

RESPONSES TO TERROR: THE NEW 'WAR'

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[The events of 11 September 2001 profoundly challenged the existing principles of international law, both as to the right of a state to use military force and as to the principles of international humanitarian law. This article assesses whether international law can provide a legal framework by which to judge state responses to acts of terrorism, the organisation and preparation of which occur in another state but where the acts are committed by non-state actors. It explores the difficulties of applying international humanitarian law in selecting military objectives when directing attacks against 'terrorists' and in classifying captured fighters. Finally, it considers the impact of the detention of individuals suspected of 'terrorist' activities on international human rights standards.]

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I INTRODUCTION

Traditionally, a declaration of war by a state led to a legal state of war. Hobsbawm put it well when he wrote, 'war was supposed to be sharply distinguished from peace, by a declaration of war at one end and a treaty of peace at the other.'¹ The *Charter of the United Nations* permits states to use force by way of self-defence in response to an 'armed attack' from another state. With the transition to 'armed conflict', set out in common article 2 of the *Geneva*

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¹ Eric Hobsbawm, 'War and Peace', *The Guardian (Saturday Review)* (London, UK), 23 February 2002, 3. For a purported 'declaration of war' by Bosnia-Herzegovina, see *Prosecutor v Tadic (Defence Motion for Interlocutory Appeal on Jurisdiction)*, Case No IT-94-1-AR72 (2 October 1995) (Separate Opinion of Judge Li) [18.5]. There have been '5 declarations of war in the 226 year history of the United States': Colonel W Hays Parks, 'The United States Military Response to the Events of September 11th: A Discussion of the Practice of the Law of War' (Speech delivered at the 15th Solferino Lecture, Australian Red Cross Victoria, International Humanitarian Law Department, Melbourne, 19 February 2002).

Conventions of 1949,² some clarity was gained as to when the laws of war would apply. There was some comfort in knowing which rules applied respectively to international and non-international armed conflicts,³ even though it has not always been easy to distinguish between the two.

The events of 11 September 2001 ('September 11') profoundly disturbed these legal certainties. This article will attempt to assess whether international law can provide a legal framework by which to judge state responses to terrorist acts that are organised and prepared in another state and carried out by non-state actors.

One of the principal legal problems after September 11 was that of classification. Were the acts of that day 'terrorist' activity, admittedly on a grand scale, or were they an 'armed attack' within the meaning of the *Charter of the UN*, or the beginning of an 'armed conflict' or of a 'war'? Closely related to these questions was who was going to respond — the US alone or the US in coalition with other states? If a coalition was the desired objective, would the other coalition states be active merely politically and not militarily?⁴

The very nature of the problem faced led to confusion over the description of the events and their aftermath. Ultimately, the US Government categorised its acts as a 'war against terrorism'.⁵ This may have satisfied the politicians but it could not satisfy the lawyers,⁶ who were troubled by the difficulties of

² *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, opened for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950); *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, opened for signature 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950); *Geneva Convention Relative to the Treatment of Prisoners of War*, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) ('*Geneva Convention III*'); *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) ('*Geneva Convention IV*') (collectively, '*Geneva Conventions*').

³ *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts*, opened for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978) ('*Additional Protocol I*'); *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts*, opened for signature 8 June 1977, 1125 UNTS 609 (entered into force 7 December 1978) ('*Additional Protocol II*').

⁴ A distinction might be drawn here between states who participated by military action on the ground in Afghanistan and other states providing military assistance of one form or another to the US: UK, *Parliamentary Debates*, House of Commons, 8 October 2001, vol 372, 835 (Geoff Hoon, Secretary of State for Defence) ('*Parliamentary Debates of 8 October 2001*'), referring to decisions of the NATO Council to assist the US armed forces.

⁵ In the UK the phrase adopted in the House of Commons was 'coalition against terrorism': *ibid* 830.

⁶ For the difficulties of defining 'terrorist' see Frits Kalshoven, *American Society of International Law: Annual Meetings Proceedings* (1985) 114, 117. There are, however, partial definitions of 'terrorism': see *European Convention on the Suppression of Terrorism*, opened for signature 27 January 1977, 1137 UNTS 93, art 1 (entered into force 4 August 1978); *Measures to Eliminate International Terrorism*, GA Res 49/60, UN GAOR, 49th sess, 84th plen mtg, UN Doc A/Res/49/60 (1994) annex, art 3. Cf *Measures to Eliminate International Terrorism*, GA Res 46/51, UN GAOR, 46th sess, 67th plen mtg, UN Doc A/Res/46/51 (1991) art 15. There are also definitions in national law: see, eg, *Terrorism Act 2000* (UK) c 11, s 1.

interpreting the terms, 'war'⁷ and 'terrorism',⁸ and the further difficulty of drawing lines between an executive (military) and a judicial response.⁹ They would have remembered that the response to the bombing of a US airliner over Lockerbie in 1988 was purely of a judicial nature.¹⁰ On the other hand, the 1998 bombings of the US embassies in Nairobi and Dar es Salaam led to military action.¹¹ They also led to judicial action against Osama bin Laden and 20 other members of al Qaeda in the form of an indictment issued by the District Court for the Southern District of New York.¹² The main differences between the 2001

⁷ For a discussion of whether 'the concept of war has become legally irrelevant', see Christopher Greenwood, 'The Concept of War in Modern International Law' (1987) 36 *International and Comparative Law Quarterly* 283.

⁸ It is quite common to read of references to 'terrorists' in a *non-international* conflict when 'the contemporary ear is more accustomed to hear the word applied to persons in conflict with governments than to persons doing the governments' bidding': Geoffrey Best, *War and Law Since 1945* (1994) 219.

⁹ For discussion of the range of responses which states may adopt with respect to international terrorism, see Antonio Cassese, 'The International Community's "Legal" Response to Terrorism' (1989) 38 *International and Comparative Law Quarterly* 589. These include international cooperation in various forms, national legislation and sanctions against state-sponsored terrorism. For the UK national law response, see the *Anti-Terrorism, Crime and Security Act 2001* (UK) c 24 (which builds upon the *Terrorism Act 2000* (UK) c 11). For the Australian 'package of ... counter-terrorism legislation designed to strengthen Australia's counter-terrorism capabilities', see Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 13 March 2002, 1139 (Peter Slipper, Parliamentary Secretary to the Minister for Finance and Administration).

¹⁰ *HM Advocate v Megrahi and Fhimah* [1999] ScotHC 248 ('Lockerbie Case'). The proceedings against the two defendants have recently been concluded. The second defendant was acquitted at his trial on 31 January 2001. The first defendant's conviction was affirmed by the Appeal Court of the High Court of Justiciary of Scotland (sitting in The Netherlands) on 14 March 2002: *Megrahi v HM Advocate* [2002] ScotCS 68. For discussion of the diplomatic activity, see SC Res 731, UN SCOR, 47th sess, 3033rd mtg, UN Doc S/Res/731 (1992); SC Res 748, UN SCOR, 47th sess, 3063rd mtg, UN Doc S/Res/748 (1992); SC Res 883, UN SCOR, 48th sess, 3312nd mtg, UN Doc S/Res/883 (1993); SC Res 1192, UN SCOR, 53rd sess, 3920th mtg, UN Doc S/Res/1192 (1998). For the setting up of a Scottish Court in The Netherlands see the *Agreement between the Government of the Kingdom of the Netherlands and the Government of the United Kingdom of Great Britain and Northern Ireland Concerning a Scottish Trial in the Netherlands*, 38 ILM 926 (1999), see Anthony Aust, 'Lockerbie: The Other Case' (2000) 49 *International and Comparative Law Quarterly* 278. For the national power to set up a Scottish Court in the Netherlands, see *The High Court of Justiciary (Proceedings in the Netherlands) (United Nations) Order 1998* (Scotland).

¹¹ See Ruth Wedgwood, 'Responding to Terrorism: The Strikes against bin Laden' (1999) 24 *Yale Journal of International Law* 559, 563; Jules Lobel, 'The Use of Force to Respond to Terrorist Attacks: The Bombing of Sudan and Afghanistan' (1999) 24 *Yale Journal of International Law* 537, 537; Sean D Murphy, 'Contemporary Practice of the United States Relating to International Law' (1999) 93 *American Journal of International Law* 161, 161-5. By 19 December 2001 'the US brought to conclusion the prosecution of four al Qaeda members for the bombing of US embassies in Dar es Salaam and Nairobi': *Report by the USA to the UN Counter-Terrorism Committee*, UN Doc S/2001/1220 (2001) 5. For a comparison of the response of the UN Security Council to the US raid on Tripoli in 1986 and the 1998 attacks on Afghanistan and in Sudan, see Lobel, 537, 549.

¹² The indictment contains 319 counts: *United States of America v Usama bin Laden (Indictment)* (1998) (US District Court for the Southern District of New York). For a discussion of the efforts to obtain custody of Osama bin Laden, see Sean D Murphy (ed), 'Contemporary Practice of the United States Relating to International Law' (2000) 94 *American Journal of International Law* 102, 366-8. For the legal challenges made by the small number of defendants within the custody of the US authorities, see Sean D Murphy (ed), 'Contemporary Practice of the United States Relating to International Law' (2001) 95

al Qaeda attacks and those in 1998 were the sheer scale of the loss of life of US nationals and the fact that the attacks in 2001 occurred on the territory of the US itself.

The response by the use of armed force against al Qaeda, as a particular terrorist organisation, created a number of separate difficulties whereby the existing law does not easily fit with the facts. These were establishing the right of self-defence under article 51 of the *Charter of the UN*, the issue of whether and when the *Geneva Conventions* became applicable, the difficulties of defining a 'military objective' in such a conflict, the status of captured fighters, and the compatibility of the US Military Commissions with international humanitarian law and human rights. It would become necessary to argue that, in some cases, al Qaeda was a part of the State of Afghanistan, and in others to argue that it was not. Each of these issues will be discussed in turn.

II LEGAL JUSTIFICATION FOR THE US-LED MILITARY RESPONSE

In 1998 the UN Security Council had strongly condemned the Taliban-led activities in Afghanistan for the 'sheltering and training of terrorists and planning of terrorist acts'¹³ and had sought a judicial rather than a military solution.¹⁴ The UN saw its role being to 'fight against terrorism at the *national level* and to strengthen, under the auspices of the United Nations, effective *international cooperation* in this field on the basis of the principles of the Charter of the United Nations.'¹⁵ Indeed, the various conventions that relate broadly to 'terrorism'¹⁶ take up these dual themes. The mere fact of taking part

American Journal of International Law 637, 637–40. For the decision on the extradition of Al Fawwaz from the UK to the US on charges which included conspiracy to bomb the embassies in Nairobi and Dar es Salaam, see *Re Al-Fawwaz (Appellant) (Application for a Writ of Habeas Corpus)* [2002] 1 AC 556. The House of Lords held that extradition from the UK was possible where, as was the case here, the US relied upon its *extra-territorial* jurisdiction over Al Fawwaz. Lord Slynn concluded that reference to jurisdiction within the *Extradition Act 1870* (UK) was not to be limited to crimes committed on the territory of the requesting state. He went on to say at [37] that:

It should not because in present conditions it would make it impossible to extradite for some of the most serious crimes now committed globally or at any rate across frontiers ... acts of terrorism, would [otherwise] to a considerable extent be excluded from the extradition process.

¹³ SC Res 1214, UN SCOR, 53rd sess, 3952nd mtg, UN Doc S/Res/1214 (1998) ('*Resolution 1214*'). See also SC Res 1267, UN SCOR, 54th sess, 4051st mtg, UN Doc S/Res/1267 (1999) ('*Resolution 1267*'); SC Res 1333, UN SCOR, 55th sess, 4251st mtg, UN Doc S/Res/1333 (2000) ('*Resolution 1333*').

¹⁴ The UN Security Council stated that it '[u]nequivocally condemns all acts, methods and practices of terrorism as *criminal*': SC Res 1269, UN SCOR, 54th sess, 4053rd mtg, UN Doc S/Res/1269 (1999) [1] (emphasis added).

¹⁵ *Ibid* preamble (emphases added). See also *Resolution 1333*, which recalls the 'obligations of parties to [the relevant counter-terrorism conventions] to extradite or prosecute terrorists': above n 13, preamble.

¹⁶ This includes the various 'hijacking' conventions. Relevant conventions include: *Convention on Offences and Certain Other Acts Committed On Board Aircraft*, opened for signature 14 September 1963, 704 UNTS 219 (entered into force 4 December 1969); *Convention for the Suppression of Unlawful Seizure of Aircraft*, opened for signature 16 December 1970, 860 UNTS 105 (entered into force 14 October 1971); *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*, opened for signature 23 September 1971, 974 UNTS 177 (entered into force 26 January 1973); *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic*

in terrorist activity was to be made criminal under national law, states were to ensure that jurisdiction to place individuals on trial was not lacking, that there were appropriate extradition arrangements in place and that they would cooperate to eliminate the risk of such activities.

The events of September 11 did not fit well into this international anti-terrorism regime, and relying upon it by way of response to the attacks would not, in the circumstances, be likely to find favour. First, the US attributed these acts to Osama bin Laden and al Qaeda. They had already issued an indictment against him in respect of the bombings in 1998 and he was still at large.¹⁷ A further indictment would be unlikely to produce any better results. Secondly, the scale of the loss of life and destruction of property on September 11 *looked like* the effects of an armed attack and a response would have to be based upon article 51 of the *Charter of the UN*, especially if a political coalition was to be built.¹⁸ To do so would not be a serious practical difficulty since the Security Council, in *Resolution 1368*,¹⁹ had recognised 'the inherent right of

Agents, opened for signature 14 December 1973, 1035 UNTS 167 (entered into force 20 February 1977); *International Convention on the Taking of Hostages*, opened for signature 17 December 1979, 1316 UNTS 205 (entered into force 3 June 1983); *Convention on the Physical Protection of Nuclear Material*, opened for signature 3 March 1980, 1456 UNTS 124 (entered into force 8 February 1987); *Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*, opened for signature 24 February 1988, 1652 UNTS 499 (entered into force 6 August 1989); *Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms on the Continental Shelf*, opened for signature 10 March 1988, 1678 UNTS 221 (entered into force 1 March 1992); *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*, opened for signature 10 March 1988, 1891 UNTS 437 (entered into force 18 October 1995); *Convention on the Marking of Plastic Explosives for the Purpose of Detection*, opened for signature 1 March 1991, 30 ILM 726 (1991) (entered into force 21 June 1998); *International Convention for the Suppression of Terrorist Bombings*, opened for signature 15 December 1997, 37 ILM 249 (1998) (entered into force 23 May 2001); *International Convention for the Suppression of Financing of Terrorism*, opened for signature 10 January 2000, 39 ILM 268 (2000) (entered into force 10 April 2002). Note also the *Declaration on Measures to Eliminate International Terrorism*, annexed to GA Res 49/60, UN GAOR, 49th sess, 84th plen mtg, UN Doc A/Res/49/60 (1994). There are also prohibitions on the use of terror as a primary objective in *Additional Protocol I*, above n 3, art 51(2) and *Additional Protocol II*, above n 3, art 13. Prohibitions on the taking of hostages are contained in *Geneva Convention IV*, above n 2, art 34.

- ¹⁷ Osama bin Laden remains at large despite the demand by the UN Security Council made to all 'Afghan factions [to] cooperate with efforts to bring indicted terrorists to justice', and the 'request of the United States of America to the Taliban to surrender [bin Laden and his associates] for trial': *Resolution 1214*, above n 13, [13]; *Resolution 1333*, above n 13, preamble.
- ¹⁸ Following the bombing of the US Embassies in Nairobi and Dar es Salaam in August 1998, the US carried out military action on its own. It also relied then upon the right of self-defence under art 51 of the *Charter of the UN*: see Murphy, 'Contemporary Practice 1999', above n 11, 163. For an account by the British Prime Minister of this coalition, see UK, *Parliamentary Debates of 8 October 2001*, above n 4, 812 (Tony Blair). He also stated at 811: 'I pay tribute to President Bush's statesmanship in having the patience to wait'.
- ¹⁹ SC Res 1368, UN SCOR, 56th sess, 4370th mtg, UN Doc S/Res/1368 (2001) ('*Resolution 1368*'). See also GA Res 56/1, UN GAOR, 56th sess, 1st plen mtg, UN Doc A/Res/56/1 (2001) which 'calls on all States to work together urgently to bring to justice the perpetrators, organizers and sponsors of these terrorist attacks': at [3]. See also Sixth Committee (Legal) of the UN General Assembly, *Measures to Eliminate International Terrorism*, UN Doc A/56/593 (2001) and its reference to the work of the UN Ad Hoc Committee established by GA Res 51/210, UN GAOR, 51st sess, 88th plen mtg, UN Doc A/Res/51/210 (1996) in drafting a comprehensive convention on international terrorism.

individual or collective self-defence' under the *Charter of the UN*.²⁰ On 28 September 2001 the Security Council met again. Acting under Chapter VII of the *Charter of the UN*, the Council, in *Resolution 1373*,²¹ decided that states 'shall take the measures necessary to prevent the commission of terrorist acts'.²² It established a Committee of the Council (later to become known as the Counter-Terrorism Committee)²³ to monitor implementation of the obligations it had placed upon states, and to assist them to combat, in various forms, the activities of terrorist organisations.

Resolution 1368 did not expressly authorise the US to act by way of self-defence,²⁴ unlike *Resolution 678* of the UN Security Council in 1990.²⁵ There was no question of basing a US response on the ground of reprisal action since such a use of force is considered unlawful under the *Charter of the UN* and the possibility of further attacks was foreseeable.

In building up the case for self-defence, the key issues were: whether there had been an armed attack against the US and, if so, against whom the action in self-defence should be directed; on what basis the use of military force by other states within a US-led coalition would be justified; and what the significance of the delay in the military response was.

²⁰ It had not done so in its resolution following the August 1998 bombings of the US Embassies in Nairobi and Dar es Salaam: Carsten Stahn, *Security Council Resolutions 1368 (2001) and 1373 (2001): What They Say and What They Do Not Say* (2001) European Journal of International Law Discussion Forum, 2 <http://www.ejil.org/forum_WTC/ny-stahn.pdf> at 23 September 2002.

²¹ SC Res 1373, UN SCOR, 56th sess, 4385th mtg, UN Doc S/Res/1373 (2001) ('*Resolution 1373*').

²² Ibid art 2(a); Michael Byers, 'Terrorism, the Use of Force and International Law after 11 September' (2002) 51 *International and Comparative Law Quarterly* 401. Byers argues that *Resolution 1373* 'could provide the US with an at-least-tenable argument whenever and wherever it decides, for political reasons, that force is necessary to "prevent the commission of terrorist acts"': at 402 (emphasis in original). It is questionable whether *Resolution 1373* can be read as widely as this since the context of art 2 refers to actions of states other than the use of armed force against other states.

²³ SC Res 1377, UN SCOR, 56th sess, 4413rd mtg, UN Doc S/Res/1377 (2001). For the US Report to the UN Counter-Terrorism Committee, see US Federation of American Scientists (Intelligence Resource Program), *Steps Taken to Combat Terrorism: US Report to the United Nations Security Council Counterterrorism Committee* (2001) <<http://www.fas.org/irp/threat/unsc.html>> at 23 September 2002. The UK response was submitted to the UN Counter-Terrorism Committee (pursuant to *Resolution 1373*, above n 21, [6]) in a letter dated 19 December 2001: UN Doc S/2001/1232 (2001). The Australian response was submitted to the above committee in a letter dated 21 December 2001: UN Doc S/2001/1247 (2001).

²⁴ *Resolution 1368*, above n 19. Indeed, the Security Council expressed 'its readiness to take all necessary steps to respond to the terrorist attacks on September 11': at [5] (emphasis added).

²⁵ SC Res 678, UN SCOR, 45th sess, 2963rd mtg, UN Doc S/Res/678 (1990). For a view that this resolution authorised the use of force, see Christopher Greenwood, 'New World Order or Old? The Invasion of Kuwait and the Rule of Law' (1992) 55 *Modern Law Review* 153, 166. Cf Marc Weller, 'The United Nations and the *ius ad bellum*' in Peter Rowe (ed), *The Gulf War 1990-91 in International and English Law* (1993) 29; Christine Gray, *International Law and the Use of Force* (2000) 154.

It is unrealistic to argue that the methods employed on September 11 did not amount to an 'armed attack'.²⁶ The use of civilian airliners,²⁷ full of fuel and piloted into buildings, had, perhaps, a capacity for destruction greater than many military weapons specifically designed to cause destruction to property. Indeed, the effects of the action were similar to a large-scale attack carried out by the air force of a state.

According to *Nicaragua*, an armed attack may include

not merely action by regular armed forces across an international border, but also 'the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to' (inter alia) an actual armed attack conducted by regular forces, 'or its substantial involvement therein'.²⁸

The concentration within the *Charter of the UN* and in *Nicaragua* on the delictual actions of a state causes difficulties for the September 11 scenario unless Afghanistan itself could, somehow, be held responsible, as the attacks were carried out by al Qaeda.

The responsibility for the September 11 attacks had to be laid partly at the door of the Taliban Government. There was evidence that it had encouraged the al Qaeda organisation²⁹ and had developed a symbiotic relationship with it by allowing al Qaeda to 'operate freely, including planning, training and preparing for terrorist activity'.³⁰ From the evidence available, it is unlikely that the Taliban wielded 'overall control of the group [al Qaeda]'³¹ or that al Qaeda was

²⁶ In relation to art 51 of the *Charter of the UN*, the French text uses the word 'aggression' rather than an 'armed attack' and the UN has not 'expressly recognis[ed] aggression': see Alain Pellet, *No, This is Not War!* (2001) European Journal of International Law Discussion Forum <http://www.ejil.org/forum_WTC/ny-pellet.html> at 23 September 2002.

²⁷ The fact that the hijacking of the aircraft was unlawful under the *Convention for the Suppression of Unlawful Seizure of Aircraft*, opened for signature 16 December 1970, 860 UNTS 105 (entered into force 14 October 1971) provides a further ground upon which jurisdiction against secondary parties could be exercised since both Afghanistan and the US are parties to it.

²⁸ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 14, [195]. See also *Resolution on the Definition of Aggression*, GA Res 3314, UN GAOR, 34th sess, 2319th plen mtg, UN Doc A/Res/3314 (1974) art 3(g).

²⁹ See *Resolution 1267*, above n 13, preamble: '[d]eploring the fact that the Taliban continues to provide safe haven to Usama bin Laden'.

³⁰ UK 10 Downing Street Newsroom, *Responsibility for the Terrorist Atrocities in the United States* (2001) [13] <<http://www.number-10.gov.uk/output/page3554.asp>> at 23 September 2002.

³¹ *Prosecutor v Tadic (Appeals Chamber Judgement)*, Case No IT-94-1-A (15 July 1999). The state must '[wield] overall control over the group, not only by equipping and financing the group, but also by coordinating or helping in the general planning of its military activity': at [131]. Cf the *Nicaragua* test, which, to hold the US liable for the actions of the *contras*, required proof that the 'United States directed or enforced the perpetration of the acts': *Nicaragua* [1986] ICJ Rep 14, [115]; see also *Prosecutor v Tadic (Appeals Chamber Judgement)*, Case No IT-94-1-A (15 July 1999), [100]. For the distinction between these two cases see International Law Commission, *Report of the International Law Commission*, UN Doc A/56/10 (2001), 106-7.

'under the direction or control of, [Afghanistan] in carrying out the conduct'³² so as to make the Afghan State responsible under international law for the actions of non-state actors on September 11. The Taliban had, however, been requested by the US to hand over named individuals to US custody.³³ They did not do so. This failure may be taken as evidence of a degree of responsibility on the part of Afghanistan itself for the direct acts of others operating within its territory.

The key issue is whether these acts were sufficient to establish adequate state responsibility on the part of Afghanistan. Strictly, the issue was not one of state responsibility in international law since no state has sought to hold Afghanistan liable to make reparation for its acts or omissions. In the circumstances it is sufficient to show a degree of responsibility on the part of the Taliban to justify armed action by the US against it, assuming that the other ingredients of self-defence existed. Drawing upon the principles of state responsibility may assist in this determination. In the *Tehran Hostages Case* the duty of Iran was held to be 'manifest. Its plain duty was at once to make every effort, and to take every appropriate step, to bring these flagrant infringements ... to a speedy end ... and to offer reparation for the damage.'³⁴ In this case, however, the ICJ concluded that the 'approval given to these facts by ... 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.'³⁵ There is, however, no evidence that the Taliban approved of the actions of al Qaeda on September 11. Nor could they *perpetuate* the acts of al Qaeda members in the same way as in the *Tehran Hostages Case*. Nor could it be said that the Taliban 'acknowledg[ed] and adopt[ed] the conduct in question as its own.'³⁶ Nor did the UN Security Council ascribe responsibility for the actions of September 11 to the Taliban.³⁷ The British Government spoke, not of the responsibility of the Taliban

³² *Responsibility of States for Internationally Wrongful Acts*, GA Res 56/83, UN GAOR, 56th sess, 85th plen mtg, UN Doc A/Res/56/83 (2001) annex, art 8.

³³ D S Lewis, *Keesing's Record of World Events* (2001) vol 47(9), 44337; *Resolution 1267*, above n 13, [1].

³⁴ *Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran) (Merits)* [1980] ICJ Rep 3, [69]. See also *Trail Smelter Arbitration (US v Canada)* (1938 and 1941) 3 RIAA 1905, 1965:

no State has the right to use or permit the use of its territory in such a manner as to cause injury ... in or to the territory of another or the properties of persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.

As to the responsibility of the Israeli Government for the acts of the 'volunteer group' who captured Eichmann in Argentina, see International Law Commission, above n 31, 121.

³⁵ *Tehran Hostages Case* [1980] ICJ Rep 3, [74] (emphasis added).

³⁶ *Responsibility of States for Internationally Wrongful Acts*, above n 32, art 11.

³⁷ See Giorgio Gaja, *In What Sense Was There an 'Armed Attack'?* (2001) European Journal of International Law Discussion Forum <http://www.ejil.org/forum_WTC/ny-Gaja.html> at 23 September 2002. However, the UN Security Council 'stresses that those responsible for aiding, supporting or harbouring the perpetrators, organizers and sponsors of these acts will be held accountable': *Resolution 1368*, above n 19, [3] (emphasis in original). It must be assumed that the Security Council was referring to the accountability of *individuals*.

for the acts of September 11, but of al Qaeda, although it also wished to 'ensure that Afghanistan ceases to harbour and sustain international terrorism'.³⁸

There was evidence, at least from *Resolution 1267* of 15 October 1999,³⁹ of Taliban encouragement and assistance to al Qaeda after the attacks on US Embassies in Nairobi and Dar es Salaam in 1998 and on the *USS Cole* in 2000. It was at least foreseeable by the Taliban that further actions would take place which would be controlled by Osama bin Laden and his associates from bases on the territory of Afghanistan. Moreover, specific duties are placed on all states to 'refrain from organizing, instigating or participating in terrorist acts in another State.'⁴⁰ There was also the Taliban refusal to apprehend Osama bin Laden after an indictment was issued against him following the August 1998 attacks⁴¹ and after September 11. Whilst the presence of one of the factors mentioned above may not be sufficient to establish the responsibility of the state concerned, it is submitted that they do provide, in conjunction, sufficient bricks to build a case to show, at the least, legal justification for the US to act by way of self-defence against Afghanistan.

What would the position have been if Afghanistan had had no effective government at all, and al Qaeda had taken advantage of this to establish itself in the territory? In this situation it might be argued that the US (and other states acting with it in collective self-defence) had a right to use military force against al Qaeda in Afghanistan on the basis that the State itself was unable to act to prevent damage to another state. An analogy might be drawn with *The Altmark* scenario, where the justification given for British warships entering neutral waters during World War II was that the territorial state (Norway) had failed to prevent *The Altmark*, a German warship, from using its territorial sea to escape from allied warships.⁴²

On what basis could other states justify their involvement in attacks against Afghanistan? In addition to the participation of other states, including Australia and Canada, British armed forces have been involved in military action in Afghanistan. The legal justification for such action might be based upon a state's need to protect its citizens abroad (since a number of Australian, Canadian and British citizens were killed on September 11) or upon action by way of collective

³⁸ UK 10 Downing Street Newsroom, *Defeating International Terrorism: Campaign Objectives* (2001) <<http://www.number-10.gov.uk/output/page3633.asp>> at 23 September 2002. One of the 'immediate objectives' listed is 'to bring [Osama bin Laden] and other Al Qa'ida [sic] leaders to justice'.

³⁹ *Resolution 1267*, above n 13. See also *Resolution 1333*, above n 13.

⁴⁰ GA Res 2625, UN GAOR, 25th sess, 1883th plen mtg, UN Doc A/8028 (1970); confirmed by SC Res 1169, UN SCOR, 53rd sess, 3885th mtg, UN Doc S/Res/1169 (1998), as set out in *Resolution 1373*, above n 21.

⁴¹ *Resolution 1333*, above n 13.

⁴² See C H M Waldock, 'Release of the *Altmark's* Prisoners' (1947) 24 *British Yearbook of International Law* 216, 237: 'if the passage [of *The Altmark*] was unlawful, Norway's failure to use the means at its disposal to terminate the passage and release the prisoners justified [the Royal Navy's] intervention in neutral waters'.

self-defence (and at the invitation) of the US.⁴³ Article 5 of the *North Atlantic Treaty*⁴⁴ was also invoked as legal justification for the military action which began on 7 October 2001, suggesting that the basis of the action was collective self-defence. The British Prime Minister told the House of Commons that the advice of the British Law Officers was that the action was in conformity with article 51 of the *Charter of the UN*.⁴⁵

It has been argued that the delay in the US response to the September 11 events caused it to fall foul of the customary law of self-defence as set out in the *Caroline Case*,⁴⁶ which requires a necessity of self-defence and 'no moment for deliberation.' It can, however, hardly be argued that a state will, in all cases, lose its right to act in self-defence unless it responds immediately to an armed attack. In situations such as this, it may seek to pursue other strategies, such as to secure the attendance of individuals for trial, with a resort to force being an option should this strategy not succeed. Following the events of September 11 the US pursued this strategy with (at least) one of the aims being to demonstrate the responsibility of the Taliban by its failure to hand over Osama bin Laden.⁴⁷

Once the new government was established in Afghanistan the legal basis of the military action, conducted principally by US armed forces, changed to being

⁴³ The British Secretary of State for Defence explained that 'under Article 51, any State is entitled to act in self-defence to protect its citizens ... That is precisely the basis on which ... the United States and the United Kingdom have acted': UK, *Parliamentary Debates of 8 October 2001*, above n 4, 834-5 (Geoff Hoon). The difference between the US and the UK is that the former's citizens were killed or injured within its own territory whereas the UK's citizens were killed or injured abroad.

⁴⁴ Opened for signature 4 April 1949, 34 UNTS 243 (entered into force 24 August 1949). The article states 'an armed attack against one or more of [the States Party] in ... North America shall be considered an attack against them all'. For the conclusion that the attack was 'directed from abroad', see North Atlantic Treaty Organisation, 'Statement by the North Atlantic Council' (Press Release, 12 September 2001) 124. For the view that the attacks also constituted a breach of arts IV and V of the *Security Treaty between Australia, New Zealand and the United States of America (ANZUS)*, opened for signature 1 September 1951, 131 UNTS 83 (entered into force 29 April 1952), see Commonwealth of Australia, *Parliamentary Debates*, Senate, 17 September 2001, 27160-6 (Robert Hill, Minister for Defence).

⁴⁵ UK, *Parliamentary Debates of 8 October 2001*, above n 4, 821 (Tony Blair, Prime Minister). No specific reference was made as to whether the British action was based upon individual or collective self-defence. For the issue of whether the UK itself was required to notify the Security Council, see 831-2 (Alex Salmond). The US notification to the UN Security Council was made in a letter dated 7 October 2001 from the Permanent Representative of the US to the UN addressed to the President of the Security Council: UN Doc No S/2001/946 (2001). The reason for notification was to 'prevent and deter further attacks on the United States.' It went on to say that 'we may find that self-defence requires further actions with respect to other organizations and other States'.

⁴⁶ (1841) 29 *British and Foreign State Papers* 1137-8. See, eg, Marjorie Cohn, *Bombing of Afghanistan is Illegal and Must be Stopped* (2001) <<http://jurist.law.pitt.edu/forum/forumnew36.htm>> at 23 September 2002.

⁴⁷ There was a delay in response following the attacks on the US Embassies in Nairobi and Dar es Salaam on 7 August 1998. It was on 20 August that 'the United States launched seventy-nine Tomahawk cruise missiles against paramilitary training camps in Afghanistan and against a Sudanese pharmaceutical plant': Murphy, 'Contemporary Practice 1999', above n 11, 161.

military action with the consent of the sovereign government.⁴⁸ A status of forces agreement could then be entered into by all the states with military forces on the ground on the one hand, and with Afghanistan on the other.⁴⁹

Commentators have argued both that the US-led military response was within and without international law.⁵⁰ This author's conclusion is that the US-led military action against Afghanistan was in conformity with article 51 of the *Charter of the UN*. The very nature of the events of September 11 was without precedent in form and scale but, in turn, the precedential value for the future of such a response should be such as to confine it to its own special facts.

III WHEN DID THE *GENEVA CONVENTIONS* COME INTO OPERATION?

As is well known, the *Geneva Conventions* apply to 'all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties'.⁵¹ The so-called 'war on terrorism' was not what was meant by the phrase 'declaration of war' in common article 2.⁵² There can be little doubt that an armed conflict between Afghanistan and the US (including its allies who were engaged in military action) took place when the bombing campaign began on 7 October 2001, but did an armed conflict between these two states come into existence before then? It might be thought, however, that this is of theoretical importance only. It was not so in this particular case, since the US military commissions were given jurisdiction over 'violations of the laws of war'.⁵³ Any non-US citizen subsequently captured by US forces and charged with planning the events of September 11 might be brought within the jurisdiction of these commissions, provided that the laws of war applied at the time of their acts. Events having some significance in international law can and do repeat themselves at various levels of factual similarity. On another occasion individuals carrying out similar acts might be captured. It would seem strange to

⁴⁸ The 'official transfer of power' to the Interim Authority in Afghanistan took place on 22 December 2001: United Nations Information Centre, *Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions* (2001) I(1) <<http://www.uno.de/frieden/afghanistan/talks/agreement.htm>> at 23 September 2002.

⁴⁹ See, for related purposes, Commonwealth of Australia, *Agreement between the Government of Australia and the Government of the Kyrgyz Republic Concerning the Status of Australian Forces in the Kyrgyz Republic* (2002) <<http://www.aph.gov.au/house/committee/JSCT/12March2002/kymnia.pdf>> at 23 September 2002.

⁵⁰ See generally, Frederic Kirgis (and subsequent commentators), *Terrorist Attacks on the World Trade Center and the Pentagon* (2001) American Society of International Law Insights <<http://www.asil.org/insights/insigh77.htm>> at 23 September 2001. For a view that the 'bombardment [of Afghanistan] violates both international law and United States law, set forth in the United Nations Charter' see Cohn, above n 46.

⁵¹ *Geneva Conventions*, above n 2, common art 2.

⁵² It is likely that the phrase 'declared war' in common art 2 refers to a formal declaration of war made by a state: *ibid.* See also the distinction on this matter between common arts 2 (reference to a declaration of war in the context of an international armed conflict) and 3 (no such reference in the context of an armed conflict not of an international character): *ibid.* Al Qaeda itself was said to have 'declared a jihad, or holy war, against the United States' in 1996: *United States of America v Zacarias Moussaoui (Indictment)* (2001) (US District Court for the Eastern District of Virginia, Alexandria Division) [2], [8].

⁵³ See below n 83 and accompanying text.

argue that the *Geneva Conventions*⁵⁴ did not come into effect until the state concerned carried out a military response. The better view, it is suggested, is that the attack on September 11 did amount to an ‘armed conflict’ between the US and Afghanistan (assuming the responsibility of the latter was engaged), even though civilian airliners were used as the means of force.⁵⁵ There are at least two arguments against such a conclusion. First, the term ‘armed conflict’ has been defined authoritatively by Pictet as ‘[a]ny difference arising between two States and leading to the intervention of armed forces’.⁵⁶ It is likely (as discussed below) that al Qaeda members were not members of the armed forces of Afghanistan. Secondly, the declaration made in 1998 upon ratification by the UK of *Additional Protocol I* concludes that

it is the understanding of the United Kingdom that the term ‘armed conflict’ of itself and in its context denotes a situation of a kind which is not constituted by the commission of ordinary crimes *including acts of terrorism* whether concerted or in isolation.⁵⁷

Although this declaration is directed at articles 1(4) and 96(3) of *Additional Protocol I*, it draws attention to the distinction to be made between the use of armed force against the armed forces of a state, and force against criminals and terrorists.

It is suggested, however, that from the moment the first plane hit one of the twin towers in New York, the *Geneva Conventions* (and all other laws of war treaties to which the US and Afghanistan were parties, as well as relevant customary international law) became applicable.⁵⁸

IV THE DIFFICULTIES OF DEFINING A ‘MILITARY OBJECTIVE’ WHEN DIRECTING MILITARY ACTION AGAINST TERRORISTS

Article 52 of *Additional Protocol I*, which can be said to reflect customary international law, binding alike on the US and Afghanistan, defines a ‘military

⁵⁴ For discussion as to whether individuals belonging to a terrorist organisation are to be treated as protected persons under the *Geneva Conventions*, see below pt V.

⁵⁵ It is questionable whether there was an armed conflict when al Qaeda detonated bombs in Nairobi and in Dar es Salaam on 7 August 1998, when the estimated death toll was over 200 including 12 US nationals. For references to the attacks on the ‘World Trade Center in 1993, US military barracks at Khobar, Saudi Arabia, in 1996, US embassies in Kenya and Tanzania in 1998, and the USS Cole in 2000,’ see American Bar Association, *American Bar Association Task Force on Terrorism and the Law: Report and Recommendations on Military Commissions* (2002) fn 16 <<http://www.abanet.org/leadership/military.pdf>> at 23 September 2002.

⁵⁶ International Committee of the Red Cross, *Commentary, Geneva Convention I (1952)* 32.

⁵⁷ *The Geneva Conventions Act (First Protocol) Order 1998*, SI No 1754 (made 21 July 1998, came into force 28 July 1998) (emphasis added). On the face of it, this declaration could not refer to the term used in an earlier treaty, eg the *Geneva Conventions*.

⁵⁸ See *Detention, Treatment, and Trial of Certain Non-Citizens in the War against Terrorism* (2001) 66 *Federal Register* 222, 57833 (‘Military Order’). Here was expressed the view that al Qaeda had ‘created a state of armed conflict that requires the use of the United States Armed Forces’: at 1(a).

objective'.⁵⁹ Attacks against military objects controlled by the Taliban Government would seem to cause no more difficulty in being assessed as military objectives than in any other armed conflict between states.⁶⁰ What, though, of the al Qaeda organisation? The very nature of such an organisation would seem to militate against the establishment of what, for a state, would clearly amount to military objectives. For instance, there are unlikely to be military airfields or sophisticated command and control centres, although there may well be training camps.⁶¹ In reality, terrorist organisation military objectives are likely to be any object used by terrorists, whether a house or a cave. In attacking terrorist organisations (as contrasted with the military infrastructure of the Taliban Government) by air attack, there is a risk, higher than in an armed conflict between states, that innocent civilians will be injured or killed.⁶² It has become trite to say that an attacking state will take all precautions to ensure that civilians are not killed or injured in such raids.⁶³ In Afghanistan this principle might have appeared to be more difficult to apply than in other recent conflicts,

⁵⁹ Article 52 defines as military objectives those

objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

It should, however, be noted that the UK and Australia have made certain understandings in relation to art 52 upon ratification. For discussion of the concept as customary international law, see Horace Robertson Jr, 'The Principle of the Military Objective in the Law of Armed Conflict' in Michael Schmitt (ed), *International Law Studies, The Law of Military Operations* (1998) vol 72, 197, 203; Christopher Greenwood 'Customary International Law and the First Geneva Protocol of 1977 in the Gulf Conflict' in Peter Rowe (ed), *The Gulf War 1990-91 in International and English Law* (1993) 63, 88. For a very detailed account of the practicalities of aerial bombardment in World War II, see Colonel W Hays Parks, "'Precision" and "Area" Bombing: Who Did Which, and When?' (1995) 18 *Journal of Strategic Studies* 145, 145-68.

⁶⁰ In respect of Kosovo, see International Criminal Tribunal for the Former Yugoslavia, 'Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia' 39 ILM 1257 (2000). Cf Natalino Ronziti, 'Is the non liquet of the Final Report by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia Acceptable?' (2000) 840 *International Review of the Red Cross* 1017. See also Amnesty International, 'NATO/Federal Republic of Yugoslavia. "Collateral Damage" or Unlawful Killings? Violations of the Laws of War by NATO during Operation Allied Force' (2000) <<http://arhiva.inet.co.yu/inet/d/20000609/nato.htm>> at 23 September 2002.

⁶¹ The British Prime Minister told the House of Commons that 'a series of air and cruise missile attacks began on the terrorist camps of Osama bin Laden and the military installations of the Taliban regime [yesterday]': UK, *Parliamentary Debates of 8 October 2001*, above n 4, 821 (Tony Blair). Further details are given by the Secretary of State for Defence at 831.

⁶² The use of special forces operating laser designators may, however, reduce the risk. I am grateful to Colonel W Hays Parks for drawing my attention to this point. For an analysis of the air campaign, see Robert Cryer, 'The Fine Art of Friendship: *Jus in Bello* in Afghanistan' (2002) 7 *Journal of Conflict and Security Law* 37, 47.

⁶³ See UK Select Committee on Foreign Affairs, 'Kosovo', *Fourth Report of the Select Committee on Foreign Affairs* (2000) HC 28-II § 157 <<http://www.publications.parliament.uk/pa/cm199900/cmselect/cmfaffi/28/2814.htm>> at 23 September 2002.

but in practice the targets were described as being generally in remote areas.⁶⁴ Indeed, the British Secretary of State for Defence informed the House of Commons that

every target was approved on advice from the Law Officers [but as a result of] the fast-moving nature of military actions ... legal advice cannot always be given precisely before any particular attack takes place. Therefore, the general practice has always been to ensure that all targets conform to international law and, indeed, national law.⁶⁵

A major difference between a ‘judicial’ response to terrorism and a military one is the risk of killing or injuring innocent civilians where the military option is chosen. A state may (lawfully) kill innocent civilians during an international armed conflict provided it is not expected that their deaths will be ‘excessive in relation to the concrete and direct military advantage anticipated.’⁶⁶ No such principle applies to secure the arrest of individuals in order to bring them before a court of law.⁶⁷

In Afghanistan in 2001 to 2002 the object has not merely been to bring al Qaeda leaders ‘to justice’ but to destroy the whole organisation.

V THE DIFFICULTIES OF CLASSIFYING CAPTURED ‘FIGHTERS’

There were (at least) two occasions when the issue of whether al Qaeda fighters (as contrasted with members of the armed forces of Afghanistan) who had ‘fallen into the power of the enemy’ were prisoners of war within the meaning of *Geneva Convention III*.⁶⁸ The first was at the fort at Mazar i Sharif,⁶⁹

⁶⁴ UK, *Parliamentary Debates of 8 October 2001*, above n 4, 832 (Geoff Hoon, Secretary of State for Defence). The Secretary of State for Defence commented that ‘we struck more than twice as many targets in the first 10 days of the Kosovo campaign than we have attacked in Afghanistan despite the appalling weather we faced in Kosovo. The targets now are not as obvious’: at 1135. See, however, Ian Traynor, ‘Storm over Afghan Civilian Victims’, *The Guardian* (London, UK), 12 February 2002, 1: ‘while the precise figure remains unclear, experts and informed sources put the total deaths of innocents at between 2,000 and 8,000’. Cf comments of the Secretary of State for Defence: UK, *Parliamentary Debates*, House of Commons, 14 February 2002, vol 380, 332 (Geoff Hoon, Secretary of State for Defence).

⁶⁵ UK, *Parliamentary Debates of 8 October 2001*, above n 4, 1134 (Geoff Hoon, Secretary of State for Defence). As to the application of UK domestic law see the *International Criminal Court Act 2001* (UK) c 17, pt 5.

⁶⁶ *Additional Protocol I*, above n 3, art 51(5)(b). This, it is generally agreed, reflects customary international law. Mistakes of fact, which result in the deaths of innocent civilians, are excluded from this principle. Mistakes of fact may be much more likely since the possibility of inaccurate databases (defining particular military objectives) is much greater when attacking terrorist bases or buildings: see Murphy, ‘Contemporary Practice 2000’, above n 12, 127.

⁶⁷ In 1988 UK armed forces shot and killed three alleged IRA terrorists in Gibraltar. No other individuals were killed or injured. The UK Government was held by the European Court of Human Rights to have infringed the right to life of these individuals in the way in which the ‘whole [operation] was controlled and organised’: *McCann v United Kingdom* (1996) 21 EHRR 97, [201]. For injury to innocent civilians, see *Güleç v Turkey* (1999) 28 EHRR 121; *Ergi v Turkey* (2001) 32 EHRR 18. The ICJ concluded, in its Advisory Opinion, *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226, that ‘[t]he test of what is an arbitrary deprivation of life [under the *International Covenant of Civil and Political Rights*] ... falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities’: at [25].

⁶⁸ *Geneva Convention III*, above n 2, art 4.

and the second was when a number were transferred by the US armed forces to their base at Guantanamo Bay. It is perhaps surprising that this issue should ever have arisen. Prior to 2001, 'terrorists' operating at an international level would not have been classified as prisoners of war if captured, since they would not have been members of an organisation 'belonging to a Party to the conflict.'⁷⁰ The nature of the relationship between al Qaeda and the Taliban Government has been described as one in which 'Osama bin Laden and the Taliban support and feed off each other. In return for the support that they give him, he trains their forces and fights alongside them in Afghanistan's civil war.'⁷¹ This link with a state (Afghanistan) has led some commentators to argue (certainly within the UK) that al Qaeda fighters were entitled to the status of prisoners of war.⁷² To arrive at such a conclusion is to misread the terms of article 4 of *Geneva Convention III*. To qualify as prisoners of war, al Qaeda 'fighters' would need to show either that they were members of the armed forces of Afghanistan⁷³ or that al Qaeda itself *belonged* to Afghanistan.⁷⁴ The mere fact that they fought alongside Taliban soldiers would not be sufficient. Where a 'doubt arises' as to their status this is required to be determined by a 'competent tribunal.'⁷⁵ In this

⁶⁹ See UK, *Parliamentary Debates*, House of Commons, 12 December 2001, vol 376, 860 (Menzies Campbell, Spokesperson for Foreign Affairs) where the following questions were raised: 'Who, for example, took the decision to bomb the prisoners? How many of the dead, in truth, had their hands tied behind their back? What was the role of British forces?'

⁷⁰ *Geneva Convention III*, above n 2, art 4A(2); *Military Prosecutor v Kassem* (1971) 42 ILR 470. See Richard Baxter, 'So-Called "Unprivileged Belligerency": Spies, Guerrillas, and Saboteurs' (1951) 28 *British Yearbook of International Law* 323, 323–5:

The correct legal formulation is ... that armed and unarmed hostilities, wherever occurring, committed by persons other than those entitled to be treated as prisoners of war or peaceful civilians merely deprive such individuals of a protection they might otherwise enjoy under international law and place them virtually at the power of the enemy.

See also A R Thomas and James Duncan (eds), *International Law Studies, Annotated Supplement to the Commander's Handbook on the Law of Naval Operations* (1999) vol 73, 296.

⁷¹ UK, *Parliamentary Debates of 8 October 2001*, above n 4, 833 (Geoff Hoon, Secretary of State for Defence).

⁷² Although the British Prime Minister was careful to avoid describing the detainees as being entitled to prisoner of war status, he stated in Parliament that 'I totally agree that anybody who is captured by American troops, British troops or anyone else should be treated humanely in accordance with the Geneva convention and proper international norms': UK, *Parliamentary Debates*, House of Commons, 16 January 2002, vol 378, 284 (Tony Blair). For the view that 'the laws of armed conflict ... pre-suppose the division of people into combatants and non-combatants', see Garth Cartledge, 'Legal Constraints on Military Personnel Deployed on Peacekeeping Operations' in Helen Durham and Timothy McCormack (eds), *The Changing Face of Conflict and the Efficacy of International Humanitarian Law* (1999) 121, 134.

⁷³ *Geneva Convention III*, above n 2, art 4A(1). For a discussion in the House of Lords, see UK, *Parliamentary Debates*, House of Lords, 21 January 2002, vol 630, 1363 (Lord Howell of Guildford).

⁷⁴ *Geneva Convention III*, above n 2, art 4A(2); *Prosecutor v Tadic (Appeals Chamber Judgement)*, Case No IT-94-1-A (15 July 1999) [95]–[97].

⁷⁵ See International Committee of the Red Cross, *Commentary, Geneva Convention III* (1960) 77. It is questionable whether in the case of the al Qaeda fighters any 'doubt arises' as to their status.

case they would be entitled to be *treated* as prisoners of war without acquiring such status.⁷⁶

Although it is argued above that Afghanistan is sufficiently responsible for the attacks of September 11 to justify the use of self-defence against it by the US on 7 October 2001 (and thereafter), it seems to be the position that those members of al Qaeda who fought alongside the Taliban armed forces were not part of those forces; the link with the State was not sufficient to say that the al Qaeda organisation *belonged* to it.

Were the position to be that members of al Qaeda are entitled to be accorded the status of prisoners of war, they would become lawful combatants. Military objectives within the US (or elsewhere, if belonging to that country) could legitimately be attacked. The position was neatly summarised by Lord Thomas in the House of Lords in 2002. He stated that

[a] terrorist is a criminal; he is a criminal who has no legitimate target, whether civil or military. To allow such a person to be labelled as a 'prisoner of war' suggests, for example, that an attack on the Pentagon would be a legitimate military target. That cannot possibly be allowed. This country has entered into many anti-terrorist conventions. We have made it clear that we stand shoulder to shoulder with many nations around the world against terrorism. The IRA terrorists and the loyalists in Northern Ireland were always anxious to be treated as prisoners of war.⁷⁷

Are they, instead, protected persons within the meaning of *Geneva Convention IV*? The difficulty here is that al Qaeda members are likely to be nationals of states with which the US, as the state in whose hands they are, has normal diplomatic relations, thus disqualifying them from the status of protected persons under *Geneva Convention IV*.⁷⁸ Even if they were protected persons they will have lost their protection from being attacked if they have taken part directly in hostilities.⁷⁹

⁷⁶ *Geneva Convention III*, above n 2, art 5. Compare the *presumption* of such status in *Additional Protocol I*, above n 3, art 45(1), to which the US is not a party. For a recent example of the applicability of *Geneva Convention III*, art 5, see *United States v Noriega* (1994) 99 ILR 143. For earlier examples see *Mohamed Ali v Public Prosecutor* [1968] 3 All ER 488; *Public Prosecutor v Koi* [1968] 1 All ER 419. For the US Army Regulation see *Enemy Prisoners of War, Retained Personnel, Civilian Internees and other Detainees*, Army Regulation 190-8 (1 October 1997) <http://www.army.mil/usapa/epubs/pdf/r190_8.pdf> at 23 September 2002. The US position during the Vietnam War is set out in Charles Bevans, 'Contemporary Practice of the United States Relating to International Law' (1968) 62 *American Journal of International Law* 754, 765. This excludes detainees who have committed 'an act of terrorism': at 767. For the relevant position in the Gulf War of 1990-91, see Colonel Gordon Risius, 'Prisoners of War in the United Kingdom' in Peter Rowe (ed), *The Gulf War 1990-91 in International and English Law* (1993) 289. A further example of a detainee being treated as a prisoner of war is the *Secretary-General's Bulletin: Observance by United Nations Forces of International Humanitarian Law* 38 ILM 1656 (1999) art 8.

⁷⁷ UK, *Parliamentary Debates*, House of Lords, 21 January 2002, vol 630, 1363 (Lord Thomas of Gresford).

⁷⁸ *Geneva Convention IV*, above n 2, art 4.

⁷⁹ *Additional Protocol I*, above n 3, art 51(3), which, it is argued, corresponds with customary international law. See, eg, *Instructions for the Government of Armies of the United States in the Field by Order of the Secretary of War (Lieber Code)* (1863) art 82.

The conclusion must be drawn that members of al Qaeda are not protected persons (either prisoners of war or civilians) within the terms of the *Geneva Conventions*. Captured Taliban fighters, on the other hand, are likely to be prisoners of war under *Geneva Convention III* since they will have belonged to the armed forces of a party to the conflict, namely Afghanistan. In this case, a further problem arises. Article 118 of *Geneva Convention III* requires prisoners of war to be released and repatriated following the cessation of active hostilities. Given that this part of *Geneva Convention III* only applies during an international armed conflict, the ending of active hostilities in that type of armed conflict will require release and repatriation of prisoners of war, even though the armed conflict is converted into one of a non-international character. The conclusion would seem to follow that members of the armed forces of Afghanistan, properly categorised as prisoners of war, are entitled to be sent back to Afghanistan, unless criminal proceedings are pending against them or they have been convicted.

VI THE COMPATIBILITY OF THE US MILITARY COMMISSIONS WITH INTERNATIONAL HUMANITARIAN LAW AND HUMAN RIGHTS

This is one further area where the classification of a group of fighters can have a profound effect on how they are dealt with after capture, namely, whether they can be placed on trial. Sundberg neatly summarises the position in respect of lawful combatants: 'acts of war are not unlawful although they may coincide with the descriptions of crimes in the penal code.'⁸⁰ He then goes on to quote from Andenaes to the effect that 'numerically these legalized homicides have played a much larger role than criminal ones in Europe during the past century.'⁸¹ Only lawful combatants (generally those entitled to prisoner of war status) are entitled to conduct these 'legitimised' killings and to take part in the armed conflict. In light of the above, we can conclude that 'unlawful combatants' can be 'brought to justice' for any of their acts committed during the armed conflict, assuming that the detaining state has jurisdiction over them. The US clearly possessed jurisdiction in respect of those responsible for the attacks of September 11, which occurred on its territory. It has currently indicted Zacarias Moussaoui to appear before the US District Court for the Eastern District of Virginia. The charges selected by the prosecutor are such that they do not rely upon an armed conflict being in existence prior to, or at the time of, the attacks of September 11.⁸²

What of those detained by US forces against whom no evidence exists concerning their involvement in the September 11 attacks? The US has given

⁸⁰ Jacob Sundberg, *American Society of International Law: Annual Meetings Proceedings* (1985) 118, 119.

⁸¹ *Ibid.*

⁸² They relate to conspiracy to commit acts of terrorism transcending national boundaries; conspiracy to commit aircraft piracy; conspiracy to destroy aircraft; conspiracy to use weapons of mass destruction; conspiracy to murder United States employees; and conspiracy to destroy property, all of which are based on US national laws: *United States of America v Zacarias Moussaoui (Indictment)* (2001) (US District Court for the Eastern District of Virginia, Alexandria Division).

itself jurisdiction⁸³ by its *Military Order* to institute military commissions to try non-citizens for ‘violations of the laws of war and other applicable laws.’⁸⁴ It seems axiomatic that a charge of a violation of the ‘laws of war’ requires those laws to be applicable. They clearly were on 7 October 2001, but were they on 11 September 2001? It has been argued above that the international armed conflict between Afghanistan and the US can be traced back to (at least) the moment the civilian aircraft were flown into the World Trade Centre towers. Should this argument be correct, the military commissions will have jurisdiction over conspirators or secondary parties to those events.⁸⁵ Any person captured by US forces within Afghanistan will be liable to a charge of violating the laws of war if he or she is not a lawful combatant, which is taken to mean (generally) that they are not entitled to the *status* of a prisoner of war under *Geneva Convention III*. The *Military Order* declares that it is ‘not practicable to apply in these military commissions ... the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts.’⁸⁶ The commissions will be able to hear any evidence that possesses ‘probative value to a reasonable person.’⁸⁷

In enacting legislation, a state may restrict the rights and liberties of those within its jurisdiction (subject to the limitations on doing so imposed by any human rights treaty to which it is a party). This rise in the importance of international human rights contained within treaties has established a benchmark against which a state’s treatment of individuals, whether nationals or not, can be judged. Even if the military commissions are considered to be constitutional within the US, an issue upon which differing views have been expressed, they will be judged by others against these basic human rights standards.

The real legal difficulty with the structure of the military commission is that it is hard to see that it is an ‘independent and impartial tribunal.’ Most of the major human rights treaties use this formula to describe the basic right to a fair trial.⁸⁸ The *Geneva Conventions* (which apply in Afghanistan and from which no derogation can be made) speak of ‘fair and regular trial’⁸⁹ and ‘judicial

⁸³ This is permissible under international law since the principle of universal jurisdiction in respect of war crimes would include jurisdiction over unlawful combatants, who commit acts contrary to the laws or customs of war during an international armed conflict. Following World War II, a number of states established military courts to try German and Japanese alleged war criminals outside the territory of the establishing state. For the UK practice, see A P V Rogers, ‘War Crimes Trials under the Royal Warrant: British Practice 1945–49’ (1990) 39 *International and Comparative Law Quarterly* 780.

⁸⁴ *Military Order*, above n 58, 1(e). For a general discussion, see Jennifer Elsea, *Terrorism and the Law of War: Trying Terrorists as War Criminals before Military Commissions* (2001) Congressional Research Service <<http://fpc.state.gov/documents/organization/7951.pdf>> at 23 September 2002. For an analysis of the *Ex parte Quirin Case* (1942) 317 US 3, see Louis Fisher, *Military Tribunals: The Quirin Precedent* (2002) Congressional Research Service Report for Congress, <<http://fpc.state.gov/documents/organization/9188.pdf>> at 23 September 2002.

⁸⁵ This is based on the assumption that the applicable law of the US accepts that jurisdiction can exist for inchoate acts occurring prior to the commencement of the laws of war.

⁸⁶ *Military Order*, above n 58, 1(f).

⁸⁷ *Ibid* 4(c)(3).

⁸⁸ See, eg, the approach of the European Court of Human Rights in respect of pre-reformed UK courts-martial: *Findlay v United Kingdom* (1997) 24 EHRR 221.

⁸⁹ *Geneva Convention III*, above n 2, art 130.

guarantees which are recognized as indispensable by civilized peoples'.⁹⁰ If the Secretary of State of Defense decides who the military commissioners will be, and the President or the Secretary of State of Defense are to receive the trial record and make 'the final decision',⁹¹ it is not difficult to see a divergence from these fundamental principles. Other well accepted safeguards to ensure fair trials include the trial being conducted in public and the availability of an appeal mechanism. The *Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War against Terrorism* were published on 21 March 2002 by the Secretary of State of Defense.⁹² These show a clear divergence from military courts operating within the *European Convention for the Protection of Human Rights and Fundamental Freedoms*.⁹³ A further difficulty lies in the fact that States Parties, for instance, to the *European Human Rights Convention*, may be precluded from extraditing a suspect to the US to be tried by military commission.⁹⁴

VII CONCLUSION

It has been shown above that the well-established laws of war do not easily fit the facts involved in the use of armed force against terrorists and their organisations. To misquote Oliver Wendell Holmes Jr, the life of international law proceeds from experience and not necessarily from logic. The aftermath of September 11 will be discussed widely by international lawyers and principles of law will emerge to cover any repeat of such events, whether on a lesser or a greater scale.

A state faced with the possibility of repeated attacks from members of a terrorist organisation may conclude that it has three broad practical choices if it wishes to bring a person to justice. Here, the use of the term 'bringing a person to justice'⁹⁵ is intended to convey the establishment of judicial proceedings against an individual and not merely executive (military) action against him or her. All the anti-terrorist conventions contain provisions, inter alia, to achieve this object.

⁹⁰ *Geneva Conventions*, above n 2, common art 3(1)(d).

⁹¹ *Military Order*, above n 58, 4(c)(8).

⁹² US Department of Defense Military Commission Order No 1, *Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War against Terrorism* (2002) <<http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf>> at 23 September 2002.

⁹³ Opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953) ('*European Human Rights Convention*'). See, eg, the roles of the Appointing Authority and the President (or Secretary of State of Defense): *ibid*. The Procedures do not have the support of the US National Association of Criminal Defense Lawyers, as in its view, they 'violate principles of fundamental fairness': National Association of Criminal Defense Lawyers, *Resolution of the Board of Directors Regarding Military Commissions* (2002) <http://www.criminaljustice.org/public.nsf/legislation/CI_01_012?opendocument> at 23 September 2002.

⁹⁴ See *Soering v United Kingdom* (1989) 11 EHRR 439; *Re Al-Fawwaz (Appellant) (Application for a Writ of Habeas Corpus)* [2002] 1 AC 556, [116].

⁹⁵ See, eg, *Resolution 1368*, above n 19, [3].

First, it may wish to proceed against alleged terrorists under national law⁹⁶ with the aim of bringing them before national courts. Secondly, it may consider the use of military force outside the state's boundaries to capture (if possible) individuals and to 'bring them to justice' within the capturing state's courts. Thirdly, it may seek to use military force outside the state's boundaries to kill or capture members of the terrorist organisation in much the same way as in an international armed conflict involving another state and governed by the laws of war. This latter choice will also often include the goal of bringing captured members of the terrorist organisation 'to justice'.

The legal consequences of each of these approaches are quite different. Under the first approach, the actions of the police or military forces are controlled by the limits of the national law, subject to any international human rights agreements (such as the *European Human Rights Convention*).⁹⁷ They will also be required to produce evidence which is both sufficient to obtain a court order for extradition, and to place an individual on trial. Under the second, the use of force outside a state's boundaries, even to capture a person for the purpose of bringing him to trial, will be difficult to justify under international law unless the consent of the territorial sovereign to the presence of foreign armed forces is sought.⁹⁸ In relation to the third, and on the assumption that an international armed conflict is taking place (whatever the scale of it), the use of military force will be constrained by the laws of war.⁹⁹ The intervening state's national law, or indeed, its international human rights obligations,¹⁰⁰ may also be applicable.

There is a major legal difference between the pursuit of the first and the third options. Where an armed conflict comes into existence in these circumstances, the members of the terrorist organisation are unlikely to be lawful combatants. Having taken an active part in the hostilities, they may be attacked and objects

⁹⁶ Including the national law of extradition. For examples, see above n 12. A small number of US citizens are alleged by the US authorities to have been connected with al Qaeda. They have been described as 'enemy combatants'. See generally American Bar Association, *Task Force on Treatment of Enemy Combatants: Preliminary Report* (2002) <http://www.abanet.org/leadership/enemy_combatants.pdf> at 7 September 2002.

⁹⁷ See, eg, *McCann v United Kingdom* (1996) 21 EHRR 97; *Güleç v Turkey* (1999) 28 EHRR 121; *Ergi v Turkey* (2001) 32 EHRR 18; *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226.

⁹⁸ An example is the capture of Adolf Eichmann in Argentina in 1960, for the purpose of bringing him to trial in Israel. This led to the UN Security Council condemning the action as a violation of the sovereignty of Argentina: UN SC Res 138, UN SCOR, 865th mtg, UN Doc S/Res/138 (1960). The 'official transfer of power' to the Interim Authority in Afghanistan took place on 22 December 2001: United Nations Information Centre, *Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions* (2001) I(1) <<http://www.uno.de/frieden/afghanistan/talks/agreement.htm>> at 23 September 2002. See also SC Res 1386, UN SCOR, 56th sess, 4443rd mtg, UN Doc S/Res/1368 (2001)

⁹⁹ This is irrespective of whether the intervening state can argue that it was acting in legitimate self-defence under the *Charter of the UN*: see *United States v Noriega* (1994) 99 ILR 143.

¹⁰⁰ An important consideration here may be whether the state has issued a valid derogation (where permitted) from its obligations: see *Brannigan and McBride v United Kingdom* (1994) 17 EHRR 539. The European Court of Human Rights has held that NATO Governments were not liable for a breach of the right to life of those killed during the NATO attack on the television station in Belgrade on 23 April 1999, since they were not 'within the jurisdiction' of a State Party to the Convention: *Bankovic v The Contracting States also Parties to the North Atlantic Treaty* (App No 52207/99, Decision of 12th December 2001).

which they are using may become military objectives. Civilians who have not taken part in the hostilities may be killed or injured legitimately as a consequence of a genuine mistake of fact by attacking forces, or if it was not expected that their death or injury would be excessive in relation to the concrete and direct military advantage anticipated. Upon falling into the hands of the intervening state's armed forces, terrorists have no immunity under international law in respect of trial for offences committed. If they are placed on trial, the normal trial procedures and, in particular, the rules as to the admissibility of evidence, will apply unless a separate trial process is established to deal with such cases (for example, the military commissions under the law of the US).¹⁰¹

The second and third approaches involve a state using military force to bring terrorists 'to justice'. It may be that these are the only realistic options available to a state to deal with this 'new breed of apocalyptic terrorist'.¹⁰² In pursuing any of these options a state will, in addition, have to consider the standards set by international law for the treatment of those whom it detains.

¹⁰¹ For comments that '[i]ntelligence often cannot be used evidentially, due both to the strict rules of admissibility and to the need to protect the safety of sources' see UK 10 Downing Street Newsroom, *Responsibility for the Terrorist Atrocities in the United States* (2001) <<http://www.number-10.gov.uk/output/page3554.asp>> at 23 September 2002. A separate system of trial seems to be called for, although compare the *Lockerbie Case* [1999] ScotHC 248.

¹⁰² Simon Reeve, *The New Jackals: Ramzi Yousef, Osama Bin Laden and the Future of Terrorism* (1999) 263. Where the terrorist acts are on a much smaller scale, the judicial approach (along with extradition) may be the preferred path.