

Humanitarian law and the war against international terrorism:

Challenges and opportunities since September 11, 2001

By

Justus Ambutsi Wabuyabo

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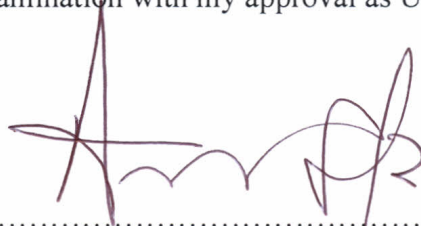
Declaration

I, **Justus Ambutsi Wabuyabo** do declare that this is my original work and has not been submitted and is not currently being submitted for a degree in any other university.

Signed.....

Justus Ambutsi Wabuyabo

This Project is submitted for examination with my approval as University Supervisor.

Signed.....

Dr. Kithure Kindiki

Senior Lecturer

School of Law

University of Nairobi

Dedication

This work is dedicated to my son, Nicholas Ambutsi Wabuyabo, who endured not seeing me for many days on end during the period I was pursuing my studies for the award of Degree of Master of Laws (LL.M) and particularly while I was writing this paper.

I also dedicate this paper to my late parents, Nicholas Ambutsi Wabuyabo and Wibrodah Musundi Namusonge and my late brother Martin Wanzetse Wabuyabo as well as my late sister-in-law Josephine Nandwa. May you all rest in peace. We miss you.

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All errors are mine.

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2. *Al-Odah v United States* 542 US 466, 124 S Ct 2686 (2004).
3. *Carolynne, the incident* (1938) 23 AJIL 82-99.
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5. *Hamdi v Rumsfeld* 542 US 507, 124 S Ct 2633.
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11. *Rasul v Bush* 542 US 466, 124 S Ct 2686 (2004).
12. *Rein v Socialist Libyan People's Arab Jamahiriya*, 162 F 3d 748 (2d Cir 1998).
13. *Smith v Socialist People's Libyan Arab Jamahiriya*, 886 F Supp 306 (ED NY 1995).
14. *SS 'Lotus', the Case of*, PCIJ Rep Series A no 10 (*The Lotus Case*).
15. *Tadic, Prosecutor v* (Appeal on Jurisdiction) ICTY-94-1-AR72 (2 October 1995).
16. *Tel-Oren v Socialist People's Libyan Arab Jamahiriya & Others* 726 F 2d 774, 233 (US App DC 384).
17. *United States v Alvarez-Machain*, 504 US 655 (1992).

LIST OF ABBREVIATIONS AND ACRONYMS

- | | |
|-------------------------------------|--|
| 1. Additional Protocol | Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts. |
| 2. Additional Protocol II | Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non International Armed Conflicts. |
| 3. Additional Protocol III | Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem. |
| 4. AEDPA | (US) Antiterrorism and Effective Death Penalty Act (1996). |
| 5. AJIL | American Journal of International Law. |
| 6. A J J | American Journal of Jurisprudence. |
| 7. Biological Weapons
Convention | Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons (1972). |
| 8. Black Panther | Black Panther Party (originally the Black Panther Party for Self-Defense) (US). |
| 9. BSO/ Black September | Black September Organization (Palestine). |
| 10. BR | <i>Brigate Rosse</i> (Red Brigades) (Italy). |
| 11. British Ybk Intl L | British Yearbook of International Law. |
| 12. Brit Foreign & St Papers | British and Foreign State Papers. |
| 13. CAT | Convention Against Torture, and Other Cruel, Inhuman |

- or Degrading Treatment or Punishment (1984).
14. Cardozo L Rev Cardozo Law Review.
 15. CEDAW Convention on the Elimination of All Forms of
Discrimination Against Women (1966).
 16. CERD Convention on the Elimination of All Forms of Racial
Discrimination (1979).
 17. Chemical Weapons Convention on the Prohibition of the Development,
Convention Production, Stockpiling and Use of Chemical Weapons
and on Their Destruction (1993).
 18. CIA Central Intelligence Agency.
 19. Counter Terrorism (US) National Strategy on Combating Terrorism.
Strategy
 20. CRC Convention on the Rights of the Child (1989).
 21. CTS Consolidated Treaty Series.
 22. CUP Cambridge University Press.
 23. Diplomats and Convention on the Prevention and Punishment of
Internationally Protected Crimes against Internationally Protected Persons,
Persons Convention Including Diplomatic Agents (1973).
 24. EC European Community.
 25. EU European Union.
 26. ETA Basque Euskadi Ta Askatasuna Basque (Basque Homeland and
Freedom) (Spain).
 27. Europol European Police Office
 28. FBI Federal Bureau of Investigation (US).
 29. FFWA Fletcher Forum of World Affairs.
 30. FSIA (US) Foreign Sovereign Immunity Act (1976).

31. GAOR (UN) General Assembly Official Records.
32. Geneva Convention of 1906 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field (1906).
33. Geneva Convention I of 1929 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field (1929).
34. Geneva Convention II of 1929 Geneva Convention relative to the Treatment of Prisoners of War (1929).
35. Geneva Convention I Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (1949).
36. Geneva Convention II Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (1949).
37. Geneva Convention III Geneva Convention relative to the Treatment of Prisoners of War (1949).
38. Geneva Convention IV Geneva Convention relative to the Protection of Civilian Persons in Time of War (1949).
39. Hague Convention Convention for the Suppression of Unlawful Seizure of Aircraft (1970).
40. Hague IV Declaration 1 Hague IV, Declaration I - Concerning the Prohibition, for the Term of Five Years, of Launching of Projectiles and Explosives from Balloons or other New Methods of Similar Nature (1899).
41. Hague Convention II Regulations concerning the Laws and Customs of War on Land annexed to the Hague Convention II with Respect to the Laws and Customs of War on Land (1899).

42. Hague Convention IV Regulations annexed to the Hague Convention IV
Respecting the Laws and Customs of War on Land
(1899).
43. Hague IV Declaration 2 Hague IV, Declaration II – Concerning the Prohibition of
the Use of Projectiles Diffusing Asphyxiating Gases
(1899).
44. Hague IV Declaration 3 Hague IV, Declaration III – Concerning the Prohibition
of the Use of Expanding Bullets (1899).
45. Hostages Convention International Convention against the Taking of Hostages
(1979).
46. Hous J Int'l L Houston Journal of International Law
47. ICC International Criminal Court.
48. ICCPR International Covenant on Civil and Political Rights
(1966).
49. ICESCR International Covenant on Economic, Social and Cultural
Rights (1966).
50. ICMW International Convention on the Protection of the Rights
of All Migrant Workers and Members of Their Families
(1990).
51. ICRC International Committee of the Red Cross.
52. ICTFY International Tribunal for the Prosecution of Persons
Responsible for Serious Violations of International
Humanitarian Law Committed in the Territory of the
Former Yugoslavia since 1991.
53. ICTR International Tribunal for the Prosecution of Persons
Responsible for Genocide and Other Serious Violations

of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States Between 1 January 1994 and 31 December 1994.

54. IMRO Internal Macedonian Revolutionary Organization (Bulgaria).
55. Int'l & Comp L Q International & Comparative Law Quarterly.
56. IRA (Provisional) Irish Republican Army (Northern Ireland).
57. IRRC International Review of the Red Cross.
58. JRA Japanese Red Army (Japan).
59. Lieber Code (US) Instructions for the Government of Armies of the United States in the Field (1863).
60. Loy L A Int'l & Comp L Rev Loyola of Los Angeles International & Comparative Law
61. Maritime Navigation Convention Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (1988).
62. Montreal Convention Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (1971).
63. NAM Non-Aligned Movement.
64. National Security Strategy (US) National Security Strategy.
65. NATO North Atlantic Treaty Organization.
66. NBC Nuclear, Biological, and Chemical weapons
67. Nuclear Materials Convention on the Physical Protection of Nuclear Material (1979).

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| 68. Nuclear Terrorism
Convention | International Convention for the Suppression of Acts of
Nuclear Terrorism (2005). |
| 69. OAS | Organization of American States. |
| 70. OAU | Organization of African Union. |
| 71. OJ | Official Journal (EC). |
| 72. OJCSL | Oxford Journal Conflict and Security Law. |
| 73. Optional Protocol to
CEDAW | Optional Protocol to the Convention on the Elimination
of All Forms of Discrimination against Women (1989). |
| 74. Optional Protocol I to
ICCPR | Optional Protocol to the International Covenant on Civil
and Political Rights (1966). |
| 75. Optional Protocol II to
ICCPR | Second Optional Protocol to the International Covenant
on Civil and Political Rights, aiming at the abolition of
the death penalty (1989). |
| 76. Plastic Explosives
Convention | Convention on the Marking of Plastic Explosives for the
Purpose of Detection (1991). |
| 77. PFLP | Popular Front for the Liberation of Palestine (Palestine). |
| 78. PLO | The Palestine Liberation Organization (Palestine). |
| 79. Protocol on Platforms on
the Continental Shelf | Protocol for the Suppression of Unlawful Acts against the
Safety of Fixed Platforms Located on the Continental
Shelf (1988). |
| 80. Protocol to Montreal
Convention | Protocol for the Suppression of Unlawful Acts of
Violence at Airports Serving International Civil Aviation
(1988). |
| 81. RAF | <i>Rote Armee Fraktion</i> (Red Army Faction) (Germany). |
| 82. Refugee Convention of
1951 | Convention Relating to the Status of Refugees (1951). |

83. Rome Statute	Rome Statute of the International Criminal Court (1998).
84. RYM	Revolutionary Youth Movement (US).
85. SAARC	South Asian Association for Regional Cooperation.
86. Schlesinger Report	(US) Final Report of the Independent Panel to Review DoD Detention Operations.
87. SCOR	(UN) Security Council Official Records.
88. SDS	Students for a Democratic Society (US).
89. Stat	Statute.
90. St Petersburg Declaration	Declaration Renouncing the Use, in Time of War, of certain Explosive Projectiles under 400 Grammes Weight (1868).
91. Terrorists Bombings Convention	International Convention for the Suppression of Terrorist Bombings (1997).
92. Terrorists Financing Convention	International Convention for the Suppression of the Financing of Terrorism (1999).
93. Tokyo Convention	Convention on Offences and Certain other Acts Committed on Board Aircraft (1963).
94. TS	Treaty Series.
95. UDHR	Universal Declaration of Human Rights.
96. UN	United Nations.
97. UN Charter	The Charter of the United Nations.
98. UNGA Res	United Nations General Assembly Resolution.
99. UNSC Res	United Nations Security Council Resolution.
100 US	United States of America.
101 Weatherman/Weathermen	Weather Underground Organization (US).
102 WMD	Weapons of Mass Destruction.

- 103 Yale J Int'l L Yale Journal of International Law.
- 104 YJL Yale Law Journal.
- 105 9/11 Commission Report Final Report of the National Commission on Terrorist
Attacks upon the United States.

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-International Treaties

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<http://www.yale.edu/lawweb/avalon/westphal.htm> or
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2. Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field (Signed on 22 August 1864 entered into force on 22 June 1865) 129 CTS 361 (Geneva Convention of 1864).
3. Declaration Renouncing the Use, in Time of War, of certain Explosive Projectiles Under 400 Grammes Weight (Signed 29 November 1868 entered into force 11 December 1868) 18 Martens Nouveau Recueil (ser 1) 474, 138 CTS 297 (St. Petersburg Declaration).
4. Regulations concerning the Laws and Customs of War on Land annexed to the Hague Convention II with Respect to the Laws and Customs of War on Land (Signed on 29 July 1899 entered into force on 4 September 1900) 187 CTS 429 (Hague Convention II)
5. Hague IV, Declaration I - Concerning the Prohibition, for the Term of Five Years, of Launching of Projectiles and Explosives from Balloons or other New Methods of Similar Nature (Signed on 29 July 1899 entered into force on 4 September 1900) 32 Stat 1839 (Hague IV Declaration 1).
6. Hague IV, Declaration II – Concerning the Prohibition of the Use of Projectiles Diffusing Asphyxiating Gases. (Signed on 29 July 1899 entered into force on 4 September 1900) 187 CTS 453 (Hague IV Declaration 2).
7. Hague IV, Declaration III – Concerning the Prohibition of the Use of Expanding Bullets (Adopted on 29 July 1899 entered into force on 4 September 1900) 187 CTS 459 (Hague

IV Declaration 3).

8. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field (Adopted on 6 July 1906 entered into force 9 August 1907) 11 LNTS 440 (Geneva Convention of 1906).
9. Regulations annexed to the Hague Convention IV Respecting the Laws and Customs of War on Land (Signed on 18 October, 1907 entered into force January 26, 1910) 205 CTS 277 (Hague Convention IV).
10. Convention IX of the Second Hague Peace Conference ((Signed on 18 October, 1907 entered into force on January 26, 1910) 205 CTS 345.
11. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field (Adopted 27 July 1929 entered into force 19 June 1931) 118 LNTS 303 (Geneva Convention I of 1929).
12. Geneva Convention relative to the Treatment of Prisoners of War (Adopted 27 July 1929 entered into force 19 June 1931) 118 LNTS 343 (Geneva Convention II of 1929).
13. The Charter of the United Nations (signed on 26 June 1945 came into force on 24 October 1945) 59 Stat 1031 (UN Charter).
14. Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217A (III) (UDHR).
15. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31 (Geneva Convention I).
16. Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 85 (Geneva Convention II).
17. Geneva Convention relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force entered into force 21 October 1950) 75 UNTS 135(Geneva

Convention III).

18. Geneva Convention relative to the Protection of Civilian Persons in Time of War
(adopted 12 August 1949, entered into force entered into force 21 October 1950) 75
UNTS 287 (Geneva Convention IV).
19. Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force
22 April 1954) 189 UNTS 150 (Refugee Convention of 1951).
20. Convention on Offences and Certain other Acts Committed on Board Aircraft (adopted
14 September 1963, entered into force 4 December 1969) 704 UNTS 219 (Tokyo
Convention).
21. Convention on the Elimination of All Forms of Racial Discrimination (adopted 7 March
1966, entered into force 4 January 1969) 660 UNTS 195 (CERD).
22. International Covenant on Civil and Political Rights (adopted 16 December 1966, entered
into force 23 March 1976) 999 UNTS 171 (ICCPR).
23. Optional Protocol to the International Covenant on Civil and Political Rights (adopted 16
December 1966, entered into force 23 March 1976) 999 UNTS 302 (Optional Protocol I
to ICCPR).
24. International Covenant on Economic, Social and Cultural Rights (adopted 16 December
1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR).
25. Convention for the Suppression of Unlawful Seizure of Aircraft (adopted 1 December
1970, entered into force 14 October 1971) 60 UNTS 105 (Hague Convention).
26. Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation
(signed 23 September 1971, entered into force 26 January 1973) 974 UNTS 177
(Montreal Convention).
27. Convention on the Prohibition of the Development, Production and Stockpiling of
Bacteriological (Biological) and Toxin Weapons (signed 10 April 1972 entered into force
on 25 March 1975) 1015 UNTS 163 (Biological Weapons Convention).

28. Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents (adopted 14 December 1973, entered into force 20 February 1977) 1035 UNTS 167 (Diplomats and Internationally Protected Persons Convention).
29. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 609 (Additional Protocol I).
30. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 (Additional Protocol II).
31. Convention on the Physical Protection of Nuclear Material (adopted 26 October 1979, entered into force 8 February 1987) 1456 UNTS 101 (Nuclear Materials Convention).
32. International Convention against the Taking of Hostages (adopted 17 December 1979, entered into force 3 June 1983) 1316 UNTS 205 (the Hostages Convention).
33. Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entry into force 3 September 1981) 1249 UNTS 13 (CEDAW).
34. Convention against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (CAT).
35. Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation (adopted 24 February 1988, entered into force 6 August 1989) 27 ILM 627 (1988) (Protocol to Montreal Convention).
36. Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (signed 10 March 1988, entered into force 1 March 1992) 1678 UNTS 221 (Maritime Navigation Convention).
37. Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms

- Located on the Continental Shelf (adopted 10 March 1988, entered into force 1 March 1992) 1678 UNTS 304 (Protocol on Platforms on the Continental Shelf).
38. Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (adopted 6 October 1989, entered into force 22 December 2000 2131 UNTS 83(Optional Protocol to CEDAW).
39. Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty (adopted 15 December 1989, entered into force 11 July 1991) 1642 UNTS 414(Optional Protocol II to ICCPR).
40. Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC).
41. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (adopted 18 December 1990, entered into force 1 July 2003) 2220 UNTS (ICMW).
42. Convention on the Marking of Plastic Explosives for the Purpose of Detection (adopted 1 March 1991, entered into force 21 June 1998) 30 ILM 721 (1998) (Plastic Explosives Convention).
43. Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction (signed 13 January 1993 entered into force on 29 April 1997) 32 ILM 800 (1993) (Chemical Weapons Convention).
44. Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (adopted by Security Council on 25 May, 1993) UN Doc S/25704 at 36, annex (1993) (ICTFY Statute).
45. Statute of the International Tribunal for Rwanda (adopted by UNSC Res 955) UN Doc S/RES/955 (1994) (ICTR Statute).
46. International Convention for the Suppression of Terrorist Bombings (adopted 15

- December 1997, entered into force 23 May 2002) UN Doc A/RES/52/164 (Terrorists Bombings Convention).
47. Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90 (the Rome Statute).
 48. International Convention for the Suppression of the Financing of Terrorism (adopted 9 December 1999, entered into force 10 April 2000) UN Doc A/RES/54/109 (Terrorists Financing Convention).
 49. Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (adopted 25 May 2000, entered into force 12 February 2002) UNGA Res 263 (LIV) (25 May 2000).
 50. Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography adopted 25 May 2000, entered into force 18 January 2002) UNGA Res 263 (LIV) (25 May 2000).
 51. Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 18 December 2002, entered into force 22 June 2006) UNGA Res 199 (LVII) (9 January 2003).
 52. International Convention for the Suppression of Acts of Nuclear Terrorism (adopted 13 April 2005, entered into force 7 July 2007) UNGA Res 10340 (LIX) (13 April 2005) (Nuclear Terrorism Convention).
 53. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (adopted 8 December 2005, entered into force 14 January 2007 (Additional Protocol III or AP III).
 54. Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, not yet entered into force) UNGA Res 106 (LXI) (13 December 2006).
 55. Optional Protocol to the Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, not yet entered into force) UNGA Res 106 (LXI) (13 December

2006).

56. International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006, not yet entered into force) UNGA Res 177 (LXI) (13 December 2006).

-Regional Treaties

57. Inter-American Treaty of Reciprocal Assistance (signed 2 September 1947 entered into force on 26 March 1975) 21 UNTS 77.
58. OAS Convention to Prevent and Punish Acts of Terrorism Taking the Form of Crimes against Persons and Related Extortion that are of International Significance (concluded at Washington, DC on 2 February 1971).
59. OAU Convention for the Elimination of Mercenaries in Africa OAU Doc CM/433/Rev L, Annex 1(1972).
60. European Convention on the Suppression of Terrorism (adopted 27 January 1977 entered into force on 4 August 1978) 1015 UNTS 163.
61. SAARC Regional Convention on Suppression of Terrorism (signed on 4 November 1987).
62. Arab Convention on the Suppression of Terrorism (signed on 22 April 1998) AI Index IOR.
63. Convention of the Organization of the Islamic Conference on Combating International Terrorism (adopted on 1 July 1999).
64. OAU Convention on the Prevention and Combating of Terrorism (adopted on 14 July 1999) OAU Doc AHG/Dec 132 (XXXV) 1999.
65. Treaty on the European Union 2002 OJ 325.

66. Treaty on Cooperation among States Members of the Commonwealth of Independent States in Combating Terrorism (done on 4 June 1999).
67. Inter-American Convention against Terrorism (adopted on 3 June 2002 entered into force on 10 July 2003) 42 ILM 19 (2003).
68. Council of Europe Convention on the Prevention of Terrorism (adopted on 16 May 2005).
69. Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (adopted on 16 May 2005) ETS No 198.

-US Legislation.

70. Antiterrorism and Effective Death Penalty Act of 1996, Pub L 104-132, § 221 (24 April 1996) (codified at 28 USC § 1605(a) (7)) (AEDPA).
71. War Crimes Act of 1996 (18 USC Section 2441).
72. Foreign Sovereign Immunities Act (FSIA) 28 USC § 1605 (1976) (FSIA).
73. American Service Members' Protection Act HR 4775 (2 August 2002).

ABSTRACT

The action by the US to invade Afghanistan and Iraq in its stated war against international terrorism represented a great paradigm shift in the law of armed conflict. The response invoked a confluence of legal regimes and norms in unprecedented ways. What would generally have been thought to be the key legal issues were not, and what was never anticipated as crucial legal concerns became so. There has been one question which has come up time after time in the consideration of the paradox: Is the war on terrorism 'war' and, therefore, requiring military responses or is it simply a matter for law enforcement? Before September 11, 2001, terrorism had generally been treated as an issue for law enforcement. After September 11, 2001 the US considered that exclusive law enforcement measures to tackle the menace of terrorism were insufficient. It was then decided to involve the military since the general view was that the September 11, 2001 attacks had risen beyond mere criminal conduct and were deemed to be acts of war.

However, the articulation of the war has not been clear. If the war on terror is indeed a war as advanced by the US, one would have expected that the application of international humanitarian law in the process would have been automatic. In reality it has not been easy to conceptualize the applicability of that law in this new war in contradistinction to the application of the general human rights law, domestic legislation and international law on cooperation in criminal matters.

There is an emerging view which suggests that the USA has made terrorism an all encompassing concept which is at times used by it to block or justify violations of human rights and internationally recognized humanitarian standards. The US has sometimes used the idea of national security as an excuse to justify its actions of sacrificing humanitarian values and principles as enshrined in the United Nations Charter, international covenants on human rights

and the Geneva Conventions for the protection war victims among other important international instruments.

Further, it appears that the direction taken by the US in dealing with the problem has been largely guided by national politics of hegemony. Its strategy has been bereft of objectivity and has obscured the efforts by legal scholars and practitioners to undertake symmetrical studies to come up with universally acceptable rules that would fully address the real problem. Such studies would probably be able to review international humanitarian law and other rules of international law and their relevance to the war against international terrorism or propose a new legal framework to deal with the challenges posed by the new war. The framework could consider issues such as the regulation of groups such as Al Qaeda and others engaged in international terrorism and their activities. Due to the influence of the USA, there has been a glib condemnation of terrorism without a scientific impartial study to come up with civilized means and methods of eradicating it. The result has been a lack of clear policy within the international community to deal with the problem with the consequence that the war against international terrorism has been fought without known values or principles. By agreeing to sink to those levels, the international community has in fact granted terrorists victory on a silver platter.

This paper tries to investigate the effects of politics hegemony of the US on the development and application of international humanitarian law in the war against international terrorism since September 11, 2001. The paper will also attempt to discuss ways in which nations of the world can tackle the menace of international terrorism without sacrificing the internationally recognized humanitarian standards for the protection of human life and dignity in time of conflict.

CHAPTER ONE

1.1 INTRODUCTION

War cannot be just on both sides. One party claims a right, the other disputes the justice of the claim; one complains of an injury, the other denies having done it. When two persons dispute over the truth of a proposition, it is impossible that the two contrary opinions should be at the same time true. However, it can happen that the contending parties are both in good faith; and in a doubtful cause, it is, moreover, uncertain which side is in the right. Since, therefore, Nations are equal and independent, and cannot set themselves up as judges over one another, it follows that in all cases open to doubt the war carried on by both parties must be regarded as equally lawful, at least as regards its exterior effects and until the cause is decided.¹

1.1.1. Background

On September 11, 2001 the world was shocked. On the morning of that day a group of 19 suicide attackers suspected of being Islamic fundamentalists² hijacked four commercial passenger jet airliners in the United States of America (US) in a move designed to kill and harm innocent civilians and bring wide scale destruction to property.³ The hijackers intentionally crashed two of the airliners into the twin towers of the World Trade Center

¹ F Bugnion, 'Just wars, wars of aggression and international humanitarian law' [30 September 2002] [www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/5FLCT4/\\$File/bugnion%20ang%20.pdf](http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/5FLCT4/$File/bugnion%20ang%20.pdf) accessed 4 August 2007 citing E de Vattel, *The Law of Nations or Principles of Natural Law*, translated by Charles G Fenwick, Washington DC, Carnegie Institution, 1916, Book III, Chapter III, 247 paras 39 and 40.

² J Dyk, 'Islamic fundamentalism in South Asia' [July 2007] www.strategicstudiesinstitute.army.mil/ accessed on 4 August 2007. Islamic fundamentalism is a form of religious ideology which advocates literalistic interpretations of the texts of Islam, Sharia law, and an Islamic State. Generally it can be said to be an umbrella designation for a very wide variety of movements, some intolerant and exclusivist, some pluralistic; some favourable to science, some anti-scientific; some primarily devotional and some primarily political; some democratic, some authoritarian; some pacific, some violent.

³ National Commission on Terrorist Attacks upon the United States, *Final Report of the National Commission on Terrorist Attacks upon the United States* (22 July 2004) (9/11 Commission Report); CNN, 'September 11: Chronology of Terror' (12 September 2001) <http://archives.cnn.com/2001/US/09/11/chronology.attack/> accessed 7 September 2007.

in New York City – one plane into each tower, resulting in the collapse of both buildings and irreparable damage to surrounding ones.⁴ A third plane was crashed into the Pentagon in Arlington County, Virginia, near Washington DC.⁵ The final one, also intended to wreak havoc, ended up crashing in a field near Shanksville in rural Somerset County, Pennsylvania.⁶ The number of deaths resulting from the attacks has been estimated to involve 2,973 people excluding the hijackers.⁷ Since the main targets which were hit were civilian most of the fatalities were innocent civilians. However, there were also some members of the US armed forces who were killed and injured when the third plane crashed into the Pentagon.⁸

According to the US Government, the attacks had been coordinated by a group known as Al Qaeda which it considers to be a terrorist organization.⁹ Immediately after, President

⁴ Ibid. In addition to the 110-floor Twin Towers of the World Trade Center itself, five other buildings at the site were destroyed or badly damaged. Several other buildings totaling about 25 were damaged. Most of those buildings had to be deconstructed. The total loss in property has been estimated beyond trillions of dollars.

⁵ Ibid.

⁶ Ibid.

⁷ CNN, 'US Deaths in Iraq, war on terror surpass 9/11 toll' [3 September 2006] <http://edition.cnn.com/2006/WORLD/meast/09/03/death.toll/> accessed on 7 September 2007.

⁸ F James, 'Families of dead carry on the sorrow but some find ways to recast their lives' *Chicago Tribune* (Washington 11 September 2002) <http://www.chicagotribune.com/news/nationworld/chic-0209110336sep11,0,5040444.story?page=1> accessed 12 October 2007. The number killed at Pentagon is estimated at 189 people who were mainly soldiers in the US army.

⁹ 9/11 Commission Report (n 3) 337. For the definition of 'terrorism' see M N Shaw, *International Law* (4th edn CUP, Cambridge 1997) 803-6. There is some controversy on the precise definition of the term 'terrorism' mainly due to ideological differences. The United States Department of Defense defines terrorism as:

...the calculated use of unlawful violence or threat of unlawful violence to inculcate fear, intended to coerce or to intimidate governments or societies in the pursuit of goals that are generally political, religious, or ideological.

Within that definition, there are three key elements—violence, fear, and intimidation—and each element must produce terror in its victims. The Federal Bureau of Investigation (FBI) on its part uses this definition:

Terrorism is the unlawful use of force and violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives.

George Bush issued a declaration of war on terrorism across the globe.¹⁰ What followed was unprecedented as the USA went to 'war' with a multitude of enemies including 'rogue states',¹¹ states which were alleged to be harboring or supporting terrorism, states which were alleged to be proliferating Weapons of Mass Destruction (WMD), terrorist organizations and even terrorism itself.¹² The stated purpose of the new efforts was to design strategies which would identify and defuse threats before they reached American

The US Department of State defines the same term to mean 'premeditated politically-motivated violence perpetrated against non-combatant targets by sub-national groups or clandestine agents, usually intended to influence an audience'. Outside the United States Government, there are greater variations in what features of terrorism are emphasized in definitions. In 1992 the United Nations came up with its own definition as follows:

An anxiety-inspiring method of repeated violent action, employed by (semi-) clandestine individual, group or state actors, for idiosyncratic, criminal or political reasons, whereby - in contrast to assassination - the direct targets of violence are not the main targets.

The British Government came up with its own definition in 1974 and described terrorism as '...the use of violence for political ends, and includes any use of violence for the purpose of putting the public, or any section of the public, in fear'. Considering the different definitions, one may sum the definition of terrorism as a criminal act that influences an audience beyond the immediate victim. The strategy of terrorists is to commit acts of violence that draws the attention of the local populace, the government, and the world to their cause. Terrorists plan their attack to obtain the greatest publicity, choosing targets that symbolize what they oppose. The effectiveness of a terrorist act lies not in the act itself, but in the public's or government's reaction to the act. For example, in 1972 at the Munich Olympics, the Black September Organization killed 11 Israelis. The Israelis were the immediate victims. However, the true target was the estimated 1 billion people watching the televised event. For purposes of this paper, terrorism shall be used to denote the use of violence or other harmful acts committed (or threatened) against civilians by groups or persons for political or ideological goals. Most definitions of terrorism include only those acts which are intended to create fear or 'terror', are perpetrated for an ideological goal (as opposed to a 'madman' attack), and deliberately target non-combatants. See also Alyson J K Bailes, 'Introduction: Terrorism and the International Security Agenda Since 2001' in Ambassador Dr Theodor H Winkler, Anja H Ebnother and Mat B Hansson (eds) *Combating Terrorism and its implications for the security sector* (Swedish National Defence College and Geneva Center for the Democratic Control of Armed Forces, Stockholm 2005).

¹⁰ US Government, 'National Strategy on Combating Terrorism' [February 2003] 1 http://www.whitehouse.gov/news/releases/2003/02/counter_terrorism/counter_terrorism_strategy.pdf accessed 12 October 2007 (Counter Terrorism Strategy) citing the speech by President George W Bush of 6 November 2001.

¹¹ US Government, 'The National Security Strategy of the United States of America' (September 2002) <http://www.whitehouse.gov/nsc/nss.html> accessed 12 October 2007 (National Security Strategy). The term 'rogue state' is a term applied by some international theorists and some governments, particularly the US government, to states considered threatening to world peace. Usually the term is used to designate states which fail to meet certain criteria, such as being ruled by authoritarian regimes that severely restrict human rights, sponsor terrorism, and seek to proliferate weapons of mass destruction.

¹² J Record, *Bounding the Global War on Terrorism* (Strategic Studies Institute, Pennsylvania 2003) 1.

borders.¹³ It was then thought that ‘...the more frequently and relentlessly we strike the terrorists across all fronts, using all the tools of statecraft, the more effective we will be’.¹⁴

That understanding laid the framework for the US to invade Afghanistan on October 7, 2001¹⁵ and Iraq on March 20, 2003.¹⁶ These two states were in many ways conflated with Al Qaeda as threats to terrorism.¹⁷ The stated purpose of the invasions was to capture Osama bin Laden, destroy Al Qaeda, and remove the Taliban and the Saddam Hussein regimes which were considered as having provided support and safe harbors to Al Qaeda terrorists.¹⁸ Although the wars succeeded in removing the Taliban and Saddam from power the Taliban forces continued to exercise relatively effective control especially outside the capital Kabul while in Iraq insurgency has been the order of the day ever since.¹⁹

¹³ Counter Terrorism Strategy (n 10) 2. In justifying the need for the Strategy compared to the already existing National Strategy for Homeland Security, the new Strategy stated as follows in its introduction:

While the National Strategy for Homeland Security focuses on preventing terrorist attacks within the United States, the National strategy for Combating Terrorism focuses on identifying and defusing threats before they reach our borders.

¹⁴ Ibid.

¹⁵ US Congressional Research Service ‘Afghanistan: Current Issues and US Policy’ (Report) (updated 27 August 2003) 8 RL 30588 <http://fpc.state.gov/documents/organization/24047.pdf> accessed 17 October 2007. The US-led war in Afghanistan was code named ‘Operation Enduring Freedom’. The campaign consisted of U.S. airstrikes on Taliban and Al Qaeda forces, coupled with targeting by US special operations forces working in Afghanistan with the Northern Alliance and other anti-Taliban forces. Taliban control of the north collapsed first, followed by its control of southern Afghanistan, which it progressively lost to pro-US Pashtun forces, such as those of Hamid Karzai, who is now President.

¹⁶ Press Secretary of the US Government, ‘President Bush Addresses the Nation’ (Press Briefing made by President Bush from the Oval Office on 19 March 2003 <http://www.whitehouse.gov/news/releases/2003/03/20030319-17.html> accessed 17 October 2007.

¹⁷ Record (n 12) 1.

¹⁸ Michael T Klare, ‘The Coming War with Iraq: Deciphering the Bush Administration’s Motives’ (A Commentary given on January 16, 2003) <<http://www.fpif.org/>> accessed on July 27, 2007.

¹⁹ Erik Leaver, ‘Top 10 Reasons for the US to Get out of Iraq’ *The Nation* (New York 24 September 2004) <http://www.thenation.com/doc/20041011/leaver> accessed July 27, 2007.

When one looks back, one is likely to see that the invasion of Afghanistan and Iraq by the US in its stated war against international terrorism resulted in a great paradigm shift in the practical articulation and future development of the law of armed conflict or commonly referred to as international humanitarian law.²⁰ The response invoked a confluence of legal regimes and norms in unprecedented ways. What would generally have been thought to be the key legal issues were not, and what was never anticipated as crucial legal concerns became so. One of the questions which have been the subject of regular interrogation since then has been this: Were the terrorist attacks on the US on September 11, 2001 acts of 'war' and, therefore, requiring military responses or were they simply criminal acts which should have been left to law enforcement?

Before September 11, 2001, terrorism had generally been seen as a crime which was to be treated as an issue for law enforcement.²¹ In fact, Britain, which was one of America's key allies in the war against international terrorism, affirmed that position at the time of ratifying the Protocol Additional to the Geneva Conventions of 12 August 1949, and

²⁰ A detailed analysis of the history of international humanitarian law and what constitutes it is discussed later in chapter 2.

²¹ WK Lietzau, 'Combating Terrorism: Law Enforcement or War?' in Michael N Schmitt and Gian Luca Beruto (eds), *Terrorism and International Law: Challenges and Responses* (Institute of Humanitarian Law with the George Marshall European Centre of for Security Studies, Sanremo, 2002 - 2003) 75 at 76. The book consists of contributions presented at the Meeting of Experts on Terrorism and International Law: Challenges and Responses - Complementary Nature of Human Rights Law, International Humanitarian Law and Refugee Law, Organized by the Institute of Humanitarian Law, Sanremo, 30th May - 1st June, 2002 and the Seminar on International Humanitarian Law and Terrorism, Organized by the Institute of Humanitarian Law in cooperation with the George Marshall Centre, Sanremo, 24th - 26th September, 2002.

relating to the Protection of Victims of Non-International Armed Conflicts²² by declaring that:

It is the understanding of the United Kingdom that the term 'armed conflict' of itself and in its context denotes a situation of a kind which is not constituted by the commission of ordinary crimes including acts of terrorism whether concerted or in isolation.²³

Even the US which had a generally broad definition of the term 'armed conflict'²⁴ did not, before September 11, 2001, usually employ its armed forces in cases of terrorism.²⁵ After September 11, 2001, the US considered that exclusive law enforcement measures to tackle the menace were insufficient.²⁶ It was then decided to involve the military since the general view was that the latest attacks had risen beyond mere criminal conduct and were deemed to be acts of war.²⁷

However, the articulation of that war has not been clear. If the war against international terrorism is indeed a war as advanced by the US, one would have expected that the

²² The Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609 (Additional Protocol II).

²³ Cited in Marco Sassoli, 'Transnational armed groups and international humanitarian law' (Occasional Paper Series for Program on Humanitarian Policy and Conflict Research of Harvard University 2006) <http://www.hpcr.org/pdfs/OccasionalPaper6.pdf> accessed 12 October 2007.

²⁴ Ibid 7-8 giving the example of Section 5(C) of the US Military Commission Manual No. 2, Crimes and Elements for Trials by the Military Commission, April 30, 2003 provides that armed conflict:

Does not require... ongoing mutual hostilities.... A single hostile act or attempted act may provide sufficient basis... so long as its magnitude or severity rises to the level of an 'armed attack' or an 'act of war', or a number, power, stated intent or the organization of the force with which the actor is associated is such that the act or attempted act is tantamount to an attack by an armed force. Similarly, conduct undertaken or organized with knowledge or intent that it initiate or contribute to such hostile act or hostilities would satisfy the nexus requirement.

²⁵ Sassoli (n 23).

²⁶ Lietzau (n 21) 76.

²⁷ Ibid.

application of international humanitarian law in the process would have been automatic. On the contrary, the US has sought to exclude the application of that law to the war against international terrorism while labeling its targets as ‘unlawful’ or ‘illegal’ combatants. This confusion of terminology and indeed confusing conduct has probably had a negative effect to the application and development of international normative rules that would otherwise have been relevant in the regulation of the war against international terrorism. There is an emerging view which suggests that the US has made terrorism an all encompassing concept which it have used at times to block or justify violations of human rights and internationally recognized humanitarian standards.²⁸ Reports abound of cases in which the US has compromised humanitarian standards as enshrined in the United Nations Charter²⁹, the Universal Declaration of Human Rights³⁰, international covenants on human rights³¹ and the Geneva Conventions for the protection of war

²⁸ James Ross, ‘Black letter abuse: the US legal response to torture since 9/11’ (September 2007) 89 IRRC 561, 561-3.

²⁹ The Charter of the United Nations (signed on 26 June 1945 came into force on 24 October 1945) 59 Stat 1031 (UN Charter).

³⁰ Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217A (III) (UDHR).

³¹ Namely the Convention on the Elimination of All Forms of Racial Discrimination (adopted 7 March 1966, entered into force 4 January 1969) 660 UNTS 195 (CERD); the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR); the Optional Protocol to the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 302 (Optional Protocol I to ICCPR); the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty (adopted 15 December 1989, entered into force 11 July 1991) 1642 UNTS 414 (Optional Protocol II to ICCPR); the International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR); the Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entry into force 3 September 1981) 1249 UNTS 13 (CEDAW); the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women (adopted 6 October 1989, entered into force 22 December 2000) 2131 UNTS 83 (Optional Protocol to CEDAW); the Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (CAT); Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 18 December 2002, entered into force 22 June 2006) UNGA Res 199 (LVII) (9 January 2003); the Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC); the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (adopted 25 May 2000, entered into force 12 February 2002) UNGA Res 263 (LIV) (25 May 2000); the Optional Protocol to

victims³² among other important international instruments.³³ It is now public knowledge that the US military and Central Intelligence Agency (CIA)³⁴ personnel committed torture and other forms of coercive interrogation in many detention facilities in Iraq, Afghanistan and at Guantanamo Bay in Cuba.³⁵

In understanding the problem further, it appears that the direction taken by the US in dealing with international terrorism has been largely guided by politics of hegemony. For instance, in its National Strategy for Combating Terrorism the US has stated its intention

the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography adopted 25 May 2000, entered into force 18 January 2002) UNGA Res 263 (LIV) (25 May 2000); the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (adopted 18 December 1990, entered into force 1 July 2003) 2220 UNTS (ICMW); Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, not yet entered into force) UNGA Res 106 (LXI) (13 December 2006); Optional Protocol to the Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, not yet entered into force) UNGA Res 106 (LXI) (13 December 2006); and the International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006, not yet entered into force) UNGA Res 177 (LXI) (13 December 2006).

³² The Geneva Conventions consist of four treaties formulated in Geneva, Switzerland, that set the standards for international law for humanitarian concerns. They chiefly concern the treatment of non-combatants and prisoners of war. The first of these conventions is called the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31 (Geneva Convention I). The second one is called the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 85 (Geneva Convention II). Thirdly we have the Geneva Convention relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force entered into force 21 October 1950) 75 UNTS 135 (Geneva Convention III). Finally there is what is called the Geneva Convention relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force entered into force 21 October 1950) 75 UNTS 287 (Geneva Convention IV). They are collectively referred to as 'the Geneva Conventions of 1949' or simply as 'the Geneva Conventions'. Those conventions which can be said to constitute the main code of the law of armed conflict are supplemented by three protocols which clarify other aspects that were not adequately covered originally. The protocols are as follows. Firstly we have the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 (Additional Protocol I or AP I). The second one is Additional Protocol II (n 22). Finally there is the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (adopted 8 December 2005, entered into force 14 January 2007 (Additional Protocol III or AP III).

³³ See Ross (n 28) 561-3.

³⁴ Central Intelligence Agency, 'Today's CIA' <https://www.cia.gov/about-cia/todays-cia/index.html> accessed 25 October 2007. The CIA is an independent agency responsible for providing national security intelligence to senior US policymakers.

³⁵ Ibid 562.

in the following terms:

The war on terrorism is asymmetric in nature but the advantage belongs to us, not to the terrorists. We will fight this campaign using our strengths against the enemy's weaknesses. We will use the power of our values to shape a free and more prosperous world. We will employ the legitimacy of our government and our cause to craft strong and agile partnerships... We will never forget what we are fighting for-our fundamental democratic values and way of life.³⁶

After the September 11, 2001 attacks, President Bush, on his part, is on record as having declared that there was no room for neutrality in the war against terrorism, and that the international coalition against terror will:

...fight this evil and fight until we are rid of it... Over time it's going to be important for nations to know they will be held accountable for inactivity... You're either with us or against us in the fight against terror... No group or nation should mistake America's intentions: We will not rest until terrorist groups of global reach have been found, have been stopped, and have been defeated.³⁷

The above statements suggest that the US has made the war on terrorism a matter of life and death which has to be won at all costs. According to it, there were only two sides to be taken - that of the US or that of 'the enemy'. It appears as if there was no other choice in the middle even for those who did not agree with either side. And because it was a war, those who were not on the US side risked to have their rights abrogated at will and even the international safeguards applied in time of war were not guaranteed if they stood in the way to victory.

³⁶ Counter Terrorism Strategy (n 10) 2.

³⁷ 'Bush says it is time for action' WASHINGTON (CNN) November 6, 2001. <http://archives.cnn.com/2001/US/11/06/ret.bush.coalition/index.html> accessed September 3, 2007

Due to the influence of the US, there have been glib condemnations of international terrorism without scientific and impartial studies being undertaken to come up with effective measures of dealing with it. The result has been a lack of application of the existing international normative rules to deal with the human problem of international terrorism which has meant that the war against international terrorism has been fought without known values or principles. The thesis advanced in this paper is that by agreeing to ignore the rules which define humanity in the war against international terrorism, the US has in fact played into the hands of the terrorists who seek to destroy human civilization by resorting to crude means to resolve human conflict.

1.1.2. Statement of the Problem

As already seen, the terrorist attacks on the World Trade Center and other buildings in the US on September 11, 2001 marked a watershed in the manner the US would respond to international terrorism hence forth. For the first time, the US opted to deploy armed force a mechanism which has since become a common feature in addressing the problem. However, it would appear that at the time the US chose to change its strategies in dealing with acts of international terrorism, it gave little or no concern to the question of safeguarding the rights and dignity of those persons who would be caught up in the new war either as victims or targets of it.

From the statements given by high ranking US government officials, one may be forgiven if one concluded that the omission was deliberate. The explanation for that may be found

in the fact that the US and its people as well as a large section of the world's population were awed by the events of the fateful day and hoped that a final solution would be found once and for all if the villains who orchestrated them were quickly rounded up and executed summarily.³⁸

Having the same security concerns of their government and people many US scholars and practitioners began looking for ways and means to justify or at least excuse the actions of their government in taking certain steps which would normally have been classified as grave violations of human rights and humanitarian standards.³⁹ The US scholars and practitioners were emulated by other scholars and practitioners in the West.⁴⁰ The result has been that a number of literature generated from the west since September 11, 2001 have not been as traditionally bold in condemning the actions of the US and her allies in conducting the war against international terrorism by relegating human rights and humanity to the periphery.⁴¹

The consequence of that approach has been that the application and development of important rules of international law which would have been appropriate in dealing with counterterrorism have been stultified and hampered. This appears to have gone on that way mainly because most legal and social writers and practitioners from the west who

³⁸ See Thomas Homer-Dixon 'Five Years After the Reverberations of 9/11' *The Globe and Mail* (Toronto 11 September 2006) A 15 https://www.lexisnexis.com/us/lnacademic/results/docview/docview.do?docLinkInd=true&risb=21_T4103639746&format=GNBFI&sort=RELEVANCE&startDocNo=1&resultsUrlKey=29_T4103639749&cisb=22_T4103639748&treeMax=true&treeWidth=0&csi=303830&docNo=20 accessed 9 October 2007. In the article it was suggested that many people in Western Europe viewed any discussion of root causes as an exercise in making excuses for terrorism.

³⁹ Ibid.

⁴⁰ Homer-Dixon (n 38).

⁴¹ Ibid.

would have given useful guidance to the process have generally preferred to give their deference to the US position when in fact it would appear that the US is the main culprit in the relevant charge.

1.1.3. Purpose

The purpose of this study is to interrogate how politics of hegemony of the US have influenced the application of international humanitarian law in the war against international terrorism since the terrorist bombings of the World Trade Centre and other sites in the US on September 11, 2001.

Secondly the study will also attempt to show that the influence of the US in the manner mentioned has had the effect of stultifying and hampering the application of relevant international rules and thereby prevented the development of a solid and responsive normative legal regime to regulate the war against international terrorism in a manner that does not unnecessarily compromise humanitarian values and principles.

By way of recommendation, the study will make a proposal to the effect that there is need for the US to put aside politics of domination in order to be able to engage with other nations in finding lasting solutions to the problem of international terrorism and how to effectively deal with it in a manner that does not compromise humanitarian values and principles. Once that happens, it would be possible for the nations to review the existing rules such as those set out in international humanitarian law and other international

instruments to see how they could be applied in the war against international terrorism and where necessary to design new rules specific to the menace. By identifying the best practices and weaknesses in the existing rules and past conduct, it would be possible to design better or new rules which specifically address the war against international terrorism without sacrificing internationally established principles and values which are the cornerstone of human civilization.

1.1.4. Research Questions

The study will be guided by the following questions:

- 1) In what ways has the politics of hegemony of the US influenced the manner in which international humanitarian law has been applied in the war against international terrorism since September 11, 2001?
- 2) How has that influence in turn affected the application and development of other rules of international law which are relevant to the regulation of the war against international terrorism? and
- 3) What measures should states adopt in dealing with the problem of international terrorism without compromising internationally established humanitarian values and principles?

1.1.5. Objectives

The study hopes to achieve the following objectives:

- 1) To explore how the politics of hegemony of the US have influenced the application of international humanitarian law in the war against international terrorism since September 11, 2001;
- 2) To examine how that influence has in turn impacted on the application and development of the existing rules of international law that could be applied to the war against international terrorism; and
- 3) To propose an effective and more responsive legal framework to govern the war against international terrorism in a manner that does not compromise humanitarian values and principles.

1.1.6. Hypothesis

The study aims to establish the following hypothesis: The application of international humanitarian law in the war against international terrorism since September 11, 2001 has been largely influenced by politics of hegemony of the US. That influence has in turn not only stultified the application of relevant rules of international law but also hampered their development to make them more effective and responsive to the war against international terrorism. If the US abandons its politics of hegemony, it will be possible for the international community of nations through the UN to improve or develop an

international normative framework that would guide the war against international terrorism in a manner that upholds humanitarian values and principles.

1.1.7. Theoretical Framework

The study is based on the historical school of jurisprudence. The historical school of jurisprudence has emerged as an important conception of the phenomenon of law. It adapts the historical method to law. In those terms law is seen in its essence as something which is a part of the community in which it is found and not as something that emanates from outside or above.⁴² As Friedrich Karl von Savigny, who is one of the leading representatives of this school, wrote many years ago:

In the earliest times to which authentic history extends, the law will be found to have already attained a fixed character, peculiar to the people, like their language, manners, and constitution. Nay, these phenomena have no separate existence, they are but the particular faculties and tendencies of an individual people, inseparably united in nature, and only wearing the semblance of distinct attributes to our view. That which binds them into one whole is the common conviction of the people, the kindred consciousness of an inward necessity, excluding all notion of an accidental and arbitrary origin.⁴³

The historical school was chosen as the theoretical background and framework in contradistinction to other schools for the following reasons. First and foremost, legal positivism treats law as essentially a political instrument, a body of law promulgated and enforced by official authorities and representing the will and the policy of the

⁴²See Robert E Rhodes Jr, 'On the Historical School of Jurisprudence' (2004) 49 AJJ 165.

⁴³Ibid. Referring to Fredrick Charles von Savigny, 'Of the Vocation of Our Age for Legislation and Jurisprudence' tr Abraham Hayward (Littlewood London 1831, reprod Legal Classics Library Birmingham 1986) 24. The translation is from the 1828 German edition. The first edition appeared in 1814.

lawmakers.⁴⁴ Natural law, on the other hand, treats law as essentially a moral instrument which embodies reason and conscience implicit in human nature.⁴⁵ As already seen, historicists, on their part, treat law as a manifestation of the group memory, the developing ethos of the society whose law it is.⁴⁶ The last category of legal scholars emphasize the source of law that 'is' and the law that 'ought to be' in the customs and traditions of a given society. This connotes that both the meaning of legal rules and justice is to be found in the character, the culture and the history of the society. This, therefore, appears to encompass both the approaches of the natural law thinkers and that of legal positivists. In the event, it will give the study an opportunity to cut through any limitations in any one of those two other schools of jurisprudence mentioned.

Based on Savigny's theory of *Volksgeist*, international law is, therefore, expected to be representative not only of the will and aspirations of the US but also that of all the other nations of the world and their peoples as a whole. It should not merely be some law promulgated in a dark smoky room and then imposed by a few powerful nations on less powerful ones and their peoples. Although that would by necessity mean that it will be drawn from the historical events of the world, that drawing must be one that takes into account the ways in which the global system will be able to adequately respond to imbalances that may have been created by other controlling factors such as past inequities. By applying this integrated approach it will be easier to blur the negative

⁴⁴Harold J Berman, 'The Historical Foundations of Law' Research Paper No. 05-3, (Emory University School of Law, Public Law & Theory Research Paper Series) 1. <http://papers.ssrn.com/abstract=666123> accessed October 7, 2007.

⁴⁵ Ibid.

⁴⁶ Ibid.

confusion that attends the treatment of global challenges such as balancing the right of states and individuals to security without compromising humanitarian principles and values in the war against international terrorism.

1.1.8. Research Methodology

The study was based on desk/library research on the manner in which the politics of hegemony of the US have influenced the application of international humanitarian law in the war against international terrorism since September 11, 2001 and how that influence has in turn generally impacted on the application and development of the relevant rules of international law applicable to the war against international terrorism.

The study also benefited a great deal from internet research and searches of works by leading scholars in the areas of terrorism and international humanitarian law. Secondary data was widely used in the study. The data was collected from various textbooks, journals, newspapers, magazines and other material from the internet.

1.1.9. Limitations

The study is limited to interrogating the question of how the politics of hegemony of the US have influenced the application of international humanitarian law in the war against international terrorism since September 11, 2001 and how that influence has in turn

affected the application and development of the relevant rules of international law applicable to the war against international terrorism. The study will also attempt to explore how the relevant law can be further developed or adapted to take care of the new challenges that have arisen since September 11, 2001.

The paper will not concern itself with the legality or otherwise of the war on terrorism and whether terrorism is justified or not in international law and whether terrorism is justified or not.

Further, as mentioned earlier, this research revealed that most scholarly materials which were readily available and which attempted to address the question of combating international terrorism after September 11, 2001 have been written by scholars from the US and those from the West who are generally sympathetic with the US position. Although most of the views expressed by them are generally acceptable, it is critical to note that majority of them tended to lean towards the American view. It is apparent that, in view of the interests of their civilizations and the fact that they shared the same security concerns with the US it is not unlikely that they were shy to admit that hegemonic politics of the US were responsible for the failure by the US to fully apply humanitarian values and principles in the war against international terrorism since September 11, 2001. There was, therefore, paucity of scholarly material presenting an alternative view on the issues tackled in this study.

Finally, due to time constraints this paper is confined to the state of the law as it was as at February 29, 2008.

1.1.10. Literature Review

The study reviewed both literature generated before and after September 11, 2001 up to February 29, 2008. However, it is documents which were generated after September 11, 2001 which were more instructive since most of them dealt directly with the issues which arose as a result of the events of September 11, 2001. A brief review of the key literature follows.

The article titled 'History of War on Land'⁴⁷ and the book titled *How does war protect in war? Cases documents and teaching materials on contemporary practice in international humanitarian law*⁴⁸ as well as the article 'Humanity in warfare: The law of civil war'⁴⁹ were useful to this paper as they gave a historical background of international humanitarian law by showing how that body of law evolved and was applied over the years and how it was influenced by national interests. The book titled, *International Humanitarian Law: An Introduction*⁵⁰ was useful in articulating the tenets of

⁴⁷ Howard S Levie, 'History of War on Land' (2000) 838 IRRC www.icrc.org/Web/eng/siteeng0.nsf/htmlall/section_ihl_history accessed on 29 September 2007

⁴⁸ Marco Sassoli and Antoine A Bouvier, *How does war protect in war? Cases documents and teaching materials on contemporary practice in international humanitarian law* (ICRC, Geneva 1999).

⁴⁹ Gerard J Boyle, 'Humanity in warfare: The law of civil war' in War since 1945 Seminar and Symposium www.globalsecurity.org/military/library/report/1984/index.html accessed 27 October 2007.

⁵⁰ Hans-Peter Gasser, *International Humanitarian Law: An Introduction* (Henry Dunant Institute, Geneva 1993).

international humanitarian law to show the reader the nature of the body of rules which guided the study.

Also reviewed were the articles titled 'A Brief History of Terrorism',⁵¹ and 'History of Terrorism',⁵² which provided useful information on the history and nature of terrorism while those titled 'International legal responses to terrorism',⁵³ 'Lawful Responses to Terrorism',⁵⁴ and 'Remember the Caroline!: The doctrine of "anticipatory self-defense"-more relevant than ever',⁵⁵ provided useful discussions on the various responses to terrorism .

The article titled 'Transnational armed groups and international humanitarian law',⁵⁶ discussed the concept of transnational armed groups and interrogated the applicability of international humanitarian law to them. The paper also attempted to investigate matters which must exist to qualify an armed group as an addressee of international humanitarian law. Additionally the paper summarized the rules of international humanitarian law which cover an armed conflict between a transnational armed group like Al Qaeda and a state like the US. In doing so, the writer discussed the legal status of such groups in

⁵¹ Mark Burgess 'A Brief History of Terrorism' (Center for Defence Information 2 July 2003) <http://www.cdi.org/friendlyversion/printversion.cfm?documentID=1502> accessed 2 November 2007.

⁵² Terrorism Research Center, Inc. 'History of Terrorism' <http://www.terrorism-research.com/incidents/> accessed 4 February 2008.

⁵³ Michael W Reisman 'International legal responses to terrorism' (1999) 22 Hous J Int'l L <http://www.encyclopedia.com/printable.aspx?id=1G1:60377458> accessed 7 November 2007.

⁵⁴ Mary Ellen O'Connell 'Lawful Responses to Terrorism' <http://jurist.law.pitt.edu/forum/forumnew30.htm> accessed 23 November 2007.

⁵⁵ David B Rivkin Jr, Lee A Casey, Darin R Bartram 'Remember the Caroline!: The doctrine of "anticipatory self-defense" - more relevant than ever' (1 July 2002) *National Review* http://findarticles.com/p/articles/mi_m1282/is_12_54/ai_87130362 accessed 4 September 2007.

⁵⁶ Sassoli (n 23).

international law and how their members ought to be treated in the war against international terrorism. The paper also examined how existing rules of international humanitarian law could be adapted to adequately cover transnational armed groups. In that line, the paper suggested some of the rules to be applied and their foundation as well as the legal and practical challenges which stood in the way of such adaptation. The material set in that paper was very useful in helping the present study understand the legal challenges presented in the application of international humanitarian law in the war against international terrorism and the opportunities available in articulating that war without unnecessary abuse of internationally recognized standards for the safeguard of human dignity.

Also reviewed was a report on a roundtable discussion on the transformation of warfare, international law, and the role of transnational armed groups titled 'Transnationality, war and the law'.⁵⁷ The report tried to explain the character and activities of transnational groups and to study their relevance in the new world order. It delved into the question of the legal status of armed transnational groups and discussed the applicability of international humanitarian law to them. It went on to review whether there was a need to develop new rules to cover such groups.

⁵⁷ Program on Humanitarian Policy and Conflict Research of Harvard University, 'Transnationality, war and the law' (April 2006) <http://www.hpcr.org/pdfs/HPCR_-_Transnationality_Roundtable_-_April_2006.pdf> accessed 15 April 2008. This was a report on a roundtable on the transformation of warfare, international law, and the role of transnational armed groups.

Another paper titled ‘Is the President Bound by the Geneva Conventions?’⁵⁸ discussed the US policy towards the Al Qaeda and Taliban detainees at Guantanamo Bay, Cuba and concluded that several aspects of US policy violated the Geneva Conventions and other internationally recognized standards for the protection of victims of war. However, that paper tried justify those breaches on the account that US national law gave some leeway to the President to override international law where the national security of the US was at stake.

Finally, the article ‘Caught in the Cold: International humanitarian law and prisoners of war during the cold war’⁵⁹ on its part discussed at length how European countries utilized international humanitarian law to achieve certain national interests during the cold war.

However, most of the materials which were reviewed did not attempt to explain how the politics hegemony of the US had influenced the application of that international humanitarian law in the war against international terrorism since September 11, 2001 and how that consequently stultified and hampered the development of the relevant rules which would guide the war against international terrorism without trampling on international standards established to secure human dignity.

⁵⁸ Derek Jinks and David Sloss, ‘Is the President Bound by the Geneva Conventions?’ [July 17, 2004]. <http://www.law.uchicago.edu/academics/publiclaw/resources/61-Jinks.pdf> accessed 19 October 2007.

⁵⁹ Stephanie Carvin, ‘Caught in the Cold: International humanitarian law and prisoners of war during the cold war’ (2006) 11 OJCSL, 1-2. <jcsl.oxfordjournals.org/cgi/content/abstract/krl005v2> accessed on 17 October 2007.

CHAPTER TWO

2.1 POLITICS OF HEGEMONY AND INTERNATIONAL HUMANITARIAN LAW

2.1.1. A brief history international humanitarian law

It is not exactly clear when humanitarian values and principles began to influence the articulation of war. According to Professor Howard Levie, humanity in land warfare did not exist for many millennia.¹ From the cave dweller to biblical times, and for centuries thereafter, the winner in battle took from the loser not only his life, but also all of his available belongings, including women, children, domestic animals, and personal property.² An example is given of the Biblical story in Numbers 31: 7-10, where the following narrated:

They made war on Midian, as the Lord commanded Moses, and slew all the men. In addition to those slain in the battle, they killed the kings of Midian - Evi, Rekem, Zur, Hur and Reba - the five kings of Midian – and they put to death also Balaam, son of Beor. The Israelites took captive the Midianite women and their dependants, and carried off their beasts, their flocks, and their property. They burnt all their cities in which they had settled and all their encampments. They took all the spoil and plunder both man and beast...³

After that battle, Moses who was the leader of the Israelites at the time instructed his

¹Howard S Levie, 'History of War on Land' (2000) 838 IRRC 339. www.icrc.org/Web/eng/siteeng0.nsf/htmlall/section_ihl_history accessed on 29 September 2007.

² Ibid.

³ Ibid.

people to ‘... kill all the boys and... every woman who has slept with a man, but save for yourselves every girl who has never slept with a man’.⁴

The above account suggests that in biblical times there was probably very little regulation on how the enemy was to be dealt with in war. Those who survived the battle were killed – whether they were capable of resisting or not, and all their property was seized or razed. It was a case of winner takes all. Those who were captured did not receive any justice but were slaughtered without mercy. Not even women and children were spared the effects of war. It would, therefore, appear that at some period in the evolution of the human race, humanity played no part, or a very small and almost accidental part, in warfare.

However, that does not mean that the practice of according humanitarian protections in time of war is completely new. Although it is not abundantly clear as to the exact date when international humanitarian law became recognized in war, Professor Levie suggests that one may be able to trace the history of humanity in war many centuries back.⁵ Whatever the case, the rules and practice of war do not appear to be entirely new. Other scholars in this area have suggested that those rules and practice can be derived from a variety of customary rules and uses, which were found in diverse cultures, regions, and civilizations from nearly all the continents.⁶ At first, the rules were unwritten and only

⁴ See International Bible Society of Africa, *Holy Bible*, (New International Version, Nairobi 1984) [Numbers 31: 17-18].

⁵ Levie (n 1).

⁶ Marco Sassoli and Antoine A Bouvier, *How does war protect in war? Cases documents and teaching materials on contemporary practice in international humanitarian law* (ICRC, Geneva 1999) 98.

based on customs that regulated armed conflicts.⁷ That was followed by *ad hoc* bilateral treaties between belligerents which were drafted in varying degrees of detail and which were sometimes ratified after the fighting was over.⁸

One writer has traced the emergence of the first detailed rules of warfare among the Greeks and Romans.⁹ The Greeks and Romans developed certain practices which spared particular peoples and buildings from destruction during war from very early times.¹⁰ Although these were not legally binding rules they were practiced with a degree of regularity which gave them some normative value.¹¹ However, it appears that these initial rules did not prove very useful in the long run since their application was limited by both time and space in that they were valid for only one battle or a specific conflict.¹² The rules also varied depending on the period, place, morals and civilization.¹³

The first moves to formalize international humanitarian law can be traced to the signing of the Treaty of Westphalia of 1648.¹⁴ That treaty, which ended the famous Thirty Years' War,¹⁵ is celebrated as the birth date of the modern state system and by extension the

⁷ Ibid.

⁸ Ibid.

⁹ Gerard J Boyle, 'Humanity in warfare: The law of civil war' in War since 1945 Seminar and Symposium www.globalsecurity.org/military/library/report/1984/index.html accessed 27 October 2007.

¹⁰ Ibid.

¹¹ Ibid.

¹² See the International Institute of Humanitarian Law website at <web.iihl.org/site/6190/default.aspx> accessed on 27 October 2007.

¹³ Ibid.

¹⁴ Treaty of Westphalia of 24 October 1648. A copy of that treaty can be viewed from <http://www.yale.edu/lawweb/avalon/westphal.htm> or <http://fletcher.tufts.edu/multi/texts/historical/westphalia.txt> accessed 26 November 2007.

¹⁵ See Robert McHenry (ed.), *The Encyclopedia Britannica* (Vol 11, 15th edn, University of Chicago, Chicago 1993) 711 (McHenry Vol. 11). The Thirty Years' War refers to a series of wars fought by various

formalized international law system.¹⁶ It was during that war that Hugo Grotius, who is considered the father of international law, published his famous book known as *Rights of war and peace*¹⁷ which set out what is probably the first formal legal framework within which states could work in time of war.¹⁸ To begin with, Grotius did not oppose war but advocated for a policy of minimum destruction.¹⁹ His work contained a detailed application of the various principles for the conduct of war such as the prohibition against attacks on churches and temples and the burning of fields or razing of houses; the protection of non-combatants; and enumerated the categories of those entitled to protection, that is, children, women and men who could not bear arms.²⁰ It also dealt with the obligation placed upon combatants to spare the lives of enemy soldiers who had surrendered.²¹ Grotius' principles were in later years accepted as customary international law and many military commanders began to practice them.²² By the mid nineteenth century these principles had begun appearing in military manuals and many states had

nations in Europe for various reasons, including religious, dynastic, territorial, and commercial rivalries. The war is thought to have officially begun in 1618 and was not ended until 1648 with the Treaty of Westphalia. It involved most of the major European powers. Beginning as a religious conflict between Protestants and Catholics in the Holy Roman Empire, it gradually developed into a general war involving much of Europe, for reasons not necessarily related to religion. The major impact of the Thirty Years' War, in which mercenary armies were extensively used, was the devastation of entire regions scavenged bare by the foraging armies which led to the bankrupting of many of the powers involved. Over the course of the war, the population of the German states was reduced by about 30%. In the territory of Brandenburg, the losses had amounted to half, while in some areas an estimated two-thirds of the population died. The male population of the German states was reduced by almost half. The population of the Czech lands declined by a third. The Swedish armies alone destroyed 2,000 castles, 18,000 villages and 1,500 towns in Germany, one-third of all German towns.

¹⁶ David Kennedy, 'The Move to Institutions' (1986-87) 8 Cardozo L Rev 841, 842 <http://www.asil.org/pdfs/kennedycardozo0607.pdf> accessed 24 August 2007.

¹⁷ Hugo Grotius, *Rights of war and peace* (A Campbell trans 1901). http://www.publicbookshelf.com/public_html/Outline_of_Great_Books_Volume_I/therights_bfg.html accessed 7 November 2007.

¹⁸ Levie (n 1).

¹⁹ Ibid.

²⁰ Ibid.

²¹ Ibid.

²² Jean Pictet, 'International Humanitarian Law' [1966] IRRC 456, 466.

embodied them in treaties.²³

Further attempts to formalize humanitarian rules, which were to be applied in time of war, can also be traced to the American Civil War.²⁴ During that war President Abraham Lincoln commissioned a German-American jurist and political philosopher known as Francis Lieber to draw up legal guidelines, which would guide the Union army during the war.²⁵ The result of his work was what was known as the Instructions for the Government of Armies of the United States in the Field of April 24, 1863.²⁶ Although the Code was a national action, not applicable to other countries, it later served as one of the sources of the international actions which were to follow in this area.

2.1.2. Codification of the rules of international humanitarian law

In the same year that the Lieber Code was promulgated, an international conference meeting was called in Geneva, Switzerland, which drafted resolutions, which called for each country to establish a committee to assist the medical services, and to provide for

²³ Ibid.

²⁴ Levie (n 1); Robert McHenry (ed.), *The Encyclopedia Britannica* (Vol. 29 15th edn, University of Chicago, Chicago 1993) 226 – 36. (McHenry Vol. 29). The American Civil War was a civil war fought in the United States of America between 1861 and 1865 over differences between some states concerning ownership of slaves. Eleven Southern slave states declared their secession from the US and formed the Confederate States of America (the Confederacy which fought against the US federal government (the Union), which was supported by all the states which were opposed to slavery and some other five slaveholding border states.

²⁵ Levie (n 1).

²⁶ Ibid. Instructions for the Government of Armies of the United States in the Field [24 April 1863] General Order No 100 (The Lieber Code).

the neutrality of ambulances and medical personnel during war.²⁷ This was the precursor to the Geneva Conferences, which drafted the Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field.²⁸

The St. Petersburg Declaration of 1868²⁹ is probably the earliest international treaty restricting the conduct of war. It was one of the earliest rules of international humanitarian law to codify the customary rule prohibiting the use of weapons and methods of warfare which cause superfluous injury or unnecessary suffering.³⁰ The Declaration was aimed at outlawing the use of weaponry that go beyond incapacitating the enemy but rather cause the victims unnecessary suffering after incapacitation. It prohibited the use of explosive projectiles under 400 grams which were tipped with light explosive or incendiary charges.³¹ That was because the projectiles did not only incapacitate the enemy but were also known to cause far greater wounds and thus greatly aggravated victims beyond those caused by an ordinary rifle bullet which could achieve the same effect of incapacitating the enemy. This principle prohibiting means which cause unnecessary suffering was again codified in the Regulations attached to the 1899

²⁷ Levie (n 1).

²⁸ Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field (Signed on 22 August 1864 entered into force on 22 June 1865) 129 CTS 361 (Geneva Convention of 1864).

²⁹ Declaration Renouncing the Use, in Time of War, of certain Explosive Projectiles Under 400 Grammes Weight (Signed 29 November 1868 entered into force 11 December 1868) 18 Martens Nouveau Recueil (ser 1) 474, 138 CTS 297 (St. Petersburg Declaration).

³⁰ Ibid. The treaty provided in terms that the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy by disabling the greatest possible number of men and went on to outlaw the use of arms which uselessly aggravated the sufferings of the disabled men, or rendered their death inevitable.

³¹ Ibid.

Convention (II) with Respect to the Laws and Customs of War³² on Land drafted by the first International Peace Conference in The Hague and the slightly redrafted set of the Regulations attached to the Hague Convention IV Respecting the Laws and Customs of War on Land of 1907.³³

In 1874 another international conference called by the Russian government met in Brussels, Belgium and adopted the International Declaration Concerning the Laws and Customs of War,³⁴ a document which contained many provisions intended to make land warfare more humane.³⁵ Unfortunately, most governments were unwilling to accept it as a binding convention so it never became effective for lack of ratifications.³⁶ However, it served as one of the sources for the Regulations attached to the Hague Conventions.³⁷ It was in the preamble to those Conventions that the famous Martens Clause³⁸ made its formal appearance. It stated as follows:

Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under

³² Art 23 of the Regulations concerning the Laws and Customs of War on Land annexed to the Hague Convention II with Respect to the Laws and Customs of War on Land (Signed on 29 July 1899 entered into force on 4 September 1900) 187 CTS 429 (Hague Convention II).

³³ See Art 23 of Regulations annexed to the Hague Convention IV Respecting the Laws and Customs of War on Land (Signed on 18 October, 1907 entered into force January 26, 1910) 205 CTS 277 (Hague Convention IV).

³⁴ International Declaration Concerning the Laws and Customs of War (Adopted on 27 August 1874 but never came to force) 65 Brit Foreign & St Papers 1005 (1873-74).

³⁵ Ibid. For example Art 12 limited the power of belligerents in their choices of means of injuring the enemy and Article 13 went on to prohibit a number of activities such as the use of poison or poisoned weapons, perfidy, attacks on *hors de combat*, the declaration that no quarter will be given, the employment of arms, projectiles or material calculated to cause unnecessary suffering, as well as the use of projectiles prohibited by the Declaration of St Petersburg of 1868 and the destruction or seizure of the enemy's property that was not imperatively demanded by the necessity of war.

³⁶ Levie (n 1).

³⁷ Regulations of Hague Convention II (n 32) and Regulations of Hague Convention IV (n 33).

³⁸ So named after Friedrich Fromhold Martens, the Russian diplomat who drafted and introduced it at The Hague Peace Conference.

the protection and empire of the principles of international law, as they result from usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience.

At the same time that Hague Convention II was being signed, three Declarations were adopted, one was called Hague IV, Declaration I - Concerning the Prohibition, for the Term of Five Years, of Launching of Projectiles and Explosives from Balloons or other New Methods of Similar Nature.³⁹ The second one was called Hague IV, Declaration II – Concerning the Prohibition of the Use of Projectiles Diffusing Asphyxiating Gases.⁴⁰ The final one was called Hague IV, Declaration III – Concerning the Prohibition of the Use of Expanding Bullets.⁴¹

The Second International Peace Conference, held in The Hague in 1907, adopted Hague Convention IV mentioned above. The only Declaration that was readopted in Hague Convention IV was that relating to the dropping of projectiles and explosives from balloons.⁴²

In 1906, an international conference met in Geneva and updated the Geneva Convention of 1864 resulting in the second Geneva Convention for the Amelioration of the Condition

³⁹ Hague IV, Declaration I - Concerning the Prohibition, for the Term of Five Years, of Launching of Projectiles and Explosives from Balloons or other New Methods of Similar Nature (Signed on 29 July 1899 entered into force on 4 September 1900) 32 Stat 1839 (Hague IV Declaration 1).

⁴⁰ Hague IV, Declaration II – Concerning the Prohibition of the Use of Projectiles Diffusing Asphyxiating Gases. (Signed on 29 July 1899 entered into force on 4 September 1900) 187 CTS 453 (Hague IV Declaration 2).

⁴¹ Hague IV, Declaration III – Concerning the Prohibition of the Use of Expanding Bullets (Adopted on 29 July 1899 entered into force on 4 September 1900) 187 CTS 459 (Hague IV Declaration 3).

⁴² Hague IV Declaration I (n 39).

of the Wounded and Sick in Armies in the Field of 1906.⁴³ This second Geneva Convention extended the principles from the Geneva Convention of 1864 to the treatment of battlefield casualties.⁴⁴ It was this Geneva Convention of 1906, which was in force during the World War I.⁴⁵

The Geneva Convention of 1906⁴⁶ was superseded by two other Conventions in 1929. The first one was the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field.⁴⁷ The second one was the Geneva Convention relative to the Treatment of Prisoners of War.⁴⁸ It is these versions of the Geneva

⁴³ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field (Adopted on 6 July 1906 entered into force 9 August 1907) 11 LNTS 440 (Geneva Convention of 1906). This Convention, which is no longer in force, should not be confused with Geneva Convention II.

⁴⁴ See particularly art 1 of Geneva Convention of 1906 which provides that 'Officers, soldiers, and other persons officially attached to armies, who are sick or wounded, shall be respected and cared for, without distinction of nationality, by the belligerent in whose power they are. A belligerent, however, when compelled to leave his wounded in the hands of his adversary, shall leave with them, so far as military conditions permit, a portion of the personnel and ' matériel ' of his sanitary service to assist in caring for them'.

⁴⁵ McHenry Vol. 29 (n 24) 961-87. World War I, also known as the First World War, the Great War, and sometimes as the War to End All Wars, was a global war which took place primarily in Europe from 1914 to 1918. The immediate cause of the war was the assassination of Archduke Franz Ferdinand, heir to the Austro-Hungarian throne on June 28, 1914 by Gavrilo Princip, a Bosnian Serb citizen of Austria-Hungary. The assassination had been plotted by Colonel Dragutin Dimitrijevic who was the head of Serbia's military intelligence. The retaliation by Austria-Hungary against the Kingdom of Serbia activated a series of alliances that set off a chain reaction of war declarations. Within a month, much of Europe was in a state of open warfare. The war was propagated by two major alliances. The Entente Powers initially consisted of France, the United Kingdom, Russia, and their associated empires and dependencies. Numerous other states joined these allies, most notably Italy in April 1915, and the United States in April 1917. The Central Powers, so named because of their central location on the European continent, initially consisted of Germany and Austria-Hungary and their associated empires. The Ottoman Empire joined the Central Powers in October 1914, followed a year later by Bulgaria. By the conclusion of the war, only the Netherlands, Switzerland, Spain and the Scandinavian nations remained officially neutral among the European countries, though many of them provided financial or material support to one side or the other.

⁴⁶ Geneva Convention of 1906 (n 45).

⁴⁷ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field (Adopted 27 July 1929 entered into force 19 June 1931) 118 LNTS 303 (Geneva Convention I of 1929).

⁴⁸ Geneva Convention relative to the Treatment of Prisoners of War (Adopted 27 July 1929 entered into force 19 June 1931) 118 LNTS 343 (Geneva Convention II of 1929).

Conventions which were applicable during World War II.⁴⁹ The 1929 Conventions were, in turn, superseded by the four Geneva Conventions of 12 August 1949.⁵⁰

Evidence of the modern effort to make land warfare more humane is to be found in a 1968 Resolution of the General Assembly of the United Nations, which stated in part as follows:

1. (The UN General Assembly) [A]ffirms resolution XXVIII of the XXth International Conference of the Red Cross held at Vienna in 1965, which laid down, inter alia, the following principles for observance by all governmental and other authorities responsible for action in armed conflicts:

- (a) That the right of the parties to a conflict to adopt means of injuring the enemy is not unlimited;
- (b) That it is prohibited to launch attacks against the civilian populations...;
- (c) That distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the latter be spared as much as possible.

⁴⁹ McHenry Vol. 29 (n 24) 987-1024. World War II, or the Second World War, was a global military conflict which involved a majority of the world's nations, including all of the great powers, organized into two opposing military alliances which were known as the Allies and the Axis. The starting date of the war is generally held to be September 1939 with the German invasion of Poland and subsequent declarations of war on Germany by the United Kingdom, France and the British Dominions and did not end until August 14, 1945 when Japan was forced to surrender with the drop of atomic bombs on her two cities, Hiroshima and Nagasaki.

⁵⁰ The Geneva Conventions of 12 August 1949 consist of four treaties formulated in Geneva, Switzerland, that set the standards for international law for humanitarian concerns. They chiefly concern the treatment of non-combatants and prisoners of war. The first of these conventions is called the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31 (Geneva Convention I). The second one is called the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 85 (Geneva Convention II). Thirdly we have the Geneva Convention relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force entered into force 21 October 1950) 75 UNTS 135 (Geneva Convention III). Finally there is what is called the Geneva Convention relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force entered into force 21 October 1950) 75 UNTS 287 (Geneva Convention IV). They are collectively referred to as 'the Geneva Conventions of 1949' or simply as 'the Geneva Conventions' and sometimes as 'the 1949 Geneva Convention'.

2. (The UN General Assembly) [I]nvites the Secretary-General, in consultation with the International Committee of the Red Cross and other appropriate international organizations, to study:

- (a) Steps which could be taken to secure the better application of existing humanitarian international conventions and rules in all armed conflicts;
- (b) The need for additional humanitarian international conventions or for other appropriate legal instruments to ensure the better protection of civilians, prisoners and combatants in all armed conflicts and the prohibition and limitation of the use of certain methods and means of warfare⁵¹

Following that resolution a diplomatic conference was convened in 1974 to fill in the lacunae, which had been found to exist in the 1949 Geneva Conventions. The conference reached agreement in 1977 resulting in two Protocols, which were additional to the Geneva Conventions of 1949.⁵² A third protocol known as Additional Protocol III⁵³ was concluded in 2005 to provide for an additional emblem. The four Geneva Conventions of 1949 and the two Additional Protocols 1977 form the bulwark of modern international humanitarian law.

⁵¹ Declaration on Respect of Human Rights in Armed Conflicts, UNGA Res 2444 (1968) GAOR 23rd Session Supp 18, 64.

⁵² The two protocols were, firstly the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 (Additional Protocol I or AP I) and secondly, is the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609 (Additional Protocol II or AP II).

⁵³ The Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (adopted 8 December 2005, entered into force 14 January 2007) (Additional Protocol III or AP III).

2.1.3. Basic Tenets of international humanitarian law

International humanitarian law, also known as the law of armed conflict or *jus in bello* or just humanitarian law, and previously as the law of war, is a body of international rules which seek to mitigate the effects of armed conflict by limiting the means and methods of conducting military operations and also by requiring belligerents to spare civilians and other persons who no longer participate in hostile activities in time of war.⁵⁴ The *raison d'être* of international humanitarian law is to establish minimum standards of human decency on the battlefield.⁵⁵ In that regard this law aspires to prevent outbursts of primitive raw violence that would otherwise result in unwarranted deaths of people, immeasurable damage to property and untold suffering, which is, in most cases, irrelevant for the acknowledged function of a war – to gain military advantage against one's enemy.⁵⁶ Its principles are, in essence, a set of rules generally accepted by a majority of nation-states which embody humanity's standards for the conduct of warfare beyond which is considered excessive brutality unnecessary for the conduct of warfare.

Among its key provisions, the law of armed conflict limits the means of warfare to ensure that an armed conflict does not cause indiscriminate destruction to property and loss of lives. This is what has been described as the principle of military necessity. This principle

⁵⁴ Gabor Rona, 'Interesting times for International Humanitarian Law: Challenges from the "War on Terror"' (Summer/Fall 2003) 27:2 FFWA 55, 70. The terms 'international humanitarian law', 'humanitarian law', 'law of armed conflict', '*jus in bello*' and 'laws of war' are interchangeable. However, the usage of the term 'war' has become somewhat archaic in international law and has gradually been replaced by the term 'armed conflict'. This appears to have been brought about by the changes from the past, in which wars were declared, to the present, in which the facts on the ground are given greater importance over the declarations of the parties to a conflict.

⁵⁵ Hans-Peter Gasser, *International Humanitarian Law: An Introduction* (Henry Dunant Institute, Geneva 1993) 3-4.

⁵⁶ *Ibid* 15-7.

dictates that measures of regulated force not forbidden by international law which are indispensable for securing the prompt submission of the enemy should only be employed with the least possible expenditures of economic and human resources.⁵⁷ Clearly, all weapons cause suffering. What this principle stands for, however, is that combatants ought not to inflict injury upon their enemy beyond that which will disable them from further fighting or such that will make their death inevitable. This principle is important to this discussion inasmuch as it stands for the proposition that, in warfare, a combatant must seek to injure, disable, destroy, or target only those persons and objects which are indispensable to accomplishing the desired end of war – to gain military advantage over ones enemy.⁵⁸ It is, therefore, wrong in the war against international terrorism to seek to inflict unnecessary suffering on those suspected of having committed acts of international terrorism including those who have been convicted of such a crime.

International humanitarian law also requires that any means of warfare adopted by a party to a conflict must only be those that are capable of making a distinction between those who are actively taking part in the conflict and the civilian population and civilian objects.⁵⁹ This is what is known as the principle of discrimination.⁶⁰ The law of armed conflict prohibits indiscriminate weapons.⁶¹ This refers to those weapons that are incapable of being controlled, through design or function, and thus violate this principle because it is reasonably foreseeable that such weapons will cause unlawful excessive

⁵⁷ Ibid 17.

⁵⁸ See the St. Petersburg Declaration (n 29).

⁵⁹ Gasser (n 55) 16.

⁶⁰ Ibid 58.

⁶¹ Ibid 49-52.

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of a regular judicial procedure.⁶⁹ This principle is important to this discussion inasmuch as it stands for the proposition that, in the war against international terrorism, the targets of that war (be it regular soldiers of a recognized government or armed bands or even those suspected of having committed acts of international terrorism) deserve to be treated with dignity and in a manner according to internationally recognized standards when they are captured. Equally, they should be entitled to due process before any punishment is meted to them.

Finally, the principle of proportionality places limitations on the use or method of employing certain weapons.⁷⁰ It requires that injury or damage to legally protected interests such as, noncombatants and non military targets should not be disproportionate to legitimate military advantages to be gained by use of the weapon in the manner employed.⁷¹ For instance, although the law of armed conflict does not require that a weapon's effects be strictly confined to military objectives, it does prohibit the use of weapons when their foreseeable effects of which will result in unlawful disproportionate injury to noncombatant civilians or damage to protected objects.⁷² This principle covers the concept of collateral damage.⁷³ International humanitarian law does not completely restrict the use of weapons so as to prohibit the injury or death of noncombatants, or damage to protected objects such as national monuments, schools, and hospitals.⁷⁴ Rather, customary international law recognizes the inevitability of collateral damage to,

⁶⁹ Ibid.

⁷⁰ Ibid 56.

⁷¹ Ibid.

⁷² Ibid.

⁷³ Ibid 63.

⁷⁴ Ibid.

or destruction of, civilian objects in proximity to valid, lawful, military targets.⁷⁵ This principle is important in so far as it suggests that the US must not carry out reckless bombings and attacks on civilians and civilian objects in its war against international terrorism.

2.1.4. The role of politics of hegemony in the application and development of international humanitarian law

Though the laws and customs of war have been characterized as humanitarian, there is evidence from the earliest times that their rationalization is likely to be found a great deal in self-interest. For instance, some writers have suggested that the practice in war which prohibited the poisoning of wells was probably adopted in order to permit the exploitation of the conquered territories than to spare the lives of the local inhabitants.⁷⁶ Similarly, the prohibition to kill prisoners of war appears to have had for its main objective to guarantee the availability of future slaves.⁷⁷ Other examples are evident in such instances as when troops were instructed 'not to destroy that which would soon be theirs'.⁷⁸ This self-interest motive has been noted to have been a long curious

⁷⁵ Ibid. Article 2 of Convention IX of the Second Hague Peace Conference ((Signed on 18 October, 1907 entered into force on January 26, 1910) 205 CTS 345) codified that principle by permitting the attacking of targets wherever located and listed the lawful targets for that purpose. The Article permitted for the bombardment of Military works, military or naval establishments, depots of arms or war materiel, workshops or plant which could be utilized for the needs of the hostile fleet or army, and the ships of war in the harbour, and further provided that a commander of a naval force could destroy them with artillery, after a summons followed by a reasonable time of waiting, if all other means were impossible, and when the local authorities have not themselves destroyed them within the time fixed.

⁷⁶ Marco Sassoli (n 6 above) 97.

⁷⁷ Ibid 97-8.

⁷⁸ Boyle (n 9).

handmaiden of humanitarianism in the development of the law of war.⁷⁹ Another view goes even further to postulate that the humanitarian rhetoric that has been witnessed over the last century and the present one has not been entirely consistent with the desire of the international community to make war more humane.⁸⁰ On the contrary, it has been suggested that international humanitarian law has for many years been used as a tool to achieve given political interests which are usually along the lines of seeking to dominate those whose interests are not the same as the power or powers using it.⁸¹

To begin with, one may argue that the interest of the West in coming up with legal rules to regulate warfare was informed by the experience of the Thirty Years' War and the two world wars.⁸² During those wars, grave atrocities were committed, which shocked the human conscience and threatened to bring the Western civilization on the brink of extinction.⁸³ The wars were conducted with such barbarity, which threatened the very

⁷⁹ Ibid.

⁸⁰ Stephanie Carvin, 'Caught in the Cold: International humanitarian law and prisoners of war during the cold war' (2006) 11 OJCSL, 1-2. Advance access copy first published online on 8 March 2006 at <jcs.oxfordjournals.org/cgi/content/abstract/kr1005v2> accessed on 17 October 2007.

⁸¹ Ibid 1-3. For the idea of self interest please see Jack L Goldsmith and Eric A Posner, *The Limits of International Law* (Oxford University Press, New York 2005) 3 where it is argued that international law does not check self-interest but instead 'emerges from states acting rationally to maximize their interests, given their perceptions of the interests of other states and the distribution of state power'. Accordingly, it would appear that classical accounts of international law that assume that international law is a powerful and much-needed external limit on states' pursuit of their own short-term interests are simply turning a blind eye to the fact that states violate their legal obligations whenever it suits them to do so. Moreover, the authors argued, that is exactly what states should do. According to them, states have every right to place their sovereign interests first and that in fact, democratic states have an obligation to do so. The authors go on to say that any form of legal globalization that may threaten states' right to govern themselves free from foreign interference will, and ought to be, resisted.

⁸² Ibid 3. See also McHenry Vol. 29 (n 24) 1022-23. The two world wars refer to World War I which was fought between 1914 and 1918 and World War II which was fought between 1939 and 1945. They are so called World Wars because they were wars in which virtually all of the most powerful nations of the world were involved, either on one side or the other, and because they were fought over large areas of the globe, on both land and sea.

⁸³ Ibid. The world wars were unprecedented in their slaughter, carnage, and destruction, as mechanized armies of millions of soldiers destroyed both each other and the territories they were fighting over. It is

existence of the people of Europe. It would, therefore, not be farfetched to say that the Europeans got more interested in international humanitarian law as a tool for self preservation.

Secondly it appears that Europeans used international humanitarian law to fulfil certain political interests.⁸⁴ For example, it has been noted that Allied Forces who were the victors in the Second World War conducted the repatriation of prisoners of war in a manner that did not accord to the international standards, which had already been established at the time.⁸⁵ What happened was that most of the German prisoners of war were treated inhumanely probably as a revenge for their country's role in the wars.⁸⁶ Other times, the prisoners of war were used as pawns in diplomatic games. For instance, the US and some of the Western powers repatriated the prisoners of war against their wishes even when it was known that they would face dire consequences upon return in order to gain some favour from the other Allied powers.⁸⁷

The first clearest indication of the invasion of international humanitarian law by politics was experienced at the 1949 Conference, which was called to review the Geneva

estimated that between 40, 000, 000 – 50, 000, 000 died in World War II alone. Several millions also died in World War I. The money cost to governments involved in World War II has been estimated at more than \$ 1, 000, 000, 000, 000.

⁸⁴ Carvin (n 80) 1-4.

⁸⁵ Carvin (n 80) 3-5. For example Article 20 of the 1907 Hague Convention IV specified that all prisoners were to be released after the conclusion of peace. Further Article 65 of the Geneva Convention II of 1929 specified that repatriation would then take place 'with the least possible delay' after the end of hostilities, even in the absence of a formal treaty but these were not followed after the World War II.

⁸⁶ Carvin (n 80) 3-5.

⁸⁷ Ibid; Jan P Charmatz and Harold M Wit 'Repatriation of Prisoners of War and the 1949 Geneva Convention' (1953) 62 YJL 391.

Conventions of 1929.⁸⁸ The Soviet Union did not send any delegates to any of the preliminary diplomatic conferences that occurred before the 1949 Conference but surprised many when it turned up at the Diplomatic Conference.⁸⁹ One of the key issues on the table concerned indiscriminate bombings.⁹⁰ To the clauses protecting civilians, the Soviet delegation proposed banning ‘all other means of exterminating the civilian population’⁹¹ causing ‘extensive destruction of the [civilian] property’.⁹² It was clear that the Soviets were aiming to ban the atomic bomb, which the US had used in the Second World War.⁹³ The proposal failed to see the light of day due to objections from the US, which sought to protect its new source of power in the atomic bomb.⁹⁴

Another hotly contested issue during the course of the Diplomatic Conference concerned the treatment of prisoners of war.⁹⁵ The Geneva Convention II of 1929 which dealt with prisoners of war contained no provision concerning the punishment of crimes committed by prisoners of war before their capture.⁹⁶ During the war crimes tribunals that followed the Second World War, a number of military personnel being tried had requested to be afforded the protections guaranteed by the Geneva Conventions of 1929 with regard to

⁸⁸ Carvin (n 80) 7.

⁸⁹ Ibid. The Soviet Union had, since its revolution in 1917, treated the International Committee of the Red Cross (ICRC), which was at the forefront of calling for the revision of the Geneva Conventions, with a lot of suspicion as it considered it as a conservative, bourgeois organization that came from a suspiciously neutral country and it always sought to undermine the ICRC’s efforts at every opportunity.

⁹⁰ Ibid 7-8.

⁹¹ Ibid 7.

⁹² Ibid.

⁹³ Ibid.

⁹⁴ Ibid.

⁹⁵ Ibid. The point in dispute was the text that would eventually form article 85 of the Geneva Convention III (n 32 Chap. 1). A discussion on this follows below.

⁹⁶ See arts 41-59 of the Geneva Convention II of 1929 which dealt with the relevant offences and punishment only referred to those acts which were committed during captivity.

judicial proceedings.⁹⁷ The Allies turned down these requests arguing that it was ‘a well-established rule of customary law that those who have violated the laws of war may not avail themselves of the protection which they afford’.⁹⁸ Captured members of enemy armed forces who had committed war crimes could not, therefore, claim the status of prisoners of war. This was the same attitude that the West maintained throughout the preliminary conferences leading up to the 1949 Diplomatic Conference.⁹⁹ This was a dangerous position when it is taken into account that in most countries, proceedings against war criminals were based on special *ad hoc* legislation and not on the regular penal legislation of the countries concerned.¹⁰⁰ That approach seemed also prejudicial to the guilt of an accused person since he was deprived of the protection of the Convention before actually having been found guilty of war crimes.¹⁰¹ The West initially opposed proposals by the International Committee of the Red Cross (ICRC) that prisoners of war should continue to receive all of the benefits of the Convention until their guilt was definitively proven.¹⁰² However, by 1949 the West had changed their mind on the issue and not only agreed with the ICRC position but also proposed to have stronger safeguards put in the law by providing that prisoners of war should continue to enjoy the benefits of the proposed Convention for protection of prisoners of war even after they had been adjudged guilty.¹⁰³ One of the reasons for this change of mind can probably be found in the fact that Western powers were interested in increasing protections for their soldiers in

⁹⁷ Carvin (n 80) 8.

⁹⁸ Ibid.

⁹⁹ Ibid.

¹⁰⁰ Jean Pictet (ed.), *Commentary: III Geneva Convention Relative to the treatment of prisoners of war* (ICRC, Geneva 1960) 413.

¹⁰¹ Ibid 414.

¹⁰² Carvin (n 80) 8.

¹⁰³ Ibid, art 85 of the new Geneva Convention III was therefore submitted to read ‘... Prisoners of war prosecuted under the laws of the Detaining Power for acts committed prior to capture shall retain, even if convicted, the benefits of the present Convention’.

the event of a war against communist nations which was made more likely by the cold war.¹⁰⁴

The Soviet Union took a very different view preferring the original proposal – that prisoners of war were only protected under the convention until after they had been convicted.¹⁰⁵ The Soviet delegation argued that there was no reason why prisoners of war convicted of such crimes should not be treated in the same way as persons serving a sentence for a criminal offence committed in the territory of the detaining power.¹⁰⁶ It appears that it was the Soviets who had consistency on their side. The article was voted on and passed as proposed by the West with the Soviet Union insisting on a reservation.¹⁰⁷

The decolonization process also presented international humanitarian law with yet another quagmire, which was heavily laden with political questions. The colonial powers, which were mainly countries of Western Europe, had for a long time managed to resist the application of international humanitarian law to national liberation and decolonisation movements.¹⁰⁸ The argument advanced for doing so was that the activities taking place

¹⁰⁴ Carvin (n 80) 8.

¹⁰⁵ Ibid.

¹⁰⁶ Ibid.

¹⁰⁷ Ibid. The Soviet insisted on a reservation which was worded as follows:

The Union of Soviet Socialist Republics does not consider itself bound by the obligation, which follows from Article 85, to extend the application of the Convention to prisoners of war who have been convicted under the law of the Detaining Power, in accordance with the principles of the Nuremberg trial, for war crimes and crimes against humanity, it being understood that persons convicted of such crimes must be subject to the conditions obtaining in the country in question for those who undergo their punishment.

¹⁰⁸ Ibid 11.

within the colonies were internal matters, which did not warrant external interference.¹⁰⁹

In retrospect, one can clearly see that the real reason for doing so was to keep their brutal methods of quelling the liberation and decolonisation movements away from the scrutiny of the international community. For this reason, the West was very opposed when the Soviet proposed to have the activities of national and decolonization movements recognized as part of international armed conflicts.¹¹⁰ The Soviet Union argued that any war involving decolonisation or liberation was automatically an international war.¹¹¹

The national liberation wars involved something beyond the traditional internal conflicts. Those conflicts exposed serious gaps in international humanitarian law, which needed to be filled to make the law be able to respond to the challenges of time. In such cases, it was determined that invoking common article 3 of the Geneva Conventions¹¹² could not

¹⁰⁹ Ibid.

¹¹⁰ George Ginsburgs, 'Wars of National Liberation and the Modern Law of Nations – The Soviet Thesis' in Hans Baade (ed.), *The Soviet impact on international law* (Oceana Publications, Inc., Dobbs Ferry, NY 1965) 66, 69.

¹¹¹ Ibid 76-7.

¹¹² Ibid. Art 3 of all the Geneva Conventions of 1949 provide in common terms as follows:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed 'hors de combat' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
 - (b) taking of hostages;
 - (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
 - (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.
- (2) The wounded and sick shall be collected and cared for.

provide the requisite protections as would be the case if the full Conventions were implemented. It was thought prudent by a number of humanitarians to press for the strengthening of humanitarian law in this regard. At the 1957 International Red Cross Conference in New Delhi, the ICRC had proposed a set of draft rules to update the 1949 Conventions to reflect the growth of internal wars taking place throughout the Third World.¹¹³

Western states also strongly opposed moves by Third World and Socialist Countries to elevate wars of self-determination to the status of international armed conflicts because they did not want to extend prisoner of war status to forces fighting for decolonization when captured.¹¹⁴ It was thought that doing so would not only guaranteed a certain standard of treatment for national liberation and anti-colonization fighters but would also afford a respectable international status, which was valuable in wars for hearts and minds.

Political considerations also took the centre stage in the development of international humanitarian law in the 1970s. The laws of war remained caught up in the cold war

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

¹¹³Carvin (n 80) 19. That was contained in a document known as the Draft Rules for the Limitation of the Dangers incurred by the Civilian Population in Time of War, ICRC, Geneva, September, 1956 <http://www.icrc.org/ihl.nsf/INTRO/420?OpenDocument> accessed 22 October 2007.

¹¹⁴Ibid. Art 1(4) of the Protocol extended the application of international humanitarian law to 'armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations'.

ideological divide with protections or claims thereto being increasingly used as tools for claims of legitimacy rather than a form of humanitarian guarantees. To begin with, the objections by the Reagan administration to the work of the 1974 -77 Conferences appear to have been guided by nothing more than the hard line stance taken at the time by the US administration to fight Communism. This is because the US delegation to the Conferences felt that the improved international rules which had been negotiated represented progress in terms of the laws of war.¹¹⁵ However, when President Reagan assumed office in 1981, he took objection to Additional Protocol I arguing that it was fundamentally flawed and would not be sent to the Senate for ratification. His main argument was captured in the following words:

(Additional Protocol I) . . . would give special status to ‘wars of national liberation,’ an ill-defined concept expressed in vague, subjective, politicized terminology. Another provision would grant combatant status to irregular forces even if they do not satisfy the traditional requirements to distinguish themselves from the civilian population and otherwise comply with the laws of war. This would endanger civilians among whom terrorists and other irregulars attempt to conceal themselves. These problems are so fundamental in character that they cannot be remedied through reservations, and I therefore have decided not to submit the Protocol to the Senate in any form . . . It is unfortunate that (Additional)

¹¹⁵ In fact, the Head of the US Delegation to the Conference, Amb George Aldrich argued in a series of articles that the two Additional Protocols represented a ‘new life for the laws of war’, see George H Aldrich, ‘New Life for the Laws of War’, (1981) 75(4) AJIL 764; and ‘a major accomplishment for international law and for human rights’, see George H Aldrich, ‘Some reflections on the origins of the 1977 Geneva Protocols’ in Christopher Swinarski (ed.) *Etudes et essays sur le droit international humanitaire et sur les principes de la Croix-Rouge en l'honneur Jean Pictet/Studies and Essays on international humanitarian law and Red Cross Principles in honour of Jean Pictet* (1984) 129. When the Reagan administration refused to sign and ratify, Aldrich is on record as having expressed his disappointment in this language:

Looking back from 1997, I deeply regret that 20 years ago I did not press, within the executive branch of my government, for prompt submission of the Protocols to the Senate of the United States for advice and consent for their ratification. All but a very few provisions had been adopted in Geneva with the complete support of both the U.S. State and Defence Departments, and I believe President Carter and Secretary Vance would have endorsed them. I failed to realize that, with the passage of time, those in both Departments who had negotiated and supported the Protocols would be replaced by sceptics and individuals with a different political agenda. (See George H Aldrich, ‘Comments on the Geneva Conventions’ (1997) 320 IRRC 508).

Protocol I must be rejected. We would have preferred to ratify such a convention, which as I said contains certain sound elements. But we cannot allow other nations of the world, however numerous, to impose upon us and our allies and friends an unacceptable and thoroughly distasteful price for joining a convention drawn to advance the laws of war. In fact, we must not, and need not, give recognition and protection to terrorist groups as a price for progress in humanitarian law.¹¹⁶

It is apparent that what President Reagan was in fact referring to as ‘terrorists’ were the national liberation movements fighting to free their countries from the yoke of colonialism and oppressive governments.

Further evidence of political considerations defining the development and application of international humanitarian law may be seen in the conduct of the US in relation to the International Criminal Court (ICC).¹¹⁷ From inception, the US voted against the Rome Statute which established the court and has managed to build up a complex legal and political arsenal aimed at guaranteeing that the ICC will never preside, prosecute or judge their nationals, and also any person, whatever his nationality, who works under the American command.¹¹⁸ The American objection was best articulated in the following words:

¹¹⁶ Ronald Reagan, ‘Message to the Senate Transmitting a Protocol to the 1949 Geneva Convention’ 29 January 1987 <http://www.reagan.utexas.edu/archives/speeches/1987/012987B.HTM> accessed 22 October 2007.

¹¹⁷ The International Criminal Court (ICC) was established by the Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90 (the Rome Statute). The Statute was adopted in Rome, Italy by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court hence its name. The ICC was established as a permanent tribunal to prosecute individuals who were charged with genocide, crimes against humanity, war crimes, and the crime of aggression.

¹¹⁸ International Federation of Human Rights, ‘International Criminal Court (ICC) No to American Exceptionalism Under Cover of the War against Terrorism, a Destructive US Offensive against the ICC’ (December 2002) www.fidh.org/justice/rapport/2002/cpi345n8a.pdf accessed 20 October 2007.

(5) Multinational peacekeeping forces operating in a country that has joined the treaty can be exposed to the Court's jurisdiction even if the country of the individual peacekeeper has not joined the treaty. Thus, the treaty purports to establish an arrangement whereby United States armed forces operating overseas could be conceivably prosecuted by the international court even if the United States has not agreed to be bound by the treaty. Not only is this contrary to the most fundamental principles of treaty law, it could inhibit the ability of the United States to use its military to meet alliance obligations and participate in multinational operations, including humanitarian interventions to save civilian lives. Other contributors to peacekeeping operations will be similarly exposed...

(8) Members of the Armed Forces of the United States should be free from the risk of prosecution by the International Criminal Court, especially when they are stationed or deployed around the world to protect the vital national interests of the United States. The United States Government has an obligation to protect the members of its Armed Forces, to the maximum extent possible, against criminal prosecutions carried out by the International Criminal Court.

(9) In addition to exposing members of the Armed Forces of the United States to the risk of international criminal prosecution, the Rome Statute creates a risk that the President and other senior elected and appointed officials of the United States Government may be prosecuted by the International Criminal Court. Particularly if the Preparatory Commission agrees on a definition of the Crime of Aggression over United States objections, senior United States officials may be at risk of criminal prosecution for national security decisions involving such matters as responding to acts of terrorism, preventing the proliferation of weapons of mass destruction, and deterring aggression. No less than members of the Armed Forces of the United States, senior officials of the United States Government should be free from the risk of prosecution by the International Criminal Court, especially with respect to official actions taken by them to protect the national interests of the United States.¹¹⁹

This position by the US is rather surprising when one considers that it had not long before supported the creation of two *ad hoc* tribunals to try persons who committed serious violations of international humanitarian law in the Former Yugoslavia¹²⁰ and those who

¹¹⁹ Ibid. This is set out in Section 2002 of the American Service Members' Protection Act HR 4775 (2 August 2002).

¹²⁰ Following the atrocities committed in the former Yugoslavia, the United Nations Security Council of which the US is a permanent member in exercise of its powers under Chapter VII of the UN Charter resolved to establish an international tribunal known as the International Tribunal for the Prosecution of

had committed Genocide and other serious violations of international humanitarian law in Rwanda.¹²¹ It is quite obvious from this conduct that the US was more interested in looking out for its own interests above the needs of humanity at large.

The influence of politics over international humanitarian law can also be seen in the war on terrorism since 11 September 2001. Since the famous 'war on terrorism' was inaugurated, there have been a number of questions which have been raised concerning the manner in which the US has articulated it. To begin with, there have been allegations of torture not to mention the refusal by the US to allow the application of internationally recognized humanitarian standards in the process.¹²² In March 2002, top officials at the CIA introduced a secret program to detain and interrogate high-profile terror suspects.¹²³ That program authorized controversial, harsh interrogation techniques against people who were in the custody of the US military.¹²⁴ The interrogation techniques which were

Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 vide United Nations Security Council Resolution 827 (25 May 1993) UN Doc S/RES/827. This was achieved through the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (adopted by Security Council on 25 May, 1993) UN Doc S/25704 at 36, annex (1993) (ICTFY).

¹²¹ The ICTFY was followed by a similar tribunal to deal with atrocities, which were committed in the territory of Rwanda, and by Rwandan citizens in the territories of neighbouring countries between 1 January 1994 and 31 December 1994. The Rwandan Tribunal was established by UNSC Res 935 (1 July 1994) and was to be known as the International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States Between 1 January 1994 and 31 December 1994 (ICTR). ICTR was to be regulated by the Statute of the International Tribunal for Rwanda (adopted by UNSC Res 955) UN Doc S/RES/955 (1994).

¹²² Human Rights Watch, 'New Accounts of Torture by US Troops: Soldiers Say Failures by Command Led to Abuse', *Human Rights News* (New York 24 September, 2005) <http://www.hrw.org/english/docs/2005/09/25/usintl11776.htm> accessed 2 November 2007.

¹²³ Sheryl Gay Stolberg, 'Bush Says Interrogation Methods Aren't Torture' *The New York Times* (New York 6 October 2007) <http://www.nytimes.com/2007/10/06/us/nationalspecial3/06interrogate.html?ex=1349323200&en=b9d6ba78961967a2&ei=5090&partner=rssuserland&emc=rss> accessed 2 November 2007.

¹²⁴ Ibid.

applied included shaking and slapping, shackling prisoners in a standing position, keeping them in cold cells and dousing them with water, and water boarding.¹²⁵

There have been over 300 documented cases in which US personnel have, allegedly, abused or killed detainees in Afghanistan, Iraq, and at Guantánamo Bay.¹²⁶ Some allegations were to the effect that:

US forces have used interrogation techniques including hooding, stripping detainees naked, subjecting them to extremes of heat, cold, noise and light, and depriving them of sleep—in violation of the Geneva Conventions and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. This apparently routine infliction of pain, discomfort, and humiliation has expanded in all too many cases into vicious beatings, sexual degradation, sodomy, near drowning, and near asphyxiation. Detainees have died under questionable circumstances while incarcerated.¹²⁷

With all the reported cases only a very small number of US soldiers have so far been prosecuted and even so, most of those prosecuted escaped with very minor sentences.¹²⁸

The reason for that is not hard to find. It may be found in the fact that the Bush administration did not object to that conduct. In fact, it appears that the administration approved of it. Proof of state approval is, firstly, found in the fact that when President Bush was interviewed in October 2007 by *the New York Times*, he had this to say on the

¹²⁵ Ibid.

¹²⁶ See James R Schlesinger and others, *Final Report of the Independent Panel to Review DoD Detention Operations* (Arlington 24 August 2004) 5 (Schlesinger Report).

<http://www.defenselink.mil/news/Aug2004/d20040824finalreport.pdf> accessed 18 October 2007.

¹²⁷ Human Rights Watch, 'US Abuse and Torture of Detainees' (New York 2004) <http://www.hrw.org/campaigns/torture.htm> accessed 2 November 2007. For specific violations in Iraq, see generally International Committee of the Red Cross, *Report of the International Committee of the Red Cross (ICRC) on the Treatment by the Coalition Forces of Prisoners of War and Other Protected Persons by the Geneva Conventions in Iraq during Arrest, Internment and Interrogation* (February 2004). http://download.repubblica.it/pdf/rapporto_crocerossa.pdf.

¹²⁸ Human Rights Watch (n 127).

question of the controversial interrogation methods:

I have put this program in place for a reason, and that is to better protect the American people... And when we find somebody who may have information regarding a potential attack on America, you bet we're going to detain them, and you bet we're going to question them, because the American people expect us to find out information — actionable intelligence so we can help protect them. That's our job.¹²⁹

Vice President Dick Cheney, on his part, said as follows:

We also have to work, though, sort of the dark side, if you will. We've got to spend time in the shadows in the intelligence world. A lot of what needs to be done here will have to be done quietly, without any discussion, using sources and methods that are available to our intelligence agencies, if we're going to be successful. That's the world these folks operate in, and so it's going to be vital for us to use any means at our disposal, basically, to achieve our objective.¹³⁰

On 7 February 2002, President Bush issued a memorandum stating that he had determined that the Geneva Conventions did not apply to the conflict with Al Qaeda and that although they did apply in the conflict with Afghanistan, the Taliban were unlawful combatants and therefore did not qualify for prisoner of war status.¹³¹ The President came to this conclusion based on the advice of senior administration lawyers, led by the former Attorney General (then White House Counsel) Alberto Gonzales.¹³² Mr. Gonzales urged

¹²⁹ Stolberg (n 123).

¹³⁰ Tim Russert, Interview with Dick Cheney, Vice President of the United States of America (Camp David, Maryland 16 September 2001). A transcript of the interview can be viewed at <http://www.whitehouse.gov/vicepresident/news-speeches/speeches/vp20010916.html> accessed on 2 November 2007.

¹³¹ Schlesinger Report (n 126) 6-7.

¹³² Human Rights Watch, 'Official Sanction of Crimes against Detainee' *A Human Rights Watch Report*, [April 2005] www.hrw.org/reports/2005/us0405/3.htm accessed on 13 November 2007. The Human Rights Watch has noted that in a series of legal memoranda written in late 2001 and early 2002 Gonzales and his team helped build the framework for circumventing international law restraints on prisoner interrogation. In particular, these memos argued that the Geneva Conventions did not apply to detainees from the Afghanistan war.

the President to declare the Taliban forces in Afghanistan as well as Al Qaeda outside the coverage of the Geneva Conventions in order to preserve the US's 'flexibility' in the war against terrorism.¹³³ He argued that the war against terrorism, 'in my judgment renders obsolete Geneva's strict limitations on questioning of enemy prisoners'.¹³⁴ Gonzales also warned that US officials involved in harsh interrogation techniques could potentially be prosecuted for war crimes under US law if the Conventions applied.¹³⁵ He said that 'it was difficult to predict with confidence' how US prosecutors might apply the Geneva Conventions' strictures against 'outrages against personal dignity' and 'inhuman treatment' in the future, and argued that by declaring that Taliban and Al Qaeda fighters did not have Geneva Convention protections substantially reduced 'the threat of domestic criminal prosecution'.¹³⁶

A former Assistant Attorney General who eventually became a Federal Appeals Court Judge also gave legal opinions stating that torturing Al Qaeda detainees in captivity abroad could be justified in given circumstances, and that international laws against torture were unconstitutional if applied to interrogations conducted in the war on terrorism.¹³⁷ The memo added that the doctrines of 'necessity and self-defense could

¹³³ Ibid.

¹³⁴ Ibid.

¹³⁵ Ibid. Gonzales was referring to prosecution under the War Crimes Act of 1996 (18 USC Section 2441), which punishes the commission of a war crimes and other serious violations of the laws of war, including torture and humiliating or degrading treatment, by or against a U.S. national, including members of the armed forces.

¹³⁶ Ibid.

¹³⁷ Memorandum by General Jay S Bybee to Alberto R Gonzales, Counsel to the President, memorandum, 'Standards for Conduct of Interrogation under 18 USC Sections 2340-2340A' (August 1, 2002) <http://news.findlaw.com/wp/docs/doj/bybee80102mem.pdf> (This memorandum has since been repudiated by the US government).

provide justifications that would eliminate any criminal liability,¹³⁸ on the part of officials who tortured Al Qaeda detainees.¹³⁹ A few months later, in October 2002, the Guantánamo authorities sent a letter to then Secretary of Defence, Mr. Donald Rumsfeld requesting permission to employ harsher interrogation techniques in order to counter what was described as tenacious resistance by some detainees.¹⁴⁰ On 2 December 2002, Mr. Rumsfeld approved 16 of the requested techniques.¹⁴¹ The approved techniques included measures such as hooding, stress positions, isolation, stripping, deprivation of light, removal of religious items, forced grooming, and use of dogs.¹⁴² Those techniques were later also used in Iraq and Afghanistan where they were regularly applied to detainees.¹⁴³

Apart from issues of torture there were instances in which the US sought to exclude some of the persons who were captured in Afghanistan in its war against international terrorism from any judicial protections afforded in law on account that they were unlawful combatants. Two cases of *Rasul v Bush*¹⁴⁴ and *Al Odah v US*¹⁴⁵ serve to illustrate the point. Rasul was a British citizen while Al Odah was Kuwaiti. Rasul and another British citizen known as Asif Iqbal and Al Odah and 11 other Kuwaitis were captured by the US military in Afghanistan during the hostilities between US and Taliban forces and Al Qaeda. The US military transferred the prisoners to Guantanamo Bay Naval Base, Cuba,

¹³⁸ Ibid.

¹³⁹ Ibid.

¹⁴⁰ Schlesinger Report (n 126) 7.

¹⁴¹ Ibid.

¹⁴² Human Rights Watch (n 132).

¹⁴³ Ibid.

¹⁴⁴ 542 US 466, 124 S Ct 2686 (2004).

¹⁴⁵ 542 US 466, 124 S Ct 2686 (2004).

where they were being held indefinitely as enemy combatants. The Bay is under the control of the US pursuant to a Lease with Cuba. During the period of their captivity they did not have access to counsel, the right to a trial or knowledge of the charges against them for over two years. The detainees, through relatives acting as their next of friends, filed petitions for writs of habeas corpus. The Supreme Court, over the administration's objections, agreed in November 2003 to hear the cases of the Guantánamo detainees.

During arguments, the US government, sought to rely on *Johnsen v Eisentrager*,¹⁴⁶ in urging the Court to find that the US courts did not have jurisdiction over aliens captured abroad and detained at Guantanamo. Although the Supreme Court agreed to side with the Petitioners in those cases¹⁴⁷ the US government continued its practice of advancing constitutional arguments based on a strong view of the President's exclusive authorities as the commander-in-chief.¹⁴⁸ The government had argued that 'exercising jurisdiction over habeas actions filed on behalf of the Guantanamo detainees would directly interfere with the Executive's conduct of the military campaign against Al Qaeda and its supporters'.¹⁴⁹ The government further noted 'the detention of captured combatants . . .

¹⁴⁶ 339 US 763 (1950). In that case, the Supreme Court held that federal courts could not entertain a habeas petition filed on behalf of twenty-one German citizens who had been captured during World War II, tried in military commissions overseas, and incarcerated in a United States military prison in Germany. It was held that 'nothing . . . in (the United States') statutes provided prisoners, captured and detained abroad, a right to habeas review'. Additionally, the Court determined that the Constitution did not provide a prisoner the right to petition for habeas corpus when he '(a) is an enemy alien; (b) has never been or resided in the United States; (c) was captured outside of our territory and there held in military custody as a prisoner of war; (d) was tried and convicted by a Military Commission sitting outside the United States; (e) for offenses against laws of war committed outside the United States; and (f) is at all times imprisoned outside the United States'.

¹⁴⁷ In a ruling on 28 June 2004, the Supreme Court ruled that the US Constitution entitled the detainees to challenge the validity of their detention.

¹⁴⁸ The government continued to proffer that argument in later cases such as *Jose Padilla v Donald Rumsfeld* 256 F Supp 2d 222-23 (SDNY 2003) and *Hamdi v Rumsfeld* 542 US 507, 124 S Ct 2633.

¹⁴⁹ *Rasul* (n 144).

falls squarely within the President's authority as Commander in Chief¹⁵⁰ arguments which the Supreme Court apparently found unconvincing to the point that it totally ignored to address them in any of the opinions given.

The situation has not been any better on the civilian front. According to testimonies from Amnesty International USA's hearings on 'Racial Profiling – Victims' Accounts of Racial Profiling While Traveling through Airports',¹⁵¹ there has been a widely reported increase in racial profiling at airports since September 11, 2001, particularly as it applied to people who appeared to be of Muslim or of South Asian or Middle-Eastern descent.¹⁵² This conduct appears to have extended to the immigration context¹⁵³ and may have in some instances affected the determination of refugee status as those seeking asylum have in the process been exposed to discrimination and had their applications denied in contravention of article 3 of Convention Relating to the Status of Refugees,¹⁵⁴ which requires states to implement the provisions Convention 'without discrimination as to race, religion or country of origin'.¹⁵⁵ Through the same conduct a number of international treaties, declarations and commitments that outlaw discrimination were also breached.¹⁵⁶

¹⁵⁰ Ibid.

¹⁵¹ Amnesty International USA, 'Hearings on Racial Profiling Victims Accounts of Racial Profiling While Traveling through Airports' http://www.amnestyusa.org/racial_profiling/report/airport.html accessed 24 October 2007.

¹⁵² Ibid; Report of Leadership Conference on the Civil Rights Education Fund (LCCREF), *Wrong then, Wrong Now: Racial Profiling Before and After September 11, 2001* http://www.civilrights.org/publications/reports/racial_profiling/racial_profiling_report.pdf accessed 27 September 2007.

¹⁵³ Ibid 15-6.

¹⁵⁴ Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 150 (Refugee Convention of 1951).

¹⁵⁵ Ibid art 3.

¹⁵⁶ For example, art 7 of the UDHR which affirms that all are equal before the law and are entitled to the protection of the law without discrimination. Secondly, the United Nations Declaration on the Elimination of All Forms of Racial Discrimination (1963) which was the precursor to CERD expressed the intention of

The US also stepped up its notorious use of the process known as ‘renditions’¹⁵⁷ after September 11, 2001.¹⁵⁸ Originally the purpose of renditions was to bring suspected foreign criminals, such as drug barons to justice. After September 11, 2001 it has been used by the US predominantly to arrest and detain foreign nationals designated as suspected terrorists and bring them to foreign countries that are willing to hold them indefinitely for further questioning and without public proceedings.¹⁵⁹ Those who do not cooperate are turned over to foreign intelligence services whose practice of torture has

States to eliminate ‘racial discrimination throughout the world, in all its forms and manifestations, and of securing understanding of and respect for the dignity of the human person’. CERD which is the most comprehensive treaty on issues of race lays down in detail the steps required by states to prevent racial discrimination and violence and to foster greater racial harmony. ICESCR emphasizes in art 2 that the rights protected in it shall be exercised without distinction of social status or race. ICCPR which is the main human rights treaty on civil and political rights obliges states in art 2 to guarantee the rights set forth the Covenant ‘without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status’. Art 20 of the same treaty also requires governments to prohibit by law any ‘national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence’. Art 26 of the same treaty goes on to stipulate that all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. Art 6 of the Rome Statute gives the court jurisdiction over acts of genocide of specific national, ethnic, racial or religious groups. UN treaties relating to specific categories of persons can also be used to protect racial and ethnic rights. For example, CEDAW provides that discrimination against women on racial and ethnic grounds may also constitute breaches of this treaty and can be taken up with the Committee on the Elimination of Discrimination against Women. Equally, CRC protects the rights of children from ethnic, religious or linguistic minorities to enjoy their culture and to practice their religion and language. Violations of these rights can be taken up with the UN Committee on the Rights of the Child.

¹⁵⁷ Dana Priest and Barton Gellman, ‘US Decries Abuse but Defends Interrogations “Stress and Duress” Tactics Used on Terrorism Suspects Held in Secret Overseas Facilities’ *Washington Post* (Washington 26 December 2002) Page A1 <http://www.washingtonpost.com/wp-dyn/content/article/2006/06/09/AR2006060901356.html> accessed 5 September 2007; Human Rights Watch Report, ‘Black Hole: The Fate of Islamists Rendered to Egypt, (New York May 25, 2005) <http://hrw.org/reports/2005/egypt0505/> accessed 2 November 2007. The term ‘rendition’ is used to describe the apprehension and extrajudicial transfer of a person from one state to another.

¹⁵⁸ Ibid.

¹⁵⁹ Priest and Gellman (n 157). The writers then note that according to US officials, nearly 3,000 persons suspected of being Al Qaeda members and their supporters have been detained worldwide since September 11, 2001. About 625 were held at the US military’s confinement facility at Guantanamo Bay, Cuba. Some officials estimated that fewer than 100 captives have been rendered to third countries and thousands have been arrested and held with US assistance in countries known for brutal treatment of prisoners.

been documented by the US government and human rights organizations.¹⁶⁰ In some of the renditions there have been reported cases in which those captured and surrendered have been killed or been made to disappear.¹⁶¹

From the above, one can clearly see that in carrying out its war on terror; the US did not care for any other values beyond its desire to crush its perceived enemy. It has conducted that war without any due regard for human rights and humanitarian standards set for protecting the dignity of humanity in time of peace and in time of war. It was official state policy to bend, ignore, or cast aside settled international rules whenever they obscured the administration's agenda. The US policy was to prevail by all means necessary.

¹⁶⁰ Ibid; Human Rights Watch Report (n 157). The countries receiving the rendered suspects are often known human rights violators like Egypt, Syria, Jordan, Saudi Arabia, and Morocco, all of which have histories of using torture and other methods of interrogation that are not legal in the US. The rendition program often ignores local and international extradition laws.

¹⁶¹ Ibid.

CHAPTER THREE

3.1 INTERNATIONAL TERRORISM AND RESPONSES TO IT

3.1.1. A brief history of terrorism

The concept of terrorism as we know it today can be traced back 2000 years ago.¹ The earliest known organization that exhibited aspects of a modern terrorist organization was the Zealots of Judea, which was made of Jewish groups active during the Roman occupation of the first century Middle East.² The Zealots favored a weapon was known as the sica, which was a short dagger and for that reason the Romans called them sicarii, or dagger-men.³ They carried on an underground campaign of assassination of Roman occupation forces, as well as any Jews whom they felt had collaborated with the Romans.⁴ They conducted their killings in broad daylight and in front of witnesses, with the perpetrators using such acts to send a message to the Roman authorities and those Jews who collaborated with them.⁵

The Assassins were the next group to show recognizable characteristics of modern terrorism.⁶ These were an 11th century breakaway faction of Shia Islam called the Nizari

¹ Mark Burgess 'A Brief History of Terrorism' (Center for Defence Information 2 July 2003) <http://www.cdi.org/friendlyversion/printversion.cfm?documentID=1502> accessed 2 November 2007.

² Terrorism Research Center, Inc. 'History of Terrorism' <http://www.terrorism-research.com/incidents/> accessed 4 February 2008.

³ Mark Burgess (n 1).

⁴ Terrorism Research Center (n 2).

⁵ Mark Burgess (n 1).

⁶ Terrorism Research Center (n 2).

Ismailis.⁷ They adopted the tactic of assassination of enemy leaders because the cult's limited manpower prevented open combat.⁸ The Assassins - whose name gave us the modern term but literally meant 'hashish-eater' - a reference to the ritualistic drug-taking they were rumored to indulge in prior to undertaking missions – also used their actions to send a message.⁹ Often, the Assassins' deeds were carried out at religious sites on holy days – a tactic intended to publicize their cause and incite others to it.¹⁰ Like many religiously inspired terrorists today, they also viewed their deaths on such operations as sacrificial and a guarantor that they would enter paradise.¹¹

The other religious group to exhibit early terrorist tendencies was known as the Thugees who bequeathed us the word 'thug'.¹² The Thugees were an Indian religious cult who ritually strangled their victims (usually travelers chosen at random) as an offering to the Hindu goddess of terror and destruction, Kali.¹³ The Thugees were active from the seventh until the mid-19th centuries and are reputed to be responsible for as many as 1 million murders.¹⁴ They were perhaps the last example of religiously-inspired terrorism until the phenomenon reemerged in 1979 when the revolution that transformed Iran into an Islamic republic led it to use and support terrorism as a means of propagating its ideals beyond its own border.¹⁵ That trend was replicated later in other places such as Japan and

⁷ Ibid; Burgess (n 1).

⁸ Terrorism Research Center (n 2).

⁹ Burgess (n 1).

¹⁰ Ibid.

¹¹ Ibid.

¹² Ibid.

¹³ Ibid.

¹⁴ Ibid.

¹⁵ Ibid.

the United States.¹⁶

More secularized motivations for terrorist actions did not emerge until the French Revolution, as did the first usage of the term now used to describe them.¹⁷ Even though these early terrorist like groups operated in antiquity, they are relevant today as forerunners of modern terrorists in aspects of motivation, organization, targeting, and goals.

Although terror and barbarism were widely used in warfare and conflict from the time of the Assassins to the 1700s those acts lacked key ingredients for terrorism. This was probably because the central authority and cohesive society that terrorism attempts to influence barely existed until the rise of the modern nation state after the Treaty of Westphalia in 1648. The other possible reasons that disqualified those acts from the classical definition of terrorism were the fact that communication was inadequate and controlled and the causes that might inspire terrorism as we know it today (religious schism, insurrection, ethnic strife) typically led to open warfare.¹⁸

The French Revolution¹⁹ provided the first uses of the words 'terrorist' and 'terrorism'.²⁰

¹⁶ Ibid. For example in 1995, the Aum Shinrikyo carried out the Sarin attack on the Tokyo subway in Japan and in the same year a religiously motivated bombing was carried out in Oklahoma, in the US culminating with the Al Qaeda attacks of September 11, 2001.

¹⁷ Ibid.

¹⁸ Michael Radu, 'The futile Search for Root Causes of Terrorism' (Commentary and Analysis at American Diplomacy Publishers Chapel Hill NC 16 August 2002 http://www.unc.edu/depts/diplomat/archives_roll/2002_07-09/radu_futile/radu_futile.html accessed 17 October 2007.

¹⁹ Paul Halsall, 'The Internet Modern History Sourcebook' (30 March 2007) <http://www.fordham.edu/halsall/mod/modsbook13.html> accessed 4 October 2007. The French Revolution (1789–1799) was a period of political and social upheaval in the history of France, during which the French

The English word 'terrorism' is derived from the French word '*regime de la terreur*' that prevailed in France from 1793-1794.²¹ Loosely translated the word meant 'regime of terror'.²² Originally an instrument of the state, the regime was designed to consolidate the power of the newly-installed revolutionary government, protecting it from elements considered subversive.²³ The French revolutionary leader, Maximilien Robespierre, viewed it as vital if the new French Republic was to survive its infancy, proclaiming in 1794 that '...terror is nothing other than justice, prompt, severe, inflexible; it is therefore an emanation of virtue; it is not so much a special principle as it is a consequence of the general principle of democracy applied to our country's most urgent needs'.²⁴ Under such justification, some 40,000 people were executed by guillotine - a fate Robespierre and his top lieutenants would themselves suffer when later that same year, his announcement of a new list of subversives led to a counter-inquisition by some in the Revolutionary government who feared their names might be on the latest roll of 'traitors'.²⁵ The agents of the Committee of Public Safety and the National Convention that enforced the policies of 'The Terror' were referred to as 'Terrorists'.²⁶ The French Revolution provided an

governmental structure, previously an absolute monarchy with feudal privileges for the aristocracy and Catholic clergy, underwent radical change to forms based on Enlightenment principles of nationalism, citizenship, and inalienable rights. These changes were accompanied by violent turmoil, including the trial and execution of the king, vast bloodshed and repression during the Reign of Terror, and warfare involving every other major European power. Subsequent events that can be traced to the Revolution include the Napoleonic Wars, two separate restorations of the monarchy, and two additional revolutions as modern France took shape. In the following century, France would be governed variously as a republic, dictatorship, constitutional monarchy, and two different empires.

²⁰ Terrorism Research Center (n 2).

²¹ Mark Burgess (n 1).

²² Ibid.

²³ Ibid.

²⁴ Quoted in Paul Halsall (n 19) 'Modern History Sourcebook Maximilien Robespierre: Justification of the Use of Terror' (30 March 2007) <http://www.fordham.edu/halsall/mod/robespierre-terror.html> accessed 4 October 2007.

²⁵ Mark Burgess (n 1).

²⁶ Terrorism Research Center (n 2).

example to future states in oppressing their populations.²⁷ It also inspired a reaction by royalists and other opponents of the Revolution who employed terrorist tactics such as assassination and intimidation in resistance to the Revolutionary agents.²⁸

The late 19th century was the era of anarchism and with it, anarchist terrorism.²⁹ The period saw the formation of small groups of revolutionaries which were probably inspired by radical political theories of the day and improvements in weapons technology which gave them capacities to effectively attack nation-states.³⁰ Anarchists espousing belief in the 'propaganda of the deed'³¹ produced some striking successes, assassinating heads of state across Europe and the United States.³²

Closely tied with anarchism were the first tides of nationalism which emerged in the late 19th century throughout the world and continued to shape history in the century that followed.³³ Nationalism introduced the concept under which the nation (the identity of a people) and the political state were perceived as combined.³⁴ As states began to

²⁷ Ibid.

²⁸ Ibid.

²⁹ Amy Zalman, 'History of Terrorism: Anarchism and Anarchist Terrorism' <http://terrorism.about.com/od/originshistory/a/Anarchism.htm> accessed 6 October 2007. Anarchism was a late 19th century idea among a number of Europeans, Russians and Americans, that all government should be abolished, and that voluntary cooperation, rather than force, should be society's organizing principle. The word itself comes from a Greek word, 'anarkos' which means "without a chief." The movement had its origins in the search for a way to give industrial working classes a political voice in their societies

³⁰ Terrorism Research Center (n 2).

³¹ Amy Zalman (n 29). Propaganda of the deed was a theory which was informed by a number of late 19th century thinkers who argued that actions, rather than words, were the best way to spread ideas. For some, it referred to communal violence, while by others it referred to assassinations and bombings carried out by anarchists. It was taken up by anarchists to describe assassinations and bombings.

³² Ibid. The anarchists were able to assassinate Tsar of Russia, Alexander II in 1881, the French President, Marie-Francois Sadi Carnot in 1894 and the American President, William McKinley in 1901 among other key notables.

³³ Terrorism Research Center (n 2).

³⁴ Ibid.

emphasize national identities, peoples that had been conquered or colonized could, like the Jews at the times of the Zealots, opt for assimilation or struggle.³⁵

Probably the earliest terrorist group that serves as a model founded on nationalism was the *Narodnya Volya*.³⁶ The *Narodnya Volya* was a Russian Populist group, whose name translated to 'the People's Will'.³⁷ It was formed in 1878 to oppose the Tsarist regime.³⁸ The group's most famous deed was the assassination of Alexander II on March 1, 1881.³⁹ The *Narodnya Volya*'s actions appear to have inspired radicals elsewhere.⁴⁰ Anarchist terrorist groups were particularly enamored of the example set by the Russian Populists.⁴¹ The notion of what is now described as 'state-sponsored terrorism' began to manifest itself long before the outbreak of World War I.⁴² For instance, it is alleged that many officials in the Serbian government and military were somehow involved in supporting, training and arming the various Balkan groups which were active prior to the assassination of the Archduke Franz Ferdinand on June 28, 1914 in Sarajevo – an act carried out by an activist from one such group, the 'Young Bosnians' and credited with setting in progress the chain of events which led to the war itself.⁴³ Similarly, the Internal Macedonian Revolutionary Organization (IMRO) survived largely because it became for all intents and purposes a tool of the Bulgarian government, and was used mainly against

³⁵ Ibid.

³⁶ Mark Burgess (n 1).

³⁷ Ibid.

³⁸ Ibid.

³⁹ Amy Zalman (n 29).

⁴⁰ Mark Burgess (n 1).

⁴¹ Ibid. A number of nationalist groups such as those in Ireland and the Balkans followed in the ways of the *Narodnya Volya* and adopted terrorism as a means towards their desired ends.

⁴² Ibid.

⁴³ Ibid.

Yugoslavia and well as against domestic enemies.⁴⁴

The 1930s saw a fresh wave of political assassinations deserving of the name terrorism.⁴⁵

The interwar years saw the term terrorism increasingly being used to refer to the oppressive measures imposed by various totalitarian regimes, most notably those in Nazi Germany, Fascist Italy and Stalinist Russia.⁴⁶ By the mid-1980s, state-sponsored terrorism reemerged and was the catalyst for the series of attacks against American and other Western targets in the Middle East.⁴⁷ Countries such as Iran, Iraq, Libya and Syria came to be seen as the principal sponsors of terrorism.⁴⁸ More recently, other governments, such as those military dictatorships which ruled some South American countries in recent years, or the current regime in Zimbabwe, have also been open to charges of using such methods as a tool of state.⁴⁹ Falling into a related category, namely state terrorism, were those countries which were alleged to have directly participated in covert acts of what could be described as terrorism.⁵⁰ As evidenced from the events of modern times, State-sponsored terrorism has actually been overshadowed by the reemergence of the religiously inspired terrorist.

The 'total war' practices of all combatants of World War II provided further justification for the 'everybody does it' view of the use of terror and violations of the law of war.⁵¹

⁴⁴ Bruce Hoffman, *Inside Terrorism*, (Columbia University Press, New York 1988) 17.

⁴⁵ Mark Burgess (n 1).

⁴⁶ Ibid.

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ Ibid.

⁵¹ Terrorism Research Center (n 2).

The two world wars caused wide populations to become insensitive to violence and its application as the intensity of the conflict between starkly opposed ideologies led to excesses on the part of all participants.⁵² New weapons and strategies that targeted the enemies' civilian population to destroy their economic capacity for conflict exposed virtually every civilian to the hazards of combatants.⁵³ The major powers' support of partisan and resistance organizations using terrorist tactics was viewed as an acceptance of their legitimacy.⁵⁴ It seemed that civilians had become legitimate targets, despite any rules forbidding it.

The two World Wars also inflamed passions and hopes of nationalists throughout the world, and severely damaged the legitimacy of the international order and governments.⁵⁵ From that time on, nationalism became an especially powerful force in the subject peoples of various colonial empires.⁵⁶ Although dissent and resistance were common in many colonial possessions, and sometimes resulted in open warfare, nationalist identities became a focal point for these actions from then on.⁵⁷

Although these nationalist and anti-colonial groups conducted guerilla warfare, which differed from terrorism mainly in that it tended towards larger bodies of 'irregulars' operating along more military lines they were regularly referred to as terrorists especially

⁵² Ibid.

⁵³ Jessica Stern, *The Ultimate Terrorists* (Harvard University Press, Cambridge 2001) 14. The author in that book argues that in deliberately bombarding civilians as a means of attacking enemy morale, states have resorted to terrorism.

⁵⁴ Ibid. Examples given for this include the Allied strategic bombing campaigns of World War II and the American dropping of atomic bombs on Hiroshima and Nagasaki that ended the Pacific phase of that conflict.

⁵⁵ Terrorism Research Center (n 2).

⁵⁶ Ibid.

⁵⁷ Ibid.

by the colonial states against whom the effort was directed.⁵⁸ Those groups were quick to exploit the burgeoning globalization of the world's media to advance their causes by every available means including acts which in many respects qualified to be designated as terrorist.⁵⁹ Whichever position one takes on the point, it is not in doubt that such groups are worthy of note in any wider understanding of terrorism.

Through the 1960s and 1970s, the numbers of groups that might be described as terrorist swelled to include not only nationalists, but those motivated by ethnic and ideological considerations.⁶⁰ The former included groups such as the Palestinian Liberation Organization and its many affiliates,⁶¹ the Basque ETA,⁶² and the Provisional Irish Republican Army,⁶³ while the latter comprised organizations such as the Red Army Faction⁶⁴ and the Italian Red Brigades.⁶⁵ As with the emergence of modern terrorism

⁵⁸ Mark Burgess (n 1).

⁵⁹ See Bruce Hoffman, (n 44) 65.

⁶⁰ Mark Burgess (n 1).

⁶¹ Ibid. The Palestine Liberation Organization (PLO) is a political and paramilitary organization which was founded by the Arab League in 1964. Its original goal was directed at the destruction of the State of Israel through armed struggle to reclaim Palestine for the Palestinians. It had a number of affiliates that were engaged in a number of terrorist activities over the years. The West and Israel considered the PLO as a terrorist organization for many years and although there have been some changes; the PLO has not been able to fully shrug of that tag to date.

⁶² Ibid. Euskadi Ta Askatasuna Basque or ETA Basque which stands for 'Basque Homeland and Freedom' is an illegal armed Basque nationalist separatist organization. Founded in 1959, it evolved from a group advocating traditional cultural ways to an armed group demanding Basque independence. The group is proscribed as a terrorist organization by both the Spanish and French authorities as well as the European Union as a whole, and the United States.

⁶³ Ibid. The Provisional Irish Republican Army (IRA) is a left-wing Irish republican paramilitary organization that, for a long time, sought to end Northern Ireland's status within the United Kingdom and bring about a United Ireland by force of arms and political persuasion. Since its emergence in 1969, its stated aim has been the overthrow of Northern Ireland and the Republic of Ireland and their replacement by a sovereign socialist all-island Irish state. The organization is classified as a proscribed terrorist group in the United Kingdom and as an illegal organization in the Republic of Ireland.

⁶⁴ Ibid. The Red Army Faction or RAF (German *Rote Armee Fraktion*) (in its early stages commonly known as Baader-Meinhof Group) was one of postwar West Germany's most active and prominent militant left-wing groups which was founded in 1970 and was considered by the West German government as a terrorist group.

almost a century earlier, the United States was not immune from this latest wave, with groups such as the Weathermen⁶⁶ the Black Panther movement.⁶⁷

Like their anti-colonialist predecessors of the immediate post-war era, many of the terrorist groups of this later period readily appreciated and adopted methods that would allow them to publicize their goals and accomplishments internationally.⁶⁸ Forerunners in this were the Palestinian groups who pioneered the hijacking of a chief symbol and means of the new age of globalization – the jet airliner – as a mode of operation and publicity. One such group, Black September,⁶⁹ staged what was, until the attacks on America of September 11, 2001, perhaps the greatest terrorist publicity coup then seen, with the seizure and murder of 11 Israeli athletes at the 1972 Olympic Games.⁷⁰ Such incidents resulted in the Palestinian groups providing the inspiration and in some cases mentorship and training for many of the new generation of terrorists' organizations.

⁶⁵ Ibid. The Red Brigades (*Brigate Rosse* in Italian, often abbreviated as the BR) were a terrorist group formed in Italy in 1970 and its objective was to create a revolutionary state through armed struggle and to separate Italy from the Western alliance.

⁶⁶ Ibid. Weatherman, known colloquially as the Weathermen and later the Weather Underground Organization, was a violent American radical left organization. The group was founded in 1969 by leaders and members who split from the Students for a Democratic Society (SDS). The Weathermen were initially part of the Revolutionary Youth Movement (RYM) within the SDS, splitting from the RYM's Maoists by claiming there was no time to build a vanguard party and that revolutionary war against the United States government and the capitalist system should begin immediately. Their founding document called for the establishment of a 'white fighting force' to be allied with the 'Black Liberation Movement' and other 'anti-colonial' movements to achieve 'the destruction of US imperialism and the achievement of a classless world.

⁶⁷ Ibid. The Black Panther Party (originally the 'Black Panther Party for Self-Defense') was an African-American organization established to promote civil rights and self-defense. It was active in the United States from the mid-1960s into the 1970s.

⁶⁸ Ibid.

⁶⁹ Ibid. The Black September Organization was a Palestinian militant group, founded in 1970. The group's name came from a conflict known as Black September, which began on September 16, 1970, when King Hussein of Jordan declared military rule in response to an attempt by certain Palestinian dissidents to seize his kingdom, resulting in the deaths or expulsion of thousands of Palestinians from Jordan. The BSO began as a small cell of Fatah men determined to take revenge on King Hussein and the Jordanian army.

⁷⁰ Ibid.

The age of modern international terrorism might be said to have begun in 1968 when the Popular Front for the Liberation of Palestine (PFLP) hijacked an El Al airliner en route from Tel Aviv to Rome.⁷¹ While hijackings of airliners had occurred before, this was the first time that the nationality of the carrier, Israeli, and its symbolic value was a specific operational aim.⁷² Also a first was the deliberate use of the passengers as hostages for demands made publicly against the Israeli government.⁷³ Another aspect of this internationalization of terrorism may be found in the cooperation between extremist organizations in conducting terrorist operations. One can trace the cooperative training between Palestinian groups and European radicals back to 1970, and joint operations between the PFLP and the Japanese Red Army (JRA) to 1974.⁷⁴ Since then it would appear that international terrorist cooperation in training, operations, and support has continued to grow, and continues to this day.⁷⁵

3.1.2. Nature of terrorism

Throughout its history terrorism has taken different forms at different times. This was probably dictated by either the availability or convenience of the existing technology.

⁷¹ Terrorism Research Center (n 2).

⁷² Ibid.

⁷³ Ibid.

⁷⁴ Ibid.

⁷⁵ Ibid. Motives range from the ideological, such as the 1980s alliance of the Western European Marxist-oriented groups, to financial, as when the IRA exported its expertise in bomb making as far afield as Colombia

However, the most common incidents of terrorism have been conducted through bombings⁷⁶ and by the use of kidnapping and hostage-taking.⁷⁷ Other incidents have been carried out by way of armed attacks⁷⁸ and assassinations,⁷⁹ arsons and fire bombings⁸⁰ and hijackings and skyjackings.⁸¹

Terrorists use kidnapping and hostage-taking to establish a bargaining position and to elicit publicity.⁸² Kidnapping are usually used to gain terrorists money, release of jailed comrades, and publicity for an extended period.⁸³ Hostage-taking involves the seizure of a facility or location and the taking of hostages.⁸⁴ In these instances, the terrorists' intended target is the audience affected by the hostage's confinement, not the hostage himself.⁸⁵

Armed attacks include raids and ambushes.⁸⁶ Assassinations are usually by unsophisticated or loosely organized terrorist groups and sometimes employed for psychological effect.⁸⁷ Arson and fire bombings are also a common tool of terrorist groups that may not be as well-organized, equipped, or trained as a major terrorist organization.⁸⁸ Arson or firebombing against a utility, hotel, government building, or

⁷⁶ Ibid.

⁷⁷ Ibid.

⁷⁸ Ibid.

⁷⁹ Ibid.

⁸⁰ Ibid.

⁸¹ Ibid.

⁸² Ibid.

⁸³ Ibid.

⁸⁴ Ibid.

⁸⁵ Ibid.

⁸⁶ Ibid.

⁸⁷ Ibid.

⁸⁸ Ibid.

industrial center may be used by a terrorist group to portray an image that the ruling government is incapable of maintaining order.⁸⁹ Hijacking and skyjacking provide terrorists with hostages from many nations and draws heavy media attention and also provides them with mobility to relocate the aircraft to a country that supports their cause as well as providing them with a human shield, making retaliation difficult.⁹⁰

In addition to the acts of violence discussed above, there are also numerous other types of violence that can exist under the framework of terrorism. Terrorist groups may sometimes conduct maiming against their own people as a form of punishment for security violations, defections or informing.⁹¹ Terrorist organizations may also conduct violent robberies and conduct extortions to enable them to raise finances for their actions.⁹² With the coming of the internet terrorists have learnt to use it to disrupt or destroy networks and computers and particularly with the aim to interrupt key government or business-related activities.⁹³

To this day, terrorist attacks using nuclear, biological, and chemical (NBC) weapons have been extremely rare. Due to the extremely high number of casualties that NBC weapons may produce, they are also referred to as weapons of mass destruction (WMD).⁹⁴ However, a number of nations are involved in arms races with neighboring countries

⁸⁹ Ibid.

⁹⁰ Ibid.

⁹¹ Ibid.

⁹² Ibid.

⁹³ Ibid.

⁹⁴ Ibid.

because they view the development of WMD as a key deterrent of attack by hostile neighbors.⁹⁵ It is quite obvious that an increase in the development of WMD also increases the potential for terrorist groups to gain access to them. It is likely that in the future terrorists may be able to gain greater access to WMD because unstable nations or states may fail to safeguard their stockpiles from accidental losses, illicit sales, or outright theft or seizure. Determined terrorist groups can also gain access to WMD through covert independent research efforts or by hiring technically skilled professionals to construct the WMD.

3.1.3. Responses to international terrorism before September 11, 2001

The means that have been adopted by states to deal with the menace of international terrorism has varied over the years. Traditionally, the first alternative which was employed by states in response to international terrorism was the application of their criminal justice systems.⁹⁶ In instances where a state brought its criminal law to play, it was usual for non-state actors such as individuals and groups carrying out attacks without the sponsorship of a state to be treated as common criminals who were dealt with under the criminal laws of the state under whose territory they were found.⁹⁷

In later years, attempts were made, particularly in the US, to seek to hold terrorists or

⁹⁵ Ibid.

⁹⁶ Michael W Reisman 'International legal responses to terrorism' (1999) 22 Hous J Int'l L. <http://www.encyclopedia.com/printable.aspx?id=1G1:60377458> accessed 7 November 2007.

⁹⁷ Ibid. For example, the alleged IRA terrorists in the United States were traditionally tried under the penal system of the US.

perpetrators of terrorist acts liable through the civil courts. One of the earliest actions in which civil remedy was sought in respect of international terrorism was the case of *Smith v Socialist People's Libyan Arab Jamahiriya & Others*.⁹⁸ That was a suit brought against the Government of Libya by the husband of a victim of Pan Am 103, which had been destroyed over Lockerbie, Scotland by persons who were believed to be Libyan agents. Libya successfully argued absence of jurisdiction, in that, *inter alia*, the destruction occurred outside the US and that the US lacked subject matter jurisdiction in the case.⁹⁹ United States courts rejected the claimant's notion that a bomb planted on an American carrier bound for the United States was, in effect, a missile directed at the United States.¹⁰⁰ Similarly, in *Tel-Oren v Socialist People's Libyan Arab Jamahiriya & Others*¹⁰¹ a US Court of Appeal refused to permit the families of victims of a terrorist attack sponsored by Libya to pursue civil remedies in United States courts.¹⁰² Those two cases indicate that success in this regard was initially difficult but more similar cases were to be brought in later years especially following amendments in US law to allow for the

⁹⁸ 886 F Supp 306 (ED NY 1995); *aff'd* 101 F 3d 239 (2d Cir 1996), *cert denied* 520 US 1204 (1997). The *Smith* plaintiffs argued, *inter alia*, that sovereign immunity should be denied to foreign states that were in violation of binding Security Council resolutions, as Libya was for failing to surrender two suspects in the Lockerbie explosion. That argument was rejected by the court because the Foreign Sovereign Immunity Act did '... not contemplate a dynamic expansion whereby FSIA immunity can be removed by action of the UN taken after the FSIA was enacted. Such a contention would encounter a substantial constitutional issue as to whether Congress could delegate to an international organization the authority to regulate the jurisdiction of United States courts. It would take an explicit indication of Congressional intent before we would construe an act of Congress to have such an effect'. The *Smith* case was decided before the effective date of the Antiterrorism and Effective Death Penalty Act of 1996, Pub L 104-132, § 221 (24 April 1996) (codified at 28 USC § 1605(a)(7)) (AEDPA), which revoked the foreign sovereign immunity of certain states designated as sponsors of terrorism. Whether the AEDPA could constitutionally be made retroactive to expand the liability of state defendants in relation to events occurring before its enactment came before the Second Circuit in another installment of the *Lockerbie* cases. See *Rein v Socialist Libyan People's Arab Jamahiriya*, 162 F 3d 748 (2d Cir 1998).

⁹⁹ Terrorism Research Center (n 2).

¹⁰⁰ *Ibid*.

¹⁰¹ 726 F 2d 774, 233 (US App DC 384).

¹⁰² Terrorism Research Center (n 2).

terrorism exception to the Foreign Sovereign Immunities Act.¹⁰³

Beyond the use of national courts, a state may also choose to employ what is known as countermeasures.¹⁰⁴ This mode of response is usually relevant in a situation in which one state is responding to another's use of violence or even armed force, if the act is a single incident, rather than an on-going series.¹⁰⁵ Countermeasures may be taken by the injured state but in the case of universal jurisdiction crimes, any state may take measures.¹⁰⁶

The most common form of countermeasure is economic sanctions.¹⁰⁷ This form of countermeasures was applied by the US following the bomb attacks on airline offices in Rome and Vienna on 27 December, 1985 which killed twenty civilians, including five Americans and injured about eighty others.¹⁰⁸ President Reagan attributed the assaults to

¹⁰³ Foreign Sovereign Immunities Act (FSIA), 28 USC § 1605. For example, in *Price v Socialist People's Libyan Arab Jamahiriya* 389 F 3d 192 (2004 US App) the US Appeals Court for the District of Columbia rejected an application by Libya to dismiss an action brought against it on the basis that the FSIA protected it against being sued in the US courts. The rationale of the Court's decision is found in the fact that the terrorism exception clause allowed for such an action to be brought.

¹⁰⁴ Reisman (n 96). Countermeasures are actions which violate the law but are taken in response to prior violations. Countermeasures are normally applied to force a wrongdoer to provide remedy for his wrong. Appropriate remedies in this mode may include compensation and assurances of non-repetition.

¹⁰⁵ Ibid.

¹⁰⁶ Ibid.

¹⁰⁷ Mary Ellen O'Connell 'Lawful Responses to Terrorism'

<http://jurist.law.pitt.edu/forum/forumnew30.htm> accessed 23 November 2007.

¹⁰⁸ US Department of State, 'Significant Terrorist Incidents, 1961-2003: A Brief Chronology' (March 2004) <http://www.state.gov/r/pa/ho/pubs/fs/5902.htm> accessed 18 October 2007. These attacks were carried out at two airports, one in Rome and another Vienna. They involved four gunmen belonging to the Abu Nidal Organization who attacked the El Al and Trans World Airlines ticket counters at Rome's Leonardo da Vinci Airport with grenades and automatic rifles. Thirteen persons were killed and 75 were wounded before Italian police and Israeli security guards killed three of the gunmen and captured the fourth. Three more Abu Nidal gunmen attacked the El Al ticket counter at Vienna's Schwechat Airport, killing three persons and wounding 30. Austrian police killed one of the gunmen and captured the others.

the Abu Nidal terrorist organization, which was believed to receive support from Libya. Following that incident, President Reagan broke off economic relations with Libya and encouraged other nations to impose economic sanctions.¹⁰⁹ When Pan Am 103 was destroyed by a bomb planted by persons suspected to have been agents of the Libyan government, the UN authorized economic sanctions which the US agreed to pursue instead of employing military response against Libya as it had done in response to the destruction of the Berlin disco.¹¹⁰

Forceful action short of armed force may also be classified as a countermeasure.¹¹¹ Although Article 2(4) of the UN Charter prohibits members from the threat or use of force against the territorial integrity or political independence of another state, it is now clear that states may, in limited cases set out in Article 51, employ armed force in self-defence. The most instructive incident with respect to this particular mode of response continues to be *the Caroline*.¹¹² In 1837, a rebellion against the crown in Canada excited considerable sympathy and acts of support for the Canadian rebels in the United States. The US government tried to limit support for the rebels, but it was not successful given

¹⁰⁹ Reisman (n 96).

¹¹⁰ Ibid.

¹¹¹ O'Connell (n 107). This form of response was very popular with the US in dealing with terrorist activities committed against its nationals or interests abroad. For example, on April 4, 1986 (April 5 in Germany), a bomb exploded in La Belle Discotheque, a nightclub in West Berlin frequented by American GIs, killing three and wounding over 150 others, including fifty to sixty Americans. On April 14, 1986, US fighter planes bombed military and paramilitary targets in Libya, including airfields, intelligence facilities, and terrorist training camps. Similarly, in 1993, President Clinton ordered the bombardment by cruise missile of intelligence headquarters in Baghdad because of an aborted effort by Iraq to assassinate former President Bush on his visit to Kuwait.

¹¹² David B Rivkin Jr, Lee A Casey, Darin R Bartram 'Remember the Caroline!: The doctrine of 'anticipatory self-defense' - more relevant than ever' (1 July 2002) *National Review* http://findarticles.com/p/articles/mi_m1282/is_12_54/ai_87130362 accessed 4 September 2007; (1938) 23 AJIL 82-99.

the very large number of American citizens who supported the rebellion. Ultimately, the insurgency was suppressed and many of the insurgents fled to the United States. In Buffalo, New York, two rebel leaders spoke to large public meetings where they requested that an American force be mounted to assist the rebellion. In December, a large group, made up mainly of Americans, looted the New York State arsenal and created, on Navy Island, a provisional government for the purpose of supporting the Canadian insurrection. These rebels constantly were resupplied with ammunition from the State of New York. *The Caroline* was particularly instrumental in transporting supplies, making at least two trips between Fort Schlosser in New York and Navy Island. With these supplies, the rebels engaged in repeated acts of war-like aggression, both on the Canadian shore and on British boats passing the Island. Before responding to this aggression, the British Lieutenant General tried to discuss the matter with the governor of New York. The dialogue he attempted to initiate, however, received no response. The commander of the British forces on the Canadian side of the river dispatched an expedition to the American side. A force of some eighty men boarded *the Caroline*, which was soon abandoned by its crew and passengers. The British boarding party thereupon set fire to *the Caroline*, cut it loose from the dock, and towed it into the current of the river, where it went over the falls and broke up. At least one American was killed in the action. When the United States Secretary of State protested to the British Ambassador in Washington, one of the key defences which was proffered by the British was that of self-defence and self-preservation. Although the United States continued to press for redress for many years it later had to contend with an apology and has lately, been known to seek to rely on the British claim in *the Caroline* when applying armed force to deal with terrorism

around the world.¹¹³

Many actions taken by states in different scenarios appear to fit in the model of forceful action which has been discussed above. Short of the extended anti-terrorist intervention such as one encounters in Israel's self-styled defense zone in Lebanon, there are many examples of short-term pursuits into the territory of ineffective states in order to evict or interdict terrorists. For example, during the Vietnam War, the North Vietnamese used Cambodian territory for a variety of military purposes. The US employed aerial and ground interventions into Cambodia to contain the situation. In other instances, a state may be able to send agents to apprehend terrorists from another state which refuses to try or extradite them.¹¹⁴ The rationale for this may be found in the assertion that police action

¹¹³ Reisman (n 96). For example when on August 7, 1998, bombs exploded at the US Embassies in Nairobi, Kenya, and Dar es Salaam, Tanzania, killing nearly three hundred people, including twelve Americans. Investigation into the coordinated attacks led US officials to suspect the involvement of Osama bin Laden, a wealthy Saudi expatriate living in Afghanistan, who reportedly had developed an extensive network of terrorists committed to acts of violence against the United States and its nationals. On August 20, 1998, the United States launched seventy-nine Tomahawk cruise missiles against paramilitary training camps in Afghanistan, which were associated with three militant Islamic terrorist groups, including that of bin Laden and against a Sudanese pharmaceutical plant that the United States identified as a chemical weapons facility, which had had ties with bin Laden. President Clinton explained that he had ordered the strikes at targets in Afghanistan and Sudan '...because of the threat they present to our national security'. The United States also notified the UN Security Council of the missile attacks, making arguments redolent of *the Caroline*:

These attacks were carried out only after repeated efforts to convince the Government of the Sudan and the Taliban regime in Afghanistan to shut these terrorist activities down and to cease their cooperation with the bin laden organization. That organization has issued a series of blatant warnings that 'strikes will continue from everywhere' against American targets, and we have convincing evidence that further such attacks were in preparation from these same terrorist facilities. The United States, therefore, had no choice but to use armed force to prevent these attacks from continuing. In doing so, the United States has acted pursuant to the right of self-defence confirmed by Article 51 of the Charter of the United Nations. The targets struck, and the timing and method of attack used, were carefully designed to minimize risks of collateral damage to civilians and to comply with international law, including the rules of necessity and proportionality.

¹¹⁴ A good example here may be found in the case of *United States v Alvarez-Machain*, 504 US 655 (1992). The case arose out of the torture and murder of Enrique Camarena-Salazar, a Drug Enforcement

or incursion is proportional to the wrong of harboring terrorists. This approach may be justified using the *Case Concerning the Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)*,¹¹⁵ in which the ICJ distinguished ‘frontier incidents’ from uses of force in violation of Article 2(4).¹¹⁶ Presumably, the Court was referring to minimal uses of cross-boundary force.¹¹⁷

There have also been a number of efforts at the international level aimed at creating a supportive normative environment for the prevention of terrorism or apprehension of those who have engaged in it. Some of the earliest efforts in this regard can be traced back to 1934 when the League of Nations made proposals for conventions to prevent and punish terrorism in response to a wave of political assassinations which were witnessed during that period. The proposals led to the conclusion of the Convention for the Prevention and Punishment of Terrorism which called for the establishment of an international criminal court neither of which came to aught as they were overshadowed by the events which eventually led to World War II.¹¹⁸ No major effort in this line was to

Administration (DEA) agent operating in Mexico. Twenty-two Mexican nationals were indicted in the United States for the murder, including Dr. Humberto Alvarez-Machain, a Mexican physician who, it was alleged, had assisted Camarena's torturers. When an agreement with a Mexican police official to deliver Alvarez for \$50,000 fell through, Alvarez was seized in Mexico, put on a twin-engine plane and flown to El Paso, where he was arrested. A reward was paid to Alvarez's abductors. The Supreme Court ultimately confirmed US jurisdiction, yet the diplomatic cost to the executive branch was heavy.

¹¹⁵ *Case Concerning the Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* 1986 ICJ Rep 14.

¹¹⁶ Ibid. In trying to distinguish between a frontier incident and an armed attack which is prohibited by art 2(4) of the UN Charter, the Court in that case said that ‘... in customary law, the prohibition of armed attacks may apply to the sending by a State of armed bands to the territory of another States, if such an operation, because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces’.

¹¹⁷ Ibid, paras 194-95

¹¹⁸ Reisman (n 96). Due to the ideological differences that existed at the time on the subject, only one country, India, ratified the agreement.

be undertaken until in 1963 when the Tokyo Convention on Offences and Certain other Acts Committed on Board Aircraft¹¹⁹ was negotiated to deal with acts affecting in-flight safety. Among some of its key provisions include the authorization given to the aircraft commander to impose reasonable measures, including restraint, on any person he has reason to believe has committed or is about to commit an outlawed act, where necessary to protect the safety of the aircraft.¹²⁰ The treaty also imposes an obligation on states parties to take custody of offenders and to return control of the aircraft to its lawful commander.¹²¹

The 1970s saw major conventional initiatives in this field. The Hague Convention for the Suppression of Unlawful Seizure of Aircraft of 1970¹²² made it an offence for any person on board an aircraft in flight to ‘...unlawfully, by force or threat thereof, or any other form of intimidation, [to] seize or exercise control of that aircraft...’¹²³ or to attempt to do so.¹²⁴ The Convention further required parties to it to take measures to make hijackings punishable by ‘severe penalties’¹²⁵ and to ensure parties that have custody of offenders to either extradite the offender or submit the case for prosecution.¹²⁶ Additionally, the Hague Convention imposed an obligation on state parties to assist each other in

¹¹⁹ Convention on Offences and Certain other Acts Committed on Board Aircraft (adopted 14 September 1963, entered into force 4 December 1969) 704 UNTS 219 (Tokyo Convention).

¹²⁰ Ibid, art 6(1).

¹²¹ Ibid, art 11(1).

¹²² Convention for the Suppression of Unlawful Seizure of Aircraft (adopted 1 December 1970, entered into force 14 October 1971) 60 UNTS 105 (Hague Convention).

¹²³ Ibid art 1(a).

¹²⁴ Ibid.

¹²⁵ Ibid, art 2

¹²⁶ Ibid, arts 4(1) and 7.

connection with criminal proceedings brought under it.¹²⁷

The Hague Convention was closely followed in 1971 by the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation¹²⁸ which made it an offence for any person unlawfully and intentionally to perform an act of violence against a person on board an aircraft in flight, if that act was likely to endanger the safety of the aircraft; to place an explosive device on an aircraft; to attempt such acts; or to be an accomplice of a person who performs or attempts to perform such acts.¹²⁹ The Montreal Convention also requires state parties to it to make offences punishable by 'severe penalties'¹³⁰ and also requires parties that have custody of offenders to either extradite the offender or submit the case for prosecution.¹³¹

In 1972, the UN Secretary General initiated legal efforts with a view towards the conclusion of a comprehensive treaty banning terrorism.¹³² However, those efforts were undermined in their initial stages due to ideological differences on the question between the West and third world countries that made up the bulwark of the Non Aligned

¹²⁷ Ibid, art 10.

¹²⁸ Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (signed 23 September 1971, entered into force 26 January 1973) 974 UNTS 177 (Montreal Convention)

¹²⁹ Ibid, art 1 (1) and (2).

¹³⁰ Ibid, art 3.

¹³¹ Ibid, arts 5 and 7.

¹³² UNGA 'Report of the Ad Hoc Committee on International Terrorism' UN GAOR 28th Session Supp No 28 UN Doc A/9028 (1973).

Movement (NAM).¹³³ The result of the stalemate was that no binding rules were to be made for a number of years so that the only guiding principles consisted of nonbinding recommendations made by an ad hoc committee established by the United Nations admonishing states, in general terms, to 'refrain from ... terrorist acts in another State....'¹³⁴ which was to be followed by a General Assembly Resolution with similar wording in 1985 calling on all states to:

...refrain from organizing, instigating, assisting or participating in terrorist acts in other States, or acquiescing in activities within their territory directed towards the commission of such acts.¹³⁵

The same Resolution went on to urge member states:

...to co-operate with one another more closely, especially through the exchange of relevant information concerning the prevention and combating of terrorism, the apprehension and prosecution or extradition of the perpetrators of such acts, the conclusion of special treaties and/or the incorporation into appropriate bilateral treaties of special clauses, in particular regarding the extradition or prosecution of terrorists.¹³⁶

¹³³ Reisman (n 96). The Non-Aligned Movement (NAM) consists of states which consider themselves not formally aligned with or against any major power bloc. It was founded in April 1955 and as of 2007, it had 118 members. The purpose of the organization as stated in the Havana Declaration of 1979 is to ensure 'the national independence, sovereignty, territorial integrity and security of non-aligned countries' in their 'struggle against imperialism, colonialism, neo-colonialism, racism, Zionism, and all forms of foreign aggression, occupation, domination, interference or hegemony as well as against great power and bloc politics'.

¹³⁴ Report of the Ad Hoc Committee on International Terrorism (n 125).

¹³⁵ UNGA 'Measures to prevent international terrorism which endangers or takes innocent human lives or jeopardizes fundamental freedoms and study of the underlying causes of those forms of terrorism and acts of violence which lie in misery, frustration, grievance and despair and which cause some people to sacrifice human lives, including their own, in an attempt to effect radical changes' UNGA Res 40/61(9 December 1985) UN Doc A/RES/40/1003.

¹³⁶ Ibid.

These General Assembly efforts were in line with Resolution 2625 of 1970,¹³⁷ which sought to codify fundamental principles of international law on friendly relations among states to the effect that:

Every state has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force.¹³⁸

Due to the fundamental fault-line in the international political topography discussed above, a series of conventions were produced for specific crimes. To begin with, the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents¹³⁹ which was negotiated in 1973 required all state parties to criminalize and make punishable the intentional murder, kidnapping or other attack upon the person or liberty of an internationally protected person, a violent attack upon the official premises, the private accommodations, or the means of transport of such person; a threat or attempt to commit such an attack; and an act ‘constituting participation as an accomplice’.¹⁴⁰ Another important treaty of this period was the International Convention against the Taking of Hostages of 1979¹⁴¹ which provided that ‘...any person who seizes or detains and threatens to kill, to injure, or to continue to detain another person in order to compel a third party, namely, a State, an

¹³⁷ Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations, UNGA Res 2625 (XXV) (24 Oct 1970).

¹³⁸ Ibid.

¹³⁹ Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents (adopted 14 December 1973, entered into force 20 February 1977) 1035 UNTS 167 (Diplomats and Internationally Protected Persons Convention).

¹⁴⁰ Ibid, art 2(2).

¹⁴¹ International Convention against the Taking of Hostages (adopted 17 December 1979, entered into force 3 June 1983) 1316 UNTS 205 (the Hostage Convention).

international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offence of taking of hostage within the meaning of this Convention',¹⁴² which is criminalized and punishable.¹⁴³

The decade which followed also saw important developments in the area of normative law which was majorly informed by the new threat of nuclear terrorism. The Convention on the Physical Protection of Nuclear Material ¹⁴⁴ was concluded to criminalize the unlawful possession, use, transfer or theft of nuclear material and threats to use nuclear material to cause death, serious injury or substantial damage to property.¹⁴⁵

In 1988 the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation ¹⁴⁶ was concluded as a supplementary to the Montreal Convention by extending its reach to acts of violence in airports serving international civil aviation.¹⁴⁷ In the same year the Convention for the Suppression of

¹⁴² Ibid, art 1(1).

¹⁴³ Ibid, art 2 requires state parties to make the offences set out in the Convention punishable with appropriate penalties which should take into account the grave nature of the offences.

¹⁴⁴ Convention on the Physical Protection of Nuclear Material (adopted 26 October 1979, entered into force 8 February 1987) 1456 UNTS 101 (Nuclear Materials Convention).

¹⁴⁵ Ibid, art 7(1).

¹⁴⁶ Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation (adopted 24 February 1988, entered into force 6 August 1989) 27 ILM 627 (1988) (Protocol to Montreal Convention).

¹⁴⁷ Ibid, art 1.

Unlawful Acts against the Safety of Maritime Navigation ¹⁴⁸ was concluded to deal with unlawful acts which threatened the safety of ships and the security of their passengers and crew. That latest treaty established a legal regime applicable to acts against international maritime navigation that is similar to the regimes established for international aviation which has been discussed above. That was because navigation security had become a major concern of the 1980s, with reports of crews being kidnapped, ships being hijacked, deliberately run aground or blown up by explosives and passengers being threatened and sometimes killed.¹⁴⁹

The Marine Navigation Convention made it an offence for a person unlawfully and intentionally to seize or exercise control over a ship by force, threat, or intimidation; to perform an act of violence against a person on board a ship if that act was likely to endanger the safe navigation of the ship; to place a destructive device or substance aboard a ship; and other similar offensive acts against the safety of ships.¹⁵⁰

In that same year the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf ¹⁵¹ was adopted. Just like the Maritime Navigation Convention, the Protocol on Platforms on the Continental Shelf established a

¹⁴⁸ Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (signed 10 March 1988, entered into force 1 March 1992) 1678 UNTS 221 (Maritime Navigation Convention).

¹⁴⁹ Reisman (n 90).

¹⁵⁰ Maritime Convention (n 144) art 3.

¹⁵¹ Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (adopted 10 March 1988, entered into force 1 March 1992) 1678 UNTS 304 (Protocol on Platforms on the Continental Shelf).

legal regime applicable to acts against fixed platforms on the continental shelf that is similar to the regimes established against international aviation. It provided that it was an offence for any person to unlawfully and intentionally seize or exercise control over a fixed platform by force or threat thereof or any other form of intimidation.¹⁵² The Protocol also provided that it was an offence for any person to perform any act of violence against a person on board a fixed platform if that act was likely to endanger the safety of the platform; or would destroy a fixed platform or cause damage to it which was likely to endanger its safety; or placed or caused to be placed on a fixed platform, by any means whatsoever, a device or substance which was likely to destroy that fixed platform or likely to endanger its safety.¹⁵³

In the aftermath of the 1988 Pan Am flight 103 bombing the Convention on the Marking of Plastic Explosives for the Purpose of Detection ¹⁵⁴ was concluded in 1991 with the intention of controlling and limiting the used of unmarked and undetectable plastic explosives. Generally speaking, the Plastic Explosives Convention obligated all state parties to ensure effective control over unmarked plastic explosives in their respective territories. Accordingly, each party must, inter alia, take necessary and effective measures to prohibit and prevent the manufacture of unmarked plastic explosives; prevent the movement of unmarked plastic explosives into or out of its territory; exercise strict and effective control over possession and transfer of unmarked explosives made or imported

¹⁵² Ibid, art 2(1) (a).

¹⁵³ Ibid, art 2(1) (b).

¹⁵⁴ Convention on the Marking of Plastic Explosives for the Purpose of Detection (adopted 1 March 1991, entered into force 21 June 1998) 30 ILM 721 (1998) (Plastic Explosives Convention).

prior to the entry into force of the Convention; ensure that all stocks of unmarked explosives not held by the military or police are destroyed, consumed, marked, or rendered permanently ineffective within three years; take necessary measures to ensure that unmarked plastic explosives held by the military or police are destroyed, consumed, marked or rendered permanently ineffective within fifteen years; and, ensure the destruction, as soon as possible, of any unmarked explosives manufactured after the date of entry into force of the Convention for that State.¹⁵⁵

The mid to late 1990s saw other important developments at the international level to deal with terrorism. After several attempts there was a qualitative change in ideological differences leading to the 1994 Declaration on Measures to Eliminate International Terrorism¹⁵⁶ which declared:

1. The States Members of the United Nations solemnly reaffirm their unequivocal condemnation of all acts, methods and practices of terrorism, as criminal and unjustifiable, wherever and by whomever committed, including those which jeopardize the friendly relations among States and peoples and threaten the territorial integrity and security of States;
2. Acts, methods and practices of terrorism constitute a grave violation of the purposes and principles of the United Nations, which may pose a threat to international peace and security, jeopardize friendly relations among States, hinder international cooperation and aim at the destruction of human rights, fundamental freedoms and the democratic bases of society;
3. Criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the

¹⁵⁵ Ibid, arts III and IV.

¹⁵⁶ Declaration on Measures to Eliminate International Terrorism, UNGA Res 51/210 (LXXXVIII) (17 Dec 1996).

considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them;

4. States, guided by the purposes and principles of the Charter of the United Nations and other relevant rules of international law, must refrain from organizing, instigating, assisting or participating in terrorist acts in territories of other States, or from acquiescing in or encouraging activities within their territories directed towards the commission of such acts.¹⁵⁷

That Declaration was accompanied by a request to the Secretariat to study the way terrorism was treated in national laws and treaties and went on to establish an ad hoc committee to:

...elaborate an international convention for the suppression of terrorist bombings and, subsequently, an international convention for the suppression of acts of nuclear terrorism, to supplement related existing international instruments, and thereafter to address means of further developing a comprehensive legal framework of conventions dealing with international terrorism¹⁵⁸

The 1997 International Convention for the Suppression of Terrorist Bombings¹⁵⁹ was the first result of that Declaration. The latest treaty represented a sea-change, for it criminalized, for the first time, a general technique, which it explicitly insulated from characterization 'as a political offence or as an offence connected with a political offence or as an offence inspired by political motives'.¹⁶⁰ It created a regime of universal jurisdiction over the unlawful and intentional use of explosives and other lethal devices in, into, or against various defined public places with intent to kill or cause serious bodily

¹⁵⁷ Ibid.

¹⁵⁸ Declaration on Measures to Eliminate International Terrorism

¹⁵⁹ International Convention for the Suppression of Terrorist Bombings (adopted 15 December 1997, entered into force 23 May 2002) UN Doc A/RES/52/164 (Terrorists Bombings Convention).

¹⁶⁰ Ibid, art 11.

injury, or with intent to cause extensive destruction of the public place.¹⁶¹

The Terrorists Bombings Convention was closely followed by the International Convention for the Suppression of the Financing of Terrorism¹⁶² which was concluded in 1999 to deal with the question of financing of terrorism. It required parties to take steps to prevent and counteract the financing of terrorists, whether direct or indirect, through groups claiming to have charitable, social or cultural goals or which also engage in illicit activities such as drug trafficking or gun running.¹⁶³ It also committed States to hold those who finance terrorism criminally, civilly or administratively liable for such acts and went on to provide for the identification, freezing and seizure of funds allocated for terrorist activities, as well as for the sharing of the forfeited funds with other States on a case by case basis.¹⁶⁴

Similarly, a number of international conventions which were concluded before September 11, 2001 have had as their main focus the need to limiting terrorists' access to highly dangerous materials through various forms of regulation. For example, the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction¹⁶⁵ and the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin

¹⁶¹ Ibid, art 2.

¹⁶² International Convention for the Suppression of the Financing of Terrorism (adopted 9 December 1999, entered into force 10 April 2000) UN DocA/RES/54/109 (Terrorists Financing Convention).

¹⁶³ Ibid, art 2.

¹⁶⁴ Ibid, arts 4-8.

¹⁶⁵ Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction (signed 13 January 1993 entered into force on 29 April 1997) 32 ILM 800 (1993) (Chemical Weapons Convention).

Weapons¹⁶⁶ have as their aim to reduce and regulate chemical and biological weapons in a manner that would ensure that they do not land into the hands of terrorists.

Cooperation between limited numbers of states sharing a certain community of interest has also been a useful tool for countering terrorism. For example, Article K 1(9) of the Treaty on the European Union¹⁶⁷ provides for 'police cooperation for the purposes of preventing and combating terrorism, unlawful drug trafficking, and other serious forms of international crime, including customs cooperation in connection with a Union-wide system for exchanging information with a European Police Office (Europol)'.¹⁶⁸ Further, the sharing of intelligence within North Atlantic Treaty Organization (NATO) and memoranda of understanding between the intelligence agencies of its members, has led to concerted international action in anticipation of terrorism.¹⁶⁹

Other treaties such as the Arab Convention on the Suppression of Terrorism,¹⁷⁰ the

¹⁶⁶ Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons (signed 10 April 1972 entered into force on 25 March 1975) 1015 UNTS 163 (Biological Weapons Convention).

¹⁶⁷ Treaty on the European Union 2002 OJ 325.

¹⁶⁸ Ibid.

¹⁶⁹ But even states with apparently converging or complementary interests in the suppression of terrorism and intricate networks of treaty relationships may not agree on action in concrete situations. A good example can be seen in the *Achille Lauro* incident. The *Achille Lauro* was a passenger liner. It was hijacked on October 7, 1985, by four men representing the Palestine Liberation Front (PLF) who took control of the liner off the Alexandria in Egypt as she was sailing to Port Said in the same country. The hijackers held the passengers and crew hostage and ordered the vessel to sail to Tartus, Syria. They also demanded the release of 50 Palestinians then in Israeli prisons. After being refused permission to dock at Tartus, the hijackers murdered one wheelchair-bound passenger – an American named Leon Klinghoffer – because he was Jewish, and threw his body overboard. The ship headed back towards Port Said, and after two days of negotiations the hijackers agreed to abandon the liner for safe conduct and were flown towards Tunisia aboard an Egyptian commercial airliner. When President Reagan ordered US forces to seize Abu Abbas, the architect of the *Achille Lauro* terrorist action, and US planes forced the Egyptian plane carrying him down in Italy, Italian troops protected him and Italy ultimately allowed him to proceed to Yugoslavia.

¹⁷⁰ Arab Convention on the Suppression of Terrorism signed at a meeting held at the General Secretariat of the League of Arab States in Cairo on 22 April 1998 AI Index IOR 51/001/2002, January 9, 2002, <http://web.amnesty.org/library/print/ENGIOR510012002> accessed April 21, 2007.

Convention of the Organization of the Islamic Conference on Combating International Terrorism,¹⁷¹ the European Convention on the Suppression of Terrorism,¹⁷² the Organization of American States (OAS) Convention to Prevent and Punish Acts of Terrorism Taking the Form of Crimes against Persons and Related Extortion that are of International Significance,¹⁷³ the Organization of African Unity (OAU) Convention on the Prevention and Combating of Terrorism,¹⁷⁴ OAU Convention for the Elimination of Mercenaries in Africa,¹⁷⁵ the South Asian Association for Regional Cooperation (SAARC) Convention on Suppression of Terrorism,¹⁷⁶ and the Treaty on Cooperation among States Members of the Commonwealth of Independent States in Combating Terrorism,¹⁷⁷ have also been important tools for dealing with terrorism at the regional level.

3.1.4. Responses to international terrorism after September 11, 2001

Apart from the use of armed force to deal with the question of international terrorism as discussed generally in this paper, there have been other normative measures which have

¹⁷¹ Convention of the Organization of the Islamic Conference on Combating International Terrorism adopted at Ouagadougou on 1 July 1999.

¹⁷² European Convention on the Suppression of Terrorism (adopted 27 January 1977 entered into force on 4 August 1978) 1015 UNTS 163.

¹⁷³ OAS Convention to Prevent and Punish Acts of Terrorism Taking the Form of Crimes against Persons and Related Extortion that are of International Significance concluded at Washington, DC on 2 February 1971.

¹⁷⁴ OAU Convention on the Prevention and Combating of Terrorism adopted at Algiers on 14 July 1999 OAU Doc AHG/Dec 132 (XXXV) 1999.

¹⁷⁵ OAU Convention for the Elimination of Mercenaries in Africa O.A.U Doc CM/433/Rev L, Annex 1(1972).

¹⁷⁶ SAARC Regional Convention on Suppression of Terrorism signed at Kathmandu on 4 November 1987.

¹⁷⁷ Treaty on Cooperation among States Members of the Commonwealth of Independent States in Combating Terrorism done at Minsk on 4 June 1999.

been undertaken by various nations after September 11, 2001 both at the regional and global level to combat the menace.

Following the events of September 11, 2001 the members of the Organization of American States concluded the Inter-American Convention against Terrorism¹⁷⁸ with the purpose to prevent, punish, and eliminate terrorism. State Parties to that Convention agreed to institute a legal and regulatory regime to prevent, combat, and eradicate the financing of terrorism; to cooperate on border controls; to afford one another the greatest measure of expeditious mutual legal assistance, extradition and cooperative training.¹⁷⁹ Similar efforts were achieved in Europe through Council of Europe Convention on the Prevention of Terrorism¹⁸⁰ and the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism.¹⁸¹

On 8 July 2005 a Conference of States Parties to the Nuclear Materials Convention reached consensus to amend that Convention in order to strengthen its requirements for protection of nuclear material, and to extend protection to nuclear facilities and nuclear

¹⁷⁸ Inter-American Convention against Terrorism 42 ILM 19 (2003) adopted on 3 June 2002 entered into force on 10 July 2003).

¹⁷⁹ See generally *ibid.*

¹⁸⁰ Council of Europe Convention on the Prevention of Terrorism adopted at Warsaw on 16 May 2005.

¹⁸¹ Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (adopted at Warsaw on 16 May 2005) ETS No 198.

material in domestic use, storage and transport.¹⁸² The Amendments sought to ensure that all State Parties would apply thorough and systematic measures to protect their domestic nuclear activities against criminal or terrorist attack.¹⁸³ New offences were also introduced in relation to the trafficking of nuclear material; the sabotage of nuclear facilities with intent to cause death, injury or damage by exposure to radiation or radioactive substances; acts of organizing or directing others to commit proscribed acts under the Convention; and acts of contributing to the commission of other offences to commit proscribed acts under the Convention.¹⁸⁴ Further amendments specifically excluded offences set out in the Convention from the ambit of political offences and thereby allowed for easy extradition and mutual legal assistance in dealing with the offences under it.¹⁸⁵ Generally, those amendments placed a legal obligation on all state parties to protect nuclear facilities and material in peaceful domestic use, storage as well as transport; and went on to provide for expanded cooperation between and among States regarding rapid measures to locate and recover stolen or smuggled nuclear material, mitigate any radiological consequences or sabotage, and prevent and combat related offences.

¹⁸² For example art 2A of the amendment requires States Parties to establish and maintain a physical protection regime to protect nuclear material against theft, to rapidly recover any missing or stolen nuclear material, to protect nuclear material and nuclear facilities against sabotage, and to mitigate or minimize the radiological consequences of any such sabotage. The same Article establishes a series of fundamental principles to be applied as part of such a regime.

¹⁸³ For example, art 5 of the Convention was amended to strengthen cooperation amongst States Parties in case of actual or threatened theft of nuclear material or sabotage of nuclear material or a nuclear facility. The new art 5 requires States Parties to inform any other State if it has knowledge of a credible threat of sabotage of nuclear material or a nuclear facility in that other State or there has been an act of sabotage of nuclear material or a nuclear facility in the State Party which is likely to radiologically affect that other State.

¹⁸⁴ Ibid, art 7

¹⁸⁵ Art 11A. However, Art 11B provides that there shall be no obligation to extradite or to afford mutual legal assistance if the requested State Party has substantial grounds for believing that the request for extradition, or for mutual legal assistance, for offences set forth in Article 7 has been made for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality, ethnic origin or political opinion.

As concerns maritime safety efforts were also made in 2005 through the Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation¹⁸⁶ to criminalize the use of a ship as a device to further an act of terrorism;¹⁸⁷ the transportation on board a ship various materials knowing that they are intended to be used to cause, or in a threat to cause, death or serious injury or damage to further an act of terrorism;¹⁸⁸ the transporting on board a ship of persons who have committed an act of terrorism;¹⁸⁹ and introduced procedures for governing the boarding of a ship believed to have committed an offence under the Convention.¹⁹⁰

Finally, on 13 April, 2005 the UN General Assembly adopted by consensus the International Convention for the Suppression of Acts of Nuclear Terrorism.¹⁹¹ The latest Convention was designed to address issues of unlawful possession or use of nuclear devices or materials by non-state actors. The Convention calls on states to develop appropriate legal frameworks criminalizing nuclear terrorism-related offenses, investigate alleged offenses, and, as appropriate, arrest, prosecute, or extradite offenders.¹⁹² It also calls for international cooperation with nuclear terrorism investigations and prosecutions, through information-sharing, extradition and the transfer of detainees to assist with

¹⁸⁶ Protocol OF 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (done 14 October 2005 not yet entered in force).

¹⁸⁷ Ibid, art 5.

¹⁸⁸ Ibid.

¹⁸⁹ Ibid, art 6

¹⁹⁰ Ibid, art 8.

¹⁹¹ International Convention for the Suppression of Acts of Nuclear Terrorism (adopted 13 April 2005, entered into force 7 July 2007) UNGA Res 10340 (LIX) (13 April 2005) (Nuclear Terrorism Convention).

¹⁹² Ibid, art 6.

foreign investigations and prosecutions.¹⁹³ With its focus on the investigation and prosecution of individuals, the Nuclear Terrorism Convention also addresses to a limited extent the treatment of detainees.¹⁹⁴

¹⁹³ Ibid, art 7.

¹⁹⁴ Ibid arts, 10 and 11.

CHAPTER FOUR

4.1 INTERNATIONAL HUMANITARIAN LAW CONFRONTS THE WAR AGAINST INTERNATIONAL TERRORISM

4.1.1. Applicability of international humanitarian law in the war against international terrorism

In conformity with the tenets of the Westphalian system, state practice and *opinio juris* show that states have been reluctant to extend the application of international humanitarian law to conflicts between them and non state actors whether those be individuals, disorganized armed bands and even organized armed groups with proper commands. The consequence of this is that states have always sought to distinguish between conflicts against one another, to which the whole of international humanitarian law applied, and other armed conflicts, to which they were never prepared to apply those same rules. Even following the successes made in the later part of the 1970s to incorporate national liberation movements fighting against the yoke of colonialism in the purview of the relevant law, states were only prepared to allow the application of more limited humanitarian rules.¹ It was, therefore, not completely surprising when the US sought to exclude the application of humanitarian standards in certain instances in its fight against global terrorism.²

¹ Muzaffer Yasin Aslan 'The Role of International Criminal Law in the Global War on Terrorism' (2005) 2 Ankara Law Review 1, 7.

² Ibid 8-9.

Unfortunately, as was bound to happen, some of those who have been affected by such an approach have been innocent people who were caught in the middle of that war. One may be able to see that one of the immediate and direct consequences of the degradation of humanitarian standards in this manner was that human civilization was demeaned in a manner that would amount to playing into the hands of the terrorists who seek to destroy the rule of law and order in human affairs. A strong proposal is made in this paper to the effect that international humanitarian law presents one of the most important tools of fighting international terrorism without weakening the structures of human civilization. Following now is a brief discussion on the applicability of international humanitarian law in the war against global terrorism.

To begin with international humanitarian law by definition is the law which is applicable in any instance where there is armed conflict.³ Its application does not, at least in law, depend on the will of any of the parties.⁴ What amounts to an 'armed conflict' within the contours of the Geneva Conventions was defined in the case of *Prosecutor v Tadic*.⁵ In that case, the Appellant who had been charged in the International Criminal Tribunal for the Former Yugoslavia challenged the jurisdiction of the Tribunal on the ground, among others, that it did not have subject-matter jurisdiction. The Appellant based his argument

³ Derek Jinks, 'September 11 and the Laws of War' (2003) 28 YALE J INT'L L 1, 21.

⁴ Ibid 10. See particularly Art 2 common to the four Geneva Conventions of 1949 which provides as follows:

In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting party, even if the said occupation meets with no armed resistance.

⁵ *Prosecutor v. Tadic* (Appeal on Jurisdiction) ICTY-94-1-AR72 (2 October 1995).

on the claim that the subject-matter jurisdiction under Articles 2, 3 and 5 of the Statute of the International Tribunal was limited to crimes committed in the context of an international armed conflict. Before the Trial Chamber, Appellant claimed that the alleged crimes, even if proven, were committed in the context of an internal armed conflict. On appeal he put forward an additional argument to the effect that there was no armed conflict at all in the region where the crimes were allegedly committed. That submission was overruled in the following words:

...armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal armed conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.⁶

From that analysis, one can say that when the US decided to invade Afghanistan and Iraq in order to either root out the Al Qaeda terrorists who were to be found in those two countries or to force or deter the Taliban who were, if the term be permitted, the *de facto* government in Afghanistan from carrying out acts of terrorism then the law of international armed conflict became applicable from the time the initial invasion was made and continues to apply until either peace is concluded between the US and the two countries or a peaceful settlement to the conflict is achieved.⁷

⁶ Ibid, para 70.

⁷ Jinks (n 3) 9.

On the other hand, even if the war against international terrorism as conducted by the US in Afghanistan and Iraq do not fit into the activities covered under the law of an international armed conflict, they may still fall under a non international armed conflict covered by Article 3 common to the four Geneva Conventions of 1949 and by Additional Protocol II of 1977.⁸ According to its provisions Article 3 is applicable in case of armed conflict not of international character occurring in the territory of one of the contracting parties to the 1949 Conventions and extends to a situation where the conflict is within the State, between the Government and the rebel forces or between the rebel forces themselves.⁹

In order to determine whether or not international humanitarian law applied to the conflicts in Afghanistan and Iraq it may also be instructive to look at the conduct of the parties themselves and interpretations given to them by relevant third parties.¹⁰ Where a State which is party to a conflict agrees to apply international humanitarian law to a given actor, it would appear that issues of state sovereignty, which historically accounted for the high threshold of application of that law in non international armed conflicts would become irrelevant.¹¹ The US, for example, agreed to apply, at least to a certain measure,

⁸ Ibid. In that article, the author argued that the law of non international armed conflict governed the September 11, 2001 attacks on the US because the quality of the attacks and the response they evoked ‘...strongly suggest that the attacks initiated or confirmed the existence of an “armed conflict” between the United States and an organized group, al Qaeda. For this proposition, the author relied on the provisions of Common Art 3 of the four Geneva Conventions of 12 August 1949, which, he argued ‘...imposes these obligations on all parties to the conflict, including non-state armed groups’.

⁹ Ibid.

¹⁰ Jinks (n 3)

¹¹ Ibid 33-5.

international humanitarian law to Taliban.¹² In relation to Al Qaeda it would appear that both the United States and Al Qaeda itself consider themselves to be involved in a war.¹³ The views of those parties appear to be supported by the reaction of the international community. Following the events of September 11, 2001, several inter-governmental organizations took steps that expressly or impliedly interpreted the attacks as ‘armed conflict’. For instance the United Nations Security Council determined that the attacks constituted a threat to international peace and security and triggered its Chapter VII powers and went on to recognize the right of the US to act in self-defense consistent with Article 51 of the UN Charter. Since the Charter requires an ‘armed attack’ as the factual predicate for the lawful exercise of self-defense, the Security Council’s invocation of Article 51 necessarily implies that it classified the September 11 attacks as such.¹⁴ Similarly, NATO and OAS interpreted the September 11, 2001 attacks as acts of ‘armed attacks’ and recognized the inherent right of the United States to act in self-defense and also invoked the collective self-defense within the treaties which governed them.¹⁵

¹² Ibid.

¹³ Ibid.

¹⁴ Ibid 35-7. The references to Article 51 in Security Council Resolutions 1368 and 1373 represent an important shift in Council practice concerning terrorist attacks. This is because the Security Council made no such finding in the aftermath of the 1998 attacks on US embassies in Nairobi and Dar es Salaam even though the United States officially invoked Article 51 as the legal justification for missile strikes against Sudan and Afghanistan.

¹⁵ See Statement by NATO Secretary-General Lord Robertson (2 October 2001) <http://www.nato.int/docu/speech/2001/s011002a.htm> accessed 6 October 2007. Upon determining that the attacks were directed from ‘abroad’, NATO invoked the collective self-defense provision of the alliance’s founding treaty. By its terms, the invocation of this provision presupposes an ‘armed attack’ directed against an alliance member. NATO Secretary-General Lord Robertson summarized the organization’s findings:

We know that the individuals who carried out these attacks were part of the worldwide terrorist network of Al-Qaida, headed by Osama bin Laden and his key lieutenants and protected by the Taliban. On the basis of this briefing, it has now been determined that the attack against the United States on 11 September was directed from abroad and shall therefore be regarded as an action covered by Article 5 of the Washington Treaty, which states that an armed attack on one or more of the Allies in Europe or North America shall be considered an attack against them all.

It would also appear that although groups such as the Taliban and Al Qaeda which may have engaged in what may amount to acts of terrorism, may still qualify to the protections under Additional Protocol II where they fulfil certain requirements to entitle them to be considered as a party to a non international armed conflict.¹⁶ In either event, terrorists or members of a terrorist group may, nevertheless, be bound and protected by international humanitarian law even if their group does not fulfil the criteria of a party to a conflict, in a situation where an armed conflict exists between other parties on the territory on which the terrorists or members of the terrorist group are found.¹⁷ In that case, they are bound by international humanitarian law for any acts they commit with a nexus to the conflict, and they are protected by international humanitarian law if they do not or no longer take an active part in the hostilities.¹⁸ That may be the case where the terrorists or members of the terrorist group are civilians, protected by Geneva Convention IV if they fulfil the necessary nationality or allegiance criteria.¹⁹ It does not really matter that the US is not a party to the two Additional Protocols to the Geneva Conventions since the ICRC has recently found that most rules on the conduct of hostilities and the treatment of civilians

Similarly art 3 of the Inter-American Treaty of Reciprocal Assistance (signed 2 September 1947 entered into force on 26 March 1975) 21 UNTS 77 provides for collective self defence in the event of attack on any of its members.

¹⁶ Jinks (n 3), 26. This appears to be the meaning to be ascribed to Art Article 1(1) of Additional Protocol II which provides:

This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.

¹⁷ *Prosecutor v. Tadic* (n 5).

¹⁸ *Ibid.*

¹⁹ Jinks (n 3) 26.

are the same in customary international humanitarian law.²⁰

Where international humanitarian law applies, its rules are required to be implemented in full and it is not for a party to pick and choose which of the rules are applicable. The four Geneva Conventions of 12 August 1949 and their two Additional Protocols contain different provisions on the standards of international humanitarian law to be applied in different situations. This paper did not find it necessary to review all those standards save to mention some key protections which appeared to have been breached in the war against international terrorism. To begin with, all the Geneva Conventions and the two Additional Protocols generally prohibit violence to life or person in both international and non international armed conflicts.²¹ In particular international humanitarian law prohibits

²⁰ Jinks (n 3) 27. This position has been affirmed in a number of case law such as *Legality of the Threat or Use of Nuclear Weapons*, (Advisory Opinion) [1996] ICJ Rep 226 (Advisory Opinion on Nuclear Weapons) paras 79, 84 which followed the *Corfu Channel Case (UK v Albania)* (Merits) [1949] ICJ Rep 4. The same position was adopted in *Nicaragua v. United States* [1986] ICJ Rep at 14, para. 220 (*Nicaragua Case*) as well as in *Prosecutor v. Tadic* (n 5) paras 98, 102, 112, 134. Similarly, that position has been accepted in a number of UN documents such as in UNSC 'Report of the Secretary-General 2/808' (1993) UN Doc S/25704 & Add.1 as well as Statute of the International Tribunal, adopted by UNSC Res 827 (25 May 1993) UN Doc S/RES/827 followed by Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (1993) UN Doc S/25704 at 36, annex (1993) and S/25704/Add 1 (1993) which was also adopted by UNSC Res 827 (25 May 1993) UN Doc S/RES/827 (ICFY Statute) as well as the Statute of the International Criminal Tribunal for Rwanda, which was adopted by UNSC Res 955 (1994) UN Doc S/Res/955, Arts 2-4 (ICTR Statute) and also the Statute of the International Criminal Court (corrected by the *procès-verbaux* of 10 November 1998 and 12 July 1999, entered into force July 1, 2002) (1998) UN Doc A/CONF.183/9 (Rome Statute). See also generally Theodor Meron, 'The Continuing Role of Custom in the Formation of International Humanitarian Law' (1996) 90 AJIL 238, 239, 244, 247.

²¹ See for example, art 50 Geneva Convention I and 51 of Geneva Convention II which prohibits 'willful killing, torture or inhuman treatment...wilfully causing great suffering or serious injury to the body or health...not justified by military necessity'. Art 13 of Geneva Convention on it part provides Prisoners of War must at all times be treated humanely. Chapter III of the same Convention sets out the judicial guarantees that must be followed before any disciplinary or penal consequences are visited upon a Prisoner of War. Art 130 of the same Convention prohibits any 'wilful killing, torture or inhuman treatment...wilfully causing great suffering or serious injury to the body or health...or wilfully depriving a prisoner of war the rights of fair and regular trial ...'. Similarly, Geneva Convention IV on its part also sets out detailed judicial guarantees which must be adhered to in respect of civilians protected by the Convention in Chapter IX and sets out in art 147 similar prohibitions as those set out under art 130 of GC III. Those protections were boosted by the incorporation of what are described as 'Fundamental Guarantees' which are to be found in art 75 of AP I and art 4 of APII.

murder of all kinds, mutilation, cruel treatment and torture. The same law prohibits the taking of hostages, outrages upon personal dignity and the punishment without fair trial. Most of those protections are all available in cases of an international armed conflict and are set as minimum the standards to be observed in cases of non international armed conflict as set out in Common Article 3 of the said Conventions.²²

As regards the so called unlawful combatants – whether they be terrorists or whatever other designation is attached to them, it is clear that as a minimum, they should be covered by rules of international customary law guarantees of humane treatment, non-discrimination, fair trial standards, and protection against unlawful detention.²³ These

²² See art 3 Common to the four Geneva Conventions of 12 August 1949 which provides as follows:

In the case of an armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply as a minimum, the following provisions:

- 1) Persons not taking part in the hostilities, including members of the armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.
To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
 - a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
 - b) taking of hostages;
 - c) outrages upon personal dignity, in particular humiliating and degrading treatment ;
 - d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.
- 2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

²³ Robert K Goldman and Brian D Tittmore, 'Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law', in The American Society of International Law, Task Force on Terrorism, pp. 35-39 and particularly fn.124, 134-135, <http://www.asil.org/taskforce/goldman.pdf> accessed 14 September 2007. In its decision in the

norms find articulation in common Article 3 to the Geneva Conventions, Article 75 of Additional Protocol I and Article 4 Additional Protocol II.

To summarize the minimum protections applicable in dealing with the so called unlawful combatants the following passage is instructive:

... At a minimum, these procedural rights include: advance notice of the charges, assistance of counsel and an interpreter, compulsory process to obtain witnesses and other evidence, adequate time to prepare for trial, and a fair and impartial tribunal before which the accused can present evidence and cross-examine witnesses. The death sentence is possible in such a trial. The unlawful belligerent tried for war crimes committed during belligerent occupation and who qualifies as a protected person is accorded due process under certain provisions of the Geneva Civilian Convention which makes mandatory upon the Occupying Power those rights just enumerated for the trial by the Detaining Power, plus: two weeks to prepare for trial, representative of the Protecting Power to be notified of the trial and attend the proceedings, instruction to the court that the accused owes no allegiance to the captor state, opportunity to appeal the findings and sentence, six month wait before execution of the death sentence, procedure for disputes as to application of the Convention, and no punishment in excess of two years for offenses not amounting to threat or loss of life or serious acts of sabotage against the Occupying Power. [T]he 'fair trial' duty in the case of a non-lawful combatant for a grave breach includes those rights accorded the accused tried by the Occupying Power for a non-grave breach, plus additional procedural rights not less favorable than enjoyed by the PW (POW) when tried for war crime offense's. The effect of this last standard of a 'fair trial' is to bring the accused in the non-occupied territory situation into the benefits conferred upon those tried by the Occupying Power. The rights of the unlawful belligerent tried by the Occupying Power already are not less favorable than the grave breach standard of procedural due process when tried by the United States. [T]he exercise of jurisdiction would be based on the territorial principle where the act took place in the United States or on territory over which the U.S. exercised exclusive control. The most frequent basis of jurisdiction over war criminals would be the universality principle, however. The trial of the PW must be before a general court-martial and appellate matters would follow the course now in effect for members of the US armed forces, namely, review by a Board of Review and then the Court of Military

Nicaragua Case (n 20) the International Court of Justice declared that the mandatory minimum rules applicable to internal armed conflicts in common Article 3 of the Geneva Conventions of 1949 reflect 'elementary considerations of humanity' applicable under customary international law to any armed conflict, whether it is of an internal or international character, para 218. See similarly *Prosecutor v. Tadic* (n 5) paras 98, 102.

Appeals in certain cases and approval by the President- in the event of a death sentence. The military commission is the proper tribunal before which the unlawful belligerent is to be tried and the procedure attending such a trial is to be the same, irrespective of which of the three Civilian Conventions might apply, namely; assistance of counsel, adequate time to prepare for trial, services of an interpreter, right to call witnesses and introduce evidence, instruction to the tribunal that the accused owes no allegiance to the US, right to challenge the commission and the non-voting law member for cause, and review of the case by military authorities. The Protecting Power is to be advised of the proceedings and furnished all possible assistance and information.²⁴

Although the quoted passage refers to war crimes trials, the discussions include important due process guarantees espoused by international humanitarian law which are important for this study. From it one may be able to see that an unlawful belligerent is entitled to be tried according to customary international law's concept of what constitutes a fair trial. The passage also indicates to the reader that even before international terrorism became the menace it is today, the US recognized that persons who were labelled as unlawful combatants were entitled to important protections which they were entitled to due to their being human if not for any other reason.

4.1.2. Advantages of applying international humanitarian law in the war against international terrorism

From the foregoing discussion one may be able to see that international humanitarian law presents one of the strongest tools, which the international community can employ in the

²⁴ Charles J Baldree, 'War Crimes Trials: Procedural Due Process' (Judge Advocate General's School April 1967) 174-76.

war against international terrorism. It is always important to remember that the responses, which the international community adopts in the war against international terrorism, involve choices that have implications for the rule of law, its development, and its reciprocal basis. International humanitarian law may enable the world to re-establish international order and stability without creating other adverse situations, which may fan more violence that may destroy the whole of human civilization in the end.

International humanitarian law is equally useful because it sets the standards upon which all players in the war against international terrorism are to be held accountable. Although the law of armed conflict may not deal with every aspect of the war against global terrorism, it is a useful bench mark to establish some minimum rules of engagement.

Thirdly, there is strong suggestion that the application of international humanitarian law provides a useful incentive for terrorist and terrorist organizations to play by certain standards. If terrorists or terrorist organizations knew that by conducting their activities in a certain way they may gain some protections or that certain conduct would result in a particular consequence, it is likely that they may make informed choices while carrying out their activities which may, hopefully, involve them in restricting their modes and means of operation.

Fourthly, the application of international humanitarian law would allow the international community to appraise the efficacy of the existing rules to the war on terror and possibly

understand their strong and weak points and probably inform debate on the development of a law that is more responsive to the situation. This would allow the international community to take an impartial study of the root causes of terrorism and devise ways that are aimed at eradicating terrorism by punishing those responsible for terrorist acts and not enforcing collective punishment based on fear and suspicion. The means and methods chosen in articulating the war against international terrorism must as an essential requirement ensure that such efforts respect the fundamental rights and freedoms of all the citizens of the world and not just a section of it. In this regard, the global community must guard against allowing ethnicity, religion, national origin, and political affiliation to be the grounds for denying one the enjoyment of their rights even when accused of involvement in the commission of an act of terrorism. By applying the law justly, it is possible that the international community will be able to easily identify and prosecute those responsible for terrorist acts and consequently triumph over those who seek to destroy human civilization by crude methods and means.

4.1.3. Challenges presented in applying international humanitarian law in the war against international terrorism.

One of the key responsibilities of states in international law is to secure their borders and guarantee protection for their nationals.²⁵ In a world that has become a global village, the protection of nationals sometimes will extend beyond territorial boundaries to the

²⁵ Malcolm N Shaw, *International Law* (4th edn CUP, Cambridge 1998), 562-3.

particular location where those nationals are to be found.²⁶ In the previous chapter, an attempt was made to show how terrorism has in many instances been employed by individuals or groups and even some states to weaken those security requirements of states. For that reason many states have long desired to have terrorism eliminated. That is why the US decided to deploy its military might following the events of September 11, 2001 in the war against international terrorism. Either due to the inherent dangers of terrorism or the new approach, the war against international terrorism has presented the international community with serious challenges by requiring a consideration to be made between issues of security and those concerning respect for international standards for the protection of human dignity. That is because the experiences learnt from the events following September 11, 2001 have shown that it is possible that measures undertaken by states to counter terrorism may have a degrading effect on humanity as a whole.

The security versus respect for human dignity conflict presented in the war against international terrorism has raised a number of questions. Do military operations involving action against terrorists constitute a new or wholly distinct category of war? What rules govern or should govern the war against international terrorism? Or rather are the existing norms of international law adequate to respond to the threat of terrorism? Does that war permit torture in order to dismantle terrorist networks? Or does it allow for the prohibition of all correspondence between those suspected of having perpetrated terrorist acts and their families? Is it indispensable in that war that civilians accused of terrorism

²⁶ Christopher C Joyner, 'International Extradition and Global Terrorism: Bringing International Criminals to Justice' (2003) 25 *Loy L A Int'l & Comp L Rev*, 493, 507.

should be detained and judged at a place different from where they were arrested during the war? Should persons who belong to the same ethnic group or race or religion or who come from the same place as persons suspected of having committed acts of international terrorism be subjected to certain incapacities due to that fact alone? Must members of a transnational armed group, fighting on the territory of a state that agrees with their presence and who openly carry arms, be punishable if they attack military objectives of a state fighting in the war against international terrorism? Or should terrorists who comply with certain obligations be given certain privileges when captured? Are there any minimum protections in law which even those on terrorism charges should enjoy? Or should terrorists 'enjoy no mercy at all'? Conversely, should any diminished protections apply across board so that terrorists should have no mercy while carrying out their terrorist activities?

To be able to answer some of those questions, it may be necessary to take into account relevant differences between the traditional state of armed conflict and the war against international terrorism. Those differences essentially relate to the character of States and non state actors such as the Taliban and Al Qaeda and their members who engage in acts of international terrorism.

To begin with, States have international legal capacity which allows them to negotiate and conclude treaties amongst themselves which have a binding effect under international

law.²⁷ For that reason, it is easy to conceptualize the application of international humanitarian law in a situation where there is an armed conflict between two states. In that event, international humanitarian law would come into play by conferring certain rights on the states which are parties to the conflict and also placing certain obligations on them which they must fulfill absent which the other may take enforcement measures to vindicate its rights.²⁸ Terrorist organizations such as the Taliban and Al Qaeda and their members are not states and do not possess international legal capacity.²⁹ It follows that they usually lack capacity to negotiate treaties and are generally never parties to them.³⁰ They cannot, therefore, enjoy the same rights nor have the same obligations like states under international law.³¹

Secondly, it has been shown that international humanitarian law is largely codified in the four Geneva Conventions of 1949 and the two Protocols of 1977. Those instruments only apply to armed conflicts.³² Would applying international humanitarian law mean that activities of international terrorism are elevated to the level of an act of ‘armed conflict’ meaning that it can lawfully be carried out? This would be hard noting that the same law prohibits all acts of terrorism yet by its nature that law seeks only to regulate the conduct

²⁷ Shaw (n 25) 150. In *The Case of SS ‘Lotus’* PCIJ Rep Series A no 10 (*The Lotus Case*) the PCIJ pronounced that ‘...restrictions upon the independence of states cannot therefore be presumed. A similar point was made in the *Nicaragua case* to the effect that ‘...in international law there are no rules, other than such rules as may be accepted by the state concerned, by treaty or otherwise, whereby the level of armament of a sovereign state can be limited, and this principle is valid for all states without exception’.

²⁸ Shaw (n 25) 150-1.

²⁹ Ibid 139.

³⁰ Ibid.

³¹ Ibid 193-5.

³² Gabor Rona, ‘Interesting times for International Humanitarian Law: Challenges from the “War on Terror”’ (Summer/Fall 2003) 27 FFWA 55, 58.

of wars while allowing the parties to it to pursue their ‘military objectives’.³³ If international humanitarian law is to be applied to the conflict between the US and the Taliban and Al Qaeda that would mean that the protagonists must be allowed to pursue their aims, as the laws of war must do. Indeed, it is the very axiom of international humanitarian law that, unlike criminal law, it must permit both sides to hope for victory while respecting its rules; otherwise the rules will not be respected. That would mean that the Taliban and Al Qaeda would be justified to attack America if such an act is geared towards gaining military advantage over the US. Would such an action bring a degree of humanity to such attacks? How would such a rule reconcile with the fact that international humanitarian law prohibits any act which could be classified as terrorism? In particular international humanitarian law prohibits attacks against civilians, acts or threats of violence the primary purpose of which is to spread terror among the civilian population, and indiscriminate attacks. As always, however, international humanitarian law not only restrains members of such a group, but also their enemies and thus protects the members of the groups. The extent of such protection of members of an international terrorist group is subject to much more controversy than their obligations.

The next problem refers to the standards of international humanitarian law that should apply in the war against international terrorism. Should the rules of international armed conflicts apply or should those governing non international armed conflicts be the relevant law? Or should a hybrid law between those two be applied? If so how would that be done? If the rules of an international armed conflict are applied, will the international

³³ Ibid.

terrorist or terrorist group be allowed to enjoy all the benefits of a party to the conflict or will they be applied restrictively? Where that law is applied with restrictions to the international terrorist or terrorist group would the US soldiers captured in the course of that law also be subject to limited protections?

In another respect, it would appear that the law of non international armed conflicts may in certain respects be inappropriate for the war against international terrorism which is conducted between the US and Al Qaeda and the Taliban outside the territories of the US since that law was designed for conflicts occurring within a country and involving mainly the government and rebels. It is for that reason that the rules of non international armed conflicts accorded much consideration for the sovereignty of the state, concerned. Conceptually, one might consider that in a war against international terrorism, a higher level of protection should be possible as opposed to a conflict occurring in the territory of only one state and fought between government and rebel forces, where the sovereignty of that state was an obstacle to greater protection.

The fact that the war against international terrorism has majorly been fought outside the territories of the US and its allies is also problematic. Theoretically, under the territoriality principle,³⁴ one would expect that in dealing with terrorists captured in Afghanistan, Iraq and such other countries, the US would seek the consent and indeed apply the laws of the territorial state.³⁵ This has largely proved unrealistic particularly where the territorial state

³⁴ Shaw (n 25) 452-4. See also *The Lotus Case* for a further discussion of the principle.

³⁵ Ibid.

was a failed state such as Afghanistan under the Taliban precisely because of the presence of a terrorist group which was uncontrollable by that State.

Beyond the question of the applicable law, other problems arise in the manner the US has conducted the war against international terrorism abroad. Those problems are similar to those which would normally arise when a state is fighting another state on the latter's territory.³⁶ What measures was the US expected to take in Afghanistan and Iraq to maintain or restore security, public safety, health, and the welfare of the local population affected by that war? Was the US entitled to capture suspected members of the Taliban and Al Qaeda, or civilian followers of those groups, or their local sympathizer and transfer them out of the territory of the state where the fighting was happening? Did the international humanitarian law of military occupation³⁷ contain answers to those questions? If that was the case who was the 'enemy'? Were the territory and its population to be included as 'enemy'? What about the local armed and security forces? Were they to be considered as directly participating in hostilities? Who were 'protected person status'? Could this be ascertained according to nationality? Or could it be

³⁶ By this is meant the law of international armed conflict.

³⁷ Art 42 of the 1907 Hague Regulations defines 'occupation' to be the situation in which a territory '...is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised'. According to their common Article 2, the four Geneva Conventions of 1949 apply to any territory occupied during international hostilities whether or not the occupation meets with armed resistance. The legality of any particular occupation is regulated by the UN Charter under the doctrine of *jus ad bellum*. Once a situation exists which factually amounts to an occupation the law of occupation applies – whether or not the occupation is considered lawful. Therefore, for the applicability of the law of occupation, it makes no difference whether an occupation has received Security Council approval, what its aim is, or indeed whether it is called an 'invasion', 'liberation', 'administration' or 'occupation'. As the law of occupation is primarily motivated by humanitarian considerations, it is solely the facts on the ground that determine its application. The rules of international law which underlie occupation provide that the occupying power does not, through occupation, gain sovereignty over the occupied territory. Occupation is considered a transitory phase in which the rights of the population must be respected by the occupying power until formal authority is restored. When exercising authority, the occupying power is required to take into account the interests of the inhabitants as well as military necessity.

ascertained according to allegiance? Some may in addition object that those issues are governed by other branches of international law, such as *jus ad bellum*, international criminal law, and the rules on conflicts of laws, jurisdiction and extraterritorial enforcement.

CHAPTER FIVE

5.1 CONCLUSION AND RECOMMENDATIONS

5.1.1. Conclusion

As a conflict method that has survived and evolved through several millennia to flourish in the modern information age, international terrorism continues to adapt to meet the challenges of emerging forms of conflict, and exploit developments in technology and society.¹ Terrorists and terrorist organizations have demonstrated increasing abilities to adapt to counter-terrorism measures and political failure by developing new capabilities of attack and improving the efficiency of existing methods. Lately, terrorists and terrorist groups have shown significant progress in escaping from a subordinate role in nation-state conflicts, and becoming prominent as international influences in their own right. They are becoming more integrated with other sub-state entities, such as criminal organizations and legitimately chartered corporations, and are gradually assuming a measure of control and identity with national governments. Additionally, they have shown that they are able to adapt to new techniques and methods of counter-terror agencies and intelligence organizations over the long term. They have demonstrated

¹ Terrorists have also been quick to use new technologies, and adapt existing ones to their uses. The debate over privacy of computer data was largely spurred by the specter of terrorists planning and communicating with encrypted data beyond law enforcement's ability to intercept or decode this data. To exchange information, terrorists have exploited disposable cellular phones, over the counter long-distance calling cards, Internet cafes, and other means of anonymous communications. Embedding information in digital pictures and graphics is another innovation employed to enable the clandestine global communication that modern terrorists require.

significant resiliency after disruption by counter-terrorist action.²

What the above means is that terrorists are able to perpetuate ideology during a significant period of dormancy, and re-emerge under favorable environment. Apart from the aggressive use of modern technology for information management and communication terrorists today can access modern weapons technology. This has been made worse by the fact that, due to the increase in information outlets, and competition with increasing numbers of other messages, terrorists now require a greatly increased amount of violence or novelty to attract the attention they require.³ Today, terrorism influences events on the international scene to a degree hitherto unachieved. Largely, this is due to the attacks of September 11, 2001. Since then, in the US at least, terrorism has largely been equated to the threat posed by Al Qaeda - a threat inflamed not only by the spectacular and deadly nature of the attacks, but by the fear that future strikes might be even more deadly and employ weapons of mass destruction.

These changes in the character and capacity of the modern terrorist or terrorist organization means that states must come up with up to date normative tools to deal with

² For example, some groups have redefined themselves after being defeated or being forced into dormancy. The Shining Path of Peru (Sendero Luminosa) lost its leadership cadre and founding leader to counter-terrorism efforts by the Peruvian government in 1993. The immediate result was severe degradation in the operational capabilities of the group. However, the Shining Path has returned to rural operations and organization in order to reconstitute itself. Although not the threat that it was, the group remains in being, and could exploit further unrest or governmental weakness in Peru to continue its renewal. In Italy, the Red Brigades (Brigate Rosse) gradually lapsed into inactivity due to governmental action and a changing political situation. However, a decade after the supposed demise of the Red Brigades, a new group called the Anti-Capitalist Nuclei emerged exhibiting a continuity of symbols, styles of communiqués, and potentially some personnel from the original Red Brigade organization.

³ The tendency of major media to compete for ratings and the subsequent revenue realized from increases in their audience size and share produces pressures on terrorists to increase the impact and violence of their actions to take advantage of this sensationalism.

the menace of international terrorism without uprooting the foundations of humanity. From the analysis given in this paper the war against international terrorism cannot be won by playing politics of hegemony. The international community of nations through the UN must insist on the application of humanitarian values and principles to that war. International humanitarian law and international human rights standards must be employed to supplement each other to ensure that humanity is never abused for whatever reason. As the considerations set out earlier clearly indicate, the international community of nations through the UN must move away from a consuming interest to root out terrorism by means that demean human dignity and instead consider broad-based approaches to the problem.

As shown in this paper, the laws of war offer a proven, durable mode of imposing principled constraints on organized violence. This widely-accepted, fully articulated normative framework should guide efforts to fashion an effective, humane response to the menace of international terrorism. That law should be applied and where it is found to be inadequate it should be strengthened but never should the rule of law be replaced with the law of the jungle. That is because ineffective methods for dealing with terrorism outside the law is likely lead to antiterrorist actions more primitive and dangerous than already witnessed which could put the whole of human civilization at grave danger. That danger is especially heightened with terrorism that is state-supported and in this age of advanced technology where WMDs are under proliferation and could easily land in the hands of terrorists.

5.1.2. Recommendations

The September 11, 2001 attacks exposed a plethora of normative issues in the war against international terrorism. The situation was made worse by the fact that although States generally agree on the importance of eradicating international terrorism, there have existed important disagreements on certain issues, which so far have prevented them from taking a comprehensive approach. At the forefront were the questions of the legal definition of terrorism, the relationship between terrorism and anti-colonial and national liberation movements and the activities of States' armed forces in armed conflicts and in exercise of their official duties.

Although those attacks were grave, the international community would be foolhardy if it allowed the attacks to form the basis for eroding international standards for humanity. The war against international terrorism needs to be fought with a human face if our civilization is to continue. Excessive measures taken by certain countries, particularly the US, against human rights defenders, migrants, asylum-seekers and refugees, individuals and businesses enterprises that do not fit in the traditional model, religious and ethnic minorities, the media and others to name but a few, all in the name of counter-terrorism are not bound to resolve the problem. It is more probable that the final solution to fighting and winning the war against international terrorism depends on how the global community will be able to strike a necessary balance between legitimate security and military concerns and fundamental rights and freedoms for all.

In the foregoing discussion, an attempt was made to show that if the appropriate law was

properly applied it would result in many meaningful benefits to humanity. On top of those benefits is the fact that by upholding the rule of law the international community would gain advantage in the war against international terrorism without compromising humanitarian values and standards which are the cornerstone of human civilization. This paper proposes to make the following recommendations:

1. That there is a need to strengthen the law governing the war against international terrorism to make it more suitable and relevant to the realities which have arisen following the callous terrorist attacks on the US on September 11, 2001. By strengthening the law it is hoped that a number of issues which have arisen and which appear not to be comprehensively dealt with in the existing law could be better addressed to guide the human community on how to respond to the menace of international terrorism without sacrificing humanity in the process. It is possible that the law can be strengthened by looking at the existing rules and picking out those which are relevant and useful and abandoning those provisions which are archaic or not relevant. Further it would be important to look into past to see whether there are certain actions which are good and which can be emulated and improved on and distinguish them with those which are unbeneficial. Practices which are found to be retrogressive will have to be abandoned them for better ways.
2. That the international community of nations through the UN needs to relook into the questions which have for so many years held back the conclusion of the draft

Comprehensive Convention on International Terrorism⁴ and resolve them. Once those questions are resolved, efforts should be made to conclude that treaty so that it may be used in the fight against international terrorism. The draft treaty should aspire to deal with, among others, the questions of defining terrorism and the means of tackling it in a manner that does not compromise international humanitarian standards for the protection of human rights and human dignity. In that regard the draft Convention should not only set out the rights of States with regard to the apprehension and prosecution of those accused of international terrorism but also set out in clear terms their obligations to secure the rights of those suspected of having committed the offence. The draft law should, therefore, explicitly contain such guarantees which outlaw discrimination, extrajudicial renditions, torture and other cruel, inhuman or degrading treatment and punishment as well as forced disappearance as means of fighting international terrorism. The draft treaty should also expressly guarantee suspects equal protection under the law which should include the right to a fair trial. To ensure a reasonable working document in this respect guidance could be sought from previous efforts such as those of the Council of Europe's Guidelines on human rights and the fight against terrorism⁵ which contain many guidelines to help States strike the right note in their responses to terrorism.⁶

⁴ The UN Sixth (Legal) Committee and the *ad hoc* Committee established pursuant to the 1996 UNGA Resolution 52/210, are currently continuing their work toward the negotiation of the draft Comprehensive Convention on International Terrorism.

⁵ Council of Europe, *Guidelines on human rights and the fight against terrorism adopted by the Committee of Ministers on 11 July 2002 at the 804th meeting of the Ministers' Deputies* (Council of Europe, Strasbourg September 2002) (Council of Europe Guidelines on Human Rights and the fight against terrorism).

⁶ In the preface of the Council of Europe Guidelines on Human Rights and the fight against terrorism Walter Schwimmer who was the then Secretary General of the Council said as follows:

3. That the ICC be set up as an impartial tribunal empowered to try persons suspected of having committed acts of international terrorism without compromising international humanitarian standards. This would be in line with efforts of the League of Nations which had proposed the establishment of an international court to deal with such cases. Although the ICC does not have specific jurisdiction over the crime of international terrorism, one could refer to the underlying criminal acts to obtain the basis for one of the crimes for which the ICC does have subject matter jurisdiction, such as genocide, war crimes, or crimes against humanity. Alternatively, the draft Comprehensive Convention on International Terrorism could expressly provide that the ICC shall have jurisdiction over the crime of terrorism. That could also be achieved by just amending the ICC Statute to confer upon that court jurisdiction over the crime of terrorism. The reason why the paper proposes the ICC over other tribunals such as national courts, *ad hoc* tribunals, special courts or military courts is because, as already seen, terrorism has been a very complicated concept on which the nations have not been able to agree. For that reason the ICC appears to be the most opportune and only formally established international tribunal which can deal

The temptation for governments and parliaments in countries suffering from terrorist action is to fight fire with fire, setting aside the legal safeguards that exist in a democratic state. But let us be clear about this: while the State has the right to employ to the full its arsenal of legal weapons to repress and prevent terrorist activities, it may not use indiscriminate measures which would only undermine the fundamental values they seek to protect. For a State to react in such a way would be to fall into the trap set by terrorism for democracy and the rule of law. It is precisely in situations of crisis, such as those brought about by terrorism, that respect for human rights is even more important, and that even greater vigilance is called for. At the same time, as I have continually stressed since the attacks, the need to respect human rights is in no circumstances an obstacle to the efficient fight against terrorism. It is perfectly possible to reconcile the requirements of defending society and the preservation of fundamental rights and freedoms. The guidelines presented here are intended precisely to aid States in finding the right balance. They are designed to serve as a realistic, practical guide for anti-terrorist policies, legislation and operations which are both effective and respectful of human rights.

with cases of international terrorism impartially by applying internationally settled guidelines.

4. That there is a need to set out clear rules on the exercise of universal jurisdiction in cases of international terrorism without breaching the rules of international law on sovereignty and also without breaching internationally established standards for the protection of human rights and human dignity. This could be captured in the draft Comprehensive Convention on International Terrorism. In that regard, the draft Convention could refer to the Princeton Principles on Universal Jurisdiction⁷ for guidance on how States could exercise the principle of universal jurisdiction over suspected terrorists in a manner that would not result in conflicts and abuse of the power.
5. That there is a need to put in place a functioning international normative regime to allow persons whose rights have been abused in the war against international terrorism to vindicate those rights. The proposed draft Comprehensive Convention on International Terrorism should, therefore, make provision for guaranteeing that any State, individual or group of individual who violate the rights of those accused of the crime of terrorism would be made accountable. In this regard the draft Convention could benefit from the provisions of Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of

⁷ Princeton University Program in Law and Public Affairs, 'The Princeton Principles on Universal Jurisdiction' 28 (2001).

International Humanitarian Law⁸ which provides that victims of a gross violation of international human rights law or of a serious violation of international humanitarian law shall have equal access to an effective judicial remedy as provided for under international law and goes on to say that in proper cases effective and prompt reparation should be made to redressing the violations.⁹ This would give those people whose rights are grossly violated in the war against international terrorism an opportunity to approach the courts to stop such abuses and also to seek compensation in appropriate cases.

⁸ Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, CHR res 2005/35, UN Doc E/CN4/2005/L10/Add11 (19 April 2005).

⁹ Ibid.

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