers. This approach is consistent with the rule of law. At the same time, disagreements over the American treatment of detainees make it clear that international humanitarian law has not yet reached a consensus on how to handle non-State actors, such as the Al Qaeda terror network.

¹ For example, commentators have compared the treatment of Al Qaeda suspects to the often-criticized treatment of Japanese Americans during World War II. See Stanley MARK, Suzette BROOKS MASTERS & Cyrus D. MEHTA, *“Have We Learned the Lessons of History? World War II Japanese Internment and Today’s Secret Detentions”*, American Immigration Law Foundation, 1 Immigration Policy Focus 3, October 2002, <http://www.aifl.org/pubed/focus/1002.htm>. The comparison is not entirely fair in terms of the numbers of people affected. During World War II, the U.S. government detained more than 100,000 Japanese residents and Japanese-Americans. In the current situation, the numbers are dramatically smaller. It has been estimated that the government has arrested and held only a few thousand people in the current war on terrorism.

² The *“International Covenant on Civil and Political Rights (1966)”*, http://www.unhcr.ch/html/menu3/b/a_ccpr.htm (accessed January 12, 2003).

³ The *“Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment”*, adopted Dec. 10, 1984, opened for signature Feb. 4, 1985, G.A. Res. A/Res/39/46 (1984), reprinted at S. Treaty Doc. 100-20 (1990), <http://www.hrweb.org/legal/cat.html> (accessed January 10, 2003).

⁴ The United States takes the position that the Convention Against Torture does not apply extraterritorially because it contains language limiting its application to the “territory” of the Parties, and to those persons “subject to the jurisdiction” of the Parties.

⁵ See, e.g., *International Covenant on Civil and Political Rights*, Art. 4 [hereinafter, “ICCPR”]: “In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.” Rights derogated during wartime include the right to be free from arbitrary arrest and detention, the right to be informed of the charges against a person, and the right to court review of a person’s detention. Compare ICCPR, Art. 4(2) with ICCPR, Art. 9.

⁶ The *“Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949”*, 6 UST. 3114, 75 U.N.T.S. 31; The *“Convention (II) for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949”*, 6 UST. 3217, 75 U.N.T.S. 85; the *“Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949”*, 6 UST. 3316, 75 U.N.T.S. 135; and the *“Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949”*, 6 UST. 3516, 75 U.N.T.S. 287.

⁷“*Protocol I Additional to the Geneva Conventions of 1949*”, arts. 45(3) & 75, 1125 U.N.T.S. 3, June 8, 1977.

⁸ “*Protocol I Additional to the Geneva Conventions of 1949*”, Art. 75(3), 1125 U.N.T.S. 3, June 8, 1977).

⁹ International Committee of the Red Cross, “*Commentary to Article 4 of the Convention (IV) Relative to the Protection of Civilian Persons in Time of War*”, Geneva, August 12, 1949, <http://www.icrc.org/ihl.nsf/COMART?openview> (accessed January 12, 2003).

¹⁰ “*Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949*”, Art. 5, 6 UST. 3316, 75 U.N.T.S. 135.

¹¹ “*Convention (III) Relative to the Treatment of Prisoners of War*”, Art. 4(A)(2). Those four conditions are that the militia or volunteer force must: (1) be commanded by a person responsible for his subordinates; (2) have a fixed distinctive sign recognizable at a distance; (3) carry arms openly; and (4) conduct their operations in accordance with the laws and customs of war. See also *Protocol I Additional to the Geneva Conventions of 1949*, arts. 43 & 44, 1125 U.N.T.S. 3 (June 8, 1977). The United States is not a party to this Protocol, but this Protocol further enforces the argument that a prisoner of war must belong to a Party to the Convention or Protocol, and cannot be operating as the agent of an independent, non-State global organization.

¹² Also termed “illegal combatants” by some writers.

¹³ See United States Mission to the European Union, “*Bush Says Geneva Convention Applies to Taliban, Not Al-Qaida*”, Feb. 7, 2002, <http://www.useu.be/Terrorism/USResponse/Feb0702BushGenevaGuantanamo.html>.

¹⁴ See, e.g., “*United States vs. Lindh*”, 212 F.Supp.2d 541, 557-558, E.D. Va. 2002, explaining distinction between lawful and unlawful combatants; see also “*Padilla vs. Bush*”, 2002 US Dist. LEXIS 23086, *62, S.D.N.Y., Dec. 4, 2002.

¹⁵ USA CONST. amend. V (“No person...shall be...deprived of life, liberty, or property, without due process of law...”).

¹⁶ US CONST. amend. VI (“In all criminal prosecutions, the accused shall...have the assistance of counsel for his defence.”).

¹⁷ 18 USC. §4001(a).

¹⁸ US CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated...”).

¹⁹ US CONST. amend. V (“nor shall any person...be deprived of life, liberty, or property, without due process of law”).

²⁰ US CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial... and to have the assistance of counsel for his defence.”).

²¹ See “*Zadvydas vs. Davis*”, 533 US 678, 693, 2001, “It is well-established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders.”

²² See, e.g., “*Korematsu vs. United States*”, 323 US 214, 1944, upholding World War II Executive Branch decision to order Japanese Americans into relocation camps.

²³ “*Third Geneva Convention*”, Art. 102.

²⁴ For example, Article 32 of the Uniform Code of Military Justice provides for a pre-trial proceeding to determine whether a case will be referred to a court-martial. Under Article 32, the accused and his attorney are permitted to examine the government’s evidence. This a far broader right than the grand jury right provided to civilians.

²⁵ “*Convention III Relative to the Treatment of Prisoners of War, Geneva, August 12, 1949*”, “Prisoners

of war shall be released and repatriated without delay after the cessation of active hostilities,” Art. 118, <http://www.icrc.org/ihl.nsf> accessed January 12, 2003.

²⁶ See, e.g., “*Johnson vs. Eisentrager*”, 339 US 763, 1950, denying German prisoners-of-war being detained in Germany by the U.S. military the right to file habeas corpus petitions in U.S. domestic courts because the privilege of the writ of habeas corpus does not extend to aliens held outside the sovereign territory of the United States; see also “*Zadvydas vs. Davis*”, 533 US 678, 693, 2001, «It is well-established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders».

²⁷ Authorization for the Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (Sept. 18, 2001).

²⁸ Exec. Order of Nov. 13, 2001 Regarding the Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, <http://www.whitehouse.gov/news/releases/2001/11/20011113-27.html>.

²⁹ 18 USC. §3144.

³⁰ 8 USC. §1227(a)(4)(B).

³¹ 8 USC. §1227(a)(4)(A)(ii).

³² 8 USC. §1158(b)(2)(A)(iv) & (b)(2)(A)(v).

³³ Previously, INS had authority to detain a person for 24 hours before charging him. On September 28, 2001, the Department of Justice publishing an interim regulation, extending the period of time to 48 hours. See 66 Fed. Reg. 48334 (Sep. 28, 2001); 8 C.F.R. § 287.3(d). A person may be detained without a warrant of arrest under the authority of 8 USC. §1357.

³⁴ 8 USC. §1226(c).

³⁵ See, generally, 8 USC. §1226; 8 C.F.R. §236.1.

³⁶ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), P. L. 107-56, 115 Stat. 272 (Oct. 26, 2001).

³⁷ USA PATRIOT Act of 2001, §412(a).

³⁸ *Id.* If the person is determined not to be removable from the United States, the person may no longer be detained.

³⁹ *Id.*

⁴⁰ USA PATRIOT Act of 2001, §412(b)(3). Any district court handling such a habeas case is also bound by the decisions of the U.S. Court of Appeals for the District of Columbia Circuit. *Id.* at §412(b)(4).

⁴¹ USA PATRIOT Act of 2001, §412(a)(6).

⁴² 8 USC. §§ 501—507.

⁴³ The use of secret evidence against foreigners suspected of being a danger to national security is not new, but dates back at least fifty years to World War II. See “*Knauff vs. Shaughnessy*”, 338 US 537, 1950, discussing the use of secret evidence against aliens during World War II.

⁴⁴ See, generally, Martin SCHWARTZ, Niels FRENZEN, & Mayra L. CALO, “*Recent Developments on the INS’ Use of Secret Evidence Against Aliens*”, 2 Immigration & Nationality Law Handbook 300-11 (2001 ed.).

⁴⁵ *Id.* at 309: “In recent years the INS has used secret evidence, with a few exceptions, primarily against Arabs and Muslims”.

⁴⁶ US CONST. Art. I, §9, cl. 2.

⁴⁷ See “*Johnson vs. Eisentrager*”, 339 US 763, 1950, denying German prisoners-of-war being detained in Germany by the U.S. military the right to file *habeas corpus* petitions in U.S. domestic courts because the

privilege of the writ of *habeas corpus* does not extend to aliens held outside the sovereign territory of the United States; see also “*Zadvydas vs. Davis*”, 533 US 678, 693, 2001.

⁴⁸ “*United States vs. Lindh*”, 212 F.Supp.2d 541, 552, E.D. Va. 2002.

⁴⁹ See “*United States vs. Lindh*”, 227 F.Supp.2d 565, E.D. Va. 2002.

⁵⁰ “*United States vs. Awadallah*”, 202 F.Supp.2d 55, S.D.N.Y. 2002; “*United States vs. Awadallah*”, 202 F.Supp.2d 82, S.D.N.Y. 2002, Judge Shira A. SCHEINDLIN.

⁵¹ In Re Material Witness Warrant, 213 F.Supp.2d 287, S.D.N.Y. 2002, Judge Michael B. MUKASEY.

⁵² US CONST. Amend. XIV (“All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States...”).

⁵³ One petition was filed by the Federal Public Defender, and another was filed by a private citizen. A third petition was filed by Hamdi’s father. The first two petitions were dismissed outright because neither the federal public defender nor the private citizen had a significant relationship to Hamdi such that they should be allowed to sue on his behalf. See “*Hamdi vs. Rumsfeld*”, 294 F.3d 598, 4th Cir. 2002.

⁵⁴ “*Hamdi vs. Rumsfeld*”, 2003 US App. LEXIS 198 (4th Cir. 2003).

⁵⁵ “*Padilla vs. Bush*”, 2002 US Dist. LEXIS 23086, *62, S.D. N.Y., Dec. 4, 2002.

⁵⁶ “*Coalition of Clergy vs. Bush*”, 189 F.Supp.2d 1036, C.D. Cal. 2002.

⁵⁷ “*Rasul vs. Bush*”, 215 F.Supp.2d 55, D.D.C. 2002.

⁵⁸ “*Turkmen vs. Ashcroft*”, 02-CV-0230007, E.D.N.Y. 2000, complaint filed April 17, 2002, <http://news.findlaw.com/hdocs/docs/terrorism/turkmenash41702cmp.pdf>, accessed January 15, 2003.

⁵⁹ “*Center for National Security Studies vs United States*” DOJ, 215 F. Supp. 2d 94, D.D.C. 2002.

⁶⁰ “*A.C.L.U. of N.J. vs. County of Hudson*”, 2002 N.J. Super. LEXIS 201, N.J. Super.Ct. App. Div., Apr. 26, 2002, rev’d, 799 A.2d 629, N.J. Super.Ct. App. Div. 2002, cert. denied, 803 A.2d 1162, N.J. 2002.

⁶¹ “*Detroit Free Press vs. Ashcroft*”, 195 F.Supp.2d 937, E.D. Mich. 2002; aff’d, 303 F.3d 681, 6th Cir. 2002, reh’g en banc denied, 2003 US App. LEXIS 1278, 6th Cir. 2003.

⁶² “*New Jersey Media Group, Inc. vs. Ashcroft*”, 205 F.Supp.2d 288, D.N.J. 2002, rev’d, 308 F.3d 198, 3rd Cir. 2002.

COUNTERING TERRORISM AND INTERNATIONAL LAW: THE TURKISH EXPERIENCE

Sadi CAYCI (*)

Introduction

Turkey exists in a vulnerable national security environment. Located at the centre of the Balkans-Caucasus-Middle East triangle, it is sometimes referred to geographically as inhabiting a tough neighbourhood. Added to this are the effects of the Ottoman Empire's demise and the resulting Eastern Question, as it is known in political history.¹

Since the 1970s, Turkey has been engaged in an almost continuous *low intensity conflict*. Individual and organized terror and terrorist insurgencies, external sponsorship, manipulation, and use of terrorist campaigns, and the Government's responses to these challenges offer many political, military, and legal lessons.² If not properly dealt with, acts of *subversion* can easily escalate to the level of *insurgency*, even to *belligerency*. Failure to launch a necessary and proportionate political and military response to a *terrorist campaign* may even result in defeat and overthrow the Government, and could result in secession.³

It is not difficult to imagine a trigger for a terrorist campaign. Depending on the circumstances of the time and strategic developments, the motive may be ideological, for instance, Marxist-Leninism or Maoism (e.g., TKP/ML, TIKKO, Dev-Yol, DHKP/C, etc.). It might also be chauvinism (e.g., Ulku Ocaklari - Bozkurtlar), ethnic nationalism (e.g., Devrimci Demokratlar, Ala Rizgari, KUK, T-KDP, ASALA, PKK/KADEK, etc.), or religious fundamentalism (e.g., IBDA/C, Turkish Hizbullah, etc.).⁴ This paper will concentrate on international law issues in the context of the secessionist PKK/KADEK terror that occurred in Turkey.

Secessionism

Generally speaking, the creation of *nation States* following the Westphalia Treaty of 1648 was the root trigger for separatist and/or secessionist movements. Drafted as the First World War was coming to a close, President Woodrow Wilson's Fourteen Points, envisaging self-determination of *peoples*, contributed to secessionism. The process continues today. Recall events in the former-Yugoslavia and East Timor. The situations in Kosovo, Chechnya, Transnistria (Moldova), Abkhazia (Georgia), Nagorno-Karabakh (Azerbaijan), and Northern Iraq (Iraq) offer further current examples in this regard.

And what of the Kurds in Turkey? A sound analysis of the situation requires an understanding of the recent Ottoman - Turkish political history. Following

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the Bolshevik revolution, the Russians revealed the existence of secret arrangements among major Western powers of the time to partition Ottoman territory in the course of the First World War's military campaigns. Political objectives included establishment of an Armenian State and autonomous Kurdistan, and containment of the Turks to a few provinces of Anatolia. Under the terms of the Treaty of Sevres (1920), establishment of an International Commission for Kurds was envisaged. However, the Ottoman Parliament never ratified the treaty, and, thus, it was never put into effect.

The Mondros Armistice ending the war signalled the end of the Ottoman State. In response to the occupation of Istanbul and parts of Anatolia by Greek, British, French, and Italian forces, Turks under the leadership of Mustapha Kemal Atatürk waged a national liberation war against *alien occupation*. The Turkish Liberation War (1919-1922) ended with national victory and international recognition of the young Republic of Turkey in the Lausanne Peace Treaty of 1923.

The Kurds and Other Ethnic Communities

In light of this Ottoman legacy, not only ethnic Kurds, but also Lazs, Circassians, Georgians, Abkhazians, Chechens, Bosnians, Albanians, Arabs and others, live alongside the Turks in present-day Turkey. Thus, the term "Turk" is not a reference to a specific race. Rather, all these people were involved in, and contributed to, the war of liberation against the Western Occupying Powers.

There are more than 12 million scattered throughout Turkey; they are not a region-specific community. Traditionally, they belong to several tribes, among them the Jirki, Alan, and Ezdinan. Additionally, they do not speak the same dialect. For instance, Kurmanci, Kirmancki, Sorani, and Gorani are major Kurdish dialects. Turkish serves as a language of communication among the Kurds; those who do not speak Turkish require interpretation to speak with members of other groups. That is why leading staff and members of the PKK/KADEK have continuously used Turkish as their means of communication during their so-called liberation war. In the context of a concerted nation-building effort, linguistic efforts to produce a common alphabet, dictionary and grammar seems to have failed so far.⁵

PKK/KADEK

Established in 1974, the PKK (Kurdistan Workers' Party) is an illegal armed bandit group aiming at establishing an independent Kurdish State in parts of Turkey. It has been sponsored, tolerated, and/or manipulated by several States; including some of Turkey's NATO friends and allies (Syria served as its major sponsor).⁶

The PKK's terrorist campaign has claimed approximately 40,000 lives since 1986. Since 1998, there has been a relative calm in its terrorist activities. Three factors contributed to this decline in activity: the Turkish Land Forces Commander's warning to Syria, through a September 1998 media statement, to halt its support of the PKK; conclusion of the Turkey - Syria Minutes of Agreement,

in Adana, on 20 October 1998; and Abdullah Ocalan's capture in Nairobi, Kenya. Ocalan, the PKK's leader, was convicted and sentenced to death by the Ankara State Security Court. Later, because of the abolition of capital punishment in Turkey, his conviction was reduced to life imprisonment (1999), a sentence he is presently serving. His case before the European Court of Human Rights on claims of *unfair trial* is pending decision.

In March 2002, in an effort to camouflage its terrorist past, the name PKK was changed to KADEK. At present, the organization continues to have an estimated 4,000-5,000 armed militants stationed in Northern Iraq.

Terrorism or Armed Conflict?

Terrorism consists of two major elements: political aims and methods and means. One may find a political aim as legitimate, even sympathise with that aim. But terrorism is not a matter of the political aim alone; instead, its essence lies in the means and methods employed to reach that political objective. The *freedom fighter v. terrorist* arguments reflect confusion on this point. The same is true for the *terrorism v. armed conflict* controversies. Whereas terrorism is an issue of means & methods, armed conflict addresses the strategic situation; the two are not comparable. Terrorism may be committed both in time of peace and in time of armed conflict.

Terrorism and Human Rights

In investigating and prosecuting terrorist criminals, the international community has a tendency to see the trees, but miss the forest. As a result, isolated, individual assessments over terrorist activities often result in incorrect conclusions.

A terrorist organization consists of three categories of individuals and other entities: leadership (command and control), militants (combat arms), and collaborators (service arms). Including proxy organizations and other *prima facie* legal entities, collaborators are integral elements of a terrorist organization. They have vital functions in the fields of propaganda (media & press), recruitment, intelligence, political and/or military training (indoctrination), logistic and financial support, the provision of safe haven, medical support, legal assistance, etc. A *collaborator* may be a member of the parliament (e.g., Leyla Zana), a prominent foreign personality (e.g., Daniella Mitterand), a University professor/student, a *so-called* journalist, a famous author, or even a pop star. What happens is that these people are presented to the public in their legitimate social status, while their violations of criminal laws are overlooked. In such a pattern, *prosecution* is characterized publicly as *persecution*. And once such individuals manage to leave the country, they are considered asylum seekers. Many are granted refugee status at the cost of the rule of law in a democratic society.

The attempts of Third States to seek political gain from these incidents are wrong and constitute a major factor harming Turkish-European relations. It is impossible to explain certain approaches by some of our NATO friends and allies to the Turkish public. NATO is supposed to serve as a solemn and solid base for

the political independence and territorial integrity of member States, including Turkey. Yet, it is difficult to understand the rationale behind allowing the PKK/KADEK, DHKP/C, and Radical Islamists to engage in so called democratic activities that are directed at Turkey's security. These groups have been especially active in Belgium (the seat of NATO), Germany, Greece, Italy, and a number of other Alliance members.

In this pattern, *democracy and human rights* turn out to be basic *legal shields* that in practice function as a *de facto* law of terrorist privileges and immunities. Several examples of human rights issues that adversely affect Turkish national security are discussed below.

Freedom of Expression & Press

In my opinion, aiding and abetting the commission of crimes, insult, libel, incitement of hatred between different social groups, the training of militants, providing militants with target lists, organizing propaganda, disseminating false news to add fuel to the fire, and other similar acts have nothing to do with the concept of freedom of expression and press. Even a simple activity such as a peaceful assembly/demonstration is used as a means of *on the job training*. It is the first opportunity to put a future militant in confrontation with security forces, in order to *test* his or her loyalty. Moreover, once their names are registered in police records, it will adversely affect their selection for future public service positions, especially when the job requires security clearance. So, the process is almost always a one-way street, ending in permanent recruitment of the deceived person.

Freedom of Conscience and Religion

In Turkey, another potential security threat relates to religious issues. Normally, there is nothing improper with forming a congregation or religious community or with participating in certain mystic groups and activities. But when such activities are *politically motivated*, where Islam is used as a political means to manipulate certain groups of people and seize political power so as to change the existing Western style democratic system of constitutional government into an Islamic Republic, the subject becomes a sensitive national security threat that cannot be tolerated. While the government cannot and will not regulate religious issues as such, it has a responsibility to take every necessary and proportionate measure to protect the constitutional order and preserve the political philosophy of Mustapha Kemal Atatürk.

Operational Law issues

In the context of international relations, the principles and purposes expressed in the UN Charter and the UN General Assembly Resolutions on the "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations" and "Definition of Aggression" are especially important.⁷ The basic rule

is the prohibition of the threat or use of force in international relations. A second important principle, non-intervention in matters essentially within the domestic jurisdiction of a State, seems to be eroding under the present practices of the international community.

The other side of the coin relates to the reality of security, specifically, the existence of State-sponsored terrorism and indirect military aggression. How should a State respond to such challenges? One must admit that courts alone cannot win an armed struggle. Therefore, the use of necessary and proportionate armed force is a necessity. *Operational law* requires operational planners and troops on the ground to comply with the norms contained in public international law, the law of armed conflict, human rights law, national law and other relevant special agreements. With regard to human rights, the issue of derogability is of great importance. Derogation is properly understood not as suspension, but rather a restriction, of certain rights and freedoms.

Armed Forces Training

Notwithstanding the quality of existing laws and regulations, military planning and the conduct of operations leading to successful mission accomplishment depend on efficient and systematic education and training of responsible personnel. To this end, the Turkish Armed Forces have issued several training documents to pass the message throughout all ranks and levels of the armed forces personnel.

Among these, are the following:

- *Memorandum for the Turkish Armed Forces Personnel Assigned to the State of Emergency Region* (1990, 47 pages);
- *Code of Conduct: Public Relations and Winning the People in the Context of Internal Security* (1996, 43 pages);
- *Instructions - Combat Rules for Turkish Soldiers* (1997, 12 pages);
- *Important Points to Pay Attention to Under Our Domestic and International Legal Commitments* (2002, 50 pages).

To put this theory into practice, mission-specific codes of conduct and rules of engagement are the basic means for establishing operational discipline. A code of conduct is a preventive, precautionary measure intended to prevent wrongful acts by one's own troops and foster a friendly environment within the area of operations. It enables the command authority to help troops avoid creating problems through misbehaviour, for example in relations with the local community in the theatre of operations. Basic concepts set forth in the code include humane treatment, non-discrimination and other affirmative actions deemed feasible.

Rules of Engagement

The legal basis for using armed force is different in law enforcement and combat operations. Because the Turkish Government did not recognize the existence of a state of armed conflict in countering PKK terrorism, security forces had to operate within a limited authority. As a rule, use of force was

limited to self-defence, execution of a legitimate mission and enforcing the law. Military necessity, use of minimal force, and proportionality were the other relevant criteria.

It is important to educate the troops in the field that the use of force during law enforcement operations does not necessarily mean use of firearms. Similarly, use of firearms does not necessarily mean use of deadly force. All will depend on the circumstances at the time of the incident. Normally, use of lethal force is considered an extreme and exceptional measure limited to saving lives or mission-essential equipment. The latter is subject to special order by an appropriate level of command.

For cross-border military operations, troops must be educated on the nuance between a *self-defence* operation and *hot pursuit*, and in the context of hot pursuit, operations in international spaces or a foreign territory. Any operation in foreign territory requires a special agreement, arrangement, or permission by the State in which it occurs. In all other cases, where the territorial State is either unable/unwilling or itself the enemy, the legal basis for using armed force will be self-defence.

Countering Terrorism and the Law of Armed Conflict

Notwithstanding the legitimacy or sympathy aspects of the relevant political and/or military strategic objective, a counter-terrorist campaign may require support from the civilian authorities by the military; in the worst case scenario, it may even reach a level which I would call *terrorist warfare* - a non-international armed conflict of lower intensity, a non-international armed conflict of higher intensity, or a liberation conflict. For the purpose of this paper, *terrorist warfare* is defined as a non-international armed conflict in which the non-State Party employs means and methods that are completely in violation of the laws of war and consist of acts of terror. I do not consider the recent political rhetoric about the *war on terror* as a reference to an open ended, generic warfare, in which blanket authority to use force against almost any selected target, at any time and place, has been granted. In this respect, a comparison between PKK/KADEK and Al Qa'ida may prove to be useful. Both have been terrorist organizations. In my opinion, both succeeded in escalating the strategic situation to a level of non-international armed conflict. The two groups totally violated laws of war and committed acts of terror.

Application of the law of armed conflict by the government side will not give the terrorist organization and its members any legal status. Similarly, it does not represent any form of recognition. Because it did not meet the required criteria, the PKK-KADEK campaign did not constitute a liberation conflict. The means and methods used during their armed campaign consisted of terrorism; it was neither against a colonial domination, an alien occupation, nor against a racist regime. Rather, although armed struggle by the PKK / KADEK reached a level of non-international armed conflict of lower intensity, it was a genuine example of terrorist warfare.

Targeting

Targeting issues pose great challenges when dealing with State-sponsors of terrorism (Syria, Iraq, Iran, Greece, etc.) and those who tolerate it (Western European countries). It is my opinion that leaders and armed militants of a terrorist organization waging terrorist warfare, as well as their military assets and capability, are legitimate targets. Therefore, any military operation resulting in their death cannot be regarded as summary execution; it is combat, not a law enforcement operation. Similarly, when taking an active/direct part in hostilities, collaborators are also legitimate targets. The wounded and sick leaders, militants, or collaborators (persons out of combat) who have been captured or have surrendered, and *innocent* civilians in general, on the other hand, are to be respected and protected.

Prosecution of Crimes

Any terrorist campaign consists of many heinous crimes committed in a variety of ways. At times, they are conspiracies involving other illegal organizations. Below are some illustrative examples of PKK terrorism that have taken place in Turkey:

- Killing 35 villagers by shooting (1993, Erzurum, Yavi);
- Setting fire to a crowded shopping centre, killing 13 (1999, Istanbul-Mavi Carsi);
- Killing all members of a family, including babies (1993, Mardin-Zavi);
- Killing elementary school teachers (total of 138);
- Executing hundreds of its own members;
- Attacks on national assets, investments and infrastructure, including setting fire to forests, sabotaging tourism, destroying educational institutions;
- Illicit drug trafficking;
- Human trafficking;
- Money laundering; and
- Other crimes of similar nature.

Status of Captured Persons

In the context of terrorist warfare, captured persons who are members of the leadership, armed militants, or collaborators and actively/directly taking part in hostilities do not enjoy the status of a *combatant*. Nor are they to be considered as *fighters*, who are persons taking direct part in an armed conflict of non-international character. These individuals are, instead, unlawful fighters, i.e., civilians taking part in an armed conflict. Briefly stated, they are terrorists who are subject to criminal laws of the territorial State.

With regard to the right to a fair trial, the criteria and procedures for detention, access to lawyers, offering a defence and other fundamental guarantees, I believe that treaty or customary norms of the law of armed conflict, as *lex specialis*, have precedence over human rights law. A tricky legal question relates to professional medical and legal assistance provided to the terrorists. Nuances between a collaborator and a professional are important. A terrorist suspect will

obviously be entitled to receive legal assistance from a lawyer of his choice. But difficult legal questions arise when the relationship is not limited to professional assistance, but in fact amounts to illegal collaboration between the armed bandit and the professional.

One must separate issues relating to the prosecution of crimes under criminal law from security measures applied in the context of an armed conflict, namely, internment. In my view, even if no other specific criminal charge seems to be possible, merely being captured as a leader, armed militant, or a collaborator who has taken a direct/active part in hostilities will suffice to permit internment until the end of hostilities. So long as the terrorist warfare continues, it would not make any sense to release such individuals. One must understand that the internment is not a prosecutorial measure, but rather simply a security measure. It is inherent in the nature of any armed conflict.⁸

However, there may be cases of doubtful status. In this regard, I believe a military tribunal or commission must be available to review and remedy the situation, to determine whether the person in question is an innocent civilian or a leader or armed militant of the terrorist organization, or a collaborator who took direct/active part in hostilities.⁹

International Co-operation - Judicial Assistance

Due to lack of political will by governments, the international judicial assistance mechanism is not functioning properly. In the case of Turkey's struggle against PKK / KADEK terrorism, compliance with the European Convention on the Suppression of Terrorism (ETS No. 90) has been no exception. Contrary to specific provisions therein, almost all crimes have been characterized as political in nature, i.e., prosecution of terror suspects has been treated as the persecution of innocents.¹⁰ Based on this governmental practice, I conclude that the basic legal principle of "prosecute or extradite" in the criminal law context has become "neither extradite, nor prosecute or co-operate."

Conclusions

This analysis of the situation in my country leads to a number of important conclusions. They include the following:

- Established in 1974, the PKK is an illegal armed bandit group with the objective of establishing an independent Kurdish State in parts of Turkey. Its campaign of terror has claimed approximately 40,000 lives since 1986.
- Terrorism is not a matter of political aim; it is a matter of the means and methods employed to launch an armed campaign. Further, whereas terrorism is a means & methods issue, armed conflict is a strategic situation. Terrorism may be committed both in time of peace and in times of armed conflict and terrorist organizations consists of three categories of individuals or other entities: leadership (command and control), militants (combat arms) and collaborators (service arms).
- In investigating and prosecuting collaborators, the international community

has a tendency to see the tree but miss the forest. As a result, isolated, individual assessments on the activities of collaborators end in flawed conclusions. In this context, *democracy and human rights* become *legal shields* that, through professional schemes, function as a *de facto* law of terrorist privileges and immunities.

- As to operational matters, successful planning and conduct of operations requires the efficient and systematic education and training of responsible personnel; this is so even if the existing laws and regulations are sound. It is particularly important to educate the troops in the field that in law enforcement operations the use of force does not necessarily mean the use of firearms. Similarly, the use of firearms does not necessarily imply the application of deadly force. Everything depends on the circumstances at the time of the incident.
- The legal basis for the use of armed force is different in a law enforcement operation and a combat operation. As the Turkish Government did not accept the existence of a state of armed conflict in countering PKK terrorism, security forces had to operate with limited authority.
- The armed struggle by the PKK/KADEK has reached a level of non-international armed conflict of lower intensity; it is a genuine example of terrorist warfare.
- In the context of terrorist warfare, captured persons who are members of the leadership, armed militants or collaborators actively/directly taking part in hostilities are unlawful fighters, i.e., civilians taking part in an armed conflict; thus, they are terrorists subject to the criminal laws of the territorial State.
- One must distinguish issues relating to the prosecution of crimes under criminal law from security measures applied in the context of an armed conflict, specifically internment. Even if no other specific criminal charge seems possible, merely being captured as a leader, armed militant, or collaborator who took direct/active part in hostilities will justify internment until the end of hostilities. There may be cases of doubtful status. In this regard, a military tribunal or commission must be available to review and remedy the situation.
- Due to lack of political will by governments, the international judicial assistance system is not functioning properly. It is a pity that the basic legal principle in criminal law context has become “neither extradite, nor prosecute or co-operate.”

¹ Cay M. ABDULHALUK (ed.), *“The Eastern Question: Imperialism and the Armenian Community”*, Institute for the Study of Turkish Culture, Ankara, 1987, p.190.

² Ergene H. HALIL, *“Neden Hedef Turkiye?”* KIYAP Yayin Dagitim, Ankara, Temmuz 1993, p. 221.

³ *“Theater Planning and Operations for Low Intensity Conflict Environments”*, Center for Land Warfare, U.S. Army War College, September 1986, p.59.

⁴ Faik BULUT and Mehmet FARAC, “Kod Adi: Hizbullah – Turkiye Hizbullahi'nin Anatomisi”, Ozan Yayıncılık, İstanbul, Temmuz 1999, p.220.

⁵ Nihat Ali OZCAN, *PKK (Kurdistan İsci Partisi), Tarihi, İdeolojisi ve Yontemi*, Avrasya Stratejik Arastirmalar Merkezi yayinlari, Ankara, 1999, p. 425.

⁶ Aydin Ahmet KURTLEK, “PKK ve A. Ocalan, Kiyap Yayin-Dagitim”, Ankara, Aralik 1992, p. 189.

⁷ “Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance With the Charter of the United Nations”, UN G.A. Res. 2625 (1970); “Definition of Aggression”, UN G.A. Res. 3314 (1974).

⁸ See Common Article 3, and Articles 41, 79, “Geneva Convention of 1949 on Protection of Civilian Persons”; Articles 4, 5, “Additional Protocol II to the Geneva Conventions of 1949”.

⁹ See Article 5, para. 2, “Geneva Convention of 1949 on Treatment of Prisoners of War”.

¹⁰ One must remember the treatment of Abdullah Ocalan by Italy, Germany and Greece, following his capture. The existence of a special Co-operation Agreement between Turkey and Italy on the fight against terrorism, signed in Rome on 22 September 1998, made no difference. Italy let him leave the country. Greece escorted him to Kenya. Meanwhile, Germany cancelled the Red Bulletin of the INTERPOL for his capture. Another fugitive, Fehriye Erdal (DHKP/C), who is responsible for the killing of a prominent Turkish businessman and two of his staff, is still residing in Belgium; the Turkish people watch her smiling at TV screens during every session held to review her status.

THE PROBLEM OF RESPONDING TO TERRORISM

Oussama DAMAJ (*)

The subject that I want to outline, even though not new, is one of the most influential issues on the international stage. Its effects are being felt in international relations, the global economy, and the national laws of most countries. The issue is “terrorism” and the resulting “War against Terror.”

This war, like any other, requires preparations at all levels of command, weaponry, special tactics and rules of engagement, and a legal framework within which to act. But despite the unanimous denunciation of terrorism by all Nations, we find it very difficult to meet these requirements.

Before considering the reasons for this difficulty and trying to find answers or solutions, it is useful to remind the audience of two basic “rules” that are today influencing our judgments and behaviour as individuals, organizations, and even Nations. The first was applied in the wake of September 11, 2001. It provides that “If you do not do what you are asked to do, that means you are against us, and if you are against us that means you are a terrorist or at least you sympathize with terrorists.” The second is stereotyping. There is a typecast for each of us that was created by the media, or whoever controls it. This typecast operates for the benefit of security-agencies, organizations, or States. These stereotypes serve specific purposes, although they seldom reflect the truth.

I have started this way, because I want to present myself. An Arab from Lebanon, I served as an officer in the Lebanese Armed Forces for twenty-eight years. Eighteen of those were during armed conflicts. Such conflicts assumed multiple faces: civil war, war between militias, anti-terrorism operations and confrontations with the armies of different countries acting in pursuit of their own national interests in my country. Five years ago, I left the service to continue, with the International Institute of Humanitarian Law and the International Committee of The Red Cross, what I have started in the Army - the dissemination and implementation of the basic rules of international humanitarian law through the framework of the military institutions.

These long years of experience, in one of the hottest spots of the world, have taught me how hard it is for a weak nation to defend its “cause,” get the world to believe in it and convince others that you are the victim and not the aggressor. On the other hand, this experience has also taught me how important it is for organizations and groups working in the humanitarian field to distance themselves from politics and politicians, for in our world politics and basic

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humanitarian rules are at odds.

Some of you will wonder why I am saying this. It is because I want to be “very clear” that if my view does not fit well with some of you, I do not want you to misunderstand it as sympathy for terrorism. I want to state clearly that terrorism is indefensible, unacceptable, and certainly unjustified, and that is why I am amongst you today.

What is terrorism?

But which terrorism are we talking about? This question bears on the main theme of this lecture, the problems we face in confronting terrorism from the point of view of international humanitarian law. Any war is simply a series of actions with specific targets using a sequence of different tactics and successive measures that at all times should be under control until the strategic goal is achieved, which is usually tied to the political or economic interests of the warring countries. So, during a military operation, there should be a specific target to be seized and controlled. In terrorism, what is this target? A person? A nation? A doctrine? An international network? Since there is a difference in the nature of these possible targets, so there should also be a clear way to identify, and therefore label, the supposed “terrorist.”

Here I think we have our first challenge - a clear and specific definition for “terrorism.” Although, the term might seem self-evident, in practice it is hard to agree upon a legal definition at the international level. An analogous example of this dilemma is the definition of “aggression,” a subject discussed in Rome during the drafting of the International Criminal Court Statute. The Statute did not include aggression” as one of its “grave crimes” because the Conference could not agree upon its definition, even though efforts to define the crime of aggression have been underway since 1948 and despite the fact that Article 51 of the UN Charter had shed the light on this issue.

I mention this to show how important definitions are in international law. There is a resemblance between the cases of aggression and terrorism, for in neither is unanimity on a definition. This remains so despite the fact that the first attempt to define terrorism took place with the Convention for the Prevention and Punishment of Terrorism in 1937.

But is it really hard to find a legal definition for a certain act? Or is it the policy of certain Nations to avoid clear-cut definitions, thereby giving them ample discretion in their actions? Surely, many opinions and recommendations could be of use, and I hope they find their way into implementation. I am saying this because seventeen years ago the “Eleventh Round Table on Current Problems of IHL” took place in Sanremo. The issue at that time was defining terrorism and the problems of “terminology.” I will not go into the details of the final paper, because it is available for the interested. But I want to mention it to emphasize that regardless of the different opinions expressed at the Round Table, what was obvious to all participants was that terrorism is a “crime.”

The Crime

Taking into consideration this commonality, we know that for an offence to be treated as a crime, there have to have three elements: victim, weapon, and intent (to commit a crime). With regard to the crime of terrorism in relation to international humanitarian law, the application of these elements leads to the following conclusions.

The victim: Victims should be persons or other targets that are not allowed to conduct an attack according to this law.

The weapon: Article 35/1 of the First Protocol Additional to the Geneva Conventions provides that “In any armed conflict the right of the parties to the conflict to choose methods or means of warfare is not unlimited.” This is an essential element of the obligation not to inflict unnecessary damage or pain.

The intent: In the case of terrorism, it should be clear that the action itself is less related to the extent of damage, than the aftermath of the event (e.g., fear of crowded places, public transportation or public events). In short, it is the creation of such conditions that should be considered terrorism. This is the goal of terrorist means, tactics, and doctrine.

Intent is important at the level of national law regarding crimes in general; it is equally significant in international humanitarian law. Several provisions address intent by emphasizing the duties of leaders regarding their orders, the way they are carried out, and measures to prohibit violations of IHL. In particular, absent specific intent in cases of even flagrant violations, some or all the charges might be dismissed.

To elaborate on the importance of “intent” in crimes, let us consider an example. Assume that someone enters a bus and kills everybody on board. If he has no criminal record, and there is no apparent reason for his action, a psychological assessment will be ordered. Most likely, he will be labelled “disturbed.” On the other hand, if the same situation happened, but the culprit knows someone, or has been in contact with a person affiliated with a so-called “terrorist group,” he could easily end up in Guantánamo.

As a final note *vis-à-vis* intent, we should not be deceived when a breach of IHL occurs and the incident is presented as a simple error. This is especially true when the breaches occur day in and day out, and apologies are presented simply to evade the possible links to criminal intent, when innocent victims are falling, but the matter is presented as one of collateral damage or incidental injury.

This analysis leads to the conclusion that committing an “act of force” that has all three elements in it - whether the culprit is a single person, a certain group or even a nation- should be considered as a terrorist action and consequently dealt with as a punishable crime. The importance of defining a common terminology for use when seeking agreement concerning the shared problem of terrorism should be obvious. This is especially so when delegates come from various, and I do not say different, linguistic and cultural backgrounds to make decisions. Agreement on the importance of definition would downplay the bright headline “War on Terror.” These two words give the media an attractive substance

with which to play on the emotions of viewers. Incidentally, the terms “war” and “terror” lack legal status; international agreements and treaties have replaced the former term with “armed conflicts.” Unfortunately, “terror” remains undefined and without a common legal framework.

The legal framework of fighting terrorism:

The second problem we face in fighting “terrorism” is the legal framework. In part, this framework depends on who carries out the terrorist attacks. Actors fall mainly into four categories.

- Attacks carried out by a State through its regular army or its citizens, or by foreign organizations housed and provisioned by this aggressor State.
- Actions committed by local organizations within the State, including those with foreign nationals in their ranks because they hold the same beliefs or work as mercenaries.
- Actions committed within the State by an individual or by a group that lacks a clear and organized structure when such actions are motivated by mental, emotional, or doctrinal reasons.
- Assaults carried out by international organizations that are associated with other organizations that might or might not share common beliefs. Such networks seek to create a *de facto* situation for their direct benefit or for the benefit of a State, criminal organization, financial organization or intelligence agency.

The first three categories are easy to deal with through the domestic legal framework during peacetime and IHL during armed conflict. Such events are covered by IHL to the extent it condemns terror (Geneva Protocol I, Art. 51/2, & the Fourth Geneva Convention, Art. 33) and treats attacks on civilians as war crimes (GPI, Art. 85). They are even covered during a local conflict (GPII, Art. 4/d). The fourth causes great concern. There are numerous reasons for this.

Usually, these acts take place during peacetime. There is seldom a legal framework to deal with them.

It is difficult to locate and tie these organizations to a geographical location due to their ability to organize, depending on the international circumstances, throughout different regions of the world.

Certain “local” intelligence agencies use them to carry out what is known as “dirty work.” A lack of honest international co-operation can occur because of differing levels of interests and occasionally conflicting political benefits.

At times, the presence of a “just cause” acts as a catalyst for these actions. (In this instance, it is important to find solutions for long lasting conflicts in order to defuse such situations and prevent the population from being used. This will reduce the number of sympathizers and make combating terrorist acts much easier).

The issue of “just cause” leads us to the traditional understanding of “*jus ad bellum*” and “*jus in bello*.” The idea of “the right to wage war” has been replaced by a more civilized position that preserves “rights and obligations during war.” The basics of IHL come into effect once an armed conflict takes place,

regardless of who is involved. In doing so, IHL attempts to preserve the humane face of armed conflict, irrespective of the legitimacy of the “cause” of any of the concerned factions.

This law has evolved to incorporate the following principles:

- Respect of human principles that are consistent with religions and world conscience.
- Restraining methods and means of fighting and limiting them to military necessity, i.e., destruction of the enemy’s military capability in order to force him to surrender.
- Prohibiting the use of certain weapons that could cause unlimited and unnecessary damage. The reliance on individual responsibility and the prohibition of collective punishment.
- Preventing acts of vengeance or reprisals, even though formerly permitted as a last resort to counter the actions of an enemy that is violating human principles; when proportional to the provocations after an ultimatum insisting on compliance with the law; and if terminated once the enemy recognizes and obeys the rules governing the conflict. Today, IHL has limited reprisals to military targets that are legitimate objectives, and has forbidden the targeting of civilians or objects and facilities that provide for the population.

After September 11, a new line of dialogue surfaced which falls back to the traditional understandings of “*jus ad bellum*.” The clichés include “just war,” “Satan’s allies,” “enemies of humanity” and others. A new strategy has been launched based on the following premises:

- The battlefield includes the whole world, and involves the right to interfere with, follow, and even attack any so-called “terrorist” (person, group or State).
- The enemy is any person, group or State labelled as a terrorist or one that either supports terrorists or abstains from participating (under an imposed scenario) in the war against terror.
- The law to be applied should be a new one, an anti-terrorism law based on “good against evil.”

Waging war under these principles, and the call to fight “evil” as if the enemy (wherever he is faced) is a criminal that has no rights, will wipe out all the achievements of IHL. The media has played a key role in exacerbating concerns. The media frenzy touches on everything; colour, race, religion, and nationality are enough to raise suspicions regarding anybody.

Whatever the circumstances, disregarding the principles and rules of international laws applicable during armed conflicts or peacetime will drive us into an enquiry of “who started it” and “who should stop first.” Mixed with bitter feelings and military arrogance, the blood bath will continue.

Means of fighting terror and their effects

The preceding analysis leads to the final point - the various ways to fight terror, especially in the first and fourth categories mentioned above (confronting

States sponsoring terrorists or terrorist organizations acting as an international network during peacetime). When the presence of an armed conflict is asserted in these cases, the implementation of IHL will be required.

The means of fighting terror are diverse. Among the most important are quiet diplomacy, security measures, public awareness, economic pressures (trade embargo), political positions, and direct military actions. They can be grouped into two categories: politico-economic and military. Implementation of such means raises several problems.

Military measures: the strength of terrorist organizations is “having the initiative.” They choose the target, time, and way to carry out an attack. In the 1937 Convention, the use of the word “prevention” was straight to the point in describing the need to confront these situations. I do not want to elaborate on the mechanics of security available, the usefulness of new technologies, the necessity of regional and international security co-operation, the need to infiltrate terrorist organizations or other measures. What I would like to point out is that certain security measures require implementing legislation. This might have direct or indirect effects on the general population’s way of life, whether in daily commuting, at the workplace, or even in social life (e.g., at one airport today the traveller has to go through seven checkpoints to cross a distance of 700 meters). This new reality in our fight against terrorism creates a confrontation, felt the most in democracies, between privacy and security.

To ease this conflict, two different techniques can be employed. The first is to keep the population in constant fear so that it will not object to measures that infringe on its rights or privacies. The second depends on educating the people to believe that these measures are for their own benefit, and that co-operation is their contribution to the long battle against terrorism.

The use of either of these approaches depends heavily on the trust of the people in their government. It also relies on the political regime, society, and culture. The media, or whoever controls it, plays a prominent role. In particular, the media is the main communication channel between governments and terrorists, while at the same time serving as the only available way for the terrorists to show off their “work” and satisfy their egos. Security agencies can even use the media to guide terrorists towards defined targets in order to intercept them. Thus, I see the media as a weapon that should be employed to its full potential in fighting terrorism, even though its primary use is in marketing political and economic policies.

Political measures: Terrorist organizations, like regimes, try to gather support to help in their activities. Initially, the group will try to rally support for a particular cause. This cause might be just and fair, especially in light of the world’s many injustices. It might be political, ideological, racial, religious, social or any combination thereof.

On the other hand, there might be some countries of regional or international influence that benefit, either for internal or external reasons, from terrorism without having direct contact with the networks that carry it out. This heightens the need

to effectively control borders between countries in order to confine the movement and actions of a terrorist group. As a result, terror is an international problem that must be dealt with accordingly.

And if I have not touched on the economic effects of “the war against terror,” that is because we are still experiencing the fallout of the World Trade Center massacre. These economic effects are closely related to the nature of targets chosen by terrorists, the means used and the additional costs of direct and indirect security measures. They are also related to aid provided to some countries or organizations in their fight against terror and to economic embargoes placed on others. In this regard, it is necessary to understand that such measures themselves can be the cause of tension between Nations.

If “having the initiative” is the strength of terrorist groups, their means of operation and the blood of their victims are their weak points. Thus, we find that effectively fighting terrorism generally consists of three tactics: distancing terrorist groups from their alleged cause(s); clearly distinguishing, as in IHL, individual responsibility under the law and avoiding prejudgement and collective punishment; and, although seeking individualized prosecution, fostering collective responsibility for combating terrorism under the umbrella of international law and its recognized institutions.

Conclusion

I have not surveyed treaties, agreements, or laws and tried to explain what they meant in this presentation. Instead, I have attempted to offer ideas and reflections, rather than judgments and positions.

Before concluding, I would like to add the following. It seems that each time we address this issue, we tie it to physical terror or the act that produces victims, blood, and direct damages. Don't you think, though, that terror might have other faces, at times more painful and having longer lasting effects even though carried out in unblemished white gloves. As an example, consider intellectual terror, in which we are not allowed to have differing points of view. What do we call the enforcement of a predefined set of cultural standards on all nations, regardless of their histories and civilizations? What do we call the depletion of natural resources in the name of supply and demand? In order to achieve justice and bring peace for all nations, do most believe in international laws, international organizations, and the justice that they represent?

I believe the war on terror is a never-ending one, not because it is difficult or impossible, but, to the contrary, because terror is the embodiment of violence and human aggression, which are part of human nature. This nature intensifies or diminishes depending on the environment in which it grows. In particular, some governments are led by individuals who are controlled by their character. History is replete with examples of leaders who led their people to the wide spaces of freedom and prosperity, and those who destroyed their empires, even though centuries old.

For all that, it is important to recognize the achievements of IHL through

the last century, including treaties and the creation of tribunals. Protection of mankind from mankind was the goal of each. The principles of this law, although intended for armed conflicts, could be applicable in large-scale counter-terrorist operations during “peacetime” together with other international law and national legislation in order to establish a common legal framework. This would allow a common understanding of this war, the definition of the enemy, and agreement on how to act to reinforce international co-operation in the “fight against terror.” Surely, this would not eliminate terrorism, but it would inevitably reduce and minimize the effects of terrorist actions.

Finally, I would like to repeat an international rule that you might be tired of hearing repeatedly, and emphasize its importance today. It was the legal solution for our friend Professor Schmitt in his white paper published in the June 2002 ICRC Review, where he tried to identify the *jus in bello* applicable to a computer network attack. Although gaps existed in treaty law, he nevertheless concluded that the general guidelines of “Martens Clause” could be the voice of human conscience when all other voices are silent.

9/11 AND FUTURE TERRORISM: SAME NATURE, DIFFERENT FACE

Andrew Nichols PRATT (*)

In the Fall of 1999, I attended a large conference in the United States entitled “OPEN ROAD ’99” which turned out to be a strident “call to arms” by the Supreme Allied Commander, Atlantic, Admiral Harold Gehman, and the Deputy Supreme Allied Commander, Europe, General Sir Rupert Smith, about the dangers posed by terrorism and asymmetric threats. Yet, despite the presentation of compelling arguments to the contrary, very senior Flag and General Officers representing the Alliance responded unanimously that terrorism and asymmetric threats were national level issues and did not require a NATO response capability. They remind me to this day of “ostriches” with their heads buried deeply in the sand. The terrorist threat was at once extant and deadly. A visibly frustrated SACLANT concluded “OPEN ROAD ’99” by saying NATO was probably going to have to “sneak up” on threats like terrorism in order to respond.¹ However, terrorism did the “sneaking up.”

On September 11, 2001, terrorists struck my country once again and we are *finally* striking back effectively. But this fight for a just and peaceful world is not one to be waged by America, or even the West, alone. The Muslim world itself must fight this fight most emphatically. All people who aspire to peace and to freedom around the world must fight this fight, for it is this very peace and freedom that terrorists seek to destroy. As noted in the new National Security Strategy of the United States, the common ideals of freedom, democracy, and free enterprise, the most powerful engines of change in the last century must be protected by a real solidarity against terrorism.

In the “*Decline and Fall of the Roman Empire*,” Gibbons asserted that “The Romans were ignorant of the extent of their dangers and the numbers of their enemies.”² Like the Romans, “9/11,” as this mass suicide-murder is known today, revealed the ignorance, in fact negligence, of my country regarding the extent of the danger terrorism posed to our Republic. We should not have been surprised, but we were, and we paid dearly.

In size and character, the 9/11 terrorist attacks were greater and more complex than any experienced in the entire 20th Century. Nine times more lethal than any previous attack, they required multiple, near simultaneous attacks, which are at once rare and difficult to achieve. Only the terrorist response to Hindu militants destroying the Babri mosque in Ayodhya in December 1992, when 13

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near-simultaneous car and truck bombings in Bombay killed 400 and injured 1000, compares.³ But while no attacks were like those of 9/11, was the “intent” of this terrorist operation different from that of 2/26, the date of the first attack on the World Trade Center? I suggest the intents were the same. The perpetrators of both attacks wanted the United States to know that it was “at war.”

So, are we fighting a new war? In fact, this war on terrorism is not new; we have just become aware of its magnitude. Ramzi Yousef, leader of the first World Trade Center attacks, hoped to cause 250,000 casualties. I benchmark the war on terrorism as beginning in March 1973 when Yasser Arafat ordered the murders of two United States diplomats in Khartoum. Cleo A. Noel Jr. and George Curtis Moore were among a group of diplomats seized by Black September terrorists during a reception held at the Saudi Arabian Embassy. They demanded the release of Sirhan Sirhan, the Palestinian assassin of Robert Kennedy, as well as terrorists being held in Israeli and European prisons. President Nixon refused to negotiate; “no concessions” would be made to terrorists. On March 2, 1973, around 8:00 pm, PLO leader Abu-Iyad called Abu-Ghassan, the Black September leader, and gave him the execution code: “Remember Nahr al-Bard. The people's blood in the Nahr al-Bard is screaming for revenge. These are our final orders. We and the world are watching you.”⁴ The executions took place at 9:06 pm. A few minutes later, when the international media still had not reported the killing, Yasser Arafat personally spoke Abu-Ghassan, asking him if he had received the code word and whether he understood what it meant. Abu-Ghassan assured Arafat that his orders had been carried out fully. This was our real “Pearl Harbor” in the global war on terrorism.

Since that fateful date, we have lost two embassies in Beirut and two in Africa. Numerous others have been the targets of planned attacks. Dozens of hostages, including a CIA station chief and a Marine Corps officer serving as an unarmed United Nations observer, have been kidnapped, tortured, and murdered. Peacekeepers have been killed. This is a global war that has lasted for more than 25 years with over 5000 killed in more than 120 attacks. And despite the passage of time, certain ties or enemy alliances persist: Arafat, Imad Mughniyah, Iran, militant Islamic fundamentalism, and now Bin Laden and his Al-Qa’ida terrorist enterprise.

However, the 9/11 attacks have focused world attention on Bin Laden and his ten-year campaign against the United States. Some aspects of the attacks have still not been satisfactorily understood. First, there is the unexplained absence of follow-on attacks in the United States. Granted, global follow-on attacks were planned at various intervals in Bosnia, Paris, Yemen, and Singapore. Providentially, these plots were thwarted. Second, we neither understand the dimensions and depth of Al-Qa’ida’s finances, nor appreciate the actual impact of the initial international efforts to dry up its funding.⁵ The United States has identified 12 individual sources of funding, but this process remains a work-in-progress. Furthermore, our national security officials have yet to realize the significance of legitimate charities, the resiliency of the “hawala” network and the recapitalization

of assets into gold and diamonds.⁶ Third, from a psychological aspect, the West still has a superficial grasp of the suicide/martyrdom dimension of terrorism, as demonstrated on 9/11 and on a regular basis in the Israeli-Palestinian conflict.⁷ Contrary to a rash of articles, suicide terrorism is not an issue of one's education, socio-economic status, or family situation. Historically, it has been among the least frequent terrorist tactics, but this trend might be changing today. Suicide terrorism appears to be developing into an essential component of some terrorist tactics. But, eventually it will fail, as have all terrorism "innovations" in the past. This begs the question of what "face" terrorism assumes then. The only course of action not yet attempted is nuclear suicide - as with the Biblical Sampson, destroying oneself along with the temple. All other tactical adaptations in the Israel-Palestinian conflict have been tried and failed.

Speculation aside, what have we learned about the nature of terrorism from the tragedy of 9/11 and what does it portend for the future? First, Bin Laden's scope is global; he is a true "supra-national" enemy. Al-Qa'ida is suitably established to operate on a scale never before contemplated. It has host nation support, albeit reduced; political and ideological support; an intricate finance system and a reasonably secure banking system; multi-layered communications resources; training bases; a recruiting system; and several levels of active service units. However, of paramount importance is the fact that the organization reaches into every region. For instance, to raise funds, Al-Qa'ida sells drugs to transnational criminal organizations (TNC) or other terrorist organizations that in turn ship these narcotics into the Balkans, thereby fuelling regional instability. This leads to migration, with its attendant social costs, which in turn fosters xenophobic reactions and violence. Afghan opium becomes Turkish heroin that is transported to Europe via Zayas, Velesta, and Aracinovo in Macedonia and Shkoeker and Durres in Albania. Simply put, Al-Qa'ida is without historical peer. It has true global reach, as illustrated by the most recent FBI arrests in tiny Lackawanna, a suburb of Buffalo, New York, that has a large Yemeni community.

The enemy in this war has come to the United States to hide, organize, train and attack. Can this be suppressed? The answer is "Yes," with time. Bin Laden has the vision, money, and organizational skills to implement his dreams. His education, "hands off" management skills, and business experience, coupled with his observation of the Soviet occupation in Afghanistan, have made Al-Qa'ida an efficient organization with a grand vision that appeals to a small, but *international* constituency seeking the return of the Caliphate. His patience and planning are evident in nearly every aspect of this organization. The real genius of the 9/11 attacks was the sophistication in its simplicity.

Al-Qa'ida has money, lots of it. According to court documents released in New York, and although the Saudi Arabian Ministry of the Interior claims to have frozen Bin Laden's personal wealth,⁸ senior members of the Saudi royal family reportedly paid at least \$304,000,000 to Al-Qa'ida and the Taliban in exchange for an agreement that there would be no attacks in Saudi Arabia. Apparently, they were deeply worried over attacks by Islamic fundamentalists on American

servicemen at a United States' training facility in Riyadh in November 1995 and at the Khobar Towers barracks in June 1996, in which 19 American airmen died. The Saudis feared Bin Laden's terrorists, who had recently relocated to Afghanistan from Sudan, would attempt to destabilize their fragile kingdom because of their opposition to the presence of American troops and the religious corruption of the Saudi royal family. The "airport Wahabbis," whose religious zeal wanes as they depart the Kingdom, came to an accommodation with the terrorist leader.⁹

Al-Qa'ida leverages modern technology. In his use of language, Bin Laden brings a return to the traditional Arabic virtue of language. Modern devices, notably satellite television, broadcast his mellifluous eloquence, however twisted, throughout the Arab world. But what is left of this organization one year after 9/11? Al-Qa'ida is fragmented, smaller, but still deadly. Consider the senior leadership who may still be at large.

Osama Bin Laden: Pakistani and Afghan intelligence reports suggest the terrorist leader is still living, sneaking from one mountain hideout to another along the two countries' common border or in the autonomous tribal areas of the Northwest Frontier. Bin Laden and a small entourage are said to be travelling on foot and horseback under cloud cover, to avoid detection by surveillance aircraft.

Ayman al-Zawahiri: Initially reported killed last year, Bin Laden's right-hand man apparently survived, as did Khalid Shaikh Mohammed and Mustafa Ahmed, operations and finance heads, respectively.

Sulaiman Abu Ghaith: Once thought to have perished in the bombing campaign, Al-Qa'ida's spokesman evidently left an audio statement on an affiliated website in July, with new threats to the U.S.

Saif al-Adil: The onetime Egyptian army officer, formerly Bin Laden's personal security chief, is now believed to have succeeded Abu Zubaydah. The Washington Post says intelligence sources place him in Iran.

Saad Bin Laden: Osama's son is only about 22 years old, but some Arab sources claim he has taken over the reins of Al-Qa'ida. American officials downplay the likelihood that he is in charge, but they say his role has increased since 9/11. These reports suggest Saad, a finance and logistics functionary, is hiding out separately from his father on the Afghanistan-Pakistan border.

Abu Hafis al-Mauritania: U.S. officials reported in January that Bin Laden's spiritual counselor was killed in Afghanistan, but the Washington Post report suggests he may be with al-Adil in Iran and plotting more attacks.

Thus, although perhaps a third of the top 25 known leaders are dead or captured, a level of leadership remains at large. Further, Bin Laden has most likely devised a succession plan in accordance with Islamic tradition in the event he is killed or captured.

Post 9/11 roundups of previously known elements have occurred and the new arrests in Morocco, Pakistan, and Spain evidence progress, as does the CIA's Yemen attack. However, there were thousands trained in the past decade by Al-Qa'ida in the Sudan and Afghanistan (perhaps 10-20,000). Additionally, training can be conducted globally due to the electronic/paper dissemination of terrorist

texts. The 11-volume *Encyclopaedia of Jihad: Jihad Manual* is available and manuals recovered recently in Afghanistan show a remarkably consistent format.

This brings me to some observations regarding future terrorism. First, it will remain a permanent ingredient of modern political behaviour. Regrettably, terrorism is one of the most consistent behaviours of mankind. Today, as in the past going back to the days of the Zealots and the Sicarii in the New Testament and Israel, terrorism is about “power.” While the acts themselves might change and the motivations might shift, the nature of terrorism will remain the abuse of the innocent in the service of political power. Terrorism is normally not an end in itself, but a means to attain and to hold this political power. Second, terrorism will remain a planned, purposeful, premeditated form of psychological warfare. As Dr. Chris Harmon of Marine Corps University is quick to point out, the general fear that pervades a political and social order - the psychological state of imbalance that we witnessed on TV after 9/11 - is intended to advance some political purpose. Third, while no terrorist campaign has succeeded in democratic and stable States, free and open societies will remain vulnerable. Terrorists will attempt to undermine a society’s confidence in government and leadership. Fourth, the enmity terrorists, particularly those motivated by militant Islam, feel toward democracies will not diminish; learning, progress and tolerance are qualities Al-Qa’ida’s followers find subversive. And finally, the battle against terrorism, like the battle against disease, is a perennial, ceaseless struggle. Just as we need to develop medicines to control the spread of deadly viruses, we need tools to control the spread of terrorism.

Allow me to offer a few general prescriptions and a strategy. To combat international terrorism, we should heed the advice of Bruce Hoffman at Rand and concentrate our main effort on mid-level cadre, *not* leadership. We should not personalize this battle and create a cult figure out of Bin Laden. As in cutting off the head of a snake, isolating the leadership causes disruption, which radiates both upwards and downwards. This counter-terrorist tactic is a variant of the Finnish *motti* technique used against the Red Army in WWII. At the tactical level, we should also develop specialized counter-intelligence units to focus on disrupting the terrorist’s own intelligence gathering, another Hoffman recommendation. Al-Qa’ida attacks have all been preceded by extensive reconnaissance of their target and its surroundings. It is clear that dealing with suicide terrorism and countering radicalism will require a grander strategy than that currently in place.

Recently, a group of 30 Arab intellectuals published a United Nations report on the situation in Muslim countries, especially those located in the Middle East. For once, blame was not placed on the “West” to explain the disastrous condition in which Arab population live. Rather, the Arab community was urged to recuperate and make fundamental reforms. The report blames Arab authorities for their lack of “commitment” toward building an egalitarian nation, which could rectify their “three deficits”: knowledge, freedom and womanpower. These deficits, the UN specialists argue, keep frustrated Arabs from reaching their potential and allow the rest of the world to both despise and fear their deadly combination of wealth and backwardness.¹⁰ Radicalism or militant Islam is a product of a relatively

recent discontent in a region of the world where a glorious past has somehow led to a futureless present.

Terrorism's appeal will endure where people have no experience with the fruits of self-government. We cannot counter it by advocating freedom only where it would not unsettle economic and security relationships with undemocratic regimes. Until all the world's remaining despotic regimes—be they profoundly cruel or not—are replaced by democratically committed regimes, terrorism will always find new adherents, and the threat to global security and democratic ideals will persist. Change is coming slowly to Afghanistan and it must be safeguarded. But change must also come to Saudi Arabia, Egypt, Pakistan, the Palestinian Authority, Iran, and Iraq. We cannot allow another generation of terrorists to develop because of a lack of personal liberty.

To date, there are several keys to the success in the global war on terrorism (GWOT): access; global co-operation; rapid, precise and decisive operations; and humanitarian sensitivity, to name only a few.¹¹ Stable democracies and vibrant alliances will hold the line on terrorism, but not an alliance that is Potemkin facade or a formation of ostriches. The true litmus test in GWOT is actions, not words. The audio must match the video. Success is all about real capabilities. “Virtual presence,” a catch phrase in the jargon of the Revolution in Military Affairs a few years ago, is as useful as blanks in a firefight. In the current global war against terrorism, “virtual presence” means actual absence.

For years, we had a strategy against terrorism, but today it is nearly obsolete. A “make no concessions” policy makes no sense because concessions today are no longer an issue. Al-Qa’ida is not negotiating. They do not want a seat at the table - they simply want to overturn it. Bringing terrorists to justice might also be irrelevant. Men and women prepared to die by transforming a commercial aircraft into a crude cruise missile or by strapping an explosive charge to their bodies and becoming a walking claymore mine will probably not be deterred by the threat of prison. Only the concept of punishing States that support terrorism remains germane today. We had a one-legged stool strategy; we need a new course and speed.

Today, we are fighting a battle against terrorism and it is a battle we will win. However, the larger battle we face is the battle of ideas and this we must also win. As Dr. Paul Wolfowitz, the American Deputy Secretary of Defense, recently noted, this is a struggle over modernity and secularism, pluralism and democracy, and real economic development. We need a strategy that encompasses both battles. The core dimensions of our strategy will need to be aimed at destroying or neutralizing near-term threats, as well as supporting conditions for future success. There must be “a strategic transformation of the whole region”.

A dangerous gap exists between the West and the Islamic World, primarily the Arab Islamic World, and we need to close it. The strategic question is “how?” We must make international terrorism more transparent by focusing the world’s attention on terrorist activities. Terrorists use the media; so should we. We need to assist those incapable of combating terrorism alone, like Georgia, Yemen, the Philippines, and Uzbekistan. We will need to redevelop those countries or regions

that cultivate terrorists: Somalia, Chechnya, and Jammu. After years of neglect, NATO and the EU finally recognize that international terrorism is a threat. We must capitalize on this opportunity and the capabilities of these organizations. And finally, we need to break into the banks and to criminalize hawala. I could hide under “Bin Laden’s” bed for weeks, but I would know more about him if I had five minutes to examine his checkbook.

We needed a new strategy and we have one. As one follows this strategy, it is useful to bear in mind the formula, $3,165+60=5$.¹² The first figure represents the number who died on 9/11. “Sixty” represents the number of countries within which Al-Qa’ida cells operate. “Five” equals the critical five elements of State power essential to deal with terrorism: diplomacy, economic resources, information and intelligence, law enforcement, and the military. Together, they form a formidable fist.

The intent of this new strategy is to stop terrorist attacks against the United States, its citizens, its interests, and our friends around the world and, ultimately, to create an international environment inhospitable to terrorists and all those who support them. To accomplish these tasks, the strategy calls for simultaneously attacks on four fronts. The centrepiece of the strategy refers to the four “D’s:”

1. *Defeat* terrorist organizations of global reach through decisive and continuous action whose cumulative effect will reduce their scope and capability to the domain of localized criminal activity. At that point, our regional partners and the individual sovereign States can engage these terrorists and destroy them.

2. *Deny* further sponsorship, support, and sanctuary to terrorists by convincing or compelling States to accept their sovereign responsibilities. UNSCR 1373 and the 12 United Nations antiterrorism conventions establish high standards that must be met in deed as well as word. We will reinvigorate old partnerships and forge new ones to combat the terrorist scourge and co-ordinate our actions to ensure that they are mutually reinforcing and cumulative. Where States are weak but willing, we will vigorously support them in their efforts to build the institutions and capabilities needed to exercise authority over their territory and to fight terrorism. Where States are reluctant, we will work with our partners and employ all the elements of our national power to convince them to change course and meet their international obligations. But, where States are unwilling, we will act decisively -politically, economically, and, if necessary, militarily- to contain the threat they pose and, ultimately, to compel them to cease supporting terrorism.

3. *Diminish* the underlying causes that spawn terrorism by enlisting the international community to focus its efforts and resources on the areas most at risk. The momentum generated in response to the September 11 attacks must be maintained by working with partners abroad and within various international forums to keep combating terrorism on the international agenda, but at the same time constantly striving to address the grievances that may foster terrorism.

4. *Defend* the United States, its citizens, and interests at home and abroad by both protecting our homeland and extending our defences in depth to ensure we identify and neutralize the threat as far from our borders as possible.

However, we must address 9/11 now. We were overwhelmingly defensive in our orientation a year ago; now we have gone on the offensive. The quickest way to reduce terrorism is not to spout platitudes, but rather to *create consequences*. To reduce the risk of “super terrorism” at home and abroad, we must end State-sponsorship of terrorism by changing the attitudes of regimes (or the regimes themselves) of State-sponsors.

In doing so, we must avoid uncritically embracing the intolerant suppression of ethnic or national aspirations; instead, we must understand terrorism for what it really is. This necessitates an agreement between Nations as to what terrorism represents. A victory in the war against terrorism will never be registered in a formal act of surrender. Instead, success will only be recognized by the undramatic and gradual waning of terrorist acts.

¹ Admiral Harold W. GEHMAN, USN, SACLANT, closing comments of the Conference “*Open Road-99*”, October 27, 1999.

² Edward GIBBON, “*The History of the Decline and Fall of the Roman Empire*”, Oliphant Smeaton's three-volume edition, New York, The Modern Library, Volume II, Chapter 38, p. 440.

³ Dr. Bruce HOFFMAN, lecture at St. Andrews College, Scotland, June 7, 2002.

⁴ Dennis RODDY, “*Repeating an unlearned history lesson in the Middle East*,” post-gazette.com, Lifestyle, April 13, 2002.

⁵ Dr. Bruce HOFFMAN, lecture at St. Andrews College, Scotland, June 7, 2002.

⁶ Private discussion with a serving American intelligence officer and current member of a multi-agency Joint Counter Terrorist Task Force.

⁷ Dr. Bruce HOFFMAN, lecture at St. Andrews College, Scotland, June 7, 2002.

⁸ Discussion with Arab official at St. Andrews College Scotland, June, 7 2002.

⁹ Stephan SCHWARTZ, “*The Two Faces of Islam*”, Doubleday New York, New York, 2002, p. 116.

¹⁰ United Nations Development Program (UNDP), “*Arab Human Development Report 2002*”, July 2002, a critical look at development in the Arab world.

¹¹ General G. S. MARTIN, USAF, Commander United States Air Forces in Europe, briefing “*The USAFE Perspective*”, February 26, 2002, Ramstein Air Base, Germany.

¹² Dr. Albert C. PIERCE, Director, Center for the Study of Professional Military Ethics, United States Naval Academy, comments to George C. Marshall Center faculty on June 3, 2002.

Concluding Summary: Terrorism and International Law

Michael N. SCHMITT

The meeting of experts and the advanced seminar from which the contributions to this book were drawn, explored the plethora of normative issues that have surfaced since the attacks of September 11 ... and the international community's forceful response thereto. They range in topic from refugee law and human rights to the *jus ad bellum*, the *jus in bello* and domestic law. Indeed, this topical diversity lies at the root of much of the disquiet evidenced by legal scholars and practitioners. Consider, as an illustration, the handling of detainees held by the United States at Guantanamo. Are they prisoners of war entitled to the protections of the Third Geneva Convention? Detainees to be treated in accordance with the rather limited human rights law regime? Criminals falling within the ambit of U.S. criminal and constitutional law? What is their status now that the international armed conflict between the coalition of the willing and Afghanistan is essentially over? What is the normative impact of the ongoing Global War on Terrorism (GWOT) on this determination? These and other issues remain unanswered, with reasonable scholars and practitioners differing over how to resolve them.

The essays in this collection constitute the reflections of a very diverse group of scholars and practitioners convened under the auspices of the International Institute of Humanitarian Law in Sanremo, Italy. The Institute's objective was not to seek definitive resolution of the differences of opinion over terrorism and international law that had surfaced since 9/11, but rather to identify the core ones for further consideration by the global legal community. In some cases, presenters offered their personal views on how to interpret the gray areas; in others, they provided a roadmap for subsequent analysis and reflection. The common thread, however, was virtually every participant's recognition that international legal norms have been dramatically challenged since September 11.

Acknowledging the risk that some efforts to counter terrorism might be contrary to the very principles and values that terrorism threatens, much of the commentary focused on the need to avoid over-reaction. For instance, Mary Robinson, the High Commissioner for Human Rights, stated that while the attacks of September 11 were crimes against humanity that "darkened the human rights horizon," she was "most worried that the standards of protection embodied in [human rights law, humanitarian law, and refugee law] are at some risk of being undermined." Robinson pointed to the excessive measures taken by certain countries against human rights defenders, migrants, asylum-seekers and refugees, religious and ethnic minorities, and the media, all in the name of counter-terrorism. In her view, strict compliance with international law results in "fair balances between legitimate security and military concerns, and fundamental freedoms."

Rudd Lubbers, the High Commissioner for Refugees, agreed. Although

pledging his organization's support for "all efforts, at both the national and international levels, aimed at eradicating terrorism and at punishing those responsible for terrorist acts," he emphasized the essentiality of ensuring that such efforts "respect the fundamental rights and freedoms of law-abiding citizens." Understandably concerned about the treatment of refugees as the war against terrorism continued, Lubbers singled out "unduly restrictive" legislative and regulatory measures adopted by a number of States. Such measures sometimes result from an "unwarranted linkage" between terrorism and refugees, despite the fact that, in his view, refugee law provides no safe haven for terrorists, nor stands in the way of prosecution.

The accompanying UNHCR position paper amplified these concerns. In particular, the UNHCR was concerned that ethnicity, religion, national origin and political affiliation might be used to deny rights, even though "[t]he refugee definition, properly applied, will lead to the exclusion of those responsible for terrorist acts, and may further assist in the identification and eventual prosecution of these individuals." Other concerns included the possibilities of: mandatory detention of asylum-seekers or other procedures not comporting with due process standards; deportation or withdrawal of refugee status on the basis of race, religion, national origin or political affiliation out of fear that those falling into a particular category might be terrorists; expeditious extradition of groups or individuals on the same basis; and failure to maintain resettlement programs at the promised levels. The UNHCR also expressed concern that the Comprehensive Convention against Terrorism could result in unfounded assumptions being made about the relationship between asylum-seekers/refugees and terrorism.

Jakob Kellenberger, President of the International Committee of the Red Cross, echoed the concerns of his colleagues. Warning against characterizing international humanitarian law (IHL) as an "obstacle to justice," he argued that international law, "if correctly applied, is one of the strongest tools which the international community has at its disposal in the efforts to reestablish [the] international order and stability" which terrorism disrupts. Indeed, Kellenberger notes that IHL obligates States to bring those who commit crimes during armed conflict to justice.

Dinah PoKempner, General Counsel for Human Rights Watch, stated the obvious, but essential, in suggesting that "[r]esponses to terrorism, whether understood as 'war' or law enforcement, involve choices that have implications for the rule of law, its development, and its reciprocal basis." This truism provided the foundation for the Institute's desire to explore the relationship between terrorism and international law.

With regard to human rights, PoKempner noted that although terrorism is a crime, it is not generally a human rights violation because the actor is seldom a State. Yet, terrorism and human rights are intimately related. Aside from the fact that it may physically harm individuals, terrorism has a negative economic effect because it may divert resources a State could otherwise use to realize economic and social rights. She also emphasized that counter-terrorism campaigns often

involve abridgement of civil and political rights through, *inter alia*, arbitrary deprivation of life or liberty, curtailment of due process guarantees, privacy incursions, limits on speech, and restrictions on alien rights. Such effects have a cyclical dynamic. The withdrawal of civil or political rights and the frustration of civil and economic rights may feed unrest...and, ultimately, terrorism itself.

Particularly important is the characterization of the counter-terrorism campaign. If it is armed conflict, rather than robust law enforcement, IHL applies. At the same time, the existence of an armed conflict can justify derogation from key human rights protections. For instance, the right to life is “caveated” during international armed conflict by the combatant “privilege” to not only kill the enemy, but also incidentally injure its civilians during an attack on a lawful military objective (so long as the military advantage accruing from the attack justifies the extent of civilian loss). During law enforcement operations, the use of deadly force is only permissible to defend oneself or another against an imminent threat to life, to prevent commission of a serious crime, or to effect the arrest of a serious criminal when less forceful alternatives are unavailable.

Detention represents another point of divergence between the two bodies of law. In law enforcement, the criminal detainee must be promptly brought before a judicial official to determine whether continued detention is appropriate and he or she must be tried within a reasonable period. Other types of peacetime detention (e.g., for public safety reasons) require some form of judicial review. By contrast, detention of combatants during an international armed conflict may go on indefinitely, with review of status required only when doubt exists. This distinction between an IHL and human rights law regime has many other normative and practical implications, such as the appropriate forum for trial and responsibility for the behavior of proxies.

Peter Hotstettler builds on the work of PoKempner by focusing on three key issues. First, he queried whether the non-derogatory provisions of human rights law and the practical requirements of counter-terrorist operations are at odds. In answering this question, he cited the differing legal regimes for law enforcement and armed conflict and warned against political use of the term “war,” particularly in light of the fundamental differences in training for law enforcement and combat operations, and the differing rules of engagement pertaining to each. On the other hand, non-derogatory prohibitions such as that on torture apply regardless of the regime in place.

The second issue involves the conditions that apply to human rights derogations. In other words, when and how are derogations permissible? As a general rule, derogation requires: 1) the existence of a state of public emergency, 2) a limitation on derogations in terms of time and place to that necessary, and 3) non-discriminatory application thereof. In terms of armed conflict, uncertainty arises over the requirements applicable in occupied territories. In *Bankovic*, the European Court of Human Rights held that aerial occupation was insufficient to amount to the effective control necessary for application of the European Convention. On the other hand, in a number of cases involving the actions of

Turkish forces in Cyprus and Northern Iraq, the Court decided that the presence of troops on foreign soil without the consent of the territorial State was sufficient to trigger the Convention's provisions. The degree to which the European approach might be illustrative of that in other regional human rights spaces is unsettled.

A final issue cited by Hotstettler is that of gray-zone conflicts which fall short of classic armed conflict. For instance, he cited "snatch operations" conducted without the acquiescence of the State where they occur. Although not delving into the issue deeply, he usefully noted that "[t]he use of force is thus governed by the same criteria as operations inside national territory because the country where the action takes place is not at war."

Emanuela-Chiara Gillard expressed the concern of many participants, that it is the *reaction* to terrorism that represents the greatest challenge to international humanitarian law. As she pointed out, "[p]aradoxically, perhaps a denial of the application and relevance of the law is much more damaging to a body of law than its violation." In her estimation, IHL satisfactorily responds to acts commonly considered as terrorist in nature committed during armed conflict, whether international or non-international in nature. In international armed conflict, the overarching principle of distinction and the prohibitions on attacking civilians, conducting indiscriminate attacks, taking hostages, murder, and attacking places of worship or installations containing dangerous works—all acts commonly considered terrorism—provide a robust core of normative strictures. In non-international armed conflicts, acts that are commonly considered as terrorism are proscribed by Common Article 3 of the Geneva Conventions.

These prohibitions are complemented by obligations regarding their repression by States, such as the obligation to prosecute or extradite. That there are fora to conduct judicial proceedings, like the ad hoc tribunals and the International Criminal Court, further strengthens the IHL regime for dealing with such acts when committed in times of armed conflict.

Gillard identified three potential challenges to IHL posed by terrorism. First, she expressed concern about differences between IHL and terrorism conventions. Specifically, "[a] risk exists that acts which are not unlawful under IHL might nevertheless be included in the definition of offenses falling within the scope of a particular convention. This would obligate third States to either prosecute or extradite an individual for acts committed during the course of armed conflict that did not violate IHL."

Gillard also expressed concern about claims that IHL is inadequate or inapplicable to counter-terrorist operations, pointing to the Guantanamo detainees controversy. Such claims are misguided; if these operations take the form of armed conflict, IHL applies. If terrorism is fought by other means, such as judicial or police cooperation or the freezing of assets, then the situation is regulated by other bodies of law.

The third challenge consists of assertions that IHL is outdated, although she dismissed such criticism summarily by noting that the ICRC has "not found a single indication of a specific way in which the law is inadequate or outdated."

Thus, IHL is not lacking in meeting the challenges of terrorism and counter-terrorism according to Gillard. By contrast, she suggested that “[I]n terms of being outdated, it is probably the *jus ad bellum* which sits most uncomfortably with modern reality.”

This is a topic addressed in my presentation on the *jus ad bellum* and counter-terrorism. Looking at the reaction of States and international organizations to the events of 9/11 and the military action against both the Taliban and al-Qa’ida, I concluded that there is a perceptible shift in the international community’s understanding of the law of self-defence. Although this law had previously been viewed as constituting the rules of the game only between States, it is now clear that it applies to armed attacks committed by non-State actors as well. Thus, law enforcement is no longer an exclusive remedy for States facing terrorist attacks. That said, the three foundational principles of self-defence (necessity, proportionality, and imminency) continue to limit defensive options. In particular, when assessing compliance with imminency, it is not appropriate to simply calculate the time differential between the defensive act and the attack that was about to be launched. The real question is whether the response occurred during the last viable window of opportunity. Furthermore, terrorist attacks should not necessarily be considered in isolation because some may be so related that they represent a “campaign.” When this is the case, questions of imminency are no longer relevant following the initial attack.

Most significant with regard to the *jus ad bellum* is the matter of State sponsorship of terrorism. The nearly universal acceptance of strikes directly against the Taliban on October 7 signaled an attitudinal sea change. It marked the culmination of a steady trend away from the rather restrictive interpretation articulated by the International Court of Justice in its 1986 *Nicaragua* opinion. Indeed, by that standard, military operations against the Taliban would only have been appropriate had they interfered with U.S. defensive operations against al-Qa’ida. The international support for the October 7 air attacks demonstrates that the extent of State support to terrorists that justifies a forceful response is dropping precipitously.

Finally, Operation Enduring Freedom provided further indication of the community’s criteria for the acceptability of cross-border counter-terrorist operations. Such operations are appropriate if the State from which the terrorists operate does not put an end to their activities on its soil following a request to do so from the victim-State. That said, cross-border operations must be limited to that application of force necessary to put an end to the terrorism and counter-terrorist forces must withdraw as soon as their mission is complete.

Insofar as the *jus in bello* is concerned, Avril McDonald addressed various implications of the threat of terrorism and the international responses of States. She looked at the legal qualifications of the Al Qa’ida attacks on the United States and the response of the United States and its allies, specifically, the “global war on terrorism,” parts of which concern the *jus in bello*. She also considered certain phases of that response, particularly the U.S. action against Afghanistan, as well

as the applicability of international humanitarian law to the conflict in Afghanistan, and to its various parties. McDonald then briefly examined the extent to which the various parties observed the law during that conflict, expressing concern about what she finds a sometimes cavalier attitude to humanitarian law. She disagreed that humanitarian law is a luxury that we cannot afford in dealing with the threat of terrorism or that it may be applied in a selective manner. McDonald pointed out that the obligation to observe the law is not discretionary, or subject to derogation. She also raised concerns that in situations where the stakes are seen as being so high, humanitarian law's principles may not be applied in a balanced way, and claims of military necessity may be seen as outweighing principles such as distinction.

Turning to the conduct of legal operations during Enduring Freedom, William Lietzau provocatively suggested that the response to 9/11 "has presented a number of challenges that together have invoked a confluence of legal regimes and norms; as a result, the landscape will never again be quite the same." Focusing on the U.S. determination with respect to detainees and the decision to establish military commissions, Lietzau argued that the Presidential decisions have "adeptly navigated the confluence, and at the same time filled gaps in our legal landscape in a principled way that furthers the interests of the rule of law."

The primary confluence has been between the law enforcement and armed conflict paradigms, since the U.S. is at war against terrorism, but also seeks to bring the wrongdoers to justice. Lietzau began by suggesting that the law of war applied to the 9/11 attacks, a position that has not been universally accepted. However, he went on to argue that while the Third Geneva Convention, which governs the treatment of prisoners of war, is applicable during the conflict, "the undisciplined clusters of armed men comprising the Taliban did not qualify for Prisoner of War status under any reasonable interpretation" of that convention.

Lietzau opined that "this new kind of war cannot be forced into the mold of existing international law; rather...the law must adapt and advance to accommodate the metamorphosis in the nature of conflict." For him, the President's order to set up military commissions "set in motion a process to fill the void regarding enforcement of the laws and customs of war." Indeed, he argues that the rules of procedure for the commissions delicately balance the "exigencies of warfare," such as the unlikelihood of being able to establish a clear chain of custody," with "the principles of fairness and due process that animate our domestic criminal jurisprudence."

Daryl Mundis brought considerable experience as a prosecutor before the ICTY to bear in discussing the practical aspects of prosecuting terrorists. He began by outlining the *fora* available to conduct such proceedings. Among those which would likely enjoy jurisdiction are: the International Criminal Court; an ad hoc international criminal tribunal established to handle acts of terrorism, much like the ICTY; a Special Court, such as those established for Kosovo, East Timor, and Sierra Leone; domestic civilian courts; domestic special courts, with rules of evidence and procedure specifically designed for the prosecution of terrorists; and military courts, including courts-martial, military tribunals, and military commissions.

The substantive law prohibiting terrorism includes international agreements addressed to various aspects of the phenomenon. Mundis identified seven features that typify recent agreements: application only to crimes with an international element; an obligation that Parties criminalize the covered offenses without regard to the motivation of the perpetrators; a requirement that Parties take offenders found on their territory into custody; an obligation to facilitate the extradition of offenders; a requirement that Parties afford one another investigative assistance; a prohibition on resorting to the political offense doctrine as a grounds for refusing extradition or legal assistance; and a requirement to transfer prisoners in order to facilitate investigation or prosecution. Core agreements on the subject include the 1970 Hijacking Convention, 1971 Safety of Aircraft Convention, 1973 Convention on the Protection of International Persons, 1979 Hostage Taking Convention, 1980 Convention on the Physical Protection of Nuclear Materials, 1988 International Airport Security Convention, 1988 Maritime Navigation Safety Convention, 1988 Safety of Fixed Platforms on the Continental Shelf Convention, 1997 Terrorist Bombing Convention, and 1999 Financing Terrorism Convention. These agreements are supplemented by a growing trend towards codification at the regional level and an emerging body of case law, such as the *Galic* trial before the ICTY.

There are also procedural and evidentiary hurdles to overcome in prosecuting terrorists. With regard to the former, due process and fair trial concerns predominate. As to evidence, practical challenges stand in the way of effective and timely prosecution. Witnesses may be unwilling to cooperate with investigators or to testify out of concern that terrorist organizations will retaliate against them. More mundane, cultural and language difficulties will impede smooth prosecution. So too will the need to protect sensitive intelligence sources and methods.

In the first of three case studies on terrorism and international law, Margaret Stock surveyed the status of those detained, the criticism of the detentions that has surfaced, and the state of the legal proceeding surrounding a number of detainees. She was generally supportive of the U.S. approach, arguing that “[w]hile the United States must provide better procedural safeguards to protect the rights of persons who may be falsely accused of having ties to Al Qa’ida, its basic approach furthers the development of international law.”

Stock was quick to point out that the law of armed conflict did not anticipate the existence of a global terrorist network that operates beyond the control of any State Party to the Geneva Conventions. This being so, she suggested that “it is misleading to assert that America is in breach of international law by failing to apply conventions that do not address an organization such as Al Qa’ida.” Rather, international law must be interpreted flexibly. For instance, the Third Geneva Convention provides that enemy prisoners may be held until the “cessation of hostilities.” Yet, in the context of terrorism, this makes little sense. Only in the most unusual of circumstances will there be a negotiated settlement between terrorists and a government. Thus, it is for the victim-State to determine, according to Stock, when hostilities have stopped.

U.S. domestic law must be considered in a much different framework. U.S. courts have generally recognized the status of “unlawful combatant.” This alone does not deprive detainees of the protection of the U.S. Constitution or legislation, but multiple courts have held that the U.S. Constitution is generally inapplicable to non-U.S. citizens held outside the United States. If arrested or detained on U.S. territory, the government has several handling options - as an enemy combatant, either lawful or unlawful; as a criminal subject to federal or State law; as a material witness; or as an immigration law violator. Each is accorded differing treatment under domestic law. Given this flexibility, the U.S. government has been very lithe in applying the regime that best meets the needs of justice, while serving the practical needs of a global war on terrorism, such as intelligence gathering. For Stock, “[t]his approach is consistent with the rule of law.”

Yuval Shany presented the second case study, that on Israeli counter-terrorism measures. In it, he highlighted three pervasive issues affecting determinations of legality by the international community: the tension inherent in counter-terrorist efforts conducted by a mature liberal democracy faced with horrendous and repeated acts of terrorism; counter-terrorism during a war of national liberation; and the impact of Israel’s status as an Occupying Power in most, if not all, of the West Bank. Israeli rules of procedure that permit nearly immediate review of many counter-terrorism measures by the Supreme Court render the Israeli case, with its rich judicial involvement, particularly enlightening.

Shany rejected the government’s position that the Fourth Geneva Convention does not apply to the Occupied Territories because Egypt and Jordan had illegally occupied the West Bank and Gaza in 1948-49, calling the government’s argument “rather formalistic” and “misguided.” Instead, he recommends construing the Convention in a manner that will give effect to its underlying purpose, the protection of civilians who find themselves in the hands of the enemy. Indeed, for Shany, “since Israel neither claims sovereignty over the Occupied Territories (with the noted exception of East Jerusalem) nor offers their inhabitants rights associated with citizenship, its refusal to apply Geneva IV leads to the undesirable result of depriving Palestinians of most protections available to individuals under international and non-international law.”

As to the conflict with the Palestinians, Shany opined that it was a non-international armed conflict that easily met the threshold criteria of Common Article 3 to the Geneva Conventions (and the criteria of Protocol Additional II to the Geneva Conventions, although because Israel is a non-Party that instrument is inapplicable). Israel objects, however, to characterization of the conflict as international in nature. The Palestinian Authority has never been a State and Israel is not a Party to Protocol Additional I, which extends its provisions to wars of national liberation.

Overall, Shany believes that international law lies at the core of public discourse in Israel. Expectedly, then, the Israeli Defence Forces work hard to ensure their operations comply with international humanitarian law, and do so in the face of clearly illegal Palestinian actions, such as suicide bombings and

disregard for the principle of distinction (even with regard to their own population). Nevertheless, for Shany, a number of policies, including targeted killing and house demolitions, rely on a legal basis that is “at best shaky.”

The third of the case studies, by Sadi Cayci, addressed Turkey. Turkey has been involved in a low intensity conflict since the 1970s, most recently against the secessionist Kurdistan Worker’s Party (PKK). The conflict, which has been relatively quiet for the past several years, resulted in the loss of tens of thousands of lives. Of particular import is Turkey’s allegation that the group’s activities have been sponsored by certain States (including Syria), and that the PKK and other organizations operating against the Turkish government have also been active in Belgium, Greece, and Italy, all of which, as Cayci points out, are Turkey’s NATO Allies.

Cayci pointed to the apparent conflict between security and individual and group rights, arguing that “democracy and human rights turn out to be basic legal shields which in practice function as a de facto law of terrorist privileges and immunities.” Several areas of human rights have, he believes, been asserted in a way that has been contrary to the national security interests of Turkey, particularly the freedoms of expression, the press, conscience, and religion.

Most robust counter-terrorist operations occur during what Cayci brands “terrorist warfare” - a non-international armed conflict in which the non-State Party employs methods and means that are completely in violation of the laws of war and consist of acts of terror. During such conflicts, terrorists do not acquire any status other than criminals, even when captured; however, Cayci argues that “even if no...specific charge seems possible, merely being captured as a leader, armed militant, or collaborator who took direct/active part in hostilities will justify internment until the end of hostilities.” Additionally, for Cayci, “leaders and armed militants of a terrorist organization waging warfare, as well as their military assets and capabilities, are legitimate targets.”

The final presentations in the collection are reflections on terrorism by two individuals who have experienced it first hand. Andrew Pratt, an experienced U.S. counter-terrorism expert, argued that stopping terrorist attacks will require creation of an “international environment inhospitable to terrorists and all those who support them.” This strategy has four objectives: 1) defeat terrorist organizations through decisive and continuous action, thereby reducing organizations with global reach to the status of mere local actors; 2) deny sponsorship, support, and sanctuary to terrorists by convincing or compelling States to accept their sovereign responsibilities; 3) diminish the underlying causes of terrorism by encouraging the international community to focus its energy and resources on the areas most at risk; and 4) protect the United States [and other target States] through homeland defence and the development of defence in depth. For Pratt, the key is to create consequences for terrorist acts.

Oussama Damaj, drawing on his experiences in Lebanon, argued for a common legal framework for the definition of an “act of terrorism.” A common definition would clearly facilitate counter-terrorism efforts at the international level.

He further warned against two prevalent dangers in the war on terrorism: creating an atmosphere in which those “who are not with us are against us” and stereotyping. Moreover, he cautioned that acting outside the realm of law when responding to terrorism will ultimately prove counterproductive. For Damaj, as for all the participants in the two meetings on which this publication is based, it is essential that international law not be sacrificed on the altar of the fight against terrorism. On the contrary, although certain aspects of international law may appear as obstacles to effective counter-terrorism, in fact, law is generally an effective force multiplier in a battle that is tragically defined by one side’s ignorance of the norms universally accepted by the global community. Hopefully, this collection of essays will help to define the parameters of discourse that must be conducted to leverage international law in the global fight against terrorism.

PRINTED IN ITALY
SANREMO, JUNE 2003

