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MILITARY FORCE AND CRIMINAL JUSTICE: THE US RESPONSE TO 11 SEPTEMBER AND INTERNATIONAL LAW

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1. There is vigorous public debate about whether the U.S.-led coalition in Afghanistan is respecting the laws that regulate conduct in an armed conflict (*jus in bello*). But discussion of whether it was lawful for the U.S. to go to war in the first place (*jus ad bellum*) has been muted. This paper asks whether international law permits the U.S. and its allies to use military force to destroy the Al-Qaeda network in Afghanistan, capture or kill its leaders, overthrow the Taliban regime and use force in the future against other states? If not, should international law change? At a deeper level, the debate is about the best way of dealing with terrorist acts, the relative role to be given to law enforcement approaches, military action and longer-term political and economic strategies. Does international law help in deciding which approaches can be justified and which have priority? Can Afghanistan and other states be held responsible for the 11 September attacks? Can individuals be held responsible and prosecuted? What does a human rights approach to these questions mean and is it helpful?

THE NATURE OF THE 11 SEPTEMBER ATTACKS & THE U.S. RESPONSE

From law enforcement to a military response to “terrorism”

2. The 11 September attacks have led to a change in how the U.S. deals with terrorist attacks. In the 1980s and 1990s the U.S. tackled terrorism mainly through national and international law enforcement efforts, backed up by occasional coercive methods including military strikes justified as self-defence (see below). It sought to arrest, extradite if necessary, try and convict individuals under criminal law. For example, two people were tried and convicted for the bombing of the World Trade Centre in 1993. Osama bin Laden was indicted for the bombing of the U.S. embassies in Tanzania and Kenya in 1998. The Security Council gave support in October 1999 by imposing sanctions under Chapter VII on the Taliban regime for failing to hand-over Osama bin Laden and for not closing down his training camps.

3. Three times in the 1980s and 1990s the U.S. also launched military strikes in response to terrorist acts, targeting alleged terrorist bases and/or government installations, against Libya following the bombing of a night-club in Berlin (1986), against Iraq following an alleged plot to assassinate ex-President Bush in Kuwait (1993) and in Sudan and Afghanistan following the bombing of U.S. embassies in Kenya and Tanzania (1998).¹ But these were one-off air strikes that looked more like acts of punishment or retaliation (see below) than a serious attempt to stop further attacks. Rather than launching a military strike after Libyan agents blew up the PanAm flight over Lockerbie in 1988, the U.S. and the UK used a mixture of negotiations and Security Council sanctions over a decade to force Libya to hand-over the suspects to a compromise court set up specially in The Hague.
4. The U.S. military action in Afghanistan launched on 7 October 2001 is the first time the U.S., or any other country, has launched a high-intensity and sustained military campaign to destroy people and infrastructure of a group accused of terrorism and to overthrow the government of a host state. This is a significant shift in policy. The U.S. now seems to be arguing that sustained military force is a natural and essential, perhaps dominant, element of its strategy against terrorist groups. The 11 September attack is seen as an “act of war” and the U.S. says it is ready to fight a war to defeat Al-Qaeda and “every terrorist group of global reach” (Presidential address to Congress, 20/9/01). The question in this paper is how does (and how should) international law and human rights advocates view this shift in U.S. policy favouring the use of force?

“Apocalyptic” terrorism?

5. This shift in thinking responds to the collective trauma felt by Americans. But it also reflects a belief that Al-Qaeda members are too fanatical, too unconditional, too sophisticated and too global to be defeated by traditional law enforcement methods. Their “goal is remaking the world – and imposing its radical beliefs on people everywhere.” (Presidential address to Congress, 20/9/01). The argument is that recourse to war, rather than exclusive reliance on law enforcement, is a morally and legally justifiable “just war”:

“The perpetrators of the September 11 attack cannot be reliably neutralized by non-violent or diplomatic means; a response that includes military action is essential to diminish the threat of repetition, to inflict punishment and to restore a sense of security at home and abroad. The extremist political vision held by Osama bin Laden, which can usefully be labelled ‘apocalyptic terrorism,’ places this persisting threat well outside any framework of potential reconciliation or even negotiation.” (*Falk [29 October 2001]*)

6. Even without using language of the apocalypse, the attacks were unprecedented. They were far more than a common crime and did mark a new stage in violence by non-state groups. The 11 September attacks:
 - involved a coordinated plan to hijack at least three passenger aircraft and turn them into high explosive weapons that killed indiscriminately;
 - killed more than 3,000 in the World Trade Centre alone;
 - were the largest terrorist attack on U.S. soil in history;
 - struck at hugely symbolic targets at the heart of the perceived economic (World Trade Centre) and military (the Pentagon) dominance of the U.S.;
 - demonstrated that operatives linked to Al-Qaeda thought to be responsible were part of a wealthy and sophisticated organisation said to be spread across scores of countries, capable

¹ The air assault against Libya targeted alleged terrorist installations, killing 37 people and injuring 93. The missile strike against Baghdad hit Iraqi intelligence headquarters. 224 people were killed and 5,000 injured in the two African U.S. embassy bombings in 1998 and in response the U.S. launched cruise missile attacks in August 1998 on alleged Al-Qaeda targets in Sudan and Afghanistan.

- of carrying out a complex strategy, undetected during years of preparation;
 - were the culmination of years of progressively more audacious attacks suspected of having been planned by the Al-Qaeda network, including the 1998 bombings of U.S. embassies in Tanzania and Kenya and the October 2000 attack on the *USS Cole* in Yemen;
 - reflected the intention expressed by Osama bin Laden in a ‘ruling’ in 1998 that it was “an individual duty for every Muslim” to “kill Americans and their allies, civilians and the military”;
 - may have reflected a new relationship between violent non-state groups and a host state in that Al-Qaeda may have had financial and political strength equal to or greater than the Taliban regime in Afghanistan – it is not clear who controlled whom.
7. International law must reflect and respond to the realities of the world. Can international law cope with this apparent escalation of international violence by a non-state group? On the other hand, the attacks should be put in historical perspective. Terrorist acts have been committed throughout history and many have killed hundreds at a time. Lawyers have a saying that “hard cases make bad law.” 11 September should not be the pretext for irrevocably changing international law so that it no longer provides the normative restraint that is an essential part of our system of international checks and balances.

How has the U.S. responded to the 11 September attacks?

1. **War in Afghanistan:** The U.S. has launched a sustained military action against another state and an armed group in that country, in order (i) to capture or kill at least Osama bin Laden and other Al-Qaeda leaders, (ii) to destroy the ability of Al-Qaeda to launch further attacks against U.S. interests and (iii) to overthrow the Taliban regime because it refused to close Al-Qaeda training camps and to hand-over Al-Qaeda leaders.

2. **Force in other states:** The U.S. has threatened coercive action, including military force, against Al-Qaeda in other countries and any terrorist group with “global reach” and against any state that “harbours” or supports these groups, including acquiescing in their presence in the country. The tactics may include lifting the 1976 presidential ban on U.S. participation in assassinations.

3. **Law enforcement:** More than 1,000 people suspected of being linked with Al-Qaeda or other terrorist organisations have been arrested, a handful so far indicted and constitutional fair trial guarantees have been removed for foreigners who will face a fast-track judicial process.

4. **Funding:** Aim to destroy sources of funding for proscribed organisations, including freezing assets and closing down businesses suspected of laundering funds.

5. **International coalition & cooperation:** The U.S. is seeking similar law enforcement and financial action in other states and is promoting stronger multilateral cooperation on law enforcement, including pushing the UN to finalise a comprehensive treaty on international terrorism. Central to all the strategies is support from a loose coalition of states.

6. **Assist other states to crush terrorist groups:** The U.S. is providing financial and military aid to governments to act against armed opposition or terrorist groups in their countries. There may be less international scrutiny of the methods used.

“TERRORISM”

8. The word “terrorist” has been applied to the 11 September attacks more than any other label. They were undoubtedly acts of terror and states have unambiguously condemned international terrorism as a threat to international peace and security and a violation of the UN Charter. But what does “terrorism” mean in international law? Unfortunately, the term obscures the real legal issues. It is unnecessary and unhelpful in deciding whether a crime has been committed and what should be the appropriate response. Calling the attacks terrorist does not help in assessing whether in law they justify a military response in self-defence. This is because the label “terrorism” lives more in the elastic rhetoric of international politics than in the slightly more precise realm of legal rules on force and accountability.

What is a “terrorist” act?

9. States have been unsuccessfully trying to agree a definition of terrorism in international law since at least 1937.² In November 2001 this yet again prevented agreement in the UN on a comprehensive convention on international terrorism. Negotiations are bogged down over the old controversy that “one man’s terrorist is another man’s freedom fighter”. Arab states argue that state terrorism should be included, in order to cover Israeli and U.S. military attacks in the Middle East (claimed by the U.S. and Israel to be in self-defence), while the U.S. and others want to limit the convention to acts by non-state actors. Arab states also want to exclude national liberation movements from the ambit of the convention. In reality, a state is just as capable of carrying out terrorist acts as non-state groups, as Greenpeace found out when French government agents blew up *The Rainbow Warrior* in 1985. Equally, a guerrilla group fighting government forces or other rebel groups are not terrorists unless they perform a terrorist act.
10. The problem in the UN is that for political reasons states focus too much on *who* could be labelled a terrorist rather than what a terrorist *act* looks like. In most cases, even if you cannot recognise a terrorist, “you know a terrorist *act* when you see one.” Most states and commentators would probably agree on some core ingredients³ of the definition of international terrorism. Terrorist acts are generally considered to include the threat or actual use of violence to create extreme fear and anxiety in a target group in order to coerce it to meet certain political or quasi-political objectives (Schachter [1993]).⁴ States could perhaps agree a definition of terrorism if they limited it to attacks, aimed at civilians, that spread terror. This would in effect apply to peacetime the existing prohibitions in international humanitarian law of attacks on civilians during armed conflicts. Indiscriminate violence against civilians, even by national liberation movements, is not morally or legally defensible.

Human rights advocates & the political (and legal) quagmire

11. Human rights advocates should be wary of when and how they invoke the term terrorism, for at least three reasons:

² One 1983 study found 109 different definitions of terrorism between 1936 and 1981 and more have appeared since then. Study by Alex Schmid, cited in Arend & Beck (1993) at p. 140.

³ The UN General Assembly declared in 1997 that “criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstances unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or other nature that may be invoked to justify them”, GA Res. 51/20, *Measures to eliminate international terrorism*.

⁴ This would also cover the more unconditional or ill-defined objectives of groups such as Al-Qaeda which probably can never be met by any concessions or negotiations by the target, in this case the U.S..

12. First, as already discussed, the term “terrorism” is still too vague in law and there is no accepted legal framework for analysing a terrorist act. It is still necessary to use several bodies of law to decide whether a particular “terrorist” act amounts to a crime under international law, whether a state is responsible for the act of a private group and what should be the appropriate response.
13. A number of specific terrorist-related acts have been defined and prohibited in a patchwork of 12 international treaties⁵ (and seven regional treaties), including hijacking, sabotage and violence on aircraft that endangers safety, sabotage at sea, hostage-taking, attacks on diplomats and financing of those who commit these acts. As mentioned above, armed forces and rebel groups are also already prohibited by the 1949 Geneva Conventions and Protocols from terrorising civilians during an armed conflict, whether international or internal. Terrorist acts could also amount to crimes against humanity or common crimes under national law (see below). The anti-terrorist treaties and the Geneva Conventions set up a form of universal jurisdiction so that a state that has ratified these treaties would be obliged to prosecute or extradite to another country anyone found on its territory who is suspected of having committed one of the outlawed acts in relation to the 11 September attacks.
14. Secondly, human rights advocates risk getting caught up in use of the term “terrorism” as a political weapon. Many states welcome the “war on terrorism” because it provides a protective, moral shield, behind which they can denounce and de-legitimise violent opposition forces in their own country as “terrorist” – whether or not those groups violate international law. The draft UN comprehensive terrorism treaty, for example, could have been interpreted as criminalising the use of any force by armed opposition groups in internal conflicts. Existing international law only prohibits armed groups using force that violates limits on the conduct of war, such as attacking civilians. (Human Rights Watch, 22 October 2001)
15. Thirdly, the U.S. campaign against terrorism may reflect a drift to what could be called the militarisation of the response to terrorism. If the U.S. now considers military force to be an integral part of tackling international terrorism, including against unidentified future targets, the U.S. is weakening the priority international law gives to the peaceful resolution of conflict and drives the world further away from tackling the deeper political, economic and social causes of many manifestations of terrorism in the world. The characteristics of the Al-Qaeda network are probably still unusual, although clearly potentially devastating. Two U.S. professors articulated this simplistic view of international terrorism after an internal terrorist act, when Timothy McVeigh blew up a federal office in Oklahoma 1996, killing 168 people:

Terrorism is not a social problem susceptible to civilian intervention and law enforcement, but a military threat and menace to our civilization appropriate for military repulsion. (Crona & Richardson [1996] at p. 357)

16. At the same time, it must be recognised that the UN and law enforcement framework has proved totally inadequate to respond to escalating “terrorist” acts and the threat of even more destructive use of biological or chemical weapons. States have not yet allowed a coherent and effective international law on terrorism to emerge. Some have argued that international law cannot cope with the new type of groups that use terrorist tactics:

It is the case that the non-state source of this global terror, and its grandiose agenda of civilizational war, overwhelms the most authoritative frameworks, international law and the UN. Both are anchored too directly in a world of sovereign states to be really useful in shaping an overall response (Falk [24 December 2001])

⁵ Despite the writings of some scholars, international terrorism as such is probably not yet an international crime under customary international law and so is only illegal under international law to the extent that particular terrorist acts are prohibited under specific treaties.

17. If this is true it was emerging well before the 11 September attacks.

IS THE U.S. MILITARY CAMPAIGN A LEGITIMATE ACT OF “SELF-DEFENCE”?

Force is prohibited and “self defence” is a narrow exception

18. The UN Charter says that states must resolve their disputes through peaceful means⁶ and should not use the threat or use of force against other states.⁷ Despite some lingering academic controversy, the UN Charter has established that there are only two exceptions to this ban on the use of force. A state may exercise self-defence under Article 51⁸ to repel an armed attack. Alternatively, a state may carry out military action authorised by the UN Security Council under Chapter VII to restore or maintain international peace and security. As an exception to the prohibition on force, the right to self-defence is interpreted by lawyers in a strict way, erring on the side of maintaining rather than weakening the general rule. Can the military campaign in Afghanistan be justified under these exceptions and is international law able to cope with the nature of the 11 September attacks and the response of the U.S. and its allies?
19. It should be emphasised that force in Afghanistan can *only* be legally justified as self-defence or if authorised by the Security Council. Some have called the military campaign a “just war,” but this is a moral doctrine based on religious thinking and not a legal term. It tries to justify war by examining the causes, means and ends of the war, but is too abstract and vague to be of use in assessing the response in law. The military response to 11 September also has nothing to do with the doctrine of “humanitarian intervention,” which argues that states should be able to militarily intervene in another state to stop massive loss of life which cannot be halted by any other means.
20. Military force in self-defence is justifiable (Oppenheim [1996]) under Article 51 if an “armed attack” is launched against a state or is immediately threatened, if there is an urgent need to repel the attack and there is no practicable alternative (necessity). The purpose of this exception is to allow states to repel and prevent further, ongoing attacks. It is not to punish or retaliate, which would be a “reprisal,” prohibited by international law. Only the amount of force necessary to repel or prevent the attack must be used (proportionality).

“Armed attack”

21. The drafters of the UN Charter envisaged that a state might have to unilaterally defend itself against traditional attacks by the armed forces of a state, such as South Africa’s intervention in Angola in the 1970s. Since then, some states have tried to expand its meaning. The most far reaching have been the claims by the U.S. and Israel to act in self-defence against past or anticipated terrorist attacks. They have invoked the law on self-defence to justify the abduction and assassination of suspected terrorists and to launch limited missile or air strikes against alleged terrorists bases and host states. Some incidents involved pre-emptive strikes on the grounds that they anticipated likely terrorist attacks and responded to a pattern of past attacks. In reality they sometimes looked more like punitive reprisals.

⁶ UN Charter, Article 2(3).

⁷ The oft-quoted Article 2(4) says states “shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”

⁸ UN Charter, Article 51: “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 ...”

22. How do the 11 September attacks compare to past incidents and do they fit within the Article 51 meaning of “armed conflict”? It is accepted that minor and isolated or sporadic attacks are not enough and the attack must be part of a continuing, consistent pattern of violent actions.
23. In the light of state practice, the 11 September attacks may well have been serious enough to be considered an “armed attack.”⁹ The magnitude of the 11 September assaults dwarfed previous terrorist attacks that led to military reaction, such as the bombing of the Berlin night-club in 1986 or even the first bombing of the World Trade Centre in 1993. In this case, unlike the U.S. blockade of Cuba in 1962 or the 1982 Israeli attack on Iraqi nuclear installations (both justified as acts of self-defence) there was an actual attack to respond to and it was on U.S. soil. But magnitude alone is not enough. Not every devastating terrorist act amounts to an armed attack. If Al-Qaeda was responsible for previous attacks as well as that on 11 September, there may well have been the all-important pattern of violent actions, which were also evidenced by the past expressed intention of Osama bin Laden to continue attacking U.S. targets. However, if further attacks were in fact not imminent or likely – few know how detailed or reliable were the U.S. the intelligence reports – the 11 September attacks would not have justified the use of force in self-defence, no matter how dreadful they were.
24. So, if the 11 September violence had been carried out by the armed forces of another state, there is an argument that they justified the resort to force in self-defence, though there are still many unanswered questions. The law starts to breakdown, however, when we ask whether Al-Qaeda, a non-state actor, can in law be responsible for an “armed attack”? Is Afghanistan also responsible in law? Was the U.S. permitted by law to use force against both?

Al-Qaeda as a target

25. The UN Charter was drafted in an age of conflicts between sovereign states and is silent on whether non-state actors can also be held responsible for an “armed attack” justifying a coercive response. Is it logical to argue that international law should catch up with the realities of a world in which states’ monopoly of power is being challenged by private groups? Some non-state armed groups, even loose networks such as Al-Qaeda, have greater international reach, more political influence and better organisation, discipline and wealth than the armed forces of some states. 11 September demonstrated this.
26. But we should also be cautious. Should any state be allowed to strike in self-defence against an armed group in another country if that state itself is not also responsible in some way for the armed attack? Would it have made sense if the U.S. were allowed in the past to launch attacks against the Red Brigade in Italy without the consent of the Italian government? The world is still divided up into states and the state is still the primary unit of international relations. States at least pay lip-service to the rule that another state must be involved before they can use unilateral force in self-defence across borders. Otherwise, this would significantly expand the situations in which states can use such force.

The Taliban as a target

27. Under international law can the U.S. hold the Taliban regime responsible for the 11 September attacks and therefore use force against it? If not, the legal justifications for the military campaign start to fall apart. The Taliban did not directly carry out the attack. Was it sufficiently connected with Al-

⁹ In a brief letter the U.S. told the Security Council that the “massive and brutal attacks ... specifically designed to maximise the loss of life” and the “ongoing threat” justified the exercise of the right of self-defence. See *Letter dated 7 October 2001 from the Permanent Representative of the USA to the UN addressed to the President of the Security Council*, UN doc: s/2001/946, 7 October 2001.

Qaeda? There are at least six levels of possible association between a state and a private armed group¹⁰:

- Agents of the armed group are actually state officials (e.g. Libyan agents bombing aircraft over Lockerbie).
 - The state employs – organises, equips, commands and controls – unofficial agents or mercenaries.
 - The armed group is independent but the state gives it financial aid or weapons or training facilities on its territory.
 - The state gives no active assistance but acquiesces to the group’s presence.
 - The state gives neither active nor passive support to a group which nevertheless uses its territory as a base.
 - The armed group is independent and has financial and political strength equal to or greater than the state, so the state may be unable to prevent the group operating on its territory.
28. The relationship between Al-Qaeda and the Taliban probably falls under level (iii) (at least by actively providing land for training facilities), (iv) or perhaps (vi), though probably not (v). Everyone agrees that in situations (i) and (ii), which do not apply to Afghanistan and Al-Qaeda, an armed attack is attributable to the state and if the other conditions are met, force against it in the name of self-defence is allowed. In relation to situations (iii) – (vi) the law is more confused. There is controversy and a credibility gap between commentators/judges and what states do and say.
29. In 1986 the International Court of Justice (ICJ) considered the U.S. support for the Nicaraguan Contras against the Nicaraguan Sandanista government. The U.S. claimed it was acting in collective self-defence and responding to attacks by Nicaragua against Costa Rica, Honduras and El Salvador. The court decided that the finance, training, equipment, arming and organisation of rebels (as in level iii above) is not sufficient to make the sponsoring state responsible for an armed attack (*Nicaragua* case¹¹). The court said a state would need to have a higher level of “effective control” over the rebel group to be held responsible for its acts. Such assistance therefore would not be sufficient to justify unilateral force against the state supporting the group. It follows that under the *Nicaragua* test the even looser associations of acquiescence (level [iv]) or mere presence (level [v]) would not make the state responsible. Under this test the Taliban were not responsible for the 11 September attacks. A state is not responsible merely because an international wrong occurs on its territory – viz there is no strict liability. Mere knowledge is not enough, toleration and even encouragement is not sufficient. The state must be able to prevent or control the wrong. *Nicaragua* still stands as the authoritative view of the ICJ, yet as the years pass by it is ever more in conflict with state practice.¹²
30. Individual states and the UN have gone far beyond *Nicaragua*. The U.S. launched missiles against targets in Sudan and Afghanistan in 1998 because it said the regimes failed to shut down the Al-Qaeda facilities. Israel attacked the PLO headquarters in Tunis in 1985 because it said Tunisia had a duty to prevent attacks by the PLO from its territory. The Security Council expects states to take proactive steps against terrorist groups in their territory. It imposed sanctions on the Taliban in 1999 for failing to close terrorist training camps. Acting under Chapter VII the Security Council has imposed a binding legal obligation on states to “refrain from providing any form of support, active or

¹⁰ For the first five categories, see Cassese (1989). See also Arend & Black (1993).

¹¹ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA)*, 1986 ICJ, 14, 27 June 1986.

¹² To be fair, *Nicaragua* has been heavily criticised by several scholars and if the question was put to the ICJ again perhaps it would follow the famous dissenting judgements in *Nicaragua* of Jennings and Schwebel, which said that logistical support with supply of weapons was enough to make a state responsible for the armed attacks by the rebel group.

*passive*¹³ to terrorist groups. The General Assembly has declared that states must “refrain from organizing, instigating, facilitating, financing, *encouraging* or *tolerating* terrorist activities...”¹⁴

31. It is unclear what passive support or toleration mean, though human rights advocates can draw on their experience with these terms in the context of state tolerated death squads in Latin America and elsewhere. Actual and threatened military action since 11 September may be accelerating a drift to a form of strict liability, a presumption that if an international terrorist group is present in a country the government will be responsible for armed attacks launched by the group and could be the target of military action in self-defence. What if a government is so weak that it cannot control the armed group, or even is itself controlled by the armed group? Who controlled whom between Al-Qaeda and the Taliban? The facts are anything but clear. Should the failed state of Somalia be held responsible for the acts of terrorist groups on its territory? Israel demands that the Palestinian Authority (PA) close down radical Islamic groups, but does Yasser Arafat have the might to do so? Israel assumes he does. If the PA was a sovereign state would it be responsible under international law for the terrorist acts of these groups? These are open questions.

Force must be proportionate and necessary

32. Force cannot be used in self-defence unless it is necessary, in the sense that there is no other reasonable alternative to avert the threat, and proportionate. To be “necessary” the U.S. military campaign must have first respected the hierarchy of responses set out in the UN Charter. It had a duty first to exhaust peaceful means to resolve the problem.¹⁵ It is a matter of judgement whether the U.S. first exhausted peaceful methods. On 20 September President Bush set out ultimatums to the Taliban regime to hand over Al-Qaeda leaders, close Al-Qaeda training camps and allow the U.S. access to verify the camps are closed. The campaign started 17 days later. The U.S. argued that the danger of further attacks by Al-Qaeda was so great that it could not waste time on further (ineffective) diplomatic efforts. In contrast, in 1986 Libya was also accused of sponsoring an ongoing campaign of terrorist attacks, yet the U.S. and UK pursued years of difficult negotiations and many impasses before Libya agreed to hand over the agents suspected of blowing-up the PanAm flight over Lockerbie. The danger is that in the shadow of 11 September and the drift to robust military campaigns against terrorism, any future terrorist attack might be used to justify force without having to demonstrate that such unilateral force is urgent, necessary and the only practicable option.
33. Is this sustained, high-intensity military campaign necessary and proportionate to repel the continuing threat of attacks after 11 September? Paradoxically, this unprecedented use of military force to destroy the ability of Al-Qaeda to operate from Afghanistan might be more justifiable than previous uses of the right to self-defence because it really has appeared to stop Al-Qaeda using Afghan soil. Perhaps it is more honest than past one-off air strikes against Libya, Sudan and Afghanistan that did little to stop any future armed attack and only satisfied feelings of revenge. Whether the methods chosen to wage the war are necessary and proportionate is judged against standards in the laws of armed conflict.
34. The U.S. also set out to destroy or overthrow the Taliban regime. There could be considerable debate about whether it was necessary to destroy a government because of the “decision of the Taliban regime to allow the parts of Afghanistan that it controls to be used” by Al-Qaeda. The U.S. and UK repeatedly justified going after the Taliban because the regime was “brutal,” repressed its people and

¹³ Security Council Resolution 1373 (2001), 28 September 2001, emphasis added.

¹⁴ UN General Assembly, *Declaration on Measures to Eliminate International Terrorism*, annexed to Resolution 49/60, 17 February 1995, emphasis added.

¹⁵ Cassese (1989). See also UN Charter, Article 33(1) which says that where a dispute between states endangers international peace and security, the states “shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement ... or other peaceful means of their own choice.”

committed serious human rights violations. This has little to do with using force to repel an armed attack.

Other states as targets

35. The U.S. has told the Security Council that “we may find our self-defence requires further actions with respect to other organisations and other States.”¹⁶ The UK Defence Secretary Geoff Hoon said in December that the UK may need to destroy terrorist cells in other countries and “coerce regimes and states which harbour or support international terrorism, with the threat and ultimately the use of, military force in the event that diplomatic and other means fail.”¹⁷ This is a military argument of forward defence as a deterrent. But using military force at an unspecified time in the future against unspecified targets, months later, is too distant from the original attack. It goes beyond the purposes of the law of unilateral self-defence. Force in self-defence must be used only to *repel* an attack. The longer the delay after the original attack, the weaker is the argument that unilateral force is needed. Nor could it be justified as an exercise of “anticipatory self-defence” which, if allowed at all, only permits a state to use pre-emptive force before an armed attack that is evidently *imminent* (Oppenheim [1996] at 421). The Security Council may chose to authorise military action in the “war on all terrorist organisations with global reach” but this cannot be justified under the law of self-defence.

The Security Council

36. The Security Council has not expressly endorsed the U.S. claim to be acting in self-defence, but neither have its members openly challenged the legality of the actions. NATO, however, by invoking the collective self-defence provision in its treaty has recognised 11 September to be an armed attack. Security Council resolutions have ambiguously “recognised” or “affirmed” the abstract right of individual or collective self-defence in the introductory or preambular parts of post-11 September resolutions, without passing judgement on the actual U.S. response. This is not unusual in Security Council practice. The quality of legal debate is often superficial.
37. Historically the U.S. is one of the few states to claim very wide rights of self-defence to anticipate attacks and respond to past terrorist and other attacks. The majority of other states articulate a much narrower concept of self-defence (Gray [2001]). However, states are often reluctant to properly critique such claims in the Security Council unless it is in their immediate political interests to do so. States have felt intense political pressure from the U.S. and its allies. A number of them have their own armed groups against which they would wish to have a free hand to deal with under the umbrella of the “war on terrorism.”
38. States only have a temporary right to use unilateral force in self-defence, until the Security Council decides what action, if any, to take to maintain international peace and security. In this case the Security Council has stated that the 11 September attacks did threaten international peace and security. But it will not have properly taken responsibility for the situation and ended the U.S.’ response in Afghanistan under the right to self-defence until it authorises a military force to maintain security in Afghanistan on its behalf.

¹⁶ Letter dated 7 October 2001 from the Permanent Representative of the USA to the UN addressed to the President of the Security Council, UN doc: s/2001/946, 7 October 2001.

¹⁷ UK Defence Secretary speech at centre for defence studies, King’s College London, reported in *The Guardian* 6 December 2001.

Expanding the right to self-defence

39. The U.S. response to 11 September is exerting considerable pressure to expand the exceptional situations in which a state may resort to force in self-defence. First, there appears to be a push to lower the degree of support for an armed group necessary before a state can be said to be responsible for attacks by that group. This will exacerbate the existing gap between the law as it has been interpreted by the ICJ and the reality of state practice and create ambiguities which can be exploited to further weaken the prohibition on force. Secondly, the right to self-defence has been the umbrella under which a government in this case has been removed, and partly justified because the regime committed human rights violations that were serious, but unrelated to the 11 September attack. Thirdly, the U.S. and UK have threatened to strike against states beyond Afghanistan and terrorist groups in their territory. There is a certain attraction and probably even military sense to such pre-emptive strikes. But it does not accord with the conscious decision by the founders of the UN to put strict restraints on the exceptional use of unilateral force. Some would argue that the law must be updated to cope with a new and complex reality of violent private groups with international reach. It is clear that either state practice or the law will need to change.

“ACT OF WAR” & LAWS OF ARMED CONFLICT

40. The 11 September attacks have been called an “act of war.” Indeed, if they amounted to an “armed attack” legally justifying resort to military force in self-defence, it seems strange if they did not also mark the beginning of an armed conflict under international law. But the laws of armed conflict are not well adapted to the rise of global armed groups.
41. From the launch of the U.S. military campaign on 7 October 2001 the U.S. and its coalition were engaged in an international armed conflict against the Taliban (and probably also Al-Qaeda forces integrated into Taliban forces). The combatants in this war must abide by the rules set out in international humanitarian law, especially the four Geneva Conventions. It is not clear, however, whether the 11 September attacks themselves marked the beginning of an armed conflict. If the relationship between Al-Qaeda and the Taliban was so close that the Taliban could be said under international law to share responsibility for the 11 September attacks (see above), then the answer is yes. But if the Taliban are not responsible, then under existing international humanitarian law there was no armed conflict as at 11 September, and there would not be one now except for the campaign in Afghanistan.¹⁸ This may be a new, hybrid type of armed conflict, between international armed groups and foreign states (Duffy [2001]). However, international terrorism by non-state armed groups is not new. It is too early to say whether the law of armed conflict should adapt. We know too little about the Al-Qaeda network and its impact, especially if such groups have sufficient organisation and command structure to be rightly considered a party to a conflict.
42. Some U.S. commentators have argued for years that terrorist attacks should be considered part of an armed conflict, because it would justify a unilateral military response and avoid having to rely on the restrictive law of self-defence (e.g. Erickson [1989], Larschan [1986], Crona & Richardson [1996]). Applying international humanitarian law would certainly accelerate the drift to a military response to terrorism and reduce the scope for a human rights and criminal justice approach. Targets in an armed conflict are wartime enemies who can be killed in combat. In contrast, suspects in the criminal justice system must be arrested and given a fair trial and lethal force can only be used when strictly necessary to save life and limb.

¹⁸ Broadly, international armed conflicts are between states. Within borders, internal conflicts are between a government and an armed group or between armed groups, as long as the armed groups have sufficient characteristics, including sufficient command structure.

43. Applying the laws of armed conflict to a terrorist act seems to complicate the analysis unnecessarily and would only assist the advocates of force if used selectively. For example, if the attack on the World Trade Centre was considered to be part of an armed conflict it would amount to a war crime, but this is not necessary since other equally grave international crimes also apply, such as crimes against humanity (see below). On the other hand, the Pentagon, as a military command building, might be a legitimate target if international humanitarian law applied, though not if it was a crime against humanity committed in peace time.

INDIVIDUAL CRIMINAL RESPONSIBILITY: CRIMES AGAINST HUMANITY & THE CRIMINAL JUSTICE APPROACH

44. There is growing acceptance that the 11 September attacks amounted to crimes against humanity. Crimes against humanity include systematic or widespread acts of murder and extermination when directed against a civilian population.¹⁹ The characteristics of the attacks support this conclusion. The magnitude and scale of the attacks, including the number of victims, are sufficient to call them “widespread”. The attacks involved a high degree of methodical planning; if carried out by Al-Qaeda agents they reflected a policy to target U.S. civilians, and they appear to have been part of a pattern of repeated attacks. These all point to the “systematic” nature of the attacks.
45. The attacks also amount to other crimes. They would obviously amount to murder in any country. Elements of the attacks are crimes under the various anti-terrorist treaties (which have been incorporated into national law by the U.S.) including hijacking and violence aboard aircraft. War crimes are similar to crimes against humanity, but committed during an armed conflict. However, because an armed conflict probably did not exist as at 11 September (see above), war crimes would not be relevant.
46. What are the implications of characterising 11 September as a crime against humanity or other international crime? First, individuals can be personally prosecuted, regardless of whether a state or non-state actor is responsible.
47. Secondly, Crimes against humanity are subject to universal jurisdiction. This means that any country may arrest and prosecute a suspect, regardless of where the crime was committed or the nationality of the victim or perpetrator. This is a way of demonstrating that all states have a concern to stop such crimes - a crime against humanity is an attack on the interests of the entire international community and not just one state.
48. Thirdly, unlike many domestic crimes, no statute of limitations applies, which means that a suspect can be prosecuted no matter how many years have passed since the crime was committed. It is also not permitted under international law to grant anyone an amnesty for such a serious crime.
49. Fourthly, in which jurisdiction should the suspects related to the 11 September attacks be tried? There are at least nine options for prosecutions (Scheffer [2001]), with different degrees of national and international involvement. In practice, suspects are most likely to be tried in the U.S. and in the domestic courts of other countries that detain them. The U.S. is the natural place to try all the suspects because the “territorial principle” – the place where the crime occurred – is the strongest in

¹⁹ Although the law on crimes against humanity is still developing and there is still some ambiguity to the term, its main characteristics are settled. Apart from murder and extermination it also includes widespread or systematic acts of enslavement, torture, deportation or forcible transfers of population, arbitrary imprisonment, enforced disappearances of persons, persecutions on political, religious, racial or gender grounds, and rape, sexual slavery and other serious forms of sexual violence. Genocide and apartheid are also crimes against humanity. Apart from customary international law the main definitions of a crime against humanity are found in the draft statute of the International Criminal Court and the statutes of the International Tribunals for the former Yugoslavia and for Rwanda.

the law on choice of jurisdictions. Other countries, however, could claim jurisdiction if the suspected perpetrator or the victim were of their nationality. Any country could prosecute if its laws recognise universal jurisdiction over the necessary international crimes. Controversy will continue to rage about whether a fair trial is possible in the U.S., especially since President Bush established Military Commissions to try foreign suspects. These Commissions will weaken fair trial rights, presumably because the evidence may not be strong enough to secure a conviction in regular and fair civilian trials. However, the fairness of trials in any state that lost its nationals on 11 September could also be questioned.

50. Nevertheless, there is a strong positive reason to include some international dimension to the trials. The leaders of the coalition against terrorism have themselves internationalised the crimes, repeatedly calling them attacks on the international community, on “civilisation,” on “democracy”. It would be a powerful statement of global condemnation and rule of law to have the perpetrators tried in a court with an international dimension. Options include an *ad hoc* court set up by the Security Council, a court set up by treaty between a group of states outside the UN framework or hybrid courts in particular countries with judges from other countries, all of which have been done before.
51. The label crime against humanity is not without difficulties for human rights advocates. The more horrific the attack and the likelihood of further atrocities, the greater is the imperative to respond swiftly and forcefully, possibly even with military force. After all, some human rights and humanitarian workers call for states to intervene militarily in another country to stop mass slaughter, although humanitarian intervention is not at issue here. However, the concept of a crime against humanity fits squarely in the criminal justice model. It suggests that perpetrators should be arrested and brought to justice in a court room and not a battlefield.

Are military force and criminal justice compatible?

52. The U.S. and its allies have repeatedly said that a primary objective of the “campaign against terrorism” is to bring perpetrators to justice. They have pursued both criminal investigative and military strategies. To what extent are these two approaches compatible?
53. International criminal investigations and prosecutions usually rely on intensive law enforcement and judicial cooperation between states, mutual assistance in criminal investigations, multilateral treaties on specific crimes such as in the area of terrorism and bilateral extradition treaties. Coercion, however, has also been used to support criminal justice. The Security Council itself has circumvented normal extradition processes by demanding that states hand-over suspects to the international criminal tribunals for the former Yugoslavia and for Rwanda. Although the results were disastrous, the Security Council authorized the UN in Somalia in 1993 to use force to apprehend those responsible for attacks on UNOSOM II. Bringing perpetrators to justice can also be the by-product of war (not usually the primary aim), such as the prosecutions at Nuremberg and Tokyo following the Second World War or the handing over of Slobodan Milosevic to The Hague following the use of force in Kosovo.
54. Some would argue that coercion, including military force, necessarily complements and supports criminal justice. After all, the human rights spirit is not pacifist. The Universal Declaration of Human Rights itself recognizes that people may, as a last resort, use violence to combat tyranny. Speaking in 1993 in the context of the war in the former Yugoslavia, the then Secretary-General of the Council of Europe, quoted Pascal:

Justice without force is impotent: force without justice is tyrannical. Justice without force is contested, because there are always wicked people; force without justice is accused. It is therefore necessary to bring

justice and force together; and for that purpose, to ensure that whatever is just is strong or that whatever is strong is just.

55. Despite these arguments, military force and criminal justice do seem to sit uncomfortably with each other. The logic of war means destroying or defeating military and political structures, imposing collective responsibility on enemy armed forces and accepting at least some unavoidable civilian deaths and suffering. It is a political response and is not based on fine standards of proof. It is immediate, dramatic, often (though not always) quicker than drawn out diplomatic or judicial strategies. The theoretical limits on the conduct of war are almost always violated by all sides at some stage in a conflict.
56. In contrast, the logic of criminal justice emphasises the rule of law, order, fairness, clear evidence and individual responsibility. It is less overtly political than military force if implemented justly and strictly according to the letter and spirit of the law. It claims to be objective in enforcing pre-established rules of behaviour and in releasing suspects from punishment if the judicial standard of proof is not met. It can help victims by revealing the truth about past crimes, while information in the context of a war is intensely political and usually restricted. Criminal justice is slower and more cumbersome and can demand extraordinary patience before an investigation, arrest and trial reach a result.
57. The use of military force can cut short the criminal justice process. The use of lethal force will often kill the very people who are being pursued by the justice system, as has happened in Afghanistan. This would be exacerbated if states began again to use assassination as a weapon. The use of military force to respond to terrorist acts or other violence by individuals and groups tends to weaken the gradual development of a system of international criminal justice which puts its faith in the logic of individual criminal justice as a deterrent and one strategy to tackle serious injustices and grievances that lead to conflicts.
58. International law requires states to exhaust peaceful means before resorting to force, whether collectively through the Security Council or when resorting to unilateral force in self-defence. The law as set out in the UN Charter privileges peaceful means, including judicial. This, however, begs the question about what should be done if the normal inter-state mechanisms for cooperation in criminal justice matters fail or are perceived as being too slow to meet an urgent situation? Whether the criminal justice approach should be abandoned or at least be made subservient to a military approach is a matter of judgement. International law is of little help. But the role of a human rights advocate is to favour the rule of law and criminal justice approaches, to interpret narrowly exceptions to the prohibition on the use of force and to emphasise the need to tackle the real and perceived human rights grievances and injustices, including economic and political inequalities, that underlie so much of the resort to terrorism.

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