

# The Attack of September 11, 2001, the Wars Against the Taliban and Iraq: Is There a Need to Reconsider International Law on the Recourse to Force and the Rules in Armed Conflict?

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## I. Introduction

The attack of September 11, 2001 against the United States, the war against the *Taliban* in reaction thereto, and, in particular, the war against Iraq in 2003 have prompted dissonant views concerning the international law regime governing the recourse to military force. Some commentators have deplored the military actions taken by the United States and its allies against the *Taliban*, and particularly against Iraq as being in violation of the international law prohibition against the unilateral use of force. They take the position that such practice is likely to erode the principle that prohibits resort to force in international relations. Others have argued that these incidents make it necessary to reconsider the scope and content of the principle of the prohibition of the use of force.<sup>1</sup> The issue is a complex one.

It is not only necessary to consider the ambit of the international law prohibition of the illegitimate recourse to force or — to phrase the question in a different way — under what circumstances or in pursuing what objectives is recourse to force legitimate under international law, but also to determine which law governs the respective military conflict and the period thereafter. To put it more generally, the attack of September 11, 2001, the war against the *Taliban* and the war of 2003 against Iraq have put the *ius ad bellum* and the *ius in bello* on the test bench. None of these incidents should be considered in isolation; they should also be seen in connection with the war against Iraq in 1990/1991 and the military intervention in the former Yugoslavia in 1999. What is of interest for the development of international law is whether the actions taken by the United States and its allies and the reaction thereto from the international community reveal a pattern or a tendency indicating that there have been changes in the international law concerning the use of force and the law in armed conflict.

As will be shown later, international law and customary international law are quite responsive to new challenges.

Two different situations have to be taken into consideration. Where no international rule exists, it is much easier to agree in favour of the development of new rules. However, where the development of new rules

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\* I am grateful to Thomas Mensah, Judge at the International Tribunal for the Law of the Sea, for his valuable recommendations.

<sup>1</sup> W.M. Reisman, "Assessing Claims to Revise the Laws of War", *AJIL* 97 (2003), 82 et seq.

would result in the derogation of established ones the onus is on those advocating the development of new rules, to prove that the old rules have fallen into *desuetudo* or have been replaced by new ones. In any case, before considering the modification of existing rules, it is necessary to establish, whether all the possibilities of interpreting and adapting the existing rules to the new situation have been exhausted. For example the notion of “matters ... within the domestic jurisdiction” as referred to in Article 2 (7) UN Charter has a different meaning under the increased bearing of the international protection of human rights than it had in 1945.

The developments referred to since September 11, 2001 have neither put the existence of international law into question, nor undermined its regulatory function for the conduct of international relations.<sup>2</sup> Those who argue the point differently<sup>3</sup> attempt to revitalize theories which have been voiced before.<sup>4</sup> Such theories do not reflect the realities of international relations where the rule of law is an established principle. Although the means to enforce international law, or rather induce its implementation and compliance with it, differ from the enforcement mechanisms on the level of national law.<sup>5</sup> None of the states which participated in the military action against Iraq has denied that binding force of international law, in general, or its prohibition to have recourse to military force. On the contrary, they, and in particular the United

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<sup>2</sup> J.A. Frowein, “Ist das Völkerrecht tot?”, *Frankfurter Allgemeine Zeitung* of 23 July 2003, 6.

<sup>3</sup> See amongst others J.R. Bolton, “Is there Really “Law” in International Affairs”, *Transnat'l L. & Contemp. Probs* 10 (2000), 1 et seq.; R. Kagan, “Power and Weakness”, *Policy Review* No. 113.

<sup>4</sup> J. Austin, *Lectures on Jurisprudence or the Philosophy of Positive Law*, 5th edition 1911, in particular Lecture VI; see on that M. Koskenniemi, *The Gentle Civilizer of Nations*, 2002.

<sup>5</sup> Quite some research has been undertaken on this issue; see for example: E. Brown-Weiss/ H.K. Jacobsen, *Engaging Countries*, 1998; R. Wolfrum, “Means of Ensuring Compliance with and Enforcement of International Environmental Law”, *RdC* 272 (1998), 25 et seq., both with further references and on the enforcement of international law in general. A more general inquiry on the issue of compliance or non compliance of states with their international obligations has been undertaken by A. Charles/ A.H. Chayes, *The New Sovereignty*, 1995, critical in this respect L.F. Damrosch, “The Permanent Five as Enforcers of Controls on Weapons of Mass Destruction: Building on the Iraq ‘Precedent’”, *EJIL* 13 (2002), 305 et seq.; she argues that only enforcement measures will prove to be effective.

States and the United Kingdom, have made every attempt to justify their actions *vis-à-vis* the Security Council and the community of states at large. Although one may disagree with their reasoning in substance, such reasoning constitutes a clear confirmation of their acceptance of the view that recourse to military force needs justification under international law. This is not meant to diminish or even to deny the existence of a profound divergence of views between, on the one hand, those who advocate the use of military force against Iraq — and thus a reinterpretation or modification of existing international law in that respect — and, on the other hand, those who are opposed to the use of military action in the circumstances. They disagree to some extent on status and scope of the international law prohibition on the use of military force in international relations and the factors legitimizing such use of force. The two groups further disagree on the scope, content and applicability of some aspects of the rules governing such conflicts, including in particular the scope of respective customary international law, the limits to targeting, the treatment of detainees and the rules governing military occupation. Phrased in more general terms, disagreement exists on some aspects of the methods and means of warfare, especially against an enemy which itself disregards the rules of warfare.

## II. Prohibition of the Use of Force in International Relations: Content, Scope and Exceptions

### 1. Article 2 (4) UN Charter

A central element in modern international law is the prohibition of the unilateral use of force in international relations as codified in Article 2 (4) UN Charter.<sup>6</sup> Marking a decisive evolution of international law in

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<sup>6</sup> There is an overwhelming literature dealing with the international prohibition of the use of force in particular. See for example: C. Antonopoulos, *The Unilateral Use of Force by States in International Law*, 1997; B. Asrat, *Prohibition of Force under the UN Charter: A Study of Art. 2 (4)*, 1991; D.W. Bowett, *Self-Defence in International Law*, 1958; I. Brownlie, *International Law and the Use of Force by States*, 1963; J. Delbrück, “Effektivität des UN-Gewaltverbots: Bedarf es einer Modifikation der Reichweite des Art. 2 (4) UN Charta”, *Die Friedenswarte* 74 (1999), 139 et seq.; Y. Dinstein, *War, Aggression and Self-Defence*, 3rd edition 2001; T.M. Franck, “Who killed Art. 2 (4), or: The Changing Norms Governing the Use of

the last century,<sup>7</sup> this provision obliges all Member States, and as customary international law all states, to refrain in their international relations from the threat of force or the use of force.<sup>8</sup> This provision is part of the ‘Purposes and Principles’ of Chapter I of the United Nations Charter which the drafters considered of transcendent importance indicating the directions which the activities of the Organization were to take and the common ends of its members.<sup>9</sup> The prohibition of unilateral recourse to force by states is generally held to be a principle of customary international law<sup>10</sup> and to constitute a peremptory norm of international law (*ius cogens*).<sup>11</sup>

The scope of the evolution that international law has undergone concerning the prohibition of the use of force becomes apparent by comparing Article 2 (4) UN Charter with article I of the *Kellogg-*

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Force by States”, *AJIL* 64 (1970), 809 et seq.; T.M. Franck, “When, If Ever, May States Deploy Military Force Without Prior Security Council Authorisation”, *Singapore Journal of International and Comparative Law* 4 (2000), 362 et seq.; T.M. Franck, *Recourse to Force: State Action Against Threats and Armed Attacks*, 2002; C. Gray, *International Law and the Use of Force*, 2000; S. Khare, *Use of Force under the UN Charter*, 1985; H. Neuhold, *Internationale Konflikte – Verbotene und erlaubte Mittel ihrer Austragung*, 1977; D. Schindler, “Die Grenzen des völkerrechtlichen Gewaltverbots”, *Reports of the DGVR* 26 (1986), 11 et seq.; S.M. Schwebel, “Aggression, Intervention and Self-Defence in International Law”, *RdC* 136 (1972), 411 et seq.; A. Randelzhofer, “Art. 2 (4)”, in: B. Simma (ed.), *The Charter of the United Nations*, 2nd edition, 2002; J. Zourek, *L’interdiction de l’emploi de la force en droit international*, 1974; R. Müllerson, “Jus ad bellum: Plus ça change (le monde) plus c’est la même chose (le droit)”, *Journal of Conflict and Security Law* 7 (2002), 149 et seq.

<sup>7</sup> See in this respect for example: G. Dahm/ J. Delbrück/ R. Wolfrum, *Völkerrecht* I/3, 2002, 816 et seq.

<sup>8</sup> Franck, *Recourse to Force*, see note 6, 12 points out that the obligation to respect the territorial integrity or political independence of any state was meant to strengthen the obligation under Article 2 (4) UN Charter. Any attempt to exclude minor military action from the ambit of that provision is therefore incongruent with the intent of the drafters of this provision.

<sup>9</sup> See L. Goodrich/ E. Hambro, *Charter of the United Nations: Commentary and Documents*, 2nd edition, 1949, 22.

<sup>10</sup> Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), ICJ Reports 1986, 14 et seq. (99, para. 188).

<sup>11</sup> ICJ, see above; Dinstein, see note 6, 93 et seq.; M.N. Schmitt, “Pre-emptive Strategies in International Law”, *Mich. J. Int’l L.* 24 (2003) 513 et seq. (525).

*Briand Pact* of 27 August 1928<sup>12</sup> which itself already constituted a major step in the progressive development of international law in this respect.<sup>13</sup> Article I of this Pact abandons the unrestricted freedom to resort to war as a feature of state sovereignty and imposes in its place a universal and general prohibition of war as an instrument of national policy in the relations amongst states. Article 2 (4) UN Charter has broadened this prohibition by also covering the use and the threat to use force. This prohibition of the unilateral use of force is meant to be implemented and enforced by a system of collective sanctions against any offender as provided for under Chapter VII of the UN Charter. It has been argued with respect to the case of Iraq, amongst others, that the system of collective sanctions has failed since the Security Council has been unable to enforce the obligation it had imposed upon Iraq with the view to preserving peace and security and, accordingly, that resort to unilateral force was again not only possible but mandatory.<sup>14</sup>

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- <sup>12</sup> LNTS Vol. 94 No. 2137 General Treaty for the Renunciation of War as an Instrument of National Policy. The Pact provided the legal basis for multiple bilateral non-aggression pacts, for example: between Germany and Luxembourg (11 September 1929), Germany and the Kingdom of Denmark (31 May 1939) and Germany and the USSR (23 August 1929). The violation of these agreements provided a basis for charges at the Nuremberg Trials. The Kellogg-Briand Pact is still considered to be in force; Barbados (30 November 1966), Fiji (10 October 1970) and Grenada (7 February 1974) have declared to further apply it.
- <sup>13</sup> The system of the League of Nations constituted the first attempt under modern international law to limit the right of states to have recourse to war. Article 15 of the Covenant of the League of Nations of 1919 <<http://www.ku.edu/carrie/docs/texts/leagnat.html>> obliged states not to resort to war as long as a dispute was under consideration by the Council of the League of Nations. Once the process set into motion had failed to produce an amicable settlement the parties of the conflict remained free “to take such action as they shall consider necessary for the maintenance of right and justice”. In the period between the wars multilateral treaties attempted to further limit the possibility of states to have recourse to war. For example, according to article 2 of the Locarno Treaty (Treaty of Mutual Guarantee) of 16 October 1925 (LNTS Vol. 54 No. 1292), the States parties to that treaty undertook “... in no case [to] attack or invade each other or to resort to war ...”. Another example to that extent is the Anti War Treaty of 10 October 1933 (LNTS Vol. 163 No. 3781).
- <sup>14</sup> See, for example, the statement of the Permanent Representative of Australia in the Security Council, Doc. S/PV. 4726 of 26 March 2003, 27; on the validity of that argument see below.

It is the prevailing view that scope and content of the prohibition on the unilateral use of force cannot be interpreted on the basis of Article 2 (4) UN Charter alone. Arts 39, 51 and 53 of the UN Charter have also to be taken into consideration. Nevertheless, there are uncertainties as to the exact meaning of the notion of force which neither the rulings of the ICJ nor resolutions of the UN General Assembly<sup>15</sup> have overcome.

As far as the definition of the notion of force is concerned only the qualification of the attack of September 11, 2001 poses a problem. The attack of September 11, 2001 was not an act of war although, at that time, politically it qualified as such. The term 'war' only describes armed conflicts between states or amongst them and organised groups or amongst such groups. This term does not embrace terrorist actions against the civilian population of another state.<sup>16</sup> On the other hand, the action taken by the United States in response to the terrorist attack of September 11, 2001 constituted the use of force against the *Taliban* within the meaning of Article 2 (4) UN Charter and therefore requires justification under international law, self-defence being the only reliable option.<sup>17</sup> Equally, the military attack on Iraq constituted an act of force. In respect of that it has been argued that it was either authorised by the UN Security Council or that it was a legitimate act of self-defence.<sup>18</sup> Although this shifts the emphasis in the analysis of this article onto the legitimisation of the recourse to force, an assessment of the meaning of this central principle of international law is necessary.

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<sup>15</sup> Definition of Aggression A/RES/3314 (XXIX) of 14 December 1974; A/RES/2625 (XXV) of 24 October 1970 (Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations; A/RES/42/22 (1987) of 18 November 1987 (Refraining from the Threat or Use of Force); T. Treves, "La Déclaration des Nations Unies sur la renforcement de l'efficacité du principe du non recours à la force", *A.F.D.I.* 33 (1987) 379 et seq., points out that this resolution does not make a respective attempt to deal with controversial issues.

<sup>16</sup> C. Tomuschat, "Der 11. September 2001 und seine rechtlichen Folgen", *EuGRZ* 28 (2001), 535 et seq. (536); F.L. Kirgis, "Security Council adopts Resolution in Combating International Terrorism", *ASIL Insight* 2001; J. Cerone, "Acts of War and State Responsibility in 'Muddy Waters': The Non-state Actor Dilemma", *ASIL Insight* 2001; R. Wolfrum/ C. Philipp, "The Status of the Taliban: Their Obligations and Rights under International Law", *Max Planck UNYB* 6 (2002), 559 et seq. (588).

<sup>17</sup> See below.

<sup>18</sup> See below.

## 2. The Prohibition of the Use of Force and its Meaning for the Community of States

The prohibition of the use of force is one of the constituent principles of the community of states. The term ‘community of states’ or, more appropriately, ‘international community’<sup>19</sup> can theoretically mean different things in different contexts. In the context used here it means that states have assented to community values which are the basis for a normative order guiding the conduct of states in international relations or in issues which are of international concern. By referring only to states in this context is not meant to ignore the growing impact non-governmental actors have not only on the formation of the common values of the international community but on the normative order as well.<sup>20</sup> Neither the common values nor still less the normative order is static; it is in permanent development.

In former periods of international law attempts were made to develop common values of the international community from the common Christian beliefs. Subsequently, this approach was superseded by references to natural law as the ultimate foundation for international law values. As at present, taking into consideration the plurality of states and peoples and their differing cultural, religious, economic and national political backgrounds on the one hand, and on the other the growing universal interdependence of factors governing the lives of individuals, common values can only develop — on the universal or re-

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<sup>19</sup> See in particular on this R.J. Dupuy, “Communauté internationale et disparité de développement”, *RdC* 165 (1979), 21 et seq.; G. Abi-Saab, “Whither the International Community”, *EJIL* 9 (1998), 248 et seq.; C. Tomuschat, “Die Internationale Gemeinschaft”, *AVR* 33 (1995), 1 et seq.; A.L. Paulus, *Die Internationale Gemeinschaft im Völkerrecht – Eine Untersuchung zur Entwicklung des Völkerrechts im Zeitalter der Globalisierung*, 2001; B. Simma/ A.L. Paulus, “The ‘International Community’: Facing the Challenge of Globalization”, *EJIL* 9 (1998), 266 et seq.; J.A. Frowein, “Konstitutionalisierung des Völkerrechts”, *Reports of the DGVR* 39 (2000), 427 et seq.; C. Walter, “Constitutionalizing (Inter)national Governance: Possibilities for and Limits to the Development of an International Constitutional Law”, *GYIL* 44 (2001), 170 et seq.; Dahm/ Delbrück/ Wolfrum, see note 7, 776 et seq.

<sup>20</sup> O. Schachter, “The Decline of the Nation-state and its Impact for International Law”, in: J.I. Charney/ D.K. Anton/ M.E. O’Connell, *Politics, Values and Functions: International Law in the 21st Century*, 1997, 13 et seq. (19).



gional level — in a free and permanent discourse of the respective governmental and social factors. They are not pre-existent but have to be developed. The international system provides for various mechanisms for this development. It offers institutions and procedures such as codification conferences, state conferences, the UN General Assembly, the Security Council or the institutions of international organizations. In addition non-governmental fora such as the one which has developed the *San Remo Manual*<sup>21</sup> are of relevance. The results achieved may be of a general normative nature but may also constitute binding decisions as the ones issued by the Security Council under Chapter VII UN Charter. In effect, the international common values thus developed crystallize into international norms or form the respective foundation for such norms which together constitute the international normative order. Hence, there is a permanent mutual cross fertilization between the community values and the international normative order. Those international norms which have contributed to the progressive development of international common values are the UN Charter, in particular, its principles and purposes,<sup>22</sup> the international human rights regime, the international economic and the international environmental regime. The common value system was further enhanced by the establishment of the ICC providing for the prosecution of individual offenders on the basis of internationally accepted criminal law.

What is the meaning of the prohibition of the use of force in this context? Through it — and that is its most traditional meaning — the very existence of each member of the international community is guaranteed, as well as its right to participate in the process for the development and articulation of common values and norms. But the prohibition of the use of force is more than a limitation on the means through which states may pursue their political intentions. It reflects a value judgment of the international community, namely, that no objective pursued by a state justifies recourse to force in international relations, except where international law so provides. The qualification of the prohibition of force as a reflection of a value judgment transpires from the wording of article I<sup>23</sup> of the *Kellogg-Briand* Pact as well as from

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<sup>21</sup> San Remo Manual Applicable to Armed Conflict at Sea <<http://www.icrc.org/ihl.nsf/0/7694fe2016f347e1c125641f002d49ce?OpenDocument>>

<sup>22</sup> B.D. Lepard, *Rethinking Humanitarian Intervention*, 2002, 39 et seq.

<sup>23</sup> “The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of in-

that of Article 2 (4) UN Charter. Both provisions clearly establish that a recourse to war or, respectively, recourse to force is not a legitimate means to pursue national policy in international relations.

The prohibition of the use of force is, as already indicated, not of an absolute nature, though. The possibility of self-defence has been clearly acknowledged. This exception is in line with what has been said earlier. As the prohibition of the use of force is meant to protect the existence of each member of the international community, it follows that each member of the international community has the right to implement that principle against an offender, independently of actions that may be taken by the international community acting through the Security Council. International law also provides for resort to force against a state having fundamentally violated common values. However, the legality of force in this case must be decided upon in a different procedure. In such a case the resort to force is not a means to protect the existence of one member of the international community but rather a means to protect the community as such, namely its normative system. In this connection it is noted that those who argue in favour of the legality of the use of military force against Iraq in fact referred to that aspect. They have claimed that the military action against Iraq was the only remaining means to effectively ensure compliance by Iraq with its international obligations.<sup>24</sup> But in such a situation it would appear that only the international community as a body can act or may authorize an individual state or group of state to act on its behalf. For the notion of unilateral use of force as a means to enforce international law in general it cannot be conceived as compatible with the maintenance of the fabric of an international normative order which is the foundation of an international community.

It is accordingly incorrect to claim that international law prohibits the resort to armed force in absolute terms and, on that basis, to argue

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international controversies, and renounce it, as an instrument of national policy in the relations with one another”.

<sup>24</sup> See letter of 20 March 2003 from the Permanent Representative of Australia to the United Nations addressed to the President of the Security Council (Doc. S/2003/350 of 20 March 2003; “... The objective of the action is to secure compliance by Iraq with its disarmament obligations as laid down by the Council ...”; in this respect, an identical letter has been sent by the Permanent Representative of the United Kingdom (Doc. S/2003/350 of 21 March 2003).

that there is a “cultural division” concerning the use of force.<sup>25</sup> The correct position is rather that the UN Charter channels the use of force. Only if force is used to protect a state, force may be used unilaterally and upon the decision of the state concerned to counter this attack. In all other cases, in particular, when force is used to defend community interests, it is for the institutions representing this international community, namely the Security Council, to take respective counter measures which may include the use of force. The underlying philosophy of Arts 2 (4) and 39 et seq. of the UN Charter reflects a certain value decision taken at the time when the UN Charter was adopted. It was heavily influenced by the experiences of the two world wars. An act of a state contrary to this value decision, even if such action is upheld by the international community, does not yet change this underlying philosophy. To the contrary, as long as other members of the international community remain committed to that value decision it remains in force and the political price to be paid by the violating state is high.

### 3. Authorization of the Use of Force by the Security Council

The members of the United Nations have conferred upon the Security Council primary responsibility for the maintenance of world peace and international security. To this extent, the Security Council acts in their name (Article 24 UN Charter). The members of the United Nations have, according to Article 25 UN Charter, agreed to accept and carry out the decisions of the Security Council. Article 39 UN Charter authorizes the Security Council to determine that a threat to or a breach of the peace exists. Article 39 UN Charter grants to the Security Council broad — certainly not unlimited<sup>26</sup> — discretionary powers which the Security Council on several occasions was ready to exhaust. For instance, in October 2002 the Security Council labelled the hostage taking at the Moscow theatre a threat to international peace<sup>27</sup> and did the same concerning the bombing in Bali.<sup>28</sup> It has even characterized Libya’s fail-

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<sup>25</sup> M.J. Glennon, “Why the Security Council failed”, *Foreign Aff.* 8 (2003), 16 et seq. (21).

<sup>26</sup> For that reason the statement of Schmitt, see note 11, 527, that a threat to peace is what the Security Council declares as such, disregards the inherent limitations of the Security Council under Chapter VII UN Charter.

<sup>27</sup> S/RES/1440 (2002) of 24 October 2002.

<sup>28</sup> S/RES/1438 (2002) of 14 October 2002.

ure to cooperate in the prosecution of the Pan Am Flight 103 bombers as a threat to peace.<sup>29</sup> This declaration under Article 39 UN Charter is the precondition for the Security Council to take measures in accordance with Chapter VII of the UN Charter with the view to maintain or to restore international peace and security.

The measures the Security Council may include, are according to Article 42 UN Charter, military measures if other measures are considered inadequate or have proved to be inadequate. To that end all members have undertaken "... to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, ..., necessary for the purpose of maintaining international peace and security" (Article 43 UN Charter).

The idea of securing peace through collective action is an old one; in the history of ideas it can be traced to, among others, *Abbé St. Pierre*, *Emanuel Kant* and *William Penn*. No agreements or arrangements as envisaged by Article 43 UN Charter have been concluded so far, leaving, at least in theory, a vacuum concerning the implementation of the collective security system. However, practice has filled or rather overcome this gap since the Security Council, instead of using forces at its disposal, has authorized states ready to do so (so-called coalition of the willing) on an *ad hoc* basis to respond militarily to a threat or breach of the international peace and security. The basis for such an approach is to be found in Article 42 UN Charter, read alone or in conjunction with Article 48 UN Charter.<sup>30</sup>

The first situation in which such an approach was used was the Korean war where the Security Council held — acting under Chapter VII of the UN Charter — "... that the Members of the UN furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack and to restore international peace and security in the area".<sup>31</sup> In 1960 the Security Council authorized another coalition of the willing to respond to an appeal of the government of the Republic of the Congo to restore order and facilitate the removal of Belgian

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<sup>29</sup> S/RES/748 (1992) of 31 March 1991.

<sup>30</sup> See J.A. Frowein/ N. Krisch, "Art. 42", MN 20-24, in: Simma, see note 6.

<sup>31</sup> S/RES/83 (1950) of 27 June 1950; S/RES/82 (1950) of 25 June 1950 had already stated that there had been a breach of peace and thus invoked Article 39 UN Charter. Frowein/ Krisch, see above, MN 21 take the view that the respective action of the Security Council was merely a recommendation to use self defence.

troops.<sup>32</sup> In 1966 the Security Council authorized the British navy to enforce UN sanctions against the government of Southern Rhodesia.<sup>33</sup> The most significant example to that extent is, though, the authorization of states co-operating with the government of Kuwait “to use all necessary means” to reverse the aggression of Iraq and to restore peace and security in the area.<sup>34</sup> There have been subsequent occasions where the Security Council has authorized the use of force by states to achieve specified objectives and thus to restore international peace and security. The Security Council has authorized a multilateral force “to use all necessary means” to facilitate the ousting of the military leadership from Haiti<sup>35</sup> and has mandated the United States and other willing states “to use all necessary means” to achieve the objectives as defined by the Security Council *vis-à-vis* Somalia.<sup>36</sup> In Resolution 1386 the Security Council authorized the creation of an Interim Assistance Force for Afghanistan and welcomed the offer of the United Kingdom to organize and command the force.<sup>37</sup> Alternatively, the Security Council may turn to regional organizations.

The particularity of this authorization of a group of states, having previously consented to that particular action, to use military force rests in the fact that it combines mandatory and non-mandatory elements on various levels.<sup>38</sup> The first step is the finding of the Security Council that there is a breach or a threat to international peace and security. This finding, made in accordance with Article 39 UN Charter, is binding upon all members of the United Nations.

Further, it is the Security Council which formulates the obligations to be fulfilled by the state having breached or threatened international peace and security and defines the objectives to be achieved by the use of force if these obligations are not fulfilled. For example, in S/RES/678

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<sup>32</sup> S/RES/143 (1960) of 14 July 1960.

<sup>33</sup> S/RES/221 (1966) of 9 April 1966; S/RES/232 (1966) of 16 December 1966.

<sup>34</sup> S/RES/678 (1990) of 29 November 1990; “2. Authorizes Member States co-operating with the Government of Kuwait, unless Iraq on or before 15 January 1991 fully implements, as set forth in paragraph 1 above, the foregoing resolutions, to use all necessary means to uphold and implement Security Council resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area.”

<sup>35</sup> S/RES/940 (1994) of 31 July 1994.

<sup>36</sup> S/RES/794 (1992) of 3 December 1992.

<sup>37</sup> S/RES/1386 (2001) of 20 December 2001.

<sup>38</sup> This has been highlighted by Franck, *Recourse to Force*, see note 6, 27.

(1990) of 29 November 1990 the Security Council speaks in mandatory terms of Iraq's obligation to comply with its demands to restore the sovereignty of Kuwait. Equally the Security Council spelled out in S/RES/794 (1992) of 3 December 1992 what humanitarian changes it was seeking in respect of Somalia.<sup>39</sup> This means that the reason for military action is defined in mandatory terms. Which states are authorized to take action would depend on the reasons as defined by the Security Council. In most cases the Security Council has refrained from identifying such states in the respective resolutions but rather referred to the coalition of the willing. The establishment of such a group is organized by the respective states themselves and the adherence thereto depends upon the individual decision of each state. This constitutes the voluntary element in this approach. However, states carrying out the authorized military intervention are limited in their action by the objective to be achieved, as defined by the Security Council. It is for that reason that the coalition forces in 1990 refrained from attacking Baghdad, since the liberation of Kuwait had been accomplished, although it is an open question whether the mandate "... to restore international peace and security in the area ..." would have covered such action.<sup>40</sup>

This combination of mandatory and non-mandatory elements marking out the features of the authorization of a willing coalition by the Security Council has made it acceptable in practice. It has to be acknowledged, though, that compared to the system envisioned under Article 43 UN Charter the control the Security Council may exercise over such military activity is significantly reduced.<sup>41</sup> This certainly was another incentive for such an approach. The Security Council is unable to control the military action in detail and the original mandate being unlimited requires another Security Council resolution to end such mandate. This gives the permanent members of the Security Council, without whose consent no such authorization to take action, or to end the mandate, can be given, an overwhelming influence on scope and duration of such mandate.

Concerning the war against Iraq in 2003 there was no such authorization of the Security Council. The military attack on Iraq by the United States and its allies can neither be based upon S/RES/1441

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<sup>39</sup> See note 36.

<sup>40</sup> See S/RES/678 (1990) of 29 November 1990.

<sup>41</sup> Frowein/ Krisch, see note 30, MN 25 argue that the UN Charter favours centralized enforcement and thus the Security Council should be in full control of the action. The reality, though, is different.

(2002) of 8 November 2002, nor as it has been claimed by, in particular, the governments of Spain,<sup>42</sup> the United Kingdom<sup>43</sup> and the United States<sup>44</sup> upon previous Security Council resolutions authorizing the use of military force against Iraq in 1990.

S/RES/1441 states in its operative paragraph 1 — the Security Council acting under Chapter VII — “... that Iraq has been and remains in material breach of its obligations under relevant resolutions, including resolution 687 (1991), in particular through Iraq’s failure to cooperate with United Nations inspectors and the IAEA, and to complete the actions required under paragraphs 8 to 13 of resolution 687 (1991); ...”. The obligations formulated by S/RES/687 (1991) were confirmed in Resolution 1441, and matters relating to disarmament, proof thereof and cooperation with inspectors were specified and expanded upon. The Security Council Resolution 1441 characterizes false declarations or omissions in the report required of Iraq, as well as the lack of cooperation with the inspectors, as violations of Iraq’s obligations. In the event of continuous non-fulfilment of the obligations, the Resolution announces “serious consequences” for Iraq.

That of which Iraq was accused, or that which was demanded of Iraq by the Security Council in exercising its functions under Chapter VII UN Charter included various elements. The most prominent thereof was the renunciation of atomic, biological and chemical weapons as well as of ballistic missiles which range greater than 150 kilometres, the destruction of corresponding weapons, the disclosure and proven dismantling of relevant development programs and the cooperation with international inspectors.<sup>45</sup> In addition, Iraq was obliged to provide information as to the whereabouts of interned prisoners of war and civilians, their repatriation or return, and the restoration of looted property.<sup>46</sup> Further, it was claimed that the system of government which *Saddam Hussein* created, and which maintained him in power, violated international human rights standards on a massive scale. Iraq

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<sup>42</sup> Doc. S/PV. 4707 of 14 February 2003; Doc. S/PV. 4701 of 5 February 2003.

<sup>43</sup> See letter of the Permanent Representative of the United Kingdom to the United Nations of 20 March 2003 (Doc. S/2003/350 of 21 March 2003).

<sup>44</sup> Letter of the Permanent Representative of the United States to the Security Council of 20 March 2003 (Doc. S/2003/351 of 21 March 2003).

<sup>45</sup> S/RES/687 (1991) of 3 April 1991, paras 7 to 14.

<sup>46</sup> S/RES/1441 (2002) of 8 November 2002 in connection with S/RES/686 (1991) of 2 March 1991, S/RES/687 (1991) of 3 April and S/RES/1284 (1999) of 17 December 1999.

was accused of oppressing the civilian population, persecuting minorities, and failing to cooperate with relief organizations. Thus, Iraq was requested by the Security Council to end the repression of its civilian population and to provide access by international humanitarian organizations to all those in need of assistance.<sup>47</sup> Finally, Iraq was accused by the Security Council of having failed to comply with its obligation against international terrorism.<sup>48</sup>

The Security Council has determined many times that actions of the government of Iraq or rather its lack of cooperation constituted a threat to international peace, S/RES/1441 (2002) of 8 November 2002 only being the last instance. In this respect, the Security Council has a far-reaching prerogative of political discretion. Such discretionary power is rather restricted through the voting system of the Security Council than juridical review. Apart from that it would be difficult to question the assessment of the Security Council that the existence of nuclear, biological or chemical weapons in the hands of the then existing government of Iraq had a destabilizing effect in the entire region, if not world wide, and thus endangered international peace. The demand for the destruction of such weapons, the dismantling of respective research programs and reliable information to that extent was just a matter of consequence. It is also for the Security Council to determine whether Iraq is in the possession of weapons of mass destruction or programs for their production, or whether their destruction and the discontinuation of the respective research has been proven. In making such assessment the Security Council does not act as court; it is not bound by judicial rules of evidence. The Security Council — in keeping with the design of the UN Charter — acts as a political organ. The greater the perceived danger to international security, the less it will be necessary to present fully confirmed facts: it is a question of proportionality.

As already indicated, Iraq's possession of weapons of mass destruction and the possibility of their use was not the only basis on which the Security Council could rest its determination that Iraq posed a threat to international peace and security. The Security Council could also take action on humanitarian grounds and has done so in the past. On several occasions it has classified serious violations of human rights as a threat

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<sup>47</sup> S/RES/1441 (2002) of 8 November 2002 in connection with S/RES/687 (1991) of 3 April 1991.

<sup>48</sup> S/RES/1441 (2002) of 8 November 2002 in connection with S/RES/688 (1991) of 5 April 1991.



to world peace; examples are Southern Rhodesia, South Africa,<sup>49</sup> Somalia, Rwanda, Former Yugoslavia and Zaire (today the Congo).<sup>50</sup> This has expanded the concept of peace under the UN Charter. Peace is not only to be understood as the absence of military engagement. A threat to the peace may already exist if essential elements of the international legal order that provide the conditions for an enduring peace, are violated. There is no doubt that gross and large scale violations of human rights may reach that threshold.<sup>51</sup> Finally, the Security Council has already, on previous occasions, determined that international terrorism may constitute a threat to international peace and security.<sup>52</sup>

However, a determination by the Security Council that a threat to international peace exists does not automatically result in the authorization of the use of military force. The latter requires an explicit determination by the Security Council. Considering the legitimizing effect accorded to such a Security Council Resolution by the world community to justify an exception from the prohibition of the use of force, it is indispensable that the resolution should contain a clear statement authorizing the use of military force, an indication of the states which are authorized to use force and the states or entities against whom such force may be used. In the cases in which the Security Council has

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<sup>49</sup> It is doubtful whether it is fully justified to quote the decisions of the Security Council in this respect. Its determination that the situations in South Rhodesia and in South Africa constituted threats to the international peace and security may primarily have been motivated by the destabilizing effect these regimes had on neighbouring countries; see Frowein/ Krisch, "Art. 39", MN 19 and 20, in: Simma, see note 6.

<sup>50</sup> See the assessment of H. Gading, *Der Schutz grundlegender Menschenrechte durch militärische Maßnahmen des Sicherheitsrates – das Ende staatlicher Souveränität?*, 1996, 91 et seq.; S.D. Murphy, *Humanitarian Intervention*, 1996, 145 et seq.; S. Chesterman, *Just War or Just Peace? Humanitarian Intervention in International Law*, 2001, 14 et seq. Critical also M.J. Glennon, *Limits of Law, Prerogatives of Power, Interventionism after Kosovo*, 2001, 120; in favour of a more flexible interpretation of the respective provisions of the Charter, see Müllerson, see note 6, 171.

<sup>51</sup> Gading, see above, 165 et seq.; B. Conforti, *The Law and Practice of the United Nations*, 2nd edition, 2000, 177; sceptical Frowein/ Krisch, see note 49, 21 who argue that it is not for the Security Council to enforce all overarching values of the international community; but this is not to say that the Security Council has no scope of action at all in this regard.

<sup>52</sup> S/RES/731 (1992) of 21 January 1992; S/RES/1044 (1996) of 31 January 1996; S/RES/1054 (1996) of 26 April 1996 (Sudan); S/RES/1267 (1999) of 15 October 1999; S/RES/1333 (2000) of 19 December 2000 (Afghanistan).

authorized states to use military force it has made it clear that such measures may be taken and has identified the coalition of the willing. The formula "... to use all necessary means ..." seems, after the resolution concerning Haiti, to have become the standard one.<sup>53</sup>

Both elements are missing in S/RES/1441 (2002) of 8 November 2002 and it therefore cannot be read as an authorization of the Security Council to use military force against Iraq. Neither does the resolution authorize a particular group of states nor does it contain a reference to the use of military force. Instead the resolution states in para. 13: "*Recalls*, in that context, that the Council has repeatedly warned Iraq that it will face serious consequences as a result of its continued violations of its obligations; ...". Taken verbally, it only reminds Iraq of previous warnings which, however, fall short of respective decisions. That even the United States and its allies did not consider S/RES/1441 as an authorization to take military action against Iraq transpires from the attempts to have the Security Council to agree upon a further resolution.<sup>54</sup>

Finally is it not possible to justify the military actions taken by the United States and its allies against Iraq by reference to S/RES/678 (1990) of 29 November 1990, which provided for a military liberation following Iraq's aggression against Kuwait, although S/RES/1441 in its preambular paragraph 4 referred to the former. This resolution had authorized Member States co-operating with the government of Kuwait "... to use all necessary means to uphold and implement resolution 660 (1990) and all subsequent resolutions and to restore international peace and security in the area; ...". This authorization which embraced the use of military force was meant to serve two different purposes namely the liberation and the restoration of peace and security in the area, both conforming to the objectives which may be pursued under Article 39 UN Charter. It is the latter one which has been invoked in the attempt to justify the attack on Iraq in 2003.

Following the liberation of Kuwait the Security Council set out, in S/RES/686 (1991) of 2 March 1991 and S/RES/687 (1991) of 3 April 1991 the steps Iraq had to take as a precondition for a formal cease-fire.

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<sup>53</sup> See S/RES/940 (1994) of 31 July 1994 (Haiti); S/RES/678 (1990) of 29 November 1990 (Iraq); S/RES/794 (1992) of 3 December 1992 (Somalia).

<sup>54</sup> See the draft offered by the United States, United Kingdom and Spain on 24 February 2003 (<http://usinfo.state.gov/topical/pol/arms/03022410.htm>) and the one on 3 March 2003 (<http://www.msnbc.com/news/87601.asp>).

These conditions Iraq was requested to accept,<sup>55</sup> which it did. Although S/RES/687 did not explicitly repeal the authorization of the Security Council to use military force<sup>56</sup> it provided for a cease-fire and furthermore confirmed the commitment of all Member States "... to the sovereignty, territorial integrity and political independence of Kuwait and Iraq ...". The resolution also took note "... of the intention expressed by the Member States cooperating with Kuwait under paragraph 2 of resolution 678 (1990) to bring their military presence in Iraq to an end as soon as possible consistent with paragraph 8 of the resolution 686 (1991) ...".<sup>57</sup> On that basis it cannot be argued that after twelve years the authorization to use military force revived for a group of states at least in part different from the original ones, merely by the statement in S/RES/1441 that Iraq had violated its obligations under resolution 687.<sup>58</sup> Since the formal cease-fire had been declared by the Security Council<sup>59</sup> only the latter could effect an end to the cease-fire and, thereby authorize renewed military action against Iraq.

In this context it has been pointed out that twice, in 1993 and in 1998, the coalition took military action under the authority of S/RES/678 (1990) of 29 November 1990 and that the attack of 1993 had been declared by the Secretary-General of the United Nations to conform to that resolution.<sup>60</sup> It is doubtful whether such limited strikes

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<sup>55</sup> Para. 33, see note 59, below.

<sup>56</sup> The first operative paragraph reads: "Affirms all thirteen resolutions noted above, except as expressly changed below to achieve the goals of the present resolution, including a formal cease-fire; ....".

<sup>57</sup> Third pre-ambular paragraph.

<sup>58</sup> See operative paras 1 and 2 of that resolution. A different position has been taken in the Written Answer of the Attorney General, Lord Goldsmith, to a Parliamentary Question on the legal basis for the use of force in Iraq. See also letter by the Permanent Representative of the United Kingdom to the Security Council Doc. S/2003/350 of 21 March 2003. It is worth noting that the justification of the United Kingdom differed from that of the United States which also invoked self-defence (see letter of the Permanent Representative of the United States to the Security Council, Doc. S/2003/351 of 21 March 2003).

<sup>59</sup> Para. 33 of S/RES/687 reads: "Declares that, upon official notification by Iraq to the Secretary-General and to the Security Council of its acceptance of the provisions above, a formal cease-fire is effective between Iraq and Kuwait and the Member States cooperating with Kuwait in accordance with resolution 678 (1990)."

<sup>60</sup> In a statement of 14 January 1993 it was said that: "... the raid and the forces that carried out the raid, have received a mandate from the Security

against surface-to-air missile sites (11 and 18 January 1993) and a strike against a nuclear fabrication facility (17 January 1998) near Baghdad can be compared to the large scale armed attack against Iraq launched by the coalition in 2003. But what is more important is the fact that such military acts as have occurred, since only one of them found the approval of the Secretary-General of the United Nations, do not necessarily lead to the conclusion that they were legal under S/RES/678 or the UN Charter. Far less can any conclusion be drawn concerning the legality of later large scale military attacks against Iraq. In any case a statement made by the Secretary-General of the United Nations justifying the military action of 1993 is of no relevance in this respect since the Secretary-General has neither the function nor the authority to give an authoritative interpretation of Security Council resolutions or the UN Charter.

#### 4. Incapacity of the Security Council as a Justification to Act Unilaterally

It has been argued that the incapacity of the Security Council to act reopened the possibility for states to take the necessary military actions unilaterally.<sup>61</sup> In fact, the arguments advanced in this respect resemble the *clausula rebus sic stantibus* debate of earlier periods when this principle was given wider applicability than it seems at present.<sup>62</sup> It is held that the limits the UN Charter imposes on self-help as a means of enforcing international law presupposes the operation of an effective collective security system based on a respective willingness of states to cooperate. Due to the ineffectiveness of the collective security system and the lack of co-operation states have regained their original capability to act unilaterally.<sup>63</sup>

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Council, according to Resolution 687, and the cause of the raid was the violation by Iraq of Resolution 687 concerning the cease-fire. I, as Secretary-General of the United Nations, I can say this action was taken and conforms to the resolutions of the Security Council and conformed to the Charter of the United Nations ...”.

<sup>61</sup> See e.g. Introduction, in: M.W./ A.R. Willard, *International Incidents*, 1988.

<sup>62</sup> R. Jennings/ A. Watts (eds), *Oppenheim's International Law*, 1992, 1305 et seq.; Dahm/ Delbrück/ Wolfrum, see note 7, 743 et seq.

<sup>63</sup> Reisman, see note 1, 83.

At least in respect of the war against Iraq 1990/1991 such approach is hardly convincing. Certainly Article 43 UN Charter has not been implemented but Security Council practice was able to overcome that by entrusting a coalition of the willing Member States. In 2003 the Security Council acknowledged that Iraq was in breach of its international obligations but did not follow the view of the United States and its allies that the time was ripe for military action. That the Security Council did not follow the assessment of one group of states cannot mean — if the decision-making process in the Security Council has a meaning at all — that it was unable to meet its functions concerning the preservation of international peace and security.<sup>64</sup>

## 5. Humanitarian Intervention

It has been argued that the serious violations of human rights committed by the government of Iraq could be used as a justification for the military attack with the objective to put an end to such violations (so-called humanitarian intervention). Humanitarian intervention may be defined as the use of force across state borders by a state, or a group of states, aimed at preventing or ending widespread and grave violations of fundamental human rights of individuals other than its own citizens.<sup>65</sup> It is already questionable even under the assumption that humanitarian interventions conform to international law whether Iraq can be considered a case for such humanitarian intervention. The serious human rights violations referred to occurred several years ago and it is more than doubtful that the concept of humanitarian intervention would cover interventions against a regime, which by its very nature, may be likely to commit serious human rights violations. However, this consideration should not detract from the question whether under present international law the protection of human rights has acquired such a weight that such protection may legitimize an infringement on the prohibition of the use of force in international relations.

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<sup>64</sup> See also T. Farer, "Humanitarian Intervention before and after 9/11: Legality and Legitimacy", in: J.L. Holzgrefe/ R.O. Keohane, (eds), *Humanitarian Intervention, Ethical, Legal and Political Dilemmas*, 2002, 53 et seq. (65).

<sup>65</sup> See J.L. Holzgrefe, "The Human International Debate", in: Holzgrefe/ Keohane, see above, 18.

Under the UN Charter, the prohibition against the use of force excludes *a priori* humanitarian intervention by military means.<sup>66</sup> The obligation of Member States contained in the UN Charter to protect human rights does not justify unilateral military means to enforce them.<sup>67</sup> To this extent the prohibition against the use of force is absolute. Several attempts have been made to argue the legitimacy of unilateral humanitarian intervention through military means. Recourse has been made *inter alia*, to the right of self-help, in cases where the Security Council fails to discharge its obligation to act,<sup>68</sup> or to the right of self-defence on behalf of the population concerned.<sup>69</sup> This approach does not find a justification in existing international law.<sup>70</sup>

However, it is claimed that precedents for unilateral humanitarian intervention exist which have generated respective customary international law. Among these reference has been made to the Indian encroachment in what was then East Pakistan, which led to the creation of the state of Bangladesh;<sup>71</sup> the Tanzanian intervention in Uganda, which resulted in the downfall of *Idi Amin's* regime;<sup>72</sup> the provision of assistance for the Kurds in Northern Iraq after *Saddam Hussein's* defeat in the Kuwait conflict,<sup>73</sup> and the deployment of troops from West African

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<sup>66</sup> Dahm/ Delbrück/ Wolfrum, see note 7, 826 et seq.; Dinstein, see note 6, 66; Franck, *Recourse to Force*, see note 6, 138.

<sup>67</sup> Different M.J. Glennon, "The New Interventionism: The Search for a Just International Law", *Foreign Aff.* 78 (1999), 2 et seq.

<sup>68</sup> Delbrück, see note 6, 152; K. Doehring (ed.), *Völkerrecht*, 1999, 435.

<sup>69</sup> Doehring, see above, 435; R. Wedgwood, "NATO's Campaign in Yugoslavia", *AJIL* 93 (1999), 828 et seq. (833).

<sup>70</sup> P. Hilpold, "Humanitarian Intervention: Is There a Need for a Legal Reappraisal?", *EJIL* 12 (2001), 437 et seq. (450 et seq.); J. Duursma, "Justifying NATO's Use of Force in Kosovo", *LJIL* 12 (1999), 287 et seq.; L. Henkin, "Editorial Comments: NATO's Kosovo Intervention: Kosovo and the Law of 'Humanitarian Intervention'", *AJIL* 93 (1999), 824 et seq. (825 et seq.).

<sup>71</sup> T.M. Franck/ N.S. Rodley, "After Bangladesh: The Law of Humanitarian Intervention by Military Force", *AJIL* 67 (1973), 275 et seq. (299-302); in the United Nations neither in the Security Council nor in the General Assembly India's claim that its military intervention was prompted by human rights concerns was accepted.

<sup>72</sup> This intervention was ignored by the Security Council.

<sup>73</sup> For an assessment see Franck, *Recourse to Force*, see note 6, 152-153.

states in the internal conflicts in Liberia and Sierra Leone.<sup>74</sup> But it is highly questionable, whether these cases can be drawn upon to justify unilateral military humanitarian intervention. None of the intervening states relied solely on a right to humanitarian intervention when legally justifying their actions; they all claimed that their interventions were necessary to preserve or restore peace in the regions concerned. In addition, and more prominently, in none of the cases was the intervention explicitly accepted for humanitarian reasons. If it was not criticized by the community of states, as in the case of India, the results achieved were merely tolerated as an improvement of the political situation. Apart from that there are cases in which corresponding interventions were treated as violations of international law. This is true, for example, for the dispute in the United Nations regarding the use of military measures against the *Pol Pot* regime.<sup>75</sup> Finally, it is impossible to refer to the NATO military action in Yugoslavia to prevent ethnic cleansing and human rights violations in Kosovo as a precedent to support military humanitarian intervention. This deployment of force was incompatible with existing international law,<sup>76</sup> and many of the politicians who defended it at the time stressed emphatically that it should not serve as a precedent to justify future humanitarian interventions. It is of no relevance in this context that the Security Council later implicitly accepted the results achieved and that the United Nations resumed responsibili-

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<sup>74</sup> K. Nowrot/ E.W. Schabacker, "The Use of Force to Restore Democracy: International Legal Implications of the ECOWAS Intervention in Sierra Leone", *Am. U. Int'l L. Rev.* 14 (1998/99), 321 et seq. (411).

<sup>75</sup> See in particular A/RES/34/22 of 14 November 1979 which clearly condemned the intervention of Vietnam. This resolution is similar to the one which the USSR had vetoed in the Security Council; for an assessment see Franck, *Recourse to Force*, see note 6, 145 et seq.

<sup>76</sup> H.P. Neuhold, "Die Operation 'Allied Forces' der NATO: Rechtmäßige humanitäre Intervention oder politisch vertretbarer Rechtsbruch", in: E. Reiter (ed.), *Der Krieg um das Kosovo 1998/1999*, 2000, 193 et seq.; Dahm/ Delbrück/ Wolfrum, see note 7, 828 et seq.; A. Cassese, "Ex iniuria ius oritur: We are Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?," *EJIL* 10 (1999), 23 et seq.; Henkin, see note 70, 825; different B. Simma, "NATO, the UN and the Use of Force: Legal Aspects", *EJIL* 10 (1999), 1 et seq. According to Schmitt, see note 11, 532 the action of NATO was justified in spite of the lack of authorization of the Security Council since it was evident that – due to the fact of the objection by Russia – no affirmative decision of the Security Council could have been achieved. On the debate in the Security Council see Lepard, see note 22, 339 et seq.

ties in relation to the administration of Kosovo. This does not amount to a general endorsement of a humanitarian intervention initiated and carried out without the consent of the Security Council.

In the end, international law cannot evade the question of how to react to national regimes that gravely violate internationally protected human rights on a large scale and thus violate the value system of the community of states. But this question cannot be answered by according a so-called right of unilateral humanitarian intervention to individual states. First and foremost it is for the Security Council to act as the organ that has been mandated by the UN Charter to act on behalf of the community of states. Where the control and reaction system of the Security Council, short of military measures is exhausted, the possibility of collectively responsible military measures must exist. A military humanitarian intervention can be made compatible with existing international law if it takes place on the basis of a Security Council resolution that expressly authorizes the mission. In this connection it is not correct, as occasionally suggested, that such a resolution by the Security Council legitimates the war. A negative value judgment is implied by the word "war" that does not apply to military missions authorized by the Security Council to enforce international law. In this regard the Security Council acts in the name of the world community to advance common goals. This paramount objective removes the odium of war from military missions authorized by the Security Council, the negative connotation that normally attaches to the term "war".

As already indicated the Security Council has in the past taken action in this respect, although sometimes only retroactively. The crucial question, though, is how to deal with a situation when the Security Council does not take up the issue or cannot come to a positive decision due to either the opposition of a majority of its members or a veto of one of its permanent members. Those who argue in favour of humanitarian intervention point out that giving prominence to the prohibition of the unilateral use of force even in cases where the use of force may be necessary to remedy grave and widespread human rights violations is not in keeping with the protection of human rights as envisioned by the UN Charter and does not take due account of the increased prominence given to human rights since the adoption of the UN Charter.<sup>77</sup> The Secretary-General of the United Nations high-

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<sup>77</sup> W.M. Reisman/ M. McDougal, "Humanitarian Intervention to Protect the Ibos", in: R.B. Lillich (ed.), *Humanitarian Intervention and the United Nations*, 1973, 167 et seq. (175).



lighted this dilemma when addressing the Kosovo conflict.<sup>78</sup> *Michael Reisman* argues, in effect, that international protection of human rights has been elevated to an “imperative level of international law”.<sup>79</sup> Furthermore, referring to the relative increase in the importance of non-state actors in the international decision process and the lack of consensus in the Security Council with regard to the importance of human rights, he has concluded that, in the absence of such consensus among the P5 to take remedial action, democratic states may do so unilaterally, and thus compensate for the dysfunctional decision-making in the Security Council.

One of the problems with this approach is that it would place a particular group of states in a privileged position and would open the possibility that such states may impose on the majority of other states a value system not acceptable to them. This is hardly reconcilable with the principles governing the international community at present. Apart from that, those being in favour of unilateral humanitarian interventions do not adequately take into consideration the real record of the Security Council. The Security Council has in fact endorsed humanitarian interventions in the past, or at least acquiesced in such interventions. Therefore, it is difficult to sustain the claim that there is a lack of consensus on the relevance of international human rights protection or the necessity to enforce them. Finally, the argument that the protection of human rights enjoys or should enjoy priority over the prohibition of the use of force is hardly tenable from the point of view of morality. The prohibition of the use of force is not only meant to ensure the integrity of existing states; nor is it just a limitation on the conduct of states in

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<sup>78</sup> “To those for whom the greatest threat to the future of the international order is the use of force in the absence of a Security Council mandate, one might ask, not in the context of Kosovo but in the context of Rwanda, if in those days ... leading up to genocide, a coalition of states had been prepared to act in defence of the Tutsi population, but did not receive prompt Council authorisation, should such coalition have stood aside and allow the horror to unfold? To those for whom the Kosovo action heralded a new era when states and groups of states can take military action outside the established mechanisms for enforcing international law, one may ask: is there not a danger of such intervention undermining the imperfect, yet resilient, security system created after the Second World War ...” (GAOR 54 Sess., 4th Plenary Mtg of 20 September 1999, 2, Doc. A/54/PV.4).

<sup>79</sup> W.M. Reisman, “Unilateral Action and the Transformation of the World Constitutive Process: The Special Problem of Humanitarian Intervention”, *EJIL* 11 (2000), 3 et seq. (15).

order to improve international relations. The prohibition of the use of force reflects the recognition — as indicated in the Preamble of the UN Charter — that war has resulted in the past in the most serious violations of human rights. It is thus meant to protect human rights against the most fundamental violations. It is beyond the scope of this paper to analyze the pros and cons in detail as to whether international law should develop into the direction where individual states, without an international mandate, should have the right to militarily intervene in other states to put an end to widespread and grave human rights violations. State practice does not seem to have moved in that direction yet.<sup>80</sup> The maximum which can be deduced from the experience concerning Uganda, Liberia and Sierra Leone is a certain willingness on the part of the international community to acquiesce in a violation of the prohibition against the unilateral use of force for humanitarian purposes in cases of necessity, if the action has been carried out by a group of states of the region rather than one state, especially where the national interests of the intervening states can reasonably be excluded as the significant factor in the decision to intervene. Even this limited acquiescence (and certainly any step further) could lower the threshold of the prohibition against recourse to force in international relations, and thus infringe upon one of the major values of the community of states.<sup>81</sup> This is, in particular, disquieting since no international control mechanism exists either over the actions taken by regional arrangements, where one may at least assume some self restraint because of the plurality of actors, or over unilateral humanitarian intervention. For unilateral humanitarian intervention to be accepted, it is at least necessary to ensure that a particular national or sectional interests of an economic or geopolitical character are not wrapped up in the garment of human rights protection.<sup>82</sup>

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<sup>80</sup> See in this respect the statements of the Non-Aligned Summit in 1999 and the Group of 77 meeting in 2000. In both statements the formula was used: “ ... We reject the so-called, ‘right of humanitarian intervention’ which has no legal basis in the UN Charter or in the general principles of international law ...”; see <<http://www.nam-gov.za/minmeet/newyorkcom.htm>, para. 171, <<http://www.nam.gov.za/documentation/southdecl.htm>>

<sup>81</sup> Farer, see note 64, 78.

<sup>82</sup> Farer, see note 64, 77 et seq.; different Reisman, see note 79, 16 who seems to presume that democratic institutions and non-governmental forces will be a sufficient threshold against such misuse. The interventions in Panama and in Granada are, however, not encouraging in this respect.

## 6. Legitimization of the Use of Force as Self-Defence or Other Forms of Self-Help

### a. Article 51 UN Charter

The United States has invoked its right of self-defence as a justification for its military actions against the *Taliban*. It has also referred to self-defence as one of its justifications for its war against Iraq.<sup>83</sup> In the coalition of states which launched the attack against Iraq it was only the United States which relied on this argument. However, it has to be noted that, in relation to the United Nations, the United States either did not use self-defence as a primary justification for the military attack against Iraq or did not pursue this argument forcefully. The approach taken domestically was different. The Congressional Joint Resolution authorizing the President to commit US troops to battle against Iraq emphasized self-defence more prominently.<sup>84</sup> Both statements are equally relevant from the point of view of international law, either as an attempt to interpret existing international law, or to initiate the development of new customary international law.<sup>85</sup>

Before dealing with possible future customary international law it is necessary to assess the scope of self-defence under existing international law. Whether it is possible to invoke the right to self-defence in the situations referred to above depends upon whether an innovative interpretation of that traditional notion is sustainable. At least two issues are critical: is it possible to resort to self-defence only in a case of an actual

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<sup>83</sup> See in particular the letter dated 20 March 2003 of the Permanent Representative of the United States to the Security Council Doc. S/2003/351 of 21 March 2003. The respective text reads: "The actions ... are necessary steps to defend the United States and the international community from the threat posed by Iraq and to restore international peace and security in the area ...". Different Frowein, see note 2, for whom the United States mainly tried to justify its attack on Iraq by reference to the respective Security Council Resolutions.

<sup>84</sup> Its relevant part reads: "... to use the Armed Forces of the United States as he determines to be necessary and appropriate in order to ... defend the national security of the United States against the continuing threat posed by Iraq; and ... enforce all relevant Security Council resolutions regarding Iraq ..." (Pub. L No.107-243, 116 Stat.1498, 1501 (2002)).

<sup>85</sup> An extended interpretation of the notion of self-defence had been advocated by Wolfowitz already in 1992 in his study *Defence Planning Guidance*.

armed attack or also when an attack is imminent or is reasonably perceived as imminent. This question has come up in the context of the war against Iraq. The attack of September 11, 2001 against the United States and its reaction thereto raises another question, namely whether the recourse to self-defence requires an armed attack launched by another state or whether an attack by a non-state actor may be sufficient. If the answer is affirmative it is necessary to discuss the issue of the entity against whom the respective actions of self-defence may be directed.

The starting point for considering the right of states to self-defence is Article 51 UN Charter. It reads in its relevant part: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, ...". It is commonly held that this provision also reflects customary international law although the latter may be wider in scope.<sup>86</sup> In interpreting the concept of self-defence the ICJ has stated in its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons: "... the Court cannot lose sight of the fundamental right of every state to survival, and thus its right to resort to self-defence, in accordance with Article 51 of the Charter when the survival is at stake".<sup>87</sup> However, it must be noted that this view unduly narrows the concept of self-defence by restricting it only to cases where the survival of a state is at stake. Self-defence is actually a form of self-help according to which a state may respond with lawful force to unlawful force carried out in the form of an armed attack.<sup>88</sup> The right to self-defence flows from the sovereignty of the state having come under attack, it is a means under international law for a state to protect itself against the violation of its rights in a particular form, although its scope is not unlimited.<sup>89</sup>

According to the wording of Article 51 of the UN Charter, only an actual attack against a state activates a state's right to self-defence which seems to rule out anticipatory or pre-emptive forms of self-defence.

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<sup>86</sup> Dinstein, see note 6, 165; Bowett, see note 6, 187 et seq.; J. Stone, *Aggression and World Order: A Critique of United Nations Theories of Aggression*, 1958, 44.

<sup>87</sup> Legality of the Threat or Use of Nuclear Weapons, ICJ Reports 1996, 226 et seq. (263, para. 96).

<sup>88</sup> Dinstein, see note 6, 159.

<sup>89</sup> As to the violation of which rights may justify self-defence see A. Randelzhofer, "Art. 51", MN 4 et seq., in: Simma, see note 6; Franck, *Recourse to Force*, see note 6, 45 et seq.

The words used “... if an armed attack occurs ...” leave little room for a wider interpretation.<sup>90</sup> Apart from that it has to be taken into consideration that Article 51 UN Charter constitutes an exception to the general prohibition of the unilateral recourse to force<sup>91</sup> and thus it is to be interpreted narrowly. The provision is, by its very objective, meant to provide the state having become the target of an attack with the possibility to react rather than a justification to take precautionary measures against a possible strike.<sup>92</sup> The merit of the approach taken by the UN Charter is that it reduces the number of disputable cases of self-defence since it will be possible to determine, on the basis of objectively verifiable data, whether an armed attack has occurred, rather than relying on a subjective assessment of a state claiming to have been threatened. Thus, under the wording of Article 51 of the UN Charter there is no right to preventive self-defence, be it anticipatory or pre-emptive, the two terms discussed later. The drafting history of Article 51 of the UN Charter clearly confirms this restricted reading which, by the way, was emphasized by the United States delegation.<sup>93</sup> The Dumbarton Oaks Proposals<sup>94</sup> were even silent regarding any residual right of self-defence since the Main Powers considered that recognition of such a right would weaken the authority of the Security Council.<sup>95</sup> It was only upon the insistence of Latin American states that Article 51 UN Charter was adopted. It is somewhat ironic that the United States which was originally in favour of vesting the authority to preserve international peace and security, which undoubtedly includes dealing with situations calling for some form of preventive self-defence, only with the Security

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<sup>90</sup> Dinstein, see note 6, 166, 167.

<sup>91</sup> Dinstein, see note 6, 160, 161 rightly points out that the right of self-defence could only develop in the context of the development of a prohibition of the unilateral use of force.

<sup>92</sup> J. Zourek, *L'interdiction de l'emploi de la force en droit international*, 1974; different, Dissenting Opinion of Judge Schwebel, Nicaragua case, see note 10, 347-348 (para. 173).

<sup>93</sup> Minutes of the 48th Mtg (Executive Session) of the United States Delegation, held at San Francisco, Sunday, May 20, 1945, Foreign Relations of the United States Vol. 1 (1945), 813 et seq. (818).

<sup>94</sup> UNCIO Oaks Proposals, in: UN Information Organization (ed.), *Documents of the UN Conference on International Organization, San Francisco, 1945*, Vol. III: Dumbarton Oaks Proposals, Comments and Proposed Amendments, 1945.

<sup>95</sup> Franck, *Recourse to Force*, see note 6, 48.

Council, is now advocating the broadening of the right of states to self-defence.

### b. Anticipatory and Pre-emptive Self-Defence

In respect of the traditional understanding of the notion of self-defence as reflected in Article 51 of the UN Charter it has been argued that — considering the development of new weapons of mass destruction and because of the threat that such weapons may be used by irresponsible states or terrorists — no state can be expected to risk its population or its very existence by waiting for the first strike. Reading Article 51 UN Charter literally would give an advantage to the aggressor. It is on that basis that some form of preventive self-defence under customary international law is considered.<sup>96</sup>

Article 51 of the UN Charter itself provides for the possibility of applying a wider concept of self-defence. Its reference to the ‘inherent right’ of individual or collective self-defence can be taken to indicate that Article 51 of the UN Charter is not intended to cover the full scope of the right of self-defence under customary international law.

Two different forms of preventive self-defence are under discussion — anticipatory self-defence and pre-emptive self-defence.<sup>97</sup> Anticipatory self-defence is understood, referring to the *Caroline* incident,<sup>98</sup> as a military action against an imminent attack which leaves no choice of

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<sup>96</sup> Bowett, see note 6, 185, 186; *Oppenheim's International Law*, see note 62, 420; Reisman, see note 1, 82; different Dinstein, see note 6, 168 et seq. In the Nicaragua Case, see note 10, the ICJ, although dealing with the right to self-defence under customary international law, passed no judgment on the issue of lawfulness of a response to the imminent threat of armed attack, 103 (para. 194).

<sup>97</sup> The terminology is not always fully coherent; Reisman, see note 1, 87, for example seems to use anticipatory and preventive self-defence interchangeably, also pre-emptive self-defence allegedly has a preventive objective.

<sup>98</sup> US Secretary of State Daniel Webster argued that for self-defence to be legitimate the British had to demonstrate that a “necessity of self-defence, instant, overwhelming leaving no choice of means, and no moment for deliberation” and that the acts would not be “unreasonable or excessive”. (Letter from Daniel Webster, Secretary of State of the United States, to Henry S. Fox, Envoy Extraordinary and Minister Plenipotentiary of Her Britannic Majesty (24 April 1841), reprinted in *British and Foreign State Papers* 19 (1857), 1129 et seq. (1138).

means and no moment of deliberation. Compared to that the notion of pre-emptive self-defence is broader and, what is more important, has a different objective. It is meant to be used to avert an incipient development that is not yet operational but which, in the assessment of the potential victim state could, if permitted to mature, lead to an objective threat or attack that would justify measures of self-defence.<sup>99</sup> To qualify as legitimate self-defence, these two forms of preventive self-defence will also have to meet the test of necessity, proportionality and immediacy.<sup>100</sup> The question to be considered is whether anticipatory self-defence and, in particular, pre-emptive self-defence are already recognized under customary international or, at least, should be recognized in the future. Some arguments advanced, justifying the military attack against Iraq, clearly establish that this is not an academic question, in particular, since some voices seem to indicate that such approach will play a dominant role in the future politics of the United States. In the National Security Strategy of September 2002 the United States seems to claim the right to proceed against “rogue” states based on its hegemonic position and as a means of pre-emptive self-defence.<sup>101</sup> Sec-

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<sup>99</sup> Reisman, see note 1, 87 even seems to favour a somewhat broader scope.

<sup>100</sup> Legality of the Threat or Use of Nuclear Weapons, see note 87, (245); Dinstein, see note 6, 183.

<sup>101</sup> Part II deals with terrorism. There it is stated: “... The struggle against global terrorism is different from any other war in our history. It will be fought on many fronts against a particularly elusive enemy over an extended period of time ...[D]efending the United States, the American people, and our interests at home and abroad by identifying and destroying the threat before it reaches our borders. While the United States will constantly strive to enlist the support of the international community, we will not hesitate to act alone, if necessary, to exercise our right to self-defence by acting pre-emptively against such terrorists, to prevent them from doing harm against our people and our country ...” Part V focuses on the proliferation of weapons of mass destruction: The respective part thereof states: “... But new deadly challenges have emerged from rogue states and terrorists. None of these contemporary threats rival the sheer destructive power that was arrayed against us by the Soviet Union. However, the nature and motivations of these new adversaries, their determination to obtain destructive powers hitherto available only to the world’s strongest states, and the greater likelihood that they will use weapons of mass destruction against us, make today’s security environment more complex and dangerous ... Traditional concepts of deterrence will not work against a terrorist enemy whose avowed tactics are wanton destruction and the targeting of innocent; whose so-called soldiers seek martyrdom in death and whose

tion V of the Strategy places this doctrine in the context of new customary international law.

To some extent the Security Council practice can be used to support anticipatory self-defence but not, however, pre-emptive self-defence. For example, the Security Council did not condemn Israel's military action in 1967 when Israel proceeded militarily against the deploying of Egyptian and other armed forces before they had reached Israel's border. This approach of the Security Council took into consideration that — as the facts presented themselves at that time — Israel did nothing more than intercept an armed attack which was in the last stages of the launching process. On the other hand, the Security Council unanimously condemned Israel's bombing and destruction of the Iraqi atomic reactor at Osirak<sup>102</sup> in 1981 while it was still under construction, although Israel had argued that its own existence would be threatened if Iraq were to possess atomic weapons.<sup>103</sup>

A comparison of the two situations and the different international reactions thereto, provides some guidance on how to distinguish between legal self-defence taken in anticipation of an armed attack and an illegal use of force. In the first case, objectively verifiable data proved that an armed attack was imminent; it was actually already in a stage of preparation where decisions contrary to the ones issued and implemented would have been needed to prevent the attack from materializing. The situation in respect of the attack on Iraq's nuclear reactor was different. Several further affirmative measures and decisions on the part of Iraq would have been needed to transform that threat into the reality of an attack or an imminent attack.

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most potent protection is statelessness ... The United States has long maintained the option of pre-emptive actions to counter a sufficient threat to our national security. The greater the threat, the greater is the risk of inaction — and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act pre-emptively. (White House, *The National Security Strategy of the United States of America* (2002), available at <<http://www.whitehouse.gov/nsc/nss.pdf>>. See in this respect also the article by P. Minnerop in this Volume.

<sup>102</sup> S/RES/487 (1981) of 19 June 1981.

<sup>103</sup> Reisman, see note 1, 88 argues this view should be reconsidered; different Dinstein, see note 6, 169. According to him the attack was justifiable through the fact that Israel was at war with Iraq at that moment.



Phrased in general terms, self-defence is justified even if taken in an anticipatory form when it constitutes an action at the last possible opportunity in the face of an attack that, according to objectively reliable data, is in the final process of being launched, other means of stopping that attack have been exhausted and the reaction is proportional to the attack.<sup>104</sup> This interpretation, in fact, reflects the interpretation of the right of self-defence as formulated in connection with the *Caroline* incident and may thus be considered as being part of customary international law.<sup>105</sup> This interpretation conforms to the objective of self-defence as an exception to the prohibition of the use of force. As already indicated, self-defence constitutes the ultimate form of self-help against an attack. The requirement of Article 51 of the UN Charter that such attack must have taken place is to be seen as a precaution against a misuse of that possibility. Where objectively reliable data demonstrating the imminence of an attack exist, the possibility of such abuse can, as far as possible, be excluded. Therefore, in such a situation, there is no justification to require the potential victim to wait for the strike and thus risk the loss of human lives.

Not even the National Security Strategy of the United States assumes that the pre-emptive form of self-defence is in conformity with existing international law, be it treaty law or customary international law. The question is whether weapons development, in particular, the risk that terrorist groups or irresponsible governments gain access to weapons of mass destruction, supports the conclusion that such a state poses a threat which justifies acts of self-defence against that state. In spite of that danger posed by such a situation, there are several reasons for not extending the right of self-defence *de lege ferenda* so as to legitimize pre-emptive forms of self-defence. The right of self-defence was conceived as a reaction to the actual violation of a state's territorial integrity. The abstract danger that such an attack may occur cannot be regarded as a situation that equally justifies an infringement upon the territorial sovereignty of another state. Such approach would abandon the requirement for an objective determination of an attack and replace

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<sup>104</sup> Considering such attack as self-defence, Schmitt, see note 11, 1535; A. D'Amato, "Israel's Air Strike upon the Iraqi Nuclear Reactor", *AJIL* 77 (1983), 584 et seq. (588); T.L.H. McCormack, *Self-Defence in International Law: The Israeli Raid on the Iraqi Nuclear Reactor*, 1996, 205 et seq.

<sup>105</sup> Dinstein, see note 6, 168, 169; Franck, *Recourse to Force*, see note 6, 104, 105 although pointing out that Israel had not exhausted its diplomatic remedies; *Oppenheim's International Law*, see note 62, refers in this context to necessity and proportionality as limiting factors.

it with a situation in which a purely subjective determination of the state asserting self-defence would be sufficient to justify the use of force. This opens the possibility for abuse, in particular, where the action is to be decided upon and implemented unilaterally. In this respect the argument that the checks and balances of a democratically governed state will preclude any misuse of the mechanism of pre-emptive self-defence is not sustainable.<sup>106</sup> In any case, it is doubtful whether such a claim is factually correct.<sup>107</sup> Be that as it may, it is necessary to emphasize that any new understanding of the right of self-defence should cover all states, without taking into consideration their internal structure. As has been already indicated, it is impossible to design international law mechanisms only for a section of states. Finally, recognizing a right of pre-emptive self-defence would, in effect, subject the prohibition of the use of force to the discretion of those states that are capable and ready to use that right. This would result in a lowering of the current threshold for the resort to self-defence under international law, and thus increase the likelihood of armed conflicts in general. It is undeniable that international law needs to create instruments which effectively cope with threats posed by a proliferation of arms of mass destruction and the inclination of certain regimes to engage in or to assist terrorist activities, but such instruments cannot be based on a so-called right of pre-emptive self-defence.

The war of 2003 against Iraq has clearly demonstrated the inherent flaws, and even dangers in shaping the notion of self-defence in the way done by the National Security Strategy of the United States. In spite of the military occupation of Iraq it has not yet been possible for the United States to demonstrate that Iraq could dispose weapons of mass destruction which would threaten other states in the foreseeable future. This is unavoidable since a state invoking the right of pre-emptive self-defence will tend to rely on data that are difficult to ascertain and are, above all, liable to be interpreted to serve the interests of that state. But the objection to pre-emptive self-defence is not only that actions might be taken on data which are not reliable or which could be misinterpreted. As with military humanitarian intervention, the so-called pre-emptive self-defence can easily be used to achieve objectives that are different from the ones given by the intervening state or states. Even democratic institutions are no safeguard in this respect as has been

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<sup>106</sup> Reisman, see note 1, 89 seems to argue that point.

<sup>107</sup> See J.N. Moore, "Solving the War Puzzle", *AJIL* 97 (2003), 282 et seq. (283 et seq.).

demonstrated in the case of Iraq. It appears that this war was fought to change the political regime of that country. Although an effective change of that regime may have a stabilizing effect in the region, this can never be an objective that can legitimately be pursued under the pretext of self-defence, pre-emptive or otherwise; and there is no indication that international law will move in this direction which, in fact, would jeopardize one central element of state sovereignty.

### c. Addressees of Acts of Self-Defence

As already indicated, the military attacks of the United States and its allies in response to the *Al Qaeda* attack of September 11, 2001 raise the question whether recourse to self-defence was legitimate in this situation and whether the force that was used was addressed against the right entity.<sup>108</sup> When Article 51 of the UN Charter was drafted it was taken for granted that military attacks which might 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 Assembly<sup>109</sup> which refers to aggression as "... the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State ...".<sup>110</sup> This reflects the fact that, at the time of the drafting of the UN Charter, international relations were considered relations amongst states. In the meantime international relations have been modified by what is commonly referred to as individualization of in-

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<sup>108</sup> When the Security Council referred to the inherent right of individual and collective self-defence of the United States in respect of terrorist attacks of September 11, 2001 in its resolutions S/RES/1368 (2001) of 12 September 2001 and S/RES/1373 (2001) of 28 September 2001 it did not name the possible target of actions of self-defence. In the latter resolution the Security Council reaffirmed the need "... to combat by all means in accordance with the Charter of the United Nations, threats to international peace and security caused by terrorist activities ...". See on this issue Wolfrum/ Philipp, see note 16, 586 et seq. It has been argued that the Security Council in resolutions 1368 and 1373 only referred to self-defence in their preambular paragraphs and that this could not be taken as an acknowledgement of a situation of self defence, E.P.J. Myjer/ N.D. White; "The Twin Towers Attack: An unlimited Right to Self-Defence?", *Journal of Conflict and Security Law* 7 (2002), 5 et seq. (17); different Müllerson, see note 6, 175.

<sup>109</sup> A/RES/3314 (XXIX) of 14 December 1974.

<sup>110</sup> Pointed out by C. Stahn, "International Law at a Crossroads? The Impact of September 11", *ZaöRV* 62 (2002), 183 et seq.

ternational relations. This individualization is reflected in the fact that non-state entities have increasingly become actors in international relations and, accordingly, addressees of international law. This has to be reflected in interpreting Article 51 of the UN Charter. The wording of Article 51 of the UN Charter which, incidentally, does not expressly state that the armed attack must come from a state cannot be interpreted to mean that states are not permitted to respond to an attack launched by private groups from the outside which is of a magnitude comparable to the type of attack referred to in Article 51 of the UN Charter.<sup>111</sup> To limit the right of states in this way would amount to granting a privilege to private actors to carry out large scale pseudo-military acts across the border, in other words, it would give a licence to terrorists.<sup>112</sup> Therefore, it is not of relevance which group carries out an action but whether the action is of a scale equivalent to military actions referred to in Article 51 of the UN Charter.<sup>113</sup> There is no doubt about that as far as the attack of September 11, 2001 is concerned.<sup>114</sup>

Whereas the attack of September 11, 2001 was undertaken by *Al Qaeda* the acts of self-defence were directed against the *Taliban*. This is only justifiable if the attack of September 11, 2001 was imputable to the *Taliban*. This may be a question, to borrow from the regime on state responsibility, as to whether the attack can be attributed to the *Taliban*.

It has been doubted that principles pertaining to the Rules on State Responsibility, such as imputability, may be used in the context of self-defence.<sup>115</sup> Through the mechanism of imputability it is established

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<sup>111</sup> S/RES/1373 (2001) of 28 September 2001 has qualified the attack of September 11, 2001 as threat to international peace and security and has reaffirmed the inherent right of the United States to self-defence.

<sup>112</sup> Tomuschat, see note 16, 540; Randelzhofer, see note 89, 51, MN 34, in: Simma, see note 6, takes an intermediate position: "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 private groups are attributable to a state they are an armed attack in the sense of Article 51"; different A. Pellet, "No, This is not War!", available under <[http://www.ejil.org/forum\\_WTC/ny-pellet.html](http://www.ejil.org/forum_WTC/ny-pellet.html)>; P.M. Dupuy, "The Law after the Destruction of the Towers", available under <[http://www.ejil.org/forum\\_WTC/ny-dupy.html](http://www.ejil.org/forum_WTC/ny-dupy.html)>.

<sup>113</sup> Wolfrum/ Philipp, see note 16, 590.

<sup>114</sup> Tomuschat, see note 16, 535, 536.

<sup>115</sup> Different L. Condorelli, "The Imputability to States of Acts of International Terrorism", *Isr. Y. B. Hum. Rts* 19 (1989), 233 et seq. (240); Stahn,

whether a subject may be held internationally responsible for a particular action or omission. Thus, imputability constitutes the indispensable link between an action, relevant in international relations and an entity which may be held accountable for such action. Borrowing in this respect from the Rules on State Responsibility, self-defence is justified if one considers that both state responsibility and self-defence are mechanisms for the enforcement of international law. On the basis of that approach, the rules on imputability should apply to both mechanisms.<sup>116</sup>

On this basis it is possible to conclude that the *Taliban* were appropriate addressees for the acts of self-defence taken by the United States after the attack of September 11, 2001. The assistance given to *Al Qaeda* was the necessary precondition for the latter to engage in terrorist activities world-wide. According to article 16 of the ILC Articles on State Responsibility, an accomplice to an international wrongful act is internationally responsible in the same way as the person who committed that act, if aid or assistance was given with the knowledge of the circumstances of the internationally wrongful act and if that act would have been wrongful if committed by the person rendering assistance or aid.<sup>117</sup> Although article 16 of the articles on State Responsibility deals, as the articles on State Responsibility do in general, only with states this provision reflects a general principle which is to be applied to other subjects of international law and non-state entities not being subjects of international law, too. If the attack of September 11, 2001 has been undertaken by a state with the assistance of another state, there would have been no doubt that both states could have been legitimate targets of self-defence. Where an entity, such as the *Taliban*, being a subject of international law,<sup>118</sup> renders assistance for an attack on a state, it cannot be privileged by the mere fact that the entity which actually launched the attack was a non-state actor. Therefore a given action of a non-state actor is attributable to the respective subject of international law supporting the non-state actor, if that subject of international law deliberately created a situation which was a necessary precondition for a later event, provided the happening of that event was not beyond reasonable

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see note 110, 30 is quite doubtful whether one may have recourse to the regime on state responsibility in the context of self-defence.

<sup>116</sup> Wolfrum/ Philipp, see note 16, 594 et seq.

<sup>117</sup> See J. Crawford, *The International Law Commission's Articles on State Responsibility*, 2002, 149.

<sup>118</sup> See on this Wolfrum/ Philipp, see note 16, 567 et seq.

probability and constituted a breach of international law. This was the case under consideration.<sup>119</sup> Had the *Taliban* prevented *Al Qaeda* from using Afghan territory as the base for its activities, as requested for several years by the Security Council,<sup>120</sup> and had the *Taliban* surrendered *Usama bin Laden*, the attack of September 11, 2001 might not have occurred. Therefore, the action of the *Taliban* or rather their inaction lasting over several years, was one of the indispensable preconditions for the functioning of *Al Qaeda* and of the attack of September 11, 2001. Certainly after S/RES/1267 (1999) of 15 October 1999 the *Taliban* were fully aware of the threat *Al Qaeda* constituted to the United States and its population. Giving shelter to *Al Qaeda* contributed to upholding that threat and made further terrorist attacks more likely.

This refusal of the *Taliban* to take action against *Al Qaeda* was, in itself, also in breach of international obligations. International law does not only prohibit states from engaging in terrorist activities but it also requires them to take measures against such activities. For example, A/RES/49/60 of 9 December 1994 which may be taken to voice customary international law, not only obliges states not to desist from engaging 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. This generally phrased obligation has been specified for the *Taliban* in respect of *Al Qaeda*. The Security Council, on several occasions, has insisted that the *Taliban* cease the provision of sanctuary and training for international terrorists and their organizations, 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 citizens<sup>121</sup> and to turn over *Usama bin Laden*.<sup>122</sup> In not complying with these demands of the Security Council and with their obligations under general international law to refrain from directly or indirectly assisting international terrorist activities, the *Taliban* themselves had violated international

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<sup>119</sup> Wolfrum/ Philipp, see note 16, 595 et seq.; Müllerson, see note 6, 185 comes to the same conclusion with a slightly different reasoning.

<sup>120</sup> The Security Council had already requested that in 1998 and 1999, S/RES/1214 (1998) of 8 December 1998 and S/RES/1267 (1999) of 15 October 1999.

<sup>121</sup> S/RES/1214 (1998) of 8 December 1998; S/RES/1267 (1999) of 15 October 1999. The latter having been adopted under Chapter VII of the UN Charter.

<sup>122</sup> S/RES/1267 (1999) of 15 October 1999; S/RES/1333 (2000) of 19 December 2000.

law. Accordingly, acts carried out by *Al Qaeda* were also attributable to the *Taliban* and they could be made the target of actions of self-defence.

### III. *Ius in Bello*

#### 1. Introduction

The law of armed conflict is primarily concerned with preserving, as far as possible, certain humanitarian core values during the conduct of hostilities. To achieve this objective the law constrains states in the way they plan and execute their military activities. The respective rules have their roots in the traditions of all cultures; they are, by their very foundation, universal.<sup>123</sup>

One of the first attempts to codify the existing customs and usages of war was the so-called *Lieber Code* of 1863 issued by the US President *Abraham Lincoln* to the Union forces in the American Civil War.<sup>124</sup> It was the first instance in western history in which the government of a state established formal guidelines for its army's conduct towards its adversary and had them published.<sup>125</sup> It influenced the international codification of that complex of international law which started in the second part of the 19th century.<sup>126</sup> The modern international treaty law on the rules in armed conflict on land comprises, in particular, the Hague Regulations Respecting the Laws and Customs of War

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<sup>123</sup> See I. Detter, *The Law of War*, 2nd edition, 2000, 164 et seq.; R.C. Algase, "Protection of Civilian Lives in Warfare: A Comparison between Islamic Law and Modern International Law Concerning the Conduct of Hostilities", *Military Law and Law of War Review* 16 (1977), 246 et seq.

<sup>124</sup> See in particular B. Röben, *Johann Caspar Bluntschli, Francis Lieber und das moderne Völkerrecht 1861-1881*, 2003, 198 et seq.

<sup>125</sup> R.S. Hartigan, *Lieber's Code and the Law of War*, 1983, 1 et seq.; B.M.L. Carnahan, "Lieber and the Laws of War: The Origins and Limits of Military Necessity", *AJIL* 92 (1998), 213 et seq.; G. Fahl, *Humanitäres Völkerrecht*, 1983, 19 refers to a regulation on war issued by Czar Peter I of 30 March 1716. See also S. Vöneky, "Der Lieber's Code und die Wurzeln des modernen Kriegsvölkerrechts", *ZaöRV* 62 (2002), 423 et seq.

<sup>126</sup> The historical development of the law in armed conflict is briefly summarized in H. McConbrey/ N.D.White, *International Law and Armed Conflict*, 1992, 209 et seq.

on Land of 1907,<sup>127</sup> the four Geneva Conventions of 1949,<sup>128</sup> Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I),<sup>129</sup> Protocol II Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II)<sup>130</sup> and various treaties dealing with weapons, culminating in the so-called Conventional Weapons Convention of 1980.<sup>131</sup> Although the rules on the law in armed conflict have been codified to a large extent, this does not mean that there is no room for customary international law. In fact, the latter remains highly relevant, in particular since the respective instruments, especially Additional Protocol I and II, have not been universally ratified. In particular, neither the United States nor the Iraq is a party to Additional Protocol I. Hence, referring to that instrument in respect of these two states is only justified if it is accepted that the respective rules of Additional Protocol I codify or have become customary international law.

The law in armed conflict, having been codified over the last hundred years, faces several problems, as far as its applicability and scope is concerned. These problems mainly stem from the fact that the typology of armed conflict has changed considerably. These rules were originally developed in the context of armed conflicts between states. The respective treaty obligations — with the exception of common article 3 of the four Geneva Conventions and Additional Protocol II — are applicable only in conflicts between states. This was also true of the respective rules of customary international law. However, most of the armed conflicts after World War II were not fought between states, but rather within states or between a state and a non-state entity. More recent

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<sup>127</sup> Annex to the Convention (IV) Respecting the Laws and Customs of War on Land, *Martens NRG 3eme serie*, Volume III, 461 et seq.

<sup>128</sup> Convention I for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field; Convention II for the Amelioration of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Convention III relative to the Treatment of Prisoners of War; Convention IV relative to the Protection of Civilian Persons in Time of War. (all reprinted in D. Schindler/ J. Toman, *The Laws of Armed Conflicts*, 1988).

<sup>129</sup> *ILM* 16 (1977), 1391 et seq.

<sup>130</sup> *ILM* 16 (1977), 1442 et seq.

<sup>131</sup> Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, *ILM* 19 (1980), 1523 et seq.



treaties concerning the rules in armed conflict reflect this change. In particular, treaties on specific weapons, for example the 1993 Chemical Weapons Convention<sup>132</sup> and the two agreements on land mines (the 1996 Protocol of the so called Conventional Weapons Convention of 1980<sup>133</sup> and the 1997 Land Mines Convention<sup>134</sup>) expressly apply to internal as well as international conflicts. However, the distinction between armed conflicts among states and those between a state and a non-state actor, which was still very dominant at the Diplomatic Conference adopting the two Additional Protocols to the four Geneva Conventions, has been further eroded in general. The Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia, for example, held in its decision *Prosecutor v. Tadic* (Jurisdiction), that customary international law applicable to internal armed conflicts is more extensive than anticipated and that it included the customary rules regarding methods and means of warfare which apply in international conflicts. This reasoning was not based on respective state practice, but the Appeals Chamber convincingly invoked that the concerns of humanity were the same and cannot depend upon the nature of the conflict.<sup>135</sup> Although the differences between the law in international and

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<sup>132</sup> Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, *ILM* 32 (1993), 800 et seq.

<sup>133</sup> Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and other Devices (Protocol II) as amended, *ILM* 35 (1996), 1206 et seq.

<sup>134</sup> Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personal Mines and on their Destruction, *ILM* 36 (1997), 1507 et seq.

<sup>135</sup> The Appeals Chamber stated: “[E]lementary considerations of humanity and common sense make it preposterous that the use by States of weapons prohibited in armed conflicts between themselves be allowed when states try to put down rebellion by their own nationals on their own territory. What is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife ...” (*Prosecutor v. Tadic*, (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction), *ILM* 35 (1996), 35 et seq. (68, para. 119); reiterated in the Judgment *Prosecutor v. Enver Hadzibasanovic, Mehmed Alagic Amir Kubura* (Decision on Interlocutory Appeal) (Case IT-01-47 - AR 72); the latter rightly pointed out that the applicability of rules for the international armed conflicts to the non-international armed conflict has to be established for each issue and this cannot be done so in general (para. 12). In doing so the Tribunal not only considers state practice but in particular

non-international conflicts have been alleviated, that does not mean that they have fully disappeared.<sup>136</sup> In consequence thereof, on certain issues it remains questionable to what extent rules in armed conflict designed for conflicts between states (international conflicts) apply between states and non-state entities (non-international conflicts).

Taking the briefly sketched development into consideration, time seems to be ripe to consider codifying humanitarian law in non-international conflicts in a way which exceeds the rudimentary rules of common article 3 of the four Geneva Conventions and of Additional Protocol II. It is not adequate to rely on these rules, and on analogies to international humanitarian law in international armed conflicts, in particular, when they are invoked in the prosecution of war crimes.<sup>137</sup> The problem is not merely that there is a lack of clarity as to which rules of humanitarian law governing international armed conflicts will actually be applicable in non-international conflicts. Significant uncertainty also exists with regard to the treatment of members of the forces of non-state entities, as will be demonstrated in the context of the war against the *Taliban* and *Al Qaeda*. But what is even more important is the general question, namely to what extent are such forces bound by the existing rules of war or — to put it into different terms — to what extent is it permissible for such forces to claim that they are not bound to follow such rules while at the same time invoking the protection of humanitarian law for themselves. This is a matter of how to re-establish reciprocity amongst parties to an armed conflict as far as the governing law on warfare is concerned, an issue upon which hinges implementation and enforcement of the law of warfare itself.

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whether the situations are analogous. F. Kalshoven, “Arms, Armaments and International Law”, *RdC* 191 (1985), 183 et seq. (296) came to the same conclusion by pointing out that under customary international law states were under an obligation to spare civilians and civilian objects in internal conflicts. C. Greenwood, “The Law of Weaponry at the Start of the New Millennium”, in: M.N. Schmitt/ L.C. Green (eds), *The Law of Armed Conflict into the Next Millennium*, International Law Studies Volume 71, 1998, 185 et seq. (193) questions whether there is enough evidence for customary international law in this respect but considers the argument advanced by the Appeals Chamber as compelling.

<sup>136</sup> See on this Greenwood, see above, 193.

<sup>137</sup> See in this respect the Separate and Partially Dissenting Opinion of Judge David Hunt in the Case *Prosecutor v. Hadzihasanovic et al.*, see note 135, concerning the question of content and scope of command responsibility.

The issue which, in part, deserves reconsideration, in particular in the context of the war against Iraq and against the *Taliban*, involves the rules that should apply on weaponry and on targeting. The prohibition of certain weapons has a long history, many of the respective international treaties have been developed at the beginning of the 20th century. Since then the weapons technology has been advanced considerably, adding new weapons but also developing smart weapons which can be targeted more precisely thus avoiding collateral damage to civilians and civilian objects. This development calls for a reconsideration of, in particular, the law of weaponry. For example, collateral damage to civilians and civilian objects which was formerly tolerable, may not be tolerable any more. Apart from that, a clear tendency can be identified that the international law rules on targeting have, in the two wars against Iraq as well as in the bombardment of Yugoslavia, received a broader interpretation than could be anticipated under the respective rules of Additional Protocol I read literally.

## 2. Use of Weapons

The law of weaponry serves several purposes.<sup>138</sup> It is one of its objectives to distinguish between civilians and civilian objects, on the one hand, and combatants and military objects on the other hand, with a view to protecting the former.<sup>139</sup> It also has for objective that the use of weapons may not cause suffering unnecessary for the achievement of legitimate military goals. This principle also protects combatants in addition to civilians. The principle of 'limited warfare' has further been broadened: it now limits the use of weapons and methods of warfare which have a substantial adverse effect upon the natural environment.<sup>140</sup>

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<sup>138</sup> Greenwood, see note 135, 185 points out that developments of weaponry and methods of warfare during the twentieth century have not been matched by the development of law; on the law of weaponry in general see Detter, see note 123, 211 et seq.

<sup>139</sup> The basic rule in this respect is article 48 Additional Protocol I; it explicitly lays down the maxim of a 'limited warfare'.

<sup>140</sup> S. Vöneky, *Die Fortgeltung des Umweltvölkerrechts in internationalen bewaffneten Konflikten*, 2001, 29 et seq.; R.G. Tarasofsky, "Legal Protection of the Environment during International Armed Conflict", *NYIL* 24 (1993), 17 et seq.

It is established in customary international law, as well as in treaty law, that attacks<sup>141</sup> must be limited strictly to military objectives.<sup>142</sup> The notion of military objective has been defined by article 52 Additional Protocol I as well as in later international instruments.<sup>143</sup> Such definition constitutes one of the most heavily disputed provisions of Additional Protocol I. The Additional Protocol has chosen to define the notion in abstract terms mainly by referring to the respective objects and persons<sup>144</sup> which legitimately may become the target of a military attack. Such definition consists of two parts — an objective part and a subjective one. In the former the definition refers to objects and persons which must not be made a military target and accordingly it must be read in conjunction with the rules limiting attacks on civilians and civilian objects.

Generally speaking, three different aspects are to be distinguished. Military actions must not be directed against the civilian population,

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<sup>141</sup> The notion of “attacks” is defined in article 49 Additional Protocol I. Attacks are “acts of violence against the adversary, whether in offence or defence”. The notion is narrower than the term “military operation” which also embraces military activities without direct use of violence. To the extent that such operations do not lead to violence against the adversary the rules concerning the protection of civilians and civilian objects do not come into play; see *S. Oeter*, “Methods and Means of Combat”, in: *D. Fleck* (ed.), *Handbook of Humanitarian Law in Armed Conflicts*, 1995, 105 et seq. (153, para. 441); *W.A. Solf*, “Article 49-Definition of Attacks and Scope of Application”, in: *M. Bothe/ K.J. Partsch/ W.A. Solf*, *New Rules for Victims of Armed Conflicts*, 1982, 286 et seq., (289).

<sup>142</sup> As to the historical development of this notion see: *A.P.V. Rogers*, *Law on the Battlefield*, 1996, 27 et seq.; *Detter*, see note 123, 280 et seq. referring to article 24 of the Hague Draft Rules of 1923 which clearly influenced the wording of article 52 Additional Protocol I.

<sup>143</sup> Article 2 of Annex II and Annex III to the so called Conventional Weapons Convention, see note 132; this is equally true for the amended Protocol II of 1996.

<sup>144</sup> The principle military targets have been traditionally enemy combatants which includes units of the army, the navy and the air force, guerrilla fighters, the civilian population of an invaded country taking part in hostilities (*levée en masse*). Already the Preamble of the Declaration of St. Petersburg of 1868 stated: “Considering ... that the only legitimate object which states should endeavour to accomplish during war is to weaken the military forces of the enemy; ...”.

individual civilians or civilian objects.<sup>145</sup> A belligerent is required to distinguish between combatants and military objects, on the one hand, and the civilian population and civilian objects, on the other hand: direct attacks against the latter are prohibited.<sup>146</sup> Even if the target of an attack is a legitimate military object, incidental loss of civilian life, injury to civilians or damage to civilian objects are prohibited if they would be excessive in relation to the concrete and direct military advantage anticipated.<sup>147</sup> If there are different choices for a military attack between several military objects for obtaining a similar military advantage, the attack which may be expected to cause the least danger to civilian lives and civilian objects should be selected.<sup>148</sup>

In practice it is the identification of the objective which may be made a military target which is problematic. According to Additional Protocol I military objects which thus may be made a target are those which by their location, nature purpose or use make an effective contribution to military actions and whose total or partial destruction, capture or neutralization offers definite military advantage.<sup>149</sup> This wording includes, as a matter of principle, all installations, buildings or ground sectors which are directly involved in the military endeavours of the adversary. The second element of the definition, the subjective one, namely that the attack must be directed against objects which

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<sup>145</sup> Article 49 (2) Additional Protocol I provides that the limitations on targeting and the use of weapons also applies to the territory of the belligerent undertaking the respective action but occupied by the adversary. These rules apply to land warfare as well as from the air and on the sea.

<sup>146</sup> See arts 48 and 51 (2), 51 (3) and 52 (1) Additional Protocol I.

<sup>147</sup> Article 51 (5) (b) Additional Protocol I; this is considered to be part of customary international law; Bothe/ Partsch/ Solf, see note 141, 299 consider the whole of article 51 Additional Protocol to be customary international law, so does the Comité International de la Croix-Rouge (ed.), *Commentaire des Protocoles additionnels due 8 juin 1977*, 1986, article 51, note 1923; H.B. Robertson, "The Principle of Military Objective in the Law of Armed Conflict", *Journal of Legal Studies* 8 (1997), 35 et seq.; points out that several operational manuals have copied article 52 (2) Additional Protocol I.

<sup>148</sup> Article 57 (3) Additional Protocol I; this, too, must be considered to be part of international customary law. Even if a different position is taken, see Rogers, see note 142, 43, the same result would have been achieved by invoking the principle of proportionality which clearly constitutes part of customary international law, different also in this respect Rogers, see note 142, 43.

<sup>149</sup> Article 52 (2) Additional Protocol I.

“make an effective contribution to military action” of the adversary and must offer a “definite military advantage” means that the intents of the adversary as well as own military planning of the attacking forces must be considered. The attack must result in a concrete military advantage of the attacking forces (whether such advantage materializes at the end is irrelevant); it must be militarily necessary to reach a permissible operative goal. Attacks launched merely for terrorizing the civilian population of the adversary, to break their determination to fight or to demonstrate military superiority are prohibited. This also excludes fanciful estimates of military advantage or an attack which is not based upon proper information.<sup>150</sup>

Already when the provisions of Additional Protocol I on civilian objects and their protection were adopted, it was known that the requested differentiation was difficult to achieve in practice, given the complex interaction between the industry of a state and its infrastructure with the machinery to sustain war efforts. This has been reconfirmed in the wars against Iraq in 1990/1991 and in 2003. It is for that reason that occasionally reference is made to mixed targets;<sup>151</sup> although the respective rules are oblivious of an intermediate status or a dual use status. Either something is a military object or it is not.<sup>152</sup> In the war against Iraq 1990/1991 the United States air warfare plan was to strike first at Iraqi command, control and communication facilities, to gain air supremacy, to destroy the nuclear, bacteriological and chemical warfare capability, to eliminate Iraq’s offensive warfare capability by attacking military production plants and to attack lines of communication to Iraqi forces in Kuwait. Finally, the plan provided for attacks on enemy armed forces.<sup>153</sup> The following objects were attacked by United States

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<sup>150</sup> Comité International de la Croix-Rouge, see note 147, article 52, note 2024; Bothe/ Partsch/ Solf, see note 141, 326.

<sup>151</sup> Rogers, see note 142, 42 et seq.

<sup>152</sup> C. Greenwood, “Customary International Law and the I. Geneva Protocol of 1977 in the Gulf conflict”, in: P.J. Rowe (ed.), *The Gulf War 1990-91 in International and English Law*, 1992, 63 et seq. (73).

<sup>153</sup> Conduct of the Persian Gulf War, US Department of Defence, Final Report to Congress, April 1992, 95; an assessment is given by O. Schachter, “United Nations Law in the Gulf Conflict”, *AJIL* (1991), 452 et seq. (466); G. Best, *Law and War since 1945*, 1994, 384; the list provided by Robertson, see note 147, 35 et seq. also includes civil television and radio installations since they could be used for Iraqi propaganda; critical R. Normand/ C. Jochnick, “The Legitimization of Violence: A Critical History of the Laws of War”, *Harv. Int’l L. J.* 35 (1994), 387 et seq. (402).

forces: leadership command facilities such as the Iraqi intelligence service headquarters, refined oil production facilities, nuclear, chemical and biological sites, bridges, communication towers, supply lines, including railway and road bridges between Baghdad and Basra, radio and television installations and electricity production facilities. United Kingdom forces attacked airfields, barracks, radar control centres, ammunition dumps, petroleum storage sites, power stations, Scud missile sites, bridges, hardened aircraft shelters, coastal defence positions, surface-to-air-missiles batteries, supply depots, naval vessels, artillery positions and concentrations of armour.<sup>154</sup> In the war of 2003 the attacks concentrated more on Iraqi communication centres and lines than on the Iraqi infrastructure; ministries and other official buildings were attacked at night so as to, amongst others, reduce the risk of human casualties.

Generally, in the war against Iraq (1990/1991) and in the one of 2003, the question has arisen whether it is sufficient that an object has a general war-sustaining capability for the adversary or whether the military advantage must be concrete before objects may be targeted. The United States government seems to have invoked in this context the targeting of cotton crops in the United States civil war<sup>155</sup> as a justification to take a wide approach, namely, to target the war sustaining capabilities of Iraq. The fact that the rules on the constraints of targeting and the use of weapons of Additional Protocol I deal with that issue in the context of attacks as defined in article 49 Additional Protocol I points in the latter direction. These rules are meant to limit the individual operation. Accordingly, it is argued, it is a matter of consequence to derive the justification for the attack from that individual operation and the concrete context it will take. Such an approach would make it quite questionable to justify an attack by referring to overarching intentions which are not even of a purely military nature or to justify a given action by arguing that everything that is weakening the war sustaining efforts of the adversary is, in general, justified.

The United States policy in the 2003 war against Iraq now seems to deviate from article 52 (2) Additional Protocol I. Although article 40 (c) of the United States Army Field Manual adopted the wording of article 52 (2) Additional Protocol I in its entirety according to Military Commission Instruction No. 2 (issued on 30 April 2003) military targets in-

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<sup>154</sup> P. Hine, "Dispatch by the Joint Commander of Operation Granby", 2nd Suppl., *London Gazette* of 28 June 1991.

<sup>155</sup> Robertson, see note 147, 35 et seq.

clude objectives that effectively contribute to helping opposing forces continue to fight (“war-sustaining capability”) thus omitting the word “definite” which clearly was meant as a limiting element.<sup>156</sup> Even before the Commanders Handbook on the Law of Naval Operations stated that economic targets of the enemy that indirectly but effectively support and sustain the enemy’s war-fighting capability may also be attacked.<sup>157</sup>

The interpretation of article 52 (2) Additional Protocol I was already disputed when it was adopted.<sup>158</sup> The German government even felt it necessary to annex to its ratification an interpretative statement of what constitutes a “definite military advantage”. It reads: “...‘military advantage’ is understood to refer to the advantage anticipated from the attack as a whole and not only from isolated or particular parts of the attack.”<sup>159</sup> However, the interpretation pursued by the United States seems to go a definite step further. If taken to the extreme, it could mean that every attack would conform to article 52 (2) Additional Protocol I even those which show military superiority or which target the infrastructure of a state or the production upon which the economy of the respective state is based. Although it is correct to say that a “military advantage” which justifies classifying an object as a “military object” may be based on an integrated view of separate actions, the effect must be a military and a direct one, namely, one which materializes itself on the military level and not via the effect on the civilian population or the destruction of civilian objects. This interpretation of the notion “military object” allows attacks against bridges and railroads and all lines of communication. However, this does not provide for the possibility of attacks against official buildings not used for military purposes, radio and TV stations even if used for propaganda purposes which have also been attacked in the NATO bombardment of Yugoslavia, and on the economy of the adversary as such. One has to concede, though, that given the relevance of the economy to sustain war efforts or even its respective transformation into an economy which is only

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<sup>156</sup> Rogers, see note 142, 36; Bothe/ Partsch/ Solf, see note 141, 326.

<sup>157</sup> Annotated Supplement to the Commander’s Handbook on the Law of Naval Operations, NWP 1-14MN (Formerly NWP 9 (Rev.A), MCWP 5-21, COMDTPUT P5800.7, para. 8.1.1.

<sup>158</sup> Bothe/ Partsch/ Solf, see note 141, 326.

<sup>159</sup> Quoted from Oeter, see note 141, para. 444, this declaration was in fact made in connection with proportionality; a similar declaration was made by the United Kingdom at signature, text in: Bothe/ Partsch/ Solf, see note 141, 721.



meant to sustain war which was typical for the two World Wars, and has become common in recent wars, it will be more and more difficult to differentiate adequately. For example, making it more difficult for several parties to internal conflicts to make use of trade in diamonds has been somewhat successful in curbing their capabilities to continue the war. Such an approach may recommend itself for wider application. Article 52 (2) Additional Protocol I gives too little guidance in this respect and should be reconsidered. If no international effort is undertaken to provide for more effective criteria to distinguish between civilian and military objects efforts will be undertaken on the national level to increase the discretionary powers of those politically or militarily responsible for military operations. This will inevitably lead to a step-by-step reduction of the protection of civilian objects an objective, sought already by *Francis Lieber*.<sup>160</sup>

The second issue concerning the usage of weapons and targeting to be addressed in the context of this article is whether the increased potential for precise targeting makes it necessary to avoid collateral damage to civilians and civilian objects. The prohibition to cause collateral damage or — in other words — to launch an indiscriminate attack, has its roots in the already-mentioned principle that belligerents shall at all times distinguish between, on the one side, the civilian population and civilian objects and, on the other, combatants and military objects. This obligation was widely disregarded in World War II but it has been reaffirmed in article 51 (4) and (5) Additional Protocol I. There is no doubt that this obligation is part of customary international law.<sup>161</sup>

Article 51 Additional Protocol I addresses three different aspects of this principle.

Article 51 (4) (a) Additional Protocol I prohibits attacks which are not directed at a specific military object. This is nothing more but a logical consequence of the obligation to distinguish between civilian and military objects. The attacker must ascertain that the targeted object is a military one in accordance with the rules of war. Further, the action must be restricted, as far as possible, to the targeted military object alone and not to objects or civilians around it. Blind fire into the territory controlled by the adversary as well as attacking without reliable information is prohibited; so is the practice of World War II to release bombs over the territory of the adversary after missing the origi-

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<sup>160</sup> See article 37 of the Code.

<sup>161</sup> Greenwood, see note 135, 200.

nal target.<sup>162</sup> In the wars against Iraq 1990/1991 and 2003 the pilots of the Allies were under the obligation to return the bomb load entirely when target identification had failed, this meets the standards set by Additional Protocol I.

According to article 51 (4) (b) Additional Protocol I attacks are prohibited which employ a method which cannot be directed at a specific military object. Using such systems again would be in violation of the obligation to distinguish between military and civilian objects. This rules out weapons systems which, by their very nature, cannot be targeted accurately. A recent example of such a weapon system was the launch of Scud-missiles by Iraq against Israel in 1991. Night attacks without respective targeting equipment or bombing raids from a very high altitude may fall into this category, when target accuracy becomes unacceptably low; as well may mines that are laid without customary precautions and which are unrecorded or unmarked and which are not designed to destroy themselves within reasonable time.<sup>163</sup>

The most controversially discussed rule is the one in article 51 (4) (c) Additional Protocol I. According to it an indiscriminate attack is the one which employs a method or means of combat the effects of which cannot be limited as required by the Protocol. This rule refers to those provisions which neutralize certain objects such as dams, the natural environment and cultural objects, for example. This rule also refers to the rule of proportionality as enshrined in article 51 (5) (b) and 57 (2) (a) Additional Protocol I.

These rules are supplemented by the rules obliging the political and military personnel responsible for the armed conduct to choose “means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life ... and damage to civilian objects.”<sup>164</sup> There are two aspects to that provision. The respective precautionary measures are to be implemented in the stage of planning as well as in action. In the planning stage states are required not only to train soldiers respectively but also to issue the necessary orders, in particular, the rules of engagement which implement that rule and to ensure logistically that weapons with adequate target accuracy are at the disposal for those responsible for military action. This aspect seems to have been taken care of in the wars against Iraq.

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<sup>162</sup> Oeter, see note 141, para. 455.

<sup>163</sup> Oeter, see note 141, para. 455; Bothe/ Partsch/ Solf, see note 141, 305.

<sup>164</sup> Article 57 (2) (a) (ii) Additional Protocol I.

The second aspect of this principle referred to concerns regarding the selection of weapons to be used. Under article 57 (2) (a) (ii) Additional Protocol I the commanding officers are under an obligation to employ those weapons which can be targeted most precisely. Hence such obligation follows the weapons development. What was tolerable in the past may not be tolerable any more. Apart from that the burden such obligation imposes may differ as to the technological standard of each state. The technological gap which may result therefrom can only be closed by excluding certain weapons as being of an effect which is no longer tolerable. The Conventional Weapons Convention can be interpreted as a move into that direction. Nevertheless it remains doubtful whether the rule only to use weapons which, from a technological point of view, are the most accurate ones has been fully implemented. A further clarification of this, particularly in military manuals, seems to be called for.

A final point deserves mentioning in this context, namely the dealing with civilian objects or objects which have been explicitly exempt from military targeting but which, however, have been used by the adversary for its military activities. The Desert Storm Rules on Engagement state: "... Hospitals, churches, shrines, schools, museums, national monuments, and any other historical or cultural sites will not be engaged except in self-defence ...".<sup>165</sup> This goes beyond what is required under article 52 (2) Additional Protocol I since such civilian objects — a different regime applies to cultural objects — lose their status as civilian object if used for military purposes by the adversary. The rules on the prohibition of indiscriminate attacks remain applicable (article 57 (2) (a) (iii) Additional Protocol I). It is worth considering supplementing existing rules on the protection of civilian objects vitally necessary for the civilian population or the treatment of wounded or sick to ensure that such objects are not used for military purposes, as is the case for cultural objects. This would render it more difficult for belligerents to use such objects as shelter.

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<sup>165</sup> Reprinted in: A. Roberts/ R. Guelff, *Documents on the Laws of War*, 3rd edition, 2000, 561; G. Best, *War and Law Since 1945*, 1994, 273 points out that the rules on targeting have been followed in the 1991 war against Iraq being unclear whether the collapse of the inner Iraq's water-supply system was accidental or intentional.

### 3. Prisoners of War and Prosecution of War Crimes

Since the commencement of military operations in Afghanistan in October 2001, the United States forces have detained people including both *Taliban* and *Al Qaeda* fighters. In addition to Afghan nationals, nationals from several Arab, Asian and European states are reported to be among the detainees. As of August 2003, approximately 660 of these prisoners had been transported and detained by United States forces in Guantanamo Bay. The United States government has stated that neither group would be granted prisoner of war status although in their treatment the rules of international humanitarian law would be respected. The United States government has advanced several arguments based upon international law to justify that approach.<sup>166</sup> It has been asserted that members of the *Taliban* forces are not entitled to prisoner of war status because the *Taliban* was not, in the view of the United States, the recognized government of Afghanistan. Further that prisoners held in Guantanamo Bay had neither carried distinctive signs nor had conducted their operations in accordance with the law of the customs of war as required under article 4 (2) Third Geneva Convention.

The issue of taken prisoners of war has also come up in the context of the war of 2003 against Iraq. It is open to question whether only the members of the army, navy and air forces taken prisoners qualify as prisoners of war or whether the members of the Republican Guard and the *Fedayeen Saddam* may also qualify. Further, the coalition forces in Iraq are faced with the question as to which tribunals may prosecute war crimes, whether persons may be transferred to Guantanamo or the United States and which rules govern the internment of these persons. The whole issue is to be seen against the background that, although the military fighting has come to an end, the coalition forces are faced with small scale attacks as well as sabotage and even terrorist acts.

The international rules governing these complex questions are contained in the Third and Fourth Geneva Convention, the Hague Regulations, in international human rights law and in customary international law. The treatment of persons captured in the wars against the *Taliban*,

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<sup>166</sup> See statement by the U.S. Press Secretary, Washington D.C. of 7 February 2002; White House Fact Sheet of 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), 21 et seq. (25); a different approach has been taken by the International Committee of the Red Cross, Press Release of 9 February 2002.

*Al Qaeda* and Iraq can be looked upon as to whether the requirements of international humanitarian laws were met in respect of the detainees,<sup>167</sup> but also whether the respective provisions that provide clear guidance in situations such as the ones faced in recent armed conflicts were met. As far as this aspect is concerned, this article will only deal with the general question whether the United States government was justified in denying detainees in Guantanamo Bay the formal prisoner of war status. It will not deal with the treatment that the detainees received there.

Article 4 Third Geneva Convention is the basic rule concerning the types of persons who are eligible as prisoners of war. This provision identifies several groups of persons which, having fallen into the power of the adversary, 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.<sup>168</sup> Additionally members of other militias and members of other volunteer corps, including those of organized resistance movements belonging to a party to the conflict and operating in or outside their own territory, may acquire the status of prisoners of war if the groups referred to meet certain criteria.<sup>169</sup> The main distinction between these categories is that the four criteria referred to in article 4 A (2) (a-d) 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 (1) and (3) of that Convention.<sup>170</sup> This is of relevance with respect to the *Taliban*.

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<sup>167</sup> See on this already Wolfrum/ Philipp, see note 16, 596 et seq.

<sup>168</sup> Article 4 A (1).

<sup>169</sup> See article 4 A (2) (a-d).

<sup>170</sup> This distinction made in article 4 A of the Third Geneva Convention follows in substance article 1 Hague Regulations; on the legislative history of article 4 Third Geneva Convention see: Final Record of the Diplomatic Conference of Geneva, 1949, Vol. II A, 465-467; A. Rosas, *The Legal Status of Prisoners of War: A Study in International Humanitarian Law Applicable in Armed Conflicts*, 1976, 328 et seq., gives a detailed analysis of this complex. See also: 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 (1983), 219 et seq. (222); 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).

The arguments advanced by the United States government for not giving the detainees in Guantanamo Bay the formal status of prisoners of war are to be judged on the basis of article 4 A Third Geneva Convention. The assertion that the members of the *Taliban* forces are not to be considered prisoners of war since the *Taliban* regime did not enjoy international recognition is not sustainable. Article 4 A (3), Third Geneva Convention covers this situation. The recognition of the adversary government by the detaining power is of no relevance to the issue of the prisoner of war status of members of forces which profess allegiance to such government. Equally it is of no relevance that the *Taliban* were not recognized internationally as the government of Afghanistan. The formal recognition of governments and states has lost the constitutive character it formerly had; what is relevant is whether the respective entity is in *de facto* control of the respective state territory or a part thereof. The *Taliban* met the requirement of a regular force. They were organized under the authority of a central command of a government, namely the *de facto* government of Afghanistan, the *Taliban*.<sup>171</sup> Finally, it may be pointed out that the approach now taken by the United States government is at variance with the position taken by it during the Korean War. On that occasion the United States government has considered detainees from the Peoples Republic of China as prisoners of war although the government of the Peoples Republic of China was not recognized by the United States government and by many other states.<sup>172</sup>

The view that combatants who have violated the rules of warfare would, in general, lose the status as prisoners 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. Article 85 Third Geneva Convention provides that the sanctions for having violated the laws of armed conflict do not include forfeiture of the prisoner of war status. There is, though, an apparent contradiction between article 4 A (2) (d) Third Geneva Convention, dealing with members of other militias and article 85 Third Geneva Convention, since the prisoner of war status would only be granted to the members of militias other than those of the armed forces if they conduct their operation in accordance with the laws and customs

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<sup>171</sup> See in this respect Wolfrum/ Philipp, see note 16, 584 et seq.

<sup>172</sup> C. Moore, "The United States, International Humanitarian Law and the Prisoners at Guantanamo Bay", *International Journal of Human Rights* 7 (2003), 1 et seq. (7).

of war. This provision cannot be invoked, though, in respect of members from the *Taliban* forces since they are to be considered as members of regular forces. Depriving them of their status for having violated the rules of warfare would be in violation of article 85 Third Geneva Convention.

Finally, the argument is untenable that *Taliban* fighters are deprived of their potential prisoner of war status for not having displayed their combatant status appropriately. As 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 (1) and (3) 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.

In defining the status of the detainees held in Guantanamo Bay, article 5 of the Third Geneva Convention is also to be applied. It maintains that if any doubt exists whether persons, having committed a belligerent act and having fallen into enemy hands, belong to any of the categories enumerated in article 4, the status of these prisoners must be determined by a competent tribunal. This decision cannot be made by the capturer himself, as the House of Lords in the Case of *Osman v. Prosecutor* has rightly pointed out.<sup>173</sup>

The situation concerning members of *Al Qaeda* is more complicated. They cannot be considered being members of the regular armed forces and it is doubtful whether they are to be seen as members of militias forming part of such armed forces falling under article 4 A (2) Third Geneva Convention. This is a question of fact. If, what is most

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<sup>173</sup> "Treatment as privileged, or unprivileged, belligerent cannot be at the pleasure of the capturer", House of Lords [Privy Council], *Osman bin Haji Mohamed Ali v. Public Prosecutor* [1969] 1 A.C. 430; see also M. Sassoli/ A.A. Bouvier (eds), *How Does Law Protect in War?*, 1999, 767 et seq. On 12 March 2002 the Inter-American Commission called on the US government "to take the urgent measures necessary to have the legal status of the detainees at Guantanamo Bay determined by a competent tribunal". This was in response to a petition filed on 25 February 2002 by the Centre for Constitutional Rights, Columbia Law School and the Centre for Justice and International Law alleging violations of the United States obligations under the American Declaration on the Rights and Duties of Man in relation to the Guantanamo detainees.

likely, *Al Qaeda* acted independently of, or only in loose connection with the *Taliban*, then the requirements of article 4 A (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. *Al Qaeda* has been organized as an international terrorist network rather than an irregular force according to article 4 A (2) Third Geneva Convention, and it was and is directing its attacks deliberately against civilians rather than other armed forces. Thus it is 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 that 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. They also cannot invoke article 44 (3) Additional Protocol I since the United States has not yet ratified Additional Protocol I and since this provision can hardly, due to its disputed content, be considered to be part of customary international law.<sup>174</sup> This does not mean that members of the *Al Qaeda* are, under international law, without protection. In respect to them the Fourth Geneva Convention becomes relevant<sup>175</sup> as well as the international human rights instruments.

In spite of their inapplicability, arts 43 and 44 Additional Protocol I are of some interest in the context of the focus of this article. Article 4 Third Geneva Convention has been considered inadequate as far as the treatment of members of liberation movements and forces by non-state entities, referred to as “new category of prisoners of war”<sup>176</sup> are concerned. This has led to the adoption of these articles which attempt to accommodate fighting practices typical in liberation wars or wars involving irregular forces. Article 44 (2) Additional Protocol I reaffirms in essence that having violated the rules of international law applicable

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<sup>174</sup> C. Greenwood, “Customary Law Status of the 1977 Additional Protocols”, in: T. Delissen (ed.), *Humanitarian Law of Armed Conflict, Challenges Ahead, Essays in Honour of Frits Kalshoven*, 1991, 100 et seq.

<sup>175</sup> The International Criminal Tribunal for the former Yugoslavia has affirmed in the *Clebić* Judgment of 1998 that: “There is no gap between the Third and the Fourth Geneva Convention. If an individual is not entitled to the protection of the Third Convention as a prisoner of war ..., he or she necessarily falls within the ambit of the Fourth Convention, provided that its article 4 requirements are satisfied”.

<sup>176</sup> Bothe/ Partsch/ Solf, see note 141, 246.



in armed conflicts does not deprive the combatant of the right to be a combatant and of the right to be a prisoner of war with one exception, namely that the weapons must have been carried openly during action.<sup>177</sup> Even this test may have not been met by *Al Qaeda* fighters and for that reason they could not invoke article 43 and 44 Additional Protocol I even if these provisions had been applicable.

In respect of the armed forces of Iraq, there is no doubt that members of the army, the navy and the air force having fallen into the power of the coalition forces qualify as prisoners of war. They may be prosecuted for having committed war crimes or other crimes but this does not deprive them of their status as prisoners of war. The situation in respect of members of the Republican Guards or of the *Fedayeen Saddam* is different. Since these were not integrated into the regular forces these groups come under article 4 A (2) Third Geneva Convention as independent militia. This means that they enjoy the prisoner of war status only if they have been under a command, had a fixed distinctive sign recognizable at distance, have carried their arms openly and have conducted their operations in accordance with the laws and customs of war.

Another issue of controversy is the prosecution of prisoners of war for acts committed before having been made prisoner. Article 85 Third Geneva Convention accepts such a possibility, although it states that such prisoners retain the benefit of the Convention even after conviction. One has to note, though, that several states have made reservations that the benefit of the prisoner of war status does not extend to war criminals. A similar view was taken in respect of members of the United States Air Force captured by North Vietnam forces in the Vietnam War. This interpretation is in conflict not only with the letter but also the spirit of the Third Geneva Convention.

The core provisions governing trials against prisoners of war are contained in Part III, Section VI, Chapter III of the Third Geneva Convention dealing with penal and disciplinary sanctions against the former. Arts 84 and 99 to 108 Third Geneva Convention guarantee certain due process rights to prisoners of war. Article 85 also extends the protection of the Third Geneva Convention to Prisoners of War prosecuted and convicted for acts committed prior to their capture.<sup>178</sup>

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<sup>177</sup> For details see Bothe/ Partsch/ Solf, see note 141, 249 et seq.; Rosas, see note 170, 354.

<sup>178</sup> F. Kalshoven/ L. Zegveld, *Constraints on the Waging of War*, 3rd edition, 2001, 61 emphasize that this provision was introduced with the objective to prevent a repetition of the practice of the Allied Powers with respect to war

This is of relevance in the context of this article. If these provisions are not applicable for the reason that the persons in question do not enjoy prisoner of war status<sup>179</sup> then the international human rights standards are to be applied. According to article 14 International Covenant on Civil and Political Rights, 1966,<sup>180</sup> States parties must ensure that all persons on its territory or under its jurisdiction<sup>181</sup> receive equal treatment before the national courts or tribunals. It further provides for the following minimum procedural guarantees: fair and public hearing before competent, independent and impartial tribunals established by law, the presumption of innocence, due process, and the right to appeal to a higher tribunal according to law.<sup>182</sup>

The procedure set up by the United States government to prosecute the detainees in Guantanamo Bay does not meet these international standards — neither the ones under the Third Geneva Convention nor those under the International Covenant on Civil and Political Rights.

In a Military Order, issued 13 November 2001<sup>183</sup> the United States President has proposed the establishment of Military Commissions. Pursuant to this Order, these Military Commissions shall prosecute terrorists for violations of the laws of war and other applicable laws. The Order gives certain guidelines as to the procedure to be followed by the Military Commissions but further details are left to an Order having

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criminals of the Axis Powers who have been denied some of these rights. See also J. Pictet (ed.), *ICRC Commentary*, Vol. III, *Geneva Convention Relative to the Treatment of Prisoners of War*, 1960, 413-416 giving a detailed analysis on the practice prevailing after World War II and the legislative history of that provision.

<sup>179</sup> International humanitarian law is *lex specialis* to international human rights law. Since members from the *Taliban* forces are covered by international humanitarian law whereas *Al Qaeda* is not (see above) both sets of rules are referred to here. Apart from that as the United States government denies to detainees in Guantanamo Bay the formal prisoner of war status it will have to meet international human rights standards.

<sup>180</sup> A/RES/2200 A (XXI) of 16 December 1966.

<sup>181</sup> See article 2 (1) of the Covenant.

<sup>182</sup> For a detailed analysis see M. Nowak, "Art. 14", in: id., *U.N. Covenant on Civil and Political Rights*, *CCPR Commentary*, 1993, para. 33 et seq. A comparative national and international law analysis on the right to a fair trial is provided for in D. Weissbrodt/ R. Wolfrum (eds.), *The Right to a Fair Trial*, 1997.

<sup>183</sup> Military Order, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed.Reg. 57, 8333 of 16 November 2001.

been issued by the Secretary of Defence.<sup>184</sup> This Order has filled some of the procedural lacuna of the Military Order criticised up to then. It has brought the trial procedure into closer alignment with rules governing civilian courts or military courts.<sup>185</sup>

Military Commissions have been established in the past in the United States with the authority to try persons not otherwise subject to military law for violations of the laws of war or for offences committed in territories under military occupation. They were used in World War II for both purposes. This practice has been upheld by the US Supreme Court on several occasions.

The legal basis for Military Commissions derives from the constitutional provisions conferring the power to wage war on Congress; their establishment has been left historically to the executive.<sup>186</sup>

The Military Order only applies to non-citizens. It entitles the military commission to assert jurisdiction over an alleged offender only after the President has made a written finding that the individual is or was a member of the *Al Qaeda* organization, that the individual was involved in acts of terrorism against the United States or the preparation thereof or has harboured knowingly a person having been involved and that it is in the interest of the United States that the alleged offender be subject to trial by a military commission. Once the trial has been completed, the Secretary of Defence or the Secretary's designate will review the record of the proceedings and render a final decision on the case. This is without prejudice to the President's authority concerning the granting of pardons or reprieves. Neither a right of appeal nor any form of *habeas corpus* relief is available.

Setting up military courts to try civilians is not necessarily in violation of article 14 of the International Covenant on Civil and Political Rights. The Human Rights Committee has stated in this respect, after having analyzed state practice, that, although the Covenant does not prohibit military tribunals "... the trying of civilians by such courts should be very exceptional and take place under conditions which

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<sup>184</sup> Department of Defence, Military Commission Order No. 1 of 21 March 2002 available at <<http://www.defencelink.mil/news/Mar2002/d20020321ord.pdf>>.

<sup>185</sup> D.A. Mundis, "The Use of Military Commissions to Prosecute Individuals Accused of Terrorist Attacks", *AJIL* 96 (2002), 320 et seq. (324).

<sup>186</sup> US Congress has provided for the establishment of military commissions in article 21 of the Uniform Code of Military Justice (10 U.S.C. sec. 821).

genuinely afford the full guarantees stipulated in article 14.”<sup>187</sup> At least in two respects the military commissions do not meet international human rights standards: the right to appeal and independence as well as impartiality. The Military Order of the President as well as the Military Commission Order of the Secretary of Defence clearly establish that the decision of a military commission is final after having been reviewed by a Review Panel.<sup>188</sup> This is no equivalent to an appeal given the limited review competence of the Review Panel. Furthermore it is doubtful for several reasons whether the military commissions meet the test of independence and impartiality. Their members will be all commissioned members of the armed forces of the United States and thus embedded in a hierarchical order. It is significant that the Appointing Authority retains the competence to “... remove members or alternates for good cause”.<sup>189</sup> Apart from that, significant decisions concerning the accused will be taken by the President<sup>190</sup> which will, given the composition of the military commissions, influence their finding in substance. Finally, it is very doubtful that the conditions imposed upon detained individuals meet international human rights standards as far as the pre-trial period is concerned or the length of detainment, which seems to be not justifiable.

According to article 102 Third Geneva Convention a sentence against a prisoner of war is valid only if pronounced by the same courts in accordance with the same procedure as for members of the detaining power’s armed forces and if the due process provisions of the Convention have been observed. The military commissions do meet some, but not all, of these conditions. In particular, the rules applicable for United States soldiers provide for stricter rules on decision-making in court-martials and on taking evidence; apart from that they open the possibility of appeal.<sup>191</sup> As far as Iraq is concerned, the occupying powers may initiate the criminal prosecution of prisoners taken. International humanitarian law provides for several procedural options in this respect. Military commissions may be set up for the prosecution of war crimes and other crimes under international law, provided they meet the human rights standards as set out in the Third Geneva Convention or the

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<sup>187</sup> General Comment 13 (21), para. 4, Doc. CCPR/4/Add.1. Reprinted in Yearbook of the Human Rights Committee 1983-1984, Vol. II, 621-623.

<sup>188</sup> Sec. 6 H (3) and (4) of the Military Commission Order No. 1, see note 184.

<sup>189</sup> Sec. 6 H (3), see note 184.

<sup>190</sup> Sec. 6 H (2) and (6), see note 184.

<sup>191</sup> For details see Mundis, see note 185, 327.

ICCPR, respectively. Another possibility would be the establishment of an international criminal tribunal such as the ICTY through the Security Council. Finally war crimes, other international crimes and crimes under the Iraqi criminal law could be prosecuted by national courts of the Iraq. The Hague Regulations as well as the Geneva Conventions contain several restrictions concerning the prosecution of prisoners of war or other persons under the jurisdiction of the coalition forces which may be relevant in the context of the occupation of Iraq and have not been referred to above.

According to article 49 Fourth Geneva Convention, persons who are not prisoners of war but are prosecuted for having committed criminal offences against the occupying power cannot be transferred from occupied territory for trial. This rules out the possibility of transferring persons from Iraq to Guantanamo Bay, even if they are under the suspicion to have participated in the attack of September 11, 2001.

In such trials the individual responsibility of each accused has to be established. Article 50 of the Hague Regulations which has to be considered as being part of customary international law affirms that no collective penalty shall be inflicted upon the population on account of acts of individuals for which they cannot be regarded as jointly and severally responsible. The same rule is applicable to prisoners of war.

In criticizing the approach taken by the United States government one has to appreciate, though, that the rules on international humanitarian law concerning the prosecution of violations of the rules of war only cover a limited group of persons. For other persons who may have committed war crimes or crimes punishable under international or national criminal law only the rudimentary rules of common article 3 of the Four Geneva Conventions or the international human rights standards are applicable. This again is an area where, given the changing nature of conflicts and the participation therein, further development is required. The setting up of special international criminal tribunals or recourse to the ICC may not be the only appropriate option. The principles of transparency and predictability, in particular, relevant for criminal proceedings require taking a more general approach which may be used as a general standard in prosecuting such persons who do not enjoy prisoner of war status. This does not necessarily require the adoption of a new international agreement. As can be seen from the practice used by the ILC concerning international responsibility, non-binding instruments may also have a normative effect.

The Fourth Geneva Convention provides for the internment of protected persons under certain conditions. Internment may serve the

protection of the security of the detaining power<sup>192</sup> or, in the case of occupation, it must serve the protection of the security of the occupying power.<sup>193</sup> In both cases the security threshold is quite high (security makes detention absolutely necessary for imperative reasons of security). Such decisions must be taken according to a regular procedure including the right to have recourse to a competent court. Internment, as such, is governed by arts 79 to 135 Fourth Geneva Convention, these rules largely being modelled on those concerning the treatment of prisoners of war.

It is doubtful whether these criteria and procedures are always met in practice. The strict standards they set reflect the view that internees are not criminals or alleged criminals subject to investigation and criminal proceedings. In fact internment seems to have been used as a form of pre-trial detention or even as a kind of penal sanction which is not in keeping with the objective which may be legitimately pursued with internment.

## 4. Occupation

### a. Introduction

Since World War II there have been only a few occasions where one belligerent assumed, for a longer period, the full administrative functions over the territory of the adversary, the West Bank and the Gaza Strip being a particular case.<sup>194</sup> International law governing this situation and thus limiting the respective activities of the occupying power is contained in the arts 42-56 of the Hague Regulations,<sup>195</sup> the Fourth Geneva Convention, in particular, arts 27-34 and 47-78<sup>196</sup> as well as cus-

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<sup>192</sup> Article 42 Fourth Geneva Convention.

<sup>193</sup> Article 78 Fourth Geneva Convention.

<sup>194</sup> Y. Dinstein, "The International Law Status of the West-Bank and the Gaza Strip", *Isr. Y. B. Hum. Rts* 28 (1998), 37 et seq. correctly affirms that the respective international rules on humanitarian law are applicable for the administration of these areas by Israel.

<sup>195</sup> The Nuremberg Trial had stated that the Hague Regulations constituted customary international law, *Trial of the Major War Criminals before the International Military Tribunal*, Nuremberg, Vol. XXII, 497.

<sup>196</sup> Article 154 Fourth Geneva Convention states that it complements the Hague Regulations. This is underlined by M. Greenspan, *The Modern Law*

tomary international law.<sup>197</sup> As far as the applicability of the international law on military occupation is concerned no distinction is being made between law and unlawful combatants. These rules apply whenever a belligerent occupies the territory of the adversary or a part thereof.<sup>198</sup> These rules do not provide for a fully adequate regime, this becomes apparent the longer occupation lasts. This, in particular is due to the fact that the rules on belligerent occupation try to strike a balance between the security interest of the occupying power and the interests of the population by preserving the *status quo ante* to the extent the security interests of the occupying power permit. This does not give adequate leeway to introduce political changes although they may be necessary for the transformation from a totalitarian government into a democracy.

The effect of military occupation is the placement of the *de facto* ruling authority in the hands of the occupant. The rights of the occupant are temporary not permanent whereas the *de jure* sovereignty rests with the respective state.

According to article 42 Hague Regulations a territory is considered militarily occupied when it or parts thereof are actually placed under the *de facto* authority of the army of the occupant. This is a factual issue,<sup>199</sup> no declaration to that extent is needed. Iraq as a whole has to be considered as militarily occupied since the major military operations have come to an end. In spite of the ongoing terrorist attacks or calls of *Saddam Hussein* to resist. The formerly disputed issue whether the rules of military occupation only apply during the course of actual warfare has been overcome by article 6 (1) Fourth Geneva Convention

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*of Land Warfare*, 1959, 213 whereas H.P. Gasser, "Protection of the Civilian Population", in: Fleck, see note 141, 209 et seq. (241) states that the dominant law is the Fourth Geneva Convention. For a comparison of the provisions of the Fourth Geneva Convention see, Pictet, see note 178, 614.

<sup>197</sup> As to the application of general international human rights standards see J.A. Frowein, "The Relationship between Human Rights Regimes and Regimes of Belligerent Occupation", *Isr. Y. B. Hum. Rts* 28 (1998), 1 et seq. (9 et seq.). He points out that international humanitarian law is to be considered as *lex specialis*.

<sup>198</sup> C. Greenwold, "The Administration of Occupied Territories in International Law", in: E. Playfair (ed.), *International Law and the Administration of Occupied Territories*, 1992, 241 et seq. (243).

<sup>199</sup> See article 42 Hague Regulations; this provision is supplemented by article 27 of the Fourth Geneva Convention.

according to which the Convention continues to apply to the occupied territory despite the general close of military operation in a conflict.

According to article 6 (3) Fourth Geneva Convention the application of this Convention ceases one year after the general close of military operations. However, as long as the Occupying Power exercises the functions of government arts 1-12, 27, 29 to 34, 47, 49, 51 to 53, 59, 61 to 77 and 143 Fourth Geneva Convention remain applicable. This rule has been modified by article 3 (b) Additional Protocol I according to which the application of the Conventions and of the Protocol shall cease, in the case of occupation, on the termination of occupation. In respect of Iraq the application of that provision is somewhat problematic. Since this provision cannot be considered to be part of customary international law for those of the occupying states, such as the United States, which is not a party to the Additional Protocol I, the Fourth Geneva Convention will be only temporarily applicable in its entirety for others until military occupation comes to an end. That means in essence that the applicable rules will differ. This is not a merely academic issue. For example, article 78 Fourth Geneva Convention dealing with security measures, in particular internment, does not belong to the core issues applicable for the whole period of occupation. In consequence thereof internment will be covered under the stricter rules of the general international human rights regime.<sup>200</sup> This possibility was discussed *in abstracto* at the Diplomatic Conference of Geneva of 1949 which adopted the Four Geneva Conventions. It was argued that one year after the close of hostilities, the authorities of the occupied state would have regained most of their responsibilities and, accordingly, there was no justification for further applying rules accommodating the security interests of the occupying power.<sup>201</sup> This may become of relevance for the situation prevailing in Iraq.

## **b. General Obligation of the Military Occupant**

It is the main obligation of the military occupant to restore and maintain, as far as possible, public order or safety.<sup>202</sup> The U.S. Army Field

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<sup>200</sup> Dinstein, see note 194, 44-45.

<sup>201</sup> Pictet, see note 178, 43.

<sup>202</sup> Article 43 Hague Regulations; this provision is supplemented by article 27 Fourth Geneva Convention which, in its last sentence, states that the occupying power may take such measures of control and security as may be necessary as a result of war. No further specification is provided for, leav-



Manual 27-10 states this obligation of the occupying power accurately: “... The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all measures in his power to restore and ensure, as far as possible, public order and safety ...”. The actual attitude obviously taken by United States troops in the first days in Baghdad did not seem to reflect that obligation adequately. This obligation also entails police functions with the view to protect, for example, the civilian population, including foreigners such as UN personnel,<sup>203</sup> museums, hospitals, the public infrastructure, public buildings, embassies and consulates against looting or destruction. It goes without saying that this does not make the occupant responsible for the effects of terrorist attacks as long as adequate precautionary measures have been taken.

Article 43 of the Hague Regulations, however, emphasizes another relevant aspect which has received detailed supplementation in the Fourth Geneva Convention. In restoring and maintaining peace and security the laws in force of the occupied state shall be respected at all times unless the occupant is absolutely prevented from doing so.

This provision — read literally — seems to be difficult to reconcile with present day realities. *M. Greenspan* argues that where wars are fought to achieve a change of a particular political regime as was the case in World War II the military occupant cannot be under an obligation to uphold the regime fought against. This is, in his view, particularly true in the case where the change of the political regime is the only effective means to secure peace. On that basis a wider interpretation of article 43 Hague Regulations is argued.<sup>204</sup> Such an interpretation would deprive article 43 Hague Regulations of all its meaning making it dependent upon the objectives pursued by the occupant when entering the war. As much it was legitimate to overthrow e.g. the totalitarian government of Germany and to reintroduce the rule of law and democ-

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ing it to the discretion of the occupying power which measures to chose. However, article 27 Fourth Geneva Convention contains certain restrictions implementing the general obligation of humane treatment. Further restrictions are contained in arts 41 to 43, 78 and 79 to 135. Apart from that, one may argue that law enforcement measures – different from fighting pockets of resistance where the laws of armed conflict apply – should be guided by the 1979 UN Code of Conduct for Law Enforcement Officials and the 1990 UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.

<sup>203</sup> See in this respect also S/RES/1502 (2003) of 26 August 2003.

<sup>204</sup> See above.

racy in Germany there are definite limits of international humanitarian law which hinder the occupant to freely change the structure and political system of an occupied state. Those limits are specified in the Fourth Geneva Convention.

Article 64 Fourth Geneva Convention stipulates that the penal laws of the occupied territory shall remain in force. It gives expression to the more general principle of the law of occupation namely the continuity of the legal system which applies to the whole of law.<sup>205</sup> Concerning penal law article 64 Fourth Geneva Convention provides for two exceptions. Penal laws may be repealed or suspended by the occupying power in cases where they constitute a threat to its own security<sup>206</sup> or an obstacle to the application of this Convention.<sup>207</sup> The first possibility is self-explanatory; the second one enables the occupying power to abrogate any law not in line with the human rights standards enshrined in the Fourth Geneva Convention or to which this Convention alludes, namely rules which adversely affect racial or religious minorities (article 27 Fourth Geneva Convention) or are incompatible with the requirement of humane treatment.

Changes in the political structure of the occupied state can only be made by the population of that state or representative institutions. A dominant influence exercised by the occupying power in this respect would go beyond its authorization under the respective rules on belligerent occupation and would be in violation of the principle of self-determination. Concerning Iraq the situation would be different if the Security Council had identified the political regime under *Saddam Hussein* as a threat to peace — directly or indirectly — and had ordered respective changes under Chapter VII of the UN Charter. Acting without such a mandate curtails the possibilities of the United States and its allies. It is the political price for having acted unilaterally.

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<sup>205</sup> ICRC Commentary, Vol. IV, see note 178, 335.

<sup>206</sup> The occupying power is authorized under this rule to promulgate provisions, including penal ones, for its own protection. This covers all civilian and military organizations and assets which an occupying power normally maintains in occupied territories. The occupying power may use all means of communication, accordingly it may take appropriate regulatory and executive measures for their protection.

<sup>207</sup> Regulations issued by the occupying power falling under this category include, amongst others, regulations concerning child welfare, labour, food, hygiene and public health; see Pictet, see note 178, 337.

### c. The Re-Establishment of an Effective Infrastructure

The occupying power is responsible for ensuring hygiene and public health<sup>208</sup> as well as food and medical supply.<sup>209</sup> In that respect the occupying power has to cooperate with the respective local and national authorities. More generally, under article 59 Fourth Geneva Convention the occupying power is under an obligation, if the whole or part of the population of an occupied territory is inadequately supplied, to agree to relief schemes on behalf of the said population, and shall facilitate them by all means at its disposal. Such schemes may be undertaken by states or impartial organizations. Every effort shall be made to protect the respective consignments. However, relief consignments do not relieve the occupying power of its responsibility.<sup>210</sup> The occupant cannot refuse the assistance of particular non-governmental organizations unless such assistance poses a threat to the security of the former.

### d. The Protection of Cultural Property

Cultural property is exposed to destruction or damage during occupation. International humanitarian law has developed a scheme for the protection in this situation. The safeguarding and preserving of cultural property remains in principle within the competence of the authorities of an occupied country. The occupying power should support them as far as possible<sup>211</sup> and should, in particular, not prevent them from discharging their duties. Support is required only “as far as possible” — this limitation seems to be relevant to active support (e.g. by the supply of material). In two special cases the occupying power itself has to take necessary measures, namely if cultural property has been damaged by military operations. When such damage occurs during a period of occupation, the responsibility of the occupying power is apparently greater. Its collaboration in this case, however, is limited to the most necessary measures. These are the ones which cover a situation which

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<sup>208</sup> Article 56 Fourth Geneva Convention.

<sup>209</sup> Article 55 Fourth Geneva Convention.

<sup>210</sup> Article 60 Fourth Geneva Convention.

<sup>211</sup> Article 5 para. 1, 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict.

threatens the very existence of cultural property or its deterioration.<sup>212</sup> The same applies for the situation where the national authorities are unable to act.<sup>213</sup>

It is the obligation of a party to a conflict to prevent the export of cultural property from a territory which it occupies during an international armed conflict. If such property is transferred from the occupied territory into the territory of another state, the latter is under an obligation to protect such property. Property illegally exported from a territory under occupation has to be returned at the close of hostilities to the competent authorities of the country previously occupied.<sup>214</sup> The former occupying power shall pay an indemnity to those who hold such property in good faith.<sup>215</sup> Cultural property coming from the territory of a High Contracting Party and deposited by it in the territory of another High Contracting Party shall be returned by the latter at the close of hostilities.<sup>216</sup> This provision is mainly addressed to the powers with custody of objects in their jurisdiction or in territories occupied by them. In such territories they may not confiscate cultural property. Violations of these duties must be prosecuted and are liable to penal or disciplinary sanctions.<sup>217</sup>

### **e. The Use of Natural and Other Resources**

According to the international rules on military obligation the occupying powers are restricted in using the national resources of Iraq. Article 55 Hague Regulations formulates the leading principle according to which the occupying state is only the administrator and usufructuary of public buildings, real property, forests and agricultural works belonging to the hostile state. Although this provision does not mention oil it is clearly covered under this provision.

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<sup>212</sup> J. Toman, *Protection of Cultural Property in the Event of Armed Conflict*, 1996, 85; R. Wolfrum, "Protection of Cultural Property in Armed Conflict", in: Y. Dinstein (ed.), *Isr. Y. B. Hum. Rts* 32 (2003), 305 et seq.

<sup>213</sup> Article 5 para. 2, 1954 Hague Convention, see note 211.

<sup>214</sup> Section I, para. 3, Protocol for the Protection of Cultural Property in the Event of Armed Conflict.

<sup>215</sup> Section I, para. 4, Protocol, see above.

<sup>216</sup> Section II, para. 5, Protocol, see note 214.

<sup>217</sup> Article 28 of the 1954 Hague Convention, see note 211.

In respect of the export of oil an arrangement has been reached within the framework of the United Nations<sup>218</sup> which meets the basic principle under article 55 Hague Regulations. According to the arrangements decided upon in the Security Council all export sales of petroleum, petroleum products or natural gas will be internationally monitored. All proceeds from such sales will be deposited into a Development Fund for Iraq until a new internationally recognized government of Iraq has been constituted. Five per cent of the proceeds are to be set aside for the Compensation Fund. Apart from that these proceeds have been declared to be immune from confiscation.

#### IV. The Role of the United Nations in the Post-conflict Period of Iraq

In the past the United Nations have been involved in the administration of an area or the territory of a state after the end of an armed conflict with the view to assist in a transition of the respective entity to a stabilized situation which is less likely to develop into an armed conflict again.<sup>219</sup> Although not anticipated when the UN Charter was drafted such a function of the United Nations fall squarely within its overall responsibility to restore and preserve international peace and security.<sup>220</sup> Cases where the United Nations have assumed such responsibility are, amongst others,<sup>221</sup> Cambodia,<sup>222</sup> Bosnia and Herzegovina,<sup>223</sup> Kosovo<sup>224</sup>

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<sup>218</sup> S/RES/1483 (2003) of 22 May 2003, paras 20 and 21.

<sup>219</sup> For a survey see J. Chopra, "UN Civil Governance-in-Trust", in: T.G. Weiss (ed.), *The United Nations and Civil Wars*, 1995, 69 et seq.; S.R. Ratner, *The UN Peacekeeping*, 1996; more recently, J.A. Frowein, "Die Notstandsverwaltung von Gebieten durch die Vereinten Nationen", *Festschrift für W. Rudolf zum 70. Geburtstag*, 2001, 43 et seq.

<sup>220</sup> C. Stahn, "International Territorial Administration in the former Yugoslavia: Origins, Developments and Challenges Ahead", *ZaöRV* 61 (2001), 107 et seq. (131).

<sup>221</sup> The earliest example to that extent is the taking over of the administration of West-Irian in 1962 which took place on a contractual basis rather than, later examples, on the basis of a resolution of the Security Council under Chapter VII, sometimes with the consent of the respective state sometimes without. Such consent is, from a legal point of view, unnecessary since the Security Council is exercising powers vested in it by the UN Charter, Frowein, see note 219, (44).

and East Timor.<sup>225</sup> The authority vested in the institutions established by the United Nations varied considerably but, as a common denominator, all such institutions took over the administrative responsibilities for the respective area. In the case of West-Irian the United Nations Temporary Executive Authority was vested with the power to appoint government officials, to legislate for the territory and to guarantee law and order. The Authority transferred administrative and police responsibilities from the Dutch to the Indonesian authorities, established a court system and a new administrative system.<sup>226</sup>

The 1991 Peace Agreement signed by the four Cambodian factions entrusted the United Nations with the key aspects of the administration of Cambodia by delegating to the United Nations Transitional Authority in Cambodia (UNTAC)<sup>227</sup> all powers necessary to ensure the implementation of the peace agreement. It exercised administrative as well as legislative functions; the areas of foreign affairs, national defence, finance, public security and information were placed under the direct control of the Authority.<sup>228</sup> The responsibilities of the United Nations Administration in Kosovo are even more embracing. This Authority is

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<sup>222</sup> In Cambodia the UN operation was governed by the Paris Agreement on a Comprehensive Political Settlement of the Cambodia Conflict of 23 October 1991. According to article 6 of that Agreement the Supreme National Council delegated to the United Nations "... all powers necessary to the implementation of this Agreement, as described in Annex I ...". See on this agreement S.R. Ratner, "The Cambodia Settlement Agreements", *AJIL* 87 (1993), 1 et seq.

<sup>223</sup> S/RES/1031 (1995) of 15 December 1995.

<sup>224</sup> S/RES/1244 (1999) of 10 June 1999. The mandate is less explicit as in the case of East Timor but it is equally clear that the United Nations are taking over the civilian administration so as to provide for sustainable peace in this area.

<sup>225</sup> S/RES/1272 (1999) of 25 October 1999. Its relevant part reads: "Decides to establish, in accordance with the report of the Secretary-General, a United Nations Transitional Administration in East Timor (UNTAET), which will be endowed with overall responsibility for the administration of East Timor and will be empowered to exercise all legislative and executive authority, including the administration of justice;...".

<sup>226</sup> For details see Ratner, see note 219, 11-12, a similar system applied for Eastern Slavonia to provide for a peaceful transition of that territory from Serbia to Croatia S/RES/1037 (1996) of 15 January 1996.

<sup>227</sup> A. Rapp/ C. Philipp, "Conflicts Cambodia/Kampuchea", in: R. Wolfrum (ed.), *United Nations: Law, Policies and Practice*, 1995, 200 et seq. (206).

<sup>228</sup> For further details see Rapp/ Philipp, see above, 206-207.

acting fully as an interim government of Kosovo.<sup>229</sup> Equally far-reaching legislative activities were entrusted to the United Nations Transitional Administration in East Timor.<sup>230</sup> Originally the main function of the High Representative in Bosnia and Herzegovina was to supervise the implementation of the Dayton Peace Agreement but meanwhile he assumed functions of an co-administrator.<sup>231</sup> The cases referred to here fall in either of two categories: delegation of parts of governmental powers to an institution established by the United Nations on the basis that this institution acts as the final authority in particular areas (Cambodia) or temporary but complete take-over of governmental functions until national reconstruction has advanced to the point where the respective state can resume its functions (West-Irian, Kosovo, Eastern Slavonia, Somalia and East Timor).<sup>232</sup>

The situation prevailing in Iraq does not fit into any of the mentioned categories; the role of the United Nations is, in spite of the rhetoric to the contrary, limited. The Security Council has adopted two resolutions,<sup>233</sup> so far, dealing with the post-conflict situation in Iraq, both under Chapter VII of the Charter. Although they, in fact, restrict the role of the United Nations to humanitarian assistance they reconfirm several principles relevant for the administration of Iraq by the occupying powers.

Both re-confirm the sovereignty and territorial integrity of Iraq thus indicating that the Security Council would not accept a fragmentation of Iraq or the occupation of parts thereof by other states. This would not rule out, though, that a future constitution for Iraq would provide for a decentralized governmental system vesting territorial units with some autonomy so as to accommodate ethnic or religious diversity.

The resolutions of the Security Council give some explicit guidance as to the future governmental system of Iraq. It shall be based on the free decision of the people of Iraq; it shall be representative, based upon

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<sup>229</sup> A detailed analysis of the governmental activities of the Authority is provided by Stahn, see note 220, 134 et seq.

<sup>230</sup> S/RES/1272 (1999) of 25 October 1999. See also in this respect, C. Stahn, "The United Nations Transitional Administration in Kosovo and East Timor: A First Analysis", *Max Planck UNYB* 5 (2001), 105 et seq.

<sup>231</sup> See Stahn, see note 220, 165 et seq.

<sup>232</sup> G.B. Helman/ S.R. Ratner, "Saving Failed States", *Foreign Policy* 89 (1992-1993), 12 et seq. (13) add another form, namely the assistance to a government such as supervising elections or a referendum.

<sup>233</sup> S/RES/1483 (2003) of 22 May 2003; S/RES/1500 (2003) of 14 August 2003.

the rule of law and affording equal rights and justice to all Iraqi citizens without regard to ethnicity, religion, or gender.<sup>234</sup> In respect to the latter topic reference is made to S/RES/1325 (2000) of 31 October 2000 calling, amongst others, upon the Member States of the United Nations to increase the number of women in national institutions at all levels. It is astonishing that both resolutions refrain from explicitly referring to democracy as the governing principle for the future constitution — the term “representative government” may be taken only to refer to a government which is the representative of the composition of the Iraqi population as far as ethnicity, religion and gender is concerned; equally there is no explicit reference to the protection of human rights according to international standards. This may be due to the expressed desire of representatives of the Iraqi society that “democracy should not be imposed from the outside”.<sup>235</sup>

The Governing Council which was established on 13 July 2003 is not considered as a government but only as an important step towards the establishment of an internationally recognized representative government.<sup>236</sup> This means that the Security Council considers the occupying powers as those who are fully responsible for the present administration of Iraq and its future development. This view was clearly expressed in some of the statements made at the adoption of S/RES/1500 (2003) of 14 August 2003.<sup>237</sup> This situation will only change with the constitution of a new Iraqi government. Whereas actions of the occupying powers are limited under the Hague Regulations and the Fourth Geneva Convention this is not the case for the future government of Iraq to that extent it acts independently from the occupying powers.

Although there are precedents that the United Nations have assumed administrative functions with respect to state territories or parts thereof to provide for a peaceful governmental transition in the post-conflict period there is no legal obligation under the UN Charter to entrust the United Nations with respective functions. The principle governing the transition of Iraq from the former governmental regime

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<sup>234</sup> S/RES/1483 (2003) of 22 May 2003, fifth pre-ambular paragraph.

<sup>235</sup> See Report of the Secretary-General pursuant to para. 24 of S/RES/1483 (2003) of 22 May 2003, Doc. S/2003/715 of 17 July 2003, para. 19.

<sup>236</sup> According to the Report of the Secretary-General, see above, para. 24, the 25 member Governing Council has a slight Shi'ah majority; it includes three women, and an equal representation of Kurds and Sunnis. There are also representatives of Christians and Turkmen.

<sup>237</sup> See, in particular, the statement of the representative of Mexico.



via the power exercised by the occupying states to a government under a new regime is the principle of self-determination. This obliges the occupying powers to induce the population into the political decision-making process. This has been highlighted in S/RES/1483 (2003) of 22 May 2003 which stresses the right of the Iraqi people to freely determine their own political future.<sup>238</sup> In that respect this resolution can be read as the confirmation of an evolving international principle, namely the right to democratic governance.<sup>239</sup>

If the United Nations were to take over administrative functions for a transitional period in Iraq it would be worth considering whether, in such a situation, the same restrictions would apply as would apply to the exercise of authority by an occupying power. The different objectives pursued by the United Nations, as compared to an occupying state, would argue against applying the same restrictions.<sup>240</sup> The rules on military occupation attempt to strike a balance between the security interest of the occupying power and the humanitarian need of the population. Also these rules try to prevent the occupying power which is modelling the governmental structure of that territory according to its own needs disregarding the cultural, religious or ethnic background of the society of the occupied territory. It has already been pointed out that international law rules on military occupation are not designed to provide the occupying power with the appropriate authority, including clearly formulated and adequate limits, and respective mechanisms to alter a governmental structure of an occupied territory although the governmental structure in question may, as in the case of Iraq, not conform to the international standards concerning a responsible government. To elaborate such rules borders on the impossible. A military occupant cannot, by its very nature, be considered a neutral entity acting only in the interest of the occupied territory and its society. Certainly the society of that occupied state will not consider the occupying state in such light.

The position of the United Nations administration in post-conflict periods in the past was different. It derived its authority from a Security Council resolution and thus from its overarching responsibility to restore and preserve international peace and security or a respective inter-

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<sup>238</sup> This has been highlighted in the Report of the Secretary-General, see note 235, in particular paras 19 to 21.

<sup>239</sup> See T.M. Franck, "The Emerging Right to Democratic Governance", *AJIL* 46 (1992), 86 et seq.

<sup>240</sup> Stahn, see note 220, 141.

national agreement. Therefore the United Nations is in the position to act as a neutral entity. The limits imposed upon it in the respective peace agreements or the limits formulated in the Security Council resolution mandating the exercise of governmental or administrative authority together with the limits inherent in or to be derived from the UN Charter should be sufficient to ensure an exercise of authority based upon the rule of law and the respect for international human rights standards.<sup>241</sup>

However, what has been said concerning international law on military occupation is true in some respect for the administration of territories by United Nations institutions, too. The United Nations is lacking the legal framework to fulfill administrative or governmental functions. Each situation is dealt with on its own. Given the uniqueness of each situation this may be mandatory but this does not exclude the application of the international human rights instruments, including codes of conduct, such as the Code of Conduct for Law Enforcement Officials.

## V. Conclusions

At the outset the question was raised whether actions taken by the United States and its allies in fighting the *Taliban* and Iraq and the reactions thereto from among the international community reveal a pattern or a tendency indicating already accomplished changes or future changes in the international law concerning the use of force and the law in armed conflict.

In spite of opinions voiced from among the academic world the binding force of international law has not been challenged as a matter of principle; and international treaties and customary international law continue to be considered as valid restrictions on the conduct of states in international relations. There is a disagreement, though, to what extent international law should automatically follow what has been referred to as the realities of international relations. In this respect the inherent function of the law should not be lost out of sight; law is one of the stabilizing factors in society. As such it must not blindly follow or seek to validate political or other changes in the community in which it

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<sup>241</sup> Critical, however, as far as East Timor and Kosovo are concerned, Frowein, see note 219, 50 et seq.; Stahn, see note 220, 152 et seq. claims that in Kosovo international human rights standards have not always been fully respected by the UN administration.

operates. This does not mean law can remain oblivious to such changes though if, and that is decisive, these changes are endorsed or sought for by states reflecting the plurality within the international community. However, international law disposes of instruments and mechanisms for closing the gap between law and the permanently changing circumstances.

As far as the prohibition against the unilateral recourse to force is concerned, the policy pursued by the United States and its allies clearly indicates that such recourse to military force requires justification. What may serve as justification, which objectives may be pursued and by whom, is the issue rather than the need for justification as such. This became quite apparent in the negative reaction of the United States government to the allegation of the Indian government that it, too, could invoke pre-emptive self-defence *vis-à-vis* the nuclear armament policy of Pakistan. Of paramount relevance in respect of the necessity to justify an armed attack are the letters of the United States and the United Kingdom addressed to the Security Council setting out their reasons in favour of the legality of the attack on Iraq. They are of relevance not only for what they state — that is evident — but also what they do not state. Both letters emphasize that the armed attack on Iraq was authorized by the Security Council. This means — although one may disagree with the reasoning — both states consider the authorization of the Security Council as necessary for such an attack. Thus, the counter-position advanced in literature and in general political statements is not reflected in the official political position taken by both states. It is this practice which contributes to the development of customary international law rather than academic writing.

As far as self-defence is concerned there is a general tendency, in particular, pursued by the United States to invoke self-defence on the basis of a liberal interpretation of that notion. For example, the invasion of Panama in December 1989 was qualified as self-defence as was the aerial attack of 1993 against the Iraqi intelligence headquarters in Baghdad and the missile attacks against *Al Qaeda* training camps in 1998. All these acts fall short of the conditions required for self-defence; and they were rejected, in one form or the other, from among the international community. Accordingly it can hardly be argued that a broader interpretation of the notion of self-defence has been accepted in principle.

What may have found international acceptance is that self-defence may be triggered by an attack of non-state actors. Such an evolution reflects the growing relevance of non-state actors in international relations.

As far as pre-emptive self-defence is concerned it is worth noting that only the United States has advanced this form of self-defence as a justification for the war against Iraq in 2003. Not even its allies seem to have followed the United States in this respect. Accordingly, it is not possible to consider the military attack against Iraq as a clear cut case of such form of self-defence. There is no indication that pre-emptive self defence will be accepted in the international community in the near future.

One has to acknowledge, though, that valid security interests of states against the spreading of international terrorism and the proliferation of weapons of mass destruction must be accommodated. The claim for pre-emptive self-defence, although it is an unacceptable approach, at least signals a security lacuna which needs to be accommodated.

The evaluation of the prevailing tendencies concerning the acceptance of a military humanitarian intervention provides little indication that this means is considered as a valid exception to the prohibition of the use of force. This is in spite of the fact that grave and persistent violations of human rights are no longer considered as an internal affair of a state immune from intervention from the outside. It is rather a matter where the international community is called upon to react. In that respect a significant shift in the value system of the international community can be identified. This does not amount to a justification of unilateral military intervention, though.

The recent armed conflicts have demonstrated that the respective rules have not been fully adhered to but also that some of the rules can no longer be considered adequate. The law in armed conflict was originally designed for inter-state conflicts; later adjustments to cover internal conflicts or conflicts with non-state entities, such as the Additional Protocol II, are rudimentary and have not found universal recognition.<sup>242</sup> To fill this lacuna the ICTY applies, on a case by case basis, humanitarian rules designed for an international conflict to non-international conflicts. Such an approach does not meet the standards for transparency and predictability as required, in particular, for criminal proceedings. Given the fact that most armed conflicts are of a non-international nature it seems mandatory to consider codifying humanitarian law in non-international conflicts in a way which balances hu-

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<sup>242</sup> Only article 3 common to the Four Geneva Conventions providing some basic humanitarian rules for the internal conflict can be regarded as being universally accepted.

manitarian needs and the fact that the belligerent non-state entities either cannot or do not intend to apply the traditional rules of warfare.

The legal rules in armed conflict which, on the basis of experience gained in the armed conflicts of the recent years particularly deserve reconsideration, are the ones on targeting, weaponry, prisoners of war and the rules on military occupation.

The rules on targeting and on weaponry as they stand at the moment were formulated on the basis of a different weapons technique. Modern weapons technology allows for a more accurate targeting which is to be taken into account when judging whether collateral damage was avoidable and whether appropriate precautionary measures were taken. Articles 51 and 57 Additional Protocol I should be read to fully accommodate the possibilities of the new weapons technology concerning targeting. The respective national military manuals or operational law handbooks should be rewritten to reflect this modern understanding of the limits on targeting.

Another issue concerning targeting has emerged from a shift in the understanding of what is a military objective which alone may become a military target. In the two wars against Iraq as well as in the bombardment in Yugoslavia a tendency has developed in practice to define objects, which make an effective contribution to military action, as objects which generally contribute to the war-sustaining efforts of the adversary. This goes beyond the established limits on targeting and disregards that the provision of article 52 Additional Protocol I, reiterated in later instruments, was formulated with the view to ensure that practices used in World War II should not be reiterated. Modifications in military manuals which provide for more latitude in targeting should be revised.

One of the salient points in recent practice is the treatment of persons detained in an armed conflict and where there are doubts whether these are members of regular armed forces and whether the persons in question have themselves acted according to the rules of armed conflict. These persons are either to be treated as prisoners of war or in a procedure applying international human rights standards.

The treatment of the detainees in Guantanamo Bay is open to criticism, in particular, their denial of the formal status as prisoners of war. In spite of that one has to concede that existing humanitarian law should provide for an internationally accepted standard for the prosecution and punishment of international terrorists, balancing the security interests of the detaining state against persons applying criminal methods and disregarding all principles upon which international humani-

tarian law is founded, with the necessity to provide for the minimum standards of human rights that every human person is entitled to.

The rules on occupation may be the ones which, in particular, require reconsideration. These rules, many of which are heavily influenced by the thinking of the beginning of the 20th century, do not adequately cover situations where the occupant is initiating a restructuring of the political organization of the occupied state. The full respect of the principle of self-determination which means the earliest possible involvement of a representative for the population as expressed in S/RES/1483 (2003) of 22 May 2003 is pertinent. Given the fact that an occupying state will never be considered as neutral it seems political advisable, although not legally mandatory, to provide for a substantial involvement of the United Nations. Events, such as the assassination of the Special UN Representative of the UN Secretary-General in Iraq *Sergio Vieira De Mello*, however, sadly show that even the established neutrality of the United Nations does not make it immune against terrorist attacks.