

International law and the ‘war against terrorism’

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Any analysis of international law and the ‘war against terrorism’ following the events of 11 September 2001 needs to start with recognition of the fact that the terrorist atrocities perpetrated in the United States on that date were plainly illegal.¹ On that, international lawyers the world over agreed. Whatever lay behind those terrible events,² there was no legal justification for them and none has been offered. Yet the consensus about the illegality of the terrorist attacks did not lead to a similar consensus about the legal questions raised by the US reaction to them. The legality of the United States’ resort to force against Al-Qa’ida and the Taliban regime in Afghanistan, of the conduct of the hostilities which followed, and of the status and treatment of prisoners held by the United States at the naval base at Guantanamo Bay have all been matters of controversy.

Much of that controversy has its roots in the fact that the events of 11 September—a terrorist attack of unprecedented savagery, apparently carried out by a shadowy organization operating outside the control of any state—did not fit easily within any of the obvious categories of international law. To some observers, the attack can only be regarded as an entirely new phenomenon falling wholly outside the existing framework of international law with its emphasis on (horizontal) relations between states and (vertical) relations between state and individual. For the members of that school of thought, a challenge on this scale by a non-state actor to the one superpower calls for entirely new thinking about the nature of international law. There is much substance in this argument; but it does not help to answer the immediate questions of what law is applicable now. The fact that the events of 11 September may demonstrate a need to re-examine some of the assumptions on which the international legal system rests does not mean that those events occurred in a legal vacuum. Nor does it relieve governments and international lawyers of the need to address the issues set out in the preceding paragraph.

¹ This article was completed in mid-February 2002 and is therefore confined to events which occurred and documents which became available prior to that date.

² For a discussion of the background to this sort of terrorism, see Fred Halliday, *Two hours that shook the world* (London: Saqi Books, 2001).

This article, therefore, attempts an analysis of how the existing rules of international law apply to those issues. It is divided into three parts. The first examines how international law characterizes the events of 11 September—should they be seen simply as crimes, or are they a threat to international peace or an armed attack or act of war? The second part considers the legality of the resort to force by the United States of America and the United Kingdom in Afghanistan. It examines the legal justification offered by the two governments and discusses whether that justification was sufficient. The third part reviews the law applicable to the conduct of the hostilities in Afghanistan, including the legal requirements regarding targeting and the treatment of prisoners.³

The characterization of the events of 11 September 2001 under international law

The starting point for any analysis of the law relating to the events of 11 September 2001 is that the hijacking of the four aircraft and the subsequent killing of those on board and those who died in the World Trade Center and the Pentagon were crimes under the ordinary criminal law of the United States.⁴ Murder does not cease to be murder because the victims are counted in thousands and the perpetrators were motivated by what they saw as political considerations or a distorted sense of religious obligation. Nor is there any doubt that international law recognizes the jurisdiction of the courts in the United States (whether at the state or federal level) to try those responsible for planning these crimes and anyone who assisted them in doing so. That would be the case even if the persons concerned at no time entered the United States, since international law recognizes the jurisdiction of a state to try persons for conspiracy outside its territory to commit a crime inside that territory, at least where (as here) other conspirators have committed acts within the territory of that state in furtherance of that conspiracy.⁵

The fact that public international law recognizes the jurisdiction of the United States to try a particular crime does not, however, mean that it requires other states to cooperate in enabling such a trial to take place. Three problems, in particular, have to be considered.

³ There are, of course, numerous other questions of international law which cannot be considered in an article of this length. These include the establishment by the United States of military commissions to try suspects, the derogation by the United Kingdom from certain provisions of the European Convention on Human Rights, the economic and other measures ordered by the United Nations Security Council in Resolutions 1373 (2001) and 1390 (2002), and the work of the United Nations Counter-Terrorism Committee established by Resolution 1373 (2001).

⁴ The term 'United States law' is used in this article to refer to both federal law (United States law properly so described) and the law of the different states of the United States of America. While the distinction between state and federal law is of great importance in the United States, for present purposes the distinction which matters is that between national law (which includes both federal and state law) and procedures, on the one hand, and international law, on the other.

⁵ See e.g. Sir R. Jennings and Sir A. Watts, *Oppenheim's International Law*, 9th edn (London: Longman, 1992), vol. 1, pp. 459–61; and the Opinion of the Judicial Committee of the Privy Council in *Somchai Liangsriprasert v. United States of America* [1991] 1 AC 225.

First, there is no general duty under international law to surrender a defendant to stand trial in another state. Such a duty to extradite arises only where there is a treaty of extradition in force between the states concerned. While a state may choose to surrender someone for trial (if its own domestic law permits) even in the absence of an extradition treaty, it is not normally under an obligation to do so. Many states have no extradition treaty with the United States. Nevertheless, this problem is considerably reduced by the effect of the multilateral anti-terrorist conventions. If a suspected perpetrator of the 11 September attacks were to be found outside the United States, the Hague Convention for the Suppression of the Unlawful Seizure of Aircraft (1970) and the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (1971) would apply, giving rise to a duty on the part of the state in which the individual was found either to extradite him or her or to refer the case to its own prosecuting authorities.⁶ The 11 September crimes would also have come within the scope of the International Convention for the Suppression of Terrorist Bombings (1997), which entered into force on 23 May 2001. However, although the United States had signed that convention, it had not ratified it by 11 September 2001 and was not, therefore, a party at the relevant time.

Ironically, even before 11 September, Afghanistan was in a unique position as regards the duty to extradite the leader of Al-Qa'ida, because in 1999 the United Nations Security Council had adopted a binding decision requiring the Taliban regime to surrender Osama bin Laden to the United States or to another state with jurisdiction or the ability to extradite him. This obligation was imposed in respect of the bomb attacks on the US embassies in Kenya and Tanzania in 1998.⁷ The failure of the Taliban to comply with that requirement was expressly noted by the Security Council after 11 September.⁸ Under Chapter VII of the UN Charter, the Security Council has the power to require a state to surrender persons for trial where there is a threat to international peace and security, and it has exercised that power on a number of occasions.⁹ In the aftermath of the events of 11 September,

⁶ Although the two conventions are concerned with international aviation and therefore do not normally apply where, as in the case of the four aircraft hijacked on 11 September 2001, the aircraft is registered in the state where landing and take-off occur (Article 4(2) of each convention), notwithstanding this limitation, the duty to extradite or prosecute comes into play when a person alleged to have committed one of the offences listed in the convention is found in the territory of another state (Article 4(3)).

⁷ Security Council Resolutions 1214 (1998), para. 13, 1267 (1999), paras 1 and 2, and 1333 (1999), para. 2. These decisions were adopted under Chapter VII of the UN Charter and are therefore legally binding under Article 25 of the charter by which member states undertake to 'accept and carry out the decisions of the Security Council in accordance with the present Charter'. Although the US embassies were not (contrary to popular belief) treated as US territory under international law the United States of America has jurisdiction to try those who attacked the embassies and the US diplomatic personnel there; see the decision of the House of Lords in *R. (Al-Fawaz) v. Governor of Brixton Prison* [2002] 2 WLR 101, a case concerning extradition to the United States of men accused of being members of Al-Qa'ida involved in the bombing of the US embassies in Kenya and Tanzania in 1998.

⁸ Security Council Resolution 1390 (2002), preamble.

⁹ The first example was Security Council Resolution 748 (1992), which required Libya to surrender the persons accused of the Lockerbie bombing and to cooperate with a French judicial investigation into another aircraft bombing involving Libya. Since then, the Security Council has required Sudan to surrender for trial the persons accused of attempting to assassinate President Mubarak of Egypt and has required all states to surrender persons for trial before the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda.

the Security Council decided that all states should 'afford one another the greatest measure of assistance' in relation to criminal investigation of terrorist offences;¹⁰ but it stopped short of imposing a requirement of extradition.

Secondly, for many states there would be a serious legal obstacle to surrendering someone wanted for the 11 September attacks to the United States. The United States has retained the death penalty for certain offences, and anyone convicted of perpetrating the murders of 11 September would be likely to receive that sentence. Capital punishment is not, in itself, contrary to general international law or to any of the treaties to which the United States is party. The European states, on the other hand, are parties to the European Convention on Human Rights (1950) and, in most cases, to Protocol VI to that Convention. In 1989, the European Court of Human Rights held, in *Soering v. United Kingdom*,¹¹ that it would be a violation of the convention's prohibition of inhuman treatment or punishment to extradite a defendant to the United States if there was a substantial risk that he would be sentenced to death, because the length of time taken between sentence and actual execution was considered to amount to inhuman treatment. Moreover, Protocol VI prohibits the parties to the protocol (which include the United Kingdom) from passing or carrying out death sentences in peacetime, and the court might well hold that this also prohibited a European state which was party to the protocol from surrendering someone to face a death sentence in a country that was not party to the convention, even if there would be no delay between sentence and actual execution. In that case, a party to the convention and protocol could lawfully surrender someone accused of the 11 September atrocities only if it received an undertaking that that person would not be executed.¹²

Thirdly, the sheer horror of the events of 11 September has led some observers to question whether, irrespective of the death penalty issue, anyone accused of perpetrating those crimes could receive a fair trial in the United States.¹³ The present writer does not share that view—at least, provided the accused were to be tried before the regular courts of the United States—but it would undoubtedly be widely presented as an obstacle to extradition to the United States. The problem becomes even greater in the case of an accused whose extradition is sought for trial before the military commissions established by the President of the United States with jurisdiction to try foreign nationals accused of terrorism. While the use of military courts or commissions as courts of trial does not in itself mean that an accused will not receive a trial which meets international standards of due process, these commissions will not be bound by the normal rules of evidence and it must be open to doubt whether other states would be willing to surrender persons for trial before them.¹⁴

¹⁰ Security Council Resolution 1373 (2001), para. 2(f).

¹¹ (1989) 11 European Human Rights Reports 439.

¹² The practice of the UK government is to request such an undertaking before surrendering a defendant on potentially capital charges; see *Al-Fawaz*, n. 7, above, at para. 121 (Lord Scott).

¹³ See e.g. Geoffrey Robertson QC, *The Times*, 18 Sept. 2001.

¹⁴ See, on this point, the doubts expressed by Lord Scott in *Al-Fawaz* at para. 121 (n. 7 above).

These and other considerations have led to calls for the accused to be tried before an international court. There is, however, no international court currently in existence which could hold such a trial. The two existing International Criminal Tribunals have jurisdiction only in respect of crimes committed in the territories of the former Yugoslavia and Rwanda respectively, and only over a very restricted list of crimes. The International Criminal Court (ICC) might have been able to try the case had it been in existence before 11 September 2001,¹⁵ but the statute of the ICC had not by that date attracted the 60 parties necessary to bring it into force; and even when it does enter into force (almost certainly during the course of 2002), the ICC will not have retrospective jurisdiction. The other international courts currently in existence, including the International Court of Justice, do not have a criminal jurisdiction. The only way in which the surviving 11 September defendants could be brought to trial before an international court, therefore, would be if the Security Council created one for the purpose of trying them.¹⁶ It has the power to do that, as the Yugoslav and Rwandan precedents demonstrate; but there is no sign that it plans to exercise that power in this case.

These problems do not alter the fact that the events of 11 September undeniably constituted a crime under United States law and under international law,¹⁷ a crime which could be tried in US courts or in the courts of another state (e.g. under the extended jurisdiction of the Hague and Montreal Conventions). The question then arises, however, whether the characterization of those events as crimes means that they could not also amount to acts of war, armed attacks or threats to the peace, which might give rise to a right to use force. It has been suggested by some commentators that the fact that the 11 September attacks were criminal acts means that they could not also be the justification for military action, whether under the enforcement powers of the United Nations or under the right of self-defence.¹⁸ The concepts of international crime, threats to the peace and armed attack are not, however, mutually exclusive and there is no reason why they should be treated as such.

The term 'act of war' is inappropriate here. Although many people spoke of the attacks on the World Trade Center and the Pentagon in those terms and drew comparisons with Japan's surprise attack on Pearl Harbor in 1941, the concept of war in international law is confined to conflicts between states—and, indeed, is no longer much used there; surrounded as it is by technicalities, it has largely

¹⁵ The only offence in the statute of the court which might cover the events of 11 September 2001 is crimes against humanity. A crime against humanity includes murder if committed as part of 'a widespread or systematic attack directed against any civilian population' (Statute of the International Criminal Court, Article 7). While that offence was intended primarily to cover crimes committed by governments, it is not confined to governmental activity; see W. Schabas, *The International Criminal Court* (Cambridge: Cambridge University Press, 2001), pp. 36–7.

¹⁶ It has also been suggested that the Council could adopt a resolution conferring jurisdiction on the ICC. In view of the non-retrospectivity provision in the ICC Statute, however, it is not clear that the ICC could accept jurisdiction on that basis.

¹⁷ Crimes against humanity are crimes under customary international law as well as under the ICC Statute.

¹⁸ See e.g. Geoffrey Robertson QC, 'There is a legal way out of this', *Guardian*, 14 Sept. 2001.

given way to the factual notion of 'armed conflict'.¹⁹ References to the attacks as 'acts of war', like the subsequent talk of a 'war against terrorism', are understandable in political terms but are not to be taken as referring to the concept of war in international law.

A more important issue is whether the events of 11 September amounted to a 'threat to the peace'. A threat to, or breach of, international peace and security is what brings into play the powers of the UN Security Council to take economic, political and even military measures under Chapter VII of the United Nations Charter.²⁰ While the concept of 'threats to the peace' was at one time considered to be limited to threats of military force emanating from a state, in more recent years the Security Council has had no hesitation in treating acts of international terrorism as threats to the peace. Thus, Security Council Resolution 748 (1992) characterized Libya's 'failure to demonstrate by concrete actions its renunciation of terrorism' as a threat to international peace and security, a decision it subsequently reaffirmed in Resolution 883 (1993). The Security Council has taken a similar stance in its resolutions regarding the attempted assassination of President Mubarak of Egypt, in which it determined that 'the suppression of acts of international terrorism, including those in which states are involved, is an essential element for the maintenance of international peace and security',²¹ and the attacks on the US embassies in Dar-es-Salaam and Nairobi (neither of which was clearly linked to a state).²² In addition, the Security Council has adopted a resolution condemning international terrorism in general as such a threat.²³

The resolutions adopted by the Council since 11 September 2001 have been unequivocal in their condemnation of the terrorist attacks as threats to international peace. Resolution 1368 (2001), adopted on 12 September 2001, expressed the determination of the Security Council 'to combat by all means threats to international peace and security caused by terrorist acts' and condemned 'the horrifying terrorist attacks which took place on 11 September 2001' as being 'like any act of international terrorism ... a threat to international peace and security'. Resolution 1373 (2001), adopted on 28 September 2001, repeated that characterization and went on to impose a requirement on all states to take various measures, set out in the resolution, against the perpetrators and states suspected of assisting them. Both resolutions were adopted unanimously. In November 2001, a meeting of the Security Council held at ministerial level adopted a Declaration on the Global Effort to Counter Terrorism which was again based on the characterization of international terrorism as a threat to inter-

¹⁹ Christopher Greenwood, 'The concept of war in modern international law', *International and Comparative Law Quarterly* 36, 1987, pp. 283–306.

²⁰ Article 39 of the charter provides that the council shall determine the existence of a threat to the peace, breach of the peace or act of aggression (peace, in this context, meaning international peace and security). Having done so, the council has the power under the subsequent articles of Chapter VII to require states to take economic and political measures and to authorize states to take military action.

²¹ Security Council Resolution 1044 (1996).

²² Security Council Resolutions 1189 (1998) and 1267 (1999).

²³ Security Council Resolution 1269 (1999).

national peace and security.²⁴ The Security Council, it is clear, has never considered the categories of international crime and threat to the peace as mutually exclusive.

Nor, contrary to what has sometimes been suggested, does the characterization of the attacks of 11 September as a threat to the peace and as international crimes mean that they cannot also amount to an armed attack. Whether they do indeed constitute an armed attack is an important question, because Article 51 of the UN Charter preserves the 'inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations'. As the next part of this article will demonstrate, the United States has relied on the right of self-defence to justify its military action after 11 September; so it is essential for the United States to be able to point to the existence of an armed attack if this justification is to be valid.

Again, the categories of threat to the peace and armed attack are not mutually exclusive. When Iraq invaded Kuwait in 1990, the Security Council had no hesitation in treating the invasion as a threat to—indeed, a breach of—international peace and security, and ordering measures (including, eventually, military measures) against Iraq.²⁵ Yet it also reaffirmed the right of self-defence of Kuwait and its allies and, in so doing, clearly treated the invasion as an armed attack.²⁶

The concept of 'armed attack' is, it is true, generally used with reference to the use of regular armed forces by states; but, once again, there is no a priori reason why the term should be so confined. There is no doubt that terrorist acts by a state can constitute an armed attack and thereby justify a military response.²⁷ The UN General Assembly included certain types of terrorist activity by states in its definition of aggression in 1974.²⁸ Similarly, the International Court of Justice, in its judgment in the *Nicaragua* case in 1986, considered that covert attacks by a state could be classified as an armed attack if they were of sufficient gravity.²⁹ Since the events of 11 September showed—if, indeed, the matter were ever in any doubt—that a terrorist organization operating outside the control of any state is capable of causing death and destruction on a scale comparable with that of regular military action by a state, it would be a strange formalism which regarded the right to take military action against those who caused or threatened such consequences as dependent upon whether their acts could somehow be imputed to a state.

²⁴ Security Council Resolution 1377 (2001).

²⁵ Security Council Resolutions 660 (1990), 661 (1990), 665 (1990) and 678 (1990).

²⁶ See, in particular, the preamble to Resolution 661 (1990). These resolutions are discussed in Christopher Greenwood, 'New world order or old?', *Modern Law Review* 55, 1992, p. 153.

²⁷ For a discussion of this issue, see Christopher Greenwood, 'International law and the United States' air operation against Libya', *West Virginia Law Review* 89, 1987, p. 933.

²⁸ General Assembly Resolution 3314 (XXIX). Para. 3 of this resolution lists a series of acts which are to be considered as aggression and includes, at sub-paragraph (g), 'the sending by or on behalf of a state of armed bands, irregulars or mercenaries which carry out acts of armed force against another state of such gravity as to amount to the acts listed [earlier in the paragraph]'.

²⁹ *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, ICJ Reports, 1986, p. 14, para. 195.

Nor is there any reason to think that international law adopts such a formalistic approach. On the contrary, the famous *Caroline* dispute, which is still regarded as the classical definition of the right of self-defence in international law, shows that an armed attack need not emanate from a state. The dispute concerned action taken in 1837 by British forces in Canada against a US merchant vessel moored on the Great Lakes which was being used by Canadian rebels and their American sympathizers as a base for attacks on the British in Canada. British forces attacked the *Caroline* while she was in US waters and destroyed her, killing a number of her crew. Subsequently, one of the British officers was arrested by the United States and threatened with prosecution for murder. He was released after the UK government interceded on his behalf. A letter written by Daniel Webster, the US Secretary of State, to Lord Ashburton, a minister in the UK government, during the negotiations regarding the officer is still generally regarded as the authoritative statement of the scope of self-defence. Webster referred to the need for the United Kingdom to demonstrate that there was 'a necessity of self-defence, instant, overwhelming, leaving no choice of means and no moment for deliberation'.³⁰ For present purposes, what is important is that the threat in the *Caroline* case emanated not from a state (the United States had actively sought to prevent the attacks on Canada) but from a non-state group whom we would probably call terrorists today. Yet nowhere in the correspondence or in the subsequent reliance on the Webster formula is it suggested that this fact might make a difference and that the Webster formula might not apply to armed attacks which did not emanate from a state.

The international reaction to the events of 11 September confirms this approach. The North Atlantic Council, the governing body of NATO, reacted to those events by agreeing, on 12 September, that

if it is determined that this attack was directed from abroad against the United States, it shall be regarded as an action covered by Article 5 of the Washington Treaty, which states that an armed attack against one or more of the Allies in Europe or North America shall be considered an attack against them all.³¹

Similarly, the UN Security Council, in its Resolutions 1368 and 1373 (2001), adopted immediately after the attacks, expressly recognized the right of self-defence in terms which could only mean that it considered that the terrorist attacks constituted armed attacks for the purposes of Article 51 of the Charter.³²

It appears, therefore, that the events of 11 September are properly characterized not only as criminal offences (both under national and international law) but also as a threat to international peace and security and an armed attack. The consequences of the first characterization—that the surviving perpetrators of the attacks can be brought to trial—has already been considered. The consequence

³⁰ 29 BFSP 1137–38 and 30 BFSP 195–6. See also R. Jennings, *American Journal of International Law* 32, 1938, p. 82.

³¹ NATO press release (2001) 124.

³² Resolution 1368 (2001), preamble, para. 3; Resolution 1373 (2001), preamble, para. 4.

of the second is that the Security Council can take—as, indeed, it has taken—measures to restore international peace and security. The consequences of characterizing the events as an armed attack on the United States will be explored in the next part of this article.

The use of force

In contrast to what happened after the attacks on the US embassies in Kenya and Tanzania in 1998, when the United States swiftly responded with missile strikes against targets in Afghanistan and Sudan, the United States did not resort to force immediately after 11 September. It was not until October that US forces—assisted by contingents from the United Kingdom and certain other states—launched military operations. However, when those operations came, they were on a very large scale. The United States and its allies attacked sites believed to house Al-Qa'ida personnel and equipment in Afghanistan and, having concluded that they could not destroy Al-Qa'ida without removing the Taliban regime which had ruled most of Afghanistan for several years (though without achieving recognition as a government from the majority of states), also attacked the Taliban's armed forces. The result was dramatically to alter the course of the civil war which had been raging in Afghanistan for several years and to ensure, by January 2002, the overthrow of the Taliban and its replacement by a coalition government whose efforts to restore law and order were supported by a UN peacekeeping operation. While military operations against the Taliban and Al-Qa'ida were initially conducted from the air, by the end of the fighting US and UK forces had a considerable ground presence in Afghanistan.

Although some commentators have talked of the Security Council having authorized these military actions, that is not the case. Security Council Resolution 1373 required all states to take certain economic and political actions, but it did not give the United States an authority to use military force, in the way that Resolution 678 (1990) had authorized 'states co-operating with the government of Kuwait' to use force against Iraq. In defending the legality of the actions which they were taking, both the United States and the United Kingdom relied on the right of self-defence enshrined in Article 51 of the United Nations Charter. Article 51 provides that

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

The exercise of this right requires no prior authorization from the Security Council. The references to self-defence in Resolutions 1368 (2001) and 1373 (2001) were not, therefore, necessary to enable the United States to justify military action, although they undoubtedly served to strengthen the argument that the conditions for the exercise of the right of self-defence had been met.

The reliance on self-defence is evident in the letters sent by the US and UK governments to the Security Council reporting (as required by the second sentence of Article 51) on the measures which they were taking. Thus, on 7 October 2001, the US ambassador to the United Nations, John Negroponte, wrote to the President of the Security Council 'to report that the United States of America, together with other states, has initiated actions in the exercise of its inherent right of individual and collective self-defence following the armed attacks that were carried out against the United States on September 11th'.³³ The letter went on to state that the United States had 'clear and compelling information that the Al-Qa'ida organization ... had a central role in the attacks' of 11 September, and stated that the United States might find 'that our self-defence requires further actions with respect to other organizations and states'. The letter continued:

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

In response to these attacks, and in accordance with the inherent right of individual and collective self-defence, United States armed forces have initiated actions designed to prevent and deter further attacks on the United States. These actions include measures against Al-Qa'ida terrorist training camps and military installations of the Taliban regime in Afghanistan. In carrying out these actions, the United States is committed to minimising civilian casualties and damage to civilian property.

The United Kingdom chargé d'affaires wrote to the Security Council in similar terms on the same day. His letter stated that UK forces were engaged in military operations in Afghanistan, and continued:

These forces have now been employed in exercise of the inherent right of individual and collective self-defence, recognized in Article 51, following the terrorist outrage of 11 September, to avert the continuing threat of attacks from the same source. My Government presented information to the United Kingdom Parliament on 4 October which showed that Usama bin Laden and his Al-Qa'ida terrorist organization have the capability to execute major terrorist attacks, claimed credit for past attacks on United

³³ United Nations document S/2001/946.

States targets, and have been engaged in a concerted campaign against the United States and its allies. One of the stated aims is the murder of United States citizens and attacks on the allies of the United States.

This military action has been carefully planned and is directed against Osama bin Laden's Al-Qa'ida terrorist organization and the Taliban regime that is supporting it. Targets have been selected with extreme care to minimise the risk to civilians.³⁴

It is therefore necessary to consider whether the requirements for the exercise of the right of self-defence were, in fact, met.

Article 51 specifies only one precondition, namely that there should be an armed attack against a member of the United Nations. It is, however, universally accepted that in order for the use of force to constitute self-defence it must also meet the requirements that the force used is both necessary and proportionate.³⁵ In addition, the right to use force in self-defence can be pre-empted when the Security Council takes measures necessary to maintain peace and security. A final condition is that a state which has not itself been the victim of an armed attack may use force by way of collective self-defence only if a state which is the victim of such an attack invites it to do so.³⁶

It has already been shown that the United States was the victim on 11 September 2001 of what international law and the various organs of the international community characterize as an armed attack. That does not, however, put an end to discussion about this threshold requirement of the right of self-defence. In particular, two problems arise.

First, the attacks of 11 September 2001, terrible as they were, were over long before the United States military response was commenced. Self-defence, which is lawful in international law, has to be carefully distinguished from reprisals, which, if they involve the use of armed force, are no longer considered lawful. The requirement of necessity in self-defence means that it is not sufficient that force is used after an armed attack; it must be necessary to repel that attack. The use of force in response to an armed attack which is over and done with does not meet that requirement and looks more like a reprisal. The US action has therefore been criticized for constituting what some considered to be a reprisal, rather than a genuine action in self-defence.

Secondly, the attacks of 11 September emanated, so far as it is possible to judge, from Al-Qa'ida, rather than from a state. Yet the military action taken by the United States and its allies involved extensive military operations on the territory of the state of Afghanistan without the consent of the regime which was in fact governing most of that territory. Indeed, the Taliban armed forces were themselves objects of attack from the start of the military operations. While the letters from the US and UK governments accused Afghanistan of harbouring the Al-Qa'ida organization and permitting it to operate from the territory under

³⁴ United Nations document S/2001/947.

³⁵ See the *Nicaragua* case (n. 29 above), para. 176, and *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports, 1996, p. 226, paras 41–2.

³⁶ *Nicaragua* (n. 29 above), para. 199.

their control, they stopped short of alleging that Afghanistan was responsible, as a matter of international law, for the attacks themselves.³⁷ It has therefore been argued that if Afghanistan was not internationally responsible for the attacks, it should not have been the target of military action taken in response to those attacks.

Neither criticism is convincing. The events of 11 September cannot be considered in isolation. Taken together with other events such as the embassy attacks and the attack on the USS *Cole*, for which Al-Qa'ida had claimed responsibility, they posed a clear threat of further outrages to come. Although the matter has at times been controversial, the right of self-defence is widely regarded as extending to armed attacks which are, in the words of Webster's formula, 'imminent', as well as to attacks which are actually taking place.³⁸ Indeed, the right of self-defence would become a hollow shell outside the context of full-scale military actions by regular armed forces if this were not the case. A significant number of states, including both the United Kingdom and the United States of America, has consistently asserted that the right of self-defence embraces a right to use force against a threatened armed attack. In the present case, an imminent threat of armed attack was undeniably in existence after 11 September and the military action taken by the United States and its allies is properly seen as a forward-looking measure to prevent that threat from materializing, rather than as a backward-looking act of retaliation for what had gone before. The letter from the UK government to the Security Council makes this clear when it refers, in the passage quoted above, to the need 'to avert the continuing threat of attacks' from Al-Qa'ida. It is noticeable that this claim did not meet the resistance from other states which might have been expected if there was no right of anticipatory self-defence in international law, or if there had been real doubts whether the conditions for the exercise of that right existed.

With regard to the objection that Afghanistan was not responsible for the actions of Al-Qa'ida, a number of points need to be made. First, even if that were true (which must be questioned, in view of the discoveries made after allied forces entered Afghanistan), the Taliban regime had undoubtedly violated international law in permitting Al-Qa'ida to operate from its territory. Although the Taliban were not widely recognized as the government of Afghanistan, prior to 11 September 2001 they controlled most of its territory and appeared to be consolidating their power there. In these circumstances, they constituted a de facto government and their actions should be treated as the actions of the state

³⁷ In view of the approach taken by the International Court in the *Nicaragua* case, it would have been difficult to produce evidence to satisfy the requirements of state responsibility at the time of the initial military operations. Documents captured in Afghanistan later in 2001, however, might demonstrate that the links between the Taliban and Al-Qa'ida were sufficiently close that Afghanistan, through the acts of what was, de facto, its government, was responsible for the attacks launched by Al-Qa'ida.

³⁸ For an eloquent exposition of the case for this kind of anticipatory self-defence, see D. W. Bowett, *Self-defence in international law* (Manchester: Manchester University Press, 1958), pp. 188ff. There is an extensive body of state and UN practice in support of Bowett's analysis, some of which is considered in Greenwood, 'International law and the United States' air operation against Libya', n. 27, above, pp. 941–5.

of Afghanistan.³⁹ By allowing Al-Qa'ida to operate from the territory which it controlled, the Taliban—and thus Afghanistan—violated the general duty of a state under international law not to allow its territory to be used as a base for attacks on other states.⁴⁰ It also violated specific obligations imposed by the Security Council following the embassy attacks in 1998.⁴¹ At the very least, its position was analogous to that of a neutral state which allows a belligerent to mount military operations from its territory: even though it is not responsible for those operations, it exposes itself to the risk of lawful military action to put a stop to them. Similarly, where a state allows terrorist organizations to mount concerted operations against other states from its territory and refuses to take the action required by international law to put a stop to such operations, the victims of those operations are entitled to take action against those terrorists. The *Caroline* formula on self-defence (discussed above) clearly permitted such action, and the undoubted changes in international law since that time have not abolished this aspect of the inherent right of self-defence, even if that means that the forces acting in self-defence also become engaged in hostilities with the state in question.

The other requirements of self-defence pose fewer problems. The evidence that military action was necessary was powerful and has already been considered. Whether the action taken was proportionate is a matter to be considered in the next part of this article. The possibility that the Security Council might pre-empt the right of self-defence by taking measures of its own does not arise here. Although the council did indeed take such measures when it adopted Resolution 1373 (2001), it made clear in the preamble to that resolution that it continued to recognize the right to take action by way of self-defence. In any event, it is extremely doubtful that a decision by the council to take non-military action can restrict or prevent the exercise of the right of self-defence. The letters quoted above also show that the United States and its allies complied with the reporting requirements of Article 51 of the Charter.

The conduct of the hostilities

Even where a state is entitled to resort to force, its conduct of the ensuing hostilities must also comply with international law. There are two separate elements to this requirement. First, action taken in self-defence must be proportionate or it ceases to be self-defence. Secondly, the conduct of hostilities must comply with international humanitarian law (often referred to as 'the law of armed conflict' or 'the law of war').

So far as proportionality is concerned, it is important to appreciate that proportionality in the law of self-defence is not a matter of 'an eye for an eye' and cannot be assessed by comparing the number killed in Afghanistan with

³⁹ See e.g. J. R. Crawford, *The International Law Commission's articles on state responsibility* (Cambridge: Cambridge University Press, 2002), p. 115.

⁴⁰ See the United Nations General Assembly Definition of Aggression (n. 28 above) and numerous resolutions of the Security Council and the General Assembly.

⁴¹ See, in particular, Security Council Resolutions 1267 (1999) and 1333 (2000).

those killed in the World Trade Center. Just as self-defence, in contrast to reprisals, is a forward-looking concept, so proportionality in self-defence looks forward.⁴² The test is whether the force used is proportionate to the threat it is designed to meet, not to the events of the past. That does not mean that past events are disregarded—the terrible loss of life on 11 September was all too clear an indication of the destructive power of the terrorists—but it is relevant as an aid to determining the scale of the future threat, not as its own yardstick for measuring proportionality. The degree of force employed by the United States and its allies was certainly extensive but, given the scale of the threat, it was not disproportionate.

The second requirement—compliance with international humanitarian law—is entirely independent of the requirements of self-defence. Moreover, the requirements of international humanitarian law may not be discarded however necessary or convenient it may be deemed to do so. There has been an extensive debate about whether international humanitarian law is, or should be, applicable to the response to 11 September.⁴³ It is here, in particular, that the political rhetoric of the ‘war against terrorism’ tends to confuse.

International humanitarian law is designed principally for application in armed conflicts between states (whether or not either side declares war), and its main treaties—the Geneva Conventions of 1949 and the First Additional Protocol of 1977—are formally applicable only in such conflicts.⁴⁴ Another, rather more restricted, body of rules is applicable in an armed conflict within a state. Fighting between the United States and Al-Qa’ida, however, appears to fit neither of these moulds.

In fact, the position is simpler than it seems. When US and allied forces commenced operations they became involved in fighting with the Taliban armed forces. In view of the extent of territorial control by the Taliban at that time, the Taliban forces have to be regarded as the armed forces of Afghanistan and their actions considered as imputable to the state of Afghanistan. In these circumstances, there was an armed conflict between Afghanistan and the United States (and its allies).⁴⁵ Since both Afghanistan and the United States were parties to the four 1949 Geneva Conventions, those conventions became applicable as soon as the fighting started and were equally binding on both parties to the conflict.⁴⁶

⁴² Thus, Argentinian complaints in 1982 that the United Kingdom was using far greater force to recapture the islands than had been employed by Argentina to effect the initial occupation were clearly based on a misunderstanding of the concept of proportionality; the amount of force used by the United Kingdom was determined by—and in law had to be assessed by reference to—the scale of the Argentine forces in the islands at the time of their recapture. Whereas Argentina had faced only a handful of marines and local volunteers in April 1982, the UK Task Force had to retake the islands from 17,000 Argentine troops.

⁴³ See Adam Roberts, ‘Counter-terrorism, armed force and the laws of war’, *Survival* 44, 2002, pp. 7–32.

⁴⁴ For states party to the First Additional Protocol, the protocol and conventions also apply in an armed conflict between a state and a ‘national liberation movement’. Al-Qa’ida would not qualify as such a movement.

⁴⁵ At least initially, this conflict was separate from the internal armed conflict—a classical civil war—being conducted between the Taliban and their Afghan opponents.

⁴⁶ That was the position taken by the International Committee of the Red Cross, among others.

The United States was not a party to the First Additional Protocol and neither was Afghanistan. The protocol did not, therefore, apply to the fighting—not even to the operations of those US allies (such as the United Kingdom and Canada) which were parties to the protocol, for the protocol applies only as between its parties.

In addition, customary international law on international armed conflicts was applicable. That customary law included the principal rules relating to targeting. Following practice in the Gulf conflict of 1990–1 and the Kosovo conflict of 1999, most of the provisions on targeting in the First Additional Protocol are considered to be declaratory of customary law,⁴⁷ and appear to have been accepted as such by the US forces. Under these principles, only military forces (whether regular or irregular) and military objectives constitute legitimate targets. The latter category of military objectives is defined as objects which, 'by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage'.⁴⁸ Even such an object is not to be attacked if to do so would be likely to cause excessive civilian casualties or damage to civilian property.⁴⁹ Where a choice of methods and means of attack are available to the commander, there is a requirement to adopt those likely to minimize the risk to the civilian population. It is too early to say whether, or to what extent, these requirements were complied with in Afghanistan. While there appear to have been some mistakes in identifying targets (an inevitable feature of any conflict), there is little or no evidence of any deliberate disregard for the principles of international humanitarian law on the part of the United States and its allies.

Another result of the armed conflict between Afghanistan and the United States was that the provisions of the Geneva Convention on Prisoners of War (1949) were applicable. That convention is one of the most important parts of international humanitarian law. As Winston Churchill, who spoke from personal experience in the Boer War, once remarked, a prisoner of war is 'the least unfortunate kind of prisoner to be'.⁵⁰ Not only does the Third Convention lay down very detailed requirements for the humane treatment of prisoners of war, it also precludes their being tried or punished for the act of bearing arms or, indeed, for their use of force (however lethal), so long as it complied with international humanitarian law.

The application of the convention became the source of great controversy when the United States began holding significant numbers of what it described as 'battlefield detainees' at the Guantanamo Naval Base in Cuba. The initial US position was that these detainees were not entitled to prisoner of war status, because they were 'unlawful combatants' (a term which was not, as some journalists

⁴⁷ See Christopher Greenwood, 'Customary law status of the 1977 additional protocols', in A. Delissen and G. Tanja, eds, *The humanitarian law of armed conflict: challenges ahead* (Dordrecht: Kluwer, 1991), pp. 93–114.

⁴⁸ Additional Protocol I, Article 52(2).

⁴⁹ *Ibid.*, Article 51(5)(b).

⁵⁰ Winston Churchill, *My early life: a roving commission* (London: Thornton Butterworth, 1930), p. 259.

suggested, invented by the United States but which has long been used to describe combatants who are not entitled, for one reason or another, to take part in conflict but who have nevertheless done so). On 7 February 2002 the United States changed its position. The White House announced that captured members of the Taliban armed forces would be treated in accordance with the Third Convention but would nevertheless not be considered as prisoners of war, because they did not meet the requirements of POW status laid down in the convention. Captured Al-Qa'ida detainees would not be regarded as falling within the scope of the convention at all.⁵¹

Controversial as it is, this policy is largely in accordance with international humanitarian law. The Third Convention accords prisoner of war status to captured members of the regular armed forces of a state, but grants that status to members of irregular groups only if they nevertheless 'belong' to a state and meet four requirements: (a) wearing a fixed, distinctive sign to distinguish themselves from the civilian population; (b) bearing arms openly; (c) being under the command of a person responsible for his subordinates; and (d) conducting operations in accordance with the laws and customs of war. It seems likely that none of the Al-Qa'ida detainees would qualify, even if they were considered as belonging to an irregular group forming part of the Afghan forces, because they did not meet the first and fourth conditions. Taliban combatants would be in a better position if regarded as members of regular armed forces (although it is questionable whether they could be so regarded), but would nevertheless lose prisoner of war status if they did not distinguish themselves from the civilian population. The position would have been different if the First Additional Protocol had been applicable, since the conditions for entitlement to prisoner of war status are significantly more relaxed under the Protocol.⁵²

Status, however, is only part of the story. Whether prisoners of war or not, detainees are not held in legal limbo. Whatever their status, they have a right to humane treatment under customary international law, the relevant principles of which are widely regarded as having been set out in Article 75 of the First Additional Protocol. The use of torture and inhuman or degrading treatment or punishment are thus prohibited, as is the imposition of penalties without a fair trial which meets basic international standards, irrespective of whether the detainees are prisoners of war or not. While the need to interrogate the detainees has frequently been emphasized, the limits within which this may be done are not substantially different for prisoners of war and other detainees—in either case there is complete freedom to question the prisoner but no obligation on the prisoner to answer the questions put (other than the requirement that prisoners of war furnish certain basic information). Moreover, it would be unlawful to use torture, inhuman or degrading treatment as a means of coercing a person to answer questions irrespective of whether he was a prisoner of war.

⁵¹ White House Press Statement, 7 February 2002.

⁵² Article 44; this provision is not regarded as declaratory of a rule of customary international law. See Greenwood, n. 47, above.

Conclusion

It is scarcely surprising that the unprecedented character and scale of the 11 September attacks and the unusual circumstances of the military operations in Afghanistan have made the process of legal analysis more than commonly difficult. That does not mean, however, that contemporary international law is incapable of providing a satisfactory legal framework for those events. On the basis of the foregoing analysis, it is suggested that the following conclusions can be drawn:

1. the hijackings and subsequent killings were crimes under United States law that the United States has jurisdiction to prosecute. Had the International Criminal Court been in existence and had the relevant States been parties to its Statute, the perpetrators of the 11 September atrocities could have been tried by that Court for crimes against humanity;
2. notwithstanding that they were crimes under both domestic and international law, the attacks on the World Trade Center and the Pentagon also constituted a threat to international peace and security and an armed attack upon the United States;
3. the United States and its allies were justified in resorting to force in Afghanistan under the principle of self-defence;
4. the conduct of hostilities in Afghanistan was subject to the general requirement of proportionality and to international humanitarian law applicable to international armed conflicts (although the First Additional Protocol to the Geneva Conventions was not applicable);
5. the detention of captured Taliban and Al-Qa'ida fighters at Guantanamo Bay was subject, as a minimum, to customary international law requirements of humane treatment and some, though almost certainly not all, of the detainees may have been entitled to prisoner of war status.