

The Status of the Taliban: Their Obligations and Rights under International Law

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I. Introduction

The attack on the Towers of the World Trade Centre in New York and the Pentagon in Washington on 11 September 2001 and the reaction of

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the United States and its allies to this has been assessed controversially under international law.

In their assessment political statements and legal writings have touched upon various issues such as self-defence,¹ the role of the Security Council² and the applicability of international humanitarian law.³ Only few voices, though, have considered the status of the *Taliban* not only as a target of military action by the United States and its allies but also as an addressee of Security Council resolutions. The question what status the *Taliban* enjoyed under international law or what status may have been attributed to them by the Security Council is possibly of relevance for some of the issues addressed and discussed controversially, so far. Apart from that and, more generically, it is worth reflecting whether the traditional views concerning subjectivity under international law should not be reconsidered due to the actions of the Security Council *vis-à-vis* the *Taliban*.

This contribution on the status of the *Taliban* necessarily proceeds from international law. Attributing the *Taliban* some rights thereunder, is not meant to detract from the suffering they have brought to the

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- ¹ C. Tomuschat, "Der 11. September 2001 und seine rechtlichen Folgen", *EuGRZ* 28 (2001), 535 et seq.; J. Delbrück, "The Fight Against Global Terrorism: Self-Defence or Collective Security as International Police Action?", *GYIL* 44 (2001), 9 et seq; T.M. Franck, "Terrorism and the Right of Self-Defence", *AJIL* 95 (2001), 839 et seq.; S.D. Murphy, "Terrorism and the Concept of 'Armed Attack'", *Harv. Int'l L. J.* 43 (2002), 42 et seq.; R.J. Beck, "Don't Tread on us: International Law and Forcible State Responses to Terrorism", *Wisconsin International Law Journal* 12 (1994), 153 et seq.; M.B. Baker, "Terrorism and the Inherent Right of Self-Defence (A Call to Amend Article 51 of the United Nations Charter)", *Houston Journal of International Law* 10 (1987), 25 et seq.; C. Stahn, "Collective Security and Self-Defence after the September 11 Attacks", *Tilburg Foreign Law Journal* 10 (2002), 10 et seq.
 - ² J.J. Paust, "Security Council Authorization to Combat Terrorism in Afghanistan", *ASIL Insight*, October 2001; F.L. Kirgis, "Security Council Adopts Resolution in Combating International Terrorism", *ASIL Insight*, October 2001.
 - ³ J. Cerone, "Acts of War and State Responsibility in 'Muddy Waters': The Non State Actor Dilemma", *ASIL Insight*, September 2001; id., "Status of Detainees in International Armed Conflict, and their Protection in the Course of Criminal Proceedings", *ASIL Insight*, January 2002; R. Wedgwood, "Tribunals and the Events of September 11", *ASIL Insight*, December 2001; id., "Al Qaeda, Terrorism, and Military Commissions", *AJIL* 96 (2002), 328 et seq.

population of Afghanistan, nor is it meant to minimize the criminal energy used in the attack of 11 September 2001 and its terrible consequences.

II. The *Taliban* in the Recent History of Afghanistan

1. Recent History of Afghanistan

Afghanistan is a multi-ethnic⁴ and, to a lesser extent, multi-religious country. Its society is, generally speaking, more oriented towards tribal or family affiliation rather than to the state of Afghanistan. It is questionable whether Afghanistan was so far able to develop and sustain a national identity except in cases where it was united by a struggle against an enemy perceived to be a common one.

It was the Soviet backed party of Afghanistan striving for a modernization of the rural backward country placing Babrak Karmal at the head of the government and Moscow which tried to install a secular regime within the Muslim population, which led to the eruption of a civil war and the Soviet invasion in December 1979. The fight against Soviet forces and their Afghan allies became a religious duty in defence of Muslim beliefs and values. It was a truly religious motivated resistance which bore the idea of *jihad* (holy war)⁵ and with it the emergence of the *mujahideen*⁶ (fighters in the *jihad*). How this group actually achieved the unlikely, by finally driving out the Soviet forces is hard to explain, but one, possibly the strongest element, may be the deep

⁴ Ethnic groups within Afghanistan are the Pashtun, 38 per cent; Tajik, 25 per cent; Hazara, 19 per cent; Uzbek, 6 per cent; minor groups are Aimaks, Turkmen; Baloch and others, altogether 12 per cent – *CIA Factbook*, *CIA – The World Factbook*, Afghanistan, available under: www.cia.gov.

⁵ The common translation as “holy war” does not fully convey the subtle meaning of this word. It means literally “the force to exceed”. A distinction is made between the great *jihad* which means the daily struggle of each individual to live according to muslim rules and the small one meaning the fight to defend muslim faith. This distinction is not always properly upheld.

⁶ In this paper the common spelling is used, even so it might be more correct to speak and write of *mujahidin*, see A. Rieck, “Afghanistan’s Taliban: An Islamic Revolution of the Pashtuns”, *German Journal for Politics and Economics of the Middle East* 38 (1997), 121 et seq., (122); the term had already been used in the war of liberation in Algeria against France.

rooted islamic beliefs within most sections of the Afghan society. Here exactly lay the roots of the *Taliban* movement.⁷

In the mid 1980s the United Nations had begun negotiations on the withdrawal of the Soviet troops, which started in early 1988, as well as the establishment of a so-called government of national unity. The Soviet forces finally withdrew from Afghanistan in 1989 and consequently the Marxist powered regime lost support and finally stepped down to hand over power to the *mujahideen*. What followed was described as “complete anarchy”,⁸ the *mujahideen* were unable to unite after the common objective of defeating the Soviets was accomplished. Several resistance groups that had fought the Soviets turned on each other in a power struggle unable to bridge their political differences. Thus, civil war became an intra-*mujahideen* struggle.⁹ During this period, by an interim power sharing agreement signed in Peshawar (Pakistan) in 1992, Burhanuddin Rabbani was appointed head of a *mujahideen* leadership council and made President the same year.¹⁰ Although Rabbani and his loyalists were never backed by the majority of the population they were in possession of important assets like international diplomatic recognition and the privilege to print and distribute Afghan currency notes.¹¹ However, this unstable and weak government was faced with local commanders acting like undisputed rulers of the areas under their control, with their shifting personal interests and the basic loyalty of the *mujahideen*. This led to an ongoing situation of robbery, plunder, enforcing road fees, poppy growing and drug trafficking within large parts of the country.¹²

⁷ W. Adam gives a very detailed picture of the fight against Russia and the Soviet invasion, W. Adam, *Das Scheitern am Hindukusch*, 1989.

⁸ See e. g. C. Power, “When women are the Enemy”, *Newsweek* of 3 August 1998.

⁹ N. Ghufuran, “The *Taliban* and the Civil War Entanglement in Afghanistan”, *Asian Survey* 41 (2001), 462 et.seq., (466).

¹⁰ Rieck, see note 6, 126, see as well at page 567 of this article.

¹¹ *Ibid.*

¹² Rieck, see note 6, 127 et seq., is very detailed concerning this part of the history, especially concerning the part of the famous Hikmatyar and his opponent Massud, who was killed in 2001; as well as A. Rashid, *Taliban – The Story of the Afghan Warlords*, 2001, 21 et seq.

Amid this confusion and turbulence another force, the *Taliban*,¹³ a united traditionalist Islamic group, suddenly entered the scene. The *Taliban* took control of Herat in September 1995, of the capital, Kabul, almost one year later and of Mazar-e-Sharif in 1997.¹⁴ There had been various efforts to unite the *Taliban* and other anti Rabbani forces but it was the *Taliban* who kept on demanding a completely Islamic government under their own leadership and on 3 April 1996 they proclaimed their founder Mullah Mohammed Omar as the leader of all Afghanistan.¹⁵

2. Roots of the *Taliban* Movement

There are many theories about the origin, characteristics, and objectives of the *Taliban*, but they are a complex phenomenon. It seems that the *Taliban* leadership has been calculatedly mysterious about the movement. Certainly, Pakistan has played a major role in their establishment. During the fight against the Soviet forces, Pakistan hosted up to 3.5 million Afghans mostly Pashtuns. Pakistan's heavy involvement may have been caused by the fact that it had had difficult relations with Afghanistan ever since the United Kingdom had drawn the *Durand* Line in 1893, which fixed borders of Afghanistan with British India, splitting tribal areas of Afghanistan, and cutting the Pashtun population in almost two halves. Leaving half of these Afghans in what is now Pakistan. Through its services for the Afghan *jihad* and by hosting a pro Pakistan political leadership, Pakistan might have hoped to establish a Pakistan friendly government in Kabul.¹⁶ And it was also Pakistan which offered something quite unique — the so called *madrasa* culture.

¹³ Normally translated by “students of religion”, but Maitra translates it differently, as being the Persian plural of the Arabic word Talib, “seeker of knowledge”, a religious formulation. Being a Talib constitutes the first stage towards becoming a Mullah, see R. Maitra, “What are the Taliban”, *Strategic Studies*, September 2000, 63 et seq. Also Rieck gives a very detailed explanation of their name, cf. Rieck, see note 6, 121, note 1.

¹⁴ The *Taliban* had some severe setbacks in that time and it is a myth that they have never been defeated, cf. in this respect Rieck, see note 6, 132 et seq.

¹⁵ Again the common spelling is used — the correct Arabic one is used by Rieck, see note 6, 134.

¹⁶ Rieck, see note 6, 122.

Madaris were religious schools which were funded by the state and received increased donations from some Arab countries. The percentage of Afghan refugee children among the pupils was particularly high.¹⁷

Most Pashtuns in both Pakistan and Afghanistan follow, according to one school of thought, a strict and literal observance of all prescriptions of the *sharia* (Islamic law) which includes rigid formalism and asceticism, as well as a pan-Islamic appeal.¹⁸ Particularly in Pakistan this school of thought produced and still produces an increasing body of graduates, which qualify for a clerical career. They struggle for the transformation of the society according to their values and refuse themselves to the demands of the modern world.¹⁹ It were those schools which had, since the early 80s, encouraged their students to participate in the Afghan *jihad* where they found compatriots and considered that the *jihad* would be won after the withdrawal of the Soviets. But soon they started to realise that the objectives they had achieved by defeating the Soviets were misused by the *mujahideen* in wrangling for power and getting entangled in corruption. They felt betrayed²⁰ and became utterly disgusted with the way the *mujahideen* "handled" their victory and treated the Islamic values. According to their leader Mullah Omar, a former small *mujahideen* commander, they "took up arms to achieve the aims of the Afghan *jihad* and save our people from suffering at the

¹⁷ S. Malik, *Islamisierung in Pakistan 1977 – 84*, 1989, 250 et seq., (300 et seq.); T. Friedman, "Cures to the Enigmatic Taliban Plague: Legal and Social Remedies Addressing Gender Apartheid in Afghanistan", *Loy. L. A. Int'l Comp. L. Rev.* 23 (2001), 81 et seq., (83); Rashid, see note 12, 89 et seq.

¹⁸ Rieck, see note 6, 124; and Maitra, see note 13, 65, which connects the madrasa culture also to the Deobandi political party and movement in Pakistan, led by the former Chairman of the Foreign Affairs Commission of the Pakistani parliament.

¹⁹ Rieck, see note 6, 125. For the current impact of this school in Pakistan, see I.H. Malik, "Pakistan in 2000", *Asian Survey* 41 (2001), 104 et seq., (111). Interestingly enough, Pakistan has outlined a new policy to reform these schools in January 2002. General Musharraf outlined several new measures governing the regulation of mosques and *madaris*. Now these schools must reform their curriculum to include English, Pakistan studies as well as science and technology to enable their students to enter university and compete for jobs, said Musharraf, cf. BBC News, 12 January 2002. His speech is available under [www. satp.org](http://www.satp.org)

²⁰ Ghufuran, see note 9, 466 et seq.; Rieck, see note 6, 128 et seq.

hands of the so-called mujahideen...".²¹ Very quickly there were like minded followers and *Taliban* spokesmen like to compare the early successes of the *Taliban* with the one of Prophet Muhammad after his *hijra* to Medina.²² Astonishingly little fighting was necessary at the beginning to gain control over the country. The *Taliban* enjoyed the overwhelming support of the war tired population which had lost patience with the *mujahideen* parties and their abuses of power. They were relatively successful in avoiding direct fighting especially with potential rival groups.²³ They wanted to disarm all rival militia,²⁴ fight against those who did not accept their request, bring peace and order and implement the *sharia*, in what they believed to be their true meaning. With their self proclaimed aura of "holy righteousness" the *Taliban* movement manifested a strong longing for morality and justice and reached a level of security and peace which was unknown for almost two decades. In achieving this they could rely on the support of the masses.²⁵ However, the price of these achievements was the establishment of the strictest standards of Islamic behaviour known in any contemporary Muslim society: a complete ban on female education and employment as well as on music, television and photographs, to mention just a few.²⁶

That is the story of the movement told by the *Taliban* and their supporters. But without doubting their sincerity, the role Pakistan played will never be fully explained. There have been very early allegations about special training camps for these students in Pakistan and by many means Pakistani authorities and even its Intelligence Service could have supported the *Taliban*, including military training as well as fund-

²¹ Ghufuran, see note 9, 467.

²² Rieck, see note 6, 129.

²³ Concerning their tactics in this respect, cf. Ghufuran, see note 9, 468.

²⁴ What they successfully did and this disarmament led to the later stockpiles of weapons.

²⁵ Rieck, see note 6, 131.

²⁶ Commission on Human Rights Doc. E/CN.4/2001/43 of 9 March 2001 – Question of the Violation of Human Rights and Fundamental Freedoms in any Part of the World – Report on the Situation of Human Rights in Afghanistan; as well as the good overview by C.L. Gadoury, "Should the United States officially Recognise the Taliban? The International Legal and Political Considerations", *Houston Journal of International Law* 23 (2001), 386 et seq., (391 et seq.); Rashid, see note 12, 105 et seq.

ing.²⁷ And it was Pakistan which was the first country to grant recognition to the *Taliban* government and which had made persistent attempts to get the seat of Afghanistan in the United Nations for the *Taliban* movement.²⁸ But the *Taliban* movement was not only endorsed by Pakistan but also by other states, such as Saudi Arabia, attempting to counter the growing influence of Iran in Afghanistan.²⁹

3. The *Taliban* Transformation after 1996

After the *Taliban* had taken Kabul in 1996 and resumed control of around 90 per cent of the country they organised their rule. They established a six member Provisional Ruling Council headed by Mullah Mohammad Rabbani³⁰ and changed the name of the country into "Islamic Emirate of Afghanistan". This was followed by instituting a framework of *shuras* (consultative bodies). A central *shura* comprising ten members³¹ was established in Kandahar. Directives and policies were initiated from here, and Kandahar started to become the capital of the *Taliban* controlled areas and the headquarter of the movement. The central *shura* had a rather intermediate character, as it saw participation from tribal leaders, military commanders and clerics. Mullah Omar tried to integrate non-Pashtuns into the *shura* but the *Taliban* have been considered biased against other ethnic groups. This central *shura* was assisted by a cabinet, a *shura* in Kabul, established in 1999, and a military *shura*.³² They all reported to the central *shura*.³³ And whereas the Kabul *shura* dealt with day to day problems of the government and the

²⁷ A. Pratap, "Who are the Taliban of Afghanistan", World News of 5 October 1996, available under www.cnn.com and H. Kreuzmann, "Taliban – neue Machthaber in Afghanistan", *Geographische Rundschau* 50 (1998), 181 et seq., (182).

²⁸ B. Crosette, "Taliban open a Campaign to gain Status at the U.N.", New York Times of 21 September 2000, A, 11.

²⁹ Rieck points out that the *mujahideen* regime the more it came under pressure the closer it moved towards Iran, Rieck, see note 6, 130, note 54.

³⁰ Ghufran, see note 9, 474; Rieck, see note 6, 135, see for the actual composition there page 135, note 86, also Rashid, see note 12, 51.

³¹ For the actual compositions see Ghufran, see note 9, 473 and again here and for the following Rashid, see note 12, 98 et seq.

³² According to Ghufran this was loosely organised, planned strategy and implemented tactical decisions; see for its composition, id., see note 9, 474.

³³ Ghufran, see note 9, 474.

city, decisions were actually made in the Kandahar *shura*.³⁴ In areas under their control the *Taliban* were trying to create a centralised Afghan state, by appointing provincial governors and administrators of districts, cities, and towns from the centre.³⁵ Governors, in general came from different provinces than the ones in which they served. Finally the *Taliban* had established a security service, the so called Ministry for the Promotion of Virtue and the Eradication of Vice.³⁶ Its task was to eradicate corruption and other vices from Afghan society. Supporters might claim that the country's administration and justice were based on firm rules, but the opposition claimed these structures were unrepresentative and unaccountable.

III. The International Legal Status of the *Taliban*

When the *Taliban* took Kabul and installed their institutions they immediately demanded from other states their formal recognition as the only legitimate government of Afghanistan. They claimed to be the sole representatives of the existing Afghan state and denied the legitimacy of the former government to represent Afghanistan. In two identical letters of 10 October 1996 addressed to the Credentials Committee of the United Nations the "Acting Minister of Foreign Affairs" M.G. Akhund, stated that "at the top of the diplomatic mission of Afghanistan there are individuals and personnel who belong to the previous regime, who are not accountable to the new ruling Government of Taliban".³⁷

The other still existing actor in Afghanistan next to the *Taliban* was a Council of Ministers according to article 100 of the 1990 Afghan constitution, led by the former President Burhanuddin Rabbani who was installed in 1992 and finally ousted from Kabul by the *Taliban* in 1996, and which was still recognised internationally as the sole representative of the Afghan state. The latter must not be mixed up with the United

³⁴ Id., 474.

³⁵ Id., 474.

³⁶ Doc. S/2001/789 Report of the Secretary-General, The Situation in Afghanistan and its Implications for International Peace and Security of 17 August 2001, 3.

³⁷ Press Release Doc. GA/9127 of 11 October 1996. The letters did not purport new representatives and thus did not constitute formal or provisional credentials. Furthermore no representative of a member state challenged the presence or credentials of the acting representative.

Islamic Front for the Salvation of Afghanistan, formerly known as Northern Alliance, which was formed in order to fight the *Taliban* and which controlled the northern 5 per cent of Afghanistan from its capital Mazar-i-Sharif. This was an alliance opposed to *Taliban* rule in Afghanistan and Rabbani became its political leader, the murdered Shah Massoud (former Afghan Defence Minister) its military leader.

As to the question of a possible recognition of the *Taliban*, one has to distinguish between the recognition of a state as such and the recognition of a government.

Concerning the *Taliban* case the question clearly concerns the problem of recognition of a government, not a new state. The fact that the *Taliban* had changed the name of the country into “Islamic Emirate of Afghanistan” does not signal the foundation of a new state; it simply reflects the particular approach of the *Taliban* concerning the establishment of an Islamic state under the law of the *sharia*.

If the question comes down to the problem of the recognition of a government in international law³⁸ it has to be asked under which legal prerequisites a government may be recognised or not recognised³⁹ and what are the legal consequences of such a recognition, or respectively, non-recognition.

1. Basic Principles of Recognition in International Law⁴⁰

Starting from the premise that the international community is composed primarily of states any changes in the composition of the international community may be of concern to existing states, whether those

³⁸ The principle matter is always what does the entity concerned purport or claim to be in the first stage, this has to be the starting point of the examination, I. Brownlie, “Recognition in Theory and Practice”, *BYIL* 53 (1982), 197 et seq., (202).

³⁹ It always has to be kept in mind that the term “recognition” is not a very safe guide to the intention of the official or institution using it; it covers a wide variety of meanings and policies which have to be examined case by case, Brownlie, see above, 203.

⁴⁰ Recognition and its consequences is one of the main topics of international law and naturally only the main questions and characteristics can be outlined here, see S. Talmon, *Recognition in International Law – A Bibliography*, 2000. It lists all relevant literature, all possible cases of recognition, as well as historic examples.

changes involve members of that community or authorities (in particular governments) through which they act.⁴¹ The decision of states to take notice of these changed circumstances, in particular, to grant recognition to a state or government or the recognition of belligerency or insurgency involves, in a broad sense, the acceptance by a state of any fact occurring in its relations with such other entity. It is not the physical status of the respective entity which is at stake but its legal status in respect to the recognising entity or state. This is decisive. Therefore it is not the physical status alone which is the basis for recognition but the integration of the respective unity into the universally accepted value system.

The recognition of a government indicates the willingness or in the case of non-recognition the unwillingness on the part of the recognising side to either establish or maintain official relations, with the government in question, but not necessarily intimate relations.⁴² The nature of the official relations is determined from case to case. Recognition merely manifests, in the view of the recognising party, to what extent the government in question is accepted as an addressee in foreign relations. By refusing, or withdrawing recognition of a government this government is refused as a partner in interactions among members of the community of states.⁴³ The effects of recognition are therefore that a government is accepted as such within the international community and that it represents the state concerned in its international relations. Its acts are binding the state in international law. The recognised government has, for example, the capacity to enter into diplomatic relations and to conclude international agreements and its executive and legislative acts will, in the courts of the recognising state, be entitled to the ac-

⁴¹ Sir R. Jennings/ Sir A. Watts (eds), *Oppenheim's International Law*, Vol. I, Peace, Introduction and Part 1, 9th edition, 1992, § 39.

⁴² S. Talmon, (ed.), *Recognition of Governments in International Law*, 1998, 23.

⁴³ As Talmon rightly points out, the recognition of governments may seem outdated at a time when more and more states declare that they recognise states and not governments. He especially points to the recent changes in the recognition policy of the United Kingdom which has received wide coverage. But these changes were simply a change in the method of recognition and not an abolition of the recognition of governments as such, *ibid.*, Introduction, and W.K. Patison, *The International Law of Recognition in Contemporary British Foreign Policy*, 1981.

ceptance which is due to another's state official acts.⁴⁴ The government from which recognition has been withdrawn or to which it has been refused is deprived of the protection which it would normally enjoy under international or national law. The acts of its legislative, administrative and judicial organs are treated as invalid, it is often refused jurisdictional immunities and it cannot appear as plaintiff in foreign courts.⁴⁵ It has even been suggested that non-recognition deprives the government in question of the capacity to wage war.⁴⁶

Recognition or non-recognition of a government may also manifest whether or not, in the opinion of the recognising authority, the government in question fulfils the criteria prescribed in international law⁴⁷ for the status of governments and, as already indicated, its readiness to adhere to the universally accepted value system.

It is the latter meaning which is disputed. The change of government in a given state is a matter of its internal affairs and does not, under normal circumstances, concern international law.⁴⁸ Only if there are special reasons rooted in international law or international relations there may be a need for an explicit recognition of a government. This will be the case if after a period of revolutionary turmoil a government has been established or when there exist two competing governments as was the case in Afghanistan.

The failure of a new government of a state to secure recognition from other subjects of international law does not destroy the international personality of that state, nor does it absolve the respective state permanently or for the period of non-recognition of the government from observing treaty obligations entered into previously.⁴⁹

The decision itself to grant recognition is usually a political one within the sovereign discretion of the individual state.⁵⁰ However, according to the general principles of international law, there exists a duty

⁴⁴ Jennings/ Watts, see note 41, § 47; J.A. Frowein, "Recognition", in: R. Bernhardt (ed.), *EPIL* IV (2000), 33 et seq., (38); H. Lauterpacht, *Recognition in International Law*, 1948, 90.

⁴⁵ Lauterpacht, see above, 90; Jennings/ Watts, see note 41, § 56.

⁴⁶ Lauterpacht, see note 44, 90.

⁴⁷ The criteria in question may be derived from general international law but also from regional international law or from international agreements.

⁴⁸ Frowein, see note 44, 37.

⁴⁹ Jennings/ Watts, see note 41, § 44.

⁵⁰ Lauterpacht, see note 44, 88; A. Cavaglieri, *Corso di Diritto Internazionale*, 1925, 187.

among states to co-operate.⁵¹ This rules out, as a matter of principle, permanently isolating governments in international relations.

Because of its political and legal consequences, recognition has to be distinguished from a looser term conveying mere acknowledgement or cognisance of an existing situation.⁵²

It must be taken into consideration, though, that through the juridification of the international relations and, above all, through the recognition of universally valid human rights, the society of states has developed into a state community to be understood as a community which is defined by common values. Governments that consciously place themselves outside of this community of values are, as a matter of consequence, to be denied participation in the further development of this community. The desire of self-assertion is a characteristic of every community.

2. Criteria for the Recognition of a Government and the Practice concerning the *Taliban*

The guiding juridical principles applicable to all categories of recognition are that international law cannot disregard facts and it must be based on them provided they are not in themselves contrary to international law.

As far as the recognition of governments is concerned, in many cases state practice relies on the effectiveness of the government concerned. Effectiveness in this connection means that the respective government is in control of, at least, the larger part of the territory as well as its administration and that such control is not just of a temporary nature but of a consolidated one. Further it has to be habitually obeyed by the

⁵¹ Cf. in this respect *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations*, A/RES/2625 (XXV) of 24 October 1970; see R. Wolfrum, "International Law of Co-operation", in: R. Bernhardt (ed.), *EPIL* 2 (1995), 1242 et seq.

⁵² Talmon, see note 42, 23.

bulk of the population.⁵³ Such a government can be said to represent the state in question and is, as such, deserving recognition.⁵⁴

The content of the last criteria is under dispute. It is to be understood as a matter of effectiveness⁵⁵ not as democratic legitimacy although recognition of governments has been made dependent in state practice upon the announcement of democratic elections.⁵⁶ However, a government which bases its control of a given territory upon the armed forces of another state cannot claim effective control and its recognition may, accordingly, be denied.⁵⁷

Revolutionary upheavals in the form of civil wars and competing assertions of power often prompt the question which of the contesting parties may be regarded as being the government of the country concerned. Or after hostilities have ceased, it has to be decided which of the opponents has to be recognised as the legitimate government. Occasionally states have refused to recognise governments on the ground of their revolutionary origin and the degree of violence accompanying the changes.⁵⁸ But as Lauterpacht has pointed out, international law does not prohibit revolutions as a means of constitutional or purely governmental changes within a state.⁵⁹ Therefore, there is generally no difference between a constitutional and a revolutionary change of government. But even when general international law does not stigmatise revolutions, so long as the revolution altogether has not been fully successful, and the lawful government, however, affected by the civil war, remains within the national territory⁶⁰ and asserts its authority, it is

⁵³ Lauterpacht, see note 44, 87, 88.

⁵⁴ Jennings/ Watts, see note 41, § 45; Lauterpacht, see note 44, 98 et seq., 115 et seq.; Frowein, see note 44, 37.

⁵⁵ Jennings/ Watts, see note 41, § 45.

⁵⁶ See B.R. Roth, *Governmental Illegitimacy in International Law*, 1999, 132 et seq.

⁵⁷ Frowein, see note 44, 37, even questions effectiveness if the new government is brought about by foreign intervention.

⁵⁸ Jennings/ Watts, see note 41, § 45; Lauterpacht, see note 44, 91.

⁵⁹ Lauterpacht, see note 44, 92, see also in this respect Jennings/ Watts, see note 41, § 45, in particular note 12 with its reference to the Tinoco arbitration (Tinoco Case-Aguilar-Amory and Royal Bank of Canada Claims – 1923), *RIAA* 1, 369 et seq.

⁶⁰ See on authorities in exile, Talmon, see note 42, 115 et seq.

supposed to represent the state as a whole.⁶¹ As long as the lawful government offers resistance which is not ostensibly hopeless or purely nominal the recognition of the revolutionary party as a government would constitute a premature recognition which the government still in power is entitled to regard as an act of intervention, contrary to international law,⁶² simply because such recognition would amount to recognising the rebels either as the government of the entire state or as the government of a new state.

Besides the criteria mentioned so far, another factor concerning the recognition of a government is considered in state practice, namely whether the new government indicated its willingness to comply with its obligations under international law.⁶³ A resolution adopted in 1965 by the Second Special Inter-American Conference recommended that recognizing a *de facto* government's readiness to fulfil the state's international obligations should be one of the factors to be given due consideration.⁶⁴ The commitment of a *de facto* government to adhere to international obligations is a different matter, though, compared to the one of an ordinary government since it indicates the capability and willingness of the former to act for the territory and population under its control which is unnecessary for the latter.

The reliance on the willingness to fulfil international obligations as a precondition for recognising a new government has been considered as being problematic. Those obligations are the ones of a state rather than of the government. Therefore this practice could be mistaken as to suggest that the government has a choice in that respect which, in fact, it has not. The view that the recognition of governments may be based upon the implementation of international law cannot be founded upon Article 4 of the Charter of the United Nations. The admission of a state as member of the United Nations is a matter different from recognising

⁶¹ H. Kelsen, *General Theory of Law and State*, 1945, 111, who stated: "It cannot be maintained that, legally, men have to behave in conformity with a certain norm, if the total legal order, of which that norm is an integral part, has lost its efficacy. The principle of legitimacy is restricted by the principle of effectiveness." Compare in this respect also the path breaking judgment of the PCIJ, PCIJ Series A/B No. 72, 1937, the Borchgrave Case concerning the Spanish civil war.

⁶² Lauterpacht, see note 44, 94, Jennings/ Watts, see note 41, § 41, § 46; see in general concerning this question H.H. Teuscher, *Die Vorzeitige Anerkennung im Völkerrecht*, 1958.

⁶³ See in particular Roth, see note 56, 149 et seq.

⁶⁴ *AJIL* 60 (1966), 460.

a government.⁶⁵ However, under a modern approach towards international law, in particular considering the emergence of a community of states united by common values a different approach seems to be preferable. The implementation of human rights, including the most basic political rights guaranteeing an equal participation of all citizens in public affairs has ceased to be an internal affair protected under the principle of non-intervention. Therefore states may consider and take into account any such violation of the respective international obligations when deciding whether or not to recognise a new government. Non-recognition under these circumstances is to be seen as retortion that is to say a counter-measure through which states attempt to enforce international obligations.⁶⁶ It is also a means to protect the established value system. The consequence thereof is that the factual situation alone is not decisive for recognition but it has to be supplemented by a commitment of the respective entity to the values of the international community.

At the beginning recognising the *Taliban* did not seem totally unimaginable. They were in control of the biggest part of the country, exercised effective authority through its *shuras* and elected governors, had been in power since 1996 and had, at least at the beginning, a reasonable expectancy of permanence, being supported by the majority of the population. In particular when in December 1999 they successfully brought to an end the hijacking of a jet of Air India, observers believed that the *Taliban* had changed sides and started to turn themselves against international terrorism and show international responsibility. But this proved to be illusive and the failure of the *Taliban* to commit to its international obligations was one reason why the United States in particular as well as most other members of the community of states opted against a recognition of the *Taliban* as the government of Afghanistan. This attitude prevailed. The United States, itself, indicated that the *Taliban's* prospects for recognition would greatly increase if the *Taliban* would turn over *Usama bin Laden* and thus implement its Security Council imposed obligation to actively fight terrorism and also

⁶⁵ Jennings/ Watts, see note 41, § 45.

⁶⁶ States have made the recognition of governments or, respectively non-recognition, dependent upon their willingness or the lack thereof to adhere to international obligations of the state concerned. For example, the continued commitment to its international obligations on the part of the new government of Afghanistan in 1978 was a factor for the government of the United States to maintain diplomatic relations with Afghanistan, see in this respect, *AJIL* 72 (1978), 879-880.

if they would stop their human rights violations, in particular concerning women, thereby fulfilling their international obligations under the respective human rights instruments.⁶⁷ Therefore the wide ranging non-recognition of the *Taliban* was not based upon the fact that their *de facto* control of significant parts of the country was put into question, but that they did not adhere to international obligations entered into by Afghanistan. Finally, the ultimate refusal to turn over *Usama bin Laden* after the attack of 11 September 2001 deemed their politics and actions totally unacceptable to the rest of the world and was a further justification of the broad explicit non-recognition of the *Taliban* government.

That apart from that, for some states there existed also other reasons for not recognising the *Taliban* as the government of Afghanistan, may just shortly be mentioned. Russia criticized the *Taliban* for recognising Chechnya,⁶⁸ which fights to establish an independent islamic state and Russia feared that the *Taliban* may spread their extreme militant form of Islam to states like Turkmenistan, Uzbekistan, and Tajikistan.⁶⁹ Like Russia, China also worried about muslim communities within its country, in particular in the province Sinkiang; and Iran as a Shiite-dominated country tried to oppose the *Taliban* as a Sunni counterpart.⁷⁰

The Security Council resolutions follow the same line of thinking. Here the *Taliban* are referred to as one of several Afghan groups or fac-

⁶⁷ Secretary of State Madeleine Albright is quoted with the words: "I think it is very clear why we are opposed to the Taliban. Because of their approach to human rights, their despicable treatment of women and children and their general lack of respect to human dignity", quoted by Gadoury, see note 26, 415. Afghanistan (ISA) itself had ratified the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, and the Convention on the Rights of the Child, and had signed the Convention on the Elimination of All Forms of Discrimination against Women.

⁶⁸ T. Grant, "Current Development: Afghanistan Recognizes Chechnya", *Am. U. Int'l L. Rev.* 15 (2000), 869 et seq.

⁶⁹ It might be telling that Uzbekistan on 26 September 2001 allowed the UN for the first time since 1998 to use the Termez River port to move humanitarian goods into Afghanistan, but only because the humanitarian crisis within that country became unbearable; UN newservice of 26 September 2001.

⁷⁰ In 1998 the *Taliban* murdered eight Iranian diplomats inside the Iranian consulate almost causing a war between Iran and Afghanistan, cf. in this respect and for a detailed description of the foregoing, Gadoury, see note 26, as well as S/RES/1193 (1998) of 28 August 1998.

tions.⁷¹ These resolutions cannot be interpreted to mean that the Security Council doubted that the *Taliban* were *de facto* in control of a significant part of Afghanistan. On the contrary, the Security Council clearly acknowledged this fact by demanding the *Taliban* to enforce the measures against terrorism and not to provide safe havens for terrorist activities. The reservations with respect to the recognition of the *Taliban* as the sole legitimate representative government of Afghanistan, however, only became fully clear when, after 11 September 2001 the Afghan nation as such was supported in establishing a transitional government that substantially differed from the *Taliban*.⁷² This was not only a call for change but also a fundamental criticism of the conditions that had been created by the *Taliban* in Afghanistan throughout their reign. At the same time, this implied that the *Taliban* reign should not be supported, or at least should not be supported any longer, by the nation's population as a whole and especially not by all of the nation's ethnic and religious groups.

This means that the then still existing regime of president Burhanuddin Rabbani was considered to be the sole legitimate government of Afghanistan. And it is in accordance with the above made findings that the Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions of 5 December 2001, signed in Bonn, Germany, thanks in its Preamble Professor B. Rabbani "for his readiness to transfer power to an interim authority which is to be established pursuant to this agreement."

⁷¹ S/RES/1214 (1998) of 8 December 1998, para. 1; S/RES/1267 (1999) of 15 October 1999, para. 1.

⁷² S/RES/1378 (2001) of 14 November 2001. The respective part (para. 1) reads: "Expresses its strong support for the efforts of the Afghan people to establish a new and transitional administration leading to the formation of a government, both of which:

- should be broad-based, multi-ethnic and fully representative of all the Afghan people and committed to peace with Afghanistan's neighbours;
- should respect the human rights of all Afghan people, regardless of gender, ethnicity or religion;
- should respect Afghanistan's international obligations, including by cooperating fully in international efforts to combat terrorism and illicit drug trafficking within and from Afghanistan, and
- should facilitate the urgent delivery of humanitarian assistance and the orderly return of refugees and internally displaced persons, when the situation permits."

The *Taliban* saw their status in spite of the wide non-recognition differently. On 16 January 2000 they recognised the secessionist government of Chechnya and moreover Chechnya as an independent state and the Chechen government opened an embassy in Kabul.⁷³ If indeed the *Taliban* were, as they claimed to be, the government of Afghanistan, then their acts were binding. But here recognition was given by a government that itself was widely viewed not to have the authority to act on behalf of the state it claims to represent and could not act as its sovereign authority. The *Taliban*'s recognition had therefore no legal effects but just recapitulated Chechnya's earlier international relations.⁷⁴

To sum it up: however successful the *Taliban* were within their reign, the sole legitimate representative of the Islamic State of Afghanistan always was the former government under the leadership of its president Burhanuddin Rabbani. The *Taliban* were never considered to be the sole legitimate government of Afghanistan.

The nearly complete rejection of the members of the community of states⁷⁵ furthermore signals that the effective control of a country is not sufficient for recognition but that such effective control must be accompanied by a commitment to the most fundamental rules of the community of states. The case of non-recognition of the *Taliban* therefore confirms the prevailing tendency in international law that a government, such as the *Taliban*, is not considered an equal partner for governments representing the community of states.

3. The *Taliban* as Party in an Internal Conflict or as Stabilised *de facto* Regime

Non-recognition of a group in power as a government, does however not exclude recognition of that group in some other capacity, for example as a rebel regime entitled to recognition as insurgents or belligerents.⁷⁶

⁷³ Grant, see note 68.

⁷⁴ *Ibid.*, 894.

⁷⁵ In fact only Pakistan, Saudi Arabia and the United Arab Emirates recognised the Taliban as the sole legitimate government of Afghanistan.

⁷⁶ Jennings/ Watts, see note 41, § 56.

a. Were the *Taliban* recognised Belligerents?

Having established that the *Taliban* did not receive the recognition as the legitimate government of Afghanistan does not mean yet that they are not to be considered as a party in an internal conflict, as belligerents, or even a stabilised *de facto* regime. Treatment as a liberation movement does not come into question. This deals with a phenomenon that is limited to a decolonisation process.⁷⁷

The notion of recognition of belligerency has developed as customary international law, its origin dating back to the period before World War I. The purpose of such recognition is to bring the laws of war, in particular the rules of humanitarian law in armed conflicts into operation for an internal armed conflict. It also settles the relations with third states concerning the protection of nationals of the latter or of vested interests. The recognition of a group as a belligerent party may be declared explicitly or implicitly by the state on whose territory the internal armed conflict takes place or by third states. In the latter case it is the intention to provide for the applicability of prize law or the laws concerning the protection of neutral states in armed conflict.

Recognition of belligerency has to be distinguished from the recognition of *de jure* or *de facto* regimes as well as from a recognition of insurgency. Whereas the recognition of a group or a movement as *de jure* or as *de facto* regime affects the relations between the recognizing states and such regimes in general the status of a recognized belligerent is confined to the period of armed conflict. Insurgents have a status more provisional in nature and more limited in content and scope of application compared to that of recognised belligerents.⁷⁸

The question has been raised whether modern international humanitarian law leaves room for the recognition of belligerency any more. Common article 3 of the four Geneva Conventions of 1949 contains minimum rules applicable to all persons taking no active part in hostilities in an armed conflict not of an international character and thus provides for some protection rendering, so far, a recognition of belligerency unnecessary. This provision, however, does not provide a

⁷⁷ Cf. i.a. O. Krönert, *Die Stellung nationaler Befreiungsbewegungen im Völkerrecht*, 1984; 28 et seq.; S. von Schorlemer, "Liberation Movements", in : R. Wolfrum (ed.), *United Nations: Law, Policies and Practice*, 1995, 854 et seq., especially the bibliography there.

⁷⁸ E. Riedel, "Recognition of Belligerency", in : R. Bernhardt (ed.), *EPIL IV* (2000), 47.

clear distinction between international conflicts and those conflicts not of an international character nor does it provide for the protection of prisoners of war in internal conflicts. The latter point is remedied to a certain extent, by article 4 of the Third Geneva Convention relative to the Treatment of Prisoners of War⁷⁹ which extends prisoners of war status also to members of resistance movements belonging to a party to the conflict and to members of armed forces professing allegiance to unrecognised authorities.⁸⁰ The two Protocols Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts and relating to the Protection of Victims of Non-International Armed Conflicts, respectively (Protocol I and II)⁸¹ also provide for an extension of the rules for international conflicts to non-international ones. Article 1 para. 4 of Protocol I extends the meaning of international armed conflicts to wars of liberation. The combatants of such wars would have otherwise found protection only as recognised belligerents.⁸² Further, article 1 para. 2 of Protocol II declares that the Protocol is not applicable in situations of internal disturbances and tensions such as riots, as they are not being armed conflicts. However, in the present case, neither Protocol II nor Protocol I is applicable because the United States and Afghanistan have not ratified them.

From the moment a party to a non-international armed conflict has been recognised as a belligerent, it gains a unique legal position, which enables it to bear as a group certain international rights and duties which are derived from the laws on international conflicts. This is in spite of the fact that this group does not constitute a government or a state or enjoys an international legal personality separate from that of the state of rebellion. In order to attain such a position the dimension of a rebellion must be of some magnitude concerning the area under the rebels' control, the degree of their organisation and the extent and the gravity of the hostilities. The special legal status of a belligerent party can never be acquired by the rebels themselves. Again the momentum of recognition expressed or implied, either by the central government or a foreign state has to take place. It is either the central government which recognises the rebels or recognition is given by a foreign state, at its discretion. The legal consequences differ. If a foreign state recognises

⁷⁹ UNTS Vol. 75 No. 972.

⁸⁰ For further elaboration on this point see below.

⁸¹ *ILM* 16 (1977), 1391 et seq.; *ILM* 16 (1977), 1442 et seq.

⁸² Riedel, see note 78, 49.

the state of belligerency it brings about the operation of the laws of war just in relation between the rebels and the recognising government. If the central government recognises the state of belligerency, its outcome is the application of the laws of war to the conflict as a whole. In any case the recognising party confers upon the recognised subject a certain limited and provisional international personality in respect of the applicability of the laws of war. But it does not give the recognised belligerents international rights or impose on them international duties. Rebels cannot, for example, maintain diplomatic relations with foreign countries and they lack the capacity to conclude international treaties. But if a group is recognised as a belligerent party the laws of inter-state war are introduced to an internal conflict. Recognition of a group as a belligerent party must therefore not be mixed up with the recognition of rebels as the new government of the state or even the recognition of a new state.⁸³

In the case in question there were no signs of recognition of the *Taliban* as a belligerent party neither from the side of the still existing government of Afghanistan nor from any other state.

But one may ask whether the frequent references to the *Taliban* in Security Council resolutions concerning Afghanistan, may be considered as an indirect recognition of them as belligerents.

Almost one year after the bombings of the US embassies of the United States of America in Nairobi, Kenya, and Dar es Salam, Tanzania, the Security Council adopted Resolution 1267 of 15 October 1999. Noting the indictment of *Usama bin Laden* and his associates by the United States, in particular the request of the United States to the *Taliban* to surrender them for trial⁸⁴ and acting under Chapter VII of the Charter the Security Council stated:

“1. Insists that the Afghan faction known as the Taliban, which also calls itself the Islamic Emirate of Afghanistan,⁸⁵ comply promptly with its previous resolutions and in particular cease the provision of sanctuary and training for international terrorists and their organi-

⁸³ Cf. for the statements made so far, Y. Dinstein, “The International Law of Civil Wars and Human Rights”, *Isr. Y. B. Hum. Rts* 6 (1976), 62 et seq.; Jennings/ Watts, see note 41, § 49, as well as Riedel, see note 78.

⁸⁴ Doc. S/1999/1021 of 4 October 1999. Between August 1998 and 1999 the *Taliban* rejected over 20 requests from the United States to expel or turn over *Usama bin Laden* and members of his terrorist organization, *ibid*.

⁸⁵ The same terminology was used later, too, for example in S/RES/1333 (2000) of 19 December 2000.

zations, take appropriate effective measures to ensure that the territory under its control is not used for terrorist installations and camps, or for the preparation or organization of terrorist acts against other States or their citizens, and cooperate with efforts to bring indicted terrorists to justice;

2. Demands that the Taliban turn over Usama bin Laden without further delay to appropriate authorities in a country where he has been indicted, or to appropriate authorities in a country where he will be returned to such a country, or to appropriate authorities in a country where he will be arrested and effectively brought to justice.”⁸⁶

In case the *Taliban* would not fulfil these demands until the 14 November 1999 the Security Council decided in para. 3 of the said resolution that it would implement a catalogue of sanctions as outlined in the said resolution. This catalogue, in effect, copied measures provided for in the International Convention for the Suppression of the Financing of Terrorism⁸⁷ which was not in force at that time. By referring to a Convention not yet in force the Security Council constituted a remarkable incident of law-making. This approach was further enhanced through S/RES/1373 (2001) of 28 September 2001.

Since the *Taliban* did not turn over *Usama bin Laden* the sanctions took effect. They were broadened with Resolution S/RES/1333 (2000) of 19 December 2000.⁸⁸

The wording used in S/RES/1267 is open to interpretation. The term “the Afghan faction” indicates that there is more than one group in Afghanistan. However, the resolution also states that this faction is in

⁸⁶ S/RES/1267 (1999) of 15 October 1999.

⁸⁷ *ILM* 39 (2000), 270 et seq.; A/RES/54/109 of 9 December 1999. Cf. in this respect also A. Aust, “Counter Terrorism – A New Approach”, *Max Planck UNYB* 5 (2001), 287 et seq. The Convention entered into force in April 2002.

⁸⁸ S/RES/1363 (2001) of 30 July 2001 and S/RES/1368 (2001) of 12 September 2001 are not dealt with here any further as they are not of relevance in this particular context. With S/RES/1388 (2002) of 15 January 2002, the Security Council terminated the sanctions measures that applied to Ariana Afghan Airlines, noting that it was no longer owned, leased or operated by the *Taliban*. The following day, the Council adopted S/RES/1390. On 16 January 2002 the Security Council adopted Resolution S/RES/1390 (2002), unanimously, which maintained the other sanctions for a period of 12 months.

control of a given territory of Afghanistan and that this control is an effective one. Otherwise it would have been meaningless to oblige the *Taliban* to take action against terrorists operating from this territory and the threat to take enforcement measures in the case of non-compliance.

The Security Council had dealt with the situation in Afghanistan previously in several resolutions. Typical in this respect was S/RES/1214 (1998) of 8 December 1998.⁸⁹ There e.g. it stated:

“Deeply disturbed by the continuing use of Afghan territory, especially areas controlled by the *Taliban*, for the sheltering and training of terrorists and planning of terrorist acts, and reiterating that the suppression of international terrorism is essential for the maintenance of international peace and security.”

But different from the Resolution 1267 one year later the status of the *Taliban* received here no further qualification in this paragraph. However, from the remaining text of this Resolution one may readily assume that the *Taliban* and other factions were considered as “parties to the conflict.” In the same (preambular) paragraph it is stated that:

“Reaffirming that all parties to the conflict are bound to comply with their obligations under international humanitarian law and in particular under the Geneva Conventions of 12 August 1949, and that persons who commit or order the commission of breaches of the Conventions are individually responsible in respect of such breaches.”

This reference is of interest since at that time the conflict in Afghanistan was an internal one whereas the Geneva Conventions, apart from their common article 3, refer to an international armed conflict. Further, in S/RES/1333 — adopted under Chapter VII — the “responsibility of the *Taliban* for the well-being of the population in the areas of Afghanistan under its control” was underlined,⁹⁰ as well as the obligation to act in accordance with international commitments of Afghanistan concerning narcotic drugs and psychotropic substances.

One cannot but conclude that until after 11 September 2001 the Security Council was quite clear in stating that the *Taliban* were in control of parts of Afghanistan and had to implement international commitments entered into by Afghanistan. The interpretation of the Security Council resolutions with the view to ascertain whether they

⁸⁹ This Resolution is of a recommendatory nature only.

⁹⁰ This was only enshrined in the recommendatory parts of the resolution.

amount to an implicit recognition of the *Taliban* as belligerents now has to answer two questions:

- whether the Security Council is in a position to express such recognition
- and, if so, did the resolutions, in fact, amount to such recognition.

When the Charter of the United Nations was drafted it was taken for granted that measures by the Security Council taken under Chapter VII would be directed against states, only. The practice of the Security Council, however, shows an increasing tendency of individualisation in this respect, namely to address individuals or groups directly. For example, by establishing the International Criminal Tribunals for the Former Yugoslavia and for Rwanda, respectively, the Security Council particularly addressed individuals. It has, apart from these examples, and also in the context of Afghanistan — frequently been pointed out that those violating international humanitarian law face prosecution. Accordingly, stating that a particular group was obliged to act in accordance with Security Council resolutions under Chapter VII and was bound by international humanitarian law as well as other rules of international law follows this established tendency.

On that basis it is possible to conclude that it is within the power of the Security Council not only to take decisions binding upon states but also upon groups in general. This may even amount to the decision that a particular group is bound by particular rules of international law.

To answer the second question recourse has to be made to the objective and purpose of recognising a group as belligerents. Traditionally the purpose of such recognition was to ensure that the rules of international humanitarian law would become operative. This means that the recognition had a constitutive character; the reciprocal rights and obligations of the parties to the conflict originated solely through the said recognition of a party as belligerents. Considering S/RES/1214 (1998) of 8 December 1998, however, indicates that the statement concerning the application of international humanitarian law was of a declaratory nature, only. The Security Council just referred to the applicability of the common article 3 of the Four Geneva Conventions which, in fact, could not have been doubted.

One has to confess, though, that part of the respective phrase, the one referring to the individual responsibility goes beyond the realm of common article 3 of the Four Geneva Conventions although it is not without precedence. Nevertheless, even from this part of the resolution

it is impossible to deduce that the Security Council attempted to recognise the *Taliban* as belligerents.

Therefore the *Taliban* never received recognition as belligerents by either side of the conflict, or by the Security Council.

b. Were the *Taliban* a non recognised *de facto* Regime?

Another option is to consider the *Taliban* as a non recognised *de facto* regime.

In his study on *de facto* regimes, Frowein deals with questions concerning the status and the rights and duties of non recognized *de facto* regimes.⁹¹ He uses the term non recognised *de facto* regime for entities which are in effective control of a territory, claim to be independent, but are not recognised either as a new state or as government of an existing state.⁹² A distinction may be made between those unproblematic cases where the non recognition is obviously due to the fact that the respective entity misses a feature required for recognition and the problematic ones where the “legal” requirements for recognition are fulfilled, but due to various other reasons recognition was not given.⁹³

The starting point for recognising that stabilised *de facto* regimes have even without any recognition a minimum of rights and duties under international law stems from the fact of their existence or in other words the fact that they have a consolidated control over a significant portion of a state territory.⁹⁴ The question is whether such effective and consolidated control over a territory is sufficient or whether other criteria have to be met. If it is accepted that the recognition of governments may be made dependent upon other criteria than the effective control of a territory, namely that governments have committed themselves to adhere to the common values of the community of states, then

⁹¹ J.A. Frowein, *Das de facto – Regime im Völkerrecht*, 1968.

⁹² Id., 6/7; different in respect of states C. Hillgruber, *Die Aufnahme neuer Staaten in die Völkerrechtsgemeinschaft*, 1998, 753 et seq. who considers an implicit recognition of a state or entity to be necessary to enjoy rights under international law.

⁹³ Frowein, see note 91, 5 et seq.

⁹⁴ Frowein, see note 91, 224 et seq.; this view is shared broadly in the meantime, see e.g., A. Vedross/ B. Simma, *Universelles Völkerrecht*, 1984; H.M. Blix, “Contemporary Aspects of Recognition”, *RdC* 130 (1979), 589 et seq., (618, 627); Jennings/ Watts, see note 41, § 167

there is no room for further asserting the legitimacy of such regimes.⁹⁵ Otherwise the concept of the *de facto* regime would become meaningless.

This concept is meant to deal with a situation in which a group exercises control over parts of a territory without being recognised as government. It is a requirement of an international relations system based upon the prohibition of the use of force and intervention, that even such entities enjoy a minimum of rights under international law. This can only be achieved if the existence of a *de facto* regime only depends upon whether the respective group exercises effective control over parts of a territory.

On that basis the *Taliban* are to be considered as a stabilised but unrecognised *de facto* regime⁹⁶ enjoying limited rights and duties under international law. Among these rights is the right not to become the target of force as referred to in Article 2 para. 4 of the UN Charter. Equally the respective territorial integrity is protected.^{97 98}

But this only holds true for pacified *de facto* regimes.⁹⁹ As long as there is a military conflict going on between a *de facto* regime and the relevant opponent the prohibition of the use of force only applies between the *de facto* regime and third states not engaged in the conflict. But the prohibition of the use of force is not applicable in a non pacified situation as between the *de facto* regime and the opposing government and the allies of the latter.

The conflict between the *Taliban* and their opponents never was terminated and therefore they did not enjoy the right to be free from the use of force nor did they enjoy the right to territorial integrity. This

⁹⁵ Frowein, see note 91, 231 emphasises that accepting that *de facto* regimes are not devoid of a minimum of rights and obligations under international law strengthens the approach that a recognition of governments may be made dependent upon their legitimacy and the commitment to their obligations under international law. This has not been taken into consideration by Hillgruber, see note 92, 763.

⁹⁶ This position was also taken by the Federal Administrative Court (Bundesverwaltungsgericht) in its judgment of 20 February 2001 (BVerwG 9 C 20.00). It emphasised the effectiveness of the control of the *Taliban* over parts of Afghanistan.

⁹⁷ Frowein, see note 91, 52, 67; Verdross/ Simma, see note 94, 241.

⁹⁸ Frowein, see note 91, 54 et seq. referring to state practice and the general applicability of the prohibition of the use of force.

⁹⁹ Id., 68.

is particularly true *vis-à-vis* the other Afghan factions but also for those states in alliance with them.

IV. The *Taliban* as Target for an Action of Self-Defence

On 7 October 2001 President Bush ordered actions of the U.S. armed forces against “Al-Qaeda terrorist training camps and military installations of the Taliban regime in Afghanistan.” The U.S. action had for its objective “... to prevent and deter further attacks on the United States...”¹⁰⁰ The United States invoked “... its inherent right of individual and collective self-defence following the armed attacks that were carried out against the United States on 11 September 2001.”

That military actions were taken against *Al Qaeda* as well as against the *Taliban* regime was justified by the United States by referring to the support the *Taliban* regime had given to *Al Qaeda*, namely that the *Taliban* regime had allowed *Al Qaeda* to use parts of Afghanistan that the *Taliban* controlled as a base of operation, and had refused to change its policy in this respect. Equally the North Atlantic Council on 12 September 2001 agreed that the attack was to be regarded as an action covered by article 5 of the Washington Treaty.¹⁰¹ Along the same lines the 23rd Meeting of Consultation of Ministers of Foreign Affairs of the OAS¹⁰² has stated in a Resolution of 21 September 2001 that:

“... these attacks against the United States of America are attacks against all American states and that in accordance with all the relevant provisions of the Inter-American Treaty of Reciprocal Assistance (Rio Treaty) and the principle of continental solidarity all States Parties to the Rio Treaty shall provide effective reciprocal assistance to address such attacks and the threat of similar attacks against any American state ...”

¹⁰⁰ See letter from John D. Negroponte, Permanent Representative of the United States to the United Nations addressed to the President of the Security Council, Doc. S/2001/946 of 7 October 2001, published in *ILM* 40 (2001), 1281; Delbrück, see note 1, 17, rightly points out that later the goal has been changed. The broader objective to depose of the Taliban regime itself cannot be justified as self-defence.

¹⁰¹ *ILM* 40 (2001), 1267.

¹⁰² *ILM* 40 (2001), 1272.

Finally, two Security Council resolutions¹⁰³ reaffirmed the inherent right of individual or collective self-defence of the United States but showed considerable self-restraint with respect to the authorisation of military force.¹⁰⁴ It is not for the first time that it has been asserted that terrorist actions may constitute an armed attack and thus acts of self-defence were legitimate.¹⁰⁵ But it may be questionable in the respective case whether the attack of 11 September had been an armed attack and the actions taken by the United States and its allies after the 7 October 2001 constituted a legitimate act of self-defence.

But apart from these questions it is the purpose of this paper to contribute to the discussion¹⁰⁶ whether the actions taken after 7 October 2001 constituted a legitimate act of self-defence by establishing whether the *Taliban* and *Al Qaeda* are to be considered as possible targets of actions of self-defence and what the consequences would be if the answer is affirmative.

However, before doing so it is necessary to, at least briefly, establish that the military actions of 7 October 2001 and thereafter undertaken

¹⁰³ S/RES/1368 (2001) of 12 September 2001; S/RES/1373 (2001) of 28 September 2001.

¹⁰⁴ These resolutions have been interpreted differently. The view has been taken that this reference amounted to the recognition of self-defence, or was to be considered as an authorisation for the use of military force, cf. Tomuschat, see note 1, 544; not precise Stahn, see note 1, who seems to argue that the resolutions amount to the authorisation of the use of force as such, but not as a validation of concrete acts of force; or that it does not mean anything in respect of self-defence (Delbrück, see note 1, 14, note 16). In our view the Security Council has expressed in these resolutions that, although it had taken action under Chapter VII (in Resolution 1373), this does not exclude further action under self-defence by the state concerned.

¹⁰⁵ See Beck, see note 1, 178 et seq. For example, Israel invoked Article 51 of the Charter of the United Nations to justify its action in Entebbe, Uganda, in 1976. Whether or not this measure, including every action taken in this context, was justified was a matter of controversial discussion; see, for example, S.A. Alexandrov, *Self-Defence Against the Use of Force in International Law*, 1996, 196; The U.S. government took the view that the Iranian violence against the U.S. embassies amounted to an armed attack and therefore justified self-defence; see Alexandrov, 197 – 199. The Security Council has, on several occasions qualified acts of terrorism as threats to international peace such as in S/RES/731 (1992) of 21 January 1992; 748 (1992) of 31 March 1992; 1267 (1999) of 15 October 1999.

¹⁰⁶ See note 1.

by the United States and its allies may be qualified at all as an act of self-defence.

The views advanced, so far, may be generally categorised as follows: it has been argued that the attack of 11 September 2001 cannot be considered as an armed attack and, accordingly, the reaction of the United States cannot constitute an act of self-defence.¹⁰⁷

Also the contrary position has been advanced¹⁰⁸ although the reasons for qualifying the attack of 11 September 2001 as an armed attack and why the actions after 7 October 2001 were justified as self-defence differ.

A different approach is pursued by those arguing that they either do not consider the action taken by the United States and its allies as a use of force in the meaning of Article 2 para. 4 of the UN Charter¹⁰⁹ or seek for a different justification of such use of force, in particular invoking necessity.¹¹⁰

Coming back to the issue of self-defence it is necessary to clearly differentiate between the attack of 11 September 2001 and the reactions thereto after 7 October 2001.¹¹¹ The attack was not an act of war although politically qualified as such. The term 'war' only describes armed conflicts amongst states or amongst them and organised groups or amongst such groups. This term does not comprise terrorist actions against the civilian population of another state.¹¹² On the other hand, the action taken by the United States after 7 October 2001 constituted the use of force against the *Taliban* within the meaning of Article 2 para. 4 UN Charter and therefore requires justification under international law; self-defence being the only reliable option.

¹⁰⁷ P.M. Dupuy, "The Law after the Destruction of the Towers", available under http://www.ejil.org/forum_WTC/ny-dupuy.html; A. Pellet, "No, This is not War!", available under http://www.ejil.org/forum_WTC/ny-pellet.html

¹⁰⁸ Murphy, see note 1, 44 et seq.; Franck, see note 1.

¹⁰⁹ This view is hardly sustainable.

¹¹⁰ Tomuschat, see note 1, 539 establishes in detail that necessity cannot justify the actions taken after 7 October 2001.

¹¹¹ Cerone, Status of Detainees, see note 3.

¹¹² Tomuschat, see note 1, 536; Dupy, see note 107; Pellet, see note 107; Kirgis, see note 2; Cerone, Acts of War, see note 3. One may consider this act a crime against humanity to be prosecuted as an international crime.

1. Self-Defence under the UN Charter

When Article 51 of the United Nations Charter was drafted it was taken for granted that military attacks which may give rise to acts of self-defence would be launched by states. This is, for example, the position of the definition of aggression adopted by the General Assembly¹¹³ which refers to aggression as "... the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State ...". This reflects the then prevailing view, international relations were considered to be relations amongst states.

In the meantime international relations have been modified by what is commonly referred to as individualisation of international relations. This may well be reflected in interpreting Article 51 of the UN Charter. Article 51 UN Charter, above all, does not expressly say that the armed attack must come from a state or an organised group; it only states that the attack occurred against a member of the United Nations. In that respect Article 51 differs from Article 2 para. 4 of the Charter. Further it is necessary to consider the purpose of Article 51 UN Charter, namely, that states, in spite of the collective security system established through the United Nations, retain their right to react in self-defence in cases of armed attacks according to Article 51 of the Charter as long as the Security Council does not take respective measures to maintain international peace and security.

This cannot be interpreted as to mean that in cases where states face an attack launched by private groups from the outside and of a magnitude comparable to the one referred to in Article 51¹¹⁴ they are limited in their possibilities to react.¹¹⁵ This would amount to granting a privi-

¹¹³ A/RES/3314 (XXIX) of 14 December 1974; C. Stahn, *International Law at a Crossroad? The Impact of September 11*, *ZaöRV* 62 (2002), 183 et seq.

¹¹⁴ The attacks of 11 September 2001 were of a magnitude that, if undertaken by a state, actions of self defence clearly would have been legitimate. See in this respect J. Rowles, "Military Responses to Terrorism: Substantive and Procedural Constraints in International Law", *Proceedings of the American Society of International Law* 81 (1987), 314 et seq., (316); A. Cassese, "The International Community's "Legal" Responses to Terrorism", *ICLQ* 38 (1989), 589 et seq., (596).

¹¹⁵ Tomuschat, see note 1, 540; A. Randelzhofer, "Art. 51", note 34, in: B. Simma (ed.), *The Charter of the United Nations*, 2nd edition, takes an intermediate position. He argues that "Acts of terrorism committed by private groups or organizations as such are not armed attacks in the meaning of Article 51 of the UN Charter. But if large scale acts of terrorism of pri-

lege to private actors carrying out large scale pseudo-military acts across the border, namely terrorists. Therefore it is not of relevance which group carries out an action but whether it is of a scale equivalent to military actions referred to in Article 51 of the Charter.

There is no doubt about that, as far as the attack of 11 September 2001 is concerned.¹¹⁶ The crucial question therefore is not whether the United States could react in self-defence at all but whether the acts of self-defence could be directed against the *Taliban*, as was the case.

2. Acts of Self-Defence against the *Taliban*

Whereas the attack of 11 September was undertaken by *Al Qaeda* the acts of self-defence were directed against the *Taliban*. In this respect two different issues have to be considered, namely

- whether acts of self-defence may be addressed against entities other than states at all

and, if so,

- whether the *Taliban* as such were the appropriate target.

In this respect the status of the *Taliban* under international law comes into play again. They constitute as shown above an established non recognised *de facto* regime enjoying a minimum of rights and duties under international law. As such the *Taliban* are bound by the prohibition to resort to the use of force in accordance with Article 2 para. 4 of the UN Charter as they are protected by the same principle. In consequence any use of force against them needs justification, self-defence being the primary option for such justification.

This leads to the second issue already identified, namely, whether the *Taliban* were the appropriate target of acts of self-defence.

When the Security Council referred to the inherent right of individual and collective self-defence in respect of terrorist attacks in its Resolutions S/RES/1368 and S/RES/1373 it did not name the possible target of actions of self-defence. In both resolutions the Security Council declared its support for efforts “to prevent and suppress terrorist acts.” Having been vague concerning actions to be taken under self-defence

vate groups are attributable to a State they are an armed attack in the sense of Art. 51”. Different Pellet see note 107; Dupuy, see note 107.

¹¹⁶ Tomuschat, see note 1, 540.

and against whom they may be taken the Security Council was quite explicit as far as non-military actions against terrorists were concerned. Therefore the Security Council gives no guidance in respect of the possible target of self-defence actions.

Because the Security Council is silent in this respect the attacks against the *Taliban* were only justifiable if the attack of 11 September 2001 was imputable to the *Taliban*.¹¹⁷ This may be a question — to borrow from the regime on state responsibility although the appropriateness has to be established — as to whether the attack can be attributed to the *Taliban*.

Only limited inspiration may be gained in this respect from state practice or case law.

Prior assertions of Israel and the United States that terrorist attacks justified acts of self-defence, e.g. against the PLO (Palestine Liberation Organisation) have not received widespread support among states. When Israel in 1982 invoked the right of self-defence to justify an incursion into Lebanon with the view to eliminate the basis of the PLO from which terrorist activities were launched such action was criticised in the General Assembly¹¹⁸ as well as in the Security Council.¹¹⁹ In 1985 when Israel bombed PLO headquarters in Tunisia in a response to PLO terrorist attacks, the Security Council condemned the action.¹²⁰ The General Assembly¹²¹ criticised the bombing of targets in Libya by the United States which alleged self-defence against the terrorist attack in Berlin directed against American servicemen. Finally, the actions taken by Israel against the PLO in the last years in reaction to the terrorist activities undertaken by particular Palestinian groups have been regularly criticised by the General Assembly.¹²² A counter example may be the reaction or rather non-reaction of the General Assembly and the Security Council concerning United States cruise missile attacks in 1998

¹¹⁷ This issue has been raised by A.M. Slaughter/ W. Burke White, "An International Constitutional Moment", *Harv. Int'l L. J.* 43 (2002), 1 et seq., (20); Randelzhofer, see note 115.

¹¹⁸ A/RES/ES-9/1 of 5 February 1982.

¹¹⁹ S/RES/508 (1982) of 5 June 1982; S/RES/509 (1982) of 6 June 1982; S/RES/517 (1982) of 4 August 1982.

¹²⁰ S/RES/573 (1985) of 4 October 1985.

¹²¹ A/RES/41/38 of 20 November 1986.

¹²² Compare here one of the latest events in this respect, the report on Jenin and its relevant resolution taken by the General Assembly, Press Release GA/10037 of 5 August 2002.

against *Al Qaeda* training camps in Afghanistan after the bombing of U.S. embassies in Nairobi and Dar es Salaam.¹²³

In the Nicaragua case the ICJ considered that an armed attack by a state must be understood as including not merely action by regular armed forces across an international border, but also the sending by or on behalf of a state “of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to an actual armed attack conducted by regular forces.”¹²⁴ However, the Court found that “... assistance to rebels in the form of the provision of weapons or logistical or other support” did not constitute an armed attack but rather an unlawful intervention by that state having rendered assistance.¹²⁵ The International Criminal Tribunal for the Former Yugoslavia (Appeals Chamber) took a different position in the Tadić case. For this Tribunal it was decisive whether the state in question had overall control rather than effective control of the activity in question as the ICJ had held. The ICTY stated :

“... Under international law it is by no means necessary that the controlling authorities should plan all the operations of the units dependent on them, choose their targets, or give specific instructions concerning the conduct of military operations and any alleged violations of international humanitarian law. The control required by international law may be deemed to exist when a State (or, in the context of armed conflict, the party to the conflict) has a role in organising, co-ordinating or planning the military actions of the military group ...”. “... Acts performed by the group or members of the group may be regarded as acts of de facto State organs regardless of any specific instruction by the controlling State concerning of each of those acts ...”¹²⁶

This means that — in respect of the *Taliban* — it must be considered whether their involvement was sufficient to justify the excise of self-defence directed against them.

¹²³ See S.D. Murphy, “Contemporary Practice of the United States Relating to International Law”, *AJIL* 93 (1999), 161 et seq.,(164-166).

¹²⁴ Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States), ICJ Reports 1986, 14 et seq., (103), the Court, in fact, quoted from the resolution of the General Assembly defining aggression, see note 113.

¹²⁵ *Ibid.*, 103-104.

¹²⁶ ICTY, Prosecutor v. Tadić (IT-94-1), Judgment of 15 July 1999, para. 137.

In this context account has to be taken of the fact that international law provides not only for actions to be taken against terrorists but also against states harbouring terrorists. For example, A/RES/49/60¹²⁷ concerning measures to eliminate international terrorism not only obliges states not to engage in terrorist activities but obliges them to refrain from acquiescing in or encouraging activities within their territories towards the commission of terrorist activities in other countries.

The international obligation not to endorse and not to give assistance to such terrorist activities but rather to join international efforts to combat terrorism is the common denominator of all respective international instruments. Apart from that, account has to be taken of the fact that the Security Council, on several occasions, has insisted that the *Taliban* cease the provision of sanctuary and training camps for international terrorists and their organisations, to take appropriate effective measures to ensure that the territory under their control is not used by terrorists for the preparation of actions against other states or their citizens¹²⁸ and to turn over *Usama bin Laden*.¹²⁹

In not complying with these demands of the Security Council and their obligations under general international law to refrain from directly or indirectly assisting international terrorist activities the *Taliban* themselves did not only get involved in international terrorism but have violated international law. But this does not yet in itself justify acts of self-defence since such an involvement as such does not constitute an armed attack.

Therefore, to be legitimately made a target of actions of self-defence it is necessary to link the attack of 11 September 2001 itself to the *Taliban*.

According to a dictum of the ICJ in the Teheran Hostages case,¹³⁰ an act of a non-state actor is attributable to the state concerned if the government approved the act in question, instead of taking measures

¹²⁷ Of 9 December 1994 as well as e.g. S/RES/1373 (2001) of 28 September 2001.

¹²⁸ S/RES/1214 (1998) of 8 December 1998; S/RES/1267 (1999) of 15 October 1999, the latter having been adopted under Chapter VII UN Charter, as well as S/RES/1333 (2000) of 19 December 2000 and 1378 (2001) of 14 November 2001.

¹²⁹ S/RES/1267 (1999) of 15 October 1999; S/RES/1333 (2000) of 19 December 2000.

¹³⁰ Case Concerning United States Diplomatic and Consular Staff in Teheran (United States v. Iran), ICJ Reports 1980, 3 et seq.

against it although there was an obligation to do so.¹³¹ This point of departure is reflected in article 11 of the ILC rules on State responsibility of 2001.¹³²

It has been doubted that principles pertaining to the rules on State responsibility, such as attributability, may be used in the context of self-defence.¹³³ Through this mechanism it is established whether a subject may be held internationally responsible for certain actions. This is not only a matter of State responsibility but a general mechanism to establish whether a certain action has been undertaken by a given subject of international law. The attempt to create different forms of attributability blurs the fact that State responsibility and acts of self-defence both serve as mechanisms to enforce compliance with obligations under international law.¹³⁴

It is very questionable, though, whether — as required — the *Taliban* retroactively accepted the attack as conduct of their own, in particular if one takes into account the caveats formulated by the ICJ in this connection¹³⁵ and article 11 of the ILC rules on State responsibility.

Equally article 9 of these rules dealing with the conduct of a person or a group of persons exercising governmental authority in the absence or default of the official authorities seems to be inapplicable.¹³⁶ The acts of *Al Qaeda* cannot be attributed to the *Taliban* on the basis of this article. Three elements have to be met under this provision as to attribute

¹³¹ Ibid., 42, para. 91.

¹³² Report of the International Law Commission, 53rd Sess., 2001, GAOR 56 rd. Sess., Suppl. 10, Doc. A/56/10 and Corrigendum, 29 et seq.

¹³³ Different L. Condorelli, "The Imputability to States of Acts of International Terrorism", *Isr. Y. B. Hum. Rts* 19 (1989), 233 et seq., (240); Stahn, see note 1, 30 is quite doubtful whether one may have recourse to the regime on State responsibility in the context of self-defence. In his other paper, see note 113, he takes a different position invoking article 9 of the ILC rules on state responsibility.

¹³⁴ Different in this respect G.M. Travaglio, "Terrorism, International Law and the Use of Military Force", *Wisconsin International Law Journal* 18 (2000), 145 et seq., (154); R. Erickson, *Legitimate Use of Force Against State Sponsored Terrorism*, 1989. They both argue that mere toleration or encouragement does not amount to an armed attack. Tavalio, however, concedes that substantial support of terrorist activities may amount to an armed attack, 157.

¹³⁵ ICJ, see note 130, 29, para. 59; this has been emphasised by Stahn, see note 1, 30.

¹³⁶ Different Stahn, see note 113.

such acts to the state/government concerned: The conduct must effectively relate to the exercise of elements of governmental authority; the conduct must have been carried out in the absence or default of the official authorities; and the circumstances must have been such as to call for the exercise of those elements of authority.¹³⁷ These criteria, particularly the second one — default of the authorities — has not been met. The *Taliban*, as a *de facto* regime were exercising effective control over parts of Afghanistan and thus left no room for *Al Qaeda* to act on behalf of the Taliban.

However, it is a matter for further thought whether arts 9 to 11 of the ILC rules on State responsibility really cover all situations where certain actions carried out by non-state entities may be attributed to a particular state or — by analogy in this case — to a *de facto* regime. Article 9 and article 11 deal with two cases in which, either state authorities are absent or in default or the state adopts the conduct later as its own. These provisions on attribution of conduct to a state do not cover situations where a state is in complicity with non-state actors. However, article 16¹³⁸ of the ILC rules on State responsibility addresses the responsibility of a state having acted together with another state (Chapter IV). If the attacks of 11 September had been undertaken by a subject of international law with the assistance of a state there would have been no doubt that both subjects could have been made the target of self-defence. The situation cannot be different if the acting side is a non state entity. The entity rendering assistance being a subject of international law cannot be privileged by the mere fact that the entity which actually has launched the attack was a non-state actor. Therefore a given action of a non-state actor is attributable to that subject of international law if that subject deliberately created a situation which was a necessary precondition for a later event under the condition the happening of that event was not beyond reasonable probability.

This was the case under consideration.

Had the *Taliban* stopped *Al Qaeda* using Afghan territory as a basis for its activities, as requested for several years by the Security Council and had the *Taliban* surrendered *Usama bin Laden*, the attack of 11 September may most likely not have occurred. Therefore, the action of the *Taliban* or rather their non-action lasting for several years, contrary to their international obligations, was one of the indispensable precon-

¹³⁷ See Report of the ILC, see note 132, Commentary to article 9.

¹³⁸ Article 16 – Aid or assistance in the Commission of an internationally wrongful act.

ditions for the functioning of *Al Qaeda* and of the attack of 11 September 2001. That *Al Qaeda* was engaged in terrorist activities on a major scale was well known to the *Taliban*, particularly after the bombing of the U.S. embassies in Nairobi and Dar es Salam in 1998. At least after Security Council Resolution S/RES/1267 the *Taliban* were fully aware of the threat *Al Qaeda* constituted to the whole western world and the United States in particular, and that giving shelter to *Al Qaeda* contributed to upholding that threat and made further terrorist attacks more likely.

Accordingly, acts carried out by *Al Qaeda* are attributable also to the *Taliban* and therefore the *Taliban* themselves could be made the target for actions of self-defence. This does not mean, though, that the attack of 11 September 2001 has to be considered an armed attack and those directly involved are to be considered combatants in the meaning of international humanitarian law. The merit of this approach namely to distinguish between the qualification of the attack of 11 September 2001 and the counter measures taken, is that it gives some discretion to the targeted state whether to respond on the level of self-defence with all its consequences or to resort to criminal law sanctions in general appropriate for terrorists. It is evident, however, that the first option, namely to resort to self-defence, is only available if the attack is by its gravity comparable to an armed attack.

V. Members of the *Taliban* Military Forces and *Al Qaeda* Members as Prisoners of War

Article 4 of the Third Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949¹³⁹ identifies several groups of persons which, having fallen into the power of the enemy, are to be considered prisoners of war.

These are members of the armed forces of a party to the conflict as well as members of militias or volunteer groups which form part of such armed forces.¹⁴⁰ It is of no relevance whether the government or the authority to which these armed forces profess allegiance has been

¹³⁹ UNTS Vol. 75 No. 972.

¹⁴⁰ Article 4 A, para. 1.

recognised by the detaining power.¹⁴¹ Additionally thereto also members of other militias and members of other volunteer corps, including those of organised resistance movements belonging to a party of the conflict may acquire the status of prisoners of war if the groups referred to meets certain criteria.¹⁴² The main distinction between these categories is that the four criteria referred to in article 4 A para. 2 Third Geneva Convention apply to irregular forces (such as militias not being part of armed forces of a party to the conflict) but not to members of regular armed forces as referred to in article 4 A paras 1 and 3 of that Convention.¹⁴³ It has been argued that meeting these criteria is inherent in the regular armed forces of states¹⁴⁴ although attempts at the Geneva Conference of 1949 to prescribe conditions for armed forces, militias and volunteer corps forming part of the regular armed forces identical with the ones for irregular forces met with Soviet objections on the ground that article 1 of the Hague Regulations of 1907 imposed such conditions only on independent or irregular forces.¹⁴⁵ However, in the view of the explicit wording of article 4 A, Third Geneva Convention, the intention not to deviate from the Hague Regulations of 1907 and taking into consideration the legislative history of article 4 of the Third

¹⁴¹ See article 4 A, para. 3. This was a matter of controversy in World War II. According to article 10 para. 3 of the Armistice Agreement concluded between France and Germany of 22 June 1940 French soldiers continuing their fight against Germany were not entitled to a prisoners of war status if they should fall into the power of German forces. However, the German government changed its attitude towards soldiers fighting under General de Gaulle and accepted them as prisoners of war due to an intervention of the International Committee of the Red Cross. However, the situation for Italian soldiers fighting against German forces after 1943 was not clarified, they did not receive the treatment as prisoners of war, J. Pictet, *Commentaire, La Convention de Genève Relative au Traitement des Prisonniers de Guerre*, 1958, Art. 4. 3.

¹⁴² See article 4 A, para. 2 (a-d).

¹⁴³ This distinction made in article 4 A of the Third Geneva Convention follows in substance article 1 of the Regulations Respecting the Laws and Customs of War on Land, 1907, (Hague Regulations of 1907), 3 Martens NRG 3ième Série (1862-1910), 461.

¹⁴⁴ A. Rosas, *The Legal Status of Prisoners of War: A Study in International Humanitarian Law Applicable in Armed Conflicts*, 1976, 328.

¹⁴⁵ Final Record of the Diplomatic Conference of Geneva, 1949, Vol. II A, 465-467.

Geneva Convention, one cannot argue that the criteria formulated for irregular forces have to be met by regular forces, too.¹⁴⁶

The view that combatants which have violated the rules of warfare lose the status as prisoner of war blurs the distinction between such status and the possibility to prosecute prisoners of war for such violations as provided for in article 82 et seq., Third Geneva Convention. Actually depriving prisoners of war of their status for having violated rules of warfare would be in violation of article 85 of the Third Geneva Convention.¹⁴⁷

It has been argued that members of the *Taliban* forces having been taken prisoners do not have the status of prisoners of war since the *Taliban* regime failed to gain international recognition. This argument is hardly sustainable. Article 4 A para. 3 of the Third Geneva Convention exactly covers this situation. The recognition of the adversary government is of no relevance for the prisoner of war status of members of forces which profess allegiance to such government.

The *Taliban* met the requirement of a regular force. They were organised under the authority of a central command of a government, namely the *de facto* government of the *Taliban* (which had instituted a military shura, as mentioned above, for their forces). Additionally, it has been argued that *Taliban* fighters having taken prisoners do not enjoy the status of prisoners of war since they were unlawful combatants, not having displayed their combatant status appropriately and not

¹⁴⁶ See G.H. Aldrich, "New Life for the Laws of War", *AJIL* 75 (1981), 764 et seq., (768 et seq.); A.P. Rubin, "Terrorism and the Laws of War", *Den. J. Int'l L. & Pol'y* 12 (1982), 219 et seq., (222); Cerone, Status of Detainees, see note 3; different, Y. Dinstein, "The Distinction between Unlawful Combatants and War Criminals", in: Y. Dinstein (ed.), *International Law at a Time of Perplexity, Essays in Honour of S. Rosenne*, 1989, 103 et seq., (108); Wedgwood, "Al Qaeda ...", see note 3, 328.

¹⁴⁷ The different interpretation of article 4 of the Third Geneva Convention has led to the adoption of arts 43 and 44 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 1977, see note 81. Article 43 gives a definition of what is meant by the term "armed forces" and states where members of armed forces are to be considered as combatants. Article 44 para. 2 then reaffirms that having violated the rules of international law applicable in armed conflict does not deprive the combatant of his right to be a combatant and of his right to be a prisoner of war.

having conducted their operations in accordance with the laws and customs of war.¹⁴⁸

As has been already pointed out this argument is based upon an interpretation of the prisoner of war status not endorsed by the wording of article 4 A paras 1 and 3 of the Third Geneva Convention. Apart from that it is even doubtful whether such assertion meets with the facts.

The *Taliban* fighters were distinguishable from the civilian population because they wore black turbans and had scarves indicating to which force they belonged. This is to be considered as a distinctive sign appropriate for identifying them as members of the armed forces. To wear a uniform is not even required for regular forces. As to the second argument it has already been pointed out that prisoners of war may be prosecuted by the detaining power also for acts committed prior to their being taken prisoner. They do not lose their prisoner of war status in this context although they may, on the basis of the criminal sanctions imposed, lose most or all rights prisoners of war enjoy. However, such sanctions may only be imposed by court and under a procedure that meets the minimum requirements for fair trial as provided for in arts 84 and 86 to 87 Third Geneva Convention.

Following the interpretation offered by the U.S. Government would, in fact, mean that whole armies which have not displayed a sufficiently distinctive sign or which have not carried their arms openly would be considered collectively as being deprived of the prisoner of war status.¹⁴⁹

The situation in respect of the members of *Al Qaeda* is more critical. Members of *Al Qaeda* cannot be considered as members of regular armed forces and it is doubtful whether they are to be seen as members of militias forming part of such armed forces.

This is a factual matter.

If, what is most likely, *Al Qaeda* acted independently from or only in a loose connection with the *Taliban* then the requirements of article 4

¹⁴⁸ See Statement by the U.S. Press Secretary, Washington D.C., 7 February 2002; White House Fact Sheet, 7 February 2002, 1; see also G.A. Lopez, "The Style of the New War: Making the Rules as We Go Along", *Ethics & International Affairs* 16 (2002), 21et seq., (25); Wegdwood, "Al Qaeda ... ", see note 3, 335; a different approach has been taken by the International Committee of the Red Cross, Press Release of 9 February 2002.

¹⁴⁹ Rosas, see note 144, 354.

A para. 2 Third Geneva Convention have to be met by *Al Qaeda* forces if they are to be considered an irregular force whose members are entitled to prisoner of war status. This seems not be the case.

The *Al Qaeda* has been organised as an international terrorist network rather than a force according to article 4 A para. 2 Third Geneva Convention and is directing its attacks deliberately against civilians rather than other armed forces¹⁵⁰, thus, not conducting its operations in accordance with the laws and customs of war.

Accordingly, *Al Qaeda* fails to meet at least one of the requirements for qualifying as an irregular force and it is more than doubtful if it meets the others. Thus, the members of *Al Qaeda* taken prisoners by the United States, its allies or Afghan authorities are not entitled to the status of prisoners of war. They are criminals to be treated according to the national law of the detaining power. But surely they should not be tried by military commissions as foreseen in the Military Order of 13 November 2001.¹⁵¹

VI. Conclusions

The events of 11 September 2001 and the reaction of the United States and its allies thereto have been qualified by some as a mayor challenge to or a turning point of international law.

This is not the view of this contribution.

We have to concede though, that the reactions to 11 September have confirmed several trends in international law.

It was well established before that international terrorism may constitute a threat to international peace or security. The respective international agreements against terrorism and the resolutions of the Security Council directly addressing the *Taliban* speak a clear language in this respect. Accordingly the system of Chapter VII of the UN Charter which includes individual or collective self-defence may be utilized

¹⁵⁰ *Usama bin Laden* itself is quoted with, "We do not differentiate between those dressed in military uniforms and civilians; they are all targets in this fatwa", Interview with *Usama bin Laden* of 10 June 1998 by J. Miller.

¹⁵¹ Office of the Press Secretary, 13 November 2001. See in this respect also American Bar Association-The Bar Association of the District of Columbia-Report to the House of Delegates, February 2002.

against terrorism in cases where it reaches the level of an armed attack. There was no doubt that this was the case on 11 September 2001.

This does not mean that this attack was to be considered an act of war. *Al Qaeda* is a terrorist group to be treated as a criminal organization and the means taken against it are the ones of criminal law, be they national or international.

The main problem from the point of international law lies in the fact that the countermeasures taken by the United States and its allies are directed against the *Taliban* together with *Al Qaeda*.

The *Taliban* have never been recognised as the government of Afghanistan although they were in control of most parts of the Afghan territory. Even the Security Council resolutions addressing them did not amount to recognition. However, these resolutions preceded from the premise that the *Taliban* had control of the territory and that they were under an obligation to implement and enforce international law in particular against terrorism and on human rights. The latter was made a precondition of their recognition. This clearly indicates that the factual government of a given territory alone is not sufficient but that it has to be supplemented by a commitment of the respective entity to the universally established values of the international community.

Due to their non-recognition the *Taliban* were a non recognised *de facto* regime and as such in spite of their non recognition enjoyed certain rights under international law, as well as being under the obligation to respect it.

It is beyond dispute that in harbouring *Al Qaeda* the *Taliban* have violated their international obligations and contributed to the terrorist attack of 11 September 2001. This made the *Taliban* the accomplices of *Al Qaeda* with the consequence that - using the model of article 16 of the ILC rules on State responsibility - the *Al Qaeda* actions can be attributed to them. Accordingly acts of self defence could be directed against the *Taliban*.

The terrorist attack of 11 September 2001 and the reaction hereto furthermore clearly confirms as a trend the individualisation of international law. This has already been reflected in the progressive development of international criminal law. Due to that individuals may not hide behind a state to escape individual responsibility for their violation of international law. However, the regime on enforcing compliance of international law has to be interpreted in such a way that the subjects of international law do not escape their responsibilities by being in complicity with terrorist groups.