

ENDS AND MEANS IN POLITICS: INTERNATIONAL LAW AS FRAMEWORK FOR POLITICAL DECISION-MAKING

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Article abstract

The international legal system in place since 1945 is based on two core principles: the repudiation of violence as a means of political action, and the protection of fundamental human rights and freedoms. It reflects the conviction that threats to international peace and security are best addressed collectively, through the procedures and institutions established for that purpose. The reality brought to the fore in the aftermath of September 11th, 2001 is very different. This paper argues that the military intervention in Afghanistan and other anti-terrorism measures undertaken by states have revealed a profound disregard for the principles and standards of international law. Far from constituting an effective response to current security concerns, the resort to force in a manner neither in keeping with the legal criteria for self-defense nor authorized by the UN Security Council, coupled with excessive restrictions of human rights, poses a threat to the very essence of the present international legal order. The paper makes a case for international law as basis for the conduct of international relations and framework for political decision-making, arguing that it is in the interest of all that those involved in political processes accept and implement its standards and principles. The paper specifically addresses the way in which international law applies to states' efforts to respond to crimes such as those of September 11th and emphasizes the need to strengthen the rule of law not only as a *sine qua non* for any effective anti-terrorism strategy, but also as a matter of national self-interest.

ENDS AND MEANS IN POLITICS : INTERNATIONAL LAW AS FRAMEWORK FOR POLITICAL DECISION-MAKING

By Sibylle Kapferer*

The international legal system in place since 1945 is based on two core principles: the repudiation of violence as a means of political action, and the protection of fundamental human rights and freedoms. It reflects the conviction that threats to international peace and security are best addressed collectively, through the procedures and institutions established for that purpose. The reality brought to the fore in the aftermath of September 11th, 2001 is very different. This paper argues that the military intervention in Afghanistan and other anti-terrorism measures undertaken by states have revealed a profound disregard for the principles and standards of international law. Far from constituting an effective response to current security concerns, the resort to force in a manner neither in keeping with the legal criteria for self-defence nor authorised by the UN Security Council, coupled with excessive restrictions of human rights, poses a threat to the very essence of the present international legal order. The paper makes a case for international law as basis for the conduct of international relations and framework for political decision-making, arguing that it is in the interest of all that those involved in political processes accept and implement its standards and principles. The paper specifically addresses the way in which international law applies to states' efforts to respond to crimes such as those of September 11th and emphasises the need to strengthen the rule of law not only as a *sine qua non* for any effective anti-terrorism strategy, but also as a matter of national self-interest.

Le système juridique international mis en place depuis 1945 est fondé sur deux principes fondamentaux : le rejet de la violence comme moyen d'action politique et la protection des droits humains et libertés fondamentales. Ceci reflète la conviction qu'il est préférable de combattre collectivement les menaces à la paix et à la sécurité internationale, et ce par l'entremise des procédures et institutions établies à cet effet. La réalité depuis le 11 septembre 2001 est pourtant très différente. En effet, l'intervention militaire en Afghanistan et d'autres mesures anti-terroristes entreprises par les États ont révélé un profond mépris des principes et standards du droit international. Loin de constituer une réponse efficace aux problèmes de sécurité actuels, le recours à la force sans respecter les critères légaux de légitime défense et sans autorisation par le Conseil de sécurité de l'ONU, joint à des restrictions excessives aux droits humains, pose une menace à l'essence même de l'ordre juridique international. Cet article plaide en faveur du droit international comme base de conduite des relations internationales et comme cadre pour la prise de décisions politiques, soutenant qu'il est dans l'intérêt de tous les acteurs politiques d'accepter et de mettre en œuvre ces standards et principes. Cet article s'adresse spécifiquement à la manière dont le droit international s'applique aux efforts des États en réponse aux crimes tel celui du 11 septembre et souligne le besoin de renforcer la règle de droit non seulement en tant que condition *sine qua non* afin d'assurer une stratégie efficace anti-terroriste, mais aussi comme problématique d'intérêt national.

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From an international law perspective, the months following September 11th, 2001 have been a dark time. In their response to the attacks in the United States on that day, states have shown concern for political, strategic and economic interests, but little consideration for legal principles and standards. As a closer look at the US-led military action in Afghanistan as well as other initiatives ostensibly aimed at enhancing national security and combating terrorism will reveal, legal constraints and requirements have been of scant importance in shaping the decision-making process. Lack of regard for international law on the part of political leaders extends to core principles governing the use of force in international relations as well as fundamental human rights guarantees, including procedural and institutional aspects.

It is argued here that this attitude of disrespect for international law is dangerous and ultimately counter-productive for all. It risks undermining the very basis of the international legal system in place since 1945, which is built on the recognition of the principle of non-aggression and respect for human rights. As a result, it is likely to increase rather than avert dangers to international peace and security. To neglect the principles and standards of international law is particularly ill-suited if the threat of terrorism¹ is to be addressed effectively: any measures that violate international law add to the factors and elements which contribute to the phenomenon of terrorism by creating new, or intensifying already existing grievances, resentment and despair. What is needed, instead, is a renewed focus on international law as the basis for the conduct of international relations and framework for political decision-making.

This paper focuses on the decisions and actions of Western states and, in particular, the United States and the United Kingdom. Their taking the lead in the military response to September 11th puts them in a position of particular responsibility, as does their political, strategic and economic power, and the resulting capacity to influence decisions and actions by other states and international organisations.

The analysis presented here is based on information publicly available. Undoubtedly, there are elements and factors which are not in the public domain but which have had an influence on decisions and subsequent actions². But on the basis of what could be observed and what the public has been told, there is reason for grave

¹ While there is not, as of yet, a universally accepted definition of what constitutes "terrorism" in international law, the term is used widely and commonly refers to acts of violence, or the threat thereof, which are carried out in pursuit of a political objective but indiscriminately endanger the lives and physical integrity of members of the public. See also below at III.C. and D.

² At various times following September 11th, it was suggested that there was undisclosed information which justified certain decisions and actions. Thus, for example, on October 4th, 2001, the UK Government published some of the evidence it had against al-Qaeda ("Responsibility for the Terrorist Attacks in the US, 11 September 2001" (4 October 2001), online: <<http://www.gov.uk>>) but indicated that there was "evidence of a very specific nature on Bin Laden's guilt too sensitive to release" (Prime Minister's Statement to Parliament of October 4th, 2001, online: <<http://www.gov.uk>>). In late October, German Chancellor Gerhard Schröder told journalists regarding discussions among states: "you do not know everything that we say to each other." ("The US has made requests, which we will meet" *The Guardian Weekly* (8-14 November 2001)).

concern about the compatibility of the military campaign in Afghanistan and other anti-terrorism measures with states' obligations under international law³. The questions of legitimacy of the use of force and the conformity of the military action with international humanitarian law are addressed in part I of this paper. Part II examines some of the anti-terrorism measures adopted by Western states in the context of the human rights framework for the fight against terrorism. Part III states the case for international law as basis for the conduct of international relations and framework for political decision-making.

I. Military action in Afghanistan and international law

When, on October 7th, 2001, American and British forces began bombing in Afghanistan, many felt that things could have been much worse. There was a sense of relief and even some praise for the fact that the United States had taken almost four weeks before starting military action. This, in combination with the choice of a strategy restricted to air strikes against al-Qaeda training camps and military installations of the Taliban, with the later deployment of ground troops to apprehend Osama Bin Laden, was widely hailed as a victory of the "doves" within the Bush Administration led by Secretary of State Colin Powell over those favouring a wider military campaign whose targets would also include other states accused of supporting international terrorism, most notably Iraq. Leaders of other countries, particularly the United Kingdom, were said to have been influential in convincing the United States of the need for restraint. Yet if the latter did not lash out as quickly and indiscriminately as it could have, this does not mean that all is well. On the contrary: even the "doves" response to the attacks of September 11th raises serious questions under international law.

From the outset, it was doubtful whether the military action in Afghanistan met the requirements for legitimate use of force. In the weeks following September 11th, legal experts and some aid organisations pointed out the applicable principles and standards of international law and suggested avenues for bringing those responsible for the crimes of September 11th to justice through peaceful means⁴. UN Secretary General Kofi Annan urged States to respond to the attacks of September

³ And, as will be seen below, part III, D, lack of transparency and public debate is part of the problem.

⁴ See, for example: Geoffrey Robertson, QC, "There is a legal way out of this" *The Guardian* (14 September 2001); Frederic L. Kirgis, "Terrorist Attacks on the World Trade Center and the Pentagon" (2001) ASIL Insights, online: <<http://www.asil.org>> [Kirgis]; Marjorie Cohn, "Rise Above It: Fight Terror Legally" (2001) Nat'l L. J., online: <<http://www.nlg.org>> [Cohn]; Karen Kenny "Ireland can play crucial role in Afghan crisis" *The Irish Times* (3 October 2001); Malcolm Shaw, "War view: Keep the response legal", online: <<http://news.bbc.co.uk>> [Shaw]. See also various articles, including: Mary Ellen O'Connell, "Lawful Responses to Terrorism" (18 September 2001) [O'Connell]; Michael Ratner and Jules Lobel, "An Alternative to the Use of US Military Force" (27 September 2001); Robert F. Turner, "International Law and the Use of Force in Response to the World Trade Center and Pentagon Attacks"; Marjorie Cohn, "Bombing of Afghanistan is illegal and must be stopped" (6 November 2001), online: <<http://www.jurist.law.pitt.edu>> [Cohn]; Oxfam, "Oxfam's Key message to political leaders" (20 September 2001); Christian Aid, "Is Christian Aid in favour of war in Afghanistan?" (25 September 2001), online: <<http://www.reliefweb.int>>.

11th by re-affirming the rule of law⁵. He and other senior UN officials, the UN Special Rapporteur on Human Rights in Afghanistan, human rights organisations, humanitarian agencies and aid staff in the region drew attention to the already precarious situation of the civilian population, both within Afghanistan and in refugee camps in neighbouring Pakistan. They called on the United States and its allies to assess carefully the impact of any proposed action, and to refrain from measures which would deteriorate even further what the heads of six UN agencies described as “a humanitarian crisis of stunning proportions”⁶.

Concern about the consequences of the military action for civilians grew even more intense after the air strikes began and their disruptive effect on humanitarian aid efforts became apparent. In mid-October, a number of aid agencies called for an immediate pause in the bombing⁷. Throughout the military campaign, the then UN High Commissioner for Human Rights, Mary Robinson, as well as human rights organisations, aid agencies and the International Committee of the Red Cross (ICRC) appealed to all parties to the conflict to act with full respect for international humanitarian law⁸.

But rather than recognising such expressions of concern as justified, political leaders brushed them aside, showing no interest in a genuine public debate about the legitimacy of the use of force or the methods employed. In the United States, it has been a matter of being “with us or against us”. Countries perceived as failing to provide unquestioning support to the US strategy and individuals doubting its wisdom and indeed legality were regarded as “enemies” and apologists for, if not supporters of, terrorism. In the United Kingdom, dissenting views were given more space in the media. Nonetheless, politicians there showed no more readiness than their American counterparts to enter into a substantial discussion of legal questions, deeming it sufficient instead to affirm – without apparent doubt or hesitation, and without further explanation – that military action was the only available option to defend its “values” and way of life, justified and even required on moral grounds.

From early November onward, those responsible for military action felt increasingly confident that advances on the ground proved them right: had they not

⁵ Secretary General urges Assembly to respond to 11 September Attacks by reaffirming the rule of law, UN SGOR, 2001, UN Doc. SG/SM/7965.

⁶ See the joint statement by the heads of Unicef, the World Food Programme (WFP), the UN High Commissioner for Refugees (UNHCR), the UN Development Programme (UNDP), the Office of the Co-ordinator for Humanitarian Affairs (OCHA), and the UN High Commissioner for Human Rights (UNHCHR) of 24 September 2001, as well as numerous statements and appeals by human rights and humanitarian organisations, online: <<http://www.reliefweb.int>>.

⁷ Luke Harding “Aid agencies plead for pause in raids” *The Guardian* (18 October 2001); see also appeals by various human rights organisations and humanitarian NGOs online: <<http://www.reliefweb.int>>.

⁸ See, for example, “Afghanistan: ICRC calls on all parties to comply with international law” (23 November 2001), online: The International Committee of Red Cross <<http://www.icrc.org>>; statements by the UN High Commissioner for Human Rights, online: The United Nations <<http://www.unhcr.ch>>; and appeals by various human rights organisations, particularly Amnesty International, online: <<http://www.amnesty.org>> and Human Rights Watch, online: <<http://www.hrw.org>> as well as humanitarian NGOs, online: <<http://www.reliefweb.int>>.

opted for military intervention, or had the air strikes been halted in October, the Taliban regime would still be in place, supporting terrorism and oppressing the civilian population, and al-Qaeda would continue training terrorists at its camps in Afghanistan. In a newspaper commentary on November 18th, 2001, UK Foreign Secretary Jack Straw acknowledged the “democratic right to dissent” of those who criticised the Government’s response to September 11th, but asked them whether the world was not, now, a safer place as a result of it, adding that it may have been “an uncomfortable truth for some, but there was no other way”⁹. On December 6th, 2001, the eve of the surrender of Kandahar, Prime Minister Tony Blair told journalists that the evolution of the situation in Afghanistan constituted a “total vindication” of the military strategy¹⁰.

Under the circumstances, there seemed to be little basis for contesting the view that employing force was the right thing to do. Those still raising questions about the lawfulness of the bombing risked being regarded as not only foolish and obstinate, but also callous, as if compliance with the law for its own sake were more important than the plight of Afghans suffering under the Taliban or the lives of civilians in the United States and elsewhere threatened by terrorist violence. However, as will be seen below, misgivings about the legitimacy of the military action in Afghanistan were not unfounded when they were first expressed, nor have they become groundless or irrelevant as a result of developments since. Concerns about possible violations of international humanitarian law remain equally pertinent.

A. The use of force in international law

Military action in Afghanistan was undertaken with the following stated aims: to capture Osama Bin Laden and others presumed responsible for the attacks of September 11th in order to bring them to justice; to destroy al-Qaeda’s training camps in Afghanistan and prevent the organisation from carrying out further attacks; and to disrupt the military capacity of the Taliban accused of harbouring Bin Laden and supporting al-Qaeda and its activities. The overthrow of the Taliban regime was initially considered not as an aim, but as a possible and, if it were to occur, welcome consequence of the military campaign¹¹. Before long, the subtle distinction was lost and the ousting of the Taliban from power was generally regarded as part of the purposes of the military operation. However, these objectives are not of themselves sufficient to justify military action.

Under international law¹², the use of force is legitimate only in certain, narrowly defined circumstances. The basic principle is simple: states do not have the

⁹ Jack Straw “Military action was the only way” *The Observer* (18 November 2001).

¹⁰ As heard by the author on Irish State radio (RTE) on 6 December 2001.

¹¹ Patrick Wintour “Blair briefs MPs over war aims” *The Guardian Weekly* (27 September – 3 October 2001).

¹² In particular, under the *Charter of the United Nations*, 26 June 1945, Can.T.S.1945 No.7 (Art. 2 (3), 2 (4), 42 and 51) and customary international law, which is defined as general and consistent state practice combined with a sense of legal obligation (*opinio juris*). The prohibition of the threat or use of force in international relation has become a peremptory norm of international law (*jus cogens*). It is

right to use force unilaterally – international law does not permit acts of aggression, nor does it grant a right of military retaliation or retribution. There are only two exceptions to the rule : (1) the exercise of the right to self-defence, as recognised in customary international law and Article 51 of the UN Charter¹³ ; and (2) the use of force as a measure authorised by the UN Security Council.

1. SELF-DEFENCE AND THE USE OF FORCE

In letters sent to the Security Council on October 7th, 2001, the United States and the United Kingdom stated, respectively, that they had undertaken military action under Article 51 of the UN Charter, directed against al-Qaeda and the Taliban, to avert the ongoing threat of further attacks from al-Qaeda. The United States also stated that the military action was “designed to prevent and deter” future attacks¹⁴. The need to counter such a threat could indeed warrant the exercise of the right of self defence. But international law imposes a number of conditions, all of which need to be met if the use of force is to be legitimate: any measure undertaken in self-defence must be in response to an “armed attack” or imminent threat thereof, emanating from an identified source¹⁵ ; it must be necessary to avert or counter that threat; and it must be proportionate¹⁶.

Pursuant to Article 51 of the UN Charter, self-defence requires an “armed attack”. Traditionally, this was understood to mean an ongoing or imminent aggression by another state. Acts of non-state actors may also amount to “armed attacks” if they can be attributed to a state, either because they come within its direct

binding on states, both individually and as members of international organizations, and on those organizations themselves. For a succinct overview of the relevant provisions of international law, see: Helen Duffy, “Responding to September 11: The Framework of International Law” (October/November 2001), online: <<http://www.interights.org>> [Duffy]. See also the comments by legal experts above at note 4, as well as Bruno Simma, “NATO, the UN and the use of force: legal aspects”, online: <<http://www.ejil.org>> [Simma].

¹³ Article 51 of the UN Charter provides: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Member States in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.”

¹⁴ United States: UN Doc. S/2001/946 of 7 October 2001; United Kingdom: UN Doc. S/2001/947 of 7 October 2001.

¹⁵ A formulation often used to describe what is necessary for the use of force in self-defence to be legitimate is that first employed in 1837 in the *Caroline Case*: the threat must be “instant, overwhelming, leaving no choice of means, and no moment for deliberation”. See Duffy, *supra* note 12 at 8-9, with further references. According to the traditional view, self-defence must be an immediate reaction, but after 11 September, States seem to have accepted a “delayed response”. See also Antonio Cassese, “Terrorism is also disrupting some crucial legal categories of international law” (2001) 12:5 *E.J.I.L.*, online: <<http://www.ejil.org>> [Cassese].

¹⁶ This was made clear by the International Court of Justice in its judgement in *Military and Paramilitary Activities (Nicaragua v. US)* [1986] I.C.J. Rep. 14 [Nicaragua]. The requirements of necessity and proportionality are not explicitly mentioned in the UN Charter. They are part of customary international law.

responsibility, that is, if a state sends those who carry out attacks¹⁷, or indirectly, if it exercises effective control over the actions of such persons¹⁸. Where a state tolerated the presence on its territory of individuals or groups engaged in terrorist acts, this was not, according to the traditional view of self-defence, considered sufficient to establish that state's responsibility for such acts, and the resort to force in self-defence against its territory was considered unlawful¹⁹.

Both the United States and the United Kingdom were clearly of the view that the events of September 11th did justify self-defence in the form of military strikes in Afghanistan, without however fully disclosing the evidence against al-Qaeda or showing proof of effective control exercised by the Taliban over the acts of the former²⁰. This position was shared by the North Atlantic Treaty Organisation (NATO): on September 12th, 2001, the North Atlantic Council issued a decision to the effect that, if it was determined that the attacks of the previous day were directed from abroad against the United States, they would be regarded as an action covered by Article 5 of the Washington Treaty establishing NATO²¹, thus invoking for the first time since its foundation in 1949 the mutual defence guarantee set forth in that provision²². On October 2nd, 2001, NATO Secretary General Lord Robertson announced that it had been so determined, and that the United States had provided "clear and compelling facts" pointing to the responsibility of al-Qaeda and the

¹⁷ See *Definition of Aggression*, GA Res. 3314 (XXIX), UN GAOR, 29th Sess., Supp. No. 31, UN Doc. A/9631 (1974) at para. 3(g).

¹⁸ The test of "effective control" was established by the International Court of Justice in the Nicaragua case, *supra* note 16. On differences of interpretation regarding the notion of "armed attack" as well as the requisite level of state control where the attack does not emanate from a state, see Duffy, *supra* note 12, at 8-10 and 18-21, with further references.

¹⁹ See Duffy, *supra* note 12, at 18-21, with further references; Carsten Stahn, "Security Council resolutions 1368, (2001) and 1373 (2001): What they say and what they do not say", online: <<http://www.ejil.org>> [Stahn]. See also Cassese, *supra* note 15; and O'Connell, *supra* note 4, for an overview of instances in which states resorted to force in response to terrorist attacks.

²⁰ See, for example, Jonathan Charney, "The use of force against terrorism and international law" (2001) 95 Am. J. Int'l L. 835 at 836-837. See also *supra* note 2. Documents discovered after the fall of Kabul in November 2001, which appeared to establish a close link between the Taliban and al-Qaeda, were described as the evidence that the US Administration had been "seeking for two long months". See Jason Burke, Tim Judah, David Rohde, Paul Harris and Paul Beaver "Al-Qaeda's trail of terror" *The Observer* (18 November 2001); see also Jason Burke, Tim Judah and Peter Beaumont "Kabul paper-trail damns al-Qaeda" *The Observer* (18 November 2001).

²¹ Art. 5 of the Washington Treaty provides: "(1) The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an attack occurs, each of them, in exercise of the right to individual or collective self-defence recognized by art. 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic Area. (2) Any such armed attack and all measures taken as a result thereof shall immediately be reported to the Security Council. Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security".

²² The statement by the North Atlantic Council of September 12th 2001 can be found in NATO Press Release PR/CP(2001)124, online: <<http://www.nato.int>>.

Taliban, described as “protecting them”²³. By contrast, the Security Council referred to the crimes of September 11th as “threats to international peace and security” and not as “armed attacks”, without attributing responsibility to either al-Qaeda or the Taliban²⁴.

It remains to be seen whether or not, as a result of developments in the aftermath of September 11th, the law of self-defence has changed with the consequence that acts of terrorism by non-state agents may now qualify as “armed attacks” for the purposes of Article 51 of the UN Charter, permitting the victim state to use military force against a state which it holds responsible for harbouring, protecting or tolerating such actors. A number of commentators favour this interpretation²⁵. Others, however, have rejected the view that acts of private individuals or groups could trigger the right to use force in self-defence²⁶ and/or expressed caution, either because they find no basis for it in the relevant Security Council resolutions²⁷, or because of the dangers inherent in widening the scope of self-defence²⁸.

²³ However, since this evidence was provided at a classified briefing, Lord Robertson declared himself unable to give all the details. See the statement online: <<http://www.nato.int>>.

²⁴ Unlike, for example, in Resolution 661 (1990), UNSCOR, 45th Sess., 2933rd Mtg., UN Doc.S/RES/661 (1990), in which the Security Council specifically affirmed the “inherent right of individual or collective self-defence, in response to the armed attack by Iraq against Kuwait, in accordance with Art. 51 of the Charter” (preamble paragraph 6). See Carsten Stahn, “Addendum: Security Council Resolutions 1377 (2001) and 1378 (2001)”, online: The American Society of International Law <<http://www.asil.org>> [Stahn, “Addendum”] and the discussion of Security Council resolutions 1368 (2001) and 1373 (2001) by the same author, *supra* note 19.

²⁵ Those who consider the events of September 11th as “armed attacks” within the meaning of Article 51 of the UN Charter include Shaw, *supra* note 4; Thomas M. Franck, “Terrorism and the right to self-defence” (2001) 95 Am. J Int’l L. 839 at 840; Christopher Greenwood, “International law and the ‘war against terrorism’” (2002) 78:2 International Affairs 301 at 307-311 [Greenwood]; Michael Byers, “Terrorism, the use of force and international law after 11 September” (2002) 51 I.C.L.Q. 401 at 406-410 [Byers].

²⁶ See, for example, Cohn, *supra* note 4. See also O’Connell, *supra* note 4, who states that “the best approach for a state interested in taking forceful measures on the territory of another state is to seek Security Council authorization for such an action”.

²⁷ See, for example, Stahn, *supra* note 19, who notes that it is “difficult to positively invoke SC resolution 1373 (2001) in support of the view that even non-state sponsored terrorism may amount to an ‘armed attack’, giving rise to the right of self-defence of the state which has been the target of the attack. Nevertheless, from the perspective of international law it is worth noting that the Council does, at least, not categorically exclude the possibility that acts of the nature of the September 11th attacks may come within the ambit of the right of self-defence”. See Part I.A.2, below, for more on this topic.

²⁸ Cassese, *supra* note 15, notes that “practically all states” would seem to “have come to assimilate a terrorist attack by a terrorist organization to an armed aggression by a state, entitling the victim state to resort to individual self-defence and third states to act in collective self-defence (at the request of the former state)”, yet goes on to state that it is “too early to take a stand on this difficult matter” and expressed concern that, “whether we are simply faced with an unsettling precedent or a conspicuous change in legal rules [...], this new conception of self-defence poses very serious problems”, in particular, the “target of self-defence, its timing, its duration and the admissible means.” In Cassese’s view, “[a] sober consideration of the general legal principles governing the international community should lead us to a clear conclusion: it would only be for the Security Council to decide whether, and on what conditions, to authorize the use of force against specific states, on the basis of compelling evidence showing that those states, instead of stopping the action of terrorist organizations and detaining its members, harbour, protect, tolerate or promote such organizations, in breach of the

Yet even in the presence of an “armed attack”, the use of force by a state, or a coalition of states, under Article 51 of the UN Charter can be lawful only if all other legal requirements for self-defence are met²⁹.

The United States and the United Kingdom spoke of the danger of future terrorist attacks only in vague terms, referring generally to the continuing threat posed by Osama Bin Laden and al-Qaeda, and their capability to carry out major terrorist attacks. It was not suggested that the military intervention was needed to avert an imminent threat of further attacks by al-Qaeda. Nor was it explained how, with the al-Qaeda network spread over 60 countries, military action in Afghanistan could be an effective means to prevent further violent acts by its members. Yet the suitability of measures employed in self-defence to achieve their purpose is one of the elements of the “necessity” criterion, as is the requirement that force would only be used as a last resort. This also raises questions.

How did the need for military intervention relate to other measures aimed at preventing further terrorist attacks, such as intensified criminal investigations and co-operation between the police, justice and intelligence services of various countries? Such measures were well under way when the bombing started, yet those responsible continued to claim that the choice before them was between military action or doing nothing³⁰. How seriously did the United States and its allies pursue peaceful alternatives to the use of force? The demands put to the Taliban by President Bush in his speech of September 20th, 2001, which included the unconditional surrender of Osama Bin Laden and other al-Qaeda members to the United States and unfettered American access to al-Qaeda training camps, were presented as non-negotiable and accompanied by a threat of military strikes³¹. The Taliban were clearly unwilling to deliver Osama Bin Laden into the hands of the United States – and indeed had failed to comply with an obligation to do so imposed by the Security Council in its resolution 1267 (1999) of 15 October 1999³² and reiterated in resolution 1333 (2000)³³ of December 19th 2000. But they offered, both before the bombing and after

general legal duty [to restrain the use of force and prevent its spawning violent reactions]”. See Part III, below, A and B for more on this topic.

²⁹ The restrictions imposed on the use of force by the UN Charter apply to all states acting individually as well as collectively, whether in regional or other alliances. As noted by Simma, *supra* note 12, with regard to NATO's intervention in Kosovo in 1999: “[...] no unanimity of NATO member states can do away with the limits to which these states are subject under peremptory international law (*jus cogens*), outside the organisation, in particular the higher law (cf. article 103) of the UN Charter on the threat or use of armed force. NATO is allowed to do everything that is legally permissible, but no more. Legally, the Alliance has no greater freedom than its member states.” See also the editorial comments by Louis Henkin, Ruth Wedgwood, Jonathan I. Charney, Christine M. Chinkin, Richard A. Falk, Thomas M. Franck and W. Michael Reisman in (1999) 93 Am. J. Int'l L. 824-862.

³⁰ For example: Tony Blair “This is a moment of utmost gravity for the world” *The Guardian Weekly* (11-17 October 2001); Jack Straw “We will not turn our back on the Afghan people again” *The Guardian Weekly* (1-7 November 2001).

³¹ In itself in principle, it is a violation of Article 2(4) of the UN Charter, which prohibits the use of force, or threat thereof, in international relations. See Karen Kenny, “Ireland, the Security Council and Afghanistan: Promoting or Undermining the International Rule of Law ?” (2001) *Tócaire Development Review* 101 at 106 [Kenny, “Ireland, The Security Council and Afghanistan”].

³² UN SCOR, 54th Sess., 4051st Mtg., UN Doc. S/RES/1267 (1999).

³³ UN SCOR, 55th Sess., 4251st Mtg., UN Doc. S/RES/1333 (2000).

it began, to hand him over for trial in a third country if they were shown the evidence linking him to the attacks of September 11th which the United States claimed to have. Each time, the offer was rejected out of hand by the United States³⁴. Neither the United States nor the Security Council is known to have explored possible ways of bringing Bin Laden to justice in a third country or before an international court³⁵.

Questions also arise with regard to the test of proportionality. This requirement for legitimate self-defence precludes any measures which are excessive, limiting the use of force to what is strictly necessary to remove the threat. It is the imminent, existing danger which provides the relevant measure, not an attack that took place in the past. Therefore, the proportionality of the proposed military action and its predictable impact on the civilian population had to be assessed not against the death toll of September 11th, but the ongoing threat of terrorist violence. The extent of the humanitarian crisis in Afghanistan was well known even prior to the bombing. In late September 2001, UN and other agencies reported that more than 5 million people were in need of assistance and warned that this figure could rise to 7.5 million, if the situation worsened³⁶. Massive displacement of civilians had already begun before the air strikes started, as large numbers of people left their homes in fear of their lives³⁷. Soon after the air strikes began, aid agencies raised alarm over their negative impact on humanitarian aid deliveries and the resulting risk for the lives of hundreds of thousands of Afghan civilians dependent on food aid and other humanitarian supplies³⁸.

In their letters to the Security Council of October 7th, 2001, the United States and the United Kingdom stressed that the air strikes would be carefully targeted and that every effort would be made to minimise civilian casualties and damage to civilian property. Members of the Security Council were reportedly deeply concerned about the humanitarian situation³⁹, but the Security Council did not decide that the bombing was disproportionate. From the decisions taken, and the resulting military action, it may be inferred that those planning the campaign considered its expected consequences to be proportionate. Yet it is difficult to see how a vaguely defined threat of further terrorist violence could justify the inevitably severe impact of military action on the situation of civilians, including the foreseeable loss of lives, injury to civilians and other damage to civilian property as a result of air strikes, even if targeted, and, in particular, the risk of knowingly exposing large numbers of Afghan

³⁴ President Bush's reported reply to the second offer was: "When I said no negotiations, I meant no negotiations. We know he's guilty, turn him over". Julian Borger and Richard Norton-Taylor "Pentagon split over battle plan" *The Guardian Weekly* (18-24 October 2001).

³⁵ See Kenny, "Ireland, The Security Council and Afghanistan", *supra* note 31 at 106-107.

³⁶ See Joint Appeal by six UN agencies, *supra* note 6. See also Luke Harding "Millions at risk in humanitarian crisis" *The Guardian* (22 September 2001) and appeals by various NGOs, online: <<http://www.reliefweb.int>>.

³⁷ See *Afghanistan: Protect Afghan Civilians and Refugees* (London: Amnesty International, 2001), AI Index ASA11/012/2001, 9 October 2001.

³⁸ See references above, note 7.

³⁹ Press statement by the President of the Security Council on 8 October 2001, UN Doc SC/7167; see also "UN urges US to limit civilian deaths" *Financial Times* (10 October 2001).

civilians to death by starvation, disease or lack of shelter by preventing humanitarian aid from reaching them.

Moreover, the strategy chosen relied almost exclusively on bombing from the air. It included the dropping of cluster bombs, despite the known dangers resulting from their use for those who find and handle unexploded "bomblets" – a risk compounded in Afghanistan by the fact that the "bomblets" used have a yellow casing and may be confused with humanitarian aid parcels, also yellow, which were dropped by the United States during the early stages of the military campaign. It is highly questionable whether this could be said to be the least intrusive option available, as required by the proportionality criterion⁴⁰.

As for the other stated aims of the military action, it is unclear how self-defence under Article 51 of the UN Charter could, under any circumstances, encompass capturing Osama Bin Laden and others thought to be responsible for the crimes of September 11th, let alone the overthrow of the Taliban regime. Arguably, these objectives could only be lawfully pursued through the use of force if authorised by the Security Council in accordance with its responsibilities under the UN Charter.

2. AUTHORISATION BY THE SECURITY COUNCIL

As noted above, the only other exception to the principle prohibiting the use of force in international relations is that of an authorisation by the Security Council. Under the UN Charter, the Security Council is the organ which has the authority and responsibility to determine the existence of a threat to the peace, breach of peace or act of aggression and to decide what action is appropriate to maintain or restore international peace and security⁴¹. The Security Council may authorise the use of force, but again, this is subject to certain conditions: peaceful measures must be inadequate or have proved to be inadequate, and only such measures may be authorised as are necessary to maintain or restore international peace and security⁴². The principle of proportionality also applies to any such measures.

On September 12th, 2001, the Security Council adopted resolution 1368 (2001)⁴³. In the preamble to this resolution, the Security Council expressed its determination to combat by all means threats to international peace and security and

⁴⁰ The question of proportionality also arises, in a slightly different perspective, under international humanitarian law.

⁴¹ Art. 39 of the UN Charter provides: "The Security Council shall determine the existence of any threat to the peace, breach of peace or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with art. 41 or 42, to maintain or restore international peace and security." Under General Assembly Resolution 377 (A) of 3 November 1950 ("Uniting for Peace"), the General Assembly may step in where the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security.

⁴² Art. 42 of the UN Charter under art. 40, the Security Council may decide provisional measures in order to avoid an aggravation of the situation, while art. 41 refers to measures which do not involve the use of force.

⁴³ UN SCOR, 56th Sess., 4370th Mtg., UN Doc. S/RES/1386 (2001).

recognised the inherent right of individual or collective self-defence under the UN Charter. In operative paragraph 1, acts such as the attacks perpetrated on the previous day are referred to as a threat to international peace and security. These points were reaffirmed in the preambular paragraphs of resolution 1373 (2001) of September 28th, 2001⁴⁴. In this resolution, which was adopted under Chapter VII of the UN Charter and is therefore binding on all states, the Security Council decided a wide range of anti-terrorism measures to be taken, including steps to curb financial and other support of terrorist acts and the use of states' territory as a basis for terrorist activities or a safe haven for those involved, as well as increased co-operation and full implementation of the relevant international conventions and protocols relating to terrorism⁴⁵ as well as Security Council resolutions⁴⁶. The Security Council also established a Committee to monitor implementation of resolution 1373 (2001) and called on all states to report to the Committee on the steps taken to this effect. In both resolutions, the Security Council expressed its readiness to take all necessary steps in the future and decided to remain seized of the matter. But neither of the two authorises individual or collective use of force⁴⁷.

In September, the Presidents of France and Russia were reported to have insisted that the Security Council play a key role and be at the centre of international efforts to respond to the crimes of September 11th⁴⁸. But when the United States and the United Kingdom informed the Security Council on October 7th, 2001 that they had undertaken military action in self-defence against targets in Afghanistan, its members simply took note of the letters. They received a briefing from the US and UK representatives and requested being informed on a daily basis about civilian

⁴⁴ UN SCOR, 56th Sess., 4385th Mtg., UN Doc. S/RES/1373 (2001).

⁴⁵ See below, note 141.

⁴⁶ Earlier Security Council resolutions dealing with terrorism include Resolutions 1189 (1998), UN SCOR, 53rd Sess., 3915th Mtg., UN Doc. S/RES/1189 (1998) and 1269 (1999), UN SCOR, 54th Sess., 4053rd Mtg., UN Doc. S/RES/1269 (1999) and, specifically addressing the issue in the context of Afghanistan, resolutions 1193 (1998), UN SCOR, 53rd Sess., 3921st Mtg., UN Doc. S/RES/1193 (1998), 1214 (1998), UN SCOR, 53rd Sess., 3952nd Mtg., UN Doc. S/RES/1214 (1998), 1267 (1999), UN SCOR, 54th Sess., 4051st Mtg., UN Doc. S/RES/1267 (1999) and 1333 (2000), UN SCOR, 55th Sess., 4251st Mtg., UN Doc S/RES/1333 (2000).

⁴⁷ See Stahn, *supra* note 19; Greenwood, *supra* note 25 at 309; Kirgis, *supra* note 4, notes that, by October 7th, 2001, the Security Council had "spoken twice, outside art. 51", and, in an "Addendum: Security Council adopts resolution on combating international terrorism" (1 October 2001), online: <<http://www.asil.org>>, stresses that, rather than authorising states to take all necessary steps to implement resolution 1373 (2001), the Security Council declared itself ready to take further steps. Byers, *supra* note 25 at 401, interprets the Security Council's expression of readiness to take all necessary steps as "implicitly encouraging the US to seek authorization once its military plans were complete." Cassese, *supra* note 15, has described the wording of resolution 1368 (2001) as "ambiguous and contradictory", noting that "[...] the Security Council wavers between the desire to take matters into its own hands and resignation to unilateral action by the United States. Probably the will of the United States to manage the crisis by itself (with the possible assistance of states of its own choice), without having to go through the Security Council and regularly report to it, accounts for the ambiguity of the resolution" (see also the discussion below at Part I.A.2.). Others, however, are of the view that Security Council resolution 1373 (2001) can be read as an authorisation to use force to prevent and suppress terrorist attacks and take action against perpetrators of such acts. See, for example, Jordan Paust, "Comment: Security Council authorization to combat terrorism in Afghanistan" (23 October 2001), online: <<http://www.asil.org>>.

⁴⁸ Ewen MacAskill, "US ready to strike without a mandate" *The Guardian* (22 September 2001).

casualties⁴⁹. None of the members of the Security Council is known to have raised objections to the use of force or called for a decision on the matter, and no such decision was taken. On October 8th, 2001, the Secretary General stated that the States concerned had “set their current military action in the context of the Security Council’s anti-terrorism stance as expressed in resolutions 1368 (2001) and 1373 (2001)”⁵⁰. However, this context also comprises the criteria for legitimate use of force as set forth in the UN Charter and customary international law.

Further Security Council resolutions dealing with the question of terrorism⁵¹ and the situation in Afghanistan⁵² no longer explicitly refer to the inherent right of individual or collective self-defence. In preambular paragraph 2 of resolution 1378 (2001), the Security Council expressed support for “international efforts to root out terrorism, in keeping with the Charter of the United Nations”⁵³. A similar passage is contained in the preambular paragraphs of resolutions 1386 (2001) and 1390 (2002), respectively. But as with the resolutions passed in September 2001, those adopted by the Security Council after the beginning of the military campaign in Afghanistan do not authorise, or endorse, the use of force⁵⁴.

The Security Council’s failure to make a clear pronouncement with regard to the use of force after September 11th has resulted in a most unsatisfactory situation: military action was allowed to continue despite strong indications that it did not meet the requirements for legitimate self-defence. It was neither authorised nor endorsed by the Security Council. It is difficult to avoid the impression that, by keeping matters

⁴⁹ Press statement by the President of the Security Council on October 8th, 2001, UN Doc SC/7167.

⁵⁰ “To defend terrorism, we need a sustained effort and broad strategy that unite all nations, says Secretary General”, UN Doc SG/SM/7985, 8 October 2001.

⁵¹ Resolution 1377 (2001), UN SCOR, 56th Sess., 4413th Mtg., UN Doc. S/RES/1377 (2001).

⁵² Resolutions 1378 (2001), UN SCOR, 56th Sess., 4415th Mtg., UN Doc.S/RES/1378 (2001); 1386 (2001), UN SCOR, 56th Sess., 4443rd Mtg., UN Doc S/RES/1386 (2001) (adopted under Chapter VII and establishing an International Security Assistance Force) and 1390 (2002) of 16 January 2002, UN SCOR, 57th Sess., 4452nd Mtg., UN Doc.S/RES/1390 (2002).

⁵³ During the debate preceding the adoption of resolution 1378 (2001), the delegate of Malaysia expressed concern at targeting errors and civilian deaths as a result of the air strikes in Afghanistan and appealed for an end to the bombing. The delegate of Egypt also stressed the importance of efforts to avoid any harm to innocent civilians. See UN SCOR, 56th Sess., 4414th Mtg., UN Doc. S/PV.4414 (2001) at 23-24, and 22, respectively, cited in Stahn “Addendum”, *supra* note 24.

⁵⁴ It has been noted that this is in contrast to other previous instances in which the Security Council did exercise its powers under Chapter VII of the UN Charter and authorise the use of force. On the military interventions in Korea and Iraq, both of which were carried out with express authorisation by the Security Council, see, for example, Stahn “Addendum”, *supra* note 24. See also the overview of Security Council action under Chapter VII of the UN Charter, authorising the use of force in Korea, Iraq, Somalia, Haiti, the former Yugoslavia, as well as its retroactive authorisation of the use of force by armed forces of the Economic Community of Western African States (ECOWAS) in Liberia and Sierra Leone, in Thomas M. Franck, “When, if ever, may states deploy military force without prior Security Council authorisation?” (2001) 5 J. L. & Pol’y 51 at 53-57. On the situation with regard to the use of force by NATO in Kosovo in 1999, which was initiated without a UN mandate, but was given effective support in the Security Council when a resolution brought by three of its members to declare the military intervention unlawful and order its cessation was rejected by a vote of twelve against three, and by subsequent Security Council resolution 1244 (1999) of June 10th, 1999, which approved the settlement reached between NATO and the Federal Republic of Yugoslavia, see the comments of Simma, *supra* note 12, and other legal experts referred to above at note 29.

deliberately vague, the Security Council has in fact evaded its responsibility under the UN Charter to determine whether the use of force by the US-led coalition was lawful. Furthermore, by failing to act when concerns were expressed about possible violations of international humanitarian law, the members of the Security Council may have omitted to prevent war crimes from being perpetrated⁵⁵.

Yet if a threat of terrorism to international peace and security continues, so too does the responsibility of the Security Council and its members to take adequate and appropriate decisions to counter the threat, and to ensure that all states comply with their duty to combat international terrorism in ways which fully respect international law. This means that they must object to the view expressed by the United States in its letter to the Security Council of October 7th, 2001 and repeated on several occasions since⁵⁶, according to which it is entitled to use force in countries other than Afghanistan, if and when it so decides. The problem here is not that the United States "reserved its right" to exercise self-defence in the future – like all other states, it is entitled to do so under customary international law and article 51 of the UN Charter. But the US Administration appears to be of the opinion that military action in self-defence against terrorism anywhere and at any time is justified merely on the basis of September 11th. In this perspective, the use of force is just another policy option, purely dependent on considerations of convenience and practicality. The members of the Security Council must make it very clear that all legal requirements for self-defence, in particular necessity and proportionality, must be met any time the use of force is proposed or undertaken by a state, either individually or collectively.

The Security Council must also ensure that any anti-terrorism measures adopted or contemplated by states are fully compatible with international human rights law (see below at Part II).

B. The conduct of armed conflict: international humanitarian law

Irrespective of whether or not the use of force was legitimate in the first place, international humanitarian law, as enshrined in international treaties and customary international law, applies and imposes restrictions on what the parties to an armed conflict can lawfully do. The four Geneva Conventions of 1949 and Additional Protocol No. I thereto of 1977 are the principal legal instruments governing the conduct of armed conflicts of an international character. Article 3 common to the 1949 Geneva Conventions also applies in non-international armed conflicts, as does

⁵⁵ For a detailed analysis of the role of the Security Council and its handling of the crisis during its first month, see Kenny "Ireland, the Security Council and Afghanistan", *supra* note 31.

⁵⁶ A recent example is the address delivered by President Bush to graduates of the West Point Military Academy on June 1st, 2002, in which he spoke of the need for pre-emptive action to defend American liberty and lives. The United States thus considers it is its right to strike against any country which it decided was developing weapons of mass destruction or supporting terrorism. See Jonathan Steele "The Bush doctrine makes nonsense of the UN charter" *The Guardian* (7 June 2002). The text of President Bush's speech can be found online: <<http://www.whitehouse.gov>>.

Additional Protocol No. II of 1977. The following fundamental rules apply to international as well as internal armed conflict⁵⁷.

Based on the principle of distinction between civilians and combatants, international humanitarian law provides that only the latter can be targets of legitimate attack. Attacks are unlawful if they are specifically directed against civilians or civilian objects, or if they are indiscriminate. One form of indiscriminate attacks are those which cause civilian losses that are excessive, i.e., disproportionate to the direct and concrete military advantage anticipated to result from them. Military commanders must take necessary precautionary measures before launching an attack. This includes the duty to verify the nature of the target and to assess the damage an attack is likely to cause. In addition, international humanitarian law prohibits means and methods of warfare that cause unnecessary suffering. International humanitarian law also prohibits certain acts directed against civilians and others who are not, or are no longer, taking an active part in hostilities, such as prisoners of war, or the sick and wounded. These include murder, torture and inhumane treatment, acts of sexual violence, taking of hostages, and violations of fair trial guarantees.

Many times during the military campaign in Afghanistan, human rights organisations and the UN High Commissioner for Human Rights expressed apprehension at civilian deaths and injuries as a result of air strikes. They repeatedly called on the United States and its allies to conduct full inquiries into such cases, provide information about them and prevent further civilian casualties⁵⁸. Estimates of the civilian death toll put forward in early 2002 varied between 2,000 and 8,000⁵⁹. Although reports of such incidents could in many cases not be independently verified due to lack of access, they nevertheless raised serious doubts about the precautions applied by US and UK forces when identifying targets. Yet the United States routinely claimed that civilian casualty figures were inflated by the enemy, only exceptionally admitting that mistakes had been made⁶⁰ or ordering an investigation into the circumstances of civilian casualties⁶¹.

⁵⁷ The summary of international humanitarian law provisions in this section essentially follows the overview provided by Duffy, *supra* note 12, Part II at 2-19. See also Greenwood, *supra* note 25 at 313-316; and Adam Roberts, "Counter-terrorism, armed force and the laws of war" (2002) 22 *Survival* 7 at 32 [Roberts]. The author is grateful to the latter for comments and suggestions on sections I and II of this paper.

⁵⁸ See for example, the numerous press releases and reports by Amnesty International (online: <<http://www.amnesty.org>>) and Human Rights Watch (online: <<http://www.hrw.org>>), and various statements made by the UN High Commissioner for Human Rights (online: <<http://www.unhcr.ch>>). See also Médecins sans Frontières, "Les bombardements sur Tora Bora font de très nombreuses victimes civiles" (10 December 2001), online: Reliefweb <<http://www.reliefweb.int>>.

⁵⁹ Ian Traynor and Julian Borger "Storm over Afghan civilian victim" *The Guardian* (12 February 2002); Ian Traynor "Afghans are still dying as air strikes go on. But no one is counting" *The Guardian* (12 February 2002). See also Dexter Filkins "Flaws in U.S. air war left hundreds of civilians dead" *The New York Times* (21 July 2002).

⁶⁰ Thus, for example, the United States admitted that bombs had missed their targets on October 20th, 2001, when a residential area of Kabul was hit, and on October 21st, 2001, when an old people's residence was bombed near Herat; Patrick Jarreau "Les Etats-Unis reconnaissent des erreurs de frappes" *Le Monde* (25 October 2001). On October 26th, 2001, the United States conceded a "human error in the targeting process" following the destruction of an ICRC warehouse in Kabul which had already been bombed ten days earlier; Agence France Presse, "ICRC warehouses destroyed in US raid"

Both the United States and the United Kingdom rejected calls for an investigation into the killing of several hundred prisoners at the fortress of Qala-i-Jhangi, near Mazar-i-Sharif on November 27th, 2001, following the fall of Kunduz. The circumstances were not clear, but US planes as well as US and UK ground troops were involved alongside soldiers of their allies, the Northern Alliance⁶². The events at the fortress raised questions about the actions of their own troops, but also as to whether the United States and the United Kingdom did enough to ensure compliance with international humanitarian law by the Northern Alliance. Some two weeks earlier, more than 500 Taliban prisoners were reported to have been killed by Northern Alliance forces at a school complex in Mazar-i-Sharif⁶³. In response to concerns about the possible recurrence of such killings after the fall of Kunduz, US Secretary of Defence Donald Rumsfeld said that the United States was not prepared to take any prisoners and that it was up to the Northern Alliance to deal with anyone captured⁶⁴. He also expressed his hopes that Taliban and al-Qaeda fighters surrounded in Kunduz and Kandahar would be "either killed or taken prisoner"⁶⁵. Earlier, he had admitted that he preferred to see Osama Bin Laden dead rather than brought to trial alive, while US special troops were reportedly deployed with orders to "flush out and kill" Bin Laden by shooting him on sight⁶⁶. Comments such as these gave rise to grave worries about compliance with international humanitarian law provisions for the protection of prisoners of war⁶⁷.

(26 October 2001). A joint US-Afghan investigation was initiated after at least 30 people were killed when a US plane dropped bombs on a wedding party at Uruzgan July 1st, 2002. See "Wedding blunder happened in Taliban target area" *The Guardian* (4 July 2002).

⁶¹ Such as the killing of 21 Afghan civilians in a raid by US special forces on the village of Uruzgan on January 24th, 2002. The ICRC reportedly initiated an investigation into the circumstances of a US bombing raid on the village of Qalaye Niazi on December 29th, 2001, during which at least 52 civilians, including 25 children, were said to have been killed; Ian Traynor and Julian Borger "Storm over Afghan civilian victims" *The Guardian* (12 February 2002).

⁶² Luke Harding, Nicholas Watt and Ewen Mac Askill "Errors revealed in siege of Afghan fort" *The Guardian* (1 December 2001); Chris Stephen "The day Mazar prison became a slaughterhouse" *The Irish Times* (1 December 2001); Frank Millar "Inquiry into Taliban deaths 'not on', says London" *The Irish Times* (1 December 2001); Richard Norton-Taylor, Nicholas Watt and Luke Harding "Call for inquiry as Allies justify mass killing" *The Guardian Weekly* (6–12 December 2001). See also Rafaële Rivais "US troops accused of war crimes against Taliban" *The Guardian Weekly* (27 June–3 July 2002).

⁶³ Chris Stephen "Afghans vent hatred on foreign Taliban fighters" *The Guardian Weekly* (22–28 November 2001).

⁶⁴ Michael Jansen "Rising concerns about prisoners" *The Irish Times* (24 November 2001).

⁶⁵ See the Transcript of Defense Department Briefing of November 19th, 2001, online: <<http://www.usinfo.state.gov>>. See also Doon Campbell "Rumsfeld hopes Afghans will flush out foe" *The Guardian Weekly* (22–28 November 2001).

⁶⁶ Ed Vulliamy "US Marines set for mission to hunt out and kill Bin Laden" *The Observer* (25 November 2001); "Focus Special: The Chase" *The Observer* (25 November 2001).

⁶⁷ See, for example, Roberts, *supra* note 57 and "Respect for the Rules of War" *The Guardian Weekly* (29 November – 5 December 2001); Jonathan Freedland "Playing the great game" *The Guardian* (28 November 2001); Michael Byers "Prisoners on our conscience" *The Guardian Weekly* (17–23 January 2002). In a press release issued on December 21st, 2001, the UN Special Rapporteur on human rights in Afghanistan also emphasised the importance of complying with international humanitarian law in Afghanistan.

The use of cluster bombs, despite the known risks they pose for civilians, is another matter which raises serious questions under international humanitarian law⁶⁸. But perhaps the single most serious issue, on account of what it reveals about the attitude underlying the military campaign in Afghanistan and the lack of consideration for the lives of civilians there, is the decision by the US-led coalition to continue the bombing despite the clear and repeated warnings by UN officials and aid organisations about their impact on humanitarian aid efforts, thereby putting the lives of hundreds of thousands of civilians at risk.

From mid-January 2002 onward, the question of the proper status and treatment of several hundred Taliban and al-Qaeda fighters held in detention at the US naval base at Guantanamo Bay, Cuba, has caused much concern. There was widespread protest against the initial decision by the US Administration not to treat them as prisoners of war under the Geneva Conventions⁶⁹, the way they were treated during their transfer to Guantanamo, and the conditions in which they have been held there since. A number of governments whose nationals are among those detained, including the United Kingdom, have joined the ICRC and various human rights organisations⁷⁰ in calling on the United States to comply with the Geneva Conventions, which provide, *inter alia*, that those detained in armed conflict are to be treated as prisoners of war until their status is clarified by a competent tribunal. On February 7th, 2002, the United States announced that President Bush had determined that neither the Taliban nor al-Qaeda members held at Guantanamo were entitled to prisoners of war status, but that all detainees would be treated humanely and, "to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of the Third Geneva Convention"⁷¹. On March 12th, 2002, the Inter-

⁶⁸ See, for example, *Cluster bombs litter Afghanistan* (New York: Human Rights Watch, 16 November 2001), online: <<http://www.hrw.org>>. "Efforts to remove unexploded cluster 'bomblets' commence in Afghanistan" *UN News Service* (31 December 2001), online: <<http://www.reliefweb.int>>.

⁶⁹ The United States referred to them as "unlawful combatants" or "battlefield detainees", ostensibly with the purpose of extracting itself from its obligations under the relevant provisions of international humanitarian law, including specific rights of prisoners of war such as that of being tried in the same jurisdiction as applies to members of the armed forces of the power holding them, and, for those who are not charged with a criminal offence, the right to be released at the end of the armed conflict.

⁷⁰ See, for example, statements and appeals by Amnesty International (online: <<http://www.amnesty.org>>) and Human Rights Watch (online: <<http://www.hrw.org>>); Julian Borger "US accused over prisoners" *The Guardian Weekly* (24–30 January 2002).

⁷¹ See "Fact Sheet: White House on Status of Detainees in Guantanamo" (7 February 2002), online: <<http://usinfo.state.gov>>. The United States considers that the *Geneva Convention* apply to members of the Taliban militia, but not those of the al-Qaeda network, but that the Taliban detainees in Guantanamo did not qualify for PoW status under article 4 of the *Geneva Convention relative to the Treatment of Prisoners of War*, 12 August 1949, 75 U.N.T.S. 135, Can. T.S. 1965 No. 20 (entered into force 21 October 1950), 75 U.N.T.S. 135 (entered into force 21 October 1950) relative to the Treatment of Prisoners of War. See "Bush Says Geneva Convention Applies to Taliban, not al-Qaeda" (7 February 2002), online: <<http://usinfo.state.gov>>. Concern about the safety of US personnel who might be taken prisoner in future conflicts was said to have prompted this decision. John Mintz and Mike Allen "Bush shifts position on captives' status" *The Guardian Weekly* (14–20 February 2002); see also the comments of Judge Richard Goldstone "PoWs or common criminals, they're entitled to protection" *The Guardian* (30 January 2002). On the continuing international humanitarian and human rights law concerns with regard to the treatment of the detainees at Guantanamo, see for example, Human Rights Watch, "U.S.: Growing Problem of Guantanamo Detainees" (30 May 2002), online:

American Commission on Human Rights adopted precautionary measures asking the Government of the United States to take the urgent measures necessary to have the legal status of the detainees at Guantanamo Bay determined by a competent tribunal⁷². The US Government rejected these precautionary measures as neither necessary nor appropriate⁷³.

Attacks and other acts committed during armed conflict which are incompatible with international humanitarian law may constitute war crimes and engage the individual criminal responsibility of those who order or perpetrate them, or fail to comply with their duty to prevent them when it is within their power and responsibility to do so⁷⁴. Under customary international law, every State is entitled to exercise jurisdiction over the violations of the laws and customs of war which constitute war crimes on the basis of the principle of universal jurisdiction, i.e., regardless of the nationality of the perpetrators or the place where such crimes have been committed⁷⁵. States Parties to the Geneva Conventions and Additional Protocol No.I have an obligation to prosecute persons responsible for acts which constitute grave breaches of these treaties in their own courts or to hand them over for trial by another State Party, regardless of their nationality.

The important and often ground-breaking work of the International Criminal Tribunals for the former Yugoslavia and Rwanda⁷⁶, the process towards the establishment of the International Criminal Court as well as a recent increase in the application of international criminal law in proceedings before national courts are an important reminder of the principles and standards which impose a duty on those engaged in armed conflict to abide by international humanitarian law, particularly with regard to the protection of civilians and other non-combatants, as well as fundamental guarantees of human rights (see also below at III.E.).

Human Rights Watch <<http://hrw.org>>. See also Lawyers Committee for Human Rights, "A Year of Loss: Reexamining Civil Liberties since September 11" (September 2002) at 43-47.

⁷² Inter-American Commission on Human Rights (IAHCR) "Detainees at Guantanamo Bay, Cuba - Pertinent Parts of Decision on Request for Precautionary Measures" The American Society of International Law (12 March 2002); see also a letter dated March 13th, 2002 from the IAHCR to the Center for Constitutional Rights, which had brought the petition for these precautionary measures, online: <<http://www.humanrightsnow.org>>.

⁷³ "United States: Response of the United States to Request for Precautionary Measures - Detainees in Guantanamo Bay" The American Society of International Law (12 April 2002).

⁷⁴ Pursuant to customary international law, and the "grave breaches" provisions of the *Geneva Conventions* (1949) and *Additional Protocol No.1* (1977) thereto. Moreover, under art. 8 (2) of its Statute, the future International Criminal Court will have jurisdiction over the acts listed in the "grave breaches provisions" of the Geneva Conventions and Additional Protocol No.I as well as over a number of war crimes in non-international armed conflict hitherto not explicitly prohibited by an international treaty. The proscription of such acts has been described as "perhaps the most remarkable achievement" of the ICC Statute. See Jelena Pejic, "Article 1 F (a): The Notion of International Crimes" (2000) 12 Int'l J. Refugee. L. Special Supplementary Issue on Exclusion 11 at 16-26, with further references.

⁷⁵ See, for example, ICRC "National Enforcement of International Humanitarian Law: Universal Jurisdiction over War Crimes" (23 February 1999), online: <<http://www.icrc.org>>. See also *Universal Jurisdiction: The duty of States to enact and enforce legislation* (London: Amnesty International, 2001), AI Index 53/002/200.

⁷⁶ The jurisprudence of both Tribunals has contributed significantly to the current understanding of international criminal law, particularly as regards war crimes committed in non-international armed conflicts.

II. Erosion of Human Rights Guarantees

In the aftermath of September 11th, States in all parts of the world have tightened national security laws, adopted new anti-terrorism legislation and taken a variety of other steps as part of intensified efforts to combat terrorism. In a number of countries, persons suspected of links with al-Qaeda and other groups have been detained, and in some cases charges have been brought against them. States have increased international co-operation to investigate suspected terrorist activities. Several suspects were extradited, in some cases in response to requests made well before September 11th. Pursuant to Security Council resolution 1373 (2001), all states must report on the measures taken to implement the anti-terrorism measures prescribed in this resolution to the Committee established to oversee its implementation⁷⁷.

But it soon became apparent that in many cases such measures pose a serious threat to human rights and civil liberties. Only ten days after September 11th, the UN High Commissioner for Human Rights declared herself "very apprehensive" about the risk of an erosion of civil liberties⁷⁸. On September 25th, 2001, she warned that there were countries who were "gearing up to tackle terrorism by clamping down on human rights defenders"⁷⁹. Since then, the High Commissioner has repeatedly urged States to comply with their obligations under international human rights law and refrain from excessive restrictions, including in a joint appeal with the heads of the Organisation for Security and Co-operation in Europe (OSCE) and the Council of Europe⁸⁰. On December 10th, 2001, 17 independent experts of the UN Commission on Human Rights made a similar appeal to all governments⁸¹, as have many others, including numerous human rights organisations, legal experts and the UN High Commissioner for Refugees (UNHCR)⁸².

US officials responded to expressions of concern about the curtailing of human rights guarantees much in the same way as with regard to misgivings about military action in Afghanistan: you are "with us or against us". This attitude was even made explicit in a law adopted on October 26th, 2001: the USA PATRIOT Act⁸³.

⁷⁷ The Committee began evaluating such reports in late January 2002. By September 24th, 2002, it had received 171 first reports and a further 83 supplementary reports. Briefings of the Chairman of the Committee established pursuant to Security Council resolution 1373 (2001) of 28 September 2001, UN SCOR, 56th Sess., 4385th Mtg., UN Doc.S/RES/1373 (2001), including an overview of emerging trends presented to the Security Council on April 4th, 2002, are available online: <<http://www.un.org/Docs/SC/Committees/1373>>.

⁷⁸ Deaglan de Bréadún "The UN must play major role, says Robinson" *The Irish Times* (22 September 2001).

⁷⁹ Transcript of press briefing by Mary Robinson, Geneva (25 September 2001).

⁸⁰ Joint statement by UNHCHR, OSCE and CoE (29 November 2001).

⁸¹ "Human rights day: independent experts remind states of obligation to uphold fundamental freedoms", Press Release (10 December 2001), online: <<http://www.unhchr.ch>>.

⁸² See the numerous reports available, *inter alia*, online: <<http://www.reliefweb.int>> as well as <<http://www.unhcr.ch>>.

⁸³ The ominous acronym stands for "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism". For a summary of human rights concerns with regard to

enables the immigration authorities to refuse entry into the United States to persons who, through their advocacy, have undermined the United States' anti-terrorism efforts⁸⁴. Criticism by US human rights activists is equally unwanted. It is considered "unpatriotic", and again a link was made between defending human rights and supporting terrorism. US Attorney General John Ashcroft told the Senate Judiciary Committee on December 7th, 2001 that the tactics of those who speak out against the curtailing of civil liberties "only aid terrorists, for they erode our national unity and diminish our resolve. They give resolve to America's enemies and pause to America's friends"⁸⁵. In the United Kingdom, Home Secretary David Blunkett notoriously dismissed human rights concerns as "airy fairy libertarian"⁸⁶. But the United States and Britain are far from being the only countries in which human rights activists have found a much harsher environment: at a gathering in Dublin in January 2002, human rights defenders from over 70 countries reported a distinct deterioration of respect for human rights and freedoms in the wake of September 11th⁸⁷. While it is widely felt that over the past year, there has been a significant erosion of human rights in all parts of the world, to many, developments in western democracies, including in countries with a strong and long-standing tradition of respect for human rights, are particularly worrying.

Virtually all who expressed concern about the erosion of human rights have made it clear that they appreciate the need for an effective response to the threat of international terrorism and the right and duty of states to protect their citizens. However, as they have also pointed out, such measures must be compatible with states obligations to respect the human rights and fundamental freedoms of all individuals, either under the numerous international and regional human rights treaties – the so-called "human rights instruments"⁸⁸ – or on the basis of customary international law, and in many cases both.

this new law and other anti-terrorism measures in the United States, see Paul Hoffman, "Civil Liberties in the United States after September 11", with further references, online: <<http://www.frontlinedefenders.org>> [Hoffman]; Susan Herman, "The USA Patriot Act and the Department of Justice: Losing our balances ?" (3 December 2001), online: Jurist <<http://www.jurist.pitt.edu>>; David Cole, "Enemy Aliens" (2002) 54 Stan. L. Rev. 953 at 966-974; Lawyers Committee for Human Rights, *supra* note 69 at 15-20.

⁸⁴ § 212 (a)(3)(I)(VI), see Hoffman, *supra* note 83 at 6.

⁸⁵ Dan Eggen "Ashcroft hits out at critics" *The Guardian Weekly* (13–19 December 2001).

⁸⁶ He made the remark in a BBC television interview on November 11th, 2001.

⁸⁷ See "Steps to Protection: The Dublin Platform for Human Rights Defenders, 17-19 January 2002 – Problems Identified and Recommendations made", online: <<http://www.frontlinedefenders.org>>.

⁸⁸ These include: the *Universal Declaration of Human Rights* (1948), the *Genocide Convention* (1948), the *Convention Relating to the Status of Refugees* (1951), the *International Covenant on Civil and Political Rights* 1966 [ICCPR], the *International Covenant on Economic, Social and Cultural Rights* (1966) [ICESC], the *Convention on the Elimination of Discrimination Against Women*, (1979) [CEDAW], the *Convention for the Elimination of Racial Discrimination* (1965) [CERD], the *International Convention on the Suppression and Punishment of the Crime of Apartheid* (1973), the *United Nations Convention Against Torture* (1984), the *Convention on the Rights of the Child* (1989) [CRC] and Regional human rights instruments include the *European Convention for the Protection of Human Rights and Freedoms*, 4 November 1950, 213 R.T.N.U 221, S.T.E. 5 (entered into force 3 September 1953) [ECHR]; the *American Convention on Human Rights*, 22 November 1969, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123 (entered into force 18 July 1978) [ACHR]; and the *African Charter of Human and People's Rights* (1981).

A. The human rights framework for anti-terrorism measures

Human rights law recognises that there are circumstances which may warrant restrictions of certain rights and freedoms. The International Covenant on Civil and Political Rights (ICCPR)⁸⁹, in particular, permits the limitation of rights such as the freedom of movement (art. 12), the right to privacy (art. 17), the freedom of speech and the right to information (art. 19), the right of peaceful assembly (art. 21) and of freedom of association (art. 22), on the grounds specifically spelled out in the relevant provisions, which in many cases include the need to protect national security of public safety, public order (*ordre public*), public health or morals, or the rights and freedoms of others. Any restrictions must be prescribed by law, necessary and proportionate. Restrictive measures must not impair the essence of the right concerned, and they must be applied in a manner which is neither discriminatory nor arbitrary.

International human rights law also recognises that derogation from human rights obligations may be permitted in certain particularly serious circumstances. However, as provided for in article 4(1) of the ICCPR, this applies only if and to the extent that the situation constitutes a public emergency threatening the life of a nation⁹⁰, and even then, States must observe certain limits⁹¹. Any restrictions must be exceptional and temporary in nature. The State party concerned must officially proclaim a state of emergency. The principles of necessity and proportionality apply: only such measures are permitted as are strictly required by the exigencies of the situation. States may not invoke a state of emergency as justification for acting in violation of international humanitarian law⁹² or peremptory norms of international law⁹³, nor does it provide an exemption from responsibility for crimes against humanity⁹⁴ committed by persons acting under the authority of a State⁹⁵.

⁸⁹ *Ibid.* [ICCPR]. As of August 2002, the number of States Parties to the ICCPR was 148 (including the United States and the United Kingdom), with a further seven signatories. Status of ratification information provided by the Office of the UNHCHR, online: <<http://www.unhchr.ch>>.

⁹⁰ *Supra* note 88, similar provisions are contained in art. 15 of the ECHR and art. 27 of the ACHR.

⁹¹ The conditions under which States parties to the ICCPR may derogate from their obligations under the Covenant, and the safeguards related to derogation, based on the principles of legality and the rule of law inherent in the ICCPR as a whole, have been set out in detail by the Human Rights Committee (the body established under the ICCPR to oversee States Parties' compliance with its provisions) in its *General Comment No. 29 on States of Emergency (Article 4)*, 2001, UN Doc CCPR/C/21/Rev.1/Add.11. [*General Comment No. 29*]

⁹² *Ibid.* paras. 9 and 11.

⁹³ The Human Rights Committee lists as examples of violations of peremptory norms of international law the taking of hostages, imposing collective punishments, arbitrary deprivations of liberty or deviating from fundamental principles of fair trial, including the presumption of innocence. See Human Rights Committee, *General Comment No. 29*, *supra* note 91, para. 11.

⁹⁴ Crimes against humanity are defined in customary international law as serious crimes (such as, for example, murder, extermination, enslavement, torture, rape and other grave acts of sexual violence, the enforced disappearance of persons), when committed as part of an attack directed against a civilian population which is either widespread or systematic, or both. "Widespread" refers to the scale of the crime and means that it must involve a substantial number of victims. An attack is "systematic" if it is part of a larger plan or pattern, usually involving a high degree of orchestration and planning. But one single act can constitute a crime against humanity, if it is particularly egregious, or if it is committed as part of such a plan or pattern. Genocide, apartheid and torture, as defined in the relevant international

But there are rights which can never be legitimately derogated from – they must be protected at all times and under all circumstances, including during situations of public emergency. The core of non-derogable rights listed in article 4(2) of the ICCPR⁹⁶ comprises: the right to life (art. 6); the right to freedom from torture or cruel, inhuman or degrading treatment or punishment (art. 7); the right not to be held in slavery or servitude (art. 8(1) and (2)); the right not to be imprisoned because of inability to fulfil a contractual obligation (art. 11); the principle of legality in the field of criminal law (art. 15)⁹⁷; the recognition of everyone as a person before the law (art. 16); and the right to freedom of thought, conscience and religion (art. 18). Certain elements of the right to non-discrimination are also non-derogable⁹⁸, as are the obligation to treat all those deprived of their liberty in accordance with respect for their dignity as well as the prohibition of hostage-taking, abductions and unacknowledged detention, and of the unlawful deportation or transfer of populations⁹⁹. Furthermore, procedural safeguards for the protection of non-derogable rights must be upheld¹⁰⁰.

Another fundamental principle under customary international law¹⁰¹, international human rights and refugee law is the right not to be expelled or returned to a country where there would be a risk of persecution (the principle of *non-refoulement*). Pursuant to the 1951 Convention Relating to the Status of Refugees, the right of refugees not to be *refouled* applies in all circumstances except on grounds of national security (art. 33(2))¹⁰². As with all limitations to human rights guarantees, this must be interpreted restrictively¹⁰³. Where there are substantial grounds for believing that *refoulement* may lead to torture, inhuman or degrading treatment or punishment, protection under international human rights law is even more stringent: pursuant to article 3 of the 1984 UN Convention Against Torture, it is not permitted to expel, return or extradite a person to another country if this would expose them to a

conventions, are special cases of crimes against humanity. Crimes against humanity can be committed in times of armed conflict as well as times of peace.

⁹⁵ See Human Rights Committee, *General Comment No. 29*, *supra* note 91, para. 12.

⁹⁶ *Supra* note 88.

⁹⁷ I.e., the requirement of both criminal liability and punishment being limited to clear and precise provisions in the law that was in place and applicable at the time the act or omission took place, except in cases where a later law imposes a lighter penalty. See Human Rights Committee, *General Comment No. 29*, *supra* note 91, para. 7.

⁹⁸ *Ibid.* para. 8.

⁹⁹ *Ibid.* para. 13.

¹⁰⁰ Thus, for example, fair trial rights in trials leading to the death penalty must conform to the provisions of the ICCPR, even during states of emergency. *Ibid.* para. 15.

¹⁰¹ See *Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, Ministerial Meeting of States Parties to the 1951 Convention and/or its 1967 Protocol relating to the status of refugees, UN Doc HCR/MMSF/2001/09 (2002).

¹⁰² Art. 33(2) of the 1951 Convention Relating to the Status of Refugees permits derogation from the principle of *non-refoulement* if a refugee is a threat to the security of the host state, or if, having been convicted of a particularly serious crime, he or she constitutes a danger to the community of that state.

¹⁰³ In its decision in *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, the Supreme Court of Canada accepted UNHCR's argument in its *factum* before the Court that art. 33 of the 1951 Convention should not be used to deny rights that other legal instruments make available to everyone without exception.

risk of torture: in such cases, the principle of *non-refoulement* is absolute and non-derogable¹⁰⁴.

These provisions form the main elements of the human rights framework for any anti-terrorism measures. Yet in many cases, new anti-terrorism or national security laws and other measures adopted or contemplated by governments limit human rights in ways that look incompatible with the above-described legal requirements. In some cases, they even impinge on non-derogable rights.

B. Human rights restrictions in the wake of September 11th

New national security and anti-terrorism laws in various countries severely restrict fundamental guarantees such as the principle of legality in the field of criminal law, including the requirement for precision of criminal law provisions and the presumption of innocence, or the rights of detainees to be brought before a court within reasonable time and to challenge their detention. There is a tendency in such laws towards very broad definitions of “terrorism” and “terrorist activities”, in some cases encompassing non-violent activities. Ministers are frequently given a great deal of discretion to determine whether a person comes within the scope of the law – a mere suspicion of involvement with “terrorism” may be enough¹⁰⁵. Yet designation as “terrorist suspect” may have far-reaching consequences for those concerned: for example, both in the United States and in the United Kingdom, new laws permit the indefinite detention of such persons on the basis of administrative decisions, with very limited possibilities for review and appeal. The same laws have provided US and UK law enforcement authorities with increased powers to conduct intelligence-gathering and share information with other services within the country and abroad, while at the same time decreasing judicial controls and other oversight mechanisms¹⁰⁶. The United Kingdom has derogated from article 5(1) of the European Convention of Human Rights to implement the detention provisions of its new anti-terrorism act. In order to do so, it needed to declare a state of “public emergency threatening the life of the nation”¹⁰⁷. The United Kingdom also derogated from article 9 of the ICCPR¹⁰⁸.

¹⁰⁴ ECHR, art. 3, ICCPR, *supra* note 88, art. 7 and ACHR, *supra* note 86, art. 5 also protect individuals against *refoulement* where they would face a risk of torture in the receiving country. The prohibition of torture is generally considered to be *ius cogens*, i.e., it is binding on all States, including those which have not become parties to the relevant treaties.

¹⁰⁵ As is the case, for example, under the UK Anti-Terrorism, Crime and Security Act 2001, which entered into law on December 14th, 2001; see Mark Kelly, “The Human Rights Impact of September 11th, 2001 in the United Kingdom”, online: <<http://www.frontlinedefenders.org>> [Kelly]; Adam Tomkins, “Legislating against terror: the Anti-Terrorism, Crime and Security Act 2001” (2002) *Public Law* 205 [Tomkins]; Helen Fenwick, “The Anti-Terrorism, Crime and Security Act 2001: a proportionate response to 11 September?” (2002) 65 *Mod. L. Rev.* 724 [Fenwick].

¹⁰⁶ For a discussion, respectively, of the relevant provisions of the USA PATRIOT Act of 26 October 2001 and the UK Anti-Terrorism, Crime and Security Act 2001, see Hoffman and others, *supra* note 83; Tomkins, *supra* note 105 at 210-219; Fenwick, *supra* note 105 at 730-743, 762.

¹⁰⁷ Kamal Ahmed, Antony Barnett and Martin Bright “Britain placed under State of Emergency” *The Observer* (11 November 2001). Commenting on the United Kingdom’s derogation from the ECHR, the Secretary General of the Council of Europe noted that “we should not fall into the trap which terrorism

In a number of countries, new security and anti-terrorism legislation has been pushed through parliaments in an accelerated process, in which usual procedures for deliberation and examination were greatly reduced if not suspended altogether¹⁰⁹. Lack of transparency and debate has also given rise to concern with regard to other measures in the wake of September 11th. In a particularly worrying move, the European Union (EU) Ministers for Justice and Home Affairs have adopted two Council Common Positions on measures to combat terrorism¹¹⁰, which contain a definition of "terrorism" so wide that it may be applied to non-violent activities in exercise, or support of legitimate expressions of dissent or opposition to governments and international organisations¹¹¹. These Common Positions, which are binding on EU Member States, were adopted on December 27th, 2001 in so-called "written procedure", that is, they were circulated among EU Governments without a debate in the European Parliament or national parliaments¹¹².

EU Council Common Position 2001/930 also undermines the rights of asylum seekers to a full refugee status determination in ways that are incompatible

presents for the rule of law. This would mean undermining our principal values on the ground of defending them". He also stated that it was for the European Court of Human Rights to decide whether the derogation was justified. See Press release No. 93a (2001) of December 21st, 2001, online: <<http://www.coe.int>>. See also Amnesty International, *United Kingdom: Creating a shadow criminal justice system in the name of "fighting international terrorism"*, AI Index EUR/45/019/2001 (16 November 2001), online: <<http://www.amnesty.org>>. The question whether derogation from art. 5 ECHR was justified, see Tomkins, *supra* note 105 at 214-217; Fenwick, *supra* note 105 at 743-756. On July 30th, 2002, the Special Immigration Appeals Commission (SIAC), a body established in 1997 to hear appeals against certain immigration and deportation decisions taken on national security grounds, decided that the powers under art. 4 of the Anti-Terrorism, Crime and Security Act 2001 were discriminatory and unlawful under art. 14 of the ECHR, *supra* note 88, as they target non-British citizens. The Home Office appealed against this decision. The appeal hearing before the Court of Appeal was due to begin on October 7th, 2002.

¹⁰⁸ The United Kingdom's derogation from Art. 9 of the ICCPR, *supra* note 88, was made without any particular notification to, or debate within, Parliament or civil society. See *Justice, Response to the Joint Committee on Human Rights Inquiry into UK Derogations from Convention Rights* (May 2002) at para. 1.2., online: <<http://www.justice.org.uk>>. In its Concluding Observations on the United Kingdom of December 6th, 2001, the Human Rights Committee noted with concern that the United Kingdom was considering the adoption of legislative measures with potentially far-reaching effects on rights guaranteed in the ICCPR, and which, "in the State Party's view, may require derogations from human rights obligations. The State Party should ensure that any measures it undertakes in this regard are in full compliance with the provisions of the Covenant, including, when applicable, the provisions on derogation contained in article 4 of the Covenant. UNHRC, 73rd Sess., UN Doc CCPR/CO/73/UK; CCPR/73/UKOT (2001).

¹⁰⁹ For the United States and UK, see, respectively, Hoffman, *supra* note 83 at 3, and Kelly, *supra* note 105 at 3; Tomkins, *supra* note 105 at 214-219; Fenwick, *supra* note 105 at 727-730. Concerns about "fast-track" national security and anti-terrorism legislation were also expressed, for example, in Germany, Italy, France and Canada. See, for example, various articles in "Libertés en danger" *Courrier International* (3-9 January 2002).

¹¹⁰ Common Positions 2001/930 and 2001/931 of December 27th, 2001.

¹¹¹ On the ways in which existing principles and standards of international law permit making a distinction between "terrorists" and "freedom fighters", see Walter Kälin and Jörg Künzli, "Article 1 F (b): Freedom Fighters, Terrorists, and the Notion of Serious Non-Political Crimes" (2000) 12 Int'l J. Refugee. L., *Special Supplementary Issue on Exclusion* 46 [Kälin and Künzli].

¹¹² Under art. 15 of the Treaty of the European Union, Member States shall ensure that their national policies conform to the common positions. For an analysis of the provisions of Common Positions 2001/930 and 2001/931 see the comments by Statewatch, online: <<http://www.statewatch.org>>.

with states' obligations under the 1951 Convention Relating to the Status of Refugees. It provides that the claims of those designated as "terrorist suspects" are to be rejected before the merit of their case is considered. In effect, this may amount to exclusion from protection on grounds not provided for in international refugee law: "terrorism" under the Common Position includes acts which are not covered by the exclusion clauses of the 1951 Convention¹¹³, while at the same time requiring a much lower standard of proof¹¹⁴. The recent UK anti-terrorism law contains a similar provision for appeals cases involving national security issues¹¹⁵. The UNHCR has expressed concern about this and the unwarranted linkage of asylum seekers and terrorism as well as a number of other issues which have negatively affected refugees and asylum seekers in the increasingly hostile protection climate since September 11¹¹⁶.

In the United States, a variety of administrative measures also led to restrictions of human rights which appear to be excessive and therefore incompatible with international human rights law. These include the detention of more than 1,000 people since September 11th, some 750 of whom continued to be held on charges of minor violations of immigration rules, in conditions surrounded by near total secrecy. By July 2002, it was reported that all but 74, who remained in detention, and a handful of others, who were released in the United States, had been expelled to their countries of origin¹¹⁷. The US Department of Justice has permitted secret monitoring of conversations between lawyers and their clients without the need for judicial authorisation¹¹⁸ – an encroachment on the attorney-client privilege which seriously limits the right of access to a lawyer¹¹⁹.

¹¹³ There have been earlier attempts by States to use the notion of "terrorism" as a sufficient reason to justify exclusion from protection as refugees, despite the lack of a generally accepted definition of terrorism, and also despite the fact that existing legal concepts allow States to reconcile their legitimate security concerns with the rights of those seeking asylum. In particular, art. 1 F (b) of the 1951 Convention, *supra* note 88, (the exclusion ground of "serious non-political crimes") provides an adequate tool for the assessment of each case in light of its particular circumstances, as demonstrated by the UK House of Lords' clear and principled approach to the application of the exclusion clauses in a "terrorism"-related case in *T. v. Secretary of State for the Home Department*, [1996] 2 All ER 865, 22 May 1996. See Sibylle Kapferer, "Exclusion Clauses in Europe – A Comparative Overview of State Practice in France, Belgium and the United Kingdom" (2000) 12 Int'l J. Refugee. L., *Special Supplementary Issue on Exclusion* 195. See also Kälin and Künzli, *supra* note 111 at 74-76, and Geoff Gilbert, "Current Issues in the Application of the Exclusion Clauses" in Erika Feller, Volker Türk and Frances Nicholson eds., *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge: Cambridge University Press, 2003, forthcoming) [Gilbert].

¹¹⁴ "Reasonable suspicion" may be sufficient, as opposed to "serious reasons for considering", as required by article 1F of the 1951 Convention Relating to the Status of Refugees, *supra* note 88.

¹¹⁵ See Kelly, *supra* note 105 at 9-10; Tomkins, *supra* note 105 at 210-212.

¹¹⁶ See, e.g., UNHCR, *Addressing Security Concerns Without Undermining Refugee Protection – UNHCR's perspective*, November 2001; see also UNHCR, "Ten refugee protection concerns in the aftermath of September 11" (14 February 2002), online: <<http://www.unhcr.ch>>.

¹¹⁷ Susan Sachs "Despite lawsuits, US has deported most foreigners held after September 11" *International Herald Tribune* (12 July 2002). See also Lawyers Committee for Human Rights, *supra* note 71 at 25-35, with references, *inter alia*, to recent decisions by US courts ordering the disclosure of information about detainees and ruling that blanket closure of deportation hearings was unconstitutional.

¹¹⁸ Federal Register, (31 October 2001) (Volume 66, Number 211), Rules and Regulations at 55061-55066.

¹¹⁹ See Hoffman, *supra* note 83 at 7-11, with further references.

One of the most alarming anti-terrorism measures is the Military Order issued by President Bush on November 13th, 2001 on the establishment of military commissions for the trial of foreign terrorist suspects¹²⁰. These commissions may impose the death penalty, yet the proceedings before them do not conform to fair trial standards as guaranteed under the relevant provisions of international humanitarian and human rights law. Under the Military Order, a person will not have a right to challenge the designation by the President that their case should be tried by a military commission. The Military Order permits the indefinite detention of terrorist suspects. Under the rules of procedure issued on March 21st, 2002¹²¹, the required standard of evidence is so low as to include hearsay evidence; secret evidence is also admissible; and, in particular, there is no appeal to an independent court, including in cases where a military commission imposes the death penalty¹²². Trials before military commissions along these lines will thus not only be in breach of fundamental fair trial rights but risk violating the right to life as well. In another extremely worrying development, the United States is reported to have reinstated the CIA's so-called "licence to kill" in its operations abroad¹²³, despite the fact that there is no such licence under international law: any such killing by CIA agents would be an extrajudicial execution and violation of the right to life. There are also reports that the United States secretly sent prisoners, seized abroad without due process of law, to countries where they may face torture during interrogation, with the purpose of extracting information from them¹²⁴.

These are just some examples of recent measures which States known as western democracies consider appropriate in their fight against terrorism¹²⁵.

¹²⁰ Military Order, *Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism* 66 Fed. Reg. 57833 (2001). Here, too, the lack of transparency has been an additional cause for concern: the Military order was passed without prior notification to, or discussion in Congress. Hoffman, *supra* note 81 at 13. For an analysis of international law concerns raised by the institution of military commissions see also Daryl Mundis, "The use of military commissions to prosecute individuals accused of terrorist acts" (2002) 96 Am. J. Int'l L. 320 at 324-328; Harold Hongju Koh, "The case against military commissions" (2002) 96 Am. J. Int'l L. at 337-344; Joan Fitzpatrick, "Jurisdiction of military commissions and the ambiguous war on terrorism" (2002) 96 Am. J. Int'l L. at 345-354; Lawyers Committee for Human Rights, *supra* note 71 at 51-53; American Civil Liberties Union, Letter to the Inter-American Commission on Human Rights (6 June 2002), online: <<http://www.aclu.org>>. On November 16th, 2001, the United Nations Special Rapporteur on the Independence of the Judiciary expressed concern about the military commissions in an urgent appeal to the United States. See Harold Hongju Koh, "The Spirit of the Laws" (2002) 43 Harv. Int'l L. J. 23 at 36 and 38-39.

¹²¹ US Department of Defense, Military Commissions Order No.1 (21 March 2002).

¹²² David E. Rovella, "Tribunal Rules Don't End Debate on Fairness" (22 March 2002), online: <<http://www.law.com>>.

¹²³ Bob Woodward "CIA told to do 'whatever necessary' to kill Bin Laden" *Washington Post* (21 October 2001). See also Bob Woodward "CIA given green light to topple Hussein" *The Guardian Weekly* (20-26 June 2002); Jim Hoagland "Mission Impossible for CIA's warriors" *The Guardian Weekly* (27 June-3 July 2002).

¹²⁴ Duncan Campbell "US sends suspects to face torture" *The Guardian* (12 March 2002).

¹²⁵ For an analysis of world-wide human rights concerns in the aftermath of September 11th, see *Rights at risk* (London: Amnesty International, 2002), Amnesty Index ACT 30/001/2002, 18 January 2002, online: <<http://www.web.amnesty.org/ai.nsf/recent/ACT300012002?OpenDocument>> See also various reports available from Human Rights Watch, online: <<http://www.hrw.org>>.

III. The primacy of international law

The present is, in the words of UN High Commissioner for Human Rights Mary Robinson, a “difficult time for human rights”, and generally, for international law as a system of binding principles and standards for the conduct of international politics. Far from abiding by the rules which States have themselves created, political leaders have made it clear that they do not consider themselves bound by international law. Restrictions on the use of force and on the conduct of armed conflict manifestly count for very little when weighed against considerations of political expediency and the expectation of military and economic advantages. In the aftermath of September 11th, Governments all over the world have succumbed to the temptation of using the threat of terrorism as a convenient justification to clamp down on opposition and dissent, and to erect further obstacles for those seeking asylum, in many cases exceeding what is permitted under international human rights law for the protection of national security and other legitimate concerns. Western democracies have been no exception.

A commentary written by UK Foreign Secretary Jack Straw in early November 2001 in defence of the use of force in Afghanistan expresses the prevailing mindset very clearly : “Bizarrely, some critics have opposed military action on the grounds that Bin Laden should be put on trial. I agree that Bin Laden should face justice. But if we will this end then we have an obligation to will the means too [...]”¹²⁶. Mr. Straw does not mention the legal requirements for the use of force, nor does he continue the ethical reasoning by adding that there are means which are unacceptable and will not be employed whatever the end, and that international humanitarian and human rights law, in particular, determine what these are.

This, however, is a step back by more than fifty years, before the modern international legal system put into place in 1945 and since then developed further in important ways. It is urgently necessary to recall that this system – the principles and standards of international law – constitutes the basis of international relations and the framework for legitimate political decision-making – and that it is in the interest of all to recognise this, and to act accordingly.

A. International law as framework for legitimate political action

The purposes of international political co-operation within the United Nations system are stated – broadly perhaps, yet in no uncertain terms – in article 1 of

¹²⁶ Jack Straw “We will not turn our backs on the Afghan people again” *The Guardian Weekly* (1–7 November 2001) 13. The sentence continues: “[...] - and it is fanciful to believe that he would volunteer himself or be handed over by the Taliban”. Whether this is correct is impossible to know, as the United States did not test the validity of the Taliban’s repeated offers to deliver Osama Bin Laden to a third country for trial if they were shown the evidence the United States had against him. As noted above (at I.A.1.), this issue is relevant to the “necessity” requirement for legitimate self-defence under customary international law.

the UN Charter of 1945: maintaining and strengthening international peace and security; settling international disputes by peaceful means and in conformity with the principles of justice and international law; developing friendly relations among nations based on respect for the principles of equal rights and self-determination of peoples; solving international problems of an economic, social, cultural or humanitarian character, and promoting and encouraging respect for human rights and fundamental freedoms for all, without discrimination.

In article 2, which lists the principles to which the member states of the United Nations shall adhere in pursuing the above purposes, the UN Charter spells out the obligation to resolve disputes by peaceful means¹²⁷ and the prohibition of the threat or use of force in all but a strictly limited number of exceptional circumstances¹²⁸. Taken together, these two principles form the core of the international legal system governing the conduct of inter-state relations. They expressly recognise that certain means and methods, though within the human repertoire, are not acceptable, and should no longer be admitted, in international relations. The numerous international human rights and humanitarian law instruments adopted since 1948 are manifestations of the same spirit with regard to the relations between states and individuals¹²⁹. These treaties and customary international law impose binding duties and obligations on all states. They delimit the realm of legitimate political decision-making by defining what may, or may not, be done lawfully, and they provide the standard by which those responsible may be held to account.

The international legal system provides mechanisms, institutions and procedures for the settling of disputes if and when they arise, and for a co-ordinated, multilateral response to issues which affect international peace and security. It also offers legal tools by which those individually responsible for particularly serious violations of international law – war crimes and crimes against humanity¹³⁰ – may be brought to justice¹³¹.

International law thus sets co-ordinates for legitimate political action. What is needed from the individuals involved in the political process is a recognition that this is indeed the framework in which they operate, and an acceptance that, as a consequence, certain ends and means, desirable as they may seem, are precluded from the range of available options because of their incompatibility with international law.

B. Why respect for international law matters

There are various ways in which international law, if and when respected, has a bearing on political or strategic decision-making. When considering, for

¹²⁷ *Charter of the United Nations*, 26 June 1945, Can. T.S. 1945 No. 7, art. 2(3).

¹²⁸ *Ibid.* art. 2(4). See above (at I.A.1.) for the requirements and criteria which must be met for the use of force to be legitimate.

¹²⁹ *Supra* note 88.

¹³⁰ *Supra* note 94.

¹³¹ See Part III, below, for more on this topic.

example, the legitimacy of the use of force, or the lawfulness of a particular military attack, the proportionality criterion imposes a duty on those responsible to think the various options through to the individuals who will be affected by them. It becomes more difficult to assert that “bombing works” when one imagines oneself in the position of the Kosovar or Afghan families wiped out by bombs that missed their target – an unintended effect of the bombing, undoubtedly, but more than “collateral damage” for those affected. Or if one looks at the issue from the point of view of the person who will pick up an unexploded cluster “bomblet” in weeks, months or even years to come.

To admit considerations such as these into the picture is not, as might be objected, an illicit manoeuvre, attempting to introduce a sentimental element into an otherwise rational discourse. On the contrary: making the link between policies and strategies and their consequences for people – “individuals with names, with aspirations, hopes and dreams”, as Mary Robinson put it¹³² – is precisely what international law, and in particular, international human rights and humanitarian law, requires of political and military leaders. It means that the fundamental rights of individual human beings are part of the political agenda and cannot simply be dropped or passed over when it may seem opportune and convenient to do so. This is one way in which respect for international law matters.

But it matters in other ways, too. It is not without consequences if the institutions and procedures established under the UN Charter for the maintenance of international peace and security are bypassed or selfishly manipulated on a regular basis by those powerful enough to do so, or if states time and again allow the Security Council to be sidelined, if not excluded from the process of deciding what should be the appropriate response to questions which are of concern to the international community as a whole.

The system of international law not only sets forth rules which are binding for all¹³³, it also provides a neutral common ground where nations, despite all their differences, can and on a daily basis do co-operate and find solutions to their disputes which respect the rights of individuals as well as interests of states. Whatever its shortcomings and failings, past and present, the UN is still regarded in many situations as an impartial and therefore legitimate arbiter, sometimes the only acceptable one. The world does not become a safer place if it is effectively replaced by coalitions of states varying according to the political or strategic interest of the moment and led by the most powerful among them – where yesterday’s enemies suddenly become allies in surprise developments which may just as quickly be reversed again, and where concern for human rights and the rule of law is of no importance whatsoever. It is essential, particularly in times of a pronounced imbalance in global power relations, that the Security Council exercises, and is

¹³² The Vincent Browne interview: Mary Robinson “Carrying the human rights torch through a bleak time” *The Irish Times* (26 January 2002).

¹³³ Fred Halliday “It is nonsense to talk of a clash of civilisations” *The Guardian Weekly* (27 September–3 October 2001). As the author has pointed out, the fact that the rules of international law are universal, that is, binding for all in the same way, helps to avoid the tendency to see conflicts as “clashes of civilisation”, rooted in supposed fundamental differences between “Western” and other people.

allowed to exercise, its prerogative of judging whether the conditions which exceptionally permit the use of force are indeed present, thus keeping a check on unilateral initiatives which are incompatible with international law.

Every statement, decision or other act that manifests disregard for international law weakens it and diminishes the overall incentive to abide by it. The more powerful and influential a state, or group of states, the greater is their responsibility to contribute, through words and deeds, to the implementation of international law. In the aftermath of September 11th, the effect of the rhetoric and practice of the US-led action against terrorism has been clearly visible. Governments in different parts of the world have taken their cue from US leaders and stepped up repressive measures against those whom they designate as "terrorists".¹³⁴ The implications for international peace and security have already become apparent.

The conduct and statements of states as well as the UN and other international institutions not only influence the practice of others, they also have an effect on the way in which international law develops. State practice, in particular, sets precedents which may lead to changes in international law. As in any legal order, changes and amendments of international law are built into the system and may well be desirable. But in the areas of interest here, which concern the very foundation of international relations and the protection of human rights, including during armed conflict, it is difficult to see how lack of respect for the law as it now stands could be beneficial. It matters, therefore, not only whether states themselves act in compliance with international law; they must also be vigilant and express their objection to any practice or statement which may lead to a lowering of legal standards.

If the US-led military action in Afghanistan were allowed to lead to a change in the legal requirements for legitimate self-defence, this would mean a widening of the range of circumstances and situations in which States would be entitled to employ force unilaterally. Legitimate self-defence would then no longer be restricted to responding to an imminent threat, but could include military action in the territory of another state to prevent and deter future attacks, or to capture suspects with the stated aim of bringing them to justice, all without the need to obtain prior authorisation from the Security Council. A lowering of the legal threshold for self-defence would allow all states, not only the United States and its allies, to resort to force more readily.

Rather than furthering international peace and security, this would pave the way for an increase in armed conflicts, inevitably resulting in political instability and adverse effects on economic activities, both nationally and internationally, which in turn would lead to a rise in poverty and other human rights violations. The

¹³⁴ Isabel Hilton "Repression by another name" *The Guardian Weekly* (20-26 December 2001). Examples reported in this article include China (increased repression in Tibet; reinforced military presence in Xinjiang province, the arrest of 2,500 separatists); India (with regard to Kashmir); Nepal (reported to have abandoned negotiations with Maoist rebels in favour of use of force). Gary Younge "The world at war on terror" *The Guardian Weekly* (27 December 2001 – 3 January 2002). The author refers to Israel's increasingly violent use of the military against what it calls Palestinian "terrorism", with Ariel Sharon explicitly likening Israeli actions to the American "war on terrorism", and to Zimbabwe, where President Robert Mugabe views opposition to his government by journalists and others as "terrorism" and has expressed his equally firm determination to eradicate this threat.

consequences and costs – in human and economic terms, as well as with regard to national security – of a proliferation of the use of force would affect all states, including the wealthy and powerful. It is in their interest to prevent such developments¹³⁵ and, instead, to promote stability through strengthening the rule of law – “the very principle that enables nations and individuals to live together in peace, by following agreed rules and settling their disputes through agreed procedures”¹³⁶.

C. After September 11th: responding to the threat of terrorism within the framework of international law

Should the military campaign in Afghanistan have been avoided, then, out of concern for international law? Absent an indication that further attacks emanating from al-Qaeda bases in Afghanistan were imminent and could not be averted through peaceful means, the answer is: “yes”. Does this mean that violent and dangerous groups such as al-Qaeda may continue their activities, supported by regimes such as the Taliban, undisturbed and without having to fear any intervention from the outside world? To this, the answer is: “no”, and it is not tantamount to wanting to have it both ways.

What should have been avoided is not necessarily military action as such, but the use of force claimed to be in self-defence when the legal requirements were, for all the public has been told, not present. A military intervention that was not strictly in self-defence against an impending attack but aimed at capturing Osama Bin Laden, or generally at fighting terrorism, should not have been undertaken until and unless the Security Council had authorised it, setting clear parameters for such action.

The acts committed in the United States on September 11th, 2001 are crimes of the most serious nature. The international community has reacted with unanimous, and unequivocal, condemnation. It has also expressed its determination to bring those responsible to justice and to fight international terrorism effectively¹³⁷. Legal

¹³⁵ For a discussion of why this is a matter of “hard-headed national self-interest” of States, see “Responding to Terrorism: Where Conflict Prevention and Resolution fits in – Address by Gareth Evans at Johns Hopkins University (SAIS)” (9 October 2001), online: International crisis group <<http://www.intl-crisis-group.org>>.

¹³⁶ “Secretary General urges Assembly to respond to September 11th Attacks by reaffirming the rule of law”, UN Doc. SG/SM/7965 (24 September 2001).

¹³⁷ See, for example, “Condemnation of terrorist attacks in the United States of America”, GA Res. 56/1, UN GAOR, 56th Sess., Suppl. No.49, UN Doc. A/RES/56/1 (2001); SC Resolution 1368 (2001) of 12 September 2001, UN SCOR, 56th Sess., 4370th mtg., UN Doc. S/RES/1368/2001; see also, for example, “Secretary-General condemns terrorist attacks on United States in strongest possible terms”, UN Doc SG/SM/7949 (2001); “Secretary-General urges Assembly to respond to September 11th Attacks by reaffirming the rule of law”, UN Doc. SG/SM/7965 (2001); NATO, Press release, (2001)124, Statement by the North Atlantic Council (12 September 2001), online: <<http://www.nato.int/docu/pr/2001/p01-124e.htm>>; and the subsequent declaration by NATO’s Secretary general, “Statement by NATO Secretary General, Lord Robertson” (2 October 2001), online: <<http://www.nato.int/docu/speech/2001/s011002a.htm>>; the declaration of the Council of the EU, Declaration by the European Union (12 September 2001), Press Release 11795/01 (Presse 318), online: <<http://europa.eu.int/news/110901/september.htm>> and the statement by President Prodi on the attacks

principles and standards do not stand in the way of such efforts. On the contrary: as described above, the framework of international law enables States to take adequate and appropriate measures to protect their legitimate national security interests, including, under certain conditions, through necessary and proportionate restrictions on some human rights and freedoms.

Moreover, international law permits, and indeed requires, states to bring to justice the perpetrators, organisers and sponsors of terrorist crimes. While states have not yet agreed on a universally accepted definition of "terrorism"¹³⁸, a number of international and regional treaties outlaw specific acts and impose a duty on the States parties to prosecute those responsible for these acts. Both the Security Council¹³⁹ and the Secretary General¹⁴⁰ repeatedly urged states to adhere to, and fully implement, the UN anti-terrorism conventions¹⁴¹. Various Security Council resolutions, adopted before and after September 11th 2001, require all states to combat terrorism through a wide range of measures, including by ensuring that the authors of terrorist acts are brought to justice¹⁴². Where terrorist crimes constitute crimes against humanity¹⁴³, any

against the United States (12 September 2001) IP/01/1265, online: <<http://europa.eu.int/news/110901/september.htm>>. Similar statements were made, among others, by the Council of Europe (Declaration of the Committee of Ministers on the fight against international terrorism, 12 September 2001, online: <<http://cm.coe.int/ta/decl/2001/2001dec3.htm>>), the OSCE (Decision by the Permanent Council on the acts of terrorism in Washington D.C. and New York, Decision No. 438, 13 September 2001, online: <<http://usinfo.state.gov/topical/pol/terror/01091350.htm>>), the OAS (Meeting of Consultation of Ministers of Foreign Affairs, Resolution on Strengthening hemispheric cooperation to prevent, combat and eliminate terrorism, RC.23/RES.1/01, 21 September 2001, online: <<http://www.oas.org/OASpage/crisis/RC.23e.htm>>). The Arab League also condemned the crimes of September 11th (Terrorist Attacks against the USA on 11 September 2001, Communiqué issued by the Arab League Council, 13 September 2001, online: <<http://www.caabu.org/press/releases/arab-league.html>>).

¹³⁸ See Gilbert, *supra* note 113 at 13-16.

¹³⁹ In Resolutions 1368 (2001), UN SCOR, 56th Sess., 4370th mtg., UN Doc.S/RES/1368 (2001); 1377 (2001), UN SCOR, 56th Sess., 4413th mtg., UN Doc.S/RES/1377 (2001).

¹⁴⁰ See, for example: Kofi Annan "Fighting Terrorism on a Global Front" *New York Times* (21 September 2001); "Secretary General urges Implementation of Legal Instruments on Terrorism, renews call for Agreement on Comprehensive Convention", UN Doc. SG/SM/8021, 12 November 2001.

¹⁴¹ The following treaties have been drawn up under the auspices of the UN: Convention on Offences and Certain Other Acts Committed on Board Aircraft (1963); Convention for the Suppression of the Unlawful Seizure of Aircraft (1970); Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (1971); Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons including Diplomatic Agents (1973); International Convention against the Taking of Hostages (1979); Convention on the Physical Protection of Nuclear Material (1979); Convention for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation (1988); Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (1988); Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (1988); Convention on the Marking of Plastic Explosives (1991); International Convention for the Suppression of Terrorist Bombings (1997); International Convention for the Suppression of the Financing of Terrorism (1999, not yet in force). Online : United Nations : Office on Drugs and Crimes <http://www.odccp.org/terrorism_conventions.html>.

¹⁴² Resolutions 1269 (1999), UN SCOR, 54th Sess., 4053rd mtg., UN Doc.S/RES/1269 (1999); 1368 (2001), UN SCOR, 56th Sess., 4370th mtg., UN Doc.S/RES/1368 (2001); 1373 (2001), UN SCOR, 56th Sess., 4385th mtg., UN Doc.S/RES/1373 (2001); 1377 (2001), UN SCOR, 56th Sess., 4413th mtg., UN Doc.S/RES/1377 (2001).

country in the world is entitled to prosecute those responsible on the basis of the principle of universal jurisdiction. As the UN High Commissioner for Human Rights, among others, has pointed out, the crimes of September 11th reached this threshold¹⁴⁴.

Several commentators have highlighted the way in which the international justice system could have provided a peaceful alternative to the use of force in the aftermath of September 11th¹⁴⁵. Had the International Criminal Court already come into existence, it might have provided a viable avenue. In the absence of this possibility, other options proposed included an extension of the jurisdiction of the International Criminal Tribunal at The Hague or the establishment of a court along the lines of that set up for the trial of the Lockerbie suspects. These and other variants would have been possible and legitimate¹⁴⁶. The Lockerbie case also provides an example in which the Security Council decided measures to facilitate the administration of justice by imposing sanctions on Libya to induce the surrender of the suspects¹⁴⁷.

D. The fight against terrorism and the need for a principled and consistent approach

The crimes of September 11th have often been referred to as an attack against the values which lie at the root of the international legal system. Yet it is important not to overlook the fact that widespread and persistent disrespect for these very values is one of the main factors contributing to the phenomenon of international terrorism. Respect for the rule of law and human rights, and the recognition that they must be upheld even in the face of crimes of an exceptional magnitude, are essential elements of the international legal system as embodied in the UN Charter and international human rights instruments. Bringing those responsible for crimes such as those of September 11th to justice means putting them on trial in a competent criminal court, in proceedings which respect the guarantees of fair and impartial justice. The methods to apprehend them must also be within the bounds of international law. This would not be an act of generosity towards criminals who, for their part, have shown utter disregard for the rights of others. Rather, it is part of the affirmation and strengthening of the rule of law which is needed to address the threat of terrorism.

¹⁴³ *Supra* note 94.

¹⁴⁴ "Terror attacks must be seen as crimes against humanity: Robinson" *UN Daily Highlights* (18 October 2001), online: <<http://www.un.org/News/dh/20011017.htm>>.

¹⁴⁵ *Supra* note 4. See also Part III. E, below, for more on this topic.

¹⁴⁶ As crimes against humanity (see above note 94), the attacks of September 11th were crimes under international law at the time they were committed. Any country could bring their authors to justice on the basis of universal jurisdiction, and the same principle would serve as the basis for a trial before an international tribunal. Some of the acts perpetrated on 11 September, such as for example the hijacking of civilian air planes, also fall within the scope of some of the existing international conventions on terrorism. The principle of non-retroactivity applies to the crime itself (*nulla poene sine lege*). It does not mean that the court which tries the author of a crime must have been in existence at the time the crime was committed.

¹⁴⁷ Resolutions 748 (1992), UN SCOR, 47th Sess., 3063rd Mtg., UN Doc.S/RES/748 (1992); 883 (1993), UN SCOR, 48th Sess., 3312th mtg., UN Doc.S/RES/883 (1993); 1192 (1998), UN SCOR, 53rd Sess., 3920th mtg., UN Doc.S/RES/1192 (1998).

This requires consistency. No strategy, legislation or other anti-terrorism measure can be effective which fails to respect the principles and standards of international law regarding, for example, the use of force, the conduct of armed conflict and the treatment of civilians and prisoners of war, or fundamental human rights guarantees. On the contrary: disrespect for these principles is likely to foment situations of anger and despair where international terrorism can take root¹⁴⁸.

Nor is it sufficient to tackle only part of the phenomenon – those individuals and organisations whose activities are perceived as a threat to the security of western societies and their way of life – and to attempt this primarily by preventing them from having access to US and European territory or assets. It is not possible, in the closely inter-connected world of our time, where increased access to information and means of communication implies greater awareness of inequalities and injustice, to retreat into splendid isolation, safety and prosperity within the twin fortresses of Europe and North America.

Certain security precautions are necessary and legitimate. However, Western states must just as urgently address the manner in which their own decisions and actions help generate conditions which breed international terrorism or support for it. Given the close connection between human rights violations and their consequences – poverty, in particular -, and international terrorism¹⁴⁹, this means reviewing their policies and strategies and, where necessary, adapting them in accordance with their obligations under international human rights law¹⁵⁰. As James Wolfensohn, President of the World Bank, has repeatedly emphasised, it is in the interest of all States to address the issue :

¹⁴⁸ In a recent address to the Council of Foreign Relations (Kofi Annan, "Neglecting Preventive Action, a Recipe for Disaster", presented to Council on Foreign Relations, UN Doc SG/SM/8154, 7 March 2002), UN Secretary General Kofi Annan noted that the root causes of conflict were "[...] likely to be found in illegitimate governance, socio-economic inequities, systematic ethnic discrimination, denial of human rights, disputes over political participation, or long-standing grievances over the allocation of land, water and other resources." While cautioning against an automatic linkage between poverty and terrorism, he stressed that "[...] it is essential to understand that "draining the swamp of terrorism", as some have called it, requires not only attacking its sources of funding and support. It requires addressing those grievances which terrorists find useful to exploit for their own ends. [...] The solution in every one of these cases is clear, if often difficult to achieve in practice: to promote human rights, to protect minority rights and to institute legitimate and representative political arrangements under the rule of law."

¹⁴⁹ The links between such grievances and the phenomenon of terrorism have been highlighted by James Wolfensohn, President of the World Bank, in various interviews with newspapers (Larry Elliott, "The West knows now that there is no wall to hide behind" *The Guardian* (11 November 2001); "The War against Terrorism will be Won by Eliminating Poverty" *La Stampa* (7 December 2001)) and the BBC (BBC Breakfast with David Frost, 11 November 2001; "Post september 11th", Interview with Jonathan Dimbleby, (7 December 2001)), online : World Bank Group <<http://www.worldbank.org>>; and also by US Secretary of State Colin Powell in a statement at the World Economic Forum in New York on 1 February 2002 ("Powell Pledges Continued Focus on Terror", online : <<http://www.usinfo.state.gov/topical/pol/terror/02020109.htm>>).

¹⁵⁰ This must lead to a change in practice, as was emphasised recently by the UN High Commissioner for Human Rights: "We have no need for new pledges and commitments. They are all there in solemn language. We need something more prosaic: implementation, implementation, implementation". Second Global Ethic Lecture, held by Mary Robinson at the University of Tübingen, Germany, on 21 January 2002, extract in: *The Irish Times* (22 January 2002).

The reduction of poverty is essential to the construction of peace. If you don't deal with the questions of equity and social justice, if you don't deal with the question of poverty, then you have the breeding ground on which you can have violence, crime and terror.¹⁵¹

"Open societies" based on tolerance, respect for the human rights of others and the rule of law, do have the means to defend themselves within the parameters of international law against the threat posed by international terrorism. Even the use of force is legitimate, as we have seen, when there is no other way to maintain or restore international peace and security. However, an "open society" cannot function without transparency and debate. Political leaders are accountable under the law, but also to the public. Where policies or strategies give rise to concern about their compatibility with international law, the public has a legitimate interest in being informed about relevant decisions and their reasons. Questions must be answered, and the answers must be more substantial than the vague claims of inevitability or moral obligation offered by political leaders to justify the various measures taken in the aftermath of September 11th.

It is not enough simply to state that there was no alternative to the use of force; in fact, on the part of politicians who had already initiated a variety of other measures to counter the threat of further terrorist attacks, to describe the choice before them as one between military action or doing nothing, and, consequently, being helpless in the face of the terrorist threat, is misleading. It is equally insufficient to affirm, as some European leaders did, that they were privately communicating their doubts and misgivings to the US Administration¹⁵². The current tendency in a number of countries to keep things secret, coupled with enhanced powers given to law enforcement authorities, is incompatible with respect for the rule of law and human rights. It means moving away from the "open society", with its checks and balances on political power, in the direction of authoritarian rule. This, however, is not an effective way to respond to the threat of international terrorism – it fuels its causes rather than addressing them.

E. Accountability – international criminal law

Respect for international law is not a question of personal preferences, or a matter of political convenience. It is a legal obligation. Political decision-makers have

¹⁵¹ Interview with Jonathan Dimbleby, BBC, (7 December 2001), online: World Bank Group <<http://www.worldbank.org>>.

¹⁵² Such statements are difficult to verify. They do, however, contradict acts and statements by the same leaders, such as their support for the military campaign, the signing of the declaration adopted at the EU summit in Ghent on October 19th, 2001, which stated that US retaliation using targeted actions was legitimate, or the lack of insistence, on the part of the representatives of France and the United Kingdom, on compliance with, or even a debate on, the relevant legal requirements, at the Security Council.

a duty to devise and implement their policies and actions in conformity with its principles and standards. International law, without the equivalent enforcement authorities of domestic legal systems, essentially depends on the willingness of decision-makers to abide by it. At present, there is little evidence that political and military leaders feel inclined to let their choices be restricted by legal standards.

In the world as it has re-aligned itself after September 11th, with the United States and its narrowly defined interests firmly at the centre, there is not much sign of a challenge to such an attitude from other States, despite statements made by some European politicians following President Bush's State of the Union address on January 29th, 2002, or with regard to US plans for a military intervention in Iraq, which indicate a growing disillusion with US unilateralism¹⁵³. Most recently, the decision by the US Administration to withdraw its signature from the treaty establishing the International Criminal Court¹⁵⁴ and US attempts at obtaining a Security Council resolution which would exempt US service personnel in international peace-keeping operations from any future prosecution by the Court met with more forceful expressions of disagreement from European leaders¹⁵⁵, but ultimately a compromise solution was reached¹⁵⁶.

However, recent developments in international criminal law and practice nevertheless provide an increasingly operative and much-needed counter-weight against the current tendency to erode respect for international law.

The notion that certain violations of international law – war crimes¹⁵⁷ and crimes against humanity¹⁵⁸ – are so serious that those responsible incur individual criminal responsibility under international law is not new. Long established in customary international law, it formed the basis for the Nuremberg and Tokyo trials after the Second World War and has since found express recognition in a number of binding international conventions¹⁵⁹, the statutes of the International Criminal

¹⁵³ See, for example, Jonathan Freedland "Patten says EU must stand up to 'go it alone' Bush" *The Guardian Weekly* (14-20 February 2002) 5; "Seeing truths differently is surely no crime" *The Guardian Weekly* (28 February – 6 March 2002) 33.

¹⁵⁴ The Rome Statute of the International Criminal Court, UN Doc. A/CONF/183.9 (1998), which entered into force on July 1st, 2002.

¹⁵⁵ See Richard Norton-Taylor, Ewen MacAskill and Ian Black "Europe angry as defiant US goes own way" *The Guardian Weekly* (4-10 July 2002) 1.

¹⁵⁶ This solution, which provides for a one-year exemption for investigating and prosecuting peace-keepers from countries which have not submitted to the court, 'if a case arises', was supported by France and the United Kingdom. See Colum Lynch "U.S. wins 1-year-shield from war crimes court" *Washington Post* (13 July 2002). For a critical assessment of the compromise see Human Rights Watch, "U.S. Campaign for Permanent Immunity Fails" (12 July 2002), online: <<http://www.hrw.org>>.

¹⁵⁷ Those violations of international humanitarian law which engage the individual criminal responsibility of their authors.

¹⁵⁸ See above at note 94.

¹⁵⁹ For example, the Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949; Geneva Convention relative to the Treatment of Prisoners of War, 12 August 1949; Geneva Convention relative to the Protection of Civilian Persons in Time of War, 12 August 1949; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of

Tribunals for the former Yugoslavia and Rwanda¹⁶⁰, the treaty establishing the International Criminal Court¹⁶¹, or the agreement between the UN and the Government of Sierra Leone to establish a Special Criminal Court for this country¹⁶². In recent years, an increasing number of countries have enacted legislation enabling them to prosecute those responsible for war crimes and crimes against humanity, irrespective of the place where they have been committed and the nationality of the perpetrators. This has already led to proceedings in a number of countries, in some cases involving former heads of state¹⁶³. These developments are a strong reminder of the relevance of international law to political decision-making.

They constitute a significant reinforcement of the notion of legal accountability in politics. It is not least their preventive potential which makes them so important. If prosecution in a court of law becomes an ever more realistic prospect for those who commit crimes under international law, or fail to prevent them when it is within their responsibility and power to do so, political leaders will need to be much more alert to the legal implications of their decisions and actions. Every time it is confirmed that individuals responsible for violations of international human rights and humanitarian law are answerable before the law, a clear signal is sent to others.

This does not make politics impracticable. It does, however, require political leaders to pay attention to the consequences of their decisions and to make sure that they are compatible with international law. This calls for careful consideration of the circumstances and an effort to seek all relevant information. It means reflecting on the

International Armed Conflicts (Protocol I), 8 June 1977; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977; International Convention on the Suppression and Punishment of the Crime of Apartheid, 30 November 1973; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment, 10 December 1984.

¹⁶⁰ Security Council resolutions 827, UN SCOR, 48th Sess., 3217th mtg., UN Doc.S/RES/827 (1993); 935 (1994) of 1 July 1994, UN SCOR, 49th Sess., 3400th mtg., UN Doc.S/RES/935 (1994) and 944 (1994), UN SCOR, 49th Sess., 3430th mtg., UN Doc.S/RES/944 (1994), respectively, adopted under Chapter VII of the UN Charter.

¹⁶¹ *Supra* note 154.

¹⁶² Chris McGreal "Unique Court to try Sierra Leone war criminals" *The Guardian Weekly* (24-30 January 2002) 5. See the Report of the Secretary General on the Establishment of a Special Court for Sierra Leone, 4 October 2000, UN Doc S/2000/915.

¹⁶³ For example, prosecution of individuals accused of having committed war crimes in the former Yugoslavia in Denmark, Germany, Austria; trials in Belgium for genocide, war crimes and crimes against humanity committed in Rwanda; the proceedings against General Pinochet and Argentine military officers in Spain; or the case initiated against Ariel Sharon in Belgium. In the latter case, the Belgian Court of Appeals ruled on June 26th, 2002 that Belgian courts did have jurisdiction over the crimes imputed to Mr. Sharon, but that the prosecution could proceed only if the accused was present on Belgian soil. An appeal against this decision was lodged on July 3rd, 2002. See the information provided online: <<http://www.indictsharon.net>>. In a recent decision, also concerning Belgium, the International Court of Justice held that incumbent Foreign Ministers enjoy immunity from criminal prosecution in the national courts of other countries during the duration of their tenure, but emphasised that immunity does not mean that they enjoy impunity, nor that it exonerates the person to whom it applies from all criminal responsibility. Arrest Warrant of April 11th, 2000 (*Democratic Republic of Congo v. Belgium*), February 14th, 2002, online: International Court of Justice <<http://www.icj-cij.org>>. See, in particular, the discussion of the principle of universal jurisdiction, which the ICJ did not address, in the joint separate opinion of Judges Higgins, Koojmans and Buergenthal.

risks and refraining from those actions which would constitute crimes under international law – not an impossible task. It seems only appropriate that a leader who incurs responsibility for crimes against humanity or war crimes should face personal consequences more serious than having to resign, perhaps, or risking unfavourable mention in history books.

At present, the practice of international criminal justice remains largely uneven and continues to depend very much on considerations of political expediency. But things are evolving fast. Even powerful, or powerfully backed, politicians can no longer be entirely sure that they are beyond the reach of criminal justice.

* * *

The legitimacy of political action – its purposes as well as methods – depends on their compatibility with the principles and standards of international law, and, in particular, human rights law.

It may be objected that acting in conformity with international law requirements is not possible in politics – that it is simply impracticable in view of the myriad conflicting demands and interests in any given situation, and the inevitable need to settle for a pragmatic, rather than a principled, course. The “doves” would soon be ousted by the “hawks”, who promise much more decisive action and demand less patience, reflection and self-restraint. This need not be so. There is no reason why political leaders could not explain to the public what advantages would flow from following a political line which has as its cornerstones the principles of respect for the rule of law and human rights.

Failure on the part of political leaders to abide by international law does not stem from lack of knowledge or awareness. Certainly, for the response to September 11th, this explanation would not hold, nor would it be sufficient as a ground for exoneration from responsibility for violations of international law¹⁶⁴. If political leaders nevertheless choose to act in ways which are not compatible with international law, something else is at stake. They manifestly do not consider it worth-while to accept legal constraints which might limit their choice of policies and strategies. As the response of western governments to September 11th and the threat of international terrorism has made plain, disregard for international law extends to the core of its principles and standards for the conduct of international relations and the protection of the fundamental rights and freedoms of individuals. This, however, amounts to rejecting the very essence of the present international legal order.

¹⁶⁴ Examples of public appeals and statements which highlighted the facts as well as applicable legal standards have been mentioned above at notes 7 and 8. Moreover, in early October 2001, Mary Robinson explicitly drew a parallel between the situation in Afghanistan and that in Rwanda in 1994. Then, the UN claimed it did not know about the scale of the crimes being committed, something which has since been admitted by the UN to have been an “error of judgement”. The same cannot be said now. See Kenny, “Ireland, The Security Council and Afghanistan”, *supra* note 31 at 112.

Not accepting a system of legal rules is not, of itself, a position that is necessarily, or even inherently wrong. There may well be legal orders which should be opposed. But whether this is the case for the principles and standards currently in place, under the UN Charter and the numerous international human rights treaties adopted since 1948, is another question.

Shaped by the experience of war and a long, ongoing struggle against oppression and injustice, this system is based on the repudiation of violence and aggression as a means of solving disputes in international relations, and the recognition that there are fundamental rights, common to all human beings, which are non-negotiable and must be respected by all. It rests on the conviction that co-operation through multilateral mechanisms and procedures is preferable to unilateral action. This is certainly not the only imaginable way of organising world affairs. As a set of fundamental rules and principles for the conduct of political action, however, it is not a bad system. Political leaders who do not agree with its principles and standards and who propose different rules, should make it clear how this would be advantageous – and for whom.

The fact that the international legal system is far from being perfectly implemented does not mean that it has no value. States – that is, the individuals who act as their representatives – must make it work. Essentially, it is a matter of choice, and therein lies their responsibility.

Rather than describing a reality, many of the provisions of international law express aspirations, purposes and objectives which have yet to be achieved. Others, however, are very precise in prohibiting acts that are not acceptable. Together, they form a normative system which, if accepted by political leaders as the framework within which decisions are taken and implemented, would go a very long way towards making the world a more equitable, just and, not least, safer place for all.