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# The 11th of September and the International Law of Military Operations

*Inaugural Lecture*

delivered on the appointment to the chair in Military Law
at the Universiteit van Amsterdam
on 20 September 2002

by

T.D. Gill

Vossiuspers UvA

*Mijnheer de Rector Magnificus,*
*Dames en heren,*

Mij is door een collega in Utrecht aangeraden om mijn oratie in het Nederlands uit te spreken. Ik heb dit advies serieus overwogen. Tenslotte woon ik, ondanks mijn Amerikaanse afkomst, bijna dertig jaar in Nederland. Ik heb bovendien veel contacten gelegd binnen de Nederlandse academische gemeenschap en wortels geschoten in de Nederlandse samenleving, ondanks de gebruikelijke problemen die de meeste immigranten beleven bij het aanpassen aan en aanvaarden van een vreemde cultuur. Ik voelde mij tot op zekere hoogte verplicht om mijn plaats binnen deze gemeenschap en aan deze universiteit te bevestigen door deze rede in het Nederlands uit te spreken.

Aan de andere kant, is de wetenschappelijke voertaal binnen mijn discipline het Engels. De keuze van het onderwerp voor deze oratie, de 11de september en het internationaal recht van militaire operaties, duwde mij verder in de richting van het Engels. Doorslaggevend echter voor deze keuze was het feit dat tot mijn grote genoegen een deel van mijn familie uit Amerika over is gekomen om deze dag mee te maken. Om al deze redenen, en met name uit beleefdheid en erkentelijkheid jegens mijn familie, heb ik gekozen om niet alleen het geschreven, doch tevens het gesproken deel van deze oratie in het Engels te voeren. Ik hoop dat U hiervoor begrip zult hebben.

*Mr. Rector Magnificus,*
*Ladies and Gentlemen,*

## 1. Introduction

This afternoon I propose to make a contribution to the discussion and analysis of the legal consequences of September 11th and the international response, specifically the military response, to the horrible and far-reaching events of that day just over a year ago. I will address two main topics within the context of this inaugural lecture.

The first of these concerns the application of the international law of self-defense to major acts of international terrorism, like those of September 11th. In this context, a number of closely related questions will also be given attention. This includes whether the requirements for the exercise of the right of self-defense would seem to have been met in relation to the campaign in Afghanistan. Another question which will receive attention is whether further military action in the post-Afghanistan phase of the conflict could be justified on the basis of the doctrine of anticipatory self-defense.

The second major topic concerns the application of the humanitarian law of armed conflict to the hostilities in Afghanistan. In this context it will also be necessary to examine the question of the applicability of humanitarian law to the military campaign against Al Qaida and its erstwhile ally, the Taliban regime. Clearly the question of the extent of the applicability of humanitarian law is in large part influenced by the answer to our first major question concerning the applicability of the law of self-defense. However, as closely related as these questions are, they are not identical, so that the second question will need at least some measure of separate consideration.

Without prejudging the answer to the applicability of humanitarian law at this stage, two main areas of the application of humanitarian law in relation to the conflict in Afghanistan will be given particular attention. Firstly, the question of targeting will be considered in light of the relevant rules and principles relating to the distinction between military objectives and civilian objects, proportionality *in bello* and military necessity. Secondly, the question of the combatant status, lawful or otherwise, of members of Al Qaida and the Taliban, and the related question of the ap-

plicability of the Geneva Prisoners of War Convention to members of those organizations who have been captured or otherwise detained, will also be examined.

Finally, in the context of the foregoing questions, the issue of the relevant legal regime for the criminal prosecution of suspected perpetrators of terrorist acts will be considered. In particular, the question of which types of military or civilian courts or tribunals would be acceptable and suitable under international law and military law for the fair trial of such individuals, will be discussed.

Clearly, the examination of these questions involves a number of differing legal perspectives including: general public international law, in particular the law regulating the use of force or *jus ad bellum,* the humanitarian law of armed conflict, also known under its classic name, the *jus in bello* or law of warfare, and elements of military penal law and international criminal law. This assortment of different branches of the law and to a certain extent of differing legal perspectives, will be referred to as "the international law of military operations" or "international military law" for the purposes of this lecture. In a wider sense these terms reflect the scope of activity I hope to be involved with in the coming years as holder of the chair in military law at this university. Without losing sight of the different origins and areas of application of these separate, but closely related areas of the law, the terms "international law of military operations" or "international military law" are considered to fairly describe the mixture of legal perspectives necessary for a comprehensive examination of military operations of a wide variety of types; including the operations under discussion in the context of this lecture.

## 2. The Applicability of the Law of Self-Defense to the Combating of International Terrorism

### *2.1 Applicability as a matter of legal principle*

Prior to the 11th of September, international legal doctrine and practice was divided and somewhat ambivalent with respect to the question whether the law of self-defense was applicable to acts of terrorism carried out by non-State entities.[1] This was at least partly due to what, for lack of a better term, can be referred to as the "Statist presumption" which underlies international law. International law was,

and to a considerable extent still is, about the legal relationships between States. This is probably particularly illustrated in the law of responsibility and the law of remedies, which are almost exclusively concerned with the legal consequences of violations of international law by States and the remedies available for States to respond to such violations.[2] The association of the right of self-defense with the law of [State]responsibility and the law of remedies through the work of the International Law Commission has tended to reinforce this "Statist presumption" in relation to self-defense in the minds of some.[3]

Another reason for the division in the doctrine and practice relating to the applicability of the law of self-defense to acts of terrorism was the tendency to relate terrorist acts to the notion of "indirect armed attacks", which was itself often linked to the problems associated with outside support for insurgencies or national liberation struggles in much of the doctrine.[4] The fact that likewise much of the practice relating to claims of self-defense in response to [alleged] terrorism was carried out by Israel and South Africa, has further tended to complicate the matter, and has clearly reduced the potential for objective assessment of the question.[5]

Finally, at the risk of stating the painfully obvious, there was nothing approaching the scale and effects, in terms of casualties or impact, of any single act of terrorism, carried out prior to the 11th of September. This meant that acts of terrorism were often seen as involving relatively sporadic and small scale violence which fell short of the threshold necessary for the use of force in the context of self-defense, and were better left to be dealt with in the context of international criminal law.[6]

Yet, for all this, there was nothing in international law which categorically ruled out the applicability of the law of self-defense to acts of terrorism carried out by non-State entities, even prior to the 11th of September. Neither the relevant provisions of the U.N. Charter, nor the major interpretative resolutions adopted by the U.N. General Assembly, such as the Friendly Relations Declaration of 1970 and the Definition of Aggression of 1974, make any such limitation.[7] The lack of reference to a relationship between terrorism and the right of self-defense in the *travaux préparatoires* of the Charter is not highly significant in view of the differing circumstances and preoccupations which prevailed at the time.[8]

Neither does the work of the International Law Commission (ILC) in relation to State Responsibility rule out the applicability of the law of self-defense to acts of terrorism, at least insofar as it relates to terrorist acts which can be incorporated to

acts of a State because of a close nexus between a terrorist organization and a State. Nor for that matter does the work of the ILC in relation to self-defense as a "circumstance precluding wrongfulness" in the context of State responsibility necessarily cover all aspects of the law of self-defense, or exhaust the question as to when the right of self-defense could be relevant in relation to terrorist attacks.[9]

Likewise, the practice of States and of the U.N. Security Council prior to the 11th of September should not be seen as ruling out the applicability of the law of self-defense. The fact that some, but not all, acts carried out under the guise of self-defense have been criticized and, on occasion condemned by States or in Security Council resolutions, does not signify that the law of self-defense was not, or is not relevant or applicable in relation to acts of terrorism as a matter of principle. Rather, the reasons for criticism or condemnation have had more to do with factual ambiguities or perceptions of disproportionality in relation to the scale of a particular response, than with any limitation of the applicability of self-defense in legal principle to conventional attacks by States.[10]

As to the "Statist presumption" in international law which was referred to earlier, it should be borne in mind that this presumption is no longer as absolute as it once was; that this is a result of the widening and gradual maturation of the international legal system over a long period, and that in any case, it is no longer capable – if it ever was - of providing a legal basis for all the situations encompassed within international law. Individual criminal responsibility, individual human rights and the right of self-determination of peoples are but several examples of international law concepts which do not fit neatly into the "Statist presumption" model of international law.

While I do not subscribe to the theory that the influence of the State and its role as the primary actor in international law are on the way out, this is not the same as accepting the "Statist presumption" model of international law as being capable of providing a basis for numerous concepts of international law or a framework for its further development in a wide variety of areas.

Even in the hey-day of the "Statist presumption", the nineteenth century, the right of self-defense was not seen as pertaining only to attacks launched by States. This is illustrated by the famous *Caroline* incident, which took place in 1837 and has had a

significant influence upon the subsequent development of the law of self-defense right up to the present.[11]

The case involved the seizure and destruction of an American vessel, the *Caroline*, which was being used by private American nationals to supply and support a rebellion against British authority across the border in Canada. In what would today be called a "special operation", British and Canadian marines boarded the vessel at night while it was at anchor on the American side of Lake Ontario, set the vessel ablaze and sent her plummeting over Niagara Falls, resulting in the death of two American crew members. The United States Government itself was not involved in supporting the rebellion, although it is probably correct to say that it was less than diligent in preventing private American sympathizers with the rebellion from carrying out actions which might well be deemed to be, at least partly, "terroristic" in their nature.[12]

Be that as it may, in the ensuing correspondence between the British and American Governments following the arrest of one of the British participants in the *Caroline* incident and his threatened prosecution for murder and arson, the British protested his criminal prosecution on the grounds that he was participating in a lawful military operation which had been carried out on the basis of self-defense. The exchange of views between the American Secretary of State, Daniel Webster, and the British Ambassador Fox, and Foreign Secretary, Lord Ashburton, examined both the factual and legal elements of the invocation of self-defense in detail. In doing so they set out the requirements of necessity and proportionality and the restrictions on anticipatory self-defense which are still part of customary law today.[13] Nowhere in this correspondence was it claimed by either side that self-defense was only relevant and applicable in response to attacks carried out by States, or with the complicity and assistance of a State. Since the *Caroline* case is seen as being so illustrative of and influential upon the customary law of self-defense and has even been referred to by a former President of the International Court of Justice as being the *locus classicus* of self-defense,[14] this raises some interesting and relevant points in our discussion.

Since the applicability of the law of self-defense is not ruled out in either the customary law of self-defense, as illustrated by the *Caroline* incident, or in the U.N. Charter itself, there seems to be no compelling reason why the exercise of this right in response to attacks carried out by non-State entities should be ruled out in principle. This is not to say that any type of terrorist violence should be deemed as an ar-

med attack which would justify the use of force in self-defense. Neither would the use of force be necessarily justified or appropriate in all situations where an act of violence by a non-State entity could be deemed as an armed attack. This will depend upon a number of considerations. However, the important conclusion at this point in our discussion is that the use of force in self-defense can be applicable in principle to situations where an armed attack is directed against a State by a non-State entity. Of course the use of force is always subject to a number of legal requirements and there must be reasonable evidence indicating that a particular non-State entity is responsible for a particular attack or series of attacks, but these are other matters which do not affect the question of the applicability of the law of self-defense as a matter of legal principle.

This applicability is, moreover, supported by an examination of State Practice, of U.N. resolutions which are widely considered to be interpretative of the Charter, and of the relevant case law. A few illustrative examples will have to suffice in this context.

The rescue by Israeli paratroopers of the passengers and crew of a hijacked Air France aircraft in Entebbe in 1976 was carried out on the basis of a claim of rescue of nationals within the context of self-defense. I will not go here into the possible theoretical distinctions between a right of rescue of nationals *sui generis* and the right of self-defense. Suffice it to say that the Israeli Government invoked the right to use transboundary military force in response to a terrorist attack carried out by a non-State entity, and that this incident, far from being condemned, received widespread support both inside and outside the Security Council.[15]

A careful reading of two key U.N. resolutions, the "Friendly Relations Declaration" of 1970 and the "Definition of Aggression" of 1974 provides further support for the applicability of the right of self-defense in relation to terrorist acts under certain circumstances. This would include situations where a State allowed its territory to be used for terrorist acts, gave significant support to a terrorist organization, and participated in organizing and or sending terrorist groups abroad; provided the acts carried out by the terrorist group met the threshold of an armed attack, which is a necessary prerequisite for the activation of the right of self-defense. The rationale of this interpretation is that if such direct and indirect assistance to armed bands or terrorists constitutes a violation of the prohibition of the use of force, and can even

constitute aggression, there is no reason why self-defense could not become operative if the basic prerequisite of an armed attack had been met.[16]

This is also an interpretation that can be made from the *Nicaragua* judgment[17] of the International Court and the *Tadic* decision[18] of the Appeals Chamber of the Yugoslavia Tribunal. In the former case, the Court, determined that the "sending by or on behalf of a State of armed bands, (which could conceivably include terrorists) or the substantial involvement of a State in acts of force carried out by such armed bands or terrorists against another State can constitute an armed attack, provided the scale and effect of such acts is comparable to an armed attack carried out by a more conventional means".[19] In the *Tadic* case, the Appeals Chamber determined that acts carried out by a paramilitary group – which could conceivably include a terrorist organization – can be seen as acts of a State which provides significant support to the terrorist organization, even in the absence of direct instructions. Or, as one noted author on the use of force has stated "[t]errorists can thus act quite autonomously and still remain *de-facto* organs of the controlling State".[20]

The situation in relation to a state would not be fundamentally different if the relationship was one more akin to partnership between the terrorist organization and the supporting State, or even one whereby the terrorist organization exercised more control and influence than the host State. In all three scenarios there would be a close relationship between a host or supporting State and a terrorist organization which would fit the criteria in the two decisions under discussion – albeit under circumstances somewhat different than those which those two courts were confronted with.

In short, there is no barrier in international law of either a customary or conventional nature to the applicability of the right of self-defense to acts of terrorism which are comparable in their scale and effects to an armed attack carried out by more conventional means. This is particularly the case when there is a close relationship between a host or supporting State and a terrorist organization. However, such a relationship is not strictly a requirement, as is illustrated by the example of the *Caroline* incident. The right of self-defense can also be relevant in situations whereby a State is not engaged in active support for a terrorist organizations operating on its territory, but is unable or unwilling to put a stop to its activities.

In situations where a terrorist organization and a State are in close cooperation, or in any case, have a relationship whereby the State provides a significant measure of

support for the activities of the organization, the relationship can be characterized as one of complicity, with the consequence that the supporting or host State incurs direct responsibility in its own right for the actions of the organization, and correspondingly becomes a legitimate target for action undertaken in self-defense.

The situation in relation to a State which is not engaged in cooperation with, or support for a terrorist organization which is operating from its territory, but is simply unable or unwilling to undertake effective action to put an end to its activities is different. In such situations, the responsibility incurred by the State would be either nonexistent, or in any case too tenuous to provide in itself a basis for self-defense actions. However, if the threat posed by the terrorist organization were significant, there would be grounds for a State confronted with such a threat to undertake action in self-defense directed against the terrorist organization and its support base, notwithstanding the (near) absence of responsibility on the part of the State where the organization was located. In the logic of the ILC's work on State responsibility, such action would probably be classified as armed counter- measures undertaken within the context of a "state of necessity" and not strictly speaking as self-defense. Whether or not one agrees with that logic, and I for one do not find it persuasive, the end result is essentially the same; namely the existence of a legal basis to undertake transboundary armed action aimed as neutralizing or extirpating the threat. It goes without saying that any action undertaken in either situation would be subject to the conditions governing the use of force in self-defense, including the relevant rules and principles of the law of armed conflict.

It follows from the above that in situations where a State is willing and capable of taking action, whether of a military or of a law enforcement nature, against terrorist elements located on its territory, there will be no basis for an outside State to undertake action in self-defense. The absence of any responsibility imputable to the State where the terrorists were located and of the condition of necessity, which is a prerequisite for the exercise of self-defense, would make any attempt to use force by the outside State without the consent of the State where the terrorists were located illegal. This would not prevent an outside State which was confronted with a threat offering its assistance. It would be up to the State where the terrorists were located to determine whether it would consent to such assistance. To the extent consent were granted, such consent would be sufficient legal basis for the outside

State to undertake action in cooperation with the State where the terrorists were located, making reliance upon self-defense superfluous and irrelevant.

Clearly each situation will have to be assessed on its own merits and on the basis of the factual information available at the relevant moment. However, it is submitted that the distinctions in situations we have just examined not only provide sufficient legal guidance as to when self-defense would be justified and relevant, but also demonstrate that criticism that self-defense in relation to terrorist organizations is open-ended and overly subject to abuse is misplaced.

*2.2 The attack of 11 September and the question of applicability of the law of self-defense.*

The attack of 11 September exceeded in its scale and effects any single act of terrorism that has been carried out to date. The effects of the attack in terms of both human casualties and material damage were horrendous and were easily comparable to a very substantial armed attack by conventional means, and as such there can be no doubt whatsoever that the attack of 11 September exceeded the threshold of the term armed attack contained in Article 51 of the U.N. Charter. It also almost certainly qualified as a crime against humanity.

This contributed in no small measure to the readiness of the international community to accept the invocation of the right of self-defense by the U.S. Government. Some commentators have argued that this readiness represented a dramatic departure from the previous existing law and was potentially disruptive and dangerous to the international legal system.[21]

The readiness of the international community to accept the applicability of the law of self-defense was evidenced by the unanimous adoption by the Security Council of Resolution 1368 one day after the attack in which the Council condemned the attack of 11 September, recognized the right of self-defense and characterized the attack as a "threat to the peace". This position and characterization has been reiterated in subsequent resolutions. This position has likewise been criticized as being "ambiguous and contradictory"and a potentially dangerous broadening of the notion of self-defense".[22]

There are in my opinion good grounds for rejecting this criticism; there is in fact no reason to assume that the Council was mistaken in recognizing the applicability of the law of self-defense to a terrorist attack which clearly can be classified as an ar-

med attack, or that this recognition represents a radical "broadening of the notion of self-defense". Neither is there anything inherently contradictory or ambiguous in simultaneously recognizing the applicability of the right of self-defense alongside a characterization of the attack and the situation it has created as a threat to the peace.

In view of what has already been said concerning the applicability of the law of self-defense to attacks carried out by non-State entities, including terrorist groups, as a matter of legal principle, there is no need to dwell on that point any further. Suffice it to say that there was ample support and precedent in international law as it existed on the *10th of September*, for the applicability of the law of self-defense to terrorist attacks in principle, provided the circumstances warranted it and the requirements for the exercise of self-defense were observed. Since the resolutions do no more than affirm this and further provide that the exercise of the right of self-defense must be carried out in conformity with the U.N. Charter and international law, they do not radically broaden the notion of self-defense, although they do provide authoritative support for the applicability of self-defense to terrorist attacks.

Likewise, the Security Council did no more than recognize the obvious when it characterized the attack of 11 September as a "threat to the peace". This is not a new position; the Council has long characterized international terrorism as a threat to the peace and has taken a variety of measures under Chapter VII before and since the 11th of September to coordinate efforts against it. These include the type of measures provided for in Resolution 1373, adopted a few weeks after the attack, such as the freezing of assets of terrorist organizations, enhancing international mutual assistance between law enforcement agencies, reiterating the duty to suppress recruitment of terrorists and denial of safe haven to terrorists on the territory of member States, and so forth. None of this contradicts the affirmation of the right to self-defense; on the contrary, military and non-military responses are complementary and equally necessary in the wake of 11th of September.

There is in fact no reason why the Council cannot and should not combine measures under Chapter VII with the recognition of the right of self-defense. As stated earlier, the appropriateness and legality of a military response is dependent upon the relationship of a terrorist organization to the State or States where it is located. In the case of Al Qaida , which is reported as having operatives in some sixty countries, there is no question of military force being used against all terrorists located in all of these countries.[23] As stated earlier, the use of military force on the basis of self-defense would only be legally justified against a State which had a close relation-

ship and significant degree of complicity with the terrorist organization, or in exceptional situations where no such relationship existed, but the State was unable or unwilling to suppress the activities of a terrorist organization operating on its territory and the circumstances made the obtaining of consent impossible. In so far as consent is given by a State where terrorists are located to another State for joint military action against a terrorist organization, there is no need for this to be based on the right of self-defense, since consent by the territorial State would provide the necessary legal basis.

In any event, it is clear that the international community has made it clear that it views the events of 11th of September as an armed attack and has recognized the applicability of the right of self-defense; and at the same time has recognized the necessity of countering the threat to international peace that these events pose, by invoking Chapter VII as the legal basis for a number of binding measures of a non-military nature. In combining these approaches, the Council has far from acting in an ambiguous or contradictory manner, instead shown that it realizes that the threat of international terrorism calls for a variety of responses and has acted in a coherent and effective way in reaffirming and providing the necessary legal bases for them.

While some might have preferred a more collective basis for military action, there is in fact nothing illogical or less legal in the choice to base the military component of the response on the right of self-defense, rather than on upon the collective security provisions of the Charter. Given the fact that the attack was directed against the heart of American territory and the military response was bound to be overwhelmingly American in composition, there was every reason for the United States to want to maintain maximum control over its policy and military forces.

From a legal standpoint, there is no reason why the right of self-defense cannot provide a clear legal basis for the type of military action the United States and its allies have taken and are still in the process of undertaking in Afghanistan, once the applicability of the law of self-defense to terrorist attacks is accepted. Whether that would include action against Al Qaida elements elsewhere, or against other States, may well be another matter and it is quite possible that the collective security system of the United Nations will have to be invoked should any further military action against States other than Afghanistan be undertaken. We will return to that possibility shortly.[24]

It is something of a truism that the international legal system is a primitive one. Certainly the prominent place that self-defense still plays within it is an indication of its relative primitiveness and probably is a source of some surprise to those less familiar with it. Yet, when it is recalled that we are dealing with a decentralized legal system in which a large number of States and other actors with widely different perspectives and interests play a role, the reasons for the continued importance of self-defense become apparent and more understandable. There is in fact no contradiction between self-defense and collective security. Both have a role to play in a divided world.

### *2.3 Proportionality and necessity criteria applied to the military response to the 11th of September*

Having demonstrated that the 11th of September qualifies as an armed attack in a material sense and had been recognized as such by the international community, it is time to examine whether the other conditions for the exercise of self-defense have been met. We are concerned here with whether the requirements of necessity and proportionality have been observed, since it should be clear from what has been said concerning the Security Council's affirmation of the right of self-defense that the procedural requirements relating to Article 51 have been met.

When discussing the principles of necessity and proportionality it is necessary to clarify which of the various meanings or contexts where these principles can be relevant we are dealing with. We are referring here to necessity and proportionality within the context of self-defense; the examination of these principles within the context of the law of armed conflict will take place later on in this lecture.

Necessity in the context of self-defense is closely related to the existence of on ongoing armed attack and/or the credible threat of (renewed) attack within the immediate future. This in turn is related to the aims of the attacking party insofar as they can be deduced from its statements and conduct. For example, if an attacking State's intention is to gain unchallenged control over a disputed portion of territory, it will usually say so and match its actions to that objective. Finally necessity is also related to the availability of feasible alternatives. For example, if the Security Council undertakes effective action within the context of Chapter VII of the Charter, the necessity for self-defense would disappear. Likewise, once an adversary has clearly complied with an armistice or has ceased resistance, the condition of an ongoing at-

tack, or credible threat of an attack ceases to be present and the necessity for self-defense would likewise no longer apply.[25]

With respect to proportionality within the context of self-defense, we are dealing with the overall scale of the attack, or of the threat of a renewed attack, in relation to the overall scale of the measures taken in self-defense. There should be a significant correlation between the two; a rough parity between the overall scale and effects of the attack on the one hand and of the measures taken in self-defense on the other. While this does not signify that a defending State is restricted to using identical or even similar tactics as its adversary, or must simply sit back and allow the attacking State to take the initiative, it does mean that the response must be roughly equivalent in scale and effects to the attack and the nature of the threat posed by the attacker.[26]

In relation to the response of the United States and its allies to the attack of 11 September, the foregoing implies that the question whether the conditions of proportionality and necessity have been met must be assessed in the light of the scale and effects of that attack, the nature of the threat of further attacks posed by Al Qaida and its supporters, either directed against the United States and American interests abroad, or against other States, the objectives pursued by Al Qaida and its supporters, and finally the feasibility of arriving at a cessation of armed activity without the continued use of force, and the probability of some type of ultimate peaceful resolution of the conflict.

Viewed from this perspective, it seems clear that there was little alternative for the United States and its allies pursuing a strategy aimed at the total eradication of the Al Qaida network in Afghanistan and consequently the overthrow of the Taliban regime and its replacement by a less oppressive government which was willing to at least seriously undertake to prevent its territory being used as a base for international terrorism and terrorist attacks against other States.

The nature and scale of the attack and the clear threat of further terrorist action were evident. Once it became clear that Al Qaida was responsible, the only way military action against the Taliban regime could have been avoided would have been in the unlikely event it cut all its ties with Al Qaida, fully complied with Security Council resolutions which predated the 11th of September by handing over the leadership of Al Qaida and putting an end to its activities within Afghanistan,[27] and fully cooperated with United States' criminal investigation of Al Qaida activities

and international verification of the cessation of those activities in Afghanistan. In fact these were essentially the conditions that the United States and its allies posed to the Taliban regime in the weeks preceding and immediately following the opening of military action.[28] They were, of course, rejected; which in view of the close nature of the relationship between the Taliban and Al Qaida leadership was not surprising.

In relation to the other elements which enter into an assessment of the observance of the requirements of necessity and proportionality it seems equally clear that the aims pursued by Al Qaida and the nature of its activities rule out any possibility of arriving at a solution other that through the use of force. Since Al Qaida is neither a feasible, nor a desirable negotiating partner, and since neither the Taliban nor Al Qaida were willing to surrender without a military confrontation, there was no alternative to the use of military force aimed at removing the Taliban regime from power and eliminating the presence of Al Qaida in Afghanistan. That this was also proportionate under the circumstances and in relation to the attack of the 11th of September and the threat of further attacks seems equally clear.[(29)] Consequently, we can conclude that the conditions of proportionality and necessity within the context of the law pertaining to self-defense have been met.

*2.4 Anticipatory self-defense and the question of further steps in the war against terrorism.*

With the campaign against Al Qaida having reached an advanced stage, notwithstanding the continued existence of potentially dangerous elements of that organization in remote areas of Afghanistan and elsewhere, the question arises as to what the possible next steps of a military nature might be in the "war against terrorism".

From a legal, as well as from a political perspective, a distinction must be made between possible military action against Al Qaida elements or forces located in Afghanistan or elsewhere, and possible action which could conceivably be directed against States which have no appreciable links with Al Qaida and the attack of 11 September, but are considered to pose a threat of more general nature.[30]

To the extent Al Qaida succeeded in regrouping in Afghanistan or in transferring its main base of operations elsewhere, the right of self-defense would continue to remain applicable under the conditions and within the limitations discussed previously. I have attempted to illustrate that this would be the case in situations where a host State and a terrorist organization have a close relationship. I have additionally

submitted that self-defense would be relevant in situations where a State was unable or unwilling to put an end to the activities of a terrorist organization which posed a significant threat operating on its territory.[31] Consequently, I see no reason why the right of self-defense would cease to be relevant in the event Al Qaida continued to operate from remote bases in Afghanistan or transferred its nerve center to another State which offered it refuge and support. To be sure, U.S. and allied forces are operating in Afghanistan with the consent of the Provisional Government; however, the authority of that government is so tenuous and its writ is so limited, that it seems correct to at least partly base military operations against Al Qaida and its supporters inside Afghanistan upon the right of self-defense, until such time as consent becomes more meaningful. I have already set out my reasons for the applicability of self-defense to situations where a State harbors a terrorist organization, or is unable or unwilling to counter its presence and activities on its territory; and there is no reason why these would not be relevant in a situation whereby Al Qaida succeeded in setting up its base in another such State, which either willingly cooperated with it, or was unable to prevent it doing so. I have also tried to make clear that self-defense would not be relevant if a State were able and willing to undertake reasonably effective action against terrorists located on its territory. Consequently, I will not add anything further to that discussion.[32]

The situation regarding possible military action against States which are not connected in any meaningful way with Al Qaida, or the attack of 11 September, is altogether another matter. Without such a connection, there would be no basis for undertaking military action against such States on the basis of a right of self-defense with pertains to Al Qaida and the attack of 11 September.

The only way that self-defense could possibly provide a basis for military action against such States would be if it could be shown that in addition to posing a potential threat now or in the future, due to their policies or increasing military potential; such States were also actively engaged in the preparation of an armed attack against the United States, or its allies within the immediate future. Under such conditions, and only under such conditions, would the law of self-defense permit so-called anticipatory action.

The question of the permissibility of anticipatory self-defense is controversial, as anyone familiar with the literature relating to self-defense will be aware. The literal text of Article 51 seems to point in the direction of it not being permitted, although it is far from conclusive. The International Court has refrained from pronouncing

upon this issue. On the other hand, practice both prior to and since 1945, would seem to indicate that anticipatory, or as some prefer to refer to it as interceptive self-defense, is permissible within the strict limits of our "old friend", the *Caroline* incident, which we examined earlier.[33] That is, in fact, my position on the matter. I will leave further discussion of the merits, or lack thereof, of anticipatory self-defense to another occasion. Suffice it to say that even if one accepts the legality of anticipatory self-defense within the strict limits of *Caroline*, this would preclude action against States which posed potential threats, even if this involved the development of a strategic capability of weapons of mass destruction, unless it could be credibly shown that an attack were imminent.[34]

However, this is not to say that nothing could or should be done if such a threat did emerge. The collective security system of the United Nations has the legal capacity to respond to threats which fall short of an imminent attack. The Security Council could, provided the necessary political base could be formed, authorize any action it deemed necessary, including the use of pre-emptive force to neutralize any such threat. This would require credible evidence of the existence of a threat and the clear unavailability of alternatives. This, in my view, is as it should be considering the possibilities of abuse and the very large stakes involved in pre-emptive war.

## 3. Elements of International Humanitarian Law Applied to the War Against Terrorism

### *3.1 Is international humanitarian law applicable to the war against terrorism?*

The obvious starting point in answering the question whether international humanitarian law is applicable in the "war against terrorism" is to examine when the law of armed conflict, or humanitarian law becomes applicable in a more general sense. The seemingly equally obvious answer to that question is that the law of armed conflict applies during armed conflict. I have put forward a number of reasons why the right of self-defense is applicable in relation to attack of 11 September. If one accepts my reasoning, it would seem to follow that a situation of armed conflict, if not a "war" in the technical sense, exists and has existed since that attack and that consequently the humanitarian law of armed conflict is applicable to the conduct of hostilities and the relationship between the adversaries.

This somewhat simplified assessment is correct up to a point, but only up to a point. The fact that the events of the 11th of September can be seen as an armed attack does not automatically signify that the law of armed conflict became immediately applicable, or that it would apply to all aspects of the "war against terrorism". However, there can be no doubt that it is relevant to the military dimension of the response to the 11th of September; in particular to the campaign in Afghanistan, and that it has been applicable at least since the opening of that campaign on 7 October of last year.

The applicability of humanitarian law is essentially a pragmatic question. Once military force of any intensity beyond the level of the maintenance or restoration of law and order is used, at least some of its basic principles, such as the duty of distinction between military objectives and civilians and civilian objects, the principle of military necessity viewed in relation to the principle of proportionality *in bello*, and the principle of humanity, will become applicable.

This is reflected, for example, in the authoritative ICRC commentaries to the Geneva Conventions, which states: "Any difference arising between two States and leading to the intervention of members of armed forces, is an armed conflict within the meaning of [common] Article 2, even if one of the Parties denies the existence of a state of war".[35]

It is clear that the humanitarian law of armed conflict is applicable to any armed conflict including two or more States, or between the international community acting upon a decision of the Security Council and a State or States, regardless of the recognition of the existence of a state of war by either or of both parties to the conflict, and irrespective of whether either side recognizes the other as a legitimate government.[36]

Consequently, from the moment armed force was employed by the United States and its allies against Afghanistan and the Al Qaida network located there, a situation of international armed conflict existed to which the humanitarian law of armed conflict applied. It will remain applicable until such time as hostilities between the U.S. and its allies and the remaining Al Qaida and Taliban elements under arms in Afghanistan come to an end, and the Afghan Government is able to exercise relatively effective authority over its territory and prevent the regrouping or re-emergence of a significant Al Qaida presence within its borders.[37]

Without going into an exhaustive list of the applicable instruments and rules it will be helpful to note that the Hague Convention on Land Warfare (as customary law), the Geneva Conventions of 1949 and the provisions of Additional Protocol I of 1977 (hereinafter referred to as API) which have obtained the status of customary law are all in principle applicable to the conflict. Those States actively engaged which have ratified AP I are bound to its provisions as treaty law.

A similar situation would apply in the event military force were employed by the United States and its allies against Al Qaida units located in other States which harbored or supported them; thereby making the exercise of the right of self-defense relevant and justifiable. In such a situation, the use of military force would be both directed against Al Qaida and against the State which was supporting and cooperating with it and there would be no question regarding the applicability of the relevant portions of international humanitarian law.[38]

Earlier on, I argued that the right of self-defense would apply in a situation whereby there was no question of a relationship of support by a State for a terrorist group located on its territory; but that State was unable or unwilling to undertake action to suppress the activities and presence of that organization, provided the threat posed was sufficient to justify taking military action. In such a situation the exercise of the right of self-defense would not be directed against the State, its organs and armed forces, but against the terrorist elements located on its territory. Would the law of armed conflict apply in such a situation? [(39)]

Both in the conventions relating to the humanitarian law of armed conflict, and in the relevant literature, there is if anything, an even stronger "Statist presumption" in relation to the applicability of humanitarian law, than there is in relation to the law of self-defense.[40] The fact that international humanitarian law can be applicable to militias, resistance groups and national liberation movements which meet certain criteria does not seem to be of much relevance in relation to an international terrorist group like Al Qaida. The former category fight on behalf of a particular country, which may be occupied, but nevertheless is continuing to resist. Moreover, they must meet certain criteria of organization, discipline and conduct of operations. They will often have a degree of international recognition from States with which they are allied, as was the case of the organized resistance movements in occupied Europe in World War II.[41]

None of this would apply to a terrorist group like Al Qaida. It is neither fighting on behalf of any particular country, nor does it meet any of the criteria which resistance and liberation movements must meet in order to open the way for the applicability of humanitarian law.[42]

This obstacle to applicability is circumvented in the event force is used against a State – like Afghanistan, which is willingly providing sanctuary and various forms of indirect and direct support to the terrorist organization. Since the force used within the context of self-defense is used as much against the supporting State as against the terrorist organization it is associated with, there is no problem with the application of international humanitarian law to such a situation. However, this could be different if self-defense were employed in the other type of situation we have outlined above; whereby it is not the State which is the object of military operations carried out in self-defense, but only the terrorist elements or units which happen to be located on a State's territory. One way of overcoming the obstacle to applicability in such situations is to emphasize that humanitarian law can become operative in any situation whereby military force is employed by one State or group of States on the territory of another State, irrespective of whether that State's organs of armed forces are directly involved, or offer any form of resistance. This is undoubtedly the case in relation to total or partial occupation which does not meet with resistance,[43] and there are reasonable grounds for assuming applicability when there is no question of total or partial occupation, even of a temporary nature, but where military force is employed by a State against the territory of another State.

The fact that Al Qaida is not party to the Conventions and that force could conceivably be used against terrorist elements without the involving of armed forces of the State where they are located should not stand in the way of applicability. Neither should the absence of military occupation referred to in Common Article 2 act as a barrier. Consequently, I would submit that the same instruments and customary rules should apply in this type of situation as in military operations directed against a State.[44]

The logic and purpose of humanitarian law is to provide some kind of legal framework for the use of force and to safeguard the rights of individuals who are affected by such use of force, not to permit the creation of legal conundrums which would result in situations whereby international humanitarian law would not apply to acts of armed force carried out by one State against terrorists located on another

State's territory. It would be an illogical and inconsistent law of armed conflict which would apply to the temporary occupation of a small portion of a State's territory which offered no resistance; but did not apply to a series of air strikes or special forces operations carried out by a State against terrorist bases on another State's territory, simply because the target State's armed forces remained outside the fighting and its government was not responsible for the acts of the terrorists.

Using the same rationale, it is my belief that the applicability of at least the basic principles of humanitarian law in relation to hostilities between a State and a terrorist organization is at least arguable in a more general sense, irrespective of any connection between the terrorist organization and any other State. This can be supported on the basis of an admittedly liberal interpretation of the Geneva Conventions and other relevant instruments in the light of their object and purpose. It can also be supported by reference to general principles of international law, which the basic principles of the law of armed conflict almost surely are.

The alternative to the applicability of at least the basic principles of international humanitarian law to this type of situation would be a legal vacuum. To argue that domestic law relating to law enforcement activities would apply seems absurd in relation to protracted and intensive military operations. Likewise the application of Common Article 3 is precluded, since it only applies to non-international armed conflicts. Finally, it would be grossly inconsistent to allow on the one hand the applicability of the *jus ad bellum* in the guise of the right of self-defense, while on the other, denying the applicability of at least the core principles of the *jus in bello*.

### *3.2 The application of international humanitarian law to targeting doctrine and practice*

The conduct of operations in Afghanistan by the United States and its allies has followed a general pattern that has been employed starting with operation "Desert Storm" and continued with the air campaign against Yugoslavia in the Kosovo Conflict; notwithstanding the clear differences between the forces employed, the objectives pursued and the environment in which each of these campaigns have been conducted. In each of these conflicts the United States has opened the initial phase of operations with efforts directed primarily towards establishing aerial supremacy, thereby facilitating the conduct of further aerial operations in the conflict area.

This is followed by a second phase in which efforts are primarily directed against targets of a strategic nature, such as: command and control centers, military head-

quarters, communications and transportation and related infrastructure, production and storage facilities and so forth; with the primary objective of weakening the adversary's capacity for sustained resistance and diminishing the support system for and mobility of its armed forces.

The next phase is primarily directed against more tactical targets such as: military concentrations, military vehicles, front line positions and similar targets. This can be coordinated with ground operations; either preceding or during a major ground offensive, which can be carried out by U.S. and allied ground units directly, or in coordination and cooperation with indigenous opposition forces engaged with the adversary's armed forces, as was the case in Afghanistan and to a lesser extent in the final stages of the Kosovo conflict.[45]

This pattern has corresponded with a steady increase in the use of precision guided weapons and munitions, which has increased steadily since the Gulf War, when some 10% of the munitions used were so-called "smart" bombs and missiles, to over 70% in the aerial campaign against Afghanistan.[46] This has resulted in a very high level of expectation of accuracy and effectiveness on the part of media and general public. This level of expectation is so high that virtually any error or degree of collateral damage is potentially viewed as a major failure of the targeting system and can potentially have large repercussions.

Both the pattern of targeting decisions, and the increased precision of the weapons used and expectations of their accuracy, have contributed to a high degree of emphasis upon legal considerations in the selection of targets and in the conducting of operations. This is not to say that civilians are not killed and do not suffer as a result of targeting errors and collateral damage. Nor is it to imply that at least some of these errors and some degree of collateral damage could not be avoided or at least reduced if techniques were improved, some target choices were avoided and in some cases, more risk to the forces conducting operations were undertaken.[47]

However, it is fair to say that this emphasis upon legal considerations is probably unprecedented in the history of warfare and has, in combination with the increased accuracy of the weapons and munitions employed, resulted in a dramatic reduction in the number of civilian casualties in comparison with earlier armed conflicts. This is especially true if the destructive capability of modern weapons systems and the number of missions carried out is taken into account.[48]

This reflects the requirements laid down in the contemporary law of armed conflict. These requirements are contained in the applicable instruments and rules and

principles of customary law referred to earlier. These include: the principle of military necessity viewed in relation to the other applicable principles, the concept of the military objective and the duty to discriminate in the choice of targets between military objectives and civilian objects and civilians, based on the information available at the time, the principle of proportionality *in bello*, which lays down the requirement that the concrete and direct military advantage expected to be gained from an attack must outweigh collateral damage to civilians and civilian objects based on the information available at the time; the principle of humanity and duty to avoid unnecessary suffering, which prohibits the use of certain weapons and makes the use of others conditional upon a similar balancing of interests as in the previously mentioned principle of proportionality; and the prohibition of attacking civilian objects as such, and the duty to spare objects of especial cultural relevance, or which are vital to the survival and health of the civilian population.[49]

In targeting doctrine and practice, legal advisers are employed in the selection and confirmation of all targets. This involves development of a list of strategic targets, for each of which a folder or dossier is made incorporating intelligence information relating to the location, defenses and proximity of the target to civilian or protected objects. Each folder is submitted for legal review. Another part of the process involves the development of a list of prohibited targets, such as civilian residential buildings, cultural objects, hospitals, schools, prisoner of war camps and so forth. This list is developed by military lawyers working together with operational planners at the staff level, and includes a double-check system to ensure that no prohibited target has inadvertently been moved onto the active target list. The procedure also includes legal review in the assessment and debriefing phase after a target has been struck, to ensure that legal considerations have been complied with.[50]

No in depth assessment has been released as of yet relating to the aerial campaign in Afghanistan. However, this has been done in relation to "Desert Storm" and the Kosovo conflict. In relation to the latter, there have also been independent assessments carried out by expert committees, NGO's and the Office of the Prosecutor of the ICTY. While there have been clear cases of error, such as the attack on the Chinese Embassy in Belgrade, and certain target choices are questionable, such as the main studio and transmitter of Serbian government controlled television, the reports issued show no evidence of significant violations of humanitarian law. In fact, as stated above, when the number of missions carried out and the potential destructive power of the munitions employed are taken into account, the campaign

overall indicates a high degree of attention to legal considerations in the choice of targets and in the execution of the missions.[51]

While this is no guarantee that there have been no violations of the law relating to targeting in the context of the conflict in Afghanistan, it is probably fair to assume that a similar degree of attention to legal considerations has played a role in the planning and conduct of the aerial campaign directed against the Taliban regime and its Al Qaida ally. The use of air strikes and special forces units firstly against the Taliban and Al Qaida Command Structure and main forces, and subsequently against the pockets of Al Qaida forces continuing resistance in remote parts of Afghanistan would seem to have generally been in conformity with the principles and rules of humanitarian law outlined above. However, since the last large scale conventional fighting between Coalition forces and Taliban and Al Qaida units last March, the continued use of airpower has become more questionable. With steadily fewer identifiable targets, the chances of target error and excessive collateral damage have increased correspondingly. This calls for a clear reassessment of the tactics and doctrine emplyed and even greater attention to the legal and political repercussions of the the use of air strikes .[52]

*3.3 The question of the status of captured or detained Taliban and Al Qaida personnel.*

The question of the status of captured or detained members of the Taliban or Al Qaida has already triggered a significant amount of comment in the media and to a lesser degree in the legal literature. It is not necessary to go through all the issues, or to repeat at length what has been said elsewhere again. However, in view of the importance of the subject and the heated comment and controversy surrounding it, some attention should be devoted to it in the context of this lecture.[53]

International humanitarian law contains a number of basic classifications of persons and objects which determine their status and the treatment which must be accorded to them. The most important one is, of course, the distinction between civilians and civilian objects on the one hand, and military personnel and objects on the other. Another distinction or classification of importance is that between combatants and non-combatants.

Article 4 of the Geneva Convention III dealing with the treatment of prisoners of war (GC 3) determines to a very great extent who is a combatant entitled to prisoner of war status.[54] In addition, several provisions of Additional Protocol I (AP I),

in particular Articles 43-45, read in conjunction with Article 1 (4), relate to prisoner of war and combatant status.

However, insofar as those provisions expand the definition of combatant entitled to POW status beyond what is provided in GC 3, it is highly doubtful whether they represent customary law which would bind the United States as a non-party, especially in view of the consistent position of the U.S. Government on this question since the Protocol was negotiated.[55] In addition to these provisions specifically relating to combatant and prisoner of war status, there are a number of other provisions in Protocol I relating to the general treatment of persons who are in the power of an adversary power to the conflict, such as Article 75, providing for humane treatment and respect for fundamental human rights, which are undoubtedly customary law.[56]

On the basis of these rules and provisions it is clear that individuals who were part of the military wing of the Taliban, whether as members of the "regular" armed forces or of local militias which were integrated into the Taliban structure, would clearly qualify as prisoners of war. This is clear from Article 4 Geneva Convention III itself, as well as from the factual circumstances and even from U.S. operational doctrine. The fact that the Taliban was not generally recognized internationally, and even the fact that the Taliban troops may not always have worn a complete military uniform when in action do not change this in the least. They were clearly distinguishable in the field as what they were, both for Northern Alliance fighters and for U.S. and allied troops and pilots.[57]

The question of the Al Qaida members who were fighting alongside the Taliban, either as part of regular Taliban military units, or in separate units made up wholly of foreign volunteers fighting alongside the Taliban is slightly more problematic, but only slightly so; they too would qualify as combatants entitled to prisoner of war status insofar as they were integrated into the Taliban military structure, or were in separate units made up foreign volunteers fighting alongside the Taliban. There are many States who allow foreign nationals to be recruited into their armed forces, and a number of States which maintain units wholly or predominately (comprised) of foreign volunteers.

While there is obviously no question of equating the French Foreign Legion or Ghurkha battalions within the British Army with units of Al Qaida volunteers in a general sense, these examples do make clear that the foreign nationality of Al Qaida members as such, and the fact that they may have been organized into separate units

within or alongside the Taliban armed forces, does not in itself disqualify them from combatant status. The important question here is whether they were, for all intents and purposes, integrated into the Taliban armed forces. Clearly a significant number of Al Qaida members did form part of such units, and as such they too would qualify for prisoner of war status.[58]

The fact that a particular person or group of persons may be entitled to prisoner of war status does not mean that they cannot be held accountable for crimes they may have committed before the outbreak of hostilities or during the course of the conflict. Nor does it mean that they may not be interrogated concerning their own or other persons responsibility for criminal acts, or any other matter which the Detaining Power considers relevant. Of course, coercion may not be employed in any case to force a person to incriminate himself or reveal other information under both the law of armed conflict and the general international law of human rights, so this could not be a reason for denying the applicability of GC 3, or withholding POW status to a person or category of persons otherwise entitled to it.[59]

As for persons who were neither members of the Taliban armed forces, nor of other units which had been incorporated into the Taliban military structure, the presumption would undoubtedly be that they were not combatants entitled to prisoner of war status, but rather civilians who may be suspected of committing serious offences under international or domestic U.S. criminal law.

What about the status of persons or groups of persons who would not qualify for combatant status as members of units which were incorporated into the Taliban military structure, but had nevertheless participated in hostilities or taken part in acts of terrorism within the overall context of the conflict? It is correct to denote such persons or groups of persons as "unlawful combatants". If so, what consequences does such a designation have?

The term "unlawful combatant" does not appear as such in either GC 3 or in AP I and the term is open to a number of possible interpretations and misunderstandings, which potentially could lead to errors or abuse. However, there is certainly room for the concept of unlawful or unprivileged combatant if this is meant to denote persons or groups of persons who take part in hostilities and commit belligerent acts, without meeting the criteria for combatant status laid down in the relevant instruments and in customary law. It is clear from both an examination of Articles 4 and 5 GC 3 and the ICRC commentaries thereto, as well as the relevant practice and literature, that only combatants are entitled to participate in hostilities and commit

belligerent acts. Persons not so entitled who engage in such activities commit a war crime and may be prosecuted for the act of participating in hostilities as such.[60]

Of course, unlawful combatants are still entitled to humane treatment and respect for their fundamental human rights in accordance with, *inter alia*, Article 75 AP I.[61] However, they possess no immunity for their participation in hostilities or commission of belligerent acts, nor are they entitled to prisoner of war status.

So, there are very likely unlawful combatants among the detainees held by the United States in Guantámano and elsewhere, in the sense referred to here. If so, they can face a variety of charges specifically related to unauthorized participation in hostilities or perpetration of terrorist offences, including murder. However, as stated earlier, anyone - lawful combatant or not - can be held accountable for crimes committed before the outbreak of hostilities, or violations of the law of armed conflict and other (international) crimes committed during the conflict. As such, the designation as unlawful combatant is not necessary in order to be able to prosecute suspects of acts of terrorism.

In case of any doubt regarding status of captured individuals, Article 5 GC 3 leaves no doubt that pending determination by a competent tribunal of an individual's status, he or she is entitled to protection under the Convention.

Until now, the major point of controversy regarding the detained Al Qaida and Taliban personnel has been the fact that no determinations have been made of their status in accordance with Article 5 of GC 3. The obligation contained in this provision is for the Detaining Power to set up Article 5 tribunals which would determine on the basis of the available facts, such as the circumstances and location of capture, possible documentary evidence, testimony and so forth, what the status of a detained individual or group of individuals was if there was doubt concerning their status. This Article 5 procedure is not a trial or judicial hearing relating to criminal responsibility, but rather a factual assessment. In U.S. military law, Article 5 tribunals are comprised of three or more officers, who apply a "preponderance of the evidence" standard of proof in what is a non-adversarial procedure. Over 1000 such tribunals were conducted in the course of Operation "Desert Storm" by the U.S. forces, so there can be no doubt that the procedure is incorporated into current U.S. military law and operational procedure.[62]

The failure to implement this procedure and comply with the requirements of Article 5 GC 3 is a significant and highly regrettable shortcoming in the compliance

with international humanitarian law in the conduct of the Afghanistan campaign. This has understandably caused a large amount of criticism and unnecessarily complicated cooperation between the U.S. and its allies, which the U.S. Government could have easily avoided by observing the required procedure. It is hoped that this will not be repeated in the future.

*3.4 Some comments concerning the adjudication of war crimes and terrorist acts suspected to have been committed by Al Qaida and Taliban detainees*

The last question I will briefly address concerns the most acceptable legal regime for adjudicating suspected acts of terrorism and war crimes. Specifically, I will focus on which type of tribunals would be best equipped to provide for a fair and effective administration of justice, in relation to the different categories of detainees and prisoners held by the United States.

At some point, the U.S. Government will have to either release the detained Al Qaida and Taliban personnel it holds, once the armed conflict has ceased, or bring charges against some or all of them and conduct some type of criminal proceedings against the accused persons before either a military or civilian tribunal or court.

As I pointed out earlier, this should be preceded by an assessment of the status of captured Al Qaida and Taliban personnel under Article 5 GC 3. However, the question nevertheless remains as to what type of procedure would be most appropriate.

Under the relevant provisions of GC 3, a prisoner of war is subject to the same laws, regulations and judicial and disciplinary procedures as are in force for the armed forces of the Detaining Power.[63] Under U.S. law, a member of the U.S. armed forces who is charged with a war crime is subject to the jurisdiction of a General Court Martial (GCM) convened under the Universal Code of Military Justice (UCMJ).[64] Alternatively, civilian federal courts have jurisdiction to "prosecute any person inside or outside the U.S., for war crimes where a U.S. national or member of the armed forces is involved as an accused or as a victim".[65]

Either of these alternatives would provide for due process guarantees and would be in conformity with the requirements for a fair trial provided for in international law, specifically under Article 14 of the International Convenant on Civil and Political Rights.[66] This is as true under the UCMJ in the context of a GCM, as in a civilian federal court, notwithstanding perceptions to the contrary. In either case, the accused would have the same constitutionally protected rights which conform to in-

ternational human rights standards; although the civilian court option would probably be preferable because of outside perception of a trial by a military court – even one conducted under the UCMJ.[67]

Since U.S. federal courts have jurisdiction over all war crimes in which U.S. nationals are victims, as well as a number of other offences which are not war crimes, such as aircraft hijacking and other such terrorist offences, there is no reason why suspected war criminals and perpetrators of terrorist offences among the detainees could not be tried before federal courts, regardless of whether they did or did not qualify for prisoner of war status and regardless of their nationality.

However, the Presidential Military Directive of 13 November 2001[68] bypasses both of the alternatives just mentioned and provides for the establishment of Special Military Commissions which would not operate under the rules of a General Court Martial. These Special Military Commissions have been subject of a great deal of controversy since they were first announced.[69]

The Defense Department Order of 21 March 2002 on Military Commissions provides some idea as to how they may operate if and when anyone is tried before them, but potentially raises another set of issues.These include an unnecessary and probably illegal distinction between U.S. and non-U.S. nationals, the lack of a right of appeal to an independent judicial body, which would violate international human rights standards relating to fair trial and probably the U.S. Constitution, and the possibility that such a commission could lack jurisdiction if the accused was entitled to prisoner of war status and as such was entitled to trial before a GCM or a federal civilian court. However, be that as it may, even if these deficiencies were remedied and errors were avoided, the fundamental problem of lack of impartiality and independence would remain.

A number of reasons have been offered for the establishment of such special military commissions in preference over a trial before a civilian federal court. These include: the possibility of intimidation or retaliation against witnesses or jury members, the need for protection of vital security sources, the need for more flexible rules relating the evidence and disclosure, and so forth.[70] While the use of military commissions might be one way around these difficulties, it is not the only way, nor is the best way in my view. Either of the other two alternatives outlined above; trial before a U.S. federal court, or trial by GCM under the UCMJ in situations where the accu-

sed was entitled to POW status, would be preferable to trial before a special military commission of the type under discussion.

Another way of avoiding these problems and nevertheless ensuring a higher degree of perceived legitimacy and acceptability would be to create an ad-hoc international tribunal by means of a treaty between the U.S. and a number of the States allied to it in the "war on terrorism". This agreement could be made either inside or outside the context of the U.N.; the latter probably being preferable for reasons of efficiency. It could provide for the guarantee of internationally recognized due process standards, while taking into account most – if not all - of the concerns that have been expressed relating to the alleged problems of trying suspects in U.S. federal courts. Finally, it would certainly and most importantly provide a much greater degree of legitimacy than any proceedings before a military commission could, and would go a long way towards alleviating concerns about unilateralism and single-mindedness on the part of the U.S. Government, while at the same time underlining that the "war against terrorism" is broadly based and has broad support. In doing so, it would help to cement the international coalition which has been and will continue to be of such vital importance in the effort to respond to the atrocity of 11 September and help to prevent the reoccurrence of such acts, wherever they occur.

Unfortunately, the chances of this happening look slimmer now, than even a few months ago, in view of the Bush Administration's decision to "unsign" the treaty establishing the International Criminal Court. Still, even that decision, misguided though it is in my opinion, should not be the last word on the U.S. position in relation to international criminal tribunals in general and specifically one designed to try the most important suspects involved in the attack of 11 September.

It is late, but perhaps still not too late, to undertake the effort necessary to create such an international tribunal.

## Acknowledgements

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Fourthly, I would like to thank my students past, present and hopefully future for their enthusiasm and interest in international law in general and in the humanitarian law of armed conflict and international law of military operations in particular. I look forward to many more hours of stimulating discourse with you.

I am grateful to my teachers of international law, especially Leo Bouchez and Shabtai Rosenne, for their friendship, guidance and generous assistance over the years.

Finally, I want to express my gratitude and deep affection to my friends and especially to my family, both the members of my American and my Dutch family, for everything they have done for me over the years. Although my father cannot be here today, I would like him to know what an example he has been throughout my life. I

would also like to express my happiness in the fact that my brothers and uncle are here today. Most of all, I want to thank my wife for all that she has given me during our more than twenty years together, I've said it before and I say it again now, Ik had het niet zonder jou kunnen doen.

Ik heb gezegd.

# Notes

This inaugural lecture was completed and went to press on 1 July 2002.

1. See A. Cassese, "Terrorism is Also Disrupting Some Crucial Legal Categories of International Law", in 12 *EJIL*, no. 5 (2001) 993; N. Schrijver, "Responding to International Terrorism: Moving the Frontiers of International Law for 'Infinite Justice'?" in 48 *NILR*, no. 3 (2001) 271; www. Asil.org/insights, "Terrorist Attacks on the World Trade Center and the Pentagon", comments by Kirgis et al.
2. For an overview and authoritative commentary on the work of the International Law Commission on State Responsibility see J. Crawford, *The International Law Commission's Articles on State Responsibility* (2002); See also D.J. Harris, *Cases and Materials on International Law* 5th ed. (1998), pp. 484-5.
3. See *inter alia* R. Ago, "Addendum to Eighth Report on State Responsibility" [1980] II (1) *ILC Yearbook* 13, 53.
4. P. Lamberti Zanardi, "Indirect Military Aggression" in A. Cassese (ed.) ,*The Current Legal Regulation of the Use of Force* (1986), p. 111.
5. Cassese, *supra*, n.1 at p. 996 (author adds U.S. to list of States).
6. See U.N., *International Instruments Related to the Prevention and Suppression of International Terrorism (2001)*(this is a compilation of treaties relating to international terrorism and establishing criminal jurisdiction over terrorist acts).
7. "Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States In Accordance with the Charter of the United Nations" U.N.G.A. Res. 2625 (XXX), 24 Oct. 1970, U.N. Doc. A/8028; "Definition of Aggression" U.N.G.A. Res 3314 (XXIX), 14 Dec. 1974, U.N. Doc. A/9631.
8. See B. Simma (ed.), *The Charter of the United Nations: A Commentary* (1995), pp. 668-674. See also *id.,* pp.114-5.
9. Y. Dinstein, *War, Aggression and Self-Defence*, 3rd rev.ed. (2001), pp. 182-3.
10. Examples of action undertaken in response to (alleged) terrorist attacks which were condemned or criticized as being disproportionate or on the basis of insufficient factual evidence include the Israeli bombardment of PLO headquarters in Tunisia in 1985, the bombardment of an alleged chemical weapons factory in Khartoum, Sudan, by cruise missiles in response to attacks on American embassies in Kenya and Tanzania in 1999, the bombardments by U.S. military aircraft of targets in Libya in 1986 in response to a terrorist attack against U.S. servicemen in a Berlin night club and numerous incursions by South African forces into neighboring States in response to alleged terrorist attacks. Although these actions were criticized and on occasion condemned by the U.N. Security Council, the primary grounds for such criticism and condemnation were the perception

of disproportionality and/or the lack of credible evidence that the target State was responsible for the (alleged) terrorist incidents. Nowhere in the relevant S.C. resolutions is there a categorical rejection of the applicability of the right of self-defense to terrorist attacks as such.

11. 29 *B.F.S.P.* 1137-1138; 30 *B.F.S.P.*, 195-196.
12. R. Jennings, "The Caroline and McLeod Cases" in 32 *AJIL* (1938), p. 82.
13. See Harris, *supra* n. 2. pp. 894-897 and Dinstein, *supra*, n.9, p. 219.
14. Jennings, *supra* n. 12 at 92.
15. The "classic" conditions for the use of force in the protection of nationals abroad were laid down in the authoritative article by C.H.M. Waldock, "The Regulation of the Use of Force by Individual States in International Law" 81 *RCADI* (1952) 451 at 467. See also N. Ronzitti, *Rescuing Nationals abroad through Military Coercion and Intervention on Grounds of Humanity* (1985), p. 30 *et seq*. and Dinstein, *supra,* n.9, pp. 203-7.
16. R. Ago, "Fourth Report on State Responsibility"[1972] II *ILC*, *Yrbk* 71, 120. See also Y. Blum, "State Responses to Acts of Terrorism"19 *GYIL* (1976) p. 223 and L. Condorelli, "The Imputability to States of Acts of International Terrorism" 19 *IYHR* (1989), p. 233.
17. *Military and Paramilitary Activities in and Against Nicaragua, ICJ Rep*. 1986, p. 14.
18. *ICTY, Prosecutor v. Dusko Tadic*. (Appeals Chamber) 15 July 1999, Case no. IT-94-1-A, reproduced in A. Klip and G. Sluiter (eds), *Annotated Leading Cases of International Tribunals* Vol. 3 (2001), p. 761.
19. *Nicaragua, supra* n. 17, para. 196, p. 104.
20. Dinstein, *supra* n. 9, p. 183.
21. Cassese, *supra* n.1, p. 993.
22. *Id*. pp. 996-997.
23. *Id*. p. 997.
24. See pp. 19-21 below.
25. See, e.g. I. Brownlie, *International Law and the Use of Force between States (1963)*, pp. 261-264; Dinstein, *supra* n. 9, pp. 183-4 and O. Schachter, *International Law in Theory and Practice* (1991), pp. 152-155.
26. See works cited in previous note.
27. See *inter alia* U.N.S.C. Resolutions 1267 (1999) of 15 Oct. 1999, 1333 (2001) of 19 Dec. 2000, 1363 (2001) of 30 July 2001, 1368 (2001) of 12 Sept. 2001 and 1378 (2001) of 14 Nov. 2001.
28. See *International Herald Tribune* 21/09/01, p.1, "U.S. Rejects Afghans' Response on bin Laden"; *International Herald Tribune* 01/10/01 p.1, "Taliban Say They are Hiding bin Laden; Saudi Must Be 'Purged', U.S. Warns"; *International Herald Tribune*, 03/10/01, p. 1, "Give Up Terrorists or Quit, Blair Warns Taliban".
29. It should be stressed that proportionality is related to the scale of the attack and the values assaulted and threatened and not a question of arithmetic involving numbers of victims on either side. See also nn. 25 and 26 *supra*.

30. The 'State of the Union' speech by Pres. George W. Bush to U.S. Congress in which he referred to States as North Korea, Iran and Iraq as forming an "Axis of Evil" is seen as the starting point for considering possible action against other States, not connected with the attack of 11 September 2001. For the text of the speech see www.Whitehouse.Gov/news/releases/2002. See also *International Herald Tribune 31/01/02, p. 1, "Bush's 'Axis of Evil' Draws Fire".*
31. See p. 13 above.
32. See p. 13 above.
33. See Dinstein on anticipatory or "interceptive" self-defense *supra* n. 9 at 171-73; Schachter, *supra* n. 25 at 150-152 and Harris, *supra* n. 2, pp. 897-898.
34. This is illustrated by the unanimous condemnation of an Israeli air strike against an Iraqi nuclear reactor in 1982 in which numerous delegations, including that of the United States, referred to the Caroline criteria within the context of anticipatory self-defense. See e.g. Schachter, n. 25 *supra* at 151 for a discussion of this problem.
35. Article 2 common to the Geneva Conventions of 1949, *ICRC Commentary to Geneva Convention III Relative to the Treatment of Prisoners of War 1949*, (hereinafter referred to as "GC 3") p. 23. See also Fleck (ed.) *The Handbook of Humanitarian Law in Armed Conflict* (1995), p. 41 and H. McCoubry, *International Humanitarian Law*, 2nd ed. (1995) at 61-62.
36. See sources cited in n. 35 *supra*.
37. See McCoubry, *supra*, n. 35, pp. 64-65; Fleck, *supra* n. 35, p. 54 *et seq*. It should be pointed out that depending upon factual circumstances, the application of some portions of the humanitarian law of armed conflict may cease to be relevant in a practical sense before others; e.g. if a temporary occupation of enemy territory ceases the relevant provisions relating to (temporary) occupation will cease to be operative while, for example, the law relative to prisoners of war could well still be applicable. This is as true of the present conflict in Afghanistan as in any other armed conflict.
38. See p. 19 above.
39. See p. 13 above.
40. This is exemplified by the text of the relevant provisions of the treaties themselves e.g., Common Article 2 of the Geneva Conventions of 1949 which states in relative part "the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them. The convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance……" See also *ICRC Commentary to GC 3*, p. 23 and Fleck, *supra*, n. 35 at 42.
41. See n. 40 *supra* and L.C. Green, *The Contemporary Law of Armed Conflict* (2nd rev.ed. 2000), pp. 117-118. An example of this was the decision by Germany in WWII to treat Free French forces as fighting "on behalf of Great Britain and her allies".

42. In addition to the sources cited in nn. 40-41, see Ipsen in Fleck, *supra* n. 35. Section 301, p. 66.
43. See text of Common Article 2 cited in n. 40 *supra*.
44. See preceding text.
45. See *inter alia* "Department of Defense Report to Congress on the Conduct of the Persian Gulf War in 31 *I.L.M.* no. 3 (1992), pp. 612-644; "Conducting Air Operations under the Law of Armed Conflict": The Desert Storm Experience" (on file with the author) and A. Cordesman, "Air and Missile Campaign in Kosovo"(2000) (on file with the author).
46. *International Herald Tribune,* 28/12/01, pp. 1 and 4, "High Tech Weapons Change the Dynamics and the Scope of Battle".
47. Independent International Commission on Kosovo; *"The Kosovo Report"*: Conflict, International Response and Lessons Learned , pp. 183-4; "Final Report to the ICTY Prosecutor by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia" in 39 *ILM* no. 5 (2000) 1257; "Human Rights Watch Report on the Crisis in Kosovo", see also sources cited in n. 45 *supra*.
48. Needless to say, comparisons are always difficult and must be treated with caution. Still the emphasis upon legal considerations and use of precision targeting techniques and munitions in the conflict under discussion compares favorably to the number of civilian casualties and wanton destruction inflicted in most other recent armed conflicts, such as the Iran-Iraq War, the conflicts in Chechnya and the former Yugoslavia and the conduct of both parties in the Israeli occupied Palestinian territories.
49. These are the principles upon which the applicable instruments referred to in n. 37 and accompanying text *supra* are based and which are reflected in their provisions and in customary law.
50. "Conducting Air Operations" in n. 45 *supra*. The author also gratefully acknowledges the information provided by Lt. Col. USAF (ret.) Wm. Schmidt who offered valuable insight into the way legal considerations are incorporated into operational planning and target selection.
51. See sources cited in n. 47 *supra*. The conclusion of the Independent Commission on Kosovo, while critical of some aspects of the NATO aerial campaign was "The Commission is impressed by the relatively small scale of civilian damage considering the magnitude of the war and its duration. It is further of the view that NATO succeeded better than any air war in history in selective targeting that adhered to principles of discrimination, proportionality and necessity, with only relatively minor breaches that were themselves reasonable interpretations of 'military necessity' in the context". (pp. 133-4).
52. This is not to imply that there were no errors or instances of excessive collateral damage; several of which were given prominent attention in the press and media. These include the mistaken (repeated) bombing in October 2001 of a ICRC warehouse in Kabul, the attack in December 2001 on a motor convoy made up of opposition leaders bound for Kabul on the basis of faulty information and the attack on Canadian forces in April 2002

by a U.S. aircraft. There were undoubtedly other instances. However, there is little or no evidence to date of indiscriminate targeting or reckless disregard for civilian casualties notwithstanding these errors. The use of cluster munitions and so-called "Daisy-cutters" against entrenched Taliban positions in the field was, despite criticism in some quarters, not in breach of the humanitarian law of armed conflict. See e.g. www. BBC. Co. UK/world:South Asia "Afghan bombing most accurate ever" where an accuracy of 75%-80% is cited by military analysts. See also *Wall Street Journal*, Feb. 7, 2001, "Human Rights Group to Estimate Civilians Killed in U.S. Campaign" on www. Commondreams.org where a figure of an estimated 350 civilian casualties as of December-January 01-02 is accredited to the independent "Human Rights Watch" organization. On 1 July 02, following a fatal accident in which an estimated 40 Afghan civilians were killed and over 100 wounded, the Provisional Afghan Government officially called upon the U.S. Military Command to increase its efforts to avoid civilian casualties. A joint investigation was launched by the Pentagon and the Afghan authorities into the incident in which a wedding celebration had been mistakenly fired upon. On 2 July, CNN reported that estimates of Afghan civilians killed in the Coalition campaign through 1 July could total as many as 1000 persons (CNN "Insight"at 20.00 hrs. GMT). While the incident was the most serious to date and demonstrated the need for further measures to avoid civilian casualties, as well as having potential repercussions, it did not in itself call into question the integrity of U.S. targeting doctrine as a whole, nor does it indicate a reckless disregard for the rules and standards of humanitarian law applicable to targeting. It does, as indicated in the accompanying text, call into question whether continued use of air strikes at this phase in the campaign is advisable and would be legal in situations where disproportionate collateral damage is an increasing risk.

53. There has been extensive commentary and criticism on this issue. See e.g. H.J. Talsma, "Humanitair Overwinnaarsrecht" in 95 *MRT* no. 3 (2002), pp. 120-4: T.D. Gill, "De gedetineerden in Guantanamo en het Internationale Humanitaire Recht" in *id.* pp. 125-127 and R.M. Eiting, "Over de Geneefse Conventie", "Unlawful Combatants" of de Kenbaarheid van het Oorlogsrecht in 95 *MRT* no. 7 (2002), ,pp . 261 *et sea*.
54. Article 4 provides that in addition to members of the armed forces of a Party to a conflict, members of militias or volunteer corps forming part of such armed forces and members of other militias and volunteer corps, including organized resistance movements which meet a number of criteria relating to command structure, distinguishability, military discipline and basic adherence to the law of war, are to be considered prisoners of war.
55. C. Greenwood , "Customary Law Status of the 1977 Geneva Protocols" in A. Delissen and G. Tanja; *Humanitarian Law of Armed Conflict: Challenges Ahead* (1991), p. 93 at 102-3.
56. See Ipsen in Fleck, *supra* nn. 35 and 42. Section 302, pp. 68-9. See also NWP 9, "Annotated Supplement to the Commander's Handbook on the Law of Naval Operations"(1989), Section 5-3 and Greenwood, *supra* n. 55 at 103.

57. This follows from the degree of accuracy in targeting referred to in the previous paragraph and in n. 52 *supra*. Clearly, a degree of 75-80% accuracy would have been virtually impossible to achieve unless Taliban and Al Qaida forces in the field were distinguishable from civilians or Northern Alliance fighters.
58. See R. Gunaratna, *Inside Al Qaeda: Global Network of Terror* (2002), pp. 58-59. The author, who has served as a principal investigator of the U.N. "Terrorism Prevention Branch" and as a consultant to the British and other governments, states that Al Qaida's guerrilla organization, known as 055 Brigade and numbering some 2000 trained fighters, "was integrated into the Army of Afghanistan" from 1997 – late 2001, and "was employed in fighting the Northern Alliance".
59. Articles 4, 5, 13, 14, and 17 GC 3, Art. 75 API are all relevant in this respect. Of course, under Art. 17 GC 3, a POW is bound only to provide his name, serial number and date of birth, but that does not signify that POWs may not be interrogated on other matters.
60. See Ipsen in Fleck, *supra* nn. 35 and 42. Section 317, pp. 93-4 and Regulation 27-13, 7/2/1995, U.S. Central Command pertinent to "Captured Persons: Determination of Eligibility for Enemy POW Status", in *U.S. Army Law of War Workshop Manual* (2000), p. 105 *et seq*.
61. See nn. 59-60 *supra* and accompanying text.
62. U.S. Army Field Manual FM 27-10 paras. 71/73 pp. 30-31, LOW Workshop *supra* n. 60 *ibid*.
63. See e.g. Art. 82 GC 3.
64. *Operational Law Handbook* 2002, Int'l & Operational Law Dept. JAG School, U.S. Army pp. 28-29.
65. *Id.,* p. 29.
66. International Covenant on Civil and Political Rights 1966 999 UNTS 171, Article 14 provides for fair trial and due process standards.
67. For example, Spain declared it would not extradite Al Qaida suspects to the United States if they would be subject to trial before a military court. See *International Herald Tribune,* 27/11/01, p. 9, comment by Wm. Safire. "Using U.S. Military Courts Harms the War on Terror".
68. "President Issues Military Order: Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism", www.whitehouse.Gov/news/ releases, Nov. 13 2001.
69. See ASIL insights *supra* n. 1 and the numerous comments in the press and on the internet relating to the special military commissions, U.S. Dept. of Defense Military Order on Military Commissions of March 21,2002 available on www. Defenselink.org. See also, *New York Times*, 20/12/02, p. A7
70. "Critics' Attack on the Military Tribunals Grow, Now Turning to International Law" and J. Paust, "Antiterrorism Military Commisions: Courting Illegality" in 23 *Mich. J.Int'Law* no.1, Fall 2001, p. 1 *et seq*.

71. United States Institute of Peace Special Report: D. Scheffer, "Options for Prosecuting International Terrorists", 14/11/01, pp. 6-7.