

International Law at a Crossroads?

The Impact of September 11

Carsten Stahn*

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* LL.M. (Köln-Paris), Research Assistant at the Institute.

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I. Introduction

1. The Facts

On September 11, 2001¹, the United States was the target of massive and brutal attacks carried out by 19 Al Qaeda suicide attackers who hijacked and crashed four U.S. commercial jets, two into the World Trade Center towers in New York City, one into the Pentagon near Washington D.C., and a fourth into a field in Shanks-

¹ On September 11 and its aftermath, see Antonio Cassese, *Terrorism is also Disrupting Some Crucial Legal Categories of International Law*, *EJIL*, Vol. 12 (2001), 993 et seq.; Anne-Marie Slaughter & William Burke-White, *An International Constitutional Moment*, *Harvard International Law Journal*, Vol. 43 (2002), 1 et seq.; Christopher Greenwood, *International Law and the "War Against Terrorism"*, *International Affairs*, Vol. 78 (2002), 301 et seq.; Michael Byers, *Terrorism, the Use of Force and International Law*, *ICLQ*, Vol. 51 (2002), 401 et seq.; Nico Schrijver, *Responding to International Terrorism: Moving the Frontiers of International Law for "Enduring Freedom"*, *NILR*, Vol. 48 (2001), 371 et seq.; Sean D. Murphy, *Terrorism and the Concept of "Armed Attack"*, *Harvard International Law Journal*, Vol. 43 (2002), 42 et seq.; Luigi Condorelli, *Les attentats du 11 Septembre et leurs suites: Où va le droit international?*, *RGDIP*, Vol. 105 (2001), 829 et seq.; Jost Delbrück, *The Fight Against Global Terrorism: Self-Defence or Collective Security as Internal Police Action? Some Comments on the International Legal Implications of the "War Against Terrorism"*, *GYIL*, Vol. 44 (2001), 9 et seq.; Jonathan I. Charney, *The Use of Force Against Terrorism and International Law*, 835 et seq.; Thomas M. Franck, *Terrorism and the Right of Self-Defense*, *AJIL*, Vol. 95 (2001), 839 et seq.; Alain Pellet & Sarah Pellet, *The Aftermath of September 11*, *Tilburg Foreign Law Review*, Vol. 10 (2002), forthcoming, and Carsten Stahn, *Collective Security and Self-Defence After the September 11 Attacks*, *Tilburg Foreign Law Review*, Vol. 10 (2002), forthcoming. See also at: <http://www.ejil.org/forum-WTC>: Alain Pellet, *No, This is not War!*; Giorgio Gaja, *In What Sense Was There an "Armed Attack"*; Carsten Stahn, *Security Council Resolutions 1368 and 1373: What They Say and What They Do Not Say*; Frédéric Mégret, *"War"? Some Semantics and the Move to Violence*; Pierre-Marie Dupuy, *The Law After the Destruction of the Towers*. See also Frederic L. Kirgis, *Security Council Adopts Resolution in Combating International Terrorism*, *ASIL Insight*, 1 October 2001; Jordan J. Paust, *Security Council Authorization to Combat Terrorism in Afghanistan*, *ASIL Insight*, 23 October 2001; John Cerone, *Acts of War and State Responsibility in "Muddy Waters": The Non-State Actor Dilemma*, *ASIL Insight*, September 2001; *ibid.*, *Status of Detainees in International Armed Conflict and Their Protection in the Course of Criminal Proceedings*, *ASIL Insight*, January 2002; Carsten Stahn, *Security Council Resolutions 1377 and 1378*, *ASIL Insight*, 1 December 2001, and Ruth Wedgwood, *Tribunals and the Events of September 11*, *ASIL Insight*, December 2001, all at: <http://www.asil.org/insights>. See also Christian Tomuschat, *Der 11. September 2001 und seine rechtlichen Folgen*, *EuGRZ*, Vol. 21-23 (2001), 535 et seq., and Christian Tietje & Karsten Nowrot, *Völkerrechtliche Aspekte militärischer Maßnahmen gegen den internationalen Terrorismus*, *NZWehrr* 2002, 1.

ville, Pennsylvania, leaving about 3,000 individuals dead or missing. One day after the attacks, the United Nations Security Council condemned the acts as "threats to international peace and security" in its Resolution 1368 (2001), reaffirming "the inherent right of individual and collective self-defence in accordance with the Charter of the United Nations".² Further, on 28 September 2001, the Council unanimously adopted Resolution 1373 (2001) that obligates all member states to deny financing, support, and safe haven to terrorists.³

The measures taken within the framework of the United Nations were accompanied by parallel statements of NATO. The North Atlantic Council of NATO decided on September 12 that if it was determined that the incidents were directed from abroad against the United States, it "shall be regarded as an action covered by Article 5 of the Washington Treaty, which states that an armed attack against one or more of the Allies in Europe or North America shall be considered an attack against them all".⁴ Finally, on October 2, the North Atlantic Council determined that the facts were "clear and compelling" and that "the attack against the United States on 11 September was directed from abroad and shall therefore be regarded as an action covered by Article 5 of the Washington Treaty".⁵

On October 7, 2001, President Bush invoked the United States' inherent right of self-defence, and as Commander-in-Chief of the U.S. military, ordered U.S. armed forces to initiate action in self-defence against members of Al Qaeda and the Taliban regime in Afghanistan. The U.S. action was "designed to prevent and deter further attacks on the United States ... [including] measures against Al Qaeda terrorist training camps and military installations of the Taliban regime in Afghanistan".⁶ Subsequently, U.S. and British forces launched airstrikes at terrorist training camps and military targets throughout Afghanistan (Operation Enduring Freedom), which led to the turnover of the Taliban regime, the establishment of a new interim administration in Afghanistan and the creation of a multinational International Security Assistance Force, authorized by Security Council Resolution 1386 (2001).⁷ Furthermore, during the course of hostilities in Afghanistan, the U.S. military and its allies captured or secured the surrender of individuals fighting as part of the Taliban or the Al Qaeda terrorist network. The U.S. military took control of many individuals and transferred some of them to Guantanamo, Cuba, where they are held on the basis of a U.S. Military Order of November 13, 2001 on "the detention, treatment and trial of certain non-citizens in the war against terrorism".⁸ The U.S. military order is built

² See para. 3 of the Preamble of SC Res. 1368 (2001), UN Doc. S/RES/1368 of 12 September 2001.

³ See paras. 1-3 of SC Res. 1373 (2001), UN Doc. S/RES/1373 of 28 September 2001.

⁴ See NATO, Press Release No. 124, Statement by the North Atlantic Council, September 12, 2001, available at: <http://www.nato.int>.

⁵ See Secretary General Lord Robertson, Statement at NATO Headquarters, October 2, 2001, available at: <http://www.nato.int>.

⁶ See Letter from John Negroponte, U.S. Permanent Representative to the U.N., to Richard Ryan, President of the Security Council, UN Doc. S/2001/946 of 7 October 2001.

⁷ See para. 1 of SC Res. 1386 (2001) of 20 December 2001, UN Doc. S/RES/1386 (2001).

upon the assumption that “[i]nternational terrorists, including members of Al Qaeda have carried out attacks on the United States ... on a scale that has created a state of armed conflict that requires the use of the United States Armed Forces” (emphasis added).⁹ It provides for the trial of individuals by military commissions.¹⁰ At the same time, the United States refused to formally recognize the detainees held in Guantanamo as prisoners of war, arguing that they are “unlawful combatants”.¹¹

2. The Law

What may be described in a few lines from a factual point of view raises multiple issues under international law. In fact, the events of September 11 are about to reshape the international security architecture from a state-centered mechanism of deterrence to a transnational security network, responding to threats emerging from global terrorist groups.¹² One of the most apparent features of the law after September 11 is a growing transformation of the roles of domestic law and international law in the fight against international terrorism¹³, and most of all, an increasing (con)fusion of different areas of international law, namely international criminal law, the laws of war and the law of self-defence.¹⁴

⁸ Military Order, Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism, 13 November 2001, 66 Fed. Reg. 57, 883 (Nov. 16, 2001), available at: <http://www.caj-pe.org/pe/terro/usa1.htm>. See generally on this issue, Jordan J. Paust, Antiterrorism Military Commissions: Courting Illegality, *Michigan Journal of International Law*, Vol. 23 (2002), 1 et seq.; Daryl A. Mundis, The Use of Military Commissions to Prosecute Individuals Accused of Terrorist Acts, *AJIL*, Vol. 96 (2002), at 320; Ruth Wedgwood, Al Qaeda, Terrorism and Military Commissions, *AJIL*, Vol. 96 (2002), at 328; Harold Hongju Koh, The Case Against Military Commissions, *AJIL*, Vol. 96 (2002), at 337; Joan Fitzpatrick, Jurisdiction of Military Commissions and the Ambiguous War on Terrorism, *AJIL*, Vol. 96 (2002), at 345; Michael J. Matheson, U.S. Military Commissions: One of Several Options, *AJIL*, Vol. 96 (2002), at 354 and Neal K. Katyal & Laurence H. Tribe, Waging War, Deciding Guilt: Trying the Military Tribunals, *Yale Law Journal*, Vol. 111 (2002), 1259.

⁹ See Sec. 1 (a) of the Military Order.

¹⁰ See Sec. 4 (a) of the Military Order: “Any individual, subject to this order shall, when tried, be tried by military commission for any and all offences triable by military commission that such individual is alleged to have committed ...”.

¹¹ See White House Fact Sheet, Status of Detainees at Guantanamo, Office of the Press Secretary, February 7, 2002, 1, at: <http://www.whitehouse.gov/news/releases/2002/02/20020207-13.html>.

¹² See also Greenwood, *supra* note 1, at 301.

¹³ The word terrorism is used here to describe “criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political or ideological purposes”. See also UN General Assembly Resolution “Measures to Eliminate International Terrorism” of January 30, 2001, UN Doc. A/RES/55/158, 2. See generally on the problems concerning the definition of terrorism, John F. Murphy, Defining International Terrorism: A Way Out of the Quagmire, *Israel Yearbook on Human Rights*, Vol. 19 (1989), 13 et seq. and Krzysztof Skubiszewski, Definition of Terrorism, *ibid.*, 39 et seq. Art. 2 (b) of the International Convention for the Suppression of the Financing of Terrorism of December 9, 1999 is historical because it contains the first treaty-based general definition of terrorism (“any act intended to cause death or serious bodily injury to a civilian, or to any other person not taking part in the hostilities in a situation of armed conflict when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from any act”).

In the past, acts of terrorism were generally treated as crimes and offences, punishable under national and/or international criminal law or governed by specific international treaties, designed to facilitate extradition and national prosecution. Although treaty-based efforts to combat international terrorism faced difficulties due to the absence of a comprehensive convention on terrorism, even countries like the United States focused their efforts on law enforcement and extradition mechanisms.¹⁵ In 1988, for example, the United States refrained from using force against Libya in response to the aerial accident over Lockerbie and acted through the UN Security Council, in order to get hold of the suspects and bring them to trial.¹⁶ The case was finally decided by a tribunal acting under Scottish law in the Netherlands.¹⁷ Moreover, after the bombing of the WTC in 1993 and the 1998 attacks on the American embassies in Nairobi and Dar es Salaam, the United States relied primarily on a criminal-law-based approach, seeking the cooperation of foreign governments to try the perpetrators in American courts. Although air strikes were later carried out against Sudan and Afghanistan in 1998¹⁸, the use of military force served not so much the purpose of getting custody over the suspects, but rather to destroy the means and infrastructure of the terrorist groups.

This practice contrasts sharply with the legal response to the September 11 attacks. Operation "Enduring Freedom" has opened a path which seems to allow states to consider different options, when countering violence emanating from terrorist actors: prosecution (under domestic law, terrorism-related conventions or international criminal law), self-defence and measures of collective security. The September 11 attacks have been qualified as an act of war by the Bush Administration¹⁹ and were soon followed by a massive military campaign in Afghanistan.²⁰ The resort to the use of force has met little or no international opposition.²¹ While the prosecution and law enforcement approach may have governed the capture of

¹⁴ See Slaughter & Burke-White, *supra* note 1, at 3.

¹⁵ See Anonymous, *Responding to Terrorism: Crime, Punishment and War*, *Harvard Law Review*, Vol. 115 (2002), 1217, at 1218.

¹⁶ The dispute arose out of the indictment by the United States of two Libyan intelligence agents in connection with the bombing of Pan Am Flight 103 over Lockerbie, Scotland, on December 21, 1998. When Libya refused to comply with the demands by the United States, the Security Council urged Libya to extradite the suspects "so as to contribute to the elimination of international terrorism". See UN SC Res. 731, UN Doc. S/RES/731 (1992). After Libya's continued refusal to cooperate, the Security Council levied various types of economic sanctions. See SC Res. 748 (1992), UN Doc. S/RES/748 (1992).

¹⁷ See *Verdict in the Trial of the Lockerbie Bombing Suspects* (2001), in: *AJIL*, Vol. 95 (2001), 405-407. See also Anthony Aust, *Lockerbie: The Other Case*, *ICLQ*, Vol. 49 (2000), 278 et seq.; Caroline Morgan, *The Trial of the Lockerbie Suspects in the Netherlands*, *African Yearbook of International Law*, Vol. 7 (2001), 255 et seq. and Michael P. Scharf, *Terrorism on Trial: The Lockerbie Criminal Proceedings*, *ILSA Journal of International and Comparative Law*, Vol. 6 (2000), 355 et seq.

¹⁸ For a legal analysis of the strikes, see Ruth Wedgwood, *Responding to Terrorism: The Strikes against Bin Laden*, *Yale Journal of International Law*, Vol. 24 (1999), 559; Gregory M. Travalio, *Terrorism, International Law and the Use of Force*, *Wisconsin International Law Journal*, Vol. 18 (2000), 145; Maureen F. Brennan, *Avoiding Anarchy: Bin Laden Terrorism, the U.S. Response and the Role of Customary International Law*, *Louisiana Law Review*, Vol. 59 (1999), 1195.

individuals believed to be responsible for the 11 September attacks, it certainly did not apply to the military action against the Taliban and the general statement of the Bush administration, that it would not make a distinction between the terrorists and those foreign governments that harbor them. The most significant difference between the acts of September 11 and earlier acts of terrorism, such as the Lockerbie incident, or the 1993 World Trade Center bombing is the number of deaths and the extent of damage caused. The gravity of the attacks did not change their nature as criminal acts²², but appears to have been the decisive point of reference for the shift from the mechanisms of criminal justice to the instruments of the use of force.

The events of September 11 mark also a crucial moment for the role of private actors under international law in general. The progressive "individualization" of international law²³ has been one of the major developments after World War II. Due to the establishment of regional and universal human rights treaty systems and the recognition of individual criminal responsibility under international law, the international legal order has gradually evolved from a state-centered system to a multi-layered normative framework, conferring rights and obligations upon individuals.²⁴ The aftermath of September 11 invigorates this process. It may, in the long run, lead to a re-definition of the role of non-state actors under the laws of war, the law of state responsibility and the right to self-defence.

Presently, acts of international terrorism emanating from private actors are only to a limited extent covered by the legal framework of international law. It is, for example, unclear whether or not international humanitarian law applied to the conduct of Bin Laden and Al Qaeda as of September 11.²⁵ International humanitarian law does generally not apply in peacetime, because its main purpose is to place restraints on the conduct of warfare, in order to limit the damaging effect of hostilities and to protect the victims of armed conflicts, including civilians and combatants who have laid down their arms or have been placed *hors de combat*. While the hostilities between a state and a non-state group may be governed by international law, the participants must qualify as belligerents or insurgents involved in an armed conflict. The regulatory framework of the U.S. Military Order

¹⁹ In a speech to the Congress on September 20, President Bush declared: "On September 11th, enemies of freedom committed an act of war against our country." See Sean D. Murphy, *Contemporary practice of the United States Relating to International Law*, AJIL, Vol. 96 (2002), 242.

²⁰ For a survey, see Murphy, *supra* note 19, 245 et seq.

²¹ For some critical governmental statements, see Stahn, Security Council Resolutions 1377 and 1378, *supra* note 1.

²² See also Murphy, *supra* note 1, at 48 ("In fact, the incidents can properly be recognized as both a criminal act and an armed attack.").

²³ See Slaughter & Burke-White, *supra* note 1, at 13 et seq.

²⁴ For further analysis, see Antonio Cassese, *International Law* (2001), 77 et seq. See also Christoph C. Schreuer, *The Waning of the Sovereign State: Towards a New Paradigm for International Law?*, EJIL, Vol. 4 (1993), 447.

²⁵ For a discussion, see Barbara Olshansky, *American Justice on Trial: Who Loses in the Case of Military Tribunals* (2002), at: <http://www.ccr-ny.org>.

of November 13, 2001 on the Detention, Treatment and Trial of Certain Non-Citizens in the War against Terrorism is built upon the premise that the attacks of September 11 have created such a status. This may be derived from Sec. 1(a) of the Order. But this finding is far from evident.²⁶ Global terrorist organizations like Al Qaeda are clearly not "insurgent groups" within the meaning of international humanitarian law, because they are not associated with any specific territory, but dispersed throughout countries all over the world.²⁷ Furthermore, an unreflected extension of the concept of "armed conflicts" to hostilities between states and terrorist networks may, in the long run, have the unwanted consequence of legitimizing attacks by non-state actors on lawful military targets.

It has so far also been controversial whether terrorist bombings can constitute an armed attack triggering the right to self-defence.²⁸ The Charter itself does not spell out the means by which an armed attack must occur. But it is quite clear that, in 1945, the idea associated with the notion of "armed attack" was that of interstate violence.²⁹ In the last 50 years, both the practice of the United Nations and international state practice supported a rather restrictive interpretation of Art. 51 of the Charter.³⁰ Following the events of September 11, however, a strong case can be made, that the law of self-defence is moving towards the admissibility of the use of force against terrorists acts.³¹ Significantly, Art. 5 of the NATO Treaty which declares an attack on one member an attack on all members of the alliance, has been triggered for the first time since 1949.³² The claim by NATO members to be acting in accordance with Article 51 and the purposes of the Charter carries great weight and may pave the way for a wider interpretation of the right to self-defence.

Finally, the legal response to the September 11 attacks sheds a new light on the relationship between collective security and self-defence in the context of counter-terror operations.³³ The reaction of the Council to the events of September 11

²⁶ See Paust, *supra* note 8, at note 16.

²⁷ On the notion of 'insurgents', see Cassese, *supra* note 14, at 67.

²⁸ See Olivier Corten & Francois Dubuisson, Operation "Liberté Immuable": Une extension abusive du concept de légitime défense?, *RGDIP* Vol. 106 (2002), 51, at 59 et seq.

²⁹ See also Delbrück, *supra* note 1, at 15.

³⁰ For an analysis of the international legal practice, see Robert J. Beck & Anthony Clark Arend, "Don't Tread on US": International Law and Forcible State Responses to Terrorism, *Wisconsin International Law Journal*, Vol. 12 (1993), 153; Stanimir A. Alexandrov, Self-Defense Against the Use of Force in International Law (1996), 182 et seq. and Mark B. Baker, Terrorism and the Inherent Right of Self-Defense (A Call to Amend Article 51 of the United Nations Charter), *Houston Journal of International Law*, Vol. 9 (1986), 25, at 48 et seq.

³¹ See also Frederic L. Kirgis, Israel's Intensified Military Campaign against Terrorism, *ASIL Insight*, December 2001. See generally on the U.S. interpretation of self-defence, Ryan C. Hendrickson, Article 51 and the Clinton Presidency: Military Strikes and the U.N. Charter, *Boston University International Law Journal*, Vol. 19 (2001), 207 et seq.

³² See the Statement of NATO Secretary General Lord Robertson of 2 October 2001, obtainable at: <<http://www.nato.int/docu/speech/2001/s011002a.htm>>.

³³ See on this issue also Delbrück, *supra* note 1, at 19 et seq. and Stahn, Collective Security and Self-Defense after the September 11 Attacks, *supra* note 1. See generally self-defence and collective security, Nico Krisch, *Selbstverteidigung und Kollektive Sicherheit* (2001), 137.

stands in the tradition of an increasing intertwining of Article 51 and enforcement action under Chapter VII in the practice of the Council, paying tribute to the interests of particular states while safeguarding the overall authority of the Council.³⁴ The Council has, on several occasions authorized or approved existing arrangements for collective self-defence, instead of taking independent enforcement action. The 1950 war in Korea marked the first precedent in which the Council called on United Nations members to exercise their right of collective self-defence.³⁵ A similar practice followed years later in the Gulf War³⁶ and in the conflict in Bosnia and Herzegovina, where the United Nations used NATO's capabilities in order to respond to violations of the UN proclaimed "safe areas" and "no-fly zones".³⁷ The legal reaction of the Council to the September 11 attacks bears some resemblance with this practice. Although the Council did not authorize Operation "Enduring Freedom" under Chapter VII of the Charter³⁸, it made reference to the right of self-defence. The clearest reference to the right of self-defence of the United States may be found in the preamble of Resolutions 1368 and 1373, in which the Council reaffirms "the inherent right of individual and collective self-defence" as recognized by the Charter of the United Nations.³⁹ The early invocation of the right to self-defence was one of the most striking features of the legal reaction of the Council to the September 11 attacks. Although the Council did not specifically mention the holder or the addressee of measures of self-defence in Resolutions 1368 (2001) and 1373 (2001), the reaction of the Council should not be underestimated. The Council is by no means required to affirm the existence of a case of self-defence. If the Council nevertheless invokes this right, this finding may provide important evidence for the legality of the use of force.

The purpose of this essay is to take a closer look at the impact of the events of September 11 on selected fields of international law, including the laws of armed conflict (II), the right to self-defence (III), the system of collective security (IV) and international criminal law (V).

³⁴ For a survey, see Alexandrov, *supra* note 30, at 252 et seq.

³⁵ See on self-defence and the Korea conflict, *ibid.*

³⁶ See on the Gulf war and collective self-defence, Yoram Dinstein, *War, Aggression and Self-Defence* (2001), 242 et seq.

³⁷ In Resolution 816 (1993), the Council decided that Member States "acting nationally or through regional organizations or arrangements" could "under the authority of the Security Council", take "all necessary measures in the airspace of Bosnia and Herzegovina. See UN Doc. S/RES/816, in Resolutions and Decisions of the Security Council, Vol. 48 (1993), 4. In Resolution 836 (1993), a similar call was made, in order to support UNPROFOR in its efforts to protect UN safe areas. See Res. 836 (1993), UN Doc. S/RES/836, in Resolutions and Decisions of the Security Council, Vol. 48 (1993), at 14. For an analysis of this practice, see Krisch, *supra* note 33, at 120 et seq. See generally on the relationship between the Security Council and regional organizations, Christian Walter, *Security Council Control Over Regional Action*, Max Planck Yearbook of United Nations Law, Vol. 1 (1997), 129 et seq.

³⁸ For a full analysis, see Stahn, *Security Council Resolutions 1368 and 1373*, *supra* note 1.

³⁹ See para. 3 of the preamble of SC Res. 1368 (2001) and para. 4 of the preamble of SC Res. 1373 (2001).

II. September 11 and the Laws of War

1. A New Kind of War?

It has been argued that the attacks of September 11 represent a challenge to the current definition of "war". This may be true in a political sense⁴⁰, but is certainly not in keeping with the concept of "war" in its accepted legal sense. The attacks on the WTC can be looked at through different lenses. They were, first of all, a series of criminal acts prohibited by domestic and international law. The initial seizure of the plane may be viewed as a violation of the 1970 Hague Convention for the Suppression of the Unlawful Seizure of Aircraft.⁴¹ The destruction of the WTC can be considered as an act of terrorism under Art. 2 (1) of the 1998 International Convention for the Suppression of Terrorist Bombings.⁴² Furthermore, the killing of civilians was murder under domestic law, albeit on a dramatic scale. Ultimately, the attack as such may be viewed as an "armed attack" on the United States within the meaning of Art. 51 of the Charter.

But the acts of September 11 cannot be regarded as an act of war in the accepted idiom of international law. The term "act of war" has lost most of its significance, because it is traditionally bound to a formal declaration of war by one or both of the parties and does not cover the various forms of organized armed violence, which are typical of modern conflicts.⁴³ Furthermore, a war requires an armed conflict between two or more states. Individuals as such or terrorist groups cannot initiate a "war", unless they are soldiers and represent a state. This follows from Common Art. 2 to the Geneva Convention, according to which a state of war exists only when a conflict arises between nation states. The use of the term "war" in connection with the global campaign against terrorism is therefore of rhetorical, rather than of any legal relevance.⁴⁴

⁴⁰ See on "terrorism as war" from a U.S. perspective, Spencer J. Crona & Neal A. Richardson, *Justice For War Criminals of Invisible Armies: A New Legal and Military Approach to Terrorism*, *Oklahoma City University Law Review*, Vol. 21 (1996), 349, at 356 and Tyler Raimo, *Winning at the Expense of Law: The Ramifications of Expanding Counter-Terrorism Law Enforcement Jurisdiction Overseas*, *American University International Law Review*, Vol. 14 (1999), 1473, at 1484.

⁴¹ See Art. 1 of the Convention for the Suppression of Unlawful Seizure of Aircraft of 16 December 1970.

⁴² Art 2 (1) of the International Convention for the Suppression of Terrorist Bombing of 12 January 1988 states: "Any person commits an offence within the meaning of this Convention if that person unlawfully and intentionally delivers, places, discharges, or detonates an explosive or other lethal devices in, into or against a place of public use, a State or government facility, a public transportation system or an infrastructure facility: a. With the intent to cause death or serious bodily injury; or b. 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".

⁴³ See Dinstein, *supra* note 36, p. 136.

⁴⁴ See also Cerone, *supra* note 1.

2. An Expanded Concept of "Armed Conflict"?

From a conceptual point of view, the so-called "war against terrorism" differs considerably from previous military operations, because it is not primarily directed against specific states or governments, but against global terrorist cells operating from all different parts of the world. In this regard, it raises new issues under the definition of "armed conflict", which has gradually replaced the classical concept of war, because it covers a broader range of forcible acts, including civil wars and intrastate insurgencies.⁴⁵ The events of September 11, in particular, pose the question if and to what extent the rules of international humanitarian law may be extended to the conduct of terrorist organizations.⁴⁶

Traditionally, acts of international terrorism were not viewed as crossing the threshold of intensity required to trigger the application of the laws of armed conflict, which provide a legal framework for exceptional situations, exceeding the level of ordinary political violence.⁴⁷ The existence of an "armed conflict", which triggers the applicability of international humanitarian law, usually requires two or more state belligerents, or a conflict within one state, but with a high threshold of intensity. Isolated and sporadic acts of terrorism within one state do not meet this standard.⁴⁸ This is clearly reflected in Art. 1 (1) of Additional Protocol II, which requires an organized and sustained struggle of a rebellious group against government forces or other militarily organized groups⁴⁹ and Art. 1 (2) of Additional

⁴⁵ Since World War II, there has been considerable debate about the application of the laws of war to conflicts involving non-state actors. Many, if not most of the conflicts since World War II have been "internal", that is between a rebel or insurgent group itself. Typically, states have resisted the application of the laws of war to such conflicts, because these rules recognize that lawful combatants may kill and engage in other acts of violence against legitimate targets. States did not want to risk of conceding the privilege of lawful combatancy to rebels, preferring to treat them as criminals.

⁴⁶ On the applicability of the laws of war to terrorists, see L. C. Green, *Terrorism and Armed Conflict: The Plea and the Verdict*, Israel Yearbook on Human Rights, Vol. 19 (1989), 131 et seq.; Kay Hailbronner, *International Terrorism and the Laws of War*, German Yearbook of International Law, Vol. 25 (1982), 169 et seq.; Stefan Oeter, *Terrorism and "Wars of National Liberation" from a Law of War Perspective*, ZaöRV, Vol. 45 (1989), 446 et seq.; Torsten Stein, *How Much Humanity Do Terrorists Deserve?*, in: A. J. M. Delissen & Gerard J. Tanja (ed.), *Humanitarian Law of Armed Conflict Challenges Ahead, Essays in Honour of Frits Kalshoven* (1991), 567 et seq.; Alfred P. Rubin, *Terrorism and the Laws of War*, Denver Journal of International Law and Policy, Vol. 12 (1983), 219 et seq.; Jordan J. Paust, *Terrorism and the International Law of War*, Military Law Review, Vol. 64 (1964), 1 et seq. and Paul A. Tharp, *The Laws of War as a Potential Legal Regime for the Control of Terrorist Activities*, Journal of International Affairs, Vol. 32 (1978), 91 et seq.

⁴⁷ See Elizabeth Chadwick, *Self-Determination, Terrorism and the International Humanitarian Law of Armed Conflict* (1996), 128. It is quite telling that the United Kingdom denied the existence of an armed conflict in Northern Ireland and refused to grant detainees the status of prisoners of war. But see Bradley Larschan, *Legal Aspects to the Control of Transnational Terrorism: An Overview*, Ohio N.U. Law Review, Vol. 13 (1986), 117, at 147, characterizing international terrorism as an armed conflict rather than a criminal act.

⁴⁸ See on the armed conflict threshold also Hans-Peter Gasser, *Prohibition of terrorist acts in international humanitarian law*, International Review of the Red Cross, No. 253, 212 et seq.

⁴⁹ Common Art. 3 to the Geneva Conventions does not provide a definition of "non-international armed conflict". Additional Protocol II, however, clarifies in its Art. 1 that the Protocol applies to

Protocol II, which states that the Protocol shall not apply to "situations of internal disturbances and tensions such as riots, isolated and sporadic acts of violence and other acts of a similar nature as not being armed conflicts". While international humanitarian law may apply to certain armed conflicts between states and non-state actors, such as insurgents in a civil war, its applicability is in principle limited to situations in which the non-state actor is in control of territory within that state and capable of conducting "sustained and concerted military operations".⁵⁰ As a loose network of individuals and groups operating from different countries like Al Qaeda appears unlikely to meet these requirements.⁵¹

It is indisputable that the military conflict in Afghanistan as of October 7, 2001 amounted to an international armed conflict⁵², which arises whenever a state intervenes coercively in an armed conflict in another state, irrespective of whether or not the force was originally directed against the intervening state. But it is highly controversial, whether the operations of Al Qaeda against the United States before that date met the requirements of an armed conflict.⁵³ This last issue is particularly important, because it challenges the traditional understanding of armed conflicts as hostilities among states or groups seeking territorial control over land. The events of September 11 raise the question, whether the rules of international humanitarian law can be applied to conflicts opposing a state and an armed terrorist group, which has no clear territorial link to that state and no intention to take physical control of territory.⁵⁴

A number of arguments support the view that Al Qaeda's attacks against U.S. property and personnel on September 11 and earlier may come within the ambit of international humanitarian law, even if the Geneva Conventions and Protocols are on their face limited to interstate and civil wars. First, the nature and scale of the September 11 attacks were akin to that of an interstate conflict.⁵⁵ Further, the at-

armed conflicts which take place in the territory of a Party between its armed forces and dissident armed forces or other organized armed groups that are able to carry out sustained and concerted military operations. See Art. 1 (1) of 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.

⁵⁰ In 1949 states believed that a conflict with a rebel group would amount to an armed conflict governed by international humanitarian law insofar as the group is organized, has a responsible command, acts on a determinate territory, and is capable of respecting and ensuring respect for humanitarian law. To address conflicts between a state and non-state actors, Additional Protocol II provides for applying law of war protections to conflicts between a state's "armed forces and dissident armed forces or other organized 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".

⁵¹ The persons responsible for the September 11 attacks were clearly not a state or a "dissident force" under Additional Protocol II.

⁵² See Cerone, *supra* note 1.

⁵³ Certainly, had they been carried out under the sponsorship of a state, no one would question that the September 11 attacks were acts of war. That a deliberate attack on non-combatant civilians violates the laws of war is firmly embedded in customary law of war and also reflected in several conventions, such as Common Art. 3 of the Geneva Conventions of 1949.

⁵⁴ See M. Cherif Bassiouni, *Legal Control of International Terrorism: A Policy-Oriented Assessment*, Harvard International Law Journal, Vol. 43 (2002), 83, at 99.

tacks were carried out in connection with several other attacks against the United States linked to Al Qaeda, including the 1993 bombing of the WTC, the 1998 attacks on the U.S. embassies in Kenya and Tanzania and the 2000 attack on the USS Cole.⁵⁶ Moreover, the purpose of international humanitarian law, which is to regulate a conflict so as to protect the civilian population and to avoid unnecessary harms of combatants, would support an application of the *jus in bello* to conflicts opposing states and terrorist organizations, even in the absence of a territorial link between these entities. In this context, it is in particular worth noting that the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia has adopted a wide interpretation of the notion of "armed conflict", which is deemed to exist "whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a state" (emphasis added).⁵⁷ This definition is broad enough to cover even conflicts between states and terrorists groups with support networks all over the world.⁵⁸ Finally, one may add that there have been some earlier attempts in legal doctrine to extend the scope of application of the laws of war to terrorist acts. It has been argued that an analogous application of the laws of war to terrorists would not only fill significant gaps in the regime of peacetime anti-terrorism conventions⁵⁹, but also ensure a more humane treatment for terrorists.⁶⁰ Moreover, the ILA Committee on International Terrorism has taken the view that the law of armed conflict would provide a better framework for the combat of terrorism than the traditional rules of extradition, which have been paralysed by the political offence exception.⁶¹

⁵⁵ The number of civilian casualties caused by the attack on the WTC amounts to just under 3,000 people killed. Moreover, the argument could be made, that an armed attack within the meaning of Art. 51 of the Charter implies the level of intensity required for an "armed conflict".

⁵⁶ The September 11 attacks apparently marked the continued escalation of attacks attributed to Al Qaeda. One may therefore argue that the events of September 11 were not isolated or sporadic acts of terrorism, but part of a more systematic pattern of violence, creating an armed conflict with an organized enemy. For further discussion, see Curtis A. Bradley & Jack L. Goldsmith, *The Constitutional Validity of Military Commissions*, The Green Bag, Vol. 5 (2002), 249 et seq.

⁵⁷ ICTY, *Prosecutor v. Tadic*, Appeal Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Decision of 2 October 1995, Case No. IT-94-1, para. 70.

⁵⁸ See Slaughter & Burke-White, *supra* note 1, at 8. See also criteria established by the ICTR in the *Akayesu* Judgment of 2 September 1998: "The term armed conflict in itself suggests the existence of hostilities between armed forces organized to a greater or lesser extent ... This consequently rules out situations of internal disturbances and tensions. For a finding to be made on the existence of an internal armed conflict in the territory of Rwanda at the time of the events alleged, it will therefore be necessary to evaluate both the intensity and the organization of the parties to the conflict". See ICTR, *Akayesu* Judgment of 2 September 1998, Case No. ICTR-96-4, para. 620.

⁵⁹ See Michael P. Scharf, *Defining Terrorism as the Peace Time Equivalent of War Crimes: A Case of Too Much Convergence Between International Humanitarian Law and International Criminal Law?*, ILSA Journal of International & Comparative Law, Vol. 7 (2001), 391, at 393 et seq.

⁶⁰ See Tharp, *supra* note 46, at 98.

⁶¹ See International Law Association, Report of the 59th Conference, Montreal 1982, 349-354, paras. 20-21.

Nevertheless, the application of the laws of war to terrorists under a relaxed "armed conflict" threshold poses some serious problems.⁶² As has been observed by one commentator at the occasion of the 79th Annual Meeting of the American Society of International Law, "[t]here are times and places when it is appropriate to apply the laws of war and there are other times ... when it is appropriate to apply other regimes such as the criminal law of a state at peace ... Premature application of the laws of war may result in a net increase in human suffering, because the laws of war permit violence prohibited by domestic criminal law".⁶³ Soldiers involved in armed conflicts may use violence against their opponents and lawfully attack military installations of their enemy. An analogous application of these principles to peace time terrorism may have unwanted consequences, because it would allow terrorists to carry out strikes against lawful military targets.⁶⁴ Attacks on objects such as the Pentagon or the USS Cole could easily become legitimate combatant acts.⁶⁵

If terrorist attacks were equated to acts carried out within the framework of non-international armed conflicts, governments would preserve the right to prosecute and punish members of terrorist groups for acts directed against the State's police and armed forces, because the law of non-international armed conflicts does not recognize any combatant status and immunity from criminal prosecution for non-state actors involved in an internal conflict.⁶⁶ However, if acts of terrorism were considered acts undertaken in the course of an international armed conflict, criminal prosecution would collide with the concept of permitted acts of combatancy.⁶⁷ The attack on the Pentagon, for example, would not qualify as a war crime because of its impact on U.S. military personnel or government installations, but because the hijacking of a commercial airliner is not a lawful means for attacking

⁶² On the negative implications of applying the laws of war to peacetime acts of terrorism, see Scharf, *supra* note 59, at 396. See also Green, *supra* note 46, at 165 ("To bring terrorists within the scope of the law of armed conflict may appear to extend the principles of humanitarian law, because the members of terrorist organizations would then be brought within the protection of the Geneva Conventions and, for States ratifying, of the 1977 Protocols. However, such action would confer respectability upon the persons involved, giving them the status of combatants.").

⁶³ See W. J. Fenrick, *Should the Laws of War Apply to Terrorists?*, in: American Society of International Law, *Proceedings of the 79th Annual Meeting*, N.Y., April 25-27, 1985, 112. For a particularly uncritical approach, see on the contrary, Larschan, *supra* note 47, at 139: "Transnational terrorism is nothing less than warfare against the United States and other governments. The various groups comprising the international terrorist network supported by a handful of states are conducting low-level armed conflicts against democratic societies. And yet, even with the recognition that armed conflict is being waged, western states continue to rely upon the ineffective and increasingly impractical criminal law approach in dealing with transnational terrorism."

⁶⁴ One must keep in mind that under international humanitarian law, killing a combatant may be justified homicide instead of murder.

⁶⁵ See also Paust, *supra* note 8, at note 16.

⁶⁶ See Oeter, *supra* note 46, at 465 and 469.

⁶⁷ It is quite telling that the United States did not ratify Protocol I, arguing that it would allow irregular terrorist groups to enjoy many of the benefits of the laws of war without fulfilling its duties. See Abraham Sofaer, *The U.S. Decision not to ratify Protocol I to the Geneva Conventions on the Protection of War Victims*, AJIL, Vol. 82 (1988), 784, at 786.

it.⁶⁸ The collateral damage doctrine would apply, so that injury or deaths to civilians would not be regarded as criminal as long as the target was a government installation, and reasonable steps were taken to minimize the risk to innocent civilians.

Last but not least, there are limits to the extension of the notion of "armed conflict" as such. While large-scale acts of terrorism such as the September 11 attacks may ultimately be viewed as precedents for an emerging new concept of international armed conflict, designed to address the conduct of hostilities between states and global terrorist networks in specific situations, they do certainly not justify a generalized application of the laws of war to members of groups engaged in international terrorism or states harboring these groups. Such an understanding, which makes a state of armed conflict the rule rather than the exception in international law, would not only go well beyond the accepted limits of the laws of war, but call into question the very distinction between the regimes of humanitarian law, criminal law and human rights law governing the combat of transnational crime.⁶⁹ The application of a broadened concept of armed conflict may, in particular, lead to a disproportional and unwanted re-militarization of the private actor phenomenon involving an indefinite circle of warring actors and little international legal constraints.

3. Terrorism, Combatancy and Prisoner-Of-War Status

Moreover, there are conceptual difficulties in fitting terrorists into the rubric of the laws of war.⁷⁰ It is, in particular, rather obvious that terrorist acts committed in

⁶⁸ See also the remarks by Ruth Wedgwood, *The Law's Response to September 11*, *Ethics & International Affairs*, Vol. 16 (2002), 8, at 12 ("The members of al-Qaeda have violated the laws of humane warfare in their attacks against civilian targets and in their tactic of disguising themselves as civilians. The fundamental rule of armed conflict is that combatants must not deliberately endanger civilians – either by choosing them as targets, or by using a civilian disguise to mask plans to attack. Al-Qaeda has done both. Al Qaeda has deliberately killed innocent noncombatants in the attempt to spread terror. Al Qaeda's attacks on military targets are also illegal because they were carried out in civilian disguise. Members of al-Qaeda familiar with its criminal purpose can thus be arrested for conspiracy to commit war crimes.").

⁶⁹ See Fitzpatrick, *supra* note 8, at 347 and 348.

⁷⁰ In considering whether terrorists should be drawn within the ambit of the law of armed conflict, Green suggests to draw a distinction "between organizations that are alleged by specific governments to be terrorist, even though they may be well organized, under some form of military command, who generally direct their activities against governmental or military installations and personnel, and who seek a state of their own, and those which, while they may be politically motivated, are not so set up and direct most of their activities against civilians and innocent third parties, defined as persons, institutions, establishments or states that have no direct connection with the conflict between the activists and the entity with their quarrel lies". See Green, *supra* note 46, at 165. This reasoning is, of course, based on the assumption that struggles for self-determination should be regarded as international armed conflicts. On this controversial question, see R. R. Baxter, *The Geneva Conventions of 1949 and Wars of National Liberation*, *Revista di diritto internazionale*, Vol. 57 (1974), 194, at 203 and Chadwick, *supra* note 47, at 30 et seq.

times of peace do not easily fit within the categories of international humanitarian law, because the system of the laws of war is based on the distinction between combatants and civilians. The application of the laws of war to peacetime terrorism cannot work unless terrorists are assimilated to combatants under the laws of war.⁷¹ The formal status of a combatant, however, may enhance the perceived standing of terrorists in an inadequate manner, by treating them as prisoners of war rather than common criminals.

Prisoners of war (POWs), for example, cannot be tried for the mere act of being combatants – that is, for taking up arms against other combatants. Instead, they are prosecuted for the same kind of offences for which the power that detains them could be tried, namely other common crimes, war crimes and crimes against humanity. Furthermore, Art. 118 of the Third Geneva Convention requires that prisoners of war be “repatriated without delay after the cessation of active hostilities”. Thus, if the captives are prisoners of war, they must eventually be returned to their home countries, because it is expected that they will resume their civilian lives. This principle does not make any sense in the context of peacetime terrorism. Finally a prisoner-of-war status would grant terrorists special rights which go beyond those of common prisoners. An excellent example is Art. 22 of the Third Geneva Convention, according to which internment in a penitentiary is not the rule, but rather the exception for prisoners of war.⁷² The provision reads: “Prisoners of war may be interned only in premises located on land and affording every guarantee of hygiene and healthfulness. Except in particular cases which are justified by the interest of the prisoners themselves, they shall not be interned in penitentiaries.”

a) Terrorists as unlawful combatants

Assuming that terrorist attacks carried out by private organizations may trigger an “armed conflict”, one may hardly deny these privileges to terrorists, arguing that members of terrorist organizations are “unlawful combatants” and not entitled to the POW status⁷³, because they did not comply with the laws of war.⁷⁴ Surely,

⁷¹ See also Stein, *supra* note 46, at 572.

⁷² This provision was invoked by General Manuel Antonio Noriega in his trials before U.S. courts for conspiracy to smuggle and produce cocaine. General Noriega attempted to divest U.S. courts from jurisdiction by claiming protection under the Geneva Conventions and immunity as a prisoner of war. See Susan B.V. Ellington, *United States v. Noriega as a Reason for an International Criminal Court*, *Dickinson Journal of International Law*, Vol. 11 (1993), 451, at 458 et seq.

⁷³ Non-privileged combatants are not entitled to the extensive trial rights of POWs under the Third Geneva Convention, but they are, in any event, entitled to a “fair and regular trial” and the fair trial protections provided by the Fourth Geneva Convention. See Cerone, *supra* note 1.

⁷⁴ See Hilaire McCoubrey, *International Humanitarian Law* (1998), 258 (“The most pernicious aspects of what is generally taken to be ‘terrorist’ activity are in any event implicitly placed outside the scope of legitimate combatancy in the course of armed conflict, in particular by the parameters set by Art. 4 A of 1949 Geneva Convention III and Arts. 43 (1) and 44 (3) of 1977 Additional Protocol I.”). For a similar argument with respect to the hijackers of September 11, see H. Wayne El-

the Regulations Annexed to the Hague Conventions Respecting the Laws and Customs of War on Land of 1899 and 1907 (Hague Regulations of 1899 and 1907)⁷⁵ expressly linked the concept of prisoners of war to that of lawful combatants, by laying down in Arts. 1 and 2 of the Regulations the categories of forces which may be regarded as “belligerents” to which “the laws, rights and duties of war apply”. Furthermore, some authority for the distinction between lawful (or privileged) and unlawful (or unprivileged) combatants⁷⁶ stems from the ruling of the Supreme Court of the United States in the *Quirin* case of 1942. The case concerned the military trial of eight Nazi saboteurs who landed on American soil in the midst of World War II carrying explosives and wearing uniforms that they promptly buried. In this case, the court noted:

“[T]he law of war draws a distinction between the armed forces and the 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.”⁷⁷

Moreover, when addressing the issue that the accused were members of the German armed forces, but dressed in civilian clothes, the Court added that “those who during time of war pass surreptitiously from enemy territory into our own, discarding their uniforms upon entry, for the commission of hostile acts involving destruction of life or property, have the status of unlawful combatants punishable as such by military commission”.⁷⁸

But the *Quirin* case, of course, preceded the adoption of the 1949 Geneva Conventions, which contain specific due process guarantees for all persons detained in time of war. Today, the concept of “unlawful combatants” has only a very limited meaning under current international law. Contrary to the solution adopted in the Hague Regulations of 1899 and 1907, Art. 4 A of the Third Geneva Convention

liott, POWs or Unlawful Combatants, September 11 and Its Aftermath, under <http://www.crime-sofwar.org>.

⁷⁵ See Regulations Respecting the Laws and Customs of War and Land, Art. 1, annexed to Convention No. IV Respecting the Laws and Customs of War on Land, October 18, 1907.

⁷⁶ See on this distinction, R. R. Baxter, “So-Called ‘Unprivileged Belligerency’: Spies, Guerillas and Saboteurs”, *British Yearbook of International Law*, Vol. 28 (1951), 323, at 343, and Yoram Dinstein, *The Distinction between Unlawful Combatants and War Criminals*, in: id. (ed.), *International Law at a Time of Perplexity* (1989), 103 et seq.

⁷⁷ See *Ex Parte Quirin et al.* (1942), 317 U.S. 1, 30-31. See also the justification of the concept of “unlawful combatancy” by Dinstein, *supra* note 76, at 105, “The distinction between lawful and unlawful combatants complements the corresponding distinction between combatants and civilians: the primary goal of the former is to preserve the latter. If combatants were free to melt away amid the civilian population, every civilian would suffer the results of being suspected as a masked combatant. Since it is desired to exempt non-combatants – as far as possible – from the calamities of war, it is necessary to guarantee that the distinction between civilians and combatants will be sharp and manifest”.

⁷⁸ *Ex Parte Quirin et al.*, *supra* note 77, at 35. For other case law of Israeli courts in this direction, see Green, *supra* note 46, at 133-155.

defines prisoners of war without any reference to the concept of lawful combatancy or belligerency. Furthermore, Art. 5 of the Third Geneva Convention incorporates a preliminary presumption for prisoner-of-war status in cases of doubt, by determining that if there is "any doubt" as to whether captured combatants should be recognized as prisoners of war, all persons "having committed a belligerent act or having fallen in the hand of the enemy shall enjoy prisoner of war protection until such time as their status has been determined by a competent tribunal".⁷⁹ There are only two categories of combatants who can properly be denied POW status – spies (Art. 46 Additional Protocol I) and mercenaries (Art. 47 Additional Protocol I). One may also hardly argue that persons who have failed to distinguish themselves from the civilian population forfeit their right to be treated as a prisoner of war. As Art. 85 of the Third Geneva Convention provides that persons who are guilty of war crimes shall retain their POW status, it is illogical to make an exception for persons who have violated this law by failing to distinguish themselves from the civilian population. Such an exception would imply that combatants who have indirectly endangered the protection of the civilian population by pretending to be civilians enjoy less protection than combatants, who although wearing uniforms, have directly prejudiced the protection of civilians by attacking them deliberately. The fact that persons who carry out attacks as disguised civilians can be punished for war crimes, provides sufficient safeguards for civilians and combatants against unlawful acts of war.⁸⁰ In addition, one may note that Art. 44 of Additional Protocol I, which reintroduced the notion of "combatants", has significantly lowered the threshold for establishing 'combatant' status, making the dis-

⁷⁹ U.S. officials have endorsed the government's adherence to this principle. In 1987, then-Deputy Legal Advisor to the U.S. State Department, Michael Matheson, stated that: "We [the United States] do support the principle that, should any doubt arise as to whether a person is entitled to combatant status, he be so treated until his status has been determined by a competent tribunal, as well as the principle that if a person who has fallen into the power of an adversary is not held as a prisoner of war and is to be tried for an offense arising out of the hostilities, he should have the right to assert his entitlement before a judicial tribunal and to have that question adjudicated." See Remarks of Michael J. Matheson, *American University Journal of International Law & Policy*, Vol. 2 (1987), 425-426. According to the U.S. Military Judge Advocate General Handbook, the U.S. armed forces used such tribunals in conflicts from Vietnam to the Gulf War: "When doubt exists as to whether captured enemy personnel warrant POW status, Art. 5 [Third Geneva Convention] Tribunals must be convened. It is important that judge advocates be prepared for such tribunals. During the Vietnam conflict, a Directive established procedures for the conduct of Art. 5 Tribunal ..." The accompanying footnote states: "No Art. 5 Tribunals were conducted in Grenada or Panama, as all captured enemy personnel were repatriated as soon as possible. In the Gulf War, Operation Desert Storm netted a large number of persons thought to be [Enemy Prisoners of War], who were actually displaced civilians ... Tribunals were conducted to verify the status of the detainees. Upon determination that they were civilians who had taken no part in hostilities, they were transferred to refugee camps." See U.S. Military Judge Advocate General Operational Law Handbook (M. Lacey & B. Bill, eds., 2000), Chapter 5, 7. For a narrow interpretation of the Art. 5 presumption, see Dinstein, *supra* note 76, at 113, who notes: "It is possible to confine the operation of Art. 5 to cases like that of a civilian accompanying the armed forces, who has lost his identity card."

⁸⁰ Dinstein concedes that "some confusion occasionally arises in regard to the dual concepts of unlawful combatancy and war crimes". See Dinstein, *supra* note 76, at 115.

inction between lawful and unlawful combatants virtually redundant.⁸¹ It is therefore highly critical to extend the category of unlawful combatants to private actors in an attempt to deny them access to any court or other independent tribunal until the cessation of the “war on terrorism”.⁸²

It is also rather obvious that the qualification of terrorists as “unlawful combatants” does not produce significant advantages in the fight against terrorism. International terrorist groups, which are able to launch attacks such as those of September 11, are usually large networks. It would be difficult to establish that those members who did not participate in the immediate decision-making process and merely supported the attacks in one way or the other are equally unlawful combatants.⁸³ In this context, Art. 5 of the Third Geneva Convention is again of importance, because it requires an individual determination of the status of each ‘combatant’ in cases of doubt.

b) The legal status members of the Taliban and Al Qaeda

The legal dispute over the status of members of Al Qaeda and the Taliban captured within the “war against terrorism”⁸⁴ illustrates that there are particular difficulties in applying the rules of international humanitarian law to anti-terrorist operations.

⁸¹ For an analysis see, Christopher Greenwood, *Terrorism and Humanitarian Law – The Debate Over Additional Protocol I*, Israel Yearbook on Human Rights, Vol. 19 (1989), 188, at 201, noting that “[t]he new rules in Protocol I largely assimilate regular and irregular forces, abolishing differences such as that a regular who committed a war crime did not forfeit his right to POW status, whereas an irregular did”. Art. 44 (3) second sentence of Additional Protocol I states: “Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly: (a) during each military engagement; and (b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.”

⁸² See also Fitzpatrick, *supra* note 8, at 348 [“Al Qaeda captives are suspected of past or future terrorist crimes, not violations of the laws of war, and no legal basis exists to detain or try them as unlawful combatants.”].

⁸³ Curiously, Mr. al Mujahir, a U.S. citizen and suspected terrorist involved in a “dirty bomb attack” on the U.S. was recently qualified as an “enemy combatant” by John Ashcraft. In explaining his view, Mr. Ashcraft relied again on the *Ex Parte Quirin* decision, in which the U.S. Supreme Court upheld the trial by a presidentially created military tribunal of persons caught on U.S. soil for acts of waging war against the U.S. in civilian clothing. This is a troublesome development, because in this case the link to an armed conflict is even less direct than in the case of the September 11 attacks.

⁸⁴ Although the International Committee of the Red Cross (ICRC) rarely acknowledges publicly differences with governments, it did so with regard to the United States’ refusal to treat the Taliban and Al Qaeda detainees as POWs. On February 8, the day after announcement of the United States’ position, Darcy Christen, a spokesperson for the ICRC, said of the detainees: “They were captured in combat [and] we consider them prisoners of war.” The ICRC emphasized that it was up to a court to decide if a detainee was not a POW. In its Press Release of February 9, the ICRC again stated that captured “members of armed forces and militias associated to them” are protected by Geneva III and that there “are divergent views between the United States and the ICRC” as to the procedures “on how to determine that the persons detained are not entitled to prisoner of war status”.

The U.S. government has made conflicting statements with regard to the treatment of captured members of the Taliban and Al Qaeda.⁸⁵ When transporting the first detainees to Guantanamo Bay/Cuba in January 2002, the Bush Administration announced that it did not consider members of the Taliban or Al Qaeda forces to be prisoners of war, but rather “unlawful combatants” entirely outside the scope of the Geneva Conventions. In early February, having come under criticism for these views, the administration corrected its initial stance. Rather than claiming that the Geneva Conventions did not even apply to the armed conflict in Afghanistan, the U.S. President determined that the rules of the Geneva Conventions applied to the hostilities with the Taliban, but not the conflict with Al Qaeda. The President stated at the same time that “neither the Taliban, nor Al Qaeda detainees are entitled to POW status”.⁸⁶ The United States stated publicly:

“Under Art. 4 of the [Third] Geneva Convention, ... Taliban detainees are not entitled to POW status ... The Taliban have not effectively distinguished themselves from the civilian population of Afghanistan. Moreover, they have not conducted their operations in accordance with the laws and customs of war ... Al Qaeda is an international terrorist group and cannot be considered a state party to the Geneva Convention. Its members therefore are not covered by the Geneva Convention, and are not entitled to POW status under the treaty.”⁸⁷

Further, the U.S. has made it clear that it considers detainees as unlawful combatants. Specifically, administration officials explained that the detainees did not meet the following criteria for recognition as a prisoner of war: being under a responsible command; having a fixed distinctive sign recognizable at a distance; carrying arms openly and conducting their operations in accordance with the laws and customs of war. These four criteria stem originally from Art. 1 of the Hague Regulations of 1899 and 1907, which defined the qualifications of “belligerents”, that is of groups entitled to take part in armed combat as follows:

“The laws, rights and duties of war apply not only to armies, but also to militias and volunteer corps fulfilling the following conditions:

- To be commanded by a person responsible for his subordinates;
- to have a fixed distinctive emblem recognizable at a distance;
- to carry arms openly; and
- to conduct their operations in accordance with the laws and customs of war.”

The 1949 Geneva Conventions, however, followed a different approach. They did not define “belligerents” or “combatants” as such, but incorporated the above-mentioned criteria in the definition of “prisoners of war”. Art. 4 A of the Third Geneva Convention provides that:

⁸⁵ See also George A. Lopez, *The Style of the New War: Making the Rules as We Go Along*, *Ethics & International Affairs*, Vol. 16 (2002), 21, at 25 et seq.

⁸⁶ See White House, Fact Sheet, February 7, 2002, at 1.

⁸⁷ See Statement by the U.S. Press Secretary, Washington, D.C., February 7, 2002, reaffirmed in Inter-American Commission on Human Rights, *Organization of American States, Response of the United States to Request for Precautionary Measures – Detainees in Guantanamo Bay, Cuba*, April 15, 2002, 10-11 (file on copy with the author).

"[p]risoners of war, in the sense of the ... Convention, are persons belonging to one of the following categories, who have fallen in the power of the enemy:

(1) Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.

(2) Members of other militias and members of volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions:

(a) that of being commanded by a person responsible for his subordinates;

(b) that of having a fixed distinctive sign recognizable at a distance;

(c) that of carrying arms openly;

(d) that of conducting their operations in accordance with the laws and customs of war.

(3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power."

When analyzing the structure of Art. 4 A, one may easily note that Art. 4 A (2) containing the four relevant conditions applies to militias, volunteer corps and resistance movements which do not form part of the regular armed forces to a conflict, whereas paragraphs (1) and (3), relating to regular armed forces, make no explicit reference to these conditions. It has been claimed that the four conditions of Art. 4 A (2) apply to regular forces as well.^{88, 89} However, in view of the express wording of the provision, which mentions the Art. 4 A (2) criteria exclusively in the context of irregular armed forces listed in that paragraph, but not in the case of members of the armed forces within the meaning of Art. 4 A(1) or 4 A (3), it cannot be concluded that the four requirements are constitutive conditions of Art. 4 A (1) to (3).⁹⁰ It is also difficult to assume that the drafters of the Convention took it for granted that the regular armed forces would comply with all of these standards because such an understanding would render Art. 4 A (1) pointless. The question which conditions forces within the meaning of Art. 4 A (1) and (3) have to fulfill in order to benefit from POW status must rather be determined on the basis of the

⁸⁸ See Dinstein, *supra* note 76, at 105 ("Although the text appears to be relevant only to irregular forces, members of regular armed forces must also satisfy these conditions.").

⁸⁹ In the *Kassem* trial an Israeli military tribunal held that the four conditions of Art. 4 A (2) apply to regular forces as well. See Israel Military Court, *Military Prosecutor v. Omar Kassem and Others* (1969), *Law and Courts in the Israeli Held Areas*, 25, at 32.

⁹⁰ See Helmut Strebel, *Die Genfer Abkommen vom 12. August 1949, Fragen des Anwendungsbereichs*, ZaöRV 1950, 118, at 132; Allan Rosas, *The Legal Status of Prisoners of War* (1976), 328 and George H. Aldrich, *New Life for the Laws of War*, AJIL, Vol. 75 (1981), 764, at 768-89, arguing that uniformed armed forces do not lose their POW status no matter what violations of the law their units commit, while guerrilla groups are held to a stricter standard. See also Rubin, *supra* note 46, at 222 ("Art. 4 of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War ... reorganizes the Hague formulation and expands it considerably. It grants soldiers' privileges, including prisoner of war status, to member of regular armed forces even ... regardless of whether those forces carry out their operations in accordance with the laws and customs of war. The provisions regarding 'carrying arms openly' and 'conducting operations in accordance with the laws and customs of war' are retained for members of militias and other volunteer corps.").

Third Convention as a whole and customary international law.⁹¹ Their failure to meet one of the requirements of Art. 4 A (2) may lead to a loss of POW status. However, the entitlement of armed forces under Art. 4 A (1) and (3) to POW status does not necessarily depend on the observance of all of them.

On the basis of these principles, it is easy to establish that members of the Taliban forces or militia groups that formed part of the forces were entitled to POW status in the context of the conflict in Afghanistan after October 7, 2001. It has been asserted that members of the Taliban armed forces were not entitled to POW status, because the Taliban have not been recognized by the large majority of states as the recognized government of Afghanistan. But this argument is untenable. The applicability of the Geneva Conventions is based on the existence of an armed conflict, which does not require formal recognition of one state by another. Furthermore, it follows directly from Art. 4 A (3)⁹² that the authority upon which a regular armed force depends must not be recognized by the capturing power to be entitled to POW status.⁹³ The Taliban fighters also seemed to meet the requirements of a regular force. They were organized under the authority of a central command, acting as a *de facto* sovereign government. It can hardly be argued that Taliban fighters did not qualify as POWs because they did not sufficiently display their combatant status. The Taliban were distinguishable from their own civilian personnel, because they obviously wore black turbans and had scarves that indicated to what force they were attached. The fact that they did not necessarily wear a uniform is irrelevant, because the requirements of Art. 4 A (2) do not automatically apply to regular forces. While it is generally assumed that regular forces wear uniforms, no specific rule seems to have emerged stating that the uniform is the only way which a member of such a force can distinguish himself from the civilian population.⁹⁴ The turban, which was the sign of the Taliban fighters, may be viewed as an identifiable emblem that was appropriate to their culture and traditions. Moreover, such a practice clearly meets the requirements of Art. 4 A, given that it is even questionable whether the condition of a fixed distinctive sign represents at all a necessary prerequisite of combatant or POW status.⁹⁵

It is more difficult to claim that members of Al Qaeda who fought on the side of the Taliban enjoy POW status. What needs to be determined is the relationship between Al Qaeda and the regular Taliban forces, which is essentially a matter of fact. The strict requirements of Art. 4 A (2) must clearly be met, if the Al Qaeda network constituted *de facto* an independent terrorist organization, which did not

⁹¹ See Rosas, *supra* note 90, at 328.

⁹² It does not make a difference in substance, whether one regards the forces of the Taliban as "armed forces of a Party to the conflict" or as armed forces not recognized by the detaining government within the meaning of Art. 4 (3).

⁹³ See McCoubry, *supra* note 74, at 134.

⁹⁴ See Rosas, *supra* note 90, at 348.

⁹⁵ See Rosas, *supra* note 90, at 354 ("As to regular forces, no one even seems to have asserted that such forces may be collectively deprived of their status if they have not complied with the conditions of a fixed distinctive sign and the open carrying of arms.").

form part of the Taliban army, but operated as an "other" militia or volunteer corps within the meaning of Art. 4 A (2). In this case, members of Al Qaeda could hardly be considered as irregular forces entitled to POW status. While one may assume that the cell structure of Al Qaeda was in fact governed by a chain of command, the members of the organization do not fulfil the requirement of Art. 4 A (2) d, because of Al Qaeda's unwillingness to apply a "Geneva" regime in their own activities. The Al Qaeda network represents an organization that openly and notoriously spreads terror and has as its goal targeting civilians.⁹⁶ These objectives are inconsistent with the laws and customs of war. It is quite telling that other terrorist groups such as the IRA in Northern Ireland and ETA in the Basque territories of Northern Spain have not been recognized as legitimate combatants.⁹⁷ Similarly, Israeli courts have refused to grant POW status to members of the PLO, arguing that they did not carry arms openly and violated the laws and customs of war.⁹⁸

But the test under Art. 4 A (2) would, on the other hand, be irrelevant, if it could be established that Al Qaeda fighters were members of a militia movement forming part of the Taliban forces under Art. 4 A (1), which does not expressly mention additional criteria for the enjoyment of POW status.⁹⁹ This may have well been the case in the military operation beginning on October 7¹⁰⁰, but cannot be determined without further factual and individual knowledge about the structure of the Taliban forces.

It is precisely in such situations, involving both questions of fact and questions of law that Art. 5 of the Third Geneva Convention comes into play¹⁰¹, which sets limits to the discretion of the detaining power, by granting captives the right to judicial determination under the Geneva Conventions before they are denied POW status.¹⁰² This was recently confirmed by the Inter-American Commission on Hu-

⁹⁶ Wedgwood goes one step further, arguing that "al-Qaeda members have not fulfilled the prerequisite conditions of the Third Geneva Convention – failing to observe the laws of war, or to wear identifying insignia, or to carry arms openly – and may thus fairly be considered as 'unlawful combatants'". See Wedgwood, *supra* note 68, at 13.

⁹⁷ See McCoubrey, *supra* note 74, at 136.

⁹⁸ See *Military Prosecutor v. Omar Mahmud Kassem and Others*, *supra* note 89.

⁹⁹ Elliott takes the view that Al Qaeda members should be treated as prisoners of war, if it is determined that they fall within the terms of Art. 4 (1). See Elliott, *supra* note 74.

¹⁰⁰ The military part of Al Qaeda appears to have had an integrated relationship with the Taliban military forces. Accordingly, it cannot be excluded that Art. 4 (1) is the decisive provision governing the question of POW status of Al Qaeda members.

¹⁰¹ See also Alfred B. Rubin, *The New World Disorder: Applying the Geneva Conventions: Military Commissions, Armed Conflict, and Al-Qaeda*, *The Fletcher Forum of World Affairs*, Vol. 26 (2002), 79, at 81: "[A] fairly clear and simple solution to the entire issue of handling Al-Qaeda members can be found in the Geneva Conventions. Under the 1949 Geneva Prisoners of War Convention, to which the United States, Afghanistan, and just about all other countries are parties, an Art. 5 tribunal results in the incarceration of any accused as a prisoner of war, even if he or she has never committed vile acts. Even if the 'armed conflict' has not been declared by at least one of the parties ..., those soldiers who have not violated the international laws of war are still 'prisoners of war' until the cessation of active hostilities."

¹⁰² For a different understanding, see David Rivkin, *Treatment of Al Qaeda and Taliban Detainees Under International Law*, Remarks at the Meeting of the Federal Society on February 27, 2002,

man Rights, which, by its decision of March 3, 2002, issued precautionary measures requesting the U.S. Government to take the urgent measures necessary to have the legal status of the detainees held in Guantanamo Bay determined by a competent tribunal. The Commission held:

"According to official statements from the United States government, its Executive Branch has most recently declined to extend prisoner of war status under the Third Geneva Convention to the detainees, without submitting the issue for determination by a competent tribunal or otherwise ascertaining the rights and protection to which the detainees are entitled under US domestic or international law. To the contrary, 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 the light of the foregoing considerations ... the Commission considers that precautionary measures are both appropriate and necessary in the present circumstances, in order to ensure that the legal status of each of the detainees is clarified and that they are afforded the legal protections commensurate with the status that they are found to possess ...".¹⁰³

This finding illustrates very clearly that the denial of POW status cannot be based on the mere invocation of the status of "unlawful combatancy", but requires an independent and individual determination of the status of each detainee. Any generalized application of the laws of war to terrorist acts, which would be based on the understanding that terrorists are bound by the obligations under the Geneva Convention, while being exempted from their privileges, is therefore hardly compatible with the existing law.

4. The Relationship between Humanitarian Law and International Human Rights Law

Furthermore, the treatment of prisoners in Guantanamo Bay has raised another issue, which is of fundamental importance for the development of a coherent legal framework governing violence emanating from global terrorist networks: the interplay between international human rights laws and international humanitarian law in situations of armed conflict.

Federalist Society for Law and Public Policy Studies, available under <http://www.fed-soc.org>. Rivkin argues that Art. 5 was not meant to give detainees an opportunity to adjudicate whether they are lawful or unlawful combatants. He notes that Art. 5 was meant to address situations in which lawful combatants are unable to present factual evidence of their lawful combatancy, because they lost their documents or took off their uniform in the course of the hostilities. But such a narrow interpretation contrasts with both the wording and the object and purpose of Art. 5.

¹⁰³ See *Inter-American Commission on Human Rights*, Request for Precautionary Measures, Decision of 13 March 2002, reprinted in I.L.M., Vol. 41 (2002), 532, at 533.

a) The parallel applicability of human rights law and international humanitarian law in situations of armed conflict

International humanitarian law and human rights law complement each other and provide minimum standards of treatment for persons involved in armed conflict. While international humanitarian law is specifically designed to regulate the conduct of hostilities with state and non-state actors, international human rights law imposes obligations on states to ensure the protection of civil liberties at all times. Both areas of law come into operation simultaneously in situations of armed conflict.¹⁰⁴

In times of armed conflict, states are generally obliged to protect the core of non-derogable rights guaranteed under human rights law and those treaty rights, which have not been subject to a formal derogation in accordance with the derogation mechanism provided for under the relevant treaty instrument. Furthermore, in case of an apparent inconsistency between human rights law and international humanitarian law, some human rights provisions may defer to the more specific provisions of humanitarian law. It is, for example, a well established rule that in times of armed conflict, the right to life is not violated by the lawful killing of a combatant, although the right to life is normally a non-derogable right. Moreover, in a situation of armed conflict, the right to liberty may be distinct from that applicable in peacetime. In such situations, the standards of human rights law must be interpreted by reference to international humanitarian law as the applicable *lex specialis*. However, as a general principle, human rights law and international humanitarian law are considered as complementary and overlapping bodies of law.¹⁰⁵ This was the position adopted by the ICJ in the *Nuclear Weapons Advisory Opinion*¹⁰⁶,

¹⁰⁴ Human rights law may extend beyond the borders of a state and govern situations, where a state has *de facto* control over another territory or where it exercises its authority abroad. For the extraterritorial application of the ICCPR, for example, see Theodor Meron, Extraterritoriality of Human Rights Treaties, AJIL, Vol. 89 (1995), 78, et seq. International humanitarian law applies in the territory of warring factions and covers therefore measures taken by a state on foreign soil. The difference between both two strands of law is that international humanitarian protects primarily persons associated with one party to the conflict who find themselves in hands of the "enemy", whereas the nationality of the individual or its affiliation to a party to the conflict is generally not relevant for the application of human rights law. Furthermore, the degree of protection of individuals under human rights law may vary according to the circumstances. International and regional human rights treaties usually contain a core of non-derogable rights that must be protected at all times, including *inter alia*, the right to life, freedom from torture and freedom from inhuman or degrading treatment and punishment. But most of the other rights may either be restricted, or they may be suspended in times of "public emergency".

¹⁰⁵ See also Jochen Abr. Frowein, The Relationship between Human Rights Regimes and Regimes of Belligerent Occupation, Israel Yearbook on Human Rights, Vol. 28 (1998), 1, at 16 ("Human rights treaties remain generally applicable in situations of armed conflict ... International humanitarian law takes precedence over human rights treaties as *lex specialis*, in so far as it may constitute a special justification in armed conflicts for interference with rights protected under human rights treaties but does not generally rule out the applicability of human rights treaties in situations of armed conflict.").

¹⁰⁶ ICJ, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion of 8 July 1996, ICJ Rep. 1996, 226 at 240, para. 25.

where the court observed in relation to rights protected under the International Covenant on Civil and Political Rights that "the protection of the International Covenant on Civil and Political Rights does not cease in times of war, except by operation of Art. 4 of the Covenant ..." ¹⁰⁷. The same approach has also been adopted by the United Nations General Assembly ¹⁰⁸, the Security Council ¹⁰⁹ and the Commission on Human Rights ¹¹⁰, as well as the European Court on Human Rights ¹¹¹.

The complementary nature of human rights law and international humanitarian law has been called into question by the United States in context of the detentions of members of Al Qaeda and the Taliban in Guantanamo Bay. ¹¹² The U.S. government has taken the view that "international human rights law is not applicable to the conduct of hostilities or the capture and detention of enemy combatants, which are governed by the more specific laws of armed conflict." ¹¹³ The view is seriously flawed from the perspective of human rights law, because international human rights law applies at all times, in peacetime and in situations of armed conflict. ¹¹⁴ The ICCPR, to which the U.S. is a party, sets forth a specific procedure that must be followed when a state wishes to derogate from the guarantees of the treaty. Under this procedure, a state must immediately inform the other parties to the Cove-

¹⁰⁷ Ibid., at para. 25.

¹⁰⁸ See, e.g., Resolution 2444 (XXIII), Respect for Human Rights in Armed Conflicts, GA Res. 2444, UN GAOR, 23rd Sess., Supp. No. 18, at 50, UN Doc. A/7218, pmb. (1969); Respect for Human Rights in Armed Conflicts, Report of the Secretary-General, UN Doc. A/8052, at Annex 1 (1970).

¹⁰⁹ See, e.g., SC Res. 237, pmb., UNSCOR, 28th Sess., Res. & Dec., at 5 UN Doc. S/INF/22/Rev.2 (1967) ("essential and inalienable human rights should be respected even during the vicissitudes of war"); see also the 1999 statement of the President condemning "attacks against civilians, especially women and children and other vulnerable groups, including also refugees and internally displaced persons in violation of the relevant rules of international law, including those of international humanitarian and human rights law." Protection of civilians in armed conflict, UN Doc. S/PRST/1999/6, para. 2.

¹¹⁰ See, e.g., resolutions of the Commission in regard to violations of human rights and humanitarian law in both international and non-international armed conflicts in Kuwait, the former Yugoslavia and Rwanda, UN Commission on Human Rights (CHR) Res. 1991/67, UN ESCOR, Supp. No. 2 at 154, UN Doc. E/1991/22, E/1991/22, E/CN.4/1991/91 (Kuwait); CHR Res. 1995/91, UN ESCOR, Supp. No. 4, at 275, para.2, UN Doc. E/1995/23, E/CN.4/1995/176 (1995) (Rwanda); CHR Res. 1995/89, ibid. at 262, para. 10 (Bosnia-Herzegovina).

¹¹¹ See European Court of Human Rights, *Ergi v. Turkey*, 1998-IV, paras. 79, 81, 86; *Mcann v. United Kingdom*, Ser. A., Vol. 324, paras. 194, 200, 213 (1995).

¹¹² See on this issue also Koh, *supra* note 8, at 338 and Fitzpatrick, *supra* note 8, at 350 et seq.

¹¹³ See Inter-American Commission on Human Rights, Organization of American States, Response of the United States to Request for Precautionary Measures – Detainees in Guantanamo Bay, Cuba, April 15, 2002, p. 21 (file on copy with the author).

¹¹⁴ See also OAS, Request for Preliminary Measures, Decision of March 13, 2002, *supra* note 103 ("It is well recognized that international human rights law applies at all times in peacetime and in situations of armed conflict. In contrast, international humanitarian law generally does not apply in peacetime ... Further, in situations of armed conflict, the protections under international human rights and humanitarian law may complement and reinforce one another, sharing as they do a common nucleus of non-derogable rights and a common purpose of promoting human life and dignity.").

nant of the specific provisions from which it has derogated, and must use as intermediary the Secretary-General of the United Nations. The decision whether such an emergency has arisen is not a unilateral decision of the contracting party, but ultimately rests with the Human Rights Committee which supervises the implementation of the treaty. Any failure to abide by these rules, calls into question the very essence of international human rights protection, because the law governing derogation is one of the cornerstones for the assessment of the lawfulness of any civil liberty infringement.¹¹⁵

Furthermore, some of the rights of the Covenant even remain applicable in a state of emergency. In this context, it is worth recalling the principles established by the Human Rights Committee in August 2001 in its General Comment No. 29, where the Committee stated:

"It is inherent in the protection of [non-derogable] rights that they must be secured by procedural guarantees, including, often judicial guarantees. The provisions of the Covenant relating to procedural safeguards may never be subject to measures that would circumvent the protection of non-derogable rights ... Thus, for example, as Art. 6 is non-derogable in its entirety, any trial leading to the imposition of the death penalty during a state of emergency must conform to the provisions of the Covenant, including all the requirements of Arts 14 [fair trial] and 15 [prohibition on retroactive criminal penalties]."¹¹⁶

Later, the Committee added 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".¹¹⁷

b) Deficiencies of the U.S. Military Order of November 13, 2001

The U.S. Military Order sharply curtails some of the guarantees of the Covenant, including non-derogable rights. Sec. 2 of the Military Order permits the President to authorize the arrest and detention of people on vague and overly broad grounds. Specifically, the provision allows the military to take a person into cus-

¹¹⁵ It is worth recalling that on January 16, 2002, the United Nations High Commissioner for Human Rights issued a statement regarding the Guantanamo detentions, noting that: All persons detained in this context are entitled to the protection of international human rights law and humanitarian law, in particular the relevant provisions of the International Covenant on Civil and Political Rights (ICCPR) and the Geneva Conventions of 1949 ... All detainees must at all times be treated humanely, consistent with the provisions of the ICCPR and the Third Geneva Convention. Any possible trials should be guided by the principles of fair trial, including the presumption of innocence, provided for in the ICCPR and the Third Geneva Convention". Statement of High Commissioner for Human Rights on Detention of Taliban and Al Qaeda Prisoners at US Base in Guantanamo Bay, Cuba, 16 January 2002, at: <http://www.unhcr.ch/hurricane/hurricane.nsf/newsroom>.

¹¹⁶ See Human Rights Committee, General Comment No. 29 of 31 August 2001 (States of Emergency), CCPR/C/21/Rev.1/Add.11, para. 15.

¹¹⁷ See Human Rights Committee, General Comment No. 29, para. 16.

tody and before a military commission, if the President states that he has "reason to believe" that the individual has "aided or abetted, or conspired to commit acts of international terrorism ... that threaten to cause or have as their aim to cause ... adverse effects on the United States foreign policy or economy". Due to the absence of a further definition of "acts of international terrorism", the Order fails to meet the standards of the prohibition against arbitrary arrest and detention. Furthermore, the Order directly undermines Art. 9 of the Covenant, by vesting the Secretary of Defense with the authority to determine the place and length of detention without any judicial oversight. In addition, the Order denies the right to appeal to a higher tribunal. This follows clearly from Sec. 7 (b) (2) of the President's Order, which provides that "the individual shall not be privileged to seek any remedy or maintain any proceeding ... in (i) any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal". While a three-member panel consisting of three Military Officers may recommend a review of the trial under the Military Order No. 1 of March 21, 2002¹¹⁸, the final decision over the review is not taken by an independent judicial body, but rests with the President or the Secretary of Defense as the President's designate.¹¹⁹ This is especially critical, because the Order authorizes the commissions to inflict death sentences.¹²⁰ Finally, the Order applies only to non-U.S. citizens, which is discrimination on the basis of national origin prohibited under Arts. 14 (1), 14 (3) and 26 of the Covenant.¹²¹

Although the Military Order No. 1 has improved the human rights protection of the detainees, by introducing the procedure of the review panels and by laying down certain minimum fair trial guarantees, such as the right to be informed about the charges brought against him¹²² and the presumption of innocence¹²³, it has failed to correct the above-mentioned flaws.

¹¹⁸ See Sec. 6 H (4) of the United States Department of Defence: Military Order No. 1 of 21 March 2002, reprinted in I.L.M., Vol. 41 (2002), 725.

¹¹⁹ See Sec. 6 H (5) and (6) of the Military Order No. 1.

¹²⁰ See Sec. 4 (a) of the Military Order of November 13, 2001. See also Fitzpatrick, *supra* note 8, at 352 ("In capital cases tried by the commissions established by President Bush, therefore, the Human Rights Committee would question any suspension of the fair trial rights set out in Art. 14.") The European Court of Human Rights has ruled that the review of British military tribunal decisions by the convening authority itself violates the suspects right to an independent and impartial tribunal and to an appeal by a tribunal meeting the requirements of Art. 6 of the European Convention on Human Rights, see ECHR, *Findlay v. United Kingdom*, Vol. 30 (1997), 263.

¹²¹ See also Paust, *supra* note 8, at 17.

¹²² See Sec. 5 A of the Military Commission Order No. 1 ("The Prosecution shall furnish to the Accused, sufficiently in advance of trial to prepare a defense, a copy of the charges in English, and if appropriate, in another language that the Accused understands.").

¹²³ See Sec. 5 B of the Military Commission Order No. 1 ("The Accused shall be presumed innocent until proven guilty.").

c) Military commissions and international human rights law

Moreover, as has been pointed out by one commentator, "military commissions are generally suspect" under human rights law.¹²⁴ Military commissions may, ultimately, be lawfully established for the trial of "unlawful combatants."¹²⁵ However, their use as a mechanism to try civilians is highly controversial. The Human Rights Committee stated in General Comment 13 that it "notes the existence, in many countries, of military or special courts which try civilians", and that "[w]hile the covenant does not prohibit such categories of courts, nevertheless the conditions which it lays down clearly indicate that the trying of civilians by such courts should be very exceptional and take place under conditions which genuinely afford the full guarantees of Art. 14".¹²⁶ Furthermore, in 1999, the Inter-American Commission on Human Rights confirmed this view, by condemning the use of military commissions in Peru on the ground that civilians should be tried in civilian courts.¹²⁷

The President's Military Order conflicts with this principle because it is intended to govern a much broader group of criminals than those who have committed war crimes. The order explicitly applies to "members" of Al Qaeda¹²⁸, people complicit in "acts of international terrorism"¹²⁹ and to those who have knowingly "harbored" such persons¹³⁰. This approach is legally questionable because it is far from obvious that conduct such as membership in Al Qaeda or the harboring of terrorists violates the laws of war.¹³¹ Moreover, it is evident that not every "act of international terrorism" amounts to violation of the laws of war.¹³² Trying individuals by military commissions is therefore a controversial step, and even more so, because the

¹²⁴ See Paust, *supra* note 8, at 10.

¹²⁵ Under the Geneva Conventions, POWs responsible for war crimes and other offences shall be tried by regular military courts. Military commissions may only be used to try non-POWs engaged in armed conflict.

¹²⁶ See Human Rights Committee, General Comment No. 13 of 13 April 1984 (Art. 14), para. 4.

¹²⁷ See Inter-American Court of Human Rights, Judgment of 30 May 1999, *Castillo Petruzzi*, Ser. C, No. 52. See on this decision also Jeanine Bucherer, *International Decisions*, AJIL, Vol. 95 (2001), 171.

¹²⁸ See Sec. 2 (a) (1) (i) of the Military Order of November 13, 2001.

¹²⁹ See Sec. 2 (a) (1) (ii) of the Military Order of November 13, 2001.

¹³⁰ See Sec. 2 (a) (1) (iii) of the Military Order of November 13, 2001.

¹³¹ Zacarias Moussaoui, for example, the suspected twentieth hijacker of the September 11 attacks was a prime target of the Military Order. He was arrested in Minnesota in August 2001 for suspected violations of immigration laws. It is difficult to assert that he was involved in an armed conflict.

¹³² The U.S. practice at Guantanamo Bay suggests that the distinction between civilians and war crimes suspects is currently not fully respected by the United States. Some of the detainees at Guantanamo Bay were not captured on any battlefield in the course of the on-going hostilities. Six of them, for example, are Algerian citizens arrested by U.S. authorities extra-judicially in Bosnia in January 2002. As non-combatants arrested in Bosnia and currently held under suspicion of "planning attacks on U.S. interests in Bosnia, these six would fall into the category of civilians facing criminal indictment and prosecution. Similarly, some of the Kuwaiti nationals detained at Guantanamo were arrested not in Afghanistan, but in Pakistan.

United States has on several occasions protested against the use of military tribunals to try its own citizens in other countries.¹³³

III. September 11 and the Right to Self-Defence

Perhaps the most important development of international law in the aftermath of September 11 is a change of perception concerning the exercise of self-defence. The attacks against the World Trade Center and the Pentagon have made it entirely clear that the means of modern technology and warfare enable terrorist groups to launch massive attacks, which are typical of the use of force one state against another. The international legal response to the September 11 attacks provides evidence that the law of self-defence is moving towards the admissibility of the use of force against terrorist acts under Art. 51 of the Charter.¹³⁴ However, some ambiguity remains, under which circumstances a state may invoke the right to self-defence to justify forcible counter-terror operations against terrorist groups or other states.

1. Alternative Justifications for the Strikes against Afghanistan?

It is, first of all, rather clear that the use of force against Afghanistan within the framework of Operation "Enduring Freedom" was essentially based on Art. 51 of the Charter. The reliance on self-defence follows clearly from the statements of the Permanent Representatives of the United States of America¹³⁵ and the United Kingdom¹³⁶ to the President of the Security Council of October 7, 2001. Furthermore, other justifications were not at hand. The conditions of the doctrine of humanitarian intervention, which has been used to justify the NATO strikes against the FRY, were clearly not fulfilled in the case of Afghanistan.¹³⁷ While there have been human rights violations and atrocities in Afghanistan before October 7, 2001,

¹³³ In its Annual Country Report on Human Rights Practices, the U.S. State Department has severely criticized the use of military tribunals in China, Egypt and Peru. For a survey, see Olshansky, *supra* note 25, at 7.

¹³⁴ See also Frederic L. Kirgis, *supra* note 31, and Murphy, *supra* note 1, at 49.

¹³⁵ See UN Doc. S/2001/946 of October 7, 2001: "[I]n accordance with the inherent right of individual and collective self-defence, the United States armed forces have initiated actions designed to prevent and deter further attacks on the United States. These actions include measures against Al Qaeda terrorist training camps and military installations of the Taliban regime in Afghanistan."

¹³⁶ See UN Doc. S/2001/947 of October 7, 2001: "These forces have now been employed in exercise of the inherent right of individual and collective self-defence, recognized in Art. 51, following the outrage of 11 September, to avert the continuing threat of attacks from the same source. My Government presented information to the United Kingdom Parliament on 4 October which showed that Usama bin Laden and his Al Qaeda terrorist organization have the capability to execute major attacks, claimed credit for past attacks on United States targets, and have been engaged in a concerted campaign against the United States and its allies. One of the stated aims is the murder of United States citizens and attacks on the allies of the United States."

¹³⁷ See also Tomuschat, *supra* note 1, at 539.

they have not quite reached a level which would allow to draw a parallel to the situation of Kosovo. Moreover, the fact that the Taliban acted as an oppressive and discriminatory *de facto* government of Afghanistan did not suffice alone to justify the use of force. Reference has been made to the existence of a "state of necessity" after September 11¹³⁸, which constitutes "a ground for precluding the wrongfulness" of an unlawful act under Art. 25 of the Draft Articles on State Responsibility of the International Law Commission (ILC).¹³⁹ But this argument cannot be used to justify the legality of the use of military force against the Taliban or Al Qaeda, because Art. 26 of the ILC's Draft Articles excludes any justification or excuse of a breach of a state's obligation under a peremptory rule of general international law¹⁴⁰, such as the prohibition of the use of force enshrined in Art. 2 (4) of the Charter.¹⁴¹ Furthermore, one cannot argue that the military action against Afghanistan was since its beginning a lawful "intervention by invitation". If a consent was given, it came only from the Northern Alliance. The Northern Alliance, however, was not the legitimate government of Afghanistan and therefore not authorized to make assistance requests on behalf of Afghanistan.¹⁴² The presence of foreign troops in Afghanistan after the fall of the Taliban may be based on an "intervention by invitation" by the new Afghan interim government.¹⁴³ But such an invitation does not have a retroactive effect, because a state is not permitted to invade the territory of another state simply because that invasion may later be welcomed by the people of that state or by the new government established by the invader.¹⁴⁴ Finally, it cannot be assumed that Afghanistan benefited no longer from the protection of Art. 2(4) of the Charter in October 2001, because it was a "failed state". While it

¹³⁸ See Ulrich Fastenrath, Ein Verteidigungskrieg läßt sich nicht vorab begrenzen, *Frankfurter Allgemeine Zeitung*, 12 November 2001, 8, justifying U.S. led strikes against Afghanistan on the basis of a state of necessity.

¹³⁹ See Art. 25 of the Draft Art.s on State Responsibility (2001), Report of the ILC on the work of its 53rd Sess. (23 April – 1 June and 2 July – 10 August 2001), UN Doc. A/56/10, available at: [http://www.un.org/law/ilc/texts/State_responsibility/responsibility_articles\(e\).pdf#pagemode=bookmarks](http://www.un.org/law/ilc/texts/State_responsibility/responsibility_articles(e).pdf#pagemode=bookmarks).

¹⁴⁰ Art. 26 reads: "Nothing in this Chapter precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law".

¹⁴¹ See Tomuschat, *supra* note 1, at 539.

¹⁴² See also Byers, *supra* note 1, at 403.

¹⁴³ See the request for the establishment of an International Security Force, expressed in Annex 1 of the Bonn Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions, December 5, 2001, at: <http://www.uno.de/frieden/afghanistan/talks/agreement.htm>. See also Art. 1, para. 2 of the Military Technical Agreement between the International Security Assistance Force and the Interim Administration of Afghanistan ("The Interim Administration understands and agrees that the Mission of ISAF is to assist it in the maintenance of security in the area of responsibility as defined below ..."). The Agreement is available at: <http://www.operations.mod.uk/isafmta.pdf>. See generally on intervention by invitation, Georg Nolte, *Eingreifen auf Einladung – Zur völkerrechtlichen Zulässigkeit des Einsatzes fremder Truppen im internen Konflikt auf Einladung der Regierung* (1999), 543 et seq.

¹⁴⁴ See Louis Henkin, *The Invasion of Panama Under International Law: A Gross Violation*, *Columbia Journal of Transnational Law*, Vol. 19 (1991), 293, at 300.

may be argued that the prohibition of the use of force between states does not fully apply to interventions in “failed states”¹⁴⁵, Afghanistan did not meet these requirements because it was controlled by the Taliban regime which acted as a *de facto* government of the territory.¹⁴⁶

2. Terrorist Acts as Armed Attacks

Although the historical context of Art. 51 of the Charter would suggest that self-defence applies only against attacks by states¹⁴⁷, one may easily agree that Art. 51 covers also armed action from non-state entities, such as the 11 September attacks.¹⁴⁸ The wording of the provision is broad enough to cover acts committed by non-state entities. Furthermore, experience has shown that terrorist actions can pose threats that were hardly conceivable at the San Francisco Conference and that are equal to attacks carried out by armed forces of states. The protection of the targeted state, which is at the heart of Art. 51, may require the use of force against armed groups, irrespective of whether or not they are linked to a specific state. A teleological reading of Art. 51 would therefore support an interpretation according to which the impact of the attack is considered to be more decisive than its public or private origin, which is often anyway difficult to determine.¹⁴⁹

Important guidance may be derived from the gravity of the attack.¹⁵⁰ This has already been the approach adopted by the International Court of Justice in the *Nicaragua* case, where the Court distinguished armed attacks from “a mere frontier

¹⁴⁵ See Matthias Herdegen, *Der Wegfall effektiver Staatsgewalt im Völkerrecht: “The Failed State”*, in: Thüerer/Herdegen/Hohloch (eds.), *Der Wegfall effektiver Staatsgewalt: “The Failed State”*, *Berichte der Deutschen Gesellschaft für Völkerrecht*, Vol. 34 (1996), 49, at 60 et seq.

¹⁴⁶ See also Byers, *supra* note 1, at 404. The Taliban (“Students of Islamic Knowledge Movement”) ruled Afghanistan from 1996 until 2001. They came to power during Afghanistan’s long civil war and managed to hold 90 % of the country’s territory. Saudi Arabia, Pakistan, and the United Arab Emirates (UAE) recognized the Taliban as Afghanistan’s legitimate government. After the September 11, 2001 terrorist attacks on the U.S., Saudi Arabia and the UAE cut diplomatic ties with the Taliban. See Laura Hayes, *Who Are the Taliban? Afghanistan’s Ruling Faction*, at: <http://www.infolplease.com/spot/taliban.html>.

¹⁴⁷ This is, *inter alia*, the approach underlying the Definition of Aggression annexed to General Assembly Resolution 3314 (XXIX). See Definition of Aggression, GA Res. 3314 (XXIX) of 14 December 1975, UN Doc. A/9631 (1974), in *AJIL*, Vol. 69 (1975), 480. Art. 1 of the definition notes that “aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another state”. In its *Nicaragua* judgment, the ICJ largely equated the definition of aggression with the concept of an “armed attack” within the meaning of Art. 51 of the Charter. See ICJ, *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. the United States)*, Judgment of 27 June 1986 (Merits), ICJ Rep. 1986, 14 et seq., para. 195.

¹⁴⁸ See also Murphy, *supra* note 1, at 45 et seq.

¹⁴⁹ See also Tomuschat, *supra* note 1, at 540.

¹⁵⁰ For earlier proposals in legal doctrine, according to which large-scale and consistent patterns of violent terrorist action may constitute armed attacks justifying the use of force, see Antonio Cassese, *The International Community’s “Legal” Response to Terrorism*, *International & Comparative Law Quarterly*, Vol. 38 (1989), 589, at 596.

incident”, emphasizing that an armed attack must have greater “scale and effects”.¹⁵¹ The Court noted, *inter alia*, that “the prohibition of armed attacks may apply to the sending by a state of armed bands to the territory of another State, if such an operation, because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by the regular armed forces”. The Court specified that this might be the case if the acts of armed bands “occur on a significant scale” but it did not add any further observations as to the required threshold.

The legal reaction to the September 11 attacks has finally brought about some clarification. The reference of the Security Council to the right of self-defence in its Resolutions 1368 (2001) and 1373 (2001), which deviates from the Council’s previous practice, appears to indicate that, at least, acts of the gravity of the September 11 attacks may raise issues under Art. 51 of the Charter. Even more revealing is the reaction of NATO¹⁵² and the OAS¹⁵³ which spelled out in clear terms that the September 11 incidents gave rise to an armed attack.

3. Self-Defence as a State-Centered Right

But the occurrence of an armed attack alone does generally not suffice to justify military response against another state. A more serious hurdle to the application of self-defence is that the attack must in principle be imputable to the entity against which forcible action is taken, if the exercise of the right to self-defence conflicts with the territorial sovereignty of that entity.¹⁵⁴ Although the influence of non-state actors on the shaping of international law has increased significantly in recent decades, the international legal order continues to be a state-centered system of norms. Private actors encounter only in very few instances direct responsibility under international law.¹⁵⁵ One may, in this context, think of non-state sponsored terrorists operating from the high sea. Moreover, the imputability requirement may be attenuated¹⁵⁶, if the “armed attack” emanates from terrorists operating from a “failed state”, because it would be unreasonable to assume that a state “must pa-

¹⁵¹ See ICJ, *supra* note 147, at para. 195.

¹⁵² See the Statement of October 2, 2001, *supra* note 5.

¹⁵³ The OAS stated that “[the] attacks against the United States of America are attacks against all American states and that in accordance with all the relevant provisions of the Inter-American Treaty of Reciprocal Assistance (Rio Treaty) and the principal of continental solidarity, all States Parties to the Rio Treaty shall provide effective reciprocal assistance to address such attacks and the threat of any similar attacks against any American state, and to maintain the peace and security of the continent.” See OAS, 24th Meeting of Consultation of Ministers of Foreign Affairs, Res. 1, Terrorist Threats to the Americas, OEA/Ser.F/II.4.RC.24/RES.1/01 of September 21, 2001.

¹⁵⁴ See also Beck & Arend, *supra* note 30, at 211. See also Luigi Condorelli, *The Imputability to States of Acts of International Terrorism*, Israel Yearbook of Human Rights, Vol. 19 (1989), 233 et seq.

¹⁵⁵ See generally on this issue Joachim Wolf, *Die Staatenhaftung für Privatpersonen nach Völkerrecht* (1997), 387 and Claus Kreß, *Gewaltverbot und Selbstverteidigung nach der Satzung der Vereinten Nationen bei staatlicher Verwicklung in Gewaltakte Privater* (1995), 268 et seq.

tiently endure painful blows, only because no sovereign State is to blame for the turn of events".¹⁵⁷ However, the need to attribute the "armed attack" to the targeted state clearly remains the rule. This is even more so because it is hard to see how further-reaching claims to consider terrorist groups directly as subjects of international law bound by Art. 2 (4) of the Charter¹⁵⁸ would substantially advance the permissibility of forcible counter-terror measures. Even if terrorist groups were treated as independent legal actors, they could only be directly targeted by the defending state on the high seas or other stateless areas, because in all other situations, the exercise of self-defence would still collide with the territorial integrity of the host state.¹⁵⁹

It is also quite telling that in the aftermath of September 11, extensive efforts have been made to attribute the action of Al Qaeda to both the Taliban regime and the state of Afghanistan. This follows clearly from the statement of the U.S. Permanent Representative to the United Nations of 7 October 2001, justifying the exercise of self-defence by the United States as follows:

"Since 11 September, my Government has obtained clear and compelling information that the Al Qaeda organization, which is supported by the Taliban regime in Afghanistan, had a central role in the attacks ... The attacks of 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."¹⁶⁰

This statement is of particular relevance because it establishes a tripartite chain of responsibility, triggering the responsibility of Afghanistan as a state, through the involvement of the Al Qaeda organization in the attacks and the role of the Taliban regime, which was in control of the territory and had knowledge of the terrorist activities of Al Qaeda.¹⁶¹ Furthermore, the reasoning is more or less in line with

¹⁵⁶ But see Tietje & Nowrot, *supra* note 1, at 12, who argue that the prohibition of Art. 2 para. 4 of the Charter applies in full even in relation to "failed states".

¹⁵⁷ See Dinstein, *supra* note 36, at 215. In many situations of internal strife, however, the legal construction of the *de facto* regime helps to establish a link between the ruling actors and the territorial state as a subject under international law. See Art. 9 of the ILC's 2001 Draft Articles on State Responsibility.

¹⁵⁸ For a proposal in this direction, see Slaughter & Burke-White, *supra* note 1, at 2, who suggest that "Art. 2 (4) (a)" of the Charter should read: "All states and individuals shall refrain from the deliberate targeting or killing of civilians in armed conflict of any kind, for any purpose". This provision should "establish parallel prohibitions on the use of force between states and the use of force against civilians".

¹⁵⁹ See also Travalio, *supra* note 18, at note 29 and Tietje & Nowrot, *supra* note 1, at 12-13.

¹⁶⁰ See 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 of October 7, 2001, reprinted in AJIL, Vol. 96 (2002), 245.

the justification invoked by the United States in the context of the 1998 missile strikes against Sudan and Afghanistan, where the U.S. notified the Security Council of the exercise of self-defence, stating:

"These attacks were carried out only after repeated efforts to convince the Government of Sudan and the Taliban regime in Afghanistan to shut these terrorist activities down and to cease their cooperation with the Bin Laden organization. That organization has issued a series of blatant warning that 'strikes will continue from everywhere' against American targets, and we have convincing evidence that further such attacks were in preparation from the same terrorist facilities. The United States, therefore, had no choice but to use armed force to prevent these attacks from continuing."¹⁶²

Such an approach deviates from the traditional criteria of state responsibility, because it is essentially based on the assumption that a state may become a lawful target of measures of self-defence, wherever it allows terrorist organizations to mount operations against other states from its territory and refuses to take action required by international law to put an end to such operations.

4. The Attribution of Acts of Private Actors within the Context of Art. 51 of the Charter

While there is some uncertainty whether the mere "harboring" of terrorists suffices to hold a state accountable for an "armed attack", one may nevertheless observe that the events of September 11 have called into question the traditional criteria for establishing state responsibility for acts of private actors, especially in situations where private individuals or groups have no transparent relationship with the organs of the custodial state.¹⁶³

a. Furtherance and toleration of transboundary terrorism as a violation of the prohibition of the use of force

It is relatively easy to establish that a state incurs international legal responsibility for tolerating the conduct of terrorist activities from its territory. As early as 1949, the ICJ held in the *Corfu Channel Case*¹⁶⁴ that every state is obliged "not to

¹⁶¹ See also Byers, *supra* note 1, at 408.

¹⁶² See Letter dated 20 August 1998 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/1998/780 (1998), reprinted in AJIL, Vol. 93 (1999), 163.

¹⁶³ See also Slaughter, *supra* note 1, at 20 ("The traditional 'effective control' test for attributing an act to a state seems insufficient to address the threats posed by global criminals and the states that harbor them.")

¹⁶⁴ See ICJ, *Corfu Channel Case*, Rep. 1949, 4. In this case, the United Kingdom engaged in a forcible mine-sweeping operation in the Corfu Straits which were within Albanian waters in order to effect free passage and to force Albania to comply with its international obligation to investigate and secure evidence concerning illegal mining of the strait. The ICJ found that Albania's actions were a violation of its responsibility under international law.

allow knowingly its territory to be used for acts contrary to the rights of other states".¹⁶⁵ Furthermore, various legal texts hold states responsible not only for their active support to terrorists, but also for their unwillingness to suppress such activities or their acquiescence of terrorist conduct. Art. 2 (6) of the 1951 Draft Code of Offenses against the Peace and Security of Mankind prohibited "[t]he undertaking or encouragement by the authorities of a State of terrorist activities in another State, or the toleration by the authorities of a State of organized activities calculated to carry out terrorist acts in another State".¹⁶⁶ In 1970, the Friendly Relations Declaration of the General Assembly interpreted Art. 2 (4) of the Charter as requiring states to refrain from "organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another state or acquiescing in organized activities within its territory directed towards the commission of such acts, when such acts involve a threat or use of force". The same obligation was later repeated in para. 4 of General Assembly Resolution 46/60 of 9 December 1994 concerning measures to eliminate international terrorism.¹⁶⁷ Therefore, a strong case can be made that governments which do not actively support, but merely tolerate terrorist activities within their borders, may encounter state responsibility under international law for a violation of Art. 2 (4) of the Charter.¹⁶⁸

Moreover, the obligation to refrain from tolerating activities organized for the purpose of carrying out terrorist acts in another state may even be extended to *de facto* regimes.¹⁶⁹ This may, *inter alia*, be derived from the fact that the Security Council has directly addressed the Taliban regime in its resolutions on the situation in Afghanistan. An excellent example of this practice is para. 1 of SC Resolution 1333 (2000), in which the Council "[a]cting under Chapter VII of the Charter of the United Nations ... [d]emands that the Taliban comply with resolution 1267 (1999) and, in particular, cease the provision of sanctuary and training for international terrorists and their organizations, take appropriate effective measures to ensure that the territory under its control is not used for terrorist installations and camps, or for the preparation or organization of terrorist acts against other States or their citizens, and cooperate with international efforts to bring indicted terrorists to justice".¹⁷⁰

¹⁶⁵ See ICJ Rep. 1949, at 22. However, the Court also noted that it is impossible to conclude "from the fact of the control exercised by a State over its territory and waters that that State necessarily knew, or ought to have known of any unlawful act perpetrated therein nor that it should have known the authors".

¹⁶⁶ See Report of the International Law Commission, 6th Session (1954), Yearbook of the International Law Commission, Vol. 2, 140, at 151.

¹⁶⁷ Para. 4 reads: "States, guided by the purposes and principles of the Charter of the United Nations and other relevant rule of international law, must refrain from organizing, instigating, assisting or participating in terrorist acts in territories of other States, or from acquiescing in or encouraging activities within their territories directed towards the commission of such acts."

¹⁶⁸ See also Yoram Dinstein, Terrorism as an International Crime, Israel Yearbook on Human Rights, Vol. 19 (1989), 56, at 66.

¹⁶⁹ See generally on *de facto* regimes and Art. 2 (4) of the Charter, Jochen Abr. Frowein, Das *de facto*-Regime im Völkerrecht (1968), 35 et seq.

However, it is questionable whether the same standards may be used to determine under which conditions acts of private actors may be attributed to a state entity within the context of Art. 51 of the Charter, giving rise to lawful forcible countermeasures in the form of self-defence. The argument that the imputability of an "armed attack" is subject to a different threshold than the attribution of the use of force under Art. 2 (4) of the Charter may be derived from the General Assembly's Definition of Aggression, which is complementary to the notion of self-defence¹⁷¹, but sets strict limits to a qualification of the indirect use of armed force as aggression. Art. 3 g of the 1974 Definition of Aggression, which was drafted in deliberate deviation from the rules enshrined in the earlier Friendly Relations Declaration¹⁷², explicitly requires "[t]he sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries". Some guidelines have been developed by the jurisprudence of the ICJ.

b) The jurisprudence of the ICJ

(1) The *Nicaragua* case

In the *Nicaragua* case, the ICJ adopted a rather strict approach, which has become known as the "effective control" test. The issue brought before the ICJ was whether a foreign State, the United States, because of its financing, organizing, training, equipping and planning of operations of organized military and paramilitary groups of the Nicaraguan rebels in Nicaragua, was responsible for violations of international humanitarian law committed by those rebels. The majority found that even "assistance to rebels in the form of the provision of weapons or logistical or other support" would not fall into the category of armed attack¹⁷³, even though "[s]uch assistance may be regarded as a threat to or use of force, or amount to intervention in the internal or external affairs of other States".¹⁷⁴ The Court held, in particular, that a high degree of control was necessary for this to be the case. It required that a Party not only be in effective control of a military or paramilitary group, but that the control to be exercised with respect to the specific operation in the course of which breaches of international humanitarian law may have been committed.¹⁷⁵

¹⁷⁰ See SC Res. 1333 (2000) of 19 December 2000, UN Doc. S/RES/1333 (2000).

¹⁷¹ On the conceptual differences between the terms "aggression" and "armed attack", see Alexandrov, *supra* note 30, at 105 et seq.

¹⁷² See on the relationship between the Friendly Relations Declaration and the Definition of Aggression, Alexandrov, *supra* note 30, at 117-118.

¹⁷³ See ICJ Rep. 1986, 103-104, para. 105.

¹⁷⁴ See ICJ Rep. 1986, 104, paras. 105 and 119, para. 230.

¹⁷⁵ The Court held that there must be "effective control of the military or paramilitary operations in the course of which the alleged violations [of international human rights and humanitarian law] were committed". Furthermore, the Court went so far as to state that in order to establish that the United States was responsible for "acts contrary to human rights and humanitarian law" allegedly perpetrated by the Nicaraguan contras, it was necessary to prove that the United States had specifi-

It is quite obvious that the requirements of the "effective control" test have not been fulfilled in the case of the military strikes against Afghanistan in 1998 or 2001, because no state has been in a position to present evidence about both the Taliban's assistance to Al Qaeda and their knowledge of or involvement in the concrete attacks on the United States. But this does not preclude the lawfulness of the strikes. The "effective control" test applied by the ICJ obliges the victim of an armed attack to deliver considerable proof of the involvement of the targeted state in the attack, in order to justify the exercise of self-defence. Such proof, however, can hardly be obtained in situations in which the relations between government officials and armed groups are not transparent or where state officials and private actors are indistinguishable in their activities.¹⁷⁶ It is therefore questionable whether the threshold developed in the context of the *Nicaragua* case applies equally in the context of combating international terrorism. While a state acting in self-defence is certainly not its own judge in determining whether an act of force carried out by private actions is attributable to the targeted state¹⁷⁷, it should not be overburdened with unrealistic standards of proof either, especially not under Art. 51 of the Charter, which makes the use of force conditional upon the respect of the "immediacy" requirement.¹⁷⁸ On the contrary, the combat of terrorism makes it necessary to re-think whether the *Nicaragua* threshold reflects the authoritative test in the context of the exercise of self-defence against acts of non-state actors.¹⁷⁹

(2) The *Tehran Hostages* case

Another model of imputability has been developed by the ICJ in the *Tehran Hostages* case¹⁸⁰, where the Court noted that subsequent approval or endorsement of wrongful acts may provide evidence of state responsibility. The Court found that the responsibility of Iran for the original takeover of the U.S. Embassy in Tehran could not be established.¹⁸¹ But the Court held that the policy announced by

cally "directed or enforced" the perpetration of those acts. See ICJ Rep. 1986, para. 115. But the judgment has not remained uncriticized. See Dissenting Opinion of Judge Schwebel, ICJ Rep. 1986, 331-341, paras. 154-161 and Dissenting Opinion of Judge Jennings, ICJ Rep. 1986, 542-544. See also ICTY, *Tadic*, Appeals Chamber judgment, paras. 116 et seq.

¹⁷⁶ See also Slaughter & Burke-White, *supra* note 1, at 20.

¹⁷⁷ But see Franck, *supra* note 1, at 842 ("The 'inherent right' being preserved in Art. 51 is clearly that of a victim state and its allies, exercising their own, sole judgment in determining whether an attack has occurred.").

¹⁷⁸ See on Art. 51 and the "immediacy" requirement, Dinstein, *supra* note 36, at 212.

¹⁷⁹ See also Nowrot & Tietje, *supra* note 1, at 9.

¹⁸⁰ ICJ, Case Concerning United States Diplomatic and Consular Staff in Tehran, Judgment of 24 May 1980 (*United States of America v. Iran*), ICJ Rep. 1980, 3.

¹⁸¹ The Court noted: "No suggestion has been made that the militants, when they executed their attacks on the Embassy, had any form of official status as recognized 'agents' or organs of the Iranian State. Their conduct in mounting the attack, overrunning the Embassy and seizing its inmates as hostages cannot, therefore, be regarded as imputable to that State on that basis. Their conduct might be considered as itself directly imputable to the Iranian States only if it were established that, in fact, on the occasion in question, the militants acted on behalf of the State, having been charged by some

Ayatollah Khomeini to maintain the occupation of the U.S. Embassy in Tehran and to detain its inmates as hostages for the purpose of exerting pressure on the U.S. Government triggered legal responsibility on the part of the state of Iran. The Court emphasized that "the approval given to these facts by the Ayatollah Khomeini and other organs of the Iranian State, and the decision to perpetuate them, translated continuing occupation of the Embassy and detention of the hostages into acts of that State".¹⁸² The reasoning of this case, which preceded the *Nicaragua* judgment, is not inconsistent with the "effective control" jurisprudence, because it is essentially based on the fact that the Iranian authorities were both able and obliged to bring an end to the situation in Tehran.¹⁸³ But when assessing the impact and value of the "subsequent approval" formula adopted by the ICJ for counter-terrorism measures, one must bear in mind, that the *Tehran Hostages* judgment did not address the issue of imputability of conduct in the context of Art. 51, but rather the responsibility of Iran under the Vienna Conventions on Diplomatic and Consular Relations¹⁸⁴. The approval of the conduct of private actors may be a decisive criterion under the general law of state responsibility, but it must be handled with the greatest care in the context of self-defence. As has been rightly pointed out in legal doctrine, attitudes of a government may, in a particular case, constitute "elements of circumstantial evidence" helping to establish that the terrorist act occurred "on behalf of the State", but is "insufficient per se".¹⁸⁵ This caveat applies *a fortiori* in the context of Art. 51, where the acting government risks to become itself the victim of forcible countermeasures. Furthermore, it is worth noting that Art. 11 of the ILC Draft Articles on State Responsibility has set a stricter standard for the attribution of acts by the "approval" or "endorsement" of the conduct of non-state actors than the jurisprudence of the ICJ in the *Tehran Hostages* judgment.¹⁸⁶ The

competent organ of the Iranian State to carry out a specific operation. The information before the Court does not, however, suffice to establish with the requisite certainty the existence at that time of such a link between the militants and any competent organ of that State". See ICJ Rep. 1980, 29, para. 58.

¹⁸² ICJ Rep. 1980, p. 35, para. 74.

¹⁸³ The ICJ concluded that the responsibility of Iran was entailed by the "inaction" of its authorities which "failed to take appropriate steps", in circumstances where such steps were evidently called for. See ICJ Rep. 1980, 31-32, paras. 63, 67. One may assume that the degree of a state's capacity to terminate non-state actor violence is one of the main criteria of the "effective control" test. In fact, if, as in *Nicaragua*, the "controlling State" is not the territorial State where the act of violence occurs, more extensive and compelling evidence is required to establish that the State is genuinely in control of the use of force carried out by private actors. However, if, as in *Tehran Hostages* case, the attack occurs on the territory of the "controlling State" itself, the "effective control" threshold is easier to establish.

¹⁸⁴ See ICJ Rep. 1980, 32, para. 67.

¹⁸⁵ See Condorelli, *supra* note 154, at 240. This point was also stressed by the ICJ in its 1980 judgment, where the Court noted that "... congratulations after the event ... and other subsequent statements of official approval ... do not alter the initially independent and unofficial character ..." of the act in question. See ICJ Rep. 1980, 30, para. 59.

¹⁸⁶ See para. 6 of the ILC Commentary on Art. 11, in which the Commission explains the choice of the wording "acknowledges and adopts": "The Court in the Diplomatic and Consular Staff case used phrases such as 'approval', 'endorsement', 'the seal of official governmental approval' and the

provision states that “[c]onduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own”. The terms “acknowledges and adopts” were inserted to exclude cases where a State merely acknowledges the factual existence of conduct or expresses its verbal approval.¹⁸⁷

It is questionable whether the reaction of the Taliban to the September 11 attacks meets these requirements. Admittedly, the Taliban first endorsed the terrorist attacks and presented themselves unwilling to capture and extradite the suspected terrorists. But, it would probably go too far to state that the Taliban acknowledged and approved the 11 September attacks as acts of their own.¹⁸⁸ After initial signs of solidarity with the terrorists and threats against the U.S., a *fatwa* was pronounced against Bin Laden asking him to leave the country.¹⁸⁹ This step was then followed by the offer of the Taliban to try Bin Laden under Islamic Law. Furthermore, an externally visible association of the Taliban and Al Qaeda in the fight against the U.S. occurred only after the beginning of the strikes on October 7, 2001.

c) The 2001 Draft Articles on State Responsibility

Some further guidance may be derived from other provisions of the ILC’s 2001 Draft Articles on State Responsibility. Although the Draft Articles do not specifically address issues such as the imputability of terrorist acts or the threshold required for the attribution of conduct under Art. 51 of the Charter, they provide an authoritative framework for determining under which conditions the use of force by terrorist actors may justify the exercise of self-defence against the state in which the terrorists are situated. Arts. 4 (2), 5, 8, and 9 are of special interest in the context of the attribution of terrorist acts.

‘decision to perpetuate [the situation]’. These were sufficient in the context of that case, but as general matter, conduct will not be attributable to a State under Art. 11 where a State merely acknowledges the factual existence of conduct or expresses its verbal approval of it. In international controversies States often take positions which amount to ‘approval’ or ‘endorsement’ of conduct in some general sense, but do not involve any assumption of responsibility. The language of ‘adoption’ on the other hand, carries with it the idea that the conduct is acknowledged by the State as, in effect, its own conduct.”

¹⁸⁷ See para. 6 of the ILC Commentary on Art. 11: “[A]rticle 11 makes it clear that what is required is something more than a general acknowledgment of a factual situation, but rather that the State identifies the conduct in question and makes it its own.”

¹⁸⁸ See also Mégret, *supra* note 1, sub. B 1. b (“The sheltering of Bin Laden, which began long before September 11, is a typically ambiguous move that might well indicate support, but can also be interpreted simply as insistence on Afghani sovereignty.”).

¹⁸⁹ On September 27, 2001 an edict from the Taliban’s ruling council of clerics (“fatwa”) requested that Osama bin Laden should leave Afghanistan. See Taliban order Bin Laden to leave, *The Guardian*, September 28, 2001, available at: <http://www.guardian.co.uk/waronterror/story/0,1361,559619,00.html>.

Art. 4 (2) and 5 apply in situations in which terrorist organizations are closely intertwined with the organs or the internal legal system of an existing state structure. Art. 4 (2) of the Draft Articles establishes a case of state responsibility in situations, in which terrorist groups act as *de facto* organs of a state, by extending the notion of state organs to "any person or entity which has that status in accordance with the internal law of the State". Accordingly, terrorist acts carried out by members of a *de facto* government of a state would entail the state responsibility under this provision.¹⁹⁰ Furthermore, Art. 5 provides that the conduct of persons or entities which are not state organs in the sense of Art. 4, but which are nonetheless empowered by the internal law of that state to exercise governmental authority, shall be considered an act of the state under international law. Obviously, none of these provisions would allow the state of Afghanistan to be held accountable for the September 11 attacks. Art. 4 (2) cannot be invoked because it has not been established that the Taliban themselves were directly involved in the planning or the execution of the attacks. Furthermore, Art. 5 does not apply, because the Al Qaeda organization did not exercise governmental functions in Afghanistan.

The most important case of attribution in the context of state responsibility for the acts of terrorist groups is Art. 8 of the Draft Articles which provides that states encounter responsibility for the conduct of private persons that are "in fact acting on the instruction of, or under the direction or control of that State in carrying out the conduct". But the solution adopted by the ILC is rather traditional. The Commentary of the ILC makes it clear that Art. 8 is more or less based on a case-to-case approach built upon the premises of the *Nicaragua* test.¹⁹¹ The provision may therefore hardly be invoked to establish a case of state responsibility in the context of the September 11 attacks.¹⁹²

Nevertheless, the ILC Draft Articles deserve special attention because Art. 9 establishes an express rule for the attribution of the conduct of non-state actors in failed state scenarios, which often provide safe haven for terrorist activities. The provision states that "[t]he conduct of a person or group of persons shall be considered an act of state if the person or group of persons is in fact exercising elements of governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority".

¹⁹⁰ See para. 4 of the ILC Commentary on Art. 9 ("A general *de facto* government ... is itself an apparatus of the State, replacing that which existed previously. The conduct of such a government is covered by Art. 4 rather than Art. 9"). See also Gaja, *supra* note 1.

¹⁹¹ In its Commentary on Art. 8, the ILC mentions the "overall control" test established by the Appeals Chamber of the ICTY in the *Tadic* case, but leaves open whether it applies in the context of state responsibility. See para. 5 of the ILC Commentary on Art. 8.

¹⁹² The approach taken by the ILC is particularly well reflected in para. 7 of the Commission's observations on Art. 8 which states: "[A] State may, either by specific directions or by exercising control over a group, in effect assume responsibility for their conduct. Each case will depend on its own facts, in particular those concerning the relationship between the instructions given or the direction or control exercised and the specific conduct complained of [...] At the same time [...] the instructions, direction or control must relate to the conduct which is said to have amounted to an internationally wrongful act."

The provision is intended to cover “both the situation of a total collapse of the State apparatus as well as cases where official authorities are not exercising their functions in some specific respect”, such as the partial collapse of the State or its loss of control over a certain locality. It therefore clearly allows for the attribution of the wrongful conduct of *de facto regimes* to destabilized, but nonetheless formally subsisting states.¹⁹³ As has been rightly observed, the conditions set out by Art. 9 “are unlikely to be fulfilled by a terrorist group” itself.¹⁹⁴ However, the significance of the provision with respect to terrorist activities lies in the fact that it facilitates a multiple chain of attribution, triggering state responsibility in situations in which the unlawful conduct of non-state actors is coupled with the cumulative support, instruction, or control of irregular armed groups performing governmental functions.¹⁹⁵ Accordingly, the combined application of Arts. 8 and 9 of the ILC Draft Articles could entail the responsibility of the state of Afghanistan for the acts of Al Qaeda and the concurrent support of the Taliban, if it were to be established that the direction or control exercised by the Taliban was specifically linked to the events of September 11.

d) The “overall control” test of the ICTY

An innovatory approach, which may be of great relevance in the context of the attribution of terrorist acts carried out by non-state actors, has recently been adopted by the Appeals Chamber of the ICTY in the *Tadic* case¹⁹⁶. The tribunal had to decide whether Bosnian Serb forces could be considered as *de jure* or *de facto* organs of the Federal Republic of Yugoslavia. The Chamber held the view that international rules do not always require the same degree of control over armed groups or private persons for the purpose of determining whether an individual not having the status of a State official under internal legislation can be regarded as the *de facto* organ of the State.¹⁹⁷ The Chamber noted that it is necessary to ascertain whether specific instructions concerning the commission of a particular act have been issued by a state, if the question at issue was “whether a single private individual or a group that is not militarily organised has acted as *de facto* organ when performing a specific act”. But the Chamber added that “by contrast, control

¹⁹³ Para. 4 of the ILC Commentary on Art. 9 notes that the cases envisaged by Art. 9 “presuppose the existence of a government in office and of a State machinery whose place is taken by irregulars or whose action is supplemented in certain cases”. This “may happen on part of the territory of a State which is for the time being out of control, or in other specific circumstances”.

¹⁹⁴ See Gaja, *supra* note 1.

¹⁹⁵ The ILC Commentary states “the different rules of attribution stated in Chapter II have a cumulative effect, such that a State may be responsible for the effect of the conduct of private parties, if it failed to take necessary measures to prevent those effects”. See Commentary on Chapter II, para. 4.

¹⁹⁶ See ICTY, Appeals Chamber, *Prosecutor v. Tadic*, Judgment of 15 July 1999, I.L.M. Vol. 38 (1999), 1518.

¹⁹⁷ See *Tadic* Appeals judgment, para. 137.

by a State over subordinate armed forces or militias or paramilitary units may be of an overall character".¹⁹⁸ Furthermore, it went on to state:

"Under international law it is by no means necessary that the controlling authorities should plan all the operations of the units dependent on them, choose their targets, or give specific instructions concerning the conduct of military operations and any alleged violations of international humanitarian law. The control required by international law may be deemed to exist when a State (or, in the context of an armed conflict, the Party to the conflict) has a role in organising, coordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support to that group. Acts performed by the group or members thereof may be regarded as acts of *de facto* State organs regardless of any specific instruction by the controlling State concerning the commission of each of those acts"¹⁹⁹.

The Chamber justified this deviation from the *Nicaragua* test by noting that international judicial and state practice has departed from the notion of "effective control" set out by the ICJ in cases dealing with members of military or paramilitary groups. It pointed, *inter alia*, to the *Kenneth P. Yeager* decision of the Iran-United States Claims Tribunal²⁰⁰ and the jurisprudence of the European Court of Human Rights in the *Loizidou* case.²⁰¹

The "overall control test" presents a more reasonable option than the strict "effective control" test in the context of state responsibility for terrorist acts, because it relieves the defending state from the (unrealistic) obligation to provide evidence about specific instructions or directions of the host state relating to the terrorist act, triggering the right to self-defence. Moreover, taking into account the additional judicial practice referred to in *Tadic*, one may reasonably assume that the "overall control test" presents a viable approach not only in the context of interna-

¹⁹⁸ An explanation is given in para.120 of the *Tadic* Appeals judgment, where the Chamber notes: "One should distinguish the situation of individuals acting on behalf of a State without specific instructions, from that of individuals making up an organized and hierarchically structured group, such as a military unit or, in case of war or civil strife, armed bands of irregulars or rebels. Plainly, an organized group differs from an individual that the former normally has a structure, a chain of command and a set of rules as well as the outward symbols of authority. Normally a member of the group does not act on his own but conforms to the standards prevailing in the group and is subject to the authority of the head of the group. Consequently, for the attribution to a State of acts of these groups it is sufficient to require that the group as a whole be under the overall control of the State."

¹⁹⁹ See para. 137 of the *Tadic* Appeals judgment.

²⁰⁰ See *Kenneth P. Yeager v. Islamic Republic of Iran*, Iran-U.S. Claims Tribunal Reports 17 (1987), Vol. IV, 92. In this case, the Tribunal examined whether the wrongful acts of the Iranian "revolutionary guards" vis-à-vis American nationals were attributable to Iran. But the Tribunal did not enquire as to whether specific instructions had been issued by the state of Iran to the "guards" with regard to the forced expulsion of Americans.

²⁰¹ See European Court of Human Rights, *Loizidou v. Turkey (Merits)*, Judgment of 18 December 1996, para. 56. The Court stated: "It is not necessary to determine whether, as the applicant and the Government of Cyprus have suggested, Turkey actually exercised detailed control over the policies and authorities of the 'TRNC'. It is obvious from the large number of troops engaged in active duties in northern Cyprus [...] that her army exercises effective overall control over that part of the island. Such control, according to the relevant test and in the circumstances in the case, entails her responsibility for the policies and actions of the 'TRNC' "(emphasis added).

tional criminal responsibility, but also in the law of state responsibility.²⁰² The “overall control” test has been developed in the context of individual responsibility for violations of international humanitarian law, but this does not exclude its application in the context of the responsibility for an “armed attack”.²⁰³ In fact, the Appeals Chamber itself stated in *Tadic* that the “overall control” test is not confined to the area of international humanitarian law. The Prosecution had argued that the criteria for ascertaining state responsibility would be different from those necessary for establishing individual criminal responsibility.²⁰⁴ But this distinction was expressly refuted by the Appeals Chamber which stated that the same standards apply “(i) where the court’s task is to ascertain whether an act performed by an individual may be attributed to a State, thereby generating the international responsibility of that State; and (ii) where the court must instead determine whether individuals are acting as *de facto* State officials, thereby rendering the conflict international and thus setting the necessary precondition for the ‘grave breaches’ regime to apply”.²⁰⁵

One may easily establish that the criteria of the “overall control” test were fulfilled in the case of Afghanistan. It is undisputed that the Taliban had a role in “training and equipping or providing operational support” to Al Qaeda. The Taliban allowed terrorist organizations to run training camps in their territory, and since 1994 provided refuge for Bin Laden and his Al Qaeda organization. The support delivered by the Taliban to Al Qaeda was even reaffirmed by the Security Council, which condemned the Taliban’s “provision of sanctuary and training for international terrorists and their organizations”.²⁰⁶ Moreover it appears that Al Qaeda was integrated into a symbiotic relationship with the Taliban, with Al Qaeda being the militarily and financially superior force.²⁰⁷ Some Al Qaeda units have reportedly acted as parts of the Taliban forces, helping the Taliban in their fight

²⁰² For a different view, see Corten & Dubuisson, *supra* note 28, at 67.

²⁰³ But see para. 5 of the ILC’s Commentary on Art. 8 of the Draft Articles on State Responsibility (“In the course of their reasoning, the majority [in the *Tadic* case] considered it necessary to disapprove the International Court’s approach in Military and Paramilitary activities. But the legal issues and the factual situation in that case were different from those facing the International Court in Military and in Paramilitary activities. The Tribunal’s mandate is directed to issues of individual criminal responsibility, not State responsibility, and the question in that case concerned not responsibility but the applicable rules of international humanitarian law”).

²⁰⁴ It has been argued that, in the first case, one would have to decide whether serious violations of international humanitarian law by private individuals may be attributed to a state because those individuals acted as *de facto* state officials. In the second case, one would have instead to establish whether a private individual may be held responsible for serious violations of international humanitarian law amounting to grave breaches.

²⁰⁵ See *Tadic* Appeals Judgment, para. 104. The Chamber explained this view by adding: “In both cases, what is at issue is not the distinction between State responsibility and individual criminal responsibility. Rather the question is that of establishing the criteria for the legal imputability to a state of acts performed by individuals not having the status of State officials. In the one case these acts, if they prove to be attributable to a State, will give rise to the international responsibility of that State; in the other case, they will ensure that the armed conflict must be classified as international.”

²⁰⁶ See para. 1 of SC Res. 1267 of 15 October 1997.

²⁰⁷ See The Taliban Connection, at: <http://www.usinfo.state.gov/products/pubs/terrornet/06.htm>.

against the Northern Alliance.²⁰⁸ It is precisely because of this symbiotic relationship that Al Qaeda and the Taliban were regarded by the British Government as being “two sides of the same coin”.²⁰⁹ The British report describes the relationship between Bin Laden and the Taliban as follows:

“Usama Bin Laden and the Taliban regime have a close alliance on which both depend for their continued existence ... Usama Bin Laden has provided the Taliban regime with troops, arms and money to fight the Northern Alliance. He is closely involved with Taliban military training, planning and operations. He has representatives in the Taliban military command structure. He has also given infrastructure assistance and humanitarian aid. Forces under the control of Usama Bin Laden have fought alongside the Taliban in the civil war in Afghanistan. [Mullah] Omar has provided Bin Laden with a safe haven in which to operate, and has allowed him to establish terrorist training camps in Afghanistan. They jointly exploit the Afghan drugs trade. In return for active Al Qaeda support, the Taliban allow Al Qaeda to operate freely, including planning, training and preparing for terrorist activity. In addition the Taliban provide security for the stockpiles of drugs”.²¹⁰

Furthermore, the report concludes that the attacks of September 11 “could not have occurred without the alliance between the Taliban and Osama Bin Laden, which allowed Bin Laden to operate freely in Afghanistan, promoting, planning and executing terrorist activity”.²¹¹

On the basis of this information, it can hardly be denied that the Taliban had “a role in organizing, coordinating or planning the military actions” of Al Qaeda, “in addition to financing, training and equipping or providing operational support to that group”. This does, of course, not mean that the state of Afghanistan may automatically be held accountable for the action of the Taliban. But the remaining gap can be closed by an application of Art. 9 of the ILC Draft Articles on State Responsibility, which allows for the attribution of acts of a *de facto* regime to a state in situations of the partial collapse of the official state machinery, such as in Afghanistan.²¹²

e) Effects of September 11

The events of September 11 mark a turning point in the attribution of responsibility for terrorist acts under Art. 51 of the Charter. They have clearly revealed that the law of self-defence cannot stand still at the level of *Nicaragua*. The “effective control” test, developed by the ICJ in 1986, provides a useful tool to deal with the traditional cases of state-sponsored terrorism. But it does not adequately ad-

²⁰⁸ See U.S. Council on Foreign Relations, *The Taliban, Terrorism: Questions & Answers*, at: <http://www.terrorismanswers.com/afghanistan/taliban2.html>.

²⁰⁹ See 10 Downing Street Facts, *Responsibility for the Terrorist Atrocities in the United States, 11 September 2001 – An Updated Account*, para. 19. The report is available at: <http://www.number-10.gov.uk/output/page458.asp>.

²¹⁰ See paras. 12 and 13 of the report, *supra* note 209.

²¹¹ See para. 74 of the report, *supra* note 209.

²¹² See *supra* note 193.

dress new forms of terrorism, emerging from largely independent private actors.²¹³ The more or less instant qualification of the acts of September 11 as armed attacks by NATO and the OAS without further inquiry about the specific role of the Taliban indicates a departure from the "effective control" test. This process has started in the context of international criminal law with the *Tadic* Appeals Chamber judgment of the ICTY. Moreover, it has continued in the field of terrorism in the aftermath of September 11. Unfortunately, it is still unclear, to which extent the law has changed. The exercise of self-defence in the case of Afghanistan may be justified on the basis of the application of the "overall control" test to counter-terror operations. But the legal reaction to the September 11 attacks may also be viewed as a step towards the establishment of a right to self-defence against states harboring terrorists.²¹⁴

In particular, the state practice of the United States has so far been based on the understanding that the mere harboring or toleration of terrorism engenders a victim's right to self-defence.²¹⁵ However, given its great risks of abuse²¹⁶, this approach has so far enjoyed little if any prominence in the context of Art. 51 of the Charter.²¹⁷ One should therefore be cautious to interpret the legal response to the

²¹³ See also Tietje & Nowrot, *supra* note 1, at 9.

²¹⁴ See Greenwood, *supra* note 1, at 313 and Tietje & Nowrot, *supra* note 1, at 10-11. See in support of this doctrine also Abraham Sofaer, Terrorism, the Law and National Defense, *Military Law Review*, Vol. 126 (1989), 95, 108; Walter Gary Sharp, The Use of Armed Force Against Terrorism: American Hegemony or Impotence, *Chicago Journal of International Law*, Vol. 1 (2000), 37, at 47; Wedgwood, *supra* note 18, at 564-565 and Dinstein, *supra* note 36, at 215-216.

²¹⁵ In 1986, U.S. Secretary of State Schultz noted shortly before the attack on targets in Libyan territories that "a state which supports terrorists or subversive attacks against another state, or which supports or encourages terrorist planning and other activities within its own territory, is responsible for ... armed aggression against the other state". See Low Intensity Warfare: The Challenge of Ambiguity, Remarks by George P. Schultz, Secretary of State, before the Low-Intensity Warfare Conference, National Defence University, Washington, January 25, 1986, at 7 and 11-12. Furthermore, the most recent and perhaps most instructive precedent is the 1998 military campaign against Afghanistan and Sudan. The United States justified the lawfulness of the missile strikes as an act of self-defence, responding to Afghanistan's provision of a safe haven to Bin Laden and Sudan's continued refusal to terminate its support to Al Qaeda. President Clinton noted in a televised address on 20 August 1998: "Afghanistan and Sudan have been warned for years to stop harboring and supporting these terrorists groups. But countries that persistently host terrorists have no right to be safe havens." The statement is reprinted in *AJIL*, Vol. 93 (1999), at 162.

²¹⁶ To regard the toleration of terrorist activities as a ground justifying the exercise of self-defence is a risky concept because it relieves the defending state to a large extent from its obligation to present evidence about the involvement of the targeted state in the attack.

²¹⁷ In 1985, the Security Council condemned the Israeli bombardment of the PLO headquarters near Tunis in response to PLO terrorist attacks. See SC Res. 573, UN Doc. S/RES/573 (1985). Furthermore, in 1986, the UN General Assembly condemned the U.S. bombing of Tripoli, Libya after the attack on U.S. servicemen in Berlin, while a corresponding resolution of the Security Council failed to be adopted due to the opposition of France, the U.K. and the U.S. See UN GA. Res. 38/41 of 20 November 1986, UN Doc. A/RES/41/53 (1986). In 1998, the League of Arab States condemned the U.S. attack on Sudan, while the General Assembly and the Security Council remained silent. See Sean D. Murphy, Contemporary Practice of the United States Relating to International Law, *AJIL*, Vol. 93 (1999), 161, at 164-165. For a survey, see also Corten & Dubuisson, *supra* note 28, at 59 et seq.

events of September 11 too early as an internationally recognized precedent for the application of the further-going "harboring doctrine".²¹⁸

To equate inaction by a state with an "armed attack" under Art. 51 of the Charter seems to go beyond the express wording of this provision.²¹⁹ Furthermore, it should be recalled that Art. 3 g of the General Assembly's Definition of Aggression avoids reference to the concepts of state toleration or acquiescence, when qualifying acts of assistance by a state to the use of force by private actors as acts of aggression. The idea of a responsibility for tolerating or facilitating unlawful conduct committed by a different actor is only inherent in Art. 3 f which prohibits a state to place its territory "at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State" (emphasis added).²²⁰ Moreover, the "harboring doctrine" raises difficult issues with respect to the limits of state responsibility for the acts of private actors under Art. 51. It is, in particular, unclear where imputability ends, once it has been established in the context of counter-terrorism measures. It might sound reasonable to allow military action against states in which training centers or camps of global terrorist groups are located. But what about states that "harbor" only a handful of terrorists or countries that have in the past offered support to terrorists or acquiesced in terrorist activities?

Finally, one should take into account that the broad international support for the military action against Afghanistan has been the result of particular circumstances, such as the continuous and grave breach of previous Chapter VII resolutions by the Taliban regime and the close links between the Taliban and Al Qaeda. These unusual circumstances distinguish the case of Afghanistan from most other counter-terror operations and make it difficult to view the widespread support for Operation "Enduring Freedom" as a general approval of the theory that a state is free to use unilateral force against another state, which fails to prevent terrorist activities emanating from its territory. Defensive action might ultimately be permissible if a state proves to be genuinely unwilling or unable to suppress acts of terrorism directed against other states.²²¹ However, the practice of September 11 appears to suggest that such a decision does not fall within the sole discretion of the defending state, but requires instead corresponding findings of other states or international institutions and the exhaustion of other remedies than the use of force in self-defence.

²¹⁸ See also Mégret, *supra* note 1, sub. 4 B 1 b.

²¹⁹ See also Travalio, *supra* note 18, at 159.

²²⁰ See also Kirsten Schmalenbach, *Die Beurteilung von grenzüberschreitenden Militäreinsätzen gegen den internationalen Terrorismus aus völkerrechtlicher Sicht*, NZWehrR 2000, 177, at 187.

²²¹ Alternatively, one might argue that only the Security Council is entitled to authorize the use of force against the "harboring state". However, such a view is hardly in line with the protection accorded to the defending state under the right to self-defence under Art. 51 of the Charter, which grants victims of an armed attack the right to put an end to the attack, even in the absence of Security Council action.

5. Limits of Counter-Terrorism Measures

Although the military action against Afghanistan may be based on the right to self-defence, some doubts remain about the observance of the limits of this right.

a) The target of self-defence

It is, first of all, clear that the limits of Operation "Enduring Freedom" must be assessed on the basis of Art. 51 of the Charter. It has been argued that the right to self-defence under customary law is wider than that enshrined in the Charter.²²² But this argument is, of course, of no relevance to the strikes against Afghanistan, because as members of the United Nations the acting states were clearly bound by Art. 51 of the Charter, which supersedes and replaces the traditional right to self-defence with respect to UN member states.²²³

One of the most striking particularities of the exercise of self-defence within the framework of Operation "Enduring Freedom" was that the use of force was not only directed against the Al Qaeda organization as the suspected author of the attack, but also against the Taliban regime, which exercised governmental powers in Afghanistan. This wide understanding of the concept of self-defence, making terrorists and organs of *de facto* regime targets of counter-terror operations, is controversial.²²⁴ Surely, the Taliban have been an oppressive and dictatorial regime, responsible for harsh human rights violations, particularly against women and children. This does not authorize other states to remove them from power. It is worth recalling that in the *Nicaragua* case itself, the ICJ declared that it could not "contemplate the creation of a new rule opening up a right of intervention by one State against another on the ground that the latter had opted for some particular ideology or political system". The Court added that to hold otherwise "would make nonsense of the fundamental principle of State sovereignty, on which the whole of international law rests, and the freedom of choice of the political, social, economic and cultural system of a State".²²⁵ Furthermore, earlier attempts to justify the removal of an existing regime under the right to self-defence have encountered international criticism.²²⁶ In particular, the 1989 U.S. invasion of Panama, which was

²²² See Derek W. Bowett, *Self-Defence in International Law* (1958), 187-192. See also the Dissenting Opinion of Judge Schwebel in the *Nicaragua* case, ICJ Rep. 1986, at 347.

²²³ See Albrecht Randelzhofer, On Article 51, in: B. Simma (ed.), *Charter of the United Nations* (1995), 675, para. 34 and 678, para. 40.

²²⁴ See also Tietje & Nowrot, *supra* note 1, at 15 and Delbrück, *supra* note 1, at 17.

²²⁵ See ICJ Rep. 1986, para. 263.

²²⁶ For a critical appraisal of the ECOWAS intervention in Sierra Leone, which was based upon the right to self-defence and ultimately led to the overthrow of the junta regime, see Karsten Nowrot & Emily W. Schabacker, *The Use of Force to Restore Democracy: International Legal Implications of the ECOWAS Intervention in Sierra Leone*, *American University International Law Review*, Vol. 14 (1998), 321, at 365 et seq. and 368 ("[t]he capture of the capital and removal of the junta regime from power cannot be justified as an exercise of self-defence". See also the criticism raised with respect to the U.S. Invasion of Panama by Louis Henkin, *The Invasion of Panama Under*

guided by the intention to overthrow the Noriega regime²²⁷, has been rejected by the large majority of states.²²⁸ As has been aptly observed by Louis Henkin, hardly any government would accept "the vindication of democracy as an exception to the prohibition of the use of force".²²⁹ Moreover, the fact that the Taliban were not recognized as the official government of Afghanistan by most states cannot lead to a different result, because it is widely accepted that even *de facto* regimes enjoy the protection of Art. 2 (4) of the Charter.²³⁰

One may easily agree that there is an emerging rule justifying the use of force against terrorists in cases in which these acts are attributable to the territorial state and give rise to an imminent threat. Such a rule may allow military action against strategic targets situated in the territory from which terrorist organizations operate, such as in the case of the U.S. strikes against Sudan and Afghanistan in 1998. However, it is far more difficult to justify military action against a regime which proves to be unwilling or unable to put an end to the terrorist activities.

The question whether military action against a specific regime is permissible under the right to self-defence must be determined on the basis of the requirements of necessity and proportionality, which limit the scope of the right to self-defence under Art. 51.²³¹ The necessity test usually obligates the defending state to verify that a peaceful settlement of the conflict is not attainable. This rule applies in traditional inter-state conflicts, but it is of even greater importance in the context of the combat of terrorism, which may often be adequately dealt with under the rules of the existing anti-terrorist conventions and the relevant instruments of criminal law. To justify measures of self-defence against a regime that fails to take appropriate action against terrorists operating from its territory, the defending state would have to fulfill, at least, two conditions, namely (1) that peaceful means are not sufficient to deter future attacks and (2) that strikes against the terrorists themselves do not provide adequate redress to forestall the danger of future attacks.

International Law: A Gross Violation, Columbia Journal of Transnational Law, Vol. 29 (1991), 293 et seq.

²²⁷ On the U.S. position, see Abraham D. Sofaer, The Legality of the United States Action in Panama, Columbia Journal of Transnational Law, Vol. 29 (1991), 281 et seq.

²²⁸ The U.N. General Assembly strongly deplored the invasion of Panama as a "flagrant violation of international law". See GA Res. 240 (1989), UN Doc. A/44/L/63 and Add.1. A virtually identical resolution in the Security Council received ten affirmative votes, four in opposition and one abstention. The OAS adopted a resolution to "deeply regret the intervention in Panama" and to "call for the withdrawal of the foreign troops used for the military intervention". See OAS CP/Res. 534 (800/89) of 22 December 1989.

²²⁹ See Henkin, *supra* note 226, at 298. For a discussion, see also Oscar Schachter, The Legality of Pro-Democratic Invasion, AJIL, Vol. 78 (1984), 645 et seq. and *id.*, Is There a Right to Overthrow an Illegitimate Regime?, in: Mélanges Michel Virally, Le Droit International au service de la paix, de la justice et du développement (1991), 423 et seq. See also Michael Reisman, Coercion and Self-Determination: Construing U.N. Charter Article 2 (4), AJIL, Vol. 78 (1984), 642 et seq.

²³⁰ See Albrecht Randelzhofer, On Article 2 (4), in: B. Simma (ed.), Charter of the United Nations (1995), 115, para. 28.

²³¹ See Dinstein, *supra* note 36, at 207-213.

It is controversial whether these conditions were fully respected in the case of Afghanistan. Surely, one might grant the defending state a right to target a regime that has itself turned into an instrument of terror and that cannot be adequately distinguished from the terrorist organizations operating under its "overall control". But it is questionable whether such a situation existed in Afghanistan. Undoubtedly, the Taliban were closely associated with the Al Qaeda organization. They supported Al Qaeda. Furthermore, forces of the Taliban and Al Qaeda units obviously fought side-by-side first against the Northern Alliance, and later against British and American troops. Moreover, when describing the links between both entities before the strikes, a former Government official in Afghanistan even went so far as to state that "Usama [bin Laden] [could not] exist in Afghanistan without the Taliban and the Taliban [could not] exist without Usama [bin Laden]".²³² However, it has not been fully established that the objective of self-defence, namely the suppression of terrorism, could only be achieved through the additional removal of the Taliban regime.

The Taliban indicated on the eve of the strikes that they were willing to cut their ties to Bin Laden.²³³ In addition, sources in the media suggest that Al Qaeda enjoyed wide operational and financial independence in its own activities. The fact that Al Qaeda obviously financed the activities of the Taliban²³⁴ has even led one observer to note that Afghanistan was not a state sponsoring terrorism, but a "terrorist-supported state".²³⁵ It is therefore doubtful whether the complete removal of the Taliban was necessary from a strategic perspective. Finally, the achievements of Operation "Enduring Freedom", namely the collapse of an undemocratic regime and the liberation of women are certainly welcome, but not strictly related to the stated war aim of defeating terrorism. The only true threat emerging from the Taliban regime was the risk that it would again fail to comply with its obligation to combat terrorism, but this alone would hardly suffice to make it a lawful target under Art. 51 of the Charter²³⁶, which generally prohibits preventive self-defence.²³⁷

Last but not least, a case can be made that measures with substantial and long-lasting effects on international peace and security, such as the removal of a regime, do not come within the ambit of self-defence, but fall primarily within the responsibility of the Security Council.²³⁸ The requirement that measures of self-defence "shall be immediately reported to the Security Council" places the exercise of self-

²³² See the report, *supra* note 209, at para. 19.

²³³ See Taliban "ready for negotiations", *The Globe and Mail*, October 3, 2001.

²³⁴ See Jeffrey Bartholet, *Method to Madness*, *Newsweek* 54, 58 (October 22, 2001).

²³⁵ See *The Taliban Connection*, *supra* note 207.

²³⁶ See in this sense Brennan, *supra* note 18, at 1204.

²³⁷ See Randelzhofer, *supra* note 223, at 675.

²³⁸ See in this sense Delbrück, *supra* note 1, at 21 ("If a regime is responsible for grave and persistent violations of human rights, including the support of terrorists who on their part are preparing or committing crimes against humanity, the Security Council ... could authorize enforcement measures against that country. Had one followed that approach, questions about the legality of the deposition of the Taliban in the course of the self-defense actions would have been clearly unfounded."). See also Tomuschat, *supra* note 1, at 543.

defence within the framework of the United Nations Charter. Under the Charter, the Council bears the primary responsibility for the maintenance of international peace and security. The overall authority of the Council includes, in particular, the right to take preventive action whereas the right of states to use force in self-defence is generally limited to responsive or retaliatory measures. This general distinction may be derived from Art. 39 of the Charter, which charges the Council explicitly with the countering of "threats" to international peace and security, whereas Art. 51 presupposes the existence of an "armed attack". The exercise of preventive self-defence conflicts therefore with the responsibility of the Council.²³⁹ It is quite telling that the international military presence in Afghanistan was based on a separate Chapter VII mandate of the Security Council.²⁴⁰

b) Art. 51 and preventive action

For the same reasons, it would be difficult to view the right to self-defence triggered by the September 11 attacks as a viable legal basis for the justification of a global campaign against terrorism, involving military action against other states than Afghanistan. The United States has made statements indicating that it intends to extend its self-defence claim beyond Afghanistan. In its letter to the Security Council of 7 October 2001, the U.S. Representative to the United Nations, clearly stated that "we [the U.S.] may find that our self-defence requires further action with respect to other organizations and other states".²⁴¹ Furthermore, similar statements have been made by other U.S. government officials.²⁴² Such an approach is hardly compatible with the temporal limitations of the right to self-defence.²⁴³ Even if one concedes that terrorist acts may amount to a breach of international peace and security or satisfy the requirements of an armed attack, this does not mean that a state may use force in self-defence, in order to suppress a future terrorist threat.²⁴⁴ The duty to combat terrorism is, first and foremost, incumbent on the state that has custody over the terrorist actors. This obligation has been clearly re-

²³⁹ See also Tomuschat, *supra* note 1, at 543.

²⁴⁰ See paras. 1 and 3 of SC Res. 1386 of 20 December 2001: "Acting for these reasons under Chapter VII of the Charter of the United Nations, 1. Authorizes, as envisaged in Annex 1 to the Bonn Agreement, the establishment for 6 months of an International Security Assistance Force to assist the Afghan Interim Authority in the maintenance of security in Kabul and its surrounding areas, so that the Afghan Interim Authority as well as the personnel of the United Nations can operate in a secure environment; ... 3. Authorizes the Member States participating in the International Security Assistance Force to take all necessary measures to fulfill its mandate." See UN Doc. S/RES1386 (2001), *supra* note 24.

²⁴¹ See UN Doc. S/2001/946, *supra* note 6.

²⁴² See Statement of President Bush, Address to a Joint Session of Congress and the American People, Office of the Press Secretary, 20 September 2001, at: <http://www.whitehouse.gov>.

²⁴³ See Mégret, *supra* note 1, sub. 4 A 2.

²⁴⁴ See also Frederic L. Kirgis, Pre-emptive Action to Forestall Terrorism, ASIL Insight, June 2002.

affirmed by the Security Council in para. 2 of its Resolution 1373 in which the Council used its powers under Chapter VII to reaffirm that "all states" shall

"(b) [t]ake the necessary steps to prevent the commission of terrorist acts, including by provision of early warning to other states by exchange of information;

(c) [d]eny safe haven to those who finance, support, plan, support, or commit terrorist acts, or provide safe havens;

(d) prevent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other States or their citizens."

States that do not fully comply with these obligations can only be targeted in the exercise of self-defence, if it is established that further attacks are, at least, "imminent".²⁴⁵ The most commonly used test in this regard is the formula applied in the *Caroline* case of 1842, according to which self-defence must be "instant, overwhelming, and leaving no choice of means, and no moment for deliberation".²⁴⁶ This standard is clearly met in situations in which an attack is on its way or has been launched in an irrevocable way.²⁴⁷ But state practice has been reluctant to recognize further-reaching claims of anticipatory self-defence.²⁴⁸ An argument in favour of the legality of pre-emptive self-defence is that a state facing the danger of an armed attack cannot be expected to wait until that attack occurs. However, the invocation of a right to preventive self-defence going beyond the limits of the *Caroline* test not only creates significant opportunities for abuse²⁴⁹, but also collides with the wording of Art. 51 ("if an armed attack occurs")²⁵⁰. Furthermore, if a state is exposed to the threat of an armed attack, it may take the necessary military steps to repel the attack or bring the matter to the attention of the Security Council.²⁵¹ It can hardly be said that this perception has changed in the aftermath of September 11.²⁵²

²⁴⁵ See Alexandrov, *supra* note 30, at 163.

²⁴⁶ See generally on the Webster formula, Dinstein, *supra* note 36, at 219. For the facts, see Robert Y. Jennings, *The Caroline and McLeod Cases*, AJIL, Vol. 32 (1938), 82.

²⁴⁷ See also Alexandrov, *supra* note 30, at 164.

²⁴⁸ See Alexandrov, *supra* note 30, at 165: "In most cases, the use of force, justified on the basis of anticipatory self-defence, was condemned or censured, or was widely disapproved: the Israeli actions against Syria, Jordan, and Lebanon, the Beirut raid in 1968, the attacks on Beirut in 1981, the invasion of Lebanon in 1982, the bombing of the Iraqi nuclear reactor, ... the United States use of force in the Gulf of Tonkin, the bombing of Libya, and the missile attack against Baghdad. It was found in those cases that there was no threat or an imminent attack or harm, leaving no choice of means and no moment for deliberation ...".

²⁴⁹ See also Christian Tomuschat, *Obligations Arising for States Without or Against Their Will*, *Recueil des Cours*, Vol. 241, 1993-IV, 199, at 216: "Generally, anticipatory self-defence against a presumed imminent attack must be deemed to be inadmissible. Justifying such pre-emptive strikes would be tantamount to opening Pandora's box. Art. 2 (4) could easily be circumvented."

²⁵⁰ For a narrow interpretation of Art. 51, prohibiting any anticipatory self-defence, see Randalzhofer, *supra* note 223, at 676.

²⁵¹ See Dinstein, *supra* note 36, at 167.

²⁵² See also Delbrück, *supra* note 1, at 18-19. But see Byers, *supra* note 1, at 411 ("[T]he letter [of the U.S. Representative to the United Nations of 7 October 2001] attracted little in the way of protests from other states – an omission that might, if continued in the face of action justified as

6. International Accountability of the Defending State

Any wide interpretation of Art. 51 of the Charter, encompassing a right of states to invoke self-defence in counter-terror operations against terrorist networks, inevitably poses the question of the control of the defending state. While a state must, in first instance, judge for itself whether it is justified in resorting to force, it does not enjoy the authority to make a final determination upon the justification of its action. Under the Charter, the exercise of self-defence is subject to several forms of control.

a) The obligation to produce evidence

Art. 51 requires any state using force in self-defence to report immediately to the Security Council on its action. If a state fails to comply with the reporting requirement, it is not *per se* precluded from justifying the use of force as self-defence²⁵³, but “the absence of a report may be one of the factors indicating whether the State in question was itself convinced that it was acting in self-defence”.²⁵⁴ Furthermore, a state must produce evidence in support of its self-defence claim. In

anticipatory self-defence – be regarded as evidence of acquiescence in yet another change to customary international law.”) It is also difficult to argue that “new threats” emerging from non-state actors, such as the development of technologically sophisticated weapons, would challenge this general perception. The issue of whether the right to self-defence may be exercised under facilitated conditions against large-scale threats was raised in the context of the 1981 Israeli air strike against an Iraqi nuclear reactor, which was still under construction, when Israel carried out its raids (see on this issue, Anthony D’Amato, *Israel’s Air strike upon the Iraqi Nuclear Reactor*, *AJIL*, Vol. 77 (1983), 584 and Uri Shoham, *The Israeli Aerial Raid upon the Iraqi Nuclear Reactor and the Right of Self-Defence*, *Military Law Review*, Vol. 109 (1985), 191). Israel argued that it had been forced to defend itself against the construction of an atomic bomb in Iraq and that the scope of self-defence had been broadened with the technological advance and the risk of surprise attacks (see on the Israeli position, W. Thomas Mallison & Sally V. Mallison, *The Israeli Aerial Attack of 7 June 1981 upon the Iraqi Nuclear Reactor: Aggression or Self-Defence?*, *Vanderbilt Journal of Transitional Law*, Vol. 15 (1982), 417, at 435-437). The Security Council implicitly rejected this argument, by concluding that there was no instant and overwhelming necessity of self-defence that would justify the Israeli use of force. The Council issued a clear and unanimous statement that condemned “the military attack by Israel in clear violation of the Charter of the United Nations and the norms of international conduct (see SC Res. 487 of 19 June 1981, UN Doc. S/RES/487 (1981), in *AJIL*, Vol. 75 (1981), 724). The reaction of the Council supports the conclusion that there are legitimate grounds to counter large scale threats in self-defence only, where the harm is imminent. See also Dinstein, *supra* note 36, at 168: “The proposition that UN Members are barred by the Charter from invoking self-defence, in response to a mere threat of force, is applicable in every situation. It is sometimes put forward that ‘[t]he destructive potential of nuclear weapons is so enormous as to call into question any and all received rules of international law regarding the transboundary use of force’. But the inference that Art. 51 is only operative under conditions of conventional warfare cannot be substantiated.”

²⁵³ See D. W. Greig, *Self-Defence and the Security Council: What Does Article 51 Require?*, *ICLQ*, Vol. 40 (1991), 366, at 380. But see Dinstein, *supra* note 36, at 189, (“The Court implied that ... a State is precluded from invoking the right to self-defence, if it fails to comply with the requirement of reporting to the Council.”).

²⁵⁴ See ICJ Rep 1986, 105, para. 200.

the *Nicaragua* case, the United States argued that the court did not have the jurisdiction under the Charter over issues involving an ongoing use of force, and that therefore the United States did not have to present evidence to justify to the Court its assertion of the need to use force in self-defence. But the ICJ rejected the U.S. argument. The Court held that the claim to use force in self-defence must be supported by credible evidence of an armed attack and of the attacker's identity.²⁵⁵ However, several uncertainties remain. It is in particular controversial whether the production of evidence is a condition preceding the exercise of self-defence. While some scholars contend that the evidentiary requirement arises only after the exercise of self-defence²⁵⁶, others take the view that a state carries the burden of presenting evidence before it takes "irreversible and irreparable measures".²⁵⁷ Moreover, no firm standard of proof has been devised, because, in many situations, the duty to disclose evidence to the international community contrasts with the defending state's security interests.

b) The jurying function of the Security Council

Presently, the core of international supervision lies therefore in the Charter's collective security system.

(1) The mechanisms of the Charter

At the San Francisco Conference, self-defence was essentially conceived as a provisional right, which is subject to the *ex post* control of the Council.²⁵⁸ The resort to force in self-defence was not made dependent on the prior approval of the Security Council. But Art. 51 second sentence determined that the exercise of self-defence should cease as soon as the Council takes the measures necessary to restore peace. This construction ensures that the right of self-defence operates within the system of collective security, while allowing states to act in cases where the United Nations has failed to prevent a threat to or breach of international peace and security and subsequently refrained from taking action.

The Security Council exercises a "jurying function"²⁵⁹, which may take several forms. Perhaps the most classical form of Security Council intervention is an *ex post* determination of the lawfulness of a measure of self-defence. The Council has

²⁵⁵ See ICJ Rep. 1986, 119-121, 127, paras. 230-234, 248-249.

²⁵⁶ In this sense Franck, *supra* note 1, at 842.

²⁵⁷ See Charney, *supra* note 1, at 836 and Oscar Schachter, *The Lawful Use of Force by a State Against Terrorists in Another Country*, in: Henry H. Han (ed.), *Terrorism & Political Violence*, (1993), 243, at 252.

²⁵⁸ See Alexandrov, *supra* note 30, at 104.

²⁵⁹ See also Thomas M. Franck, *When, If Ever, May States Deploy Military Force Without Prior Security Council Authorization?*, *Washington University Journal of Law & Policy*, Vol. 5 (2001), 51, at 66.

exercised this authority on several occasions. In analysing responsive military action, the Council has frequently condemned the use of force in self-defence which did not meet the requirements of necessity, immediacy or proportionality.²⁶⁰ The Council has also rejected claims self-defence by United Nations members.²⁶¹ Furthermore, Art. 51 second sentence allows for self-defence action only "until" the Security Council takes action. This provision implies the right of the Council to replace the exercise of self-defence by measures of collective security.²⁶²

The question whether a state remains entitled to invoke the right to self-defence notwithstanding Chapter VII measures by Council has been debated in the context of the use of force against Iraq in 1990.²⁶³ It has also been raised with respect to the legal response of the September 11 attacks. The practice in the case of Operation "Enduring Freedom" lends support to the view that the phrase "until the Security Council has taken measures necessary to maintain international peace and security", cannot be understood as a mere temporal limitation on the right to self-defence²⁶⁴, but requires further indications of the Council's intention to suspend the exercise of self-defence, be it by action under Arts. 42 and 48 of the Charter or measures not involving the use of force.

Some ambiguities arose from the fact that the Council itself had adopted a wide range of non-military measures based on Chapter VII in its Res. 1373 (2001), while expressing "its determination to take all necessary steps in order to ensure the full implementation of this resolution, in accordance with its responsibilities under the Charter". This has led some authors to interpret the measures taken by the Council as a bar to the exercise of military force under Art. 51 of the Charter.²⁶⁵ But this

²⁶⁰ For a survey, see Derek B. Bowett, *Reprisals Involving Recourse to Armed Force*, *AJIL*, Vol. 66 (1972), 1, at 11-13 and 33-36.

²⁶¹ In 1951, for example, when Egypt invoked the right to self-defence to justify restrictions imposed on the passage of goods to Israel through the Suez Canal, the Council stated: "[S]ince the armistice regime, which has been in existence for nearly two and a half years, is of a permanent character, neither party can reasonably assert that it is actively a belligerent or requires to exercise the right of visit, search, and seizure for any legitimate purpose of self-defence". See Res. S/2322 of 1 September 1951. For a discussion, see Thomas K. Plofchan, *Article 51: Limits of Self-Defence?*, *Michigan Journal of International Law*, Vol. 13 (1992), 336, at 367-369. Moreover, in the Falklands war in 1982, the Security Council Resolution 502 demanded the immediate withdrawal of all Argentine forces from the Falkland Islands, rejecting Argentina's claim to self-defence. See SC Res. 502 of 3 April 1982.

²⁶² See Randalzhofer, *supra* note 223, 677.

²⁶³ See E.V. Rostow, *Until What?, Enforcement Action or Collective Self-Defence?*, *AJIL*, Vol. 85 (1991), 506 et seq.

²⁶⁴ For such an understanding of Art. 51 second sentence, see Abram Chayes, *The Use of Force in the Persian Gulf*, in: L.F. Damirsch & D.J. Scheffer, *Law and Force in the New International Order* (1991), 3, at 5-6.

²⁶⁵ See Pellet, *No, This is not War!*, *supra* note 1 ("Above and beyond this, according to the terms of Paragraph 5 of Resolution 1368, the Council has clearly indicated that it was prepared to take the necessary measures to maintain international peace and security which it has declared to be threatened. It would be contrary to the letter as much as to the spirit of Art. 51 that the United States, alone or with other states, were to by-pass the Council and proceed, alone and without its endorsement, with an armed response.").

position has turned out to be untenable. The measures taken by the Council in Res. 1373 (2001) were clearly not intended to deal conclusively with the threat to international peace and security posed by the Taliban and Al Qaeda.²⁶⁶ The general reference to the exercise of self-defence, mentioned in the preamble of Resolution 1368 (2001) and later reiterated in Resolution 1373 (2001) has made it entirely clear that the suspension of the right of self-defence was not the intention of the Council. Moreover, last doubts were removed by para. 2 of the preamble of Resolution 1378 (2001) in which the Council expressed its support for "international efforts to root out terrorism" after the beginning of the strikes against Afghanistan. This practice indicates that the right of self-defence is not simply overridden whenever the Security Council adopts measures considered necessary in case of an armed attack.²⁶⁷ On the contrary, one may only agree with Dinstein that "the only resolution that will engender that result is a legally binding decision, whereby the cessation of the (real or imagined) defensive action becomes imperative".²⁶⁸

(2) Towards new forms of control

However, the most significant development for the interplay between self-defence and collective security in the aftermath of September 11 is the anticipated invocation of the right to self-defence by the Council even before its concrete exercise. Resolution 661 (1991) marked the first occasion in which the ordinary chronology of the Charter, which is based on a subsequent intervention of the collective security system, was reversed by the Security Council. The Council recognized the existence of a right to self-defence immediately after Iraq's invasion of Kuwait. Although the right to self-defence was only mentioned in the preamble of the resolution, the early reaction of the Council had considerable weight. The Council thereby recognized the right of third states to use force against the Iraqi aggressor, independent of any special links with Kuwait. Collective self-defence was immediately placed in the overall context of the maintenance of international peace and security. Furthermore, by invoking the right to self-defence, the Council reaffirmed that the collective use of force against Iraq did not conflict with the economic sanctions imposed under Resolution 661.²⁶⁹

A similar model underlies the legal reaction of the Council to the September 11 attacks, where the Council did not go so far as to positively determine the aggressor and holder of the right to self-defence, but presumed its general applicability by reaffirming "the inherent right of individual and collective self-defence" in the preambles of Resolutions 1368 (2001)²⁷⁰ and 1373 (2001)²⁷¹. This practice is re-

²⁶⁶ See Franck, *supra* note 1, at 841.

²⁶⁷ See in this sense, Oscar Schachter, *United Nations Law in the Gulf Conflict*, AJIL, Vol. 85 (1991), 452, at 458.

²⁶⁸ See Dinstein, *supra* note 36, at 189.

²⁶⁹ Resolution 661 required all states to ban imports to, and exports from Iraq. Furthermore, the Council set up a special committee to monitor the sanctions.

²⁷⁰ See para. 3 of the preamble of SC Res. 1368 (2001).

markable for the development of the law of self-defence because it extends the role of the Council as "arbiter" over the lawfulness of measures under Art. 51 of the Charter to the stage before the first employment of military force. Taking into account the precedents of Kuwait and Afghanistan, one may in fact argue that the Council exercises a preventive *droit de regard* with regard to self-defence when mentioning this right even before its exercise. Such a practice may lay the foundation for a new model of community based self-defence²⁷², allowing the use of force against large-scale acts of international terrorism, while requiring close cooperation with the Council. This approach may, in particular, help to distinguish the permissible use of force from abusive claims to self-defence under the heading of an expanding concept of armed attack, without calling into question the general principle that resort to force in self-defence does not require a prior authorization of the Security Council under the Charter.²⁷³

IV. September 11 and Collective Security

Nevertheless, there are cases, in which the use of force should be based on enforcement measures under Chapter VII or, at least, a formal authorization by the Council, in order to justify measures which would generally fall out of the scope of Art. 51 of the Charter. Operation "Enduring Freedom" is one of them. Given the far-reaching impact of the operation, combining the combat of terrorism with a transformation of the entire political system of Afghanistan, the use of force should have been based on a clear authorization of the Council under Chapter VII.²⁷⁴ Unfortunately, the international community has not followed this path. In its Resolution 1373 (2001), the Council adopted a wide array of measures not involving the use of force to combat international terrorism. These measures, mostly based on international obligations arising out of existing treaty law, can be categorized as measures under Art. 41 of the Charter. But the Council showed considerable caution and restraint with respect to the authorization of the use of force. The outcome is a unique legal construction: An operation based on Art. 51 of the Charter, but mixed with various elements of approval by the Council.²⁷⁵

²⁷¹ See para. 4 of the preamble of SC Res. 1373 (2001).

²⁷² See also generally on such a concept Alexandrov, *supra* note 30, at 296.

²⁷³ Given the present construction of Article 51 it is, however, doubtful whether one can go so far as to require that a state must first exhaust the option of collective security, before taking measures of self-defence. See in support of such an approach, Corten & Dubuisson, *supra* note 28, at 75 ("En d'autres termes, comme le relevait Robert Ago, la légitime défense suppose une situation d'extrême d'urgence qui ne laisse ni le temps, ni le moyen de s'adresser à d'autres instances, Conseil de sécurité y compris". Ce schéma, qui est à notre sens le seul qui correspond au texte comme à l'esprit de la Charte, a volontairement été évité par les Etats-Unis. Quoi qu'on puisse en penser sur le plan politique, il est indéniable que, dans ces conditions, on ne peut pas estimer que tous les moyens aient été épuisés avant de décider de recourir unilatéralement à l'emploi de la force.").

²⁷⁴ See also Charney, *supra* note 1, at 835; Corten & Dubuisson, *supra* note 28, at 75 and Delbrück, *supra* note 1, at 21.

1. The Absence of a Formal Chapter VII Authorization

The Security Council formally authorized the exercise of self-defence in two cases, namely the use of force against North Korea in 1950 and the military operation against Iraq. The legal reaction to the September 11 attacks, however, differs from these two examples in several ways. One may observe that the Council has been hesitant to make a final decision as to the applicability of Art. 51 of the Charter. The right to self-defence is only mentioned in general and abstract terms in Resolutions 1368 (2001) and 1373 (2001)²⁷⁶. Moreover, the findings of the Council with respect to action by states, which could possibly be interpreted as an authorization of self-defence or the use of force, are not contained in the operative part of Resolution 1373 (2001), but only in its preamble, where the council reaffirms "the need to combat by all means, in accordance with the Charter of the United Nations, threats to international peace and security caused by terrorist acts".²⁷⁷ Furthermore, the Council has visibly refrained from employing the language previously used in the context of authorization. The relevant passage of Security Resolution 84 (1950) with respect to Korea reads:

"The Security Council ... 3. Recommends that all Members providing military forces and other assistance pursuant to the aforesaid Security Council Resolutions make such forces and other assistance available to a unified command under the United States of America ... 5. Authorizes the unified command at its discretion to use the United Nations flag in the course of operations against North Korean forces concurrently with the flags of the various nations participating".

Resolution 678 (1990) of 29 September 1990 concerning the use of force against Iraq employs the terms "The Security Council ... Acting under Chapter VII of the Charter ... 2. Authorizes Member States ... to use all necessary means ...".

Security Council Resolution 1373 (2001), on the contrary, contains neither an explicit recommendation, nor an authorization. The preamble of the resolution merely "reaffirms" the need to combat "by all means". In addition, para. 2 (b) of the resolution demands that "all States shall ... [t]ake the necessary steps to prevent the commission of terrorist acts", while falling short of authorizing the use of force. This last clause has been interpreted as an "almost unlimited mandate to use force", providing "the U.S. with an at least-tenable argument whenever it decides for political reasons, that force is necessary to 'prevent the commission of terrorist acts'".²⁷⁸ But such an interpretation is highly questionable. It would not only grant the U.S., but virtually every state a "carte blanche" to justify violations of the prohibition of the use of force by pretending to fight international terrorism. This has hardly been the intention of the Council. It is even unclear whether the provision refers to the use of force, because it mentions the "provision of early warning to

²⁷⁵ For an analysis, see also Tomuschat, *supra* note 1, at 543-544.

²⁷⁶ For a full discussion, see Stahn, Security Council Resolutions 1368 and 1373, *supra* note 1.

²⁷⁷ See para. 5 of SC Res. 1373 (2001).

²⁷⁸ See Byers, *supra* note 1, at 402.

other States by exchange of information” as an example. Moreover, the provision as such is drafted as an obligation rather than as an authorization. In the absence of a formal authorization by the Council, the strikes against Afghanistan must be conceived as “ordinary” measures of self-defence carried out under the framework of Art. 51 of the Charter. This is regrettable, because it leaves some doubts as to whether the strikes were fully in accordance with the law, in so far as the U.S broadened the claim of self-defence to include action against the Taliban.²⁷⁹

2. The Search for other Forms of Approval

However, one cannot fail to note that the resolutions of the Council contain at the same time several passages that may be interpreted as acts of approval, legitimizing the use of force. The reference of the Council to “the need to combat *by all means* ... threats to international peace and security caused by terrorist acts”, contained in para. 5 of Resolution 1373 (2001) could be interpreted in this sense. Furthermore, one may point to para. 2 of the preamble to SC Resolution 1378 (2001), in which the Council declared its support for the “international efforts to root out terrorism, in keeping with the Charter of the United Nations”. This clause may be viewed as a general approval of the resort to the use of force, because there has been widespread support for the military strikes in the Council.²⁸⁰ In particular, many Western countries have openly stated that they regard the U.S. led military campaign as being “legitimate and in accordance with the terms of the Charter and Security Council Resolution 1368 (2001)”.²⁸¹ Finally, in its Resolution 1386 (2001) of 20 December 2001, the Security Council established the International Security Assistance Force for Afghanistan, which draws upon the achievements of the military campaign. The most plausible argument in favour of the legality of the strikes is therefore the almost unanimous support of states that may be regarded as evidence of their acquiescence.²⁸²

²⁷⁹ See also Delbrück, *supra* note 1, at 18 (“Yet, doubts remain about the soundness of stretching the concept of self-defence to the extent that it also covers the replacement of the government of the enemy state, be it only a *de facto* regime or not.”) See also the critical remarks by Cassese, *supra* note 1, at 999.

²⁸⁰ One commentator goes even so far as rely exclusively on the silence of the Council, noting that “[i]f the Council, in its wisdom, does not object to the steps proposed (and since) taken by the United States, then within the institutional framework of the Charter for the maintenance of international peace and security, the United States must be deemed to have the acquiescence of the Security Council in the course of its action”. See Surya Narayhan Sinha, *Terrorism and the Laws of War: September 11 and Its Aftermath*, at: <http://www.crimesofwar.org/expert/attack-sinha.html>.

²⁸¹ See Security Council, 4414th meeting, 13 November 2001, UN Doc. S/PV.4414 (Resumption 1), at 2.

²⁸² Note, however, that some states have expressed concerns that are relevant to the evaluation of the proportionality of the attacks. One example is the statement of the representative of Malaysia, who noted on the day before the adoption of SC Res. 1378 (2001): “[T]he use of military force is a legitimate course of action as an act of self-defence, but it is not the only course of action, the most effective or politically wise. It is unfortunate that, in the move to punish a group of people who are

3. Lost Opportunities

But this solution is not entirely satisfying. Acquiescence is generally a weak argument for the validation of measures of self-defence, especially if it is based on different bits and pieces of various Security Council resolutions. Furthermore, it may encourage states to bypass the system of the Charter in expectation of subsequent approval of the Council.²⁸³ These implications could have been easily avoided. Given the broad international support for the combat of international terrorism, the events of September 11 offered a unique occasion to rely on the collective security mechanisms of the Charter. Unlike in the case of Kosovo, the chance of obtaining an affirmative vote from all permanent members of the Council was comparatively high.²⁸⁴ The reasons of the United States and its allies not to go down that road were obviously of a different nature. One reason is that an operation under Art. 51 of the Charter leaves the acting states greater operational independence than a United Nations mandated use of force.²⁸⁵ Moreover, strategic interests may have played a role. The insistence on a wide concept of self-defence might prove to be useful in other cases, where the likelihood of receiving a clear Security Council authorization is less obvious.²⁸⁶ One cannot say that the Council was bypassed in the aftermath of September 11. On the contrary, significant efforts have been made to involve the Council as early as possible in legal reaction to the September 11 attacks. But one can hardly deny that the mechanisms of the Charter have been used to meet the interests of the Council's currently most influential permanent member.

believed to be behind the terrorist attacks and their protectors, the poor, long-suffering people of Afghanistan have to suffer" (p. 23) "... As in all such bombings, we are seriously concerned at the so-called collateral damage, in spite of the much-touted precision bombings which are supposed to have taken place. We are concerned at the rather high margin of targeting error in the current military campaign, which has led to the reportedly high death toll of civilians. We therefore appeal for an end to the bombing so as to spare the long-suffering people of Afghanistan further hardship and travail and to allow them to return to their villages and homes for the fast-approaching winter season and Ramadan" (p. 24). The statement of the representative of Egypt went in a similar direction, noting that "Egypt understands the motives and justifications that impelled the United States to resort to military force against the Taliban regime in Afghanistan", while stressing "the importance of a serious and committed effort to avoid any harm to innocent Afghan civilians".

²⁸³ See also Jules Lobel & Michael Ratner, *Bypassing the Security Council: Ambiguous Authorizations to Use Force, Cease-Fires and the Iraqi Inspection Regime*, *AJIL*, Vol. 93 (1999), 124, at 135, "A rule that allows acquiescence to constitute authorization and that substitutes ambiguity for clear intent would encourage the Security Council to avoid deciding when the use of force is necessary and appropriate. Acquiescence begets more acquiescence, and once a custom of allowing nations to take forceful action under claims based on ambiguous authority is established, it will develop a momentum of its own."

²⁸⁴ See also Corten & Dubuisson, *supra* note 28, at 75.

²⁸⁵ See also Delbrück, *supra* note 1, at 22. For a similar argument in favour of collective self-defence in the Gulf war, see Jochen A. Frowein, *On Article 42*, in: B. Simma, *Charter of the United Nations* (1995), 634, para. 22.

²⁸⁶ See also Byers, *supra* note 1, at 402 and 413.

V. September 11 and International Criminal Law

The events of September 11 finally invite some reflections on the development of international criminal law.²⁸⁷ The combat of new forms of international terrorism not only creates overlaps between the right to self-defence, the law of judicial cooperation and domestic law, but also presents new challenges for the development of international criminal law. The events of September 11 may, in particular, lead states to consider serious acts of terrorism as crimes against humanity, irrespective of whether they have been committed in peacetime or in wartime.²⁸⁸ The advantages of such an approach are numerous. The qualification of grave acts of international terrorism as international crimes would pay tribute to the fact that they are embedded in the context of the maintenance of international peace and security and do not only touch a specific national jurisdiction, but the international community as a whole. Furthermore, such an approach would strengthen the emergence of a unified legal framework governing the adjudication of grave acts of violence and help to overcome divergent national standards, such as in the area of defences.²⁸⁹ Moreover, the possibility to raise claims of immunity would be excluded if serious terrorist attacks were considered as crimes against humanity.

1. International Criminal Law and Terrorism

Terrorism has so far remained outside the very core of international criminal law. While there are numerous conventions that define specific terrorist crimes and require states to punish these crimes through domestic legislation, terrorist acts have mostly been regarded as a matter of domestic criminal law and have, accordingly, been treated as a national rather than an international phenomenon. After World War I, the wave of violence in the Balkans led to the establishment of the Convention Against Terrorism of 1937 by the League of Nations and a Convention for the Creation of an International Criminal Court.²⁹⁰ But due to the outbreak of World War II and the corresponding decline of the League of Nations, none of

²⁸⁷ See Bassiouni, *supra* note 54, at 84 et seq.

²⁸⁸ See also Cassese, *supra* note 1, at 995.

²⁸⁹ See Stefan Oeter, *Terrorismus – Ein völkerrechtliches Verbrechen? Zur Frage der Unterstellung terroristischer Akte unter die internationale Strafgerichtsbarkeit*, *Die Friedens-Warte*, Vol. 76 (2001), 11, at 12.

²⁹⁰ The League of Nations Convention for the Prevention and Punishment of Terrorism, which was opened for signature on 16 November 1937, required High Contracting Parties to implement domestic penal offences for acts defined as terrorist. The Convention for the Creation of an International Criminal Court was opened for signature on the same day as the Terrorism Convention. Its entry into force was made contingent on the coming into force of the Terrorism Convention. See Chadwick, *supra* note 47, at 95. See generally on the pre-World War II efforts to combat terrorism, Thomas M. Franck & Bert B. Lockwood, *Preliminary Thoughts Towards an International Convention on Terrorism*, *AJIL*, Vol. 68 (1974), 69 et seq., and Rupa Bhattacharyya, *Establishing a Rule-of-Law International Criminal Justice*, *Texas International Law Journal*, Vol. 31 (1996), 57, at 58.

treaties entered into force.²⁹¹ The attempt to create a comprehensive legal framework governing the prosecution of terrorist acts lay dormant until 1972, when the United Nations Draft Convention on Terrorism failed to be adopted. What subsequently followed was a piecemeal approach, which resulted in the adoption of various specific anti-terrorism conventions banning mostly attacks aimed at specific types of targets.²⁹² This approach had mixed success. While the establishment of international treaty law led to the development of international cooperation mechanisms and the emergence of a normative framework, which is sometimes referred to as the "law of terrorism"²⁹³, prosecution efforts suffered from the practical difficulties and limitations of the principle of *aut dedere aut judicare*²⁹⁴ and the existence of the political offense exception²⁹⁵ commonly found in extradition treaties. In 1999, Trinidad and Tobago requested the General Assembly to establish an international criminal court to control drug trafficking which posed a serious problem to the judicial systems of Latin American countries.²⁹⁶ But ironically, terrorism was not finally included as a separate crime under the jurisdiction of the International Criminal Court.

The current institutionalization and centralization of international criminal law, which has been determined by the establishment of the international criminal tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) and the adoption of

²⁹¹ As of 1 January 1941, only India had ratified the Terrorism Convention, and no state had ratified the proposed Convention of the International Criminal Court. See Chadwick, *supra* note 47, at 97.

²⁹² Terrorists acts include aircraft hijacking, unlawful acts against the safety of civilian aviation, unlawful acts against internationally protected persons, taking of hostages, and the theft of nuclear materials. For a survey, see Oeter, *supra* note 289, at 15 et seq. and Rosalyn Higgins, The General International Law on Terrorism, in: R. Higgins & M. Flory (eds.), *Terrorism and International Law* (1997), 13, at 23 et seq.

²⁹³ See Slaughter & Burke-White, *supra* note 1, at 9.

²⁹⁴ The obligation to either extradite or prosecute is common to most of the international anti-terrorism conventions. It is most clearly reflected in the Montreal Convention of 1971 for the Suppression of Unlawful Acts against the Safety of Civil Aviation. The Convention against the taking of hostages and the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons followed the same path.

²⁹⁵ See the critical remarks by Todd M. Sailer, The International Criminal Court: An Argument to Extend Its Jurisdiction to Terrorism and a Dismissal of U.S. Objections, *Temple International and Comparative Law Journal*, Vol. 13 (1999), 311, at 345: "The extradition system is ... seriously flawed in controlling terrorism because many states have disparate views on what separates a political offense from a criminal act. Often these decisions are heavily influenced by bias, self-interest of the state, and/or political objectives." See generally on the political offense exception Leslie C. Green, Terrorism, the Extradition of Terrorists and the 'Political Offence' Defence, *GYIL*, Vol. 31 (1988), 337 and Torsten Stein, *Die Auslieferungsausnahme bei politischen Delikten* (1983), 49 et seq.

²⁹⁶ It is worth noting that the ILC's 1994 Draft Statute of an International Criminal Court distinguishes between "crimes under general international law" and "treaty crimes", including terrorist crimes. See UN Doc. A/CN.4/SER.A/1994/Add.1 (Part. 2), 38. But the Commission noted that in the absence of a general definition of terrorism "[a] systematic campaign of terror committed by some groups against the civilian population would fall within the category of crimes under general international law in subparagraph (d) [=crimes against humanity]...". See Commentary of the ILC, UN Doc. A/CN.4/SER.A/1994/Add.1 (Part. 2), 41.

the Rome Statute of the International Criminal Court (ICC), has so far mainly focused on the prosecution and punishment of large-scale crimes committed in an environment of interstate hostilities or civil wars.²⁹⁷ While transnational or state-sponsored attacks against the civilian population have been criminalized in the form of the prohibition of genocide, war crimes and crimes against humanity, terrorist acts carried by private actors have received little attention.²⁹⁸ The existing rules are mainly designed to provide a normative framework for the combat of state-related terrorism and the restoration of justice in a post-conflict society, but do not specifically address the criminalization of peacetime terrorism. It is, for example, rather obvious that acts of international terrorist groups rarely amount to an act of genocide, because they lack the intent to destroy a specific target group. Furthermore, the random nature of private terrorist acts usually disqualifies them from constituting war crimes. Finally, even though terrorist acts frequently involve murder or other attacks directed against the civilian population, they often lack the widespread and systematic character necessary to qualify as a crime against humanity.

The failure to adopt specific rules governing the combat of non-state actor terrorism resulted from differing viewpoints about the definition of terrorism and the more limited threat of violence emanating from the activities of private terrorist networks. But the events of September 11 may change this perception. They challenge the strict separation of crimes, committed by terrorists defined in treaties, applicable in peacetime, and the core crimes of international criminal law, which usually occur in situations of armed conflicts.

2. The September 11 Attacks as Crimes Against Humanity

The present state of the law appears to leave room for an interpretation, which would place large-scale terrorist acts within the ambit of the notion of crimes against humanity.²⁹⁹ Although the exact requirements of this crime vary in the jurisprudence of the international *ad hoc* criminal tribunals and the jurisdiction of the

²⁹⁷ For further analysis, see Carsten Stahn, *Internationaler Menschenrechtsschutz und Völkerstrafrecht*, Vol. 32 (1999), 343, at 351 et seq. and Carsten Stahn & Sven R. Eiffler, *Über das Verhältnis von Internationalem Menschenrechtsschutz und Völkerstrafrecht anhand des Statuts von Rom*, *Kritische Vierteljahresschrift*, Vol. 82 (1999), 253, at 263 et seq.

²⁹⁸ For an analysis of the shortcomings of this approach, see Sailer, *supra* note 295, at 319 et seq.; Steven W. Krohne, *The United States and the World Need an International Criminal Court as an Ally in the War Against Terrorism*, *Indiana International & Comparative Law Review*, Vol. 8 (1997), 159 et seq. and Jacqueline Ann Carberry, *Terrorism: A Global Phenomenon Mandating a United International Response*, *Indiana Journal of Global Legal Studies*, Vol. 6 (1999), 685.

²⁹⁹ In this sense, Tomuschat, *supra* note 1, at 536; Byers, *supra* note 1, at 413; Cassese, *supra* note 1, at 995; Greenwood, *supra* note 1, at 317 and Delbrück, *supra* note 1, at 12. For a discussion, see also Mikaela Heikkilä, *Holding Non-State Actors Directly Responsible for Acts of International Violence*, Institute for Human Rights Abo Akademi University (2002), 39 et seq., at: <http://www.abo.fi/institut/imr/norfa/mikaela.pdf>.

International Criminal Court³⁰⁰, it is a well established rule that they must be committed as part of a widespread or systematic attack against a civilian population. The term "attack" has a different meaning in the context of a crime against humanity than under the laws of war. It is, in particular, broad enough to cover grave acts of violence committed against a civilian population in peacetime situations³⁰¹ and must not necessarily involve an attack against the armed forces of a state or a party to an armed conflict.³⁰² While Art. 6 (c) of the Charter of the Nuremberg Military Tribunal required that crimes against humanity be committed in the context of an armed conflict or military occupation, later international instruments such as the Statute of the ICTR or the ICC Statute abandoned the nexus requirement. Art. 5 of the ICTY Statute reintroduced the "armed conflict" requirement. But it may be inferred from the jurisprudence of the ICTY that this element of definition was added for the purposes of the ICTY only.³⁰³ One may therefore assume that the link between crimes against humanity and any other crimes has disappeared under customary international law.³⁰⁴

The term "population" is used to underline the collective nature of crimes against humanity, but does not require that the entire population of a geographical entity be subject to the attack. The "population" must form a self-contained group of individuals, either geographically or as a result of other common features³⁰⁵, and may constitute only a small part of a broader civilian population of the territory³⁰⁶. From a terrorism-based perspective, it is particularly important that the *Tadic* Appeals Chamber has refused to consider crimes against humanity as a special intent

³⁰⁰ For an excellent survey, see Guanael Mettraux, Crimes Against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda, *Harvard International Law Journal*, Vol. 43 (2002), 237 et seq.

³⁰¹ See ICTY, *Prosecutor v. Tadic*, Decision on the Defense Motion for Interlocutory Appeal, paras. 140-141 and ICTY, *Prosecutor v. Tadic*, Appeal Judgment of July 15, 1999, Case No. IT-94-1, paras. 248 and 251.

³⁰² See ICTY, *Prosecutor v. Kunarac*, Case No. IT-96-23, Judgment of February 22, 2001, para. 416.

³⁰³ The Appeals of the ICTY stated in the *Tadic* case that the requirement of a nexus between crimes against humanity and other crimes was "peculiar to the jurisdiction of the Nuremberg Tribunal". Furthermore, the Appeals Chamber added that "customary international law may not require a connection between crimes against humanity and any conflict at all" and that the "Security Council may have defined the crime in Art. 5 more narrowly than necessary under international customary law". See ICTY, *Prosecutor v. Tadic*, Decision on the Defense Motion for Interlocutory Appeal, paras. 140-141.

³⁰⁴ See also ICTY, *Prosecutor v. Kupreskic*, Case No. IT-95-16, Judgment of January 14, 2000, paras. 577 and 581 and the Report of the Secretary-General Pursuant to para. 2 of Security Council Res. 808, UN Doc. S/25704 (1993), para. 47 stating that "crimes against humanity are aimed at any civilian population and are prohibited regardless of whether they are committed in an armed conflict, international or internal in character". But one should bear in mind that convictions for crimes against humanity have so far been limited to cases in which the crimes were committed in the context of an international or an internal armed conflict. See Yoram Dinstein, Crimes against Humanity after *Tadic*, *Leiden Journal of International Law*, Vol. 13 (2000), 373, at 393.

³⁰⁵ ICTY, *Prosecutor v. Kunarac*, Judgment of February 22, 2001, para. 423.

³⁰⁶ See ICTY, *Prosecutor v. Tadic*, Opinion and Judgment of 7 May 1997, para. 648 and ICTY, *Prosecutor v. Kunarac*, Judgment of February 22, 2001, para. 422.

crime, because "a discriminatory intent requirement would prevent the penalization of random and indiscriminate violence intended to spread terror among a civilian population as a crime against humanity".³⁰⁷ Accordingly, the perpetrators only need to inflict injury upon the victims of the crimes while knowing the general context in which the acts occurred.

It has been contended that crimes against humanity further require an additional planning or policy element. Such a reference to a plan or a policy could bar the commission of crimes against humanity by non-state-actors, because the policy requirement was traditionally bound to a policy of terror carried out by a state.³⁰⁸ But the most recent international practice indicates that the existence of a policy or a plan serves merely to assess whether the attack was of a systematic character³⁰⁹, and that such a policy need not be the policy of a state.³¹⁰ It is quite telling that neither Art. 5 of the ICTY Statute nor Art. 3 of the ICTR Statute contain any reference to a policy or plan. Furthermore, the chapeau of Art. 18 of the 1996 Draft Code of Crimes against the Peace and Security of Mankind merely requires that the acts be "instigated or directed by a Government or by any organization or group".³¹¹

The jurisprudence of both *ad hoc* tribunals has subsequently lent support to this interpretation. In *Tadic*, the Trial Chamber of the ICTY noted that the commission of crimes against humanity implies "some form of a governmental, organizational or group policy to commit these acts", but added that "such a policy need not be formalized and can be deduced from the way in which the acts occurred", such as the "widespread or systematic" character of the committed acts.³¹² Moreover, the Chamber stated that this policy would not have to be the policy of a state, but that it could also be the policy of "entities exercising de facto control over a particular territory".³¹³ More recently, the *Kunarac* and *Kordic* Chambers went even so far as

³⁰⁷ See ICTY, *Tadic* Appeal Judgment of 15 July 1999, para. 285 and para. 305 ("The Trial Chamber erred in finding that all crimes against humanity require a discriminatory intent. Such an intent is an indispensable ingredient of the offense only with regard to those crimes for which this is expressly required that is, for Art. 5 (h), concerning various types of persecution.").

³⁰⁸ See ICTY, *Prosecutor v. Tadic*, Opinion and Judgment, 7 May 1997, para. 654. Within the context of World War II, the US-American military tribunals established under Control Council Law No. 10 took the view that crimes against humanity may only be committed by state organs. See the Decision in the "Juristenprozess", Nuremberg Military Tribunal, Vol. 10, 401.

³⁰⁹ In the *Kordic* case, the Trial Chamber held that the presence of a policy to commit criminal acts "should be regarded as indicative of the systematic character of offenses charged as crimes against humanity". See ICTY, *Prosecutor v. Kordic & Cordez*, Case No. IT-95-14/2, Judgment of February 26, 2001, paras. 181-182.

³¹⁰ See ICTR, *Prosecutor v. Akayesu*, Judgment of 2 September 1998, Case No. ICTR-96-4, para. 580.

³¹¹ See ILC, Draft Code of Crimes Against the Peace and Security of Mankind (1996), Art. 18, available at: <http://www.un.org/law/ilc/texts/dcodefra.htm>. For an analysis of the Draft Code of Crimes, see Martin C. Ortega, The ILC Adopts the Draft Code of Crimes Against the Peace and Security of Mankind, Max Planck UNYB, Vol. 1 (1997), 238 et seq. and Christian Tomuschat, Das Strafgesetzbuch der Verbrechen gegen den Frieden und die Sicherheit der Menschheit, EuGRZ, Vol. 25 (1998), 1 et seq.

³¹² See ICTY, *Prosecutor v. Tadic*, Opinion and Judgment, 7 May 1997, para. 653.

to raise doubts whether the policy requirement exists under international customary law.³¹⁴ The ICTR Trial Chamber in the *Kayishema & Ruzindana* case held that “the Tribunal’s jurisdiction covers both State and non-State actors” and noted in the context of the policy requirement that “to have jurisdiction ..., the Chamber must be satisfied that their actions were instigated or directed by a Government or by any other organisation or group”.³¹⁵

The Rome Statute of the International Criminal Court has reintroduced the policy requirement in Art. 7³¹⁶, in order to facilitate a compromise on the threshold requirement of crimes against humanity, which in return allows for an alternative rather than a conjunctive reading of the terms “widespread” and/or “systematic”.³¹⁷ But even the ICC Statute recognizes that an organizational policy suffices to trigger the applicability of Art. 7 of the Statute.³¹⁸

Accordingly, one may very well argue that large-scale terrorist acts committed by non-state actors fall under the notion of crimes against humanity, if they are undertaken pursuant to or in furtherance of a corresponding organizational policy of the acting terrorist group. Furthermore, the attack itself must be widespread or systematic and committed against a civilian population.

Such an approach, which places certain acts of peacetime terrorism on the scale of crimes against humanity, would of course, challenge the traditional understanding of crimes against humanity which has been limited to state-actors or non-state actors that exercise state-like powers”.³¹⁹ International terrorist networks, on the contrary, rarely exercise state-like control over territory or people, because they are mostly composed of rather small groups of individuals, dispersed in many different countries of the world. However, given both the organized nature and the

³¹³ See ICTY, *Prosecutor v. Tadic*, Opinion and Judgment, 7 May 1997, para. 654. See also *Prosecutor v. Kupreskic*, Judgment of 14 January 2000, para. 551 (“it appears that such a policy need not be explicitly formulated, nor need it to be the policy of a State”); *Prosecutor v. Blaskic*, Judgment of March 3, 2000, para. 203-205, where the Trial Chamber noted that the systematic element of the attack required some form of plan or political objective, but did not have to be organized at the state level.

³¹⁴ See ICTY, *Prosecutor v. Kunarac*, Judgment of 22 February 2001, para. 432 and *Prosecutor v. Kordic & Cordez*, Judgment of February 26, 2001, paras. 181-182.

³¹⁵ See ICTR, *Prosecutor v. Kayishema & Ruzindana*, Judgment of 21 May 1999, Case No. ICTR-95-1/ICTR-96-10, para. 126.

³¹⁶ This development does not necessarily reflect international customary law. See ICTY, *Prosecutor v. Kunarac*, Judgment of 22 February 2001, para. 491.

³¹⁷ See Darryl Robinson, *Developments in International Criminal Law: Defining “Crimes Against Humanity”*, AJIL, Vol. 93 (1999), 43.

³¹⁸ See Art. 7 (2) (a) of the Rome Statute.

³¹⁹ In the *Tadic* case, the Trial Chamber referred to “forces which although not those of the legitimate government, have *de facto* control over, or, are able to move freely within, defined territory”. See *Prosecutor v. Tadic*, Opinion and Judgment, 7 May 1997, para. 564. See also M. Cherif Bassiouni, *The Sources and Content of International Criminal Law: A Theoretical Framework*, in: M. Cherif Bassiouni (ed.), *International Criminal Law, Vol. 1 – Crimes* (1999), 3, at 27 (“non-state actors must have some of the characteristics of state actors ... as the exercise of domination or control over territory or people, or both, and the ability to carry out a policy similar in nature to that of state action or policy”).

horrendous impact of large scale acts of terror carried out by global terrorist groups, it seems plausible to extend the notion of crimes against humanity to this kind of non-state violence.³²⁰ Terrorist attacks as those of September 11 will, in particular, most likely fulfill the requirements of murder, extermination³²¹ and persecution³²², involving discriminatory intent based on political grounds.

3. Terrorist Acts and the Crime of Aggression

Moreover, one may ask whether large-scale acts of international terrorism meet the requirements of the crime of aggression, which has been condemned as "the supreme international crime ... that ... contains within itself the accumulated evil of the whole".³²³

a) Aggression as a crime under international law

Individual criminal responsibility for acts of aggression has its origin in the war crimes trials of the post-World War II period. Aggression was criminalized by Art. 6 (a) of the Charter of the International Military Tribunal, which declared the "planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances" as "crimes against peace"³²⁴, while leaving the exact content of the definition to the jurisprudence of the Tribunal. In 1946, the criminalization of aggression was reiterated in Art. 5 (a) of the Charter of the International Military Tribunal for the Far East in Tokyo.³²⁵ While no other indictment for aggression followed the practice of the post-World

³²⁰ See also Bassiouni, *supra* note 54, at 101 and the authors referred to in note 299.

³²¹ Extermination differs from murder in that it requires an element of mass destruction which is not required for murder. See ICTR, *Prosecutor v. Akayesu*, Judgment of 2 September, 1998, Case No. ICTR-96-4, para. 591 and ICTY, *Prosecutor v. Kayishema*, Judgment of 21 May 1999, para. 144.

³²² Acts of persecution can take many forms and do not require a link to other crimes. In the *Kupreskic* case, the Trial Chamber defined persecution as the "gross or blatant denial, on discriminatory grounds, of a fundamental right, laid out in international customary or treaty law, reaching the same level of gravity as the other acts prohibited in Art. 5". See ICTY, *Prosecutor v. Kupreskic*, Judgment of 14 January 2000, para. 621. Furthermore, persecution requires a discriminatory intent based on political, racial or religious grounds. See ICTY, *Prosecutor v. Kupreskic*, Judgment of 14 January 2000, para. 633 and ICTY, *Prosecutor v. Kordic*, Judgment of 26 February 2001, para. 212.

³²³ The International Military Tribunal at Nuremberg held in 1945: "The charges of the indictment that the defendants planned and waged aggressive war are charges of the utmost gravity ... To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole." The statement is reprinted in Benjamin Ferencz, *Defining International Aggression* (1975), at 452.

³²⁴ See Charter of the International Military Tribunal, annexed to the London Agreement for the Establishment of an International Military Tribunal, in: M.O. Hudson (ed.), *International Legislation* (1931-1950), Vol. 9, 632, at 637. See also Art. II (1) (a) of Control Council Law No. 10, which served as the legal basis for "Subsequent Proceedings at Nuremberg", in which German war criminals were tried by American militia tribunals.

War II era, a number of international instruments established legal principles governing the individual criminal responsibility for the crime of aggression. Both the first principle of the Friendly Relations Declaration of 1970 and Art. 5 of the 1974 Definition of Aggression (General Assembly Res. 3314) confirmed that the waging of a "war of aggression" is a crime against international peace.³²⁶ A broader concept of individual responsibility is reflected in Art. 16 of the 1996 Draft Code of Crimes against the Peace and Security of Mankind, which dissociates the notion of aggression from acts of war, by dealing with acts of aggression rather than with wars of aggression.³²⁷ Finally, Art. 5 of the Statute of the International Criminal Court was drafted in a way that includes the crime of aggression in the jurisdiction of the court, but makes the exercise of jurisdiction dependent on a further definition of the contents and requirements of the crime by the state parties.³²⁸ One may therefore conclude that the crime of aggression has currently a basis in customary international law, without, however, being accurately defined.³²⁹

³²⁵ See Charter of the International Military Tribunal for the Far East (1946), at: <http://www.yale.edu/lawweb/avalon/imtfech.htm>. For a survey, see Martin Hummrich, *Der völkerrechtliche Straftatbestand der Aggression* (2001), 62-63.

³²⁶ Art. 5 draws a distinction between aggression which "gives rise to international responsibility" and a war of aggression which is considered a "crime against international peace".

³²⁷ Art. 16 States: "An individual, who as leader or organizer, actively participates in or orders the planning, preparation, initiation, or waging of aggression committed by a State shall be responsible for a crime of aggression." But the ILC cautiously noted in its Commentary on Art. 16 that only "a sufficiently serious violation of the prohibition contained in Art. 2, paragraph 4 of the charter of the United Nations" amounts to aggression. For a critical appraisal, see Dinstein, *supra* note 36, at 114.

³²⁸ Art. 5 of the Rome Statute states: "1. ...The Court has jurisdiction in accordance with this Statute with respect to the following crimes: ... (d) aggression. 2. The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with Arts. 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations". See generally on aggression under the ICC Statute Andreas Zimmermann, Article 5, in: O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, 97, at 102 and Irina Kaye Müller-Schieke, *Defining the Crime of Aggression Under the Statute of the International Criminal Court*, *Leiden Journal of International Law*, Vol. 14 (2001), 409 et seq.

³²⁹ It is worth noting that in its judgment of 1946, the International Military Tribunal at Nuremberg held that Art. 6 (a) of the London Charter is declaratory of customary law. See International Military Tribunal (Nuremberg trial), *Judgment* (1946), *Trial of Major War Criminals before the International Military Tribunal*, Vol. 1, 171, at 219-223. See also International Military Tribunal for the Far East, *In re Hirota and Others*, *Annual Digest and Reports of Public International Law Cases* (1948), 356, at 362-363. Within the framework of the Rome Statute, the dispute centers mainly around the necessity of the involvement of the Security Council in determining a case of aggression and the determination of the various forms of the use of the force which may amount to aggression. See Andreas Zimmermann, *The Creation of a Permanent International Criminal Court*, *Max Planck UNYB*, Vol. 2 (1998), 169, at 199 et seq. and Müller-Schieke, *supra* note 328, at 415 et seq. For a denial of the customary nature of the crime of aggression, see however Tomuschat, *Strafgesetzbuch*, *supra* note 311, at 5.

b) Aggression and non-state actors

It is undisputed that the use of armed force by one state against another state in violation of the Charter of the United Nations constitutes an act of aggression criminalized under international law.³³⁰ But it is questionable whether non-state related acts of terrorism may be punished as acts of aggression. Relying primarily on the impact of the act, one might be tempted to argue that large-scale terrorist acts carried out by private actors may constitute an act of aggression, if they reach the scale of "armed attack". However, such an argument would hardly suffice to establish a case of international criminal responsibility under the crime of aggression. One must recall that both the General Assembly's Friendly Relations Declaration and the Definition of Aggression distinguish very clearly the levels of state responsibility and individual criminal responsibility, indicating that not every act of aggression constitutes a crime of aggression. Furthermore, customary international law has not developed in a direction which is favourable to the recognition of the acts of non-state actors as acts of aggression.³³¹ It is quite telling that Art. 16 of the ILC Draft Code on Crimes refers exclusively to an "aggression committed by a State", making "a violation of the law by a State ...[the] *sine qua non* condition for the possible attribution to an individual of responsibility for the crime of aggression".³³² Moreover, to extend the crime of aggression to acts short of an inter-state conflict would represent a significant departure from the practice of Nuremberg and Tokyo.³³³ This is particularly grave, because – unlike in the case of the other international core crimes – there is hardly any other state practice which would support the claim that the leaders of private organisations may be tried for the crime of aggression after having launched an attack against another state. Finally, terrorist attacks without a state-sponsored background do not properly fit within the categories of aggression, because they are usually not carried out in an attempt to move into and invade foreign territory, which is the core idea of aggression.³³⁴ Terrorist attacks are seldomly directed towards the take-over of governmental powers in a foreign state, but are designed to spread terror among the civilian po-

³³⁰ See Cherif M. Bassiouni & Benjamin Ferencz, The Crime against Peace, in: Cherif. M. Bassiouni (ed.), *International Criminal Law*, Vol. 1 (1999), 347 ("In this context the crime of aggression is necessarily committed by those decision-makers who have the capacity to produce those acts which constitute an "armed conflict" [...] against another state.") See also the ILC's Commentary on Art. 16 of the Draft Code of Crimes ("[Art. 16] reaffirms the criminal responsibility of the participants in the crime of aggression. Individual responsibility for such a crime is intrinsically linked to the commission of aggression by a state. The rule of international law which prohibits aggression applies to the conduct of a State in relation to another State.").

³³¹ See also Müller-Schieke, *supra* note 328, at 420.

³³² See the Commentary of the ILC on Art. 16 of the Draft Code on Crimes ("[O]nly a state is capable of committing aggression ... The words 'aggression committed by a State' clearly indicate that such a violation of the law by a State is *sine qua non* condition for the possible attribution to an individual of responsibility for the crime of aggression.").

³³³ See also Dinstein, *supra* note 36, at 114.

³³⁴ See Art. 3 (a) of the 1974 Definition of Aggression. See also Zimmermann, *supra* note 329, at 201.

pulation and to hit the institutions of the targeted state, which are the typical features of crimes against humanity and war crimes. It is therefore difficult to see why they should – even in future – be dealt with under the category of aggression.

4. Terrorism and the ICC

A last question which deserves further attention within the context of the global efforts to suppress international terrorism is the model of prosecution of serious terrorist crimes.³³⁵ Under the current anti-terrorism conventions, the focus lies clearly on national forums. National courts rely on their jurisdiction to try terrorist offences on the basis of internationally harmonized domestic laws. The aftermath of September 11 makes it necessary to rethink whether some of the crimes, which form currently part of the treaty-based law of terrorism, should be subjected to the jurisdiction of a centralized prosecution mechanism such as the International Criminal Court.

a) The state of the law

Although there is no direct precedent for the inclusion of terrorist crimes within the jurisdiction of an international criminal tribunal, attempts in this direction have been made in the past.³³⁶ Art. 2 of the proposed 1937 Convention for the Creation of an International Criminal Court provided that a High Contracting Party to the Terrorism Convention could commit an accused to the court for trial of criminal offences contained in Art. 2 of the 1937 Anti-Terrorism Convention.³³⁷ Furthermore, Art. 20 (e) of the ILC's 1994 Draft Statute of an International Criminal Court recognized the Court's jurisdiction over terrorist offences amounting to exceptionally serious crimes of international concern.³³⁸ The Commission explicitly mentioned the unlawful seizure of aircraft as defined by Art.1 of the Convention

³³⁵ See also Alfred P. Rubin, *Legal Response to Terror: An International Criminal Court?*, *Harvard International Law Journal*, Vol. 43 (2002), 65 et seq.

³³⁶ For a survey, see Neil Boister, *The Exclusion of Treaty Crimes from the Jurisdiction of the Proposed International Criminal Court: Law, Pragmatism, Politics*, *Journal of Armed Conflict Law*, Vol. 3 (1998), 27 et seq. See also Heikkilä, *supra* note 299, at 58 et seq.

³³⁷ For further discussion, see Chadwick, *supra* note 47, at 102.

³³⁸ See ILC, *Draft Statute for an International Criminal Court*, Report of the International Law Commission on the work of its 46th Session, 1 September 1994, UN Doc. A/49/355 of 21 February 1997, available at: <http://www.npwj.org/iccrome/statute.html>. Art. 20 reads: "The Court has jurisdiction in accordance with this Statute with respect to the following crimes: (a) the crime of genocide; (b) the crime of aggression; (c) serious violations of the laws and customs applicable in armed conflict; (d) crimes against humanity; (e) crimes, established under or pursuant to the treaty provisions listed in the Annex, which, having regard to the conduct alleged, constitute exceptionally serious crimes of international concern." See generally in the ILC Draft Statute, James Crawford, *The ILC's Draft Statute for an International Criminal Tribunal*, *AJIL*, Vol. 88 (1994), 140 et seq.; Bradley E. Berg, *The 1994 ILC Draft Statute for an International Criminal Court: A Principled Appraisal of Jurisdictional Structure*, *Case Western Reserve Journal of International Law*, Vol. 28 (1996), 221 et seq.

for the Suppression of Unlawful Seizure of Aircraft of 16 December 1970 and the crimes contained in Art. 1 of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation of 23 September 1971, Art. 2 of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons of 14 December 1973, Art. 1 of the International Convention against the Taking of Hostages of 17 December 1979, and Art. 3 of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation of 10 March 1988.³³⁹

Moreover, during the negotiations of the Rome Statute of the International Criminal Court, several proposals were made to include terrorist offences in the jurisdiction of the court. Some delegations were of the view that treaty-based crimes qualified for inclusion under the jurisdictional standard of the court, due to the increasing frequency of international terrorist acts, their unprecedented scale and the resulting threat to international peace and security. It was argued that including those crimes in the Court's jurisdiction would strengthen the ability of the international community to combat those crimes, give states the option of referring cases to the Court in exceptional situations and avoid jurisdictional disputes between states such as in the *Lockerbie* case.³⁴⁰ Accordingly, the Preparatory Committee's Draft Statute on the Establishment of an International Criminal Court contained a proposal on "Crimes of terrorism" which reads as follows:

"For the purposes of the present Statute, crimes of terrorism means:

- (1) Undertaking, organizing, sponsoring, ordering, facilitating, financing, encouraging or tolerating acts of violence against another State directed at persons or property of such a nature as to create terror, fear or insecurity in the minds of public figures, groups of persons, the general public or populations, for whatever considerations and purposes of a political, philosophical, ideological, racial, ethnic, religious or such other nature that may be invoked to justify them;
- (2) An offence under the following Conventions:
 - (a) Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation;
 - (b) Convention for the Suppression of Unlawful Seizure of Aircraft;
 - (c) Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents;
 - (d) International Convention against the Taking of Hostages;
 - (e) Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation;
 - (f) Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms on the Continental Shelf;

³³⁹ See ILC Draft Statute, *supra* note 338, Annex, Crimes pursuant to Treaties (Art. 20 e).

³⁴⁰ See Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume I, Proceedings of the Preparatory Committee During March-April and August 1996, UN Doc. A/52/22 (1996), paras. 103-107, reprinted in: M. Cherif Bassiouni, *International Criminal Court Compilation of United Nations Documents and Draft ICC Statute before the Diplomatic Conference* (1998), 363, at 393.

(3) An offence involving the use of firearms, weapons, explosives and dangerous substances when used as a means to perpetrate indiscriminate violence involving death or serious bodily injury to persons or groups of persons or populations or serious damage to property".³⁴¹

It was argued that precisely with respect to these crimes national jurisdiction would in many cases not be available. However, a footnote stated that the Preparatory Committee did not have the time to examine crimes of terrorism as thoroughly as the three core crimes and added that the Committee considered these crimes "only in a general manner" and "without prejudice to a final decision on their inclusion in the Statute".³⁴² This footnote reflected the position of other delegations which were of the view that the jurisdiction of the Court should be limited to the core crimes under general international law to avoid overburdening the limited financial and personnel resources of the Court or trivializing its role and functions.³⁴³

At the Rome Conference, crimes of terrorism were finally not included in the jurisdiction of the Court, due to time constraints, controversies over the definition of terrorism and the intent to limit the jurisdiction of the Court to the most serious international crimes.³⁴⁴ But the Final Act of the Rome Conference contains a Resolution in which the participating states declare that they recognize "that terrorist acts, by whomever and wherever perpetrated and whatever their forms, methods or motives, are serious crimes of concern to the international community", and recommend "that a review Conference pursuant to Art. 123 of the Statute of the International Criminal Court consider the crimes of terrorism and drug crimes with a view to arriving at an acceptable definition and their inclusion in the list of crimes within the jurisdiction of the Court".³⁴⁵

³⁴¹ See Report of the Preparatory Committee on the Establishment of an International Criminal Court, Draft Statute & Draft Final Act, UN Doc. A/Conf.183/2/Add.1, 1998, reprinted in: M. Cherif Bassiouni (ed.), *supra* note 340, 7, at 24.

³⁴² See Report of the Preparatory Committee on the Establishment of an International Criminal Court, Draft Statute & Draft Final Act, note 18, reprinted in: M. Cherif Bassiouni (ed.), *supra* note 340, 7, at 24.

³⁴³ An excellent example is the statement of the U.S. ambassador to the General Assembly's 6th Committee of 23 October 1997: "This court should not concern itself with incidental or common crimes, nor should it be in the business of deciding what even is a crime. This is not the place for progressive development of the law into uncertain areas, or for the elaboration of new and unprecedented criminal law. The court must concern itself with those atrocities which are universally recognized as wrongful and condemned. This court's foundation is just now being established, and it is important that it be built on wide acceptability and on solid ground. If all goes well, the international community can and will be built on our initial efforts and the court will grow and evolve. At this stage, however, we should not allow an overly ambitious approach to jeopardize the prospects for success." See Agenda Item 150, the Establishment of an International Criminal Court, 23 October 1996, at: <http://www.igc.org/icc>.

³⁴⁴ See Herman von Hebel & Darryl Robinson, Crimes within the jurisdiction of the Court, in: R.-S. Lee (ed.), *The International Criminal Court – The Making of the Rome Statute* (1999), 79, at 85-87.

³⁴⁵ See Resolution E of the Final Act of the Rome Conference, UN Doc. A/CONF.183/10, 7-8. See also Sailer, *supra* note 295, at 317.

b) No need for reform

Although it might, in the long run, be desirable to extend the jurisdiction of the Court to selected terrorist crimes, there is currently no urgent need to do so. The Statute provides an effective tool to combat terrorism, as it stands.³⁴⁶ Terrorist atrocities committed in situations of armed conflict are largely covered by the war crimes provisions of the Statute, which prohibit *inter alia* the taking of hostages³⁴⁷, the destruction of non-combat related property³⁴⁸ and most of all, indiscriminate attacks against the civilian population.³⁴⁹ Furthermore, the Statute allows for the prosecution of large-scale terrorist acts committed in peacetime, by defining crimes against humanity as acts of violence which do not require a nexus to an armed conflict. Moreover, there are other mechanisms of prosecuting acts of international terrorism, which rule out the possibility of prejudiced justice, such as the establishment of international or mixed national-international tribunals through special arrangements. Finally, the most plausible argument against an unreflected extension of the jurisdiction of the Court is that the ICC should not be overburdened with daily acts of politically-motivated terrorism, such as isolated suicide bombings or terrorist attacks of a minor significance, which are very well covered by the jurisdiction of national courts.³⁵⁰ The greatest merit of the ICC is that it establishes an independent prosecutor and trial mechanism for crimes that states are unable or unwilling to prosecute. Such a mechanism is indispensable in the area of state-based or state-sponsored terrorism, which is often not fairly dealt with under either the state's own or a foreign jurisdiction. However, terrorist acts initiated by private organizations may be viewed from a different perspective. In these cases, the exercise of national jurisdiction is less suspect, because it is usually not linked to inter-state rivalries and thus less connected with competing state-interests.³⁵¹

VI. Conclusions

There is a widespread tendency to view the events of September 11 not only as a key moment in history, but also as a turning point in the development of interna-

³⁴⁶ See Heikkilä, *supra* note 299, at 57. See also Greenwood, *supra* note 81, at 206, noting that "there is no anti-terrorist treaty that creates a regime of penal sanctions backed by a requirement of *aut dedere, aut judicare*, as extensive as Protocol I and the Geneva Conventions". A different reasoning applies, however, to drug-related crimes which are not all covered by the Statute. For arguments in favour of their inclusion, see Boister, *supra* note 336, at 30 et seq.

³⁴⁷ See Art. 8 (2) (a) (viii) and Art. 8 (2)(c) (iii).

³⁴⁸ See Art. 8 (2) (a) (iv), Art. 8 (2) (b) (v), (ix), (xiii) and Art. 8 (2) (e) (iv) and (xii).

³⁴⁹ See Art. 8 (2) (b) (iv) and Art. 8 (2) (e) (i).

³⁵⁰ See also the doubts expressed by Oeter, *supra* note 289, at 29 et seq., who invokes the examples of Hamas, the IRA and ETA.

³⁵¹ Global acts of terrorism carried out by private actors, such as the hijacking of aircrafts or biological or chemical attacks, mostly affect a number of states which have equal interests in the prosecution of the perpetrators.

tional law. A closer look at the impact of September 11 on different branches of international law reveals that this is only partly true. The events of September 11 have made it very clear that international terrorism is a cross-border phenomenon, which cannot be dealt with exclusively under either domestic or international law. It requires a multi-faceted legal reaction, combining traditional prosecution and law enforcement techniques with targeted military operations against private actors. Nevertheless, this does not mean that it cannot be adequately addressed by the existing rules of international law. Some developments are taking shape in traditionally state-centered areas of public international law, such as the law of self-defence and the law of state responsibility, and to a certain extent international criminal law. But the foundations for most of these developments were laid long before September 11.

The fact that acts of terrorism are treated as threats to international peace and security, falling within the powers of the Security Council, for example, is not a novelty of the September 11 attacks, but goes back to Resolution 731 (1992), in which the Council condemned the terrorist acts over Lockerbie. Furthermore, the interpretation of terrorist acts as armed attacks by NATO or the OAS may be directly derived from the original wording of the Charter, which was drafted broadly enough to include attacks launched by private actors (see III 2). Last but not least, the risks arising from a new interpretation of the right to self-defence may be balanced by the continuing application of the necessity and proportionality requirements established in the *Caroline* case (see III 5) and the limitations of self-defence under Art. 51 of the Charter (see III 6. b).

Other trends are less a product of the events of September 11 than a result of the general transformation of international law from a state-based legal system to a normative order for state and non-state actors. The deviation from the strict "effective control" test, for example, which underlies the exercise of self-defence in the aftermath of September 11, finds support in the standards of accountability developed by the ICTY in the context of individual criminal responsibility (see III 4 d). The same may be said of the widely supported qualification of large-scale terrorist acts as crimes against humanity, which has its origin in the jurisprudence of the two *ad hoc* tribunals, interpreting crimes against humanity as peacetime crimes (see V 2).

Finally, even on the institutional level, the question is not whether the international community disposes of the appropriate organs to counter new terrorist threats, but rather whether there is a will to deploy them. This holds certainly true with respect to the collective security system of the Charter, the use of which had avoided any doubts about the legality of the military response to the September 11 attacks (see IV 1 and 3). But it applies also to the ICC, which may, even in its present form, be used as an instrument to deal with large-scale terrorist crimes (see V 4).

The only true innovation is the application of the laws of war to terrorist acts under the heading of a new concept of "armed conflict". But given the many practical difficulties that such an approach entails (see II 2), one must be skeptical whether it will meet with broad acceptance in the future.

