TERRORISM AND INTERNATIONAL LAW

GILBERT GUILLAUME*

On 11 September 2001 commercial passenger jets hijacked by suicide commandos were flown into the Twin Towers of the World Trade Center in New York. As the Towers imploded and collapsed, the death of several thousand people was witnessed live on television screens throughout the world. Those attacks, together with that on the Pentagon and the failed attempt that ended in Pennsylvania, aroused profound indignation and led to immediate reactions against the perpetrators or their protectors and sponsors, and more generally against international terrorism.

Some commentators felt that international law was left dumbfounded, incapable of giving a name to these events, which did not seem to fall under any of its established categories. For those observers, the law had been seriously challenged by the impact of 11 September, and a whole new law was emerging. But, as time went by, others observed that it was in fact possible to find solutions to the issues raised within the existing law, and that legal responses simply had to be fine-tuned to address this new situation.

So what conclusions can be drawn from this? Has international law succeeded in finding a generally accepted definition of terrorism? Has it set up agreed measures for the prevention and punishment of terrorist acts? And finally, does it provide adequate mechanisms for action against States which aid and abet terrorism? These are the three questions that I shall address here.

What is terrorism? How can it be characterized in law, and in particular international law?

The notion of terrorism is obviously related to that of 'terror'. In the most general sense, that term denotes an extreme fear, usually stemming from a vaguely perceived, relatively unknown and largely unforeseeable threat. In this sense, terror can be caused by human action but also by natural disasters such as volcanic eruptions or earthquakes.

However, the word 'terror' took on a new meaning at the end of the eighteenth century during the French Revolution, when, threatened with a foreign invasion and civil unrest, the Convention proclaimed the 'Terror' in 1793 and under that head adopted a series of exceptional measures that were to be implemented by the Committee of Public Safety under the authority of Robespierre. In 1794 he was overthrown and then executed. But in condemning him the

* Judge and former President of the International Court of Justice. This is the text of the 2003 Grotius Lecture delivered by HE Gilbert Guillaume at the British Institute of International and Comparative Law on 13 November 2003.

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Convention could not claim he was responsible for the Terror that they themselves had proclaimed. So they accused him of 'terrorism', a term which from the outset thus referred to the use of terror by the State.

The term was to take on a new meaning in the late nineteenth century. The attacks perpetrated in Russia by the Nihilists, then throughout Europe by the Anarchists, were to be described as 'terrorist'. As a result, terrorism came to refer not only to terror used by the State but also to that used against the State.

The two meanings remained commonplace throughout the first half of the twentieth century. In 1920 Trotsky wrote an apologia of terrorism[1] in which he justified State terror when used in the name of the dictatorship of the proletariat. However, in the following decade, after the assassination in 1934 of King Alexander of Yugoslavia, the League of Nations drew up two stillborn conventions, one of which provided for the prevention and suppression of that type of terrorist act.

State terror has unfortunately thrived over the past half century. But there has also been a considerable rise in anti-State terrorism, which is the type of action now usually referred to by the term 'terrorism' in everyday parlance.

The reason why such terrorism has become widespread in the world today is because it provides a highly advantageous method of combat, with its potential for significant results at limited human and financial cost. Technical progress has played an essential role in this regard. Nitroglycerine or mercury bombs have been replaced by remote-controlled devices that are increasingly difficult to detect. The growing fragility of our civilization has increased the number of sensitive targets as it has the means of escape. Lastly, the development of mass media has enabled terrorists to put across their message more effectively and, through the press and television, to accentuate the terror they seek to spread. Impassioned feelings, or indeed fanaticism, have further increased the risks.

Faced with this situation, governments have not simply remained on the sidelines. Since 1963, various decisions and conventions have been adopted within the United Nations, specialized agencies and regional organizations, particularly within Europe.

For decades the authors of these instruments for the prevention and suppression of offences including certain acts of terrorism have, however, refrained from using or defining the term 'terrorism' itself. They have preferred to focus on the prosecution or extradition of perpetrators of certain designated acts such as the hijacking of aircraft, acts of violence against aircraft, airports, ships and oil platforms, attacks on diplomats or hostage-taking.[2] This prudence indeed explains the success of the various conventions

[1] Leon Trotsky *In Defence of Terrorism* (London Allen & Unwin 1935); see also 'Défense du terrorisme' Nouvelle Revue Critique 1935, in particular at 23 and 76.

[2] See the Hague Convention for the Suppression of Unlawful Seizure of Aircraft, 16 Dec 1970; Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 23 Sept 1971; Convention on the Prevention and Punishment of Crimes against

thus concluded under the auspices of the ICAO, the IMO or the United Nations, now binding on the vast majority of States. (The Hague Convention of 1970 for the Suppression of the Unlawful Seizure of Aircraft has, for example, been ratified by some 180 countries.)

The discussions that took place at the time, in both Strasbourg and New York, illustrated the difficulty of finding a unanimously accepted definition of terrorism. The Ad Hoc Committee on International Terrorism set up by the United Nations General Assembly attempted to achieve this between 1972 and 1979. But it was unable to succeed because, during the debates, the members of the Group of 77 repeatedly emphasized the legitimacy of actions by national liberation movements and demanded that such actions should in no way be confused with terrorism.[3] It appeared then and later that, quite often, according to a commonplace of our times, 'one person's terrorist is another person's freedom fighter'.

The wisdom of the draftsmen of those early conventions which sought to combat terrorism without actually naming it as such, was however short-lived. In the 1990s, the term 'terrorism' reappeared under the pressure of politicians, the media and NGOs, first of all in press releases, unilateral declarations or other so-called 'soft law' texts, then in international conventions. In 1977, the Council of Europe had already drawn up a convention on the suppression of terrorism, but had omitted to provide any definition of the term.[4] Twenty years later a convention was drawn up by the United Nations for the suppression of terrorist bombings, but came no closer to defining 'terrorism'.[5] It was only in 1999 that a convention signed in New York for the suppression of the financing of terrorism made a first attempt at a definition, the result being unhappily inconclusive.[6] It was somewhat paradoxical—at least at first glance—that the international community was seeking to suppress terrorism but could not really pinpoint its meaning.

The 11 September events did not herald any change of direction in this respect. The Security Council, in its Resolution 1368 of 12 September 2001,

Internationally Protected Persons, including Diplomatic Agents, New York, 14 Dec 1973; International Convention against the Taking of Hostages, New York, 17 Dec 1979; Protocol for the Suppression of Unlawful Acts of Violence at Airports serving International Civil Aviation, supplementary to the Montreal Convention for the Suppression of Unlawful acts against the Safety of Civil Aviation, 24 Feb 1988; Rome Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 10 Mar 1988, and the Protocol to the abovementioned Convention for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf.

[3] See United Nations General Assembly Resolutions 40/61 and 42/159.

[4] European Convention on the Suppression of Terrorism, adopted at Strasbourg on 27 Jan 1977.

[5] International Convention for the Suppression of Terrorist Bombings, adopted at New York on 15 Dec 1997. It covers various offences enumerated in the text but confines itself to just a few words in Art 5 indicating that certain acts in question are 'intended or calculated to provoke a state of terror'.

[6] International Convention for the Suppression of the Financing of Terrorism, adopted at New York on 9 Dec 1999.

called on the international community to 'redouble their efforts to prevent and suppress terrorist acts'. Later on, in Resolution 1373 of 28 September 2001, the Council decided upon a certain number of appropriate measures to be taken by States. However, the Council failed to provide any clarification as to what it meant by 'terrorism'. Moreover, India presented a proposal to the United Nations General Assembly for a comprehensive convention against international terrorism, which has been unsuccessful due to the failure to agree on the scope of the Convention, that is to say, once again, on a definition of terrorism.[7] The same difficulties were encountered in the preparation of a draft convention on the suppression of acts of nuclear terrorism.[8] It was only in the context of the European Union that an attempt was made to lay down such a definition, although with somewhat complex and uncertain wording, in a 2002 Framework Decision on combating terrorism.[9]

To combat terrorism without defining it remained possible for as long as the word itself was not uttered. However, to make use of the term as we do today, often without determining its true scope, does carry certain drawbacks. It tends to give rise to uncertainty and leaves States the possibility of making unilateral interpretations geared towards their own interests, particularly with respect to Security Council resolutions. It would thus be helpful to attempt to provide such a definition, taking as a basis the few texts that have endeavoured to do so.

In the context of international law, it would appear to me that the adjective 'terrorist' may be applied to any criminal activity involving the use of violence in circumstances likely to cause bodily harm or a threat to human life, in connection with an enterprise whose aim is to provoke terror. Three conditions thus have to be met: (a) the perpetration of certain acts of violence capable of causing death, or at the very least severe physical injury. Certain texts of domestic and European law go further than this, however, and consider that the destruction of property even without any danger for human life may also constitute a terrorist act; (b) an individual or collective enterprise that is not simply improvised, in other words an organized operation or concerted plan reflected in coordinated efforts to achieve a specific goal (which, for example, excludes the case of the deranged killer who shoots at everyone in sight); (c) the pursuit of an objective: to create terror among certain predetermined persons, groups or, more commonly, the public at large (thus differentiating terrorism from the political assassination of a single personality, such as that of Julius Caesar by Brutus).

In this respect a distinction should be made between the victim that the terrorist seeks to harm, the target that he wishes to attain and the results he is

[7] See UN official documents A/C.6/55/L.2, A/C.6/56/L.9 and A/C.6/57/L.9.

[8] See Second Report of the Ad Hoc Committee established by General Assembly Resolution 51/210 of 17 Dec 1996—document A/53/37 of 23 July 1998, at 2.

[9] See European Council Framework Decision of 13 June 2002 on combating terrorism No 2002/475/JHA, in Official Journal of the European Communities, 22 June 2002.

looking to secure. Terrorism is a method of combat in which the victims are not chosen on an individual basis but are struck either at random or for symbolic effect. The goal pursued in attacking them is not to eliminate the victims themselves but to spread terror among the group to which they belong. By doing so, terrorists generally seek to compel governments or public opinion to make some concession towards them, if only to consider their position more favourably.

However, the international community has not yet been able to reach an agreement on such a definition of terrorism. As my colleague Judge Rosalyn Higgins pointed out in 1997:

> Terrorism is a term without any legal significance. It is merely a convenient way of alluding to activities, whether of States or of individuals, widely disapproved of and in which either the methods used are unlawful, or the targets protected, or both.[10]

Has this failure resulted in serious consequences in practice? That is the issue I shall now address by examining first the provisions of international criminal law that deal with the perpetrators of terrorist acts and secondly those of public international law governing the conduct of States involved in such acts.

The various international instruments of a universal nature that have already been drawn up under the auspices of the United Nations or specialized agencies have one objective in common: to respond to the internationalization of terrorism by the internationalization of repression.

In this respect, however, it should be observed at the outset that, in the absence of any agreed definition of terrorism, States have been unable to entrust international criminal tribunals with the task of punishing this type of crime. Even the new International Criminal Court, set up under the Rome Convention, does not entertain jurisdiction over such offences.[11]

Repression is thus left to domestic police forces and courts, and its effectiveness will largely depend on the quality of police and judicial cooperation between States. In this respect, the various conventions of a universal nature that deal with the perpetrators of specific offences, such as the hijacking of aircraft or ships and hostage-taking, have considerably improved the situation as far as those offences are concerned.

Each of those conventions defines the offence or offences to which it applies and obliges the signatory States to implement different measures of prevention. They also impose an obligation to punish those offences by sentences usually characterized as severe.

[10] R Higgins 'The General International Law of Terrorism', in R Higgins and M Flory *International Law and Terrorism* (London Routledge 1997), at 28.

[11] The Final Act of the Rome Conference observes that, during the discussions, no generally acceptable definition of crimes of terrorism could be agreed upon for inclusion in the convention. It confines itself to recommending that the question be reconsidered by the Review Conference to be held in 2010 (doc A/CONF/183/10). The ICC nevertheless has jurisdiction in respect of terrorist acts that constitute crimes against humanity or war crimes as defined in its Statute.

As regards the jurisdiction of courts, such treaties attempt to fill in the gaps left by classical international law. Under the latter, domestic courts are traditionally granted jurisdiction to punish first of all offences committed on their territory and subsequently certain offences committed abroad, by or against their nationals, or those which impugn their fundamental interests. However, most domestic courts do not have jurisdiction to entertain offences committed abroad by foreigners against foreigners. As a result, terrorists who take refuge on the territory of a third State may escape prosecution in such cases. Criminal law conventions which deal with various acts of violence, including some of a terrorist nature, have attempted to fill the vacuum.

Those conventions, inspired by the Hague Convention of 1970 on the Unlawful Seizure of Aircraft, thus multiply the bases of jurisdiction and impose an obligation on each State party to establish its jurisdiction over the offences in question in cases where 'the alleged offender is present on its territory' unless it extradites that offender to another State. Such conventions thus provide for a subsidiary universal jurisdiction—that of the arresting State—to ensure application of the rule '*aut dedere, aut judicare*'. According to that rule, which Grotius advocated in his day, the arresting State has a choice between prosecuting or extraditing. However, it is obliged to opt for one or the other and cannot simply wash its hands of criminals found on its territory.

Apart from the facilitation of extradition, it was difficult to impose more stringent obligations on States at a worldwide level. It has only proved possible to go further at a bilateral or regional level. For example, Libya agreed to the trial in 2001, by a Scottish court sitting in the Netherlands and under conditions agreed with the United Kingdom, of two of its nationals who stood accused of organizing the Lockerbie bombing.[12] Similarly, the Member States of the European Union agreed in 2002 that terrorism should be included among the offences giving rise to surrender pursuant to a European arrest warrant rather than to the application of extradition procedures.[13]

Moreover, it has recently become apparent that terrorist acts are increasingly perpetrated by well-structured organizations with considerable financial resources, rather than by isolated individuals or small groups. Seeking to impede the operation of such organizations, a convention was adopted in New York in 1999 with a view to hindering the financing of international terrorism.

The events of 11 September 2001 did not lead to the adoption of any new measures for the arrest, prosecution or extradition of terrorists. They did however trigger a new determination to ensure the universal application of existing measures.

[12] See the decision by the High Court of Justiciary on 31 Jan 2001, confirmed on appeal on 14 Mar 2002 <http://www.scotcourts.gov.uk/index1.asp>. See also Revue française de droit aérien et spatial 2001, at 152, and 2002, at 216.

[13] See European Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States No 2002/584/JHA, in Official Journal of the European Communities, 18 July 2002.

By its Resolutions 1368 and 1373, the Security Council, acting under Chapter VII of the Charter, adopted a number of decisions of principle to be carried out by States pursuant to Article 25 of the Charter. In particular, it imposed on all States certain obligations specifically selected from those imposed by the 1999 Convention for the Suppression of the Financing of Terrorism, which at that time was not yet in force. In so acting, the Council rendered certain purely treaty rules binding on all Member States of the United Nations and thus assumed the role of a true international legislator.

Moreover, the Council went further with the creation of a committee charged with combating terrorism, through which it seeks to monitor the implementation of its resolutions by Member States. By a broadened interpretation of its mandate, it is now assuming not only powers of action but also legislative powers in the interest of international peace and security.

Furthermore, the events of 11 September 2001, and the anthrax scare that followed shortly after, put the spotlight on the risks of biological and chemical terrorism. Certain instruments already existed in these areas, but they remained incomplete, and control mechanisms were still insufficient. Whilst the Chemical Weapons Convention of 13 January 1993 had entrusted such controls to an organization, the OPCW, that was not the case for the Biological Weapons Convention of 10 April 1992. A Protocol was drawn up for that purpose, but in December 2001 it met with opposition from the United States.

Notwithstanding these deficiencies, the results in this field are far from insignificant. A dozen or so conventions have been adopted for the prohibition and suppression of various acts of terrorism and their ratification has been widespread. The Security Council has extended their scope. Numerous obligations have thus become incumbent upon States under international criminal law, which even provides for certain control mechanisms. Whilst there is admittedly room for improvement in this respect, over and above this, there is still an essential question to be addressed: what should be done if States fail to meet their obligations?

In answer to this question, there are certain classic responses provided by international law. When dealing with wrongful acts, States can either seek to rely upon the law of State responsibility or resort to various forms of pressure, ranging from countermeasures to the use of armed force.

As regards international responsibility, a distinction can be made between two different types of situation:

- that of the State on whose territory terrorist attacks have been perpetrated;
- that of the State which is involved in any other way in such attacks.

The legal response is well-established in the first of these cases. On a number of occasions, arbitral tribunals and the International Court of Justice have been seised of disputes in which a State might have incurred international responsibility as a result of injury caused to foreign nationals on its territory by certain

acts of violence that, in some cases, can be characterized as terrorist. According to the case law which has thus developed, a careful distinction should be drawn between those acts which are imputable to the individual perpetrators and those acts or omissions for which public authorities are responsible. State responsibility may be engaged, in particular, if those authorities have failed to exercise the requisite degree of vigilance or diligence.[14]

Terrorist acts perpetrated on the territory of a foreign State raise different issues. Public authorities only have limited jurisdiction outside their own territory and their responsibility will not normally be engaged unless they are involved in some way or another in terrorist activity. That degree of involvement may vary greatly: terrorist acts may be prepared on the territory of a State without the knowledge of that State. In other cases a State may know that terrorists are using its territory to prepare attacks, but will either be incapable of controlling such activities or will fail to do so. A threshold is crossed when terrorist organizations base themselves in a country with the forbearance or even the support of the government. The highest level of involvement is reached when the terrorist activity is actually initiated by government agents. It is thus necessary to assess, on the facts of each particular case, whether a State has demonstrated wrongful conduct and whether its international responsibility is engaged.

Rather than applying to an arbitrator or court to obtain the condemnation of the State at fault, States that are victims of terrorism may exert various forms of pressure on that State to attempt to make it change its conduct. Such pressure may take the form of countermeasures not involving the use of armed force; in extreme cases such use may be contemplated. In either case, the Security Council may be required to take decisions under Chapter VII of the Charter. States may also be tempted to act on a unilateral basis.

Thus, following the mid-air explosion of an American jet liner above the Scottish town of Lockerbie in 1988, in 1992 the United States took unilateral countermeasures against Libya, whilst the Security Council imposed an air embargo on that country.[15] Similarly, following the attempt in Ethiopia to assassinate the Egyptian president and the escape of the suspects to Sudan, the Security Council imposed sanctions on Khartoum in 1996.[16] The Council more recently decided on various sanctions against Afghanistan, in 1999 and 2000, demanding that 'the Taliban . . . cease the provision of sanctuary and training for international terrorists'.[17]

[14] See the Arbitral Award of 23 Oct 1924 by Max Huber in the case concerning *British Property in the Spanish Zone of Morocco,* RIAA, vol II, at 640–7; the Award in the *William E Chapman* case *(USA v United Mexican States)*, RIAA, vol IV, at 632–40; Judgment of the International Court of Justice of 24 May 1980 in the case concerning *United States Diplomatic and Consular Staff in Tehran,* ICJ Reports 1980, at 3; see also the case concerning the *Janina* incident, Yearbook of the International Law Commission, 1972, vol II, at 77.

[15] Security Council Resolutions 731 (1992) and 748 (1992).

[16] Security Council Resolutions 1044 (1996) and 1054 (1996).

[17] Security Council Resolutions 1267 (1999) and 1333 (2000).

However, the issues are much more sensitive when armed force is used against a State accused of supporting terrorist activities. In principle, such use by a State is contrary both to the rule of the non-use of force, pursuant to Article 2, paragraph 4, of the United Nations Charter, and to that of non-intervention as recalled on several occasions by the International Court of Justice.[18] Thus, in the absence of a decision by the Security Council, States which have used force unilaterally have generally sought to justify their conduct either on the ground of humanitarian intervention or by arguing that they have been the victim of an armed attack within the meaning of Article 51 of the Charter.

In this respect, the events of 11 September 2001 raise issues of the greatest interest concerning both the powers of the Security Council and the exercise of self-defence.

The very next day after the attacks, the Security Council adopted Resolution 1368, in which it regarded those acts, using the very words of Chapter VII of the Charter, as 'a threat to international peace and security'. The Council could thus have been expected, in exercising the responsibilities vested in it in such matters, to take certain decisions with a view to addressing that threat. However, this was not the case. After condemning the attacks, and stating that it was ready to act, the Council did not in fact take any concrete measures directly relating to those attacks.

The military action by American armed forces and their allies in Afghanistan was not initiated in the context of the United Nations but as an exercise of the right of self-defence—a right in fact expressly recognized by the Security Council in the preamble to its Resolution 1368. In his letter of 7 October 2001 to the President of the Security Council, the Permanent Representative of the United States thus indicated:

> In response to [the] attacks of 11 September, and in accordance with the inherent right of individual and collective self defence, United States Forces have initiated actions designed to prevent and deter further attacks on the United States. These actions include measures against Al-Qaïda terrorist training camps and military installations of the Taliban regime in Afghanistan.

The Security Council did not react to this communication. It was not until the Taliban régime was overthrown that the Council further addressed the situation in Afghanistan, approving the Bonn Agreement between Afghan groups and authorizing the deployment of an international security force with the participation of Member States.

This situation has posed many questions and it has quite rightly been emphasized that, if a military response to the attacks was necessary, the unanimous

[18] See Judgment of the International Court of Justice of 9 Apr 1949 in the case concerning *Corfu Channel, Merits, Judgment*, ICJ Reports 1949, at 35; and the Court's Judgment of 27 June 1986 in the case concerning *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)*, Merits, ICJ Reports 1986, at 243 and 246.

support given to the United States offered a historic opportunity for Chapter VII of the Charter. But whilst the United Nations was prepared to authorize military action by the United States and its allies in Afghanistan, the United States was not looking for such authorization. It was seeking to act freely by invoking its inherent right of self-defence pursuant to Article 51 of the Charter.

There has been considerable debate in the literature about whether such a right really existed in this situation.[19] Could the attacks on the World Trade Centre be regarded as an 'armed attack'? Could the right of self-defence as recognized by Article 51 of the Charter be exercised on foreign territory not only when the attacker is a State, but even when it is a non-State terrorist organization like Al-Qaida? If not, was the Taliban régime's support for Al-Qaida such that the Afghan State could be regarded as having perpetrated an armed attack against the United States?

These questions have given rise to heated debate and I will simply note that, according to the majority of authors, acts of terrorism reaching the extent and gravity of the events on 11 September 2001 could be described as acts of armed attack. However, for those acts to be considered as acts of armed attack within the meaning of Article 51 of the Charter, such acts, in the view of those same authors, have to be attributed not only to private individuals liable to criminal prosecution, but further to a State which exercises effective control over those individuals. In the circumstances at issue, certain doubts were expressed as to whether the Taliban really exercised such control over Al-Qaida. In other words, whilst it was not in dispute that Kabul's support for Al-Qaida engaged the responsibility of Afghanistan, there was some controversy about whether that country in fact perpetrated an armed attack against the United States within the meaning of the Charter.

By contrast, it was pointed out by others that the argument whereby the 11 September attacks justified a right to use force on the basis of self-defence had hardly met with any opposition from States and that it was even explicitly endorsed by both the North Atlantic Council and the European Council.[20] It was further suggested by some that the 11 September attacks and the ensuing reactions had led to the emergence of a new law on the use of force, authorizing States to use force on foreign territory in the face of grave acts of violence perpetrated by private individuals or groups, regardless of any link between them and a particular State.

[19] See, eg, L Condorelli 'Les attentats du 11 septembre et leur suite: où va le droit international?' (2001) 105(4) RGDIP; T Franck 'Terrorism and the Right of Self Defense' (2001) 95 AJIL, at 840; M Reisman 'In Defense of World Public Order' (2001) 95 AJIL, at 833; 'Le droit international face au terrorisme' CEDIN, Paris I, Cahiers internationaux No 17; G AbiSaab 'The Proper Role of International Law in Combating Terrorism' Chinese Journal of International Law vol I 2002 no 1, at 305.

[20] Statement by the North Atlantic Council of 12 Sept 2001 and Conclusions of the European Council at its extraordinary meeting of 21 Sept 2001.

Certain doubts have been expressed, however, as to the validity of this argument. It has thus been emphasized that it would be dubious to derive an instantaneous custom from one isolated precedent. It has further been observed that this evolution would amount to such a radical change in international law that it would require a clearer practice and a more constant *opinio juris*.

The debate is not over, but such questions pertaining to the *jus ad bellum* have now to a certain extent lost their immediacy. However, that is not the case for questions of *jus in bello*, especially those concerning the application of the Third Geneva Convention on Prisoners of War and of the Fourth Convention on the Protection of Civilians in respect of the persons who were captured by the allied armed forces during military operations in Afghanistan.

Many of those individuals were transferred to the US base at Guantanamo Bay in Cuba where most of them are still held. The United States considered that the Geneva Conventions applied to the Taliban detainees captured in Afghanistan, but not to the Al-Qaida combatants. It was further decided by the United States that the Taliban 'did not meet the criteria applicable to lawful combatants' and that, accordingly, they did not enjoy the status of prisoner of war within the meaning of the Third Geneva Convention. That stance aroused lively debate and the ICRC pointed out that in case of doubt in this respect the Third Convention provided in Article 5 that persons 'having committed a belligerent act and having fallen into the hands of the enemy . . . shall enjoy the protection of the . . . Convention until such time as their status has been determined by a competent tribunal'. For its part, the Inter-American Commission on Human Rights rendered a decision on 12 March 2002 in which it requested the United States 'to take the urgent measures necessary to have the legal status of the detainees at Guantanamo Bay determined by a competent tribunal'.[21] Various actions have been brought before domestic courts, both in the United States and in Europe, and the submission of the matter to the International Court of Justice has been envisaged. I am sure you will thus understand if I refrain from dwelling more on the subject at this stage.

What general conclusions can be drawn from all this?

My first impression is that, over the past 40 years, international criminal law has made significant progress in the combat against international terrorism. Whilst that combat is still mainly a matter for the police and domestic courts, numerous conventions have been adopted and ratified on a universal level with a view to ensuring the prosecution or extradition of the perpetrators of various crimes. Judicial and police cooperation has developed on both a bilateral and a regional level. Most of the normative work has been accomplished.

[21] International Legal Materials, vol 41, no 3, May 2002, at 532–5.

The application of those norms is nevertheless dependent on the will of States. In this respect, it cannot be denied that certain difficulties may arise, either because certain States are unable to maintain their authority on their own territory, or because of wrongful conduct by the States themselves.

In view of the development and globalization of terrorist networks, States which are potential targets of murderous attacks can no longer remain indifferent to such dangers. In this respect, the events of 11 September 2001 have opened their eyes.

Those events have propelled States to the forefront of the international arena. Over the previous few decades, both scholarly writings and the media had constantly been promoting international civil society, in opposition to States seen as heartless 'monsters'. The 11 September attacks have shown that such monsters may emerge from civil society itself and that the terrorist groups themselves have now become actors of the international community in their own right.

In the current circumstances, States have appeared to represent the best defence against terror, as they alone are entitled to deploy violence legitimately. They must nevertheless, of course, act in compliance with the law, and in particular with international law, of which various areas are relevant: the law on the use of force, criminal law, humanitarian law and human rights. International law is not as ill-prepared on this question as we have been led to believe and States cannot allow themselves to disregard it. That is the underlying condition for the legitimacy of their action.