TRANSITIONAL JUSTICE IN AFGHANISTAN: CONFRONTING VIOLATIONS OF INTERNATIONAL HUMANITARIAN AND HUMAN RIGHTS LAW¹

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1. INTRODUCTION

After more than two decades of war and foreign interventions, including the recent US-led military campaign following the 11 September 2001 terrorist attacks, Afghanistan has now entered a period of transition and rebuilding. It joins a host of other countries – from South Africa to Sierra Leone to East Timor – seeking to move from a repressive and violent past to a future based on democracy, the rule of law and respect for fundamental human rights and international humanitarian law. Afghanistan presents one of the most confronting case studies of ‘transitional justice’, what Teitel has described as the issue of how societies deal with their ‘evil pasts’.³

In the case of war-torn Afghanistan, the challenge is overwhelming. A recent report on human rights and reconstruction in the country describes the situation as follows:

‘For the past 23 years, foreign interventions have fueled a series of brutal wars that entrenched the power of unaccountable warlords, divided the country along ethnic lines, and destroyed its already-limited infrastructure and economic base. During this period the people of Afghanistan experienced widespread violations of all their fundamental human rights, ranging from political killings to systematic impoverishment ... Throughout the world, the reconstruction of Afghanistan is seen as a litmus test for whether the universal values of human rights and development will help define the parameters of global security, or whether the narrow military interests of powerful states will predominate. At stake is not only the ability of the Afghans to enjoy their fundamental rights, but the very legitimacy of the United Nations as the unbiased

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3. R. Teitel, *Transitional Justice* (New York, Oxford University Press 2000) p. 3.

guardian of international law and guarantor of peace and security for all peoples of the world.’⁴

This article considers the question of how to confront the long history of systematic and widespread violations of international humanitarian and human rights law perpetrated by previous Afghan regimes, warring factions, terrorist groups and other relevant actors (including foreign military personnel). Two general arguments are advanced. First, the scale and scope of atrocities in Afghanistan, combined with the current unstable political and fragmented social environment make the pursuit of both accountability and justice on the one hand and truth and reconciliation on the other extremely problematic, at least at this early stage in the country’s transition. Second, the actions of the US, both inside Afghanistan as part of its military campaign against the Taliban and Al Qaeda and in other parts of the world as part of its ongoing war against terrorism, are serving to undermine long-established principles of international humanitarian and human rights law, and threaten to impede the transition to peace, security and the rule of law in Afghanistan.

Perceiving new threats and modes of armed conflict, the US has failed to comply with even those international obligations to which it has expressly consented. This has served to further expose a long-standing exceptionalist stance towards international law, which has troubling implications not only for the coherence and progressive development of the humanitarian and human rights treaty regimes but also for future efforts to end impunity and bring to justice those suspected of committing atrocities.⁵

The inquiry proceeds in three stages. Part Two provides a brief historical background to the last two decades of armed conflict in Afghanistan and sets the post-September 11 political and military situation in the context of applicable norms of international law. Part Three then addresses the application of international humanitarian and human rights law to the various armed conflicts (both international and internal) that have occurred in Afghanistan. In relation to the role of the US, the combatant-civilian distinction which is so central to humanitarian law and the categorization and treatment of detainees under both humanitarian and human rights law is examined. Finally, Part Four assesses the normative and institutional choices faced by Afghanistan as it begins to navigate the divide between seeking justice for past abuses on the one hand and dealing with the political realities and entrenched power relations on the other.

4. Center for Economic and Social Rights, *Human Rights and Reconstruction in Afghanistan* (May 2002) (‘CESR Report’) pp. 1-2.

5. Koh attributes these developments to the larger phenomenon of a post-World War II legal system placed under increasing stress by the end of the ‘post-Cold War era’ on September 11. He has suggested that traditional legal dichotomies between ‘war and peace, public and private, domestic and international, and civil and criminal’ have become ‘muddled’ and that we are witnessing a ‘transition from global optimism [the period from 1989 to 2001] to pessimism [the post-September 11 period]’ and that this transition may be seen in three areas of the law: the use of force, the rise of the global justice system, and the relationship between civil liberties and national security. H. Koh, ‘The Law Under Stress After September 11’, *Yale L. Rep.* (2002) pp. 12 at 13-14.

2. HISTORICAL BACKGROUND

Afghanistan has a long history of dynastic rule and coexistence of various religious and ethnic minorities.⁶ In 1747, after Ahmad Shah Abdali was chosen as king by a Loya Jirga, he unified Afghanistan under the Durrani Pashtun dynasty, which ruled unbroken until the coup against Zahir Shah in 1973. The history of foreign interventions in Afghanistan began as early as the 1840s due to the country's geographic location at the frontiers of the British and Russian empires in Asia. Throughout much of the nineteenth century, Britain and Russia competed to utilize Afghanistan's geopolitical importance as a buffer against the other's expansion. Britain invaded Afghanistan twice between 1840 and 1878, until finally establishing the Durand Line in 1893, which sought to divide Afghans along tribal lines and to secure the frontier areas between Afghanistan and the Indian subcontinent.⁷

In 1880 the 'Iron Amir', Amir Abdul Rahman, became king of Afghanistan with British consent and was the first Afghan leader to seek to centralize and strengthen the state. It was not until after the third Anglo-Afghan war in 1919, however, that Afghanistan finally gained its independence from Britain and its first constitution. King Amanullah Khan initiated a broad-ranging program of Western-style domestic reforms and modernization which met with clerical opposition. This led to a rebellion in 1928 which saw the king exiled in 1929 and the rise to power of the short-lived and ruinous reign of the Saqaoists. It took a number of years for King Nadir Shah, who defeated the Saqaoists, to restore order and to regenerate the country's trade, infrastructure and education sectors. Then, in 1933, the last of the Durrani kings, Zahir Shah, ascended to the throne and ruled Afghanistan without any major changes until the mid-1950s.

After the Second World War, British influence in the region waned and Afghanistan under Prime Minister Sardar Muhammad Daud Khan (Zahir Shah's cousin and brother-in-law) turned to the Soviet Union for military and economic aid. Between 1953 and 1963, Daud Khan embarked on a policy of development, reform and modernization which produced some positive results (especially for Soviet financiers) but overall did not achieve much for the general population. After Daud was removed from power by Zahir Shah, the next decade, from 1963 to 1973, saw four prime ministers come and go, each with similar economic development plans and each one similarly ineffective. Then, in 1973, Muhammad Daud Khan overthrew King Zahir Shah⁸ with the assistance of the pro-Soviet communist parties proclaiming Afghanistan a republic and himself both president and prime minister.

6. Various religions such as Zoroastrianism, Graeco-Buddism and Islam have existed in Afghanistan under successive ruling dynasties, including the Ghaznavid, Ghorid, Lodhi, Safavid and Moghul empires. Today, the country has a population of approximately 27 million people comprised of a number of ethnic groups: Pashtun (38%), Tajik (25%), Hazara (19%), minor ethnic groups (Aimaks, Turkmen, Baloch and others) (12%), and Uzbek (6%).

7. The Durand Line, established by Britain in 1893, was an artificial colonial division between present day Pakistan and Afghanistan that still divides the ethnic Pashtun tribes.

8. Zahir Shah was exiled to Rome, where he remained until the events of 11 September 2001.

After his return to power, Daud sought to marginalize the Parchamis, whom he suspected of being under Soviet influence, and looked instead to the West for economic assistance. By 1977, Daud had removed most People's Democratic Party of Afghanistan (PDPA) members from power and introduced a new constitution that banned the PDPA altogether. This prompted the two factions of the PDPA to seek more urgently to overcome their internal divisions. On 19 April 1978, 15,000 protesters took to the streets of Kabul in support of the PDPA, prompting the arrest and imprisonment a week later of the parties' leaders. The next day, the military staged a coup that removed Daud from power (killing him and his family in the presidential palace) and installed Nur Mohammad Taraki, the leader of the Khalq faction of the PDPA, as president of Afghanistan. Taraki immediately faced disagreements between and struggles for supremacy within each of the two PDPA factions and turned to the Soviet Union in an attempt to solidify his hold on power.⁹ The Taraki government then initiated a program of radical land reform that resulted in mass repression in the countryside and the arrest and summary execution of many thousands of Afghans.¹⁰ The attempt to reform rural society through terror provoked armed uprisings throughout Afghanistan and the start of guerrilla warfare.

2.1 Afghanistan's civil war (1979-2001)

This rapidly deteriorating situation in the late 1970s led to what is regarded as the first phase in Afghanistan's 23-year period of war – the Saur revolution and subsequent Soviet occupation. The power struggle between Taraki and his erstwhile disciple, Hafizullah Amin, was finally resolved in September 1979 when Amin prevailed and ordered Taraki's assassination. Amin immediately requested Soviet troops to protect Kabul so that he could redeploy the Afghan army to fight the Mujahidin (or 'jihad fighters'), who were by then intensifying their armed resistance. Fearing instability on its southern border and keen to establish firmer control in Afghanistan, on 24 December 1979, the USSR airlifted thousands of troops into Kabul, assassinated Amin and installed the Parcham leader Babrak Karmal as president.

The Soviet occupation had the effect of inflaming the nationalist and Islamic sentiments of the population and led to popular uprisings and war throughout Afghanistan. The Soviet troops and Karmal government sought to crush the uprisings with mass arrests, torture, and extra-judicial killings of dissidents, and with aerial bombardments and executions in the countryside.¹¹

9. In December 1978, Afghanistan signed a Treaty of Friendship, Good Neighborliness, and Cooperation with the USSR that obliged the Soviets to provide military aid if requested by Afghanistan.

10. See Human Rights Watch, *Backgrounder on Afghanistan: History of the War* (2002) p. 1.

11. This ensured the collapse of the Afghan economy by turning more than a third of the population into refugees (five million out of a total population of 16 million), forcing the abandonment of more than half of the country's farming villages due to the aerial bombardment, and leaving only 20 to 25 percent of arable land being cultivated: see ESCR Report, *supra* n. 4, p. 59.

It is estimated that over one million Afghans died during this period, mostly in aerial bombardments, while the Mujahidin based in Pakistan and Iran continued their armed resistance. Recognizing the conflict between the Mujahidin and Soviet forces as a Cold War battleground implicating important energy resources in the Persian Gulf, the US and Saudi Arabia initiated covert operations in Afghanistan, providing massive military and financial support to the resistance. Throughout the 1980s, the US provided between \$2-3 billion in weapons and supplies through the CIA and Pakistan's Inter-Service Intelligence Agency (ISI) as part of the largest US covert action program since the end of the Second World War. By 1987, the US was providing more than 65,000 tons of arms *per annum* to the Mujahidin, and in particular to the faction of Gulbuddin Hekmatyar. The CIA and the Pentagon worked with the ISI to forge unity among various Afghan and religious groups in Pakistan and to create a network of *deeni madrasas* (religious schools) in Pakistan and bases in Afghanistan to train the Mujahidin.¹²

In 1988, UN-mediated negotiations to end the war finally culminated in the Geneva Accords under which the Soviet Union agreed to remove all troops by February 1989. While still providing substantial financial assistance, the Soviets left behind a proxy communist government headed by Dr Najibullah, Karmal's former deputy, who managed to cling to power until early-1992. During this period and without *bona fide* commitments from either Afghanistan's neighbors or the international community, the UN attempted in vain to implement a transitional process acceptable to all the parties. The various Mujahidin factions, however, refused to negotiate with the government and continued their armed struggle. Following the Soviet withdrawal from Afghanistan, the US and its allies effectively abandoned any efforts to establish a peace process although some effort was made to support the continuing UN relief and humanitarian assistance operations. Afghanistan was thus left to its own resources to deal with the legacies of a huge flow of armaments, a burgeoning drug trade, a destroyed infrastructure and an impoverished population.

In early-1992, phase two of Afghanistan's 23-year civil war began when the forces of Ahmed Shah Massoud (a Tajik leader), General Abdul Rashid Dostum (head of a powerful Uzbek militia formerly allied with Najibullah), and the Hazara faction Hizb-i Wahdat formed a coalition called the Northern Alliance. Following a mutiny on 15 April non-Pashtun militia forces formerly allied to the government took control of Kabul airport and prevented President Najibullah from leaving Afghanistan. Massoud entered Kabul and installed a coalition government. The new government, however, excluded the Hizb-i Islami led by Gulbuddin Hekmatyar, who rejected the arrangement and launched massive and indiscrimi-

12. During this period, militant religio-political groups and *madrasas* proliferated in Pakistan. Today there are 58 registered religious political parties and 24 armed religious militias in the country. See S. Shafqat, 'From Official Islam to Islamism: The Rise of Dawat-ul-Irshad and Lashkar-e-Taiba', in C. Jaffrelot, *Pakistan: Nationalism without a Nation?* (New Delhi, Manohar/London, Zed Books 2002) pp. 131 at 133-134.

nate rocket attacks on Kabul that continued intermittently until February 1995.¹³ In June 1992, Burhanuddin Rabbani (the Tajik leader of Jamiat-i Islami or 'Society of Islam') became president of the Islamic State of Afghanistan. Fighting continued, however, between the Hazara faction of Hizb-i Wahdat and Abd al-Rabb al-Rasul Sayyaf's Ittihad-i Islami, with many civilians being abducted and killed. In January 1994, Hekmatyar joined forces with General Abdul Rashid Dostum and successfully ousted Rabbani and his Defence Minister Massoud, thus initiating a full-scale civil war in Kabul which, by 1995, had reduced a third of the city to rubble.¹⁴

It was in the context of this chaos and lawlessness created by warring Mujahidin factions that the Taliban first emerged and the third phase of Afghanistan's civil war began. The Taliban (meaning 'students') were former Mujahidin and *madrasa* students who coalesced around Mullah Mohammad Omar, a former *mujahid* from Kandahar province. The group also included commanders in other Pashtun parties and former Khalqi PDPA members. The Taliban were disillusioned with the results of their victory over the communists and sought to restore stability to Afghanistan by enforcing a strict form of Islamic law (they adhered to an extreme form of Sunni Islam closely related to Saudi Wahhabism) and attacking local warlords who had carved up the country among the various factions. Also trained by Pakistan's ISI in *madrasa* and training camps, the Taliban demonstrated disciplined military prowess and defeated various Mujahidin factions, driving Massoud from Kabul to the north and securing control of 27 out of 30 provinces. Under Massoud's leadership, the Northern Alliance continued to fight the Taliban from the north, and received arms and financial assistance from Iran, Russia and India allowing them to control about five to ten percent of the country.

In 1997, the Taliban renamed the country the Islamic Emirate of Afghanistan and vigorously enforced their interpretation of Islamic law.¹⁵ Between 1997 and 1998, the Taliban sought to gain more control in northern Afghanistan where Dostum still held large areas of land in and around Mazar-i Sharif in an alliance with Hizb-i Wahdat (which had a stronghold in the large Hazara population). After one of Dostum's deputies, General Abdul Malik Pahlawan ('Malik'), struck a deal with the Taliban, they were able to enter Mazar-i Sharif, prompting Pakistan, Saudi Arabia and the United Arab Emirates to recognize the Taliban as the official government of Afghanistan.¹⁶ But the alliance with Malik proved to be short-lived,

13. The framework for an Afghan interim government forged by Pakastani-based Mujahidin in the Peshawar Agreement of 24 April 1992 collapsed only months after its implementation.

14. Human Rights Watch report, *supra* n. 10, p. 3.

15. Mullah Omar assumed the title *amir-ul momineen* (commander of the faithful). In order to enforce Islamic law, the Taliban created the Ministry of Promotion of Virtue and Prevention of Vice which was responsible for enforcing all decrees regarding moral behavior. This included comprehensive policies that were especially repressive towards women (prohibiting work outside the home in areas other than health care, virtually eliminating education for women and girls and requiring a draconian dress code) but also rigidly restricted the freedom of men in many areas of personal and social life.

16. Despite the fact that the Taliban had control of over 80 percent of the country, it failed to achieve international recognition as the legitimate government of Afghanistan. The UN continued to regard Rabbani's government as the *de jure* government of Afghanistan in exile (the 'Islamic State of

and when the Taliban sought to disarm local Hazaras, thousands of Taliban soldiers were taken prisoner and summarily executed Malik and Hizb-i Wahdat. In August 1998, however, the Taliban at last captured Mazar-i Sharif, massacring at least 2,000 people in the process, mainly Hazara civilians. Thus, during this period, the country was divided along ethnic lines, with the Taliban controlling the capital Kabul and over two-thirds of the country (including the predominantly ethnic Pashtun areas in southern Afghanistan) while opposing factions, under the banner of the Northern Alliance (or 'United Front for the Salvation of Afghanistan', as they later renamed themselves) had their strongholds in the ethnically diverse north.

As discussed in the next two sections, the conflict between the Taliban and the Northern Alliance resulted in serious violations of international humanitarian and human rights law on both sides, including indiscriminate aerial bombardment and shelling, summary executions and the widespread use of antipersonnel mines. Taliban offensives included scorched earth tactics in the Shomali plains north of Kabul, summary executions of prisoners in the north-central province of Samangan, and forced relocation and conscription. At the same time, the Northern Alliance carried out summary executions, burnt houses and looted in areas under its control, the principal targets being ethnic Pashtuns and others suspected of supporting the Taliban.

By 2001, Afghanistan was a country crippled not only by incessant civil war but also by the effects of a severe three year drought that resulted in the failure of crops and the death of most of its livestock. Life expectancy at birth was approximately 46 years old, and the overall literacy rate of people above the age of 15 was 31 percent, making it amongst the lowest in the world. During 23 years of civil war, the country lost a third of its population (over 1.5 million people are estimated to have died as a direct result of armed conflict) while another five million fled as refugees to Iran and Pakistan. A large part of the remaining population was left internally displaced.

2.2 Al Qaeda and the 'war against terrorism' (2001-2003)

In addition to the incessant meddling of neighboring countries,¹⁷ the war in Afghanistan had a further unique and ultimately disastrous dimension that soon led

Afghanistan'), a position later confirmed in the Bonn Agreement of 5 December 2001. See *infra* n. 34 and accompanying text. The response of the Organization of the Islamic Conference was to leave the Afghan seat vacant until such time as the question of legitimacy could be resolved through negotiations among the warring factions.

17. Although there have been numerous agreements by Afghanistan's neighbors and other states involved in the conflict to end arms supplies as part of a larger peace process, none of these agreements has included enforcement mechanisms. On 21 July 1999, at a meeting in Tashkent of the Group of Six-plus-Two, comprising the countries bordering Afghanistan plus the US and Russia, the delegates signed an agreement, subsequently known as the Tashkent Declaration, in which they agreed 'not to provide military support to any Afghan party and to prevent the use of our territories for such purposes'.

to its fourth phase. The Saudi multi-millionaire Osama bin Laden, who had left Afghanistan in 1990, returned in 1996. He lived first under the protection of the Jalalabad *shura* (tribal council) until the Taliban took control of Jalalabad and Kabul in 1997. He then moved to Kandahar where he developed a close relationship with the Taliban leader Mullah Muhammad Omar. During this period, bin Laden continued to develop an international network of Islamic fighters from various countries (known as 'Al Qaeda') dedicated to carrying out acts of violence against embassies, military targets and civilians linked to the US. His fighters also fought alongside Taliban troops during their ongoing struggle with the Northern Alliance forces.

In August 1998, the US launched 79 cruise missiles against bin Laden's training camps near the Pakistan border and at a pharmaceutical plant in Sudan's capital Khartoum which US officials linked to bin Laden's operations. The strikes followed the bombings of the US embassies in Nairobi and Dar es-Salaam which killed more than 200 people, including 12 Americans, and an earlier truck bombing in 1996 that killed 19 members of the US military services and wounded nearly 400 others in an apartment building being used as military barracks in Saudi Arabia. On 15 October 1999, the UN Security Council imposed sanctions on the Taliban in order to pressure them to turn over bin Laden, banning Taliban-controlled aircraft from takeoff and landing and freezing the Taliban's assets abroad.¹⁸ On 12 October 2000, a US warship, the *USS Cole*, was bombed while refueling in the Yemeni port of Aden by two suicide bombers in a fiberglass skiff loaded with explosives, killing 17 American sailors. In the wake of several arrests by Yemeni authorities, the Yemeni Prime Minister said that preliminary evidence suggested bin Laden's involvement, although no more conclusive evidence has subsequently come to light.

The Taliban's continuing failure to hand over bin Laden led to an expansion by the Security Council on 19 December 2000 of the sanctions regime, including an arms embargo on the Taliban, a ban on travel outside Afghanistan by Taliban officials of deputy ministerial rank and the closing of Taliban offices abroad.¹⁹ On 9 September 2001, Massoud was assassinated when suicide bombers disguised as journalists detonated a hidden device in a video camera.²⁰ Then, dramatically, on 11 September 2001, international terrorists, including members of the organization Al Qaeda, carried out attacks on the Pentagon in Washington DC and on the World Trade Center in New York City killing over 3,000 people. The terrorists hijacked four civilian aircraft and flew them into these targets (with one aircraft crashing in Pennsylvania), killing all passengers on board and causing mass deaths and injuries to civilians and massive destruction of property. The next day, the Security

18. SC Res. 1267 (1999).

19. SC Res. 1333 (2000).

20. United Front leaders have claimed that the assassins were linked to Osama bin Laden, and many observers believe that the assassination was designed to deprive the United Front of its most effective leader in the aftermath of the events of September 11: see Human Rights Watch report, *supra* n. 10, p. 5.

Council adopted a resolution unequivocally condemning the attacks, declaring them to be a 'threat to international peace and security' and recognizing the 'inherent right of individual or collective self defense in accordance with the Charter'.²¹

On 28 September, the Security Council, acting under Chapter VII of the Charter, unanimously adopted a resolution directed towards combating terrorists and all states which support, harbor, provide safe haven to, finance, supply weapons to, help recruit or aid terrorists, and requiring all member states to cooperate in a wide range of areas – from suppressing and financing of terrorism to providing early warning, cooperating in criminal investigations, and exchanging information on possible terrorist acts.²² The resolution also provided for the establishment of a new 'terrorism committee' of the Security Council, consisting of all members of the Council, to which all member states were required to report within 90 days on the steps they had taken to implement the resolution. Thus, Resolution 1373 quickly established a new comprehensive legal framework – backed by Chapter VII enforcement power – for states to address the threat of international terrorism through mutual cooperation and coordination of their criminal justice systems.

A week later on 7 October, the US Ambassador to the UN, John Negroponte, delivered a letter to the President of the Security Council stating that the US, together with other states, had 'initiated actions in the exercise of its inherent right of individual and collective self-defense' against Al Qaeda terrorist training camps and military installations of the Taliban regime in Afghanistan on the basis of 'clear and compelling information' that Al Qaeda, supported by the Taliban regime in Afghanistan, had a 'central role in the attacks'.²³ The letter further stated that while still at the early stages, the US 'may find that our self-defense requires further actions with respect to other organizations and other States'. Thus was born the 'Bush doctrine' – the asserted right to use military force in 'self defense' against any state which aids, harbors or supports international terrorists or terrorist organizations.²⁴ As of 7 October 2001 (and likely earlier), a US-led coalition of armed forces commenced 'self defense' operations in Afghanistan in order to destroy the Al Qaeda terrorist organization and to remove the Taliban regime from power.

The military tactics employed by the US and its allies (the 'international coalition') were to use overwhelming air power in conjunction with covert operations in cooperation with Northern Alliance forces. The international coalition rearmed anti-Taliban forces, provided them with tactical support through US special forces

21. SC Res. 1368 (2001).

22. SC Res. 1373 (2001).

23. Letter from the Permanent Representative of the US to the President of the UN Security Council (S/2001/946).

24. For discussion on self-defense and state responsibility for terrorist acts, see *infra* n. 58 and accompanying text

liaisons on the ground, and gave aerial bombing support.²⁵ The result was that Afghan anti-Taliban forces conducted most of the ground offensives and subsequently took military control of the areas they captured. This in turn meant that ethnically-based factions and individual warlords, once more, gained a stranglehold on power in provincial areas in the absence of an expanded international security force beyond Kabul.²⁶ As Ahmed Rashid has observed:

'In the 1980s, Washington backed anti-Soviet Afghan militias which in victory produced the factionalism that brought the Taliban to power. Now, the same forces, which with US backing ousted the Taliban, are threatening to return the country to warlordism all over again ... Warlords whose armies acted as proxy US ground forces in the Taliban campaign are now refusing to disarm or accept the writ of the country's fledgling interim government.'²⁷

The international coalition's military campaign against the Taliban and Al Qaeda is now largely completed, although US and allied special operations forces continue to search for Al Qaeda forces in various parts of the country. Due to the secrecy of the Pentagon and general lack of access to conflict areas, accurate and independently verifiable details of the effects of the war remain unavailable. Despite the ability of the US to target its weaponry with precision accuracy, however, estimates by some observers of Afghan civilian casualties due to coalition bombing and special operations have ranged from 3,000 to 3,500.²⁸ In

25. See S.B. Glasser, 'U.S. Backing Helps Warlords Solidify Power', *Washington Post* (18 February 2002); Human Rights Watch, 'Dangerous Dealings: Changes to U.S. Military Assistance After September 11', Vol. 14(1)(G) (February 2002) at pp. 6-8.

26. See Human Rights Watch Briefing Paper, 'Afghanistan: Return of the Warlords', June 2002 (noting the reemergence of figures associated with the Taliban as well as the extremist Islamist movement led by the former Afghan Prime Minister Gulbuddin Hekmatyar in several southern provinces).

27. A. Rushid, 'Fledgling Afghan Government Faces Scourge of Warlordism – Local Leaders Who Ousted Taliban With Aid of U.S. Are Restoring Old Fiefs', *Wall Street Journal* (16 January 2002).

28. Most casualties are believed to have resulted from 'collateral damage' due to the US bombing of heavily populated metropolitan areas where military installations and other strategic targets were also located. In isolated cases, it appears that bombs were dropped on hospitals, schools, mosques and groups of fleeing refugees: see e.g., M.W. Herold, *A Dossier on Civilian Victims of United States' Aerial Bombing of Afghanistan: A Comprehensive Accounting* (2002) available online at www.cursor.org/stories/civilian_deaths.htm (suggesting that the US targeted civilian infrastructure, including the Kajaki dam and other power stations, radio stations, the Kabul telephone exchange, the Al Jazeera Kabul office, trucks and buses containing refugees, and numerous civilian trucks carrying fuel and oil). There have also been reports of US strikes on a Red Cross warehouse in Kabul (which was allegedly used by the Taliban for supplies) and a Red Crescent clinic in Kandahar on 31 October 2001 killing 15-25 civilians. Note, however, that there is disagreement over the numbers of civilian casualties and that the figures suggested by Herold have been challenged as being excessive: see J. Muravchik, 'Racking Up Afghan Casualties', *Wall Street Journal Europe* (21 August 2002) at A8 (arguing that the figure of over 3,500 civilian casualties is unsubstantiated).

addition, the US has employed its full arsenal of weapons, including JDAM-type bombs, cluster bombs and devastating sub-atomic 'daisy cutter' bombs.²⁹

As discussed further below, both civilian casualties and the use of certain types of weapons raise the question of potential violations of international humanitarian law. But perhaps the most volatile political dimension of the most recent phase of the armed conflict in Afghanistan has centered on the issue of the legal status and treatment of detainees. Since the commencement of US military operations on 7 October 2001, thousands of individuals have been detained by anti-Taliban Afghan forces and by the US armed forces. These include both Taliban and 'foreign' Al Qaeda fighters from over two-dozen countries. In addition to Afghan nationals, many Pakistani nationals are reportedly among the detainees, as well as smaller numbers of Saudis, Yemenis and others from Arab States, Uzbeks, Chechens from Russia, Chinese, Europeans, and others.³⁰ The US military has been screening and interrogating detainees in Afghan custody in order to identify persons it wishes to prosecute or detain or who may have useful intelligence information (primarily in relation to the whereabouts of Taliban or Al Qaeda leaders, or knowledge about the inner workings of the Al Qaeda terrorist network). The US has taken custody of several hundred detainees held by Afghan forces, and has transferred them to its own detention facilities: a US military detention facility located outside Kandahar and detention facilities in offshore Navy ships, such as the *USS Peleliu*. In addition, US military forces have also directly taken custody of persons while carrying out military operations inside Afghanistan. In January 2002, the US began transferring these persons from the detention facilities in the immediate theater of conflict to a more permanent detention facility at the US military base in Guantánamo Bay, Cuba. According to the Department of Defense, as of 28 January 2002, 482 prisoners were being held by US forces in Afghanistan and at Guantánamo Bay, about one fifth of whom were Saudi nationals.

2.3 Post-war transition and rebuilding: the Bonn Agreement

As the full effects of the US-led military campaign became apparent in late-2001, the UN began to make arrangements for Afghanistan's political transition and rebuilding.³¹ The UN has in fact long been engaged in the country, both in trying to

29. Weapons employed by the Air Force have included medium-sized Tomahawk and cruise missiles; fuel air bombs; B-52 carpet bombs; BLU-82 sub-atomic bombs (known as 'daisy cutters' which destroy everything in a 600 yard radius); 1,000 and 2,000 pound JDAM (Joint Direct Attack Munition) bombs; and Aerojet/Honeywell CBU-87 cluster bombs. As of 30 November 2001, it is estimated that US bombers had dropped approximately 600 cluster bombs in Afghanistan. Assuming a failure rate of 12 percent, this suggests that there are currently about 14,500 unexploded bomblets in the Afghan countryside and villages adding to the existing proliferation of landmines: see M. Steen, 'US Cluster Bombs Add to Afghan Landmine Tragedy', Reuters News Service (5 December 2001).

30. See Human Rights Watch, Backgrounder, *Afghanistan: Return of Foreign Fighters and Torture Concerns* (December 2001).

31. See Security Council Meeting 4414, SC/7210, 13 November 2001 (Secretary General's Special Representative, Lakhdar Brahimi, outlining plans for political transition in Afghanistan and stressing the need for a 'home-grown solution that was aided by the international community' in order

end the inter-Afghan fighting that followed the Soviet withdrawal in 1989, and in delivering humanitarian assistance to large numbers of people both in Afghanistan and in refugee camps in neighboring countries.³² Recognizing that Afghanistan presented a radically different situation compared with recent international peace-building operations in Kosovo and East Timor, the UN opted for a model closer to its earlier assistance missions that provided development support to post-conflict societies.³³ On 5 December 2001, the UN brokered talks in Bonn, Germany, which culminated in an agreement for Afghanistan's future political framework, which was fully endorsed by the Security Council the following day.³⁴ The Secretary General, Kofi Annan, stated that the Bonn Agreement represents a 'historic opportunity for the people of Afghanistan to emerge from a cycle of conflict and devastating poverty into a future in which there can be reconstruction and peaceful development'.³⁵

The Bonn Agreement provided for a transfer of power from Burhanuddin Rabbani (whom the UN still recognized as the leader of the *de jure* government of Afghanistan in exile) to an Interim Authority that was to be established on 22 December 2001.³⁶ Six months after the establishment of the Interim Authority, an

to create a 'stable, representative and accountable government with both internal and external legitimacy').

32. The UN Special Mission to Afghanistan (UNAMA) operated for many years on a relatively minor budget. In 1997, for example, UNAMA received \$3.1 million for its peacemaking operations and 30-person staff in Kabul and Islamabad: see Press Release, UN General Assembly, Fifth Committee, GA/AB/3130, 16 December 1996. Following the negotiation of the Bonn Agreement, on 28 March 2002, the Security Council endorsed the establishment, for an initial period of 12 months, of a UN Assistance Mission in Afghanistan (UNAMA) in order to integrate all existing UN elements into a single mission: see Report of the UN Secretary General, *The situation in Afghanistan and its implications for international peace and security*, A/56/875-S/2002/278 (18 March 2002) at Ch. VI, para. 94 et seq.

33. Thus, whereas sustained grassroots peace-building, peacekeeping and institutional construction have been pursued in other conflicts prior to establishing self-governing institutions, in Afghanistan the strategy was to assemble a broadly-based administration as quickly as possible in order to establish security and a partnership with the international community (which would assume a supportive role): see J. Dobbins, the US Special Envoy for Afghanistan, Remarks at a US Institute of Peace conference titled 'Afghanistan: Prospects for Peace and Reconstruction' (15 January 2002). As has been pointed out, however, this strategy creates a 'divide between formal authority and practical influence, increasing the risk that the political consensus established in the Bonn Agreement and recently reaffirmed at the Loya Jirga Kabul will spin out of control': S. Chesterman, 'Afghanistan: The Hard Part for the UN Starts Now', *International Herald Tribune* (5 July 2002) (arguing that the success of the UN mission in Afghanistan requires the Bonn Agreement to be seen not as a final status agreement but as a framework for further negotiations and for the UN to be able to exert significant political influence over that process).

34. Agreement on provisional arrangements in Afghanistan pending the re-establishment of permanent government institutions, S/2001/1154, 5 December 2001 (the 'Bonn Agreement'), endorsed by SC Res. 1383 (2001), 6 December 2001.

35. Report of the Secretary General, *supra* n. 32, para. 7.

36. Art. I, sec. 2 of the Bonn Agreement provides that the Interim Authority is to consist of an Interim Administration presided over by a Chairman, a Special Independent Commission for the Convening of the Emergency Loya Jirga, and a Supreme Court of Afghanistan, as well as any other courts established by the Interim Administration. The Interim Authority is the sole repository of

Emergency Loya Jirga was required to decide on a Transitional Authority. This should be a 'broad-based transitional administration' mandated to govern Afghanistan until such time as a 'fully representative government can be elected through free and fair elections', which must be held no later than two years after the convening of the Emergency Loya Jirga.³⁷ The Bonn Agreement also required a Constitutional Loya Jirga to be convened within 18 months of the establishment of the Transitional Authority in order to adopt a new constitution for Afghanistan.³⁸

The Interim Authority chosen at Bonn in December 2001 was headed by Hamid Karzai, a Pashtun tribal leader, who was also later elected by the Emergency Loya Jirga held in June 2002 as President of the Transitional Authority. The overall composition of both the Interim and Transitional Authorities, however, was heavily influenced by the renewed military and political power of Afghanistan's warlords.³⁹ The three main ethnically-based armed militias in northern Afghanistan managed to secure representation in the Interim Administration. The Panjshiri Tajik leadership of Jamiat, the dominant element within the United Front (formerly, the Northern Alliance), which assisted the US-led coalition in the ousting of the Taliban, secured the three most critical departments in the Interim Administration – defense, interior and foreign affairs.⁴⁰ Hizb-i Wahdat received control of the planning department whose head, Haji Mohammad Mohaqiq, was

Afghan sovereignty, represents Afghanistan in its external relations, and occupies Afghanistan's seat at the UN, its specialized agencies and other international bodies: Art. I, sec. 3.

37. Art. I, sec. 4 of the Bonn Agreement.

38. This requires the Transitional Authority to establish a Constitutional Commission with the assistance of the UN: Art. I, sec. 6. Until a new Constitution is adopted, the Constitution of 1964 and existing laws and regulations constitute the applicable legal framework in the country (with some exceptions relating to the Bonn Agreement itself, international legal obligations to which Afghanistan is a party, and several provisions in the 1964 Constitution relating to the monarchy and executive and legislative bodies).

39. Four main groups signed the Bonn Agreement: the Northern Alliance, the Pakistan-based Peshawar Front, the Iran-backed Cyprus Group, and the Rome Process representing former King Zahir Shah. The 30-member cabinet of the Interim Administration included 11 Pashtuns, eight Tajiks, five from the Shi'a Hazara population, three Uzbeks, with the rest drawn from other minorities. Despite efforts to the contrary by the Special Independent Commission for the Convening of the Emergency Loya Jirga and the UN, warlords such as General Abdul Rashid Dostum and Commander Atta Mohammed selected themselves to the Loya Jirga, while in the west of the country, Ismail Khan reportedly manipulated the selection process: see Human Rights Watch briefing paper, *supra* n. 26 at p. 11.

40. Mohammad Qasim Fahim, the commander-in-chief of the Northern Alliance's Jamiat forces, became the Defense Minister in the Interim Administration; Yunus Qanooni, who led the Northern Alliance delegation, became the Interior Minister; and Abdullah Abdullah, who retained his position as foreign secretary, became the Foreign Affairs Minister. General Abdul Rashid Dostum, the military governor of Herat and commander of Junbish, initially denounced the Bonn Agreement but was ultimately assigned the post of deputy defense minister. Similarly, Ismail Khan, an ally of Jamiat leader Burhannudin Rabbani, pledged to recognize the Interim Administration while proclaiming autonomy for five western provinces: see P. Baker, 'Afghan Factions Criticize Accord: Some Leaders Vow to Boycott Regime', *Washington Post* (7 December 2001) cited in Human Rights Watch, *Paying for the Taliban's Crimes: Abuses Against Ethnic Pashtuns in Northern Afghanistan*, Vol. 14(2)(C) (April 2002) at p. 7.

also designated one of the five deputy chairmen of the Interim Cabinet.⁴¹

The Bonn Agreement requires the Interim Administration to establish with UN assistance an independent Human Rights Commission and a Judicial Commission, which together will have the task of ensuring that international humanitarian and human rights law and standards are implemented in the particular social, political and cultural context of Afghanistan.⁴² Importantly from a transitional justice perspective, the Bonn Agreement makes two further stipulations: first, that the Interim Authority and the Emergency Loya Jirga act in accordance with 'basic principles and provisions contained in international instruments on human rights and international humanitarian law to which Afghanistan is a party',⁴³ and second, that the UN shall have the 'right to investigate human rights violations and, where necessary, recommend corrective action'.⁴⁴

On 9 March 2002, a national workshop on human rights was convened in Kabul by the then-UN High Commissioner for Human Rights, Mary Robinson, with participants representing a wide spectrum of Afghan society and numerous human rights NGOs and institutions. The workshop produced four working groups which should proceed to formulate proposals for the establishment of the independent Human Rights Commission; the development of a national programme of human rights education; approaches to human rights monitoring; investigation and remedial action; and the advancement of the rights of women. Achieving accountability for humanitarian and human rights law violations and establishing transitional justice mechanisms more broadly – including proposals for the establishment of a Truth Commission to uncover the atrocities committed over two decades of war – will involve components of these proposals. At the same time, the Security Council has sought to link development aid to improved human rights performance,⁴⁵ and it is clear that the \$4.5 billion reconstruction process will be a test

41. The cabinet of the subsequent Transitional Administration named by President Karzai in late-June 2002 differed only slightly from that of the Interim Administration.

42. Art. II, sec. 2 stipulates that a Judicial Commission will be established to 'rebuild the domestic justice system in accordance with Islamic principles, international standards, the rule of law and Afghan legal traditions'. Art. III, sec. C, para. 6 stipulates that a Human Rights Commission will be established with its responsibilities to include 'human rights monitoring, investigation of violations of human rights, and development of domestic human rights institutions'.

43. Bonn Agreement, Art. V, sec. 2. The Interim Authority is also required to 'respect international law' (Art. V, sec. 3) and to 'ensure the participation of women as well as the equitable representation of all ethnic and religious communities in the Interim Administration and Emergency Loya Jirga' (Art. V, sec. 4).

44. The UN is also responsible for the 'development and implementation of a programme of human rights education to promote respect for and understanding of human rights': Annex II – Role of the United Nations During the Interim Period, sec. 6. The advancement of the rights and participation of women and the integration of a gender perspective will be a primary focus for these institutions. In this regard, the Office of the High Commissioner for Human Rights has seconded a human rights adviser to the Office of the Special Representative in Kabul to provide advice in the initial stages of developing a human rights programme. In addition, the work of the Special Rapporteur of the Commission on Human Rights, Kamal Hossain, remains integral to this process: see Report of the Secretary General, *supra* n. 32, para. 43.

45. SC Res. 1401 of 28 March 2002.

case for a rights-based development approach that prioritizes basic needs, guarantees local participation, addresses the root causes of poverty, and establishes effective procedures for accountability and remedies for victims.

Outside Kabul, the overall human rights situation in Afghanistan remains precarious. There have been reports of civilian massacres involving reprisal killings and summary executions and the taking and retaking of areas by warring factions. Gross violations of the human rights of women and girls are continuing in many areas, including rape and other forms of sexual violence, abductions and kidnappings, as well as forced marriages and trafficking. The existence of millions of Afghan refugees and internally displaced persons is also creating great insecurity and instability in the country. Pending the creation of a national army, the unwillingness of the US and UK to expand the International Security Assistance Force (ISAF) beyond Kabul to other major cities and surrounding areas has allowed these violations to continue largely unchecked.⁴⁶

Each of these factors has been recognized by the General Assembly⁴⁷ and the UN Commission on Human Rights,⁴⁸ both of which have called upon all Afghan parties to adhere strictly to their obligations under human rights instruments and international humanitarian law. The Secretary-General has further urged the Security Council to 'support the wish of the Afghan people for the expansion of the [ISAF]' so as to minimize the 'likelihood of large-scale hostilities erupting again between existing armed factions'.⁴⁹ A recent independent mission to Afghanistan

46. Under the Bonn Agreement, it was agreed that 'responsibility for providing stability and law and order throughout the country resides with the Afghans themselves'. Given that it would take some time to reconstitute Afghanistan's security and armed forces, however, a request was made to the Security Council to consider authorizing the early deployment of a UN-mandated force to 'assist in the maintenance of security for Kabul and its surrounding areas' and which could, 'as appropriate, be progressively expanded to other urban centers and other areas': Annex I – International Security Force, sec. 3. On 20 December 2001, the Security Council, acting under Chapter VII of the UN Charter, authorized an International Security Assistance Force (ISAF) for a period of six months to assist the Interim Authority maintain security in 'Kabul and its surrounding areas'. Despite repeated requests by both the Afghan administration and the Secretary-General, the Security Council has refused to expand the mandate of the ISAF to areas outside of Kabul and its immediately surrounding areas. See Report of the Secretary-General, *supra* n. 32, paras. 58–59 (noting that while the ISAF remains limited to Kabul, the main threats to the Interim Administration emanate from the provinces).

47. *Question of human rights in Afghanistan*, A/Res/56/176, 7 February 2002 (calling upon all Afghan parties, *inter alia*, to 'facilitate the provision of efficient and effective remedies to the victims of grave violations and abuses of human rights and of international humanitarian law and to bring the perpetrators to justice in accordance with international standards' and to 'treat all suspects and convicted or detained persons in accordance with relevant international law').

48. *The situation of human rights in Afghanistan*, Comm. HR Res. 2002/19, E/CN.4/2002/L.31, 22 April 2002 (calling upon the Interim Authority, its successors and all Afghan groups, in application of the Bonn Agreement, to 'adhere strictly to their obligations under human rights instruments and international humanitarian law, *inter alia*, in relation to the treatment of prisoners' and strongly condemning the 'past violations and abuses of human rights and international humanitarian law in Afghanistan by the Taliban and others', including torture, the use of child soldiers, civilian massacres and summary executions, the killing of foreign correspondents, Iranian diplomats and UN personnel, and the gross violations of the human rights of women and girls).

49. A/56/875-S/2002/278 at pp. 9, 21.

has warned that ‘without an international force to maintain peace, disarm warlords, oversee the transition to a more representative government and establish mechanisms for human rights accountability, Afghanistan is likely to slide into renewed war once the world’s attention shifts to the next global crisis’.⁵⁰ Thus, until the overall human security situation in the country is adequately addressed, the broad scope of activities of UNAMA – political, human rights and rule of law, gender, relief, recovery and reconstruction – will remain at risk of unraveling.

3. VIOLATIONS OF INTERNATIONAL HUMANITARIAN AND HUMAN RIGHTS LAW

3.1 Some preliminary questions

Before one can address the controversial question of modes of accountability for individual violations of international humanitarian and human rights law, it is first necessary to discuss three prior and interrelated issues: first, who are the potential perpetrators and actors; second, what is the scope of application of the relevant conventional and customary norms of international law; and third, what is the nature of the armed conflict (or multiple armed conflicts) that has existed at different periods over the last 23 years in Afghanistan, and how does this relate to the two prior issues?

In relation to the first issue, the analysis is divided into four parts in accordance with the different types of potential perpetrators: (a) Mujahidin and other warring Afghan factions, including Taliban forces; (b) forces of the Soviet Union and neighbouring states; (c) members of Al Qaeda and other international terrorist networks; and (d) US-led military forces involved in the post-September 11 armed conflict in Afghanistan.

In relation to the second issue, Afghanistan is a party to the four Geneva Conventions of 1949 (although not the two Additional Protocols of 1977), and to most of the human rights conventions.⁵¹ Thus, almost the full scope of international humanitarian and human rights law is potentially applicable to abuses committed during periods of both armed conflict and peacetime in Afghanistan over the last two decades.

In relation to the third issue, some preliminary comments are necessary. For some years, both scholars and practitioners have been observing the gradual convergence of international human rights and humanitarian law.⁵² Indeed, today

50. CESR Report, *supra* n. 4, at p. 2.

51. Afghanistan is a party to the Convention on the Prevention and Punishment of the Crime of Genocide; International Covenant on Civil and Political Rights; International Covenant on Economic, Social and Cultural Rights, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and the Convention on the Rights of the Child. Afghanistan has signed but not ratified the Convention on the Elimination of All Forms of Discrimination Against Women.

52. See e.g., T. Meron, ‘The Humanization of International Humanitarian Law’, 94 *AJIL* (2000) p. 239.

we no longer refer to the 'laws of war' but rather to 'international humanitarian law', reflecting the influence of the human rights movement and principles of humanity. In many respects, the older body of the law of armed conflict, which derives historically from medieval notions of chivalry and reciprocity guaranteeing 'fair play' and minimizing unnecessary suffering in times of armed conflict, is being 'humanized' to accord with a more modern conception of individual human dignity that is thought to prevail in all circumstances.

This can be seen in a number of areas. As compared with the Lieber Code and early Hague law, the guarantees against torture, arbitrary arrest and detention, discrimination, and of due process in the 1949 Geneva Conventions and 1977 Additional Protocols reflect the unmistakable influence of the Universal Declaration of Human Rights; the domain of legitimate reprisals (collective responsibility of the many for violations by a few) has diminished and been influenced by the emphasis in human rights law on individual responsibility; violations of humanitarian law are increasingly subject to prosecution in third states under the principle of universal jurisdiction; the classic distinctions in thresholds of applicability between 'international' and 'non-international' armed conflicts has begun to break down with increasing calls for the formulation of fundamental standards of humanity that protect an 'irreducible core of non-derogable norms',⁵³ and we have seen the emergence of the notion of 'crimes against humanity' with no *a priori* nexus to armed conflict.

While these convergences are welcome developments, it is important to realize that significant differences between human rights and humanitarian law remain. Humanitarian law regulates aspects of a struggle for life and death between contestants who operate on the basis of formal equality; it allows the killing of 'combatants' and, in some circumstances, it may tolerate the killing and wounding of civilians as 'lawful collateral damage, where the military necessity is sufficiently great; it permits deprivation of personal freedom without conviction in a court of law; it allows an occupying power to resort to internment and limits the appeal rights of detained persons; and it permits far-reaching limitations on freedoms of expression and assembly'. Thus, while humanitarian law attempts to impose constraints on the savagery of war, especially regarding unnecessary suffering of civilians and inhumane methods and means of warfare, it nevertheless permits violations of some fundamental human rights. It is of importance, therefore – as will be seen in the case of Afghanistan – to determine whether the threshold requirements of either an international or internal armed conflict have been met or whether states remain bound by the full array of international obligations that exist under human rights law and other regimes providing for the protection of the rights of the individual.

53. See e.g., T. Meron and A. Rosas, 'A Declaration of Minimum Humanitarian Standards', *AJIL* (1991) p. 375; A. Eide, A. Rosas and T. Meron, 'Combating Lawlessness in Gray Zone Conflicts through Minimum Humanitarian Standards', 89 *AJIL* (1995) p. 215; D. Petrasek, 'Moving Forward on the Development of Minimum Humanitarian Standards', 92 *AJIL* (1998) p. 557. See also Minimum Humanitarian Standards: Analytical Report of the Secretary-General Submitted pursuant to Commission on Human Rights resolution 1197/21, UN Doc. E/CN.4/1998/87 (1998).

Once an international armed conflict may be said to exist, the killing of any person meeting the definition of a 'combatant' is permissible and the rights of civilians and detainees are governed primarily by the Geneva Conventions. While human rights law continues to apply in such situations and fill any 'gaps' in the humanitarian law regime, it may be limited or derogated from by states, leaving only a small 'core' of human rights norms applicable.⁵⁴ Where there is a conflict between the two legal regimes, the law of armed conflict – as the *lex specialis* – will prevail.⁵⁵ In the case of Afghanistan, the issue of thresholds of applicability is complex for two reasons. First, as we have seen, the cycle of war in Afghanistan has moved through at least four phases since the Saur revolution and Soviet occupation in 1979, with certain periods of hostilities having a more international, and others a more internal, character. Even during periods of largely internal armed conflict, Russia, the US, and neighboring states have been deeply involved in providing military and financial assistance to the warring Afghan factions. Thus, as in the case of the fighting in the former Yugoslavia after 1991, which was held to have mixed internal and international aspects,⁵⁶ difficult determinations need to be made regarding the consecutive phases of the Afghan wars in order to determine which rules apply to different perpetrators at different times. That said, the characterization of the different phases of conflict in Afghanistan – at least in relation to the most serious abuses of humanitarian law – is arguably less critical now in the wake of the progressive jurisprudence of the International Criminal Tribunal for the Former Yugoslavia (ICTY), which has expanded the crimes for which individuals may incur individual responsibility under international law, whether committed in international or internal conflicts.⁵⁷

Second, the unprecedented nature of the events of September 11 and the consequent initiation by a US-led coalition of states of a global and ongoing 'war on terrorism' has further complicated the question of thresholds of applicability. In order to justify its 7 October 2001 military offensive in Afghanistan, the US attributed the legal responsibility for the September 11 attacks by Al Qaeda – an international terrorist organization – to the Taliban regime, and thus to the state of Afghanistan itself.⁵⁸ At the same time, the US advanced the so-called 'Bush doctrine', suggesting that its self-defense may require further actions with respect

54. See *Advisory Opinion, Legality of the Threat or Use of Nuclear Weapons*, ICJ Reps. (1996) p. 226, para. 25.

55. Meron, *supra* n. 52, pp. 266-273.

56. See Decision on the Interlocutory Appeal on Jurisdiction, *Prosecutor v. Duško Tadić*, 35 ILM (1996) p. 32, para. 77; *Prosecutor v. Tadić*, Opinion and Judgment, case IT-94-I-T (7 May 1997), 36 ILM (1997) p. 908.

57. *Ibid.*

58. Under international law the question of state responsibility for terrorist acts is unsettled. See L. Henkin, *International Law: Politics and Values* (Dordrecht, Martinus Nijhoff Publishers 1995) p. 125; I. Brownlie, *International Law and the Use of Force by States* (Oxford, Clarendon Press 1981) p. 370. However, the question of the extent of control required by the Taliban over Al Qaeda's terrorist operations appears to have been settled by SC Res. 1368 (2001): a state which aids, harbours or supports terrorists who carry out armed attacks against another state will be held responsible under international law and may be subject to a use of force in self-defense.

to other organizations and other states which aid, harbor or support international terrorists or terrorist organizations. This notion has prompted one scholar to suggest that following the initiation of US military strikes in Afghanistan on October 7 (and arguably even before that date), there was not one but two armed conflicts in existence: one between the US and Afghanistan (and hence the Taliban), and another – not limited to Afghanistan – between the US and Al Qaeda.⁵⁹ If this argument is accepted, it has significant implications not only for the stability of the inter-state system but also for the protection of individual human rights.⁶⁰ The better view is that the long-running internal armed conflict in Afghanistan between the Taliban and Northern Alliance became ‘internationalized’ on 7 October by the initiation of US military strikes and thus the rules of humanitarian law that regulate international armed conflicts became applicable at that point.⁶¹

3.2 Mujahidin and warring Afghan factions

Since the 20 April 1978 coup that removed Muhammad Daud Khan from power and the consequent Soviet occupation, Afghanistan has been a country ravaged by the brutality of war. Apart from abuses by Soviet forces (which are discussed in the

59. G. Aldrich, ‘The Taliban, al Qaeda, and the Determination of Illegal Combatants’, Presentation made at the Conference on the ‘Twenty Fifth Anniversary of the Additional Protocols to the Geneva Conventions’, The Hague, 7 June 2002. Reprinted in 4 *Humanitäres Völkerrecht* (2002) p. 202.

60. The main consequence would be that any member of Al Qaeda in any state or territory would be a ‘combatant’ (or, in the US view, an ‘unlawful combatant’) under international humanitarian law and hence a legitimate target for US military action. If accepted, such a position would represent a radical change to both humanitarian and general international law regarding the use of force.

61. There is some uncertainty regarding the exact point at which an international armed conflict commenced. Some commentators have argued that the August 1998 bombing by Al Qaeda of the US embassies in Nairobi and Dar-es-Salaam constitutes the relevant date or, failing that, the September 11 terrorist attacks themselves. See, for example, J. Paust, ‘Responding Lawfully to International Terrorism: The Use of Force Abroad’, 8 *Whittier LR* (1986) p. 711. These arguments assume, however, that an international armed conflict may arise between a state and a non-state international terrorist organization not linked to any particular state or territory. The better view is that the US military offensive of 7 October marked the point at which an international armed conflict began, at least as between the US and Afghanistan, and hence constituted the point at which international humanitarian law became applicable. A further complication is the question whether an ‘armed attack’ under Art. 51 of the UN Charter may be equated with the concept of an ‘international armed conflict’ for the purposes of humanitarian law (i.e., whether once a state has been subject to an armed attack – albeit by a non-state actor – the threshold for the application of the rules of humanitarian law that regulate international armed conflicts is thereby crossed). It is clear that the Security Council, NATO and the community of nations have accepted that while the US was attacked by a non-state terrorist organization, it was nevertheless subject to an ‘armed attack’ for the purposes of Art. 51, thus justifying the use of force in self defense. This issue affects the characterization under humanitarian law of the September 11 terrorist acts themselves (which cannot constitute war crimes unless there was an international armed conflict in existence when they were committed). Such acts may still, however, constitute crimes against humanity, violations of treaties governing matters such as hijacking, aircraft safety, terrorism etc., or simply crimes under domestic law: see *infra* n. 93 and accompanying text. See also T. Franck, ‘Terrorism and the Right of Self-Defence’, 95 *AJIL* (2001) p. 839 (arguing that self-defense is not limited to armed attacks by states, nations or belligerents);

next section), gross humanitarian and human rights violations have been committed over the last two decades by Afghan government troops, members of the different *mujahidin* factions and by the militias of any local military leader able to establish control over a pocket of territory. As territory has changed hands during different periods, entire local populations have been targeted for reprisals and collective punishment, including deliberate and arbitrary killings and torture.

One of the earliest reports on the unfolding human rights catastrophe in Afghanistan was written by Helsinki Watch in 1984. Covering the first phase of armed conflict in Afghanistan from the time of the Soviet invasion and occupation in 1979, the report documented mass destruction in the countryside (including the killing of farmers, destruction of food supplies, livestock and agricultural infrastructure); crimes against the rural population (including indiscriminate bombing); reprisal killings and massacres; summary executions and random killings; the widespread use of anti-personnel mines; and arbitrary arrest, forced conscription and widespread use of torture.⁶² At the same time, fundamental civil liberties and independent institutions were brutally repressed in the cities.⁶³ Given that the armed conflict may be characterized as international during this period, the vast majority of these practices by Soviet and Afghan forces constitute violations of both international humanitarian law and the non-derogable rights protected by human rights law.⁶⁴

After the Soviet withdrawal in 1989, the war in Afghanistan has generally been regarded as an internal armed conflict for the purposes of international humanitarian law and thus subject to common Article 3 of the four Geneva Conventions and Additional Protocol II (to the extent that it is customary law). During the period between 1989 and the rise of the Taliban around 1995, intense fighting between warring Afghan factions continued to result in gross and widespread violations of humanitarian and human rights law. These abuses were characterized by acts of torture, ill-treatment and extrajudicial executions of prisoners on the basis of political affiliation or ethnic origin and death sentences imposed by special courts

62. Helsinki Watch, *'Tears, Blood and Cries': Human Rights in Afghanistan Since the Invasion 1979-1984*, December 1984.

63. See A. Hyman, *Afghanistan under Soviet Domination, 1964-1981* (New York, St Martin's Press 1982) p. 81.

64. Indiscriminate bombing not directed at a specific military objective violates AP I, Art. 51(4); reprisals against villages and villagers violates AP I, Arts. 51(6) and 52(1); summary executions violate ICCPR, Arts. 6 and 7 and AP I, Art. 51(2); placing mines in inhabited areas or in homes violates AP I, Arts. 51(4b), (5b), 35(2); burning bodies of the slain and mining corpses with grenades violates AP I, Art. 34(1); destruction of agriculture violates AP I, Art. 54 (starvation of civilians as a method of warfare); stealing the property of civilians violates Geneva IV, Art. 33; attacks on and desecration of mosques violates AP I, Art. 52(3); suppression of freedoms of speech, press, political activity, association, assembly and movement; torture; detention in inhumane conditions; trial without due process all violate fundamental rights protected under the ICCPR (some of which may be derogated from in a time of public emergency threatening the life of the nation). See Helsinki Watch report, *supra* n. 62, pp. 167-170.

without the benefit of a fair trial.⁶⁵ There were also accounts of thousands of unarmed civilian women killed by unexpected and deliberate artillery attacks on their homes, as well as rapes, beatings and massacres by armed groups.⁶⁶ These practices violate common Article 3 and the customary laws of war applicable in non-international armed conflicts.

During the third phase of civil war between 1995 and 2001, most of the serious violations of humanitarian law (including, in some instances, atrocities rising to the level of crimes against humanity) resulted from the ongoing conflict between Taliban and Northern Alliance forces to the north of Kabul. Both the Taliban and the Northern Alliance resorted to indiscriminate aerial bombardment and shelling, summary executions and the widespread use of anti-personnel mines. Between 1991 and 2001, Taliban offensives were characterized by scorched-earth tactics in the Shomali plains north of Kabul, summary executions of prisoners in the north-central province of Samangan, and forced relocation and conscription. Northern Alliance forces between 1996 and 1998 sent volleys of rockets into crowded areas of Kabul, and there were also reports of summary executions, burning of houses and looting, mainly of ethnic Pashtuns and others suspected of supporting the Taliban. The atrocities and reprisals discussed previously which were committed by both sides in Mazar-i Sharif between 1997 and 1998 are representative of the impunity and war crimes committed during this phase of the conflict.⁶⁷ The two groups of victims most directly affected by the ongoing conflict were the Hazaras – a Shia Muslim ethnic group targeted by the Taliban as a form of collective punishment for suspected collaboration with the Northern Alliance⁶⁸ – and women generally.⁶⁹

Following the collapse of the Taliban regime in November 2001 during the fourth phase of armed conflict in Afghanistan, further serious violations of humanitarian and human rights law by Afghan forces occurred. The UN and other agencies have reported the killings of hundreds of Taliban prisoners who were sealed in truck containers, suffocated and later buried in mass graves near Dasht-e Leili while being transferred by Northern Alliance forces to the Sheberghan prison near Mazar-i-Sharif.⁷⁰ At the same time, in the security vacuum created by the

65. See Amnesty International, *Afghanistan: Reports of torture, ill-treatment and extrajudicial executions of prisoners 1992* (noting violations of the ICCPR and the Torture Convention).

66. See Amnesty International, *Women in Afghanistan: A Human Rights Catastrophe*, May 1995. See also the Human Rights Watch report, *The Forgotten War: Human Rights Abuses and Violations of the Laws of War Since the Soviet Withdrawal* (1991).

67. See *supra* n. 15 and accompanying text.

68. See Human Rights Watch, *Afghanistan: Massacres of Hazaras in Afghanistan*, Vol. 13(1), 19 February 2001. See also Report of the situation of human rights in Afghanistan submitted by Mr Kamal Hossain, Special Rapporteur, in accordance with HR Commission resolution 2000/18, E/CN.4/2001/43, 9 March 2001, at paras. 40-4.

69. See Human Rights Watch, *Humanity Denied: Systematic Denial of Women's Rights in Afghanistan*, Vol. 13(5), October 2001.

70. See P. Constable, 'Afghans Condemn Killings of Taliban – Investigation into Deaths is Uncertain', *Washington Post* (22 August 2002) at p. A10 (noting that while the Afghan government has condemned the killings it has not carried out any investigations); B. Dehghanpisheh, J. Barry and

ISAF being restricted to Kabul, ethnic Pashtuns throughout northern Afghanistan have been targeted for reprisals for their association with the Taliban and have faced widespread abuses, including killings, sexual violence, beatings, extortion and looting. The three main ethnically-based parties and their militias in northern Afghanistan that formerly comprised the Northern Alliance (and which are now well-represented in the transitional government⁷¹) have been implicated in these violations – the mainly ethnic Uzbek Junbish-i Milly-yi Islami of General Abdul Rashid Dostum, the mainly ethnic Tajik Jamiat-e Islami led in Mazar-i Sharif by Ustad Atta Mohammad, and the ethnic Hazara Hizb-i Wahdat led in the north by Haji Mohammad Mohaqiq, as well as non-aligned armed Uzbeks, Tajiks, and Hazaras seeking to capitalize on the vulnerability of disarmed Pashtun communities.⁷² Due to the fact that after October 7 the conflict in Afghanistan once again became ‘internationalized’, the rules of humanitarian law applicable to international armed conflicts apply in full to the conduct of these hostilities and there can be little doubt that these abuses constitute grave breaches of the Geneva Conventions and of customary humanitarian law.

As the situation currently stands, there are violators of international humanitarian and human rights law on all sides and in relation to all phases of the armed conflict. Some of these perpetrators are in the custody of the new Afghan authorities, others are in the custody of the US-led military coalition both inside and outside Afghanistan, while still others are either in control of provincial areas⁷³ or in positions of power in the new Afghan Transitional Government itself. Those in the first category comprise mainly Taliban commanders who are alleged to have committed war crimes and the most serious human rights abuses. They are being detained by former Northern Alliance officials who have returned to power and who, as in the case of General Abdul Rashid Dostum, are themselves implicated in gross violations of humanitarian and human rights law, and by the United States.

R. Gutman, ‘The Death Convoy of Afghanistan’, *Newsweek* (26 August 2002) (noting that General Abdul Rashid Dostum was in charge of the militia forces accused of committing the abuses and continues to run the region in the north of the country near Mazar-e Sharif, making any government investigation of the deaths unlikely); ‘Dead on Arrival – A War Crime in Afghanistan’, *The Economist* (22 August 2002) at p. 34 (noting mounting pressure on ‘local and international authorities to uncover the truth’, including whether US forces in the area at the time had knowledge of the use of containers to transport detainees).

71. See *supra* n. 40 and accompanying text.

72. See Human Rights Watch, *supra* n. 40 (noting that in other parts of the north, commanders affiliated with the three major parties have established *de facto* authority over large areas, marking the return to a virtual monopoly of power by individual warlords).

73. Note, for example, the recent standoff between the Afghan Transitional Authority and Padsha Khan Zadran, a warlord in control of significant areas in southeast Afghanistan who rejects the leadership of Hamid Karzai and is seeking a formal position in the central government. Following the Bonn process, Zadran was appointed as the governor of Paktika province but another local warlord blocked him from taking office in Gardez. In April 2002, Zadran carried out a revenge rocket attack on Gardez, killing 36 people, including numerous civilians. In a direct affront to Karzai, Zadran now claims effective control of three southeastern provinces which the Transitional Authority has assigned to other regional leaders. See I. Fisher, ‘Warlord Pushes for Control of a Corner of Afghanistan: Karzai Warns Armed Response is Possible’, *New York Times* (6 August 2002) at p. A8.

3.3 Soviet and neighboring forces pre-September 11

In addition to the question of individual accountability for abuses by warring Afghan forces, account must also be taken of the role played by neighboring and other states in fueling Afghanistan's civil war. As discussed above, Afghanistan became the paradigmatic site for Cold War geopolitical struggle sponsored by various outside parties – Russia, Pakistan, Iran and other neighboring countries,⁷⁴ with the US and India influencing the conduct of the war in other ways. This aspect of the conflict raises difficult questions of state responsibility, violations of specific international conventions and, in some cases, individual accountability for serious violations of humanitarian and human rights law.

The most blatant violations relate to the period of Soviet occupation between 1979 and 1988. During this time, at least four types of violations may be identified: first, indiscriminate bombing of civilian areas by the Soviet air force, causing mass destruction to the countryside and thousands of civilian casualties; second, massacres of civilians by specialized commando units in areas where resistance forces were operating, including the widespread use of torture, rape and arbitrary detention; third, the widespread use of anti-personnel mines camouflaged as everyday objects; and fourth, the forcible transfer of Afghan children to the Soviet Union for up to ten years of education.⁷⁵

These abuses constitute grave breaches of the Geneva Conventions (which apply in full given that this was an international armed conflict) and of non-derogable human rights. In both instances, Russia is required under international law to hold individual perpetrators accountable.⁷⁶ The indiscriminate use of landmines also violates conventional and customary humanitarian law rules prohibiting the use of weapons which 'employ a method or means of combat which cannot be directed at a specific military objective'.⁷⁷

74. See Human Rights Watch, *Crisis of Impunity: The Role of Pakistan, Russia, and Iran in Fueling the Civil War*, Vol. 13(3), July 2001.

75. See Helsinki Watch, *supra* n. 62.

76. The Geneva Conventions and AP I oblige the contracting parties to make grave breaches of the protective provisions liable to punishment and to take all suitable measures to ensure compliance with the Conventions: Geneva I, Arts. 49, 50; Geneva II, Arts. 50, 51; Geneva III, Arts. 129, 130; Geneva IV, Arts. 146, 147; AP I, Art. 85. Under Art. 2 of the ICCPR, states are required to 'respect and ensure' the rights recognized in the Covenant. Furthermore, any acts amounting to genocide or crimes against humanity (widespread or systematic attacks directed against a civilian population whether during peace or wartime) – either of which may be applicable in the case of Soviet atrocities in Afghanistan – are subject to individual responsibility under international law.

77. During the Soviet occupation, thousands of 'butterfly mines', known as PFM-1s, were randomly disseminated by helicopter over large areas of Afghanistan. In general, mines placed without customary precautions and which are unrecorded, unmarked, or are not designated to destroy themselves within a reasonable time may be 'blind weapons' in relation to time and are thus prohibited. Contact mines may also violate prohibitions on the use of weapons 'the primary purpose of which is to spread terror among the civilian population': AP I, Art. 51(2). The main source of international law governing the use of landmines is the 1981 Protocol on Prohibitions or Restrictions on the Use of Mines, Booby Traps and Other Devices (Protocol II), annexed to the 1981 Convention on Prohibition or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Exces-

As regards the issue of outside support and provision of military and financial assistance to the warring Afghan factions by several states, two legal issues arise. First, do these states bear any responsibility under international law for their actions in directly and indirectly sustaining and manipulating the ongoing conflict;⁷⁸ and second, was the level of foreign interference such that during the third phase of the Afghan war the armed conflict between the Taliban and Northern Alliance is better characterized as international rather than internal?

From 1994 on, the Taliban were strongly supported by Pakistan which sought to secure valuable trade routes to Central Asia. In September 1995, the Taliban took control of Herat with substantial assistance provided by Pakistan. During the ongoing civil conflict in 2000 and 2001 between the Taliban and the Northern Alliance, Pakistan assisted the Taliban forces by facilitating the recruitment of fighters, offering military training, planning and directing pivotal military operations, and allowing arms for the Taliban to transit its territory. In late-2000, Pakistani aircraft assisted with troop rotations for Taliban forces during combat operations. Saudi Arabia and the United Arab Emirates also provided financial support to the Taliban. The Northern Alliance, on the other hand, obtained their arms primarily from Iran and Russia, with Tajikistan providing the necessary transit territory. Iran provided rockets, ammunition and mines and also military training to Northern Alliance forces. The Russian Federation enabled the transportation of Iranian aid, while providing direct assistance itself, including crucial support services and helicopters.⁷⁹ At different periods prior to the fourth phase of the conflict, the US and Saudi Arabia similarly provided direct financial and covert military assistance to mujahidin and Taliban forces. The Northern Alliance also received substantial military assistance dating back to the Soviet occupation in 1979, mainly from Iran (including large shipments of weapons, aerial resupply between 1996 and 1998 and military training for anti-Taliban forces in northern Afghanistan).⁸⁰ At the same time, Russia and several of the Central Asian States of

sively Injurious and to Have Indiscriminate Effects: Final Act, app. C, opened for signature 10 April 1981, UN Doc. A/CONF.95/15 (1980) ('Land Mines Protocol') which gives effect to several principles of customary law relating to the protection of the civilian population.

78. See Draft Articles on Responsibility of States for internationally wrongful acts, adopted by the ILC at its fifty-third session (November 2001), Art. 2 ('Draft Articles on State Responsibility'). On the issue of state responsibility for the conduct of armed forces, see F. Kalshoven, 'State Responsibility for Warlike Acts of the Armed Forces: From Article 3 of the Hague Convention IV of 1907 to Article 91 of Additional Protocol I of 1977 and Beyond', 40 *ICLQ* (1991) pp. 827, 853-858 (noting that in the *Nicaragua* case the ICJ recognized the possibility in principle for a state to become directly responsible for conduct of a foreign armed force that cannot, under the terms of Art. 43 of Protocol I, be regarded as part of its armed forces).

79. Although there have been numerous agreements by Afghanistan's neighbors and other states involved in the conflict to end arms supplies as part of a larger peace process, none of these agreements has included enforcement mechanisms. On 21 July 1999, at a meeting in Tashkent of the Group of Six-plus-Two, comprising the countries bordering Afghanistan plus the US and Russia, the delegates signed an agreement, subsequently known as the Tashkent Declaration, in which they agreed 'not to provide military support to any Afghan party and to prevent the use of our territories for such purposes'.

80. Human Rights Watch, *supra* n. 74, pp. 35-40.

the former Soviet Union have, to varying degrees, aided the Northern Alliance.⁸¹ As is now well-known, after 7 October 2001, the US and its coalition partners switched allegiances and provided massive financial and military assistance to the Northern Alliance as its proxy force on the ground to oust the Taliban regime and the Al Qaeda terrorist network as part of its war against terrorism.⁸²

Any conduct of either the Taliban or Northern Alliance forces in breach of an international obligation will be considered an act attributable to an outside state if those forces are in fact 'acting on the instructions of, or under the direction or control of, that State in carrying out the conduct'.⁸³ This raises something of a paradox for the US which, following the September 11 terrorist attacks, sought to attribute the unlawful acts of Al Qaeda to the Taliban regime on the basis of an apparently broader test of attribution than that established in the *Nicaragua* and *Tadić* cases. On the basis of that test – or even on the basis of the stricter 'effective' or 'overall' control tests laid out in *Nicaragua* and *Tadić* respectively⁸⁴ – violations of humanitarian and human rights law committed by Taliban and Northern Alliance forces may be attributable, in different ways and to varying degrees, to Russia, the US, Pakistan, Saudi Arabia and several of the other neighboring states if the requisite degree of control can be established. In addition, certain instances of direct military assistance provided to rebel Afghan groups could amount to an illegal use of force in breach of Article 2(4) of the UN Charter.⁸⁵ If such attribution can be established, the responsible state is under an obligation to make full reparation for the injury caused by the internationally wrongful act.⁸⁶

Finally, the interference of outside states also relates to the second issue of characterization of the third phase of the Afghan conflict. As argued by Meron in

81. *Ibid.*, pp. 40-49 (noting the direct role of Russia in arranging for the transportation of Iranian aid and providing assistance to Massoud and other anti-Taliban leaders, and the indirect support provided by Tajikistan, Uzbekistan, Turkmenistan and Kyrgyzstan in allowing cargo to transit through, and military bases and training camps to operate in, their territories)

82. Apart from questions of attribution and state responsibility, these actions also raise potential violations of the United States' 'Leahy Law'. Section 563 of the Foreign Operations Appropriations Act for Fiscal Year 2001 prohibits the provision of funds under the Act to 'any unit of the security forces of a foreign country if the Secretary of State has credible evidence that such unit has committed gross violations of human rights, unless the Secretary determines that ... the government of such country is taking effective measures to bring the responsible members of the security forces unit to justice': P.L. 104-208. Given the long history of abuses by Northern Alliances forces, US military assistance post-7 October 2001 appears to be in direct violation of this law.

83. Draft Articles on Responsibility of States for internationally wrongful acts, adopted by the ILC at its fifty-third session (November 2001), Art. 8 (Conduct directed or controlled by a state) ('Draft Articles on State Responsibility'). On the issue of state responsibility for the conduct of armed forces, see F. Kalshoven, 'State Responsibility for Warlike Acts of the Armed Forces: From Article 3 of the Hague Convention IV of 1907 to Article 91 of Additional Protocol I of 1977 and Beyond', 40 *ICLQ* (1991) pp. 827, 853-858 (noting that in the *Nicaragua* case the ICJ recognized the possibility in principle for a state to become directly responsible for conduct of a foreign armed force that cannot, under the terms of Art. 43 of Protocol I, be regarded as part of its armed forces).

84. *Tadić* Appeals Decision, *supra* n. 56, paras. 137-138.

85. Such military assistance may also have violated the Tashkent agreement. See *supra* n. 17.

86. Draft Articles on State Responsibility, *supra* n. 83, Art. 31 (injury' includes any damage, whether material or moral, caused by the internationally wrongful act of a state).

rejecting the approach of the ICTY in the *Tadić* case, the question of attribution under the law of state responsibility is a related, but ultimately different, question to that of characterizing the nature of an armed conflict under international humanitarian law.⁸⁷ At the same time, it has been accepted that a conflict may have a mix of international and internal dimensions such that the rules of humanitarian law may apply in different ways as between the different parties to the conflict. For present purposes it is sufficient to note that the degree and scope of outside involvement in the Afghan civil war during the 1990s was such that certain aspects of an otherwise internal conflict may have become internationalized.⁸⁸ As in the *Tadić* case, this will affect the application of the rules of humanitarian law in any future trials for war crimes committed during this period.

3.4 Al Qaeda and foreign 'terrorists'

In addition to the individual responsibility of Afghan fighters and outside military forces under international law, it is necessary to consider the role played by members of Al Qaeda and other foreign 'terrorist' fighters operating within Afghanistan. As discussed in the next section, the legal status of international terrorists under humanitarian law has become a matter of considerable controversy following the September 11 attacks on New York and Washington, DC. While it is unclear exactly how many Al Qaeda and non-Afghan fighters have been captured in the course of US-led operations in Afghanistan, it is known that thousands of such individuals have been detained by anti-Taliban Afghan forces and US armed forces both in Afghanistan and in Guantánamo Bay, Cuba. Thus, the question of individual responsibility under international (and domestic) law for terrorist and related acts will be a central issue in any future criminal trials whether in Afghanistan, the US or before an international tribunal. For reasons discussed more fully below, however, while these issues raise complex questions of international law, there is only a remote prospect in reality of trials of such persons before an international tribunal. More likely is trial before a US military tribunal or domestic court, but even here the US to date has shown little willingness to conduct trials of alleged terrorists or persons suspected of violating humanitarian law.

Despite assertions by the Bush administration to the contrary, international terrorism and terrorism in war are not new phenomena and were clearly contemplated during the drafting of the Geneva Conventions and Additional Protocols.⁸⁹ During times of peace, acts of terrorism are prohibited both under numerous offence-specific international conventions and by the internal legislation of all states and are thus subject to prosecution and punishment under national criminal law. During times of armed conflict, the legal determination of terrorist acts depends on two criteria: first, the status of the person committing the violence

87. See *supra* n. 56 and accompanying text.

88. See H.-P. Gasser, 'Internationalized Non-International Armed Conflicts: Case Studies of Afghanistan, Kampuchea, and Lebanon', 33 *Amer. Univ. LR* (1983) p. 149.

89. See J.J. Paust, 'Terrorism and the International Law of War', 64 *Mich. LR* (1974) p. 1.

and second, the rules of humanitarian law governing the protection of specific categories of persons and the methods and means of warfare. In relation to the first criterion, only members of the armed forces of a party to an armed conflict have a right to participate directly in hostilities. If other persons resort to violence, they breach the law and their actions may constitute acts of terrorism. In relation to the second criterion, even members of the armed forces legitimately entitled to use violence may themselves become terrorists if they violate the rules of humanitarian law.⁹⁰ Article 51(2) of Additional Protocol I, under which acts or threats of violence 'the primary purpose of which is to spread terror among the civilian population' are prohibited, confirms that terrorism is not an authorized method of warfare. Terrorist attacks against civilians causing death or serious injury are grave breaches under Article 85 of Protocol I and are thus regarded as war crimes.⁹¹

Applying these principles to the various terrorist acts of Al Qaeda during the period following Osama bin Laden's return to Afghanistan in 1996, the position under international law is as follows. Regardless of the status of Al Qaeda or foreign fighters as either lawful or unlawful combatants in the context of the ongoing Afghan armed conflict, the deliberate targeting of civilians in Afghanistan is a war crime giving rise to individual responsibility and subject to prosecution under international law.⁹² The legal position in relation to Al Qaeda's terrorist attacks on targets in Africa, Yemen and the US on or prior to September 11 2001 is complicated by the grey area that exists between war and peace in the context of international terrorism. Assuming these acts to have been committed during times of peace, they would constitute crimes under the various offence-specific international conventions discussed previously and would also be liable to prosecution under domestic criminal law.⁹³ Some commentators have suggested that the September 11 attacks themselves constitute crimes against humanity under customary law (which does not require a nexus to a state of armed conflict and which makes such crimes subject to universal jurisdiction).⁹⁴

90. See H-P. Gasser, 'Prohibition of terrorist acts in international humanitarian law', *IRRC* No. 253 (1986) pp. 200 at 202-205 and the same writer in this volume at p. 329.

91. In relation to non-international armed conflicts, common Art. 3 makes clear that terrorist acts of any kind against persons not taking part in the hostilities are absolutely prohibited. In identical terms to Art. 51(2) of AP I regarding international armed conflicts, Art. 13 of AP II stipulates that acts or threats of violence 'the primary purpose of which is to spread terror among the civilian population' are prohibited.

92. The more difficult question is whether a member of Al Qaeda fighting alongside the Taliban who takes up arms against opposing forces (whether of the Northern Alliance forces or US forces) is thereby committing a crime. This will depend on whether the Al Qaeda member is a 'combatant' for the purposes of international humanitarian law: see *infra* n. 107 and accompanying text.

93. Jurisdictional questions would arise in relation to whether the state on whose territory the crime was committed or the state of nationality of either the perpetrator or the victims were parties to the relevant treaty. In relation to US domestic law, acts of terrorism may be prosecuted under the US Antiterrorist Act of 1990, 18 U.S.C. §2331 (2000).

94. Given the high degree of orchestration and planning behind the September 11 attack on the World Trade Center (the Pentagon being a military rather than civilian target), a case can be made that the 'systematic' requirement of crimes against humanity is satisfied: see D.A. Mundis, 'The Use of

Whether the attacks constitute war crimes remains a matter of divided opinion.⁹⁵

3.5 US military actions post-September 11

In considering how to confront violations of humanitarian and human rights law in the transition now occurring in Afghanistan, it is finally necessary to consider the role played by the US in the context of the post-September 11 war on terrorism. This role has been problematic for at least three reasons. First, in determining the status of persons captured on the battlefield and subsequently detained in Afghanistan and in Cuba, the US has adopted an evasive – perhaps even *mala fides* – approach towards the basic protections of international humanitarian law. On 13 November 2001, the US President issued a Military Order entitled the ‘Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism’.⁹⁶ Section 2 of the Order provides for the trial in military commissions of any non-US citizen whom the President determines is or was a member of Al Qaeda or has engaged in, aided or abetted, or conspired to commit acts of international terrorism that have damaged or threaten to damage US citizens, national security, foreign policy, or the economy; any individual who has knowingly harbored any such persons; or where ‘it is in the interest of the United States that such individual be subject to this order’. The unprecedented scope of the Order permits detention of persons of different nationalities with varying degrees of involvement in the fighting in Afghanistan, association with Al Qaeda or the Taliban, and connection to the events of September 11 or future acts of international terrorism.

3.5.1 *Status of detainees under international humanitarian law*

Immediately following the release of the Order, a number of concerned states and human rights NGOs questioned whether the determination by the US of the status of detainees being held at Guantánamo Bay and other military locations complied with the requirements of international humanitarian law. As already discussed, both the US and Afghanistan are parties to the four Geneva Conventions, which together provide a comprehensive legal framework for determining the status and ensuring the protection of captured combatants and civilians during situations of armed conflict.⁹⁷ Under Geneva III and IV, different regimes of protection apply

Military Commissions to Prosecute Individuals Accused of Terrorist Acts’, 96 *AJIL* (2002) pp. 320, 327.

95. As discussed, *supra* n. 61, the uncertainty relates to the fact that the September 11 attacks were carried out by a non-state terrorist organization. The Bush administration has stated that the scale of the attack ‘created a state of armed conflict’: see November 13 Military Order, *infra* n. 96, sec. 1(a) (although the Order does not specify exactly with whom).

96. 66 *Fed. Reg.* 57,833 (16 November 2001).

97. While the two Additional Protocols of 1977 contain further extensive provisions on these issues, neither Protocol has been ratified by the US or Afghanistan. Several of these provisions, however, are regarded as being representative of customary international humanitarian law: see T. Meron, *Human Rights and Humanitarian Norms as Customary Law* (Oxford, Oxford University Press

depending on the status of persons not, or no longer, taking an active part in hostilities. An individual may either be a 'prisoner of war' under Geneva III (Treatment of Prisoners in War)⁹⁸ or a 'protected person' under Article 4 of Geneva IV (Protection of Civilian Persons in Time of War).⁹⁹ According to the authoritative Commentary to the Geneva Conventions of the International Committee of the Red Cross, *all* detainees must fall within the protections of one of these two conventions: 'There is no intermediate status; nobody in enemy hands can fall outside the law.'¹⁰⁰ In the event of 'any doubt' as to whether an individual is entitled to POW status, that person must be treated as a POW 'until such time as their status has been determined by a competent tribunal'.¹⁰¹

On 7 February 2002, the Bush Administration issued a statement indicating that the US would (after some initial uncertainty) apply the Geneva Conventions to those persons detained on the battlefield in Afghanistan.¹⁰² In applying the Conventions, however, the US determined that Taliban detainees were not entitled to POW status as, in its view, they did not meet the requirements of Article 4 of Geneva III. Although comprising the armed forces of the government in effective control of Afghanistan, they were said not to wear uniforms sufficiently to distinguish themselves from the civilian population and not to conduct their operations in accordance with the laws and customs of war. In relation to Al Qaeda detainees, the US claimed that, as members of a non-state international terrorist organization, these individuals fell outside of the Geneva law altogether. They were akin to saboteurs or spies, which operate within the territory of an adversary out of uniform and without openly carrying arms. In both cases the detainees were said to be 'unlawful' or 'non-privileged' combatants, a term which does not appear in the Geneva Conventions but which derives from the World War II-era decision of the US Supreme Court *Ex Parte Quirin*.¹⁰³ Despite their suggested status as unlawful combatants, the US indicated that it would for the most part treat Taliban and Al Qaeda detainees 'in a manner that is reasonably consistent with the Geneva

1991); G. Aldrich, 'Prospects for United States Ratification of Additional Protocol I to the 1949 Geneva Conventions', 85 *AJIL* (1991) pp. 1 at 19 (arguing that much of Protocol I is 'clearly a codification of customary law').

98. Geneva III, Art. 4A sets out the requirements for POW status.

99. Paust has noted that during an armed conflict 'all persons who are not prisoners of war, including so-called unprivileged or unlawful combatants who may or may not have prisoner of war status, have at least various non-derogable rights to due process under the Geneva Civilian Convention and Geneva Protocol I'. See J.J. Paust, 'Antiterrorism Military Commissions: Courting Illegality', 23 *Mich. JIL* (2001) pp. 1 at 7, n. 15.

100. Commentary, J. Pictet, ed., *IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (Geneva, International Committee of the Red Cross 1958) p. 51.

101. Geneva III, Art. 5.

102. *Status of Detainees at Guantanamo*, Fact Sheet, White House, Washington DC, 7 February 2002.

103. 317 US 1, 32 (1942) (eight German saboteurs captured on US territory were denied POW status and tried before a special military commission).

Conventions, to the extent they are appropriate' and that they would receive 'humane treatment'.¹⁰⁴

The blanket denial of POW status to the Guantánamo detainees constitutes an unprecedented interpretation of humanitarian law which deviates both from prior US practice and general state practice under the Geneva Conventions. For present purposes, it is unnecessary to join the debate on competing constructions of Article 4 of Geneva III.¹⁰⁵ It is sufficient to observe that, regardless of the correct interpretation, an Article 5 tribunal must be established to resolve the legal status of each detainee.¹⁰⁶ Such tribunals were convened by the US in the Vietnam and Gulf Wars in cases where doubt existed as to whether captured enemy personnel warranted

104. DoD News Briefing – Secretary Rumsfeld and Gen. Myers 11 January 2002, 2:10 pm (Pentagon), DoD News Briefing – ASD PA Clarke 14 January 2002 – 12:30 pm. Reproduced in this volume at pp. 657–658.

105. Most legal scholars agree that the Taliban should be accorded POW status under Geneva III. See 'Agora: Military Commissions', 96 *AJIL* (2002) pp. 320 et seq; Paust, *supra* n. 99. The status of members of Al Qaeda under humanitarian law, however, is more controversial. Following the authoritative ICRC commentaries, Al Qaeda members should be accorded the status of 'protected persons' under Geneva IV who may be prosecuted in the same manner as all other civilians who are prohibited from taking a direct part in hostilities. Alternatively, they may in some cases have attained the status of POWs in accordance with Geneva III, Art. 4A(2); API, Art. 44; and relevant customary norms. The US Department of the Army Field Manual further confirms this position stating that if a 'person is determined by a competent tribunal, acting in conformity with Art. 5 [Geneva III] not to fall within any of the categories listed in Article 4 [Geneva III], he is not entitled to be treated as a prisoner of war. He is, however, a 'protected person' within the meaning of Article 4 [Geneva IV]' (citations omitted): U.S. Department of the Army, Field Manual 27-10, The Law of Land Warfare, 15 July 1976, § 73. There is, however, at least one difficulty with this position. Geneva IV, Art. 70 provides that protected persons shall not be 'arrested, prosecuted or convicted by the Occupying Power for acts committed or for opinions expressed before the occupation ... with the exception of breaches of the laws and customs of war'. If Al Qaeda members were accorded the status of protected persons, the US would thus be prohibited from prosecuting them for terrorist acts such as those committed on September 11, 2001. Presumably, however, they could be prosecuted for war crimes committed in Afghanistan prior to 7 October 2001. Clearly, Art. 70 is in need of revision if the rules of humanitarian law are to remain relevant in the wake of September 11.

106. On 25 February 2002, a petition was lodged with the Inter-American Commission on Human Rights, of which the US is a member, seeking certain provisional measures in relation to the Guantánamo detainees. See Detainees in Guantánamo Bay, Request by the Center for Constitutional Rights, the Human Rights Clinic at Columbia Law School and the Center for Justice and International Law for Precautionary Measures Under Article 25 of the Commission's Regulations, 25 February 2002. On 13 March, the Commission upheld the petition and ruled that the US must immediately convene a 'competent tribunal' as required by Art. 5 of Geneva III to resolve the legal status of each of the detainees. The US has challenged the Commission's ruling, arguing that it has already conducted multi-agency, case-by-case screening procedures on the battlefield in Afghanistan which render an Art. 5 tribunal unnecessary. See Response of the United States to Request for Precautionary Measures – Detainees in Guantánamo Bay, Cuba, 12 April 2002. It is questionable, however, whether these screening procedures comply even with the US Army's internal code of conduct. The relevant provisions in the US Army Field Manual – which stand as the US interpretation of its obligations under international humanitarian law – require a 'competent tribunal' to comprise a board of 'not less than three officers' in determining whether a person claiming treatment as a POW, and who has committed a 'beligerent act or has engaged in hostile activities in aid of the armed forces', is entitled to that status. See FM, *ibid.*, Ch. 3, Sec II, Art. 71, 'Interim Protection'.

POW status.¹⁰⁷ In several instances, detainees were found to be civilians who had taken no part in the hostilities and were transferred to refugee camps. Only a competent tribunal is able to properly assess the differing circumstances and degrees of involvement of individuals detained on the battlefield in the Taliban and Al Qaeda ranks. Whatever determinations of status are made, the US assertion of blanket 'unlawful combatant' status creates a dangerous and vague grey area between combatant and civilian status that not only violates the object and purpose of the Geneva Conventions but leaves the Guantánamo detainees without any defined legal rights protecting their fundamental human dignity under international law.

3.5.2 *Rights and future trials of detainees under international humanitarian law*

The second problematic feature of US military actions post-September 11 has centered on the volatile issue of whether the ongoing detention and proposed future trials of detainees in military commissions accord with the rights of prisoners under humanitarian law and the rights of all persons under international human rights law.¹⁰⁸ In establishing its own mechanisms to determine the rights of prisoners and to prosecute individuals for crimes under international law, the US has undermined well-defined international standards and has adopted a generally unilateralist

107. AP I, Art. 44 indicates that humanitarian law is progressively developing in such a way that criteria such as the uniform requirement are subordinate to the issue of whether individuals are members of a party to the armed conflict. Art. 44 deals mainly with combatants using methods of guerrilla warfare and ensures that once captured such persons are given 'protections equivalent in all respects to those accorded to prisoners of war' under Geneva III: see AP I, Art. 44(4). During the Vietnam war, the US granted captured Viet Cong fighters POW status despite their lack of uniform or identifying insignia. The curious logic of the current US position means that even soldiers of the Northern Alliance – who operated as proxy forces for the US in the fourth phase of the armed conflict in Afghanistan and who similarly fail to meet the uniform criteria – may be regarded as 'unlawful combatants'. If accepted, this position would have far-reaching and illogical consequences in any future war crimes trials in Afghanistan. As 'unlawful combatants', Northern Alliance soldiers could be prosecuted along with Taliban and Al Qaeda members as common criminals in accordance with AP I, Art. 45 for merely taking part in the hostilities both against each other and against the US and other international military forces ('lawful combatants'). Even if this were the case, however, such persons must at a minimum be treated in accordance with the fundamental guarantees of AP I, Art. 75 (provided that Geneva IV, to the extent that it is applicable, does not grant more favorable treatment). See D. Fleck, ed., *The Handbook of Humanitarian Law in Armed Conflicts* (Oxford, Oxford University Press 1995) p. 68.

108. Several cases are currently before the US courts seeking to challenge the indefinite detention of individuals captured on the battlefield in Afghanistan and subsequently transferred to the US military base in Guantánamo Bay, Cuba: see e.g., *Coalition of Clergy v. Bush*, case No. 02-570, 21 February 2002 (petition for *habeas corpus* rejected in federal court in California); *Fawzi Khalid Abdullah Fahad Al Odah v. US*, case No. 02-828, July 2002 (federal action brought by 11 Kuwaiti nationals and their family members alleging that their arbitrary detention on Guantánamo Bay violates customary international law and constitutional due process standards); *Shafiq Rasul v. Bush*, case No. 02-299, July 2002 (*habeas corpus* proceeding brought in the District of Columbia on behalf of Guantánamo Bay detainees).

position towards the norms and mechanisms of international justice. Both of these factors bear on questions of transitional justice in Afghanistan, where the rights of prisoners and the conduct of any future criminal trials (whether domestic or international or a combination of the two) will be influenced normatively and procedurally by the US approach

Photographs revealing the detainees kneeling, shackled, wearing blacked-out goggles and ear muffers has raised questions about possible violations of 'humane treatment'¹⁰⁹ and the 1984 Torture Convention. In relation to future trials before military commissions, President Bush's November 13 Military Order has come under withering attack both within and outside of the US. Section 4 of the order requires the Secretary of Defense to formulate rules for the conduct of 'full and fair trials' subject to a few minimum requirements. The Order, however, provides for no right of judicial appeal or other independent review mechanism; sentencing (including imposition of the death penalty), not on the basis of unanimity but rather a two-thirds majority of commission members present; a standard of proof to be decided by the Secretary of Defense; no express presumption of innocence; the possibility of secret proceedings and hearsay evidence; no requirement that a defendant be given adequate time to prepare a reasonable defense; no explicit disclosure obligations on the prosecution, including of the nature of the charges filed against him or her; and no explicit right for defendants to select their own attorney. Furthermore, the proposed military commissions will lack any independence from the executive branch. The President has accorded to himself, or the Secretary of Defense, the power to determine who will be tried, to appoint the members of the commission, to select the panel that will review convictions and sentences, and to make the final decision in any case. The US State Department has repeatedly criticized states such as Burma, China, Russia, Sudan, Turkey, Egypt, Nigeria and Malaysia for the use of military tribunals to try civilians. Indeed, the State Department's annual Country Reports on Human Rights Practices monitor and evaluate other states in relation to the extent to which they guarantee the right to a 'fair public trial', which is defined to include many of the due process rights omitted by the November 13 Military Order.

The Order violates many of the protections contained in Articles 82 to 108 of Geneva III which apply to the detention and trial of POWs. These provisions require *inter alia* that POWs be tried by the same courts and according to the same procedure, be sentenced to the same penalties for the same acts, and have the same right of appeal as members of the armed forces of the Detaining Power. This requires the US to provide POWs the same rights accorded to its own forces under the Uniform Code of Military Justice. Article 105 further provides for the rights of defense, including the right to counsel of the accused's choice; the right to confer privately with counsel; the right to call witnesses; and the right to an interpreter. 'Protected persons', on the other hand, are entitled to the protection of Articles 71 to 76 of Geneva IV. This includes the right to a regular trial; the right to counsel of

109. Geneva III, Art. 25.

the accused's choice, who must be allowed to visit freely and be provided with the necessary facilities for preparing the defense; the right to call witnesses; the right to an interpreter; the right of appeal 'provided for by the laws applied by the court'; the right to be visited by the delegates of the Protecting Power (a neutral state appointed to monitor compliance with the Geneva Conventions); and the right to be detained and serve sentences in the occupied territory.

Any person who does not benefit from greater protection under these provisions is entitled to the protection of Article 75 of Additional Protocol I (at least to the extent that it is customary law in relation to the US and Afghanistan). Article 75(4) requires that proceedings be conducted before an 'impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure'. Those principles are deemed to include a range of procedural rights, such as the provision of 'all necessary rights and means of defense'; the right to be presumed innocent; freedom from compelled self-incrimination; and the right to be advised of remedies. Article 75(4) also prohibits *ex post facto* application of criminal law and requires respect for the principle of *non bis in idem*.¹¹⁰

A number of these violations were remedied on 21 March 2002 when the Secretary of Defense issued rules and regulations under section 6 of the Military Order.¹¹¹ The rules provide for the appointment of military defense lawyers with the possibility of hiring civilian lawyers of the defendant's own choosing (although at his or her own expense); the proof of guilt beyond a reasonable doubt; the right to call witnesses; and the presumption of innocence. A limited right of appeal is also now provided to a three member Review Panel comprising of military officers appointed by the Secretary of Defense (but which may also include civilians temporarily commissioned as military officers by the President). While these rules bring the proposed commissions more closely in line with the relevant provisions of Geneva III, several deficiencies remain. Any evidence which has 'probative value to a reasonable person' is admissible as are secret evidence and anonymous witnesses. Thus, while under the Uniform Code of Military Justice courts martial follow strict rules of evidence, in the military commissions hearsay evidence will be admissible. This is not a violation of international humanitarian law *per se* (the Geneva Conventions do not prohibit hearsay evidence) but it does provide a lesser evidential standard than under US military law. The right to appeal to a three member Review Panel does not accord with

110. Note also that Geneva IV, Art. 146, mirrored in all four Conventions, requires that any person prosecuted for violations of the Geneva Conventions, irrespective of their status under humanitarian law, must be provided with 'safeguards of proper trial and defense, which shall not be less favorable than' those provided for in Arts. 105 and following of Geneva III. These include the same rights of defense and appeal as those accorded to POWs. If a POW or protected person is willfully deprived of these rights of a fair and regular trial, the persons responsible for such a failure will themselves have committed a grave breach of the Geneva Conventions. See Geneva III, Art. 130; Geneva IV, Art. 147.

111. US Department of Defence, Military Commissions Order No. 1, Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism, 21 March 2002.

Article 106 of Geneva III, which guarantees that POWs be accorded the same appeal rights as US soldiers (who have the right of appeal to the civilian courts after they exhaust their remedies within the military justice system). This has particular relevance to the imposition of the death penalty. Finally, the independence and impartiality of the proposed commissions remains in doubt. It is the President or the Secretary of Defense who ultimately decides who is to be tried, appoints the members of the commissions, selects the panels that will review convictions and sentences, and makes final decisions in individual cases. Given the broad scope of persons subject to the President's Order, the ambiguity surrounding which offences may be tried before the commissions and the prospect of indefinite detention (even following acquittal before a military commission), it is clear that the proposed military commissions do not accord with either the spirit or the letter of international humanitarian law.

Apart from its obligations under humanitarian law, the US is also bound by norms of conventional and customary human rights law. In 1992, the US ratified the International Covenant on Civil and Political Rights (ICCPR), which requires State Parties to respect and ensure to 'all individuals within its territory and subject to its jurisdiction' the rights recognized in the Covenant.¹¹² The ICCPR applies at all times – in times of war and peace – although states may derogate from certain provisions in a time of 'public emergency which threatens the life of the nation', but only to the extent 'strictly required by the exigencies of the situation'. Any state wishing to avail itself of this right of derogation must immediately inform the UN Secretary-General.¹¹³

On 14 September 2001, the President proclaimed a national emergency,¹¹⁴ but the US has not officially sought to exercise its right of derogation under Article 4 of the Covenant. Accordingly, human rights scholars and NGOs have argued that the President's November 13 Military Order providing for the detention of certain individuals and the establishment of military commissions is in violation of various provisions of the ICCPR. The vague scope of section 2, which seeks to

112. ICCPR, Art. 2. For a discussion of the obligations imposed on States Parties by Art. 2 of the Covenant, see O. Schachter, 'The Obligation to Implement the Covenant in Domestic Law' in L. Henkin, ed., *The International Bill of Rights: The Covenant on Civil and Political Rights* (New York, Columbia University Press 1981) pp. 311–331. One question that has arisen is whether the obligations of the US under the Covenant extend to its activities in Guantánamo Bay at all, i.e., whether the holding of 'battlefield detainees' at the military base in Cuba may be considered as being 'within [US] territory and subject to its jurisdiction'. See e.g., T. Buergerthal, 'To Respect and Ensure: State Obligations and Permissible Derogations' in *ibid.*, at pp. 72, 73–75 (arguing that the phrase 'within its territory and subject to its jurisdiction' in Art. 2(1) of the Covenant should be read as a disjunctive conjunction and that a State Party that 'denies to an individual subject to its jurisdiction the rights guaranteed in the Covenant violates its obligations even if the individual is not within its territory at the time the violation is committed'). See also *Cyprus v. Turkey*, 18 YB Eur. Conv. HR (1975) p. 83 (Commission holding that States Parties to the European Convention on Human Rights are 'bound to secure the said rights and freedoms to all persons under their actual authority and responsibility, whether that authority is exercised within their own territory or abroad').

113. ICCPR, Art. 4.

114. Proclamation 7463, Declaration of National Emergency by Reason of Certain Terrorist Attacks.

define a broad class of persons who may be subject to detention for involvement in acts of 'international terrorism', arguably violates the right to security and liberty of the person and the prohibition on arbitrary arrest and detention.¹¹⁵ The denial of minimum due process rights to the Guantánamo detainees, including the right of *habeas corpus*, the right to challenge the lawfulness of their detention in a civilian court and the entitlement to trial within a reasonable time, also arguably violate the ICCPR.¹¹⁶ Finally, the failure to specify those criminal acts encompassed by the term 'international terrorism' may place the US in violation of the Covenant's non-derogable prohibition on the imposition of 'ex-post facto laws'.¹¹⁷ This issue may become especially relevant if it is sought to convict individuals for international crimes solely on the basis of membership in a terrorist organization such as Al Qaeda without proof of any direct involvement in specific acts.

Further questions have been raised regarding the fairness of future trials conducted by military commissions, especially given the likelihood of imposition of the death penalty. The ICCPR requires a 'fair and public hearing by a competent, independent and impartial tribunal established by law'. This includes the presumption of innocence, the right to be informed of charges, the right to adequate time for the preparation of a defense, the right to legal assistance of one's own choosing, and the right to examine witnesses. Whether the commissions, which remain wholly subject to the discretion of the executive, will satisfy these standards remains the subject of controversy.¹¹⁸ The Covenant also guarantees that anyone

115. ICCPR, Art. 9(1).

116. Art. 9(3)-(4). While Art. 9 may be subject to lawful derogation, the US has not sought to derogate and these obligations must therefore be held to be in full force and effect. Furthermore, the Human Rights Committee has stated that even in times of national emergency, the right to *habeas corpus* and judicial review of detention cannot be suspended: see General Comment No. 29, States of Emergency (Art. 4), 31 August 2001. Under the US Constitution, *habeas corpus* may only be suspended in the case of 'rebellion' or 'invasion', and only then by Congress (although this appears only to apply to persons held on US territory). In *Rasul* and *Odah* (see *supra* n. 108) it was held that in relation to petitions for writs of *habeas corpus* on behalf of aliens detained by the US at Guantánamo Bay, the Supreme Court's ruling in *Johnson v. Eisentrager*, 399 U.S. 763 (1950) was controlling and barred the Court's consideration of the merits of these two cases. *Johnson v. Eisentrager* involved a petition for writs of *habeas corpus* filed by 21 German nationals captured in China for engaging in espionage against the US following the surrender of Germany, but before the surrender of Japan, at the end of World War II. A US military commission sitting in China convicted the prisoners for violations of the laws of war and repatriated them to a US prison in Germany. Justice Robert Jackson, in an opinion for a divided Supreme Court, held that no court was able to extend the writ of *habeas corpus* to aliens held outside the sovereign territory of the US (at p. 778). The position was different in relation to 'citizens' (both in US territory and abroad) and 'friendly aliens' lawfully present or seeking residence within US territorial jurisdiction. But both enemy and friendly aliens captured incident to war have no right to *habeas corpus* (at p. 776). This decision leaves at least two areas of uncertainty: first, in relation to 'enemy combatants' who may be US citizens held outside of US territory, and second, in relation to enemy combatants who are aliens but who are present in US territory. In *Rasul* and *Odah*, the Court held that Guantánamo Bay was not within the sovereign territory of the US simply because it exercises 'jurisdiction and control over that facility' (at p. 28).

117. Art. 15.

118. See A. Neier, 'The Military Tribunals on Trial', *New York Review of Books* (11 February 2002) at p. 13. See also 'Agora: Military Commissions', 96 *AJIL* (2002) p. 83.

convicted of a crime shall have the right to judicial review of his or her conviction and sentence 'by a higher tribunal according to law'. Whether the military review board established by the rules issued by the Secretary of Defense satisfies this obligation is similarly an open question. Given that Geneva III guarantees final appeals to the civilian courts for POWs interred by the US, it would be incongruous for the ICCPR – which applies to States Parties at all times, not just during war – to establish a lower standard.

What is clear is that the holding of prisoners in Cuba rather than on US soil is an attempt to ensure that no individual (or interested state) is able to seek or obtain a legal remedy in a judicial forum. US domestic courts petitioned on *habeas corpus* grounds by the parents of several Guantánamo detainees have held that they have no jurisdiction in relation to Guantánamo Bay.¹¹⁹ The US has not acceded to the Optional Protocol to the ICCPR and it is therefore not possible for any detainee to initiate an individual communication to the UN Human Rights Committee; nor has it recognized the competence of the Committee to receive and consider communications from other States Parties alleging violations of the Covenant.¹²⁰ The US has also withdrawn its acceptance of the jurisdiction of the International Court of Justice following the 1986 *Nicaragua* case and it is therefore impossible for any state to bring an action for alleged violations of the ICCPR in the World Court (although an action under the Vienna Convention on Consular Relations may be brought under the specific jurisdiction clause in Article 1 of the Convention's Optional Protocol).

In conclusion, the November 13 Military Order sets a dangerous precedent by the world's reigning superpower. It sets a differential standard of justice for citizens and non-citizens, it seeks to derogate from both constitutional and international standards of due process and, by situating detention facilities outside of the US, it seeks to deny the availability of any judicial *fora* able to provide effective remedies. This sends a strong message to an increasing number of states, such as China, Burma, Colombia, Egypt, Kyrgyzstan, Malaysia, Nigeria, Peru, Russia, Sudan and Turkey as they wage their own 'wars on terrorism', and reverses the consistent and long-standing opposition of the US to the use of military tribunals in other countries in the name of states of emergency and national security.¹²¹ It also ignores the availability of other domestic and international alternatives. Various commentators following the events of September 11 have suggested other prefer-

119. When, on 5 April 2002, it was discovered that a prisoner being held at Guantánamo Bay, Yasser Esam Hamdi, was an American citizen, he was immediately transferred to a military jail in Norfolk, Virginia. As a US citizen and alleged 'enemy combatant', it was unclear whether Hamdi retained his right to lodge a petition of *habeas corpus* in federal court demanding that the government either charge him with a crime or set him free. As this raised the opportunity for challenge to the detention and status of all prisoners being held at Guantánamo – and thus the suspension of *habeas corpus* in relation to 'enemy alien belligerents' in general – Hamdi was immediately removed: see K. Seelye, 'U.S. Moves Taliban Prisoner Born in America to Virginia', *New York Times* (5 April 2002).

120. Art. 41.

121. Human Rights Watch, *Past U.S. Criticism of Military Tribunals*, Washington, 28 November 2001.

able *fora* to prosecute and try international terrorists. Anne-Marie Slaughter has suggested that 'Al Qaeda should be tried before the world' and has advocated the establishment of an international tribunal to try accused terrorists.¹²² Conversely, Harold Koh has said that 'we have the right courts for Bin Laden' and has argued that the US should try suspected international terrorists in its own federal courts as it has done on numerous prior occasions (including in relation to the 1993 bombing of the World Trade Center and the August 1998 bombings of the US embassies in Tanzania and Kenya).¹²³ The confusion of the war and justice paradigms in combating international terrorism, as represented by the move to establish military tribunals, has potentially far-reaching and devastating effects for the international human rights movement which, over the last half century, has sought to create a culture of rights and respect for human dignity in all parts of the world.

3.5.3 *US violations of international humanitarian law*

Third and finally, in its conduct of the war against the Taliban and Al Qaeda in Afghanistan, the US may itself have committed serious violations of humanitarian law regarding civilian casualties and the use of certain types of weapons. Thus, a further volatile and sensitive issue to be taken into account in considering transitional justice in Afghanistan is the question of future trials or investigations regarding war crimes committed by US forces. In the area of civilian casualties, the guiding principle of humanitarian law is that civilians may not be the direct object of attack, and that civilian status is lost only where individuals take an active part in hostilities (rather than merely on the basis of support or affiliation). The critical presumption is that if there is any doubt regarding whether someone is a combatant or a civilian, he or she must be presumed to be a civilian.¹²⁴ The principle of proportionality is also critical here, especially in relation to the volatile issue of 'collateral damage'. Attacks are prohibited if they cause incidental loss of civilian life, injury to civilians, or damage to civilian objects that is excessive in relation to the anticipated concrete and direct military advantage of the attack.¹²⁵

Given the well-known complexities in this area of the law, for present purposes it is sufficient to note that several US military actions conducted in Afghanistan

122. A.-M. Slaughter, 'Terrorism and Justice: An international tribunal comprising US and Islamic judiciary should be set up to try terrorists', *Financial Times* (11 October 2001).

123. H. Koh, 'We Have the Right Courts for Bin Laden', *New York Times* (23 November 2001).

124. See Fleck, *op. cit.* n. 107, at pp. 211 et seq. ('neither the civilian population as such, nor individual civilians, shall be attacked, killed, wounded or taken prisoner without sufficient reason': AP I, Art. 51(2); AP II, Art. 13).

125. See H. Fischer, 'The Principle of Proportionality', available at www.crimesofwar.org. A closely related issue is the targeting of objects. Under AP I, Art. 52, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction offers a definite military advantage. This raises difficult questions in relation to objects with dual military and civilian uses such as bridges, roads, power installations and communications networks. Such questions are sure to arise in the context of the US-led strikes in Afghanistan (for example, in relation to the bombing of Red Cross and other food storage facilities in Kabul and the targeting of the civilian infrastructure noted above: see *supra* n. 28).

have raised questions regarding conformity with these norms of humanitarian law. While many deaths were likely the result of lawful collateral damage, several incidents have sparked controversy. In particular, on 1 July 2002, a team of American military experts was sent to the province of Uruzgan in central Afghanistan to investigate the circumstances under which US aircraft bombed an Afghan wedding celebration, killing an estimated 48 civilians and wounding 117.¹²⁶ In late-November 2001, questions were also raised by Amnesty International and other NGOs regarding the uprising and killings that occurred in the Qalai Janghi fort outside Mazar-i Sharif.¹²⁷ These and related incidents have led Afghan leaders to voice serious concerns about US military tactics in their ongoing war on terrorism.¹²⁸

The second area of concern is the use of certain types of weapons. As noted above, the US has employed its full arsenal of conventional weapons in Afghanistan.¹²⁹ In January 2002, after coalition forces provided the UN Mine Action Programme (MAPA) with a list of 103 sites where cluster bombs were used, the UN began clearing an estimated 25,000 unexploded cluster bomblet units (CBU) dropped in Afghanistan by US warplanes.¹³⁰ This raises questions under conventional and customary humanitarian law, which prohibit the waging of war in a manner that causes unnecessary suffering, especially in relation to weapons that are either cruel or excessive in the nature and degree of suffering they cause or are incapable of distinguishing combatants from civilians.

While the use of cluster bombs and similar weapons remains unsettled under international law, these are questions that should be – but for the reasons discussed

126. See *Pentagon Team to Examine Bomb Error*, BBC News, 8 July 2002 (noting that the US had acknowledged that there were civilian deaths when an AC-130 attack helicopter raided villages 250 miles south-west of Kabul). See also D. Osborne, 'UN keeps damning report on Afghan massacre secret', *The Independent*, 31 July 2002 (noting in relation to the 1 July wedding party incident that the UN no longer intended to release a report written by a UN fact-finding team that included allegations that the US had under-reported civilian casualties and removed evidence from the site suggesting a 'cover-up').

127. J. Huggler, 'How our Afghan allies applied the Geneva Convention: Prisoners massacred, the dead plundered for boots, guns and even gold teeth', *The Independent* (29 November 2001). General Abdul Rashid Dostum, currently the Transitional Afghan deputy Defence Minister, was in command of the Northern Alliance forces during this incident.

128. UN Integrated Regional Information Network. Mounting Concern over Civilian Casualties', UN Integrated Regional Information Network, 7 January 2002 (noting concerns by both Hamid Karzai and Lakhdar Brahimi following reports that 52 civilians in the eastern province of Paktia were killed in a coalition strike).

129. See *supra* n. 29 and accompanying text.

130. From a total of 103 sub-munition strikes, 78 were struck by a total of 1,210 CBUs equaling a total of 244,420 sub-munitions. See 'UN to Clear Coalition Cluster Bombs', UN Integrated Regional Information Network, 2 January 2002. See also Human Rights Watch Report, 'Fatally Flawed: Cluster Bombs and Their Use by the United States in Afghanistan', 18 December 2002 (arguing that the US did not take all feasible precautions to avoid civilian casualties as required by international humanitarian law when it used cluster bombs in or near populated areas; problems included lack of accuracy in targeting during attacks, large numbers of explosive duds remaining after attacks resulting in the deaths of many civilians, and difficulties in clearance).

in Part 4 below are most unlikely to be – investigated and confronted in any future comprehensive process of transitional justice in Afghanistan.

4. TRANSITIONAL JUSTICE IN POST-WAR AFGHANISTAN

The discussion in Part 3 set out the full scale and scope of violations of humanitarian and human rights law in Afghanistan over the last two decades. As the Transitional Authority now begins the task of rebuilding Afghanistan's legislative, judicial and administrative institutions, how does it prioritize critical competing needs, and what does international law require in relation to holding individual perpetrators of atrocities accountable and in dealing with victims of the crimes? In trying to reconcile justice for past abuses and dealing with political realities and entrenched power relations, what are the factors that should be taken into account in designing an effective transitional justice policy for Afghanistan?

The unique nature of the Afghan transition raises a host of questions which challenge existing models of transitional justice employed so enthusiastically elsewhere. In a state ravaged by decades of internal and international armed conflict, should more pressing societal needs, such as establishing military and civil security, instituting humanitarian programs to deal with massive human insecurity, and rebuilding essential systems of governance, take priority over justice and reconciliation processes? From whose perspective should the desirability of establishing domestic or international courts or a Truth and Reconciliation Commission (TRC), or determining the priority of competing normative regimes be judged, the Afghan people themselves or the international community? If a TRC process is to be established, for example, how will the divisions between Afghanistan's various religious and ethnic groups – between Pashtuns, Tajiks, Hazaras, Uzbeks, and other minor ethnic groups – impact on this process? To what extent will a domestic or international court or a TRC be able to deal with the long history of outside involvement by surrounding states and terrorist groups in fomenting armed conflict and human rights atrocities in Afghanistan?

There is at least a degree of consensus between the new Afghan administration and the UN – at the level of principle if not on the details of implementation – that genuine accountability for humanitarian law and human rights abuses, tied to some process of truth telling and reconciliation, are structural requirements for future stability in the country. It is equally clear, however, that the inherent tensions between these objectives – between different transitional justice mechanisms and between norms based on human rights standards, Afghan cultural traditions and Islam – have yet to be comprehensively explored and resolved.

4.1 **Rebuilding the legal system**

In facing these challenges, the new government has had to confront two main clusters of problems: first, the question of how to achieve far greater cooperation and coordination to strengthen the peacekeeping-development nexus; and second, how

to undertake post-conflict judicial and legal reconstruction alongside continuing military operations.

4.1.1 *Aid and reconstruction*

Chronic lack of resources hamper all transitional administrations. This is exacerbated by the fact that donor countries rarely provide sufficient resources in a timely fashion and have an even worse record in following through on pledges. Recent aid and reconstruction efforts in the former Yugoslavia and East Timor have revealed two general priorities: first, they must target local actors and capacity within an overall nation-building framework; and second, they must be provided in a timely fashion so that a black market economy cannot predominate.¹³¹ In this respect, the Afghan transition represents a certain degree of progress and innovation. In order to address the problem of multiple actors engaging in redundant and competitive development work, the Karzai government has created the Afghan Assistance Coordination Authority (AACA), headed by the senior World Bank official, Ashraf Ghani. This Authority has developed a National Development Framework (NDF) that establishes a 'road map for recovery' and forces the donor community to coordinate among themselves while taking the priorities of the local government into account. This is intended to diminish the notoriously supply- rather than demand-driven, effects of development aid and to foster 'local ownership'.¹³² Even so, of the international aid dispersed so far in Afghanistan, only approximately ten percent has been allocated to the Afghan government, the rest going to UNAMA. Furthermore, some of the largest donors have refused to pool their funds into a trust fund for the whole of Afghanistan.

4.1.2 *Rule of law and judicial reconstruction*

The Herculean task of seeking to establish the rule of law and legal institutions under international administration has become a fast-emerging area of study and policy innovation in recent years. The main challenge has been how to resolve the inherent tension between building capacity for sustainable local institutions while at the same time maintaining respect for international standards of justice. The more complex the political and security environment, the more acute the tension and the more resources that are needed. Thus, in situations of great human insecurity and scarce resources, improvisation and pragmatism are likely to trump principle at the level of practice. Given the level of devastation of both infrastruc-

131. See B. Rubin, 'Afghanistan and Threats to Human Security', International Symposium on Human Security, *Human Security and Terrorism - Diversifying Threats under Globalization - from Afghanistan to the Future of the World*, Tokyo, 15 December 2001.

132. S. Chesterman, *Tiptoeing Through Afghanistan: The Future of UN State-Building*, International Peace Academy, Transitional Administrations Project, September 2002.

ture and institutions in Afghanistan, the Transitional Authority has decided that, in accordance with the express terms of the Bonn Agreement, its first priorities in the area of legal reform and rebuilding are to establish independent Judicial and Human Rights Commissions.¹³³

In assessing the UN experiments in judicial reconstruction in Bosnia, Kosovo, East Timor and Afghanistan over the last few years, the New York-based International Peace Academy has drawn three broad 'lessons learned'. First, the administration of justice should be amongst the top priorities of a post-conflict peace operation. Despite the fact, for example, that Bosnia has received more per capita international aid than Europe under the Marshall Plan, it remains in a legal and political quagmire. The main reason for this has been a failure to prioritize the promotion of the rule of law.¹³⁴ Similarly, the rule of law and the administration of justice have not been amongst the top priorities in Afghanistan, with the result that the peace achieved in Bonn remains dangerously fragile and provides a weak foundation for any subsequent reconciliation processes.

Second, in a post-conflict environment which lacks functioning law enforcement and judicial systems, rule of law functions may need to be temporarily transferred to the military. A key issue in all transitions is the role of the military in ensuring security, and it is increasingly being argued that this should include assuming policing functions to protect certain individuals and groups, to secure mass graves for exhumations, and to arrest war crimes suspects. This raises issues regarding the power of arrest and seizure of documentation which may contain information for future prosecutions.¹³⁵

133. These priorities accord closely with the three prerequisites to long-term security in Afghanistan suggested recently by a coalition of human rights and development NGOs, the Consortium for Response to the Afghanistan Transition (CRAFT): (1) *rule of law* (determining, publishing and distributing applicable law; establishing the Judicial Commission mandated under the Bonn Agreement as soon as possible; providing governmental salary support; building institutional capacity by training ministry staff, judges, bar members and legal educators; providing basic equipment and law texts); (2) *human rights* (establishing an effective and independent Human Rights Commission; building the capacity of Afghan civil society to promote and protect human rights; providing human rights education; addressing women's rights; and establishing structures to monitor human rights); and (3) *governance* (building local institutions and the Bonn commissions): see Report of the Consortium for Response to the Afghanistan Transition, *Filling the Vacuum: Prerequisites to Security in Afghanistan*, March 2002, pp. 5-7.

134. International Peace Academy Conference Report, *You, the People: Transitional Administration, State-Building and the United Nations*, 18-19 October 2002, at Part V (arguing that the Bosnian governments failed to involve local communities and independent professionals in reconstruction planning and implementation, thus impeding the development of legal and judicial institutions and infrastructure).

135. See International Peace Academy, *Managing Security Challenges in Post-Conflict Peacebuilding*, IPA Workshop Report, 22-23 June 2001, at p. 7 (discussing the feasibility of creating an international arresting team separate from the military peacekeeping presence). In East Timor, INTERFET troops were authorized to detain persons suspected of committing serious offences under international law and were required to deliver them to the Force Detention Centre in Dili. See further I. Martin, 'Justice and Reconciliation: Responsibilities and Dilemmas of Peace-makers and Peace-builders,' in A.H. Henkin, ed., *The Legacy of Abuse: Confronting the Past, Facing the Future* (The Aspen Institute and New York University School of Law 2002) at p. 84.

Third, once the security environment stabilizes and the process of civil reconstruction commences, sustainability should take precedence over temporary standards in the administration of basic law and order.

In Afghanistan, the immense difficulty of undertaking post-conflict reconstruction alongside continuing military operations has become starkly apparent. The ISAF has been restricted to Kabul and its immediate environs while US Special Forces in the countryside have focused their operations entirely on the 'war against terrorism' (as opposed to also protecting civilians from violent reprisals or securing war criminals and evidence for future trials).¹³⁶ The prioritization of military over political strategies has undermined both the Transitional Authority in Kabul and re-entrenched the warlords in the provinces. The need to quickly develop a civil service and national police force and for military forces to assume temporary policing functions has not occurred on anything like the scale required. Until these problems are adequately addressed, there are no means by which to reduce the grip of rearmed warlords and for demilitarization to begin. As stated recently by UN Special Rapporteur Kamal Hossain, resources are urgently needed to recruit and develop a national police force and this is 'universally recognized by all sections of the Afghan people to be the number one priority'.¹³⁷

To date, the state of development of the justice sector has been disappointing.¹³⁸ Given the experiences in Kosovo and East Timor, it is clear that failure to engage immediately with rule of law questions can result in a missed opportunity for the maximum impact of international engagement. A document from the Office of the SRSG in Afghanistan in May 2002 stated that a 'strategic, comprehensive, Afghan led, integrated program of justice sector reform can only begin with a comprehensive sectoral review and assessment of domestic needs, priorities, initiatives and capacities for reconstruction and development of this crucial sector'.¹³⁹ These assumptions are debatable if they require delays until the security environment allows for a thorough review. Rather it appears as though the rule of law and transitional justice have not been priorities for UNAMA (even taking into account its assistance rather than leadership role), the Transitional administration or the donor

136. See Human Rights Watch, 'All Our Hopes Are Crushed: Violence and Repression in Western Afghanistan', Vol. 14, No. 7, November 2002 (arguing that the UN approach of a 'light footprint' has proven ineffective to protect human rights and that American military forces have maintained relationships with local warlords that have undercut efforts by US diplomats and aid agencies to strengthen central authority and the rule of law).

137. Statement by Dr Kamal Hossain, Special Rapporteur on the Situation of Human Rights in Afghanistan, 58th Session of the Commission on Human Rights, 26 March 2002, at para. 10.

138. See e.g., International Crisis Group, *Afghanistan: Judicial Reform and Transitional Justice*, 28 January 2003 (observing that the judicial and human rights commissions have, to date, achieved little and that the Chief Justice of the Supreme Court, Fazl Hadi Shinwari, has rapidly placed political allies in key positions and advocated the return of a strict form of sharia law in Afghanistan).

139. Office of the SRSG for Afghanistan (UNAMA) (UNAMA-OSRSG, Kabul, May 2002), cited in Simon Chesterman, *Justice Under International Administration: Kosovo, East Timor and Afghanistan*, International Peace Academy, Transitional Administration Project, September 2002, at p. 11.

community. Indeed, in the AACA's National Development Framework, the justice system is barely mentioned.

4.2 International obligations and mechanisms for accountability

International human rights law has traditionally provided states with a wide discretion in implementing international obligations to respect and ensure rights.¹⁴⁰ At the same time, international criminal law has focused principally on the power rather than the duty of states to punish violations committed outside their territorial jurisdiction.¹⁴¹ In more recent times, however, international law has required states to punish certain human rights crimes – such as genocide and torture – committed in their territorial jurisdiction, to investigate violations and to punish the perpetrators.¹⁴² It is also well established that individual violations of international humanitarian law entail criminal sanctions.¹⁴³ Thus, it is clear that modern international criminal law (which encompasses specific violations of both humanitarian and human rights law) imposes obligations directly on individuals, making them liable to punishment, and imposes duties on states with respect to matters usually left to their discretion. The significance of these developments is that an amnesty law or an exercise of prosecutorial discretion that is valid under domestic law may nevertheless breach a state's international obligations.

In applying these principles to the last two decades of abuses in Afghanistan, it is clear that under international law the transitional government is under a duty to investigate allegations of war crimes, crimes against humanity, torture, extra-legal executions, disappearances and other serious violations of humanitarian and human rights law and to hold individual wrongdoers responsible. In certain

140. Human rights treaties such as the ICCPR emphasize 'obligations of result' leaving the determination of means of protecting rights to states: see Schachter, *supra* n. 112, p. 311. Increasingly, however, human rights treaties specify 'obligations of means' as well as result: see D. Orentlicher, 'Setting Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime', 100 *Yale LJ* (1991) pp. 2537.

141. When international criminal law has required states to punish offences committed in their territory, the duty has traditionally applied to crimes committed against foreign nationals: see Orentlicher, *supra* n. 140, pp. 2551-2555, nn. 63-65.

142. While the ICCPR does not specify a duty to punish violations of rights, it is well accepted that a state Party fails in its duty to ensure those rights protecting physical integrity if it does not investigate violations and seek to punish those who are responsible. See e.g., Report of the Human Rights Committee, 37 UN GAOR Supp. (No. 40) Annex V, general comment 7(16), para. 1, UN Doc. E/CN.4/Sub.2/Add.1/963 (1982) (complaints about ill-treatment under Art. 7 of the Covenant must be investigated effectively by competent authorities and those found guilty must be held responsible). In addition, a state's failure to punish repeated or notorious violations breaches the customary obligation to respect fundamental human rights: *ibid.*, p. 2552.

143. Arts. 49, 50, 129, and 146 of Geneva I, II, III, and IV respectively enjoin the High Contracting Parties to enact legislation providing 'penal sanctions' for grave breaches of the Conventions. Further, common penal provisions of the Conventions confer universal jurisdiction over grave breaches of any Convention making the perpetrators *hostes humani generis*. The duty to punish or surrender those who have committed grave breaches is not conditioned in any way that suggests any restrictions on jurisdiction. See M. Bothe, ed., *National Implementation of International Humanitarian Law* (Dordrecht, Martinus Nijhoff Publishers 1990) pp. 73-78.

instances, the government may also be required to ensure that individuals whose rights have been violated have an effective remedy before a competent body and that they receive adequate compensation.¹⁴⁴

The fact that discharging these various obligations in the volatile and fragile situation of post-conflict Afghanistan will prove extremely hazardous does not relieve the state of its duties as a matter of international law. A state cannot evade its duty to punish atrocious crimes merely to appease disaffected military forces, newly returned warlords or to promote national reconciliation.¹⁴⁵

4.2.1 *International versus domestic justice*

The question of individual criminal accountability for past abuses was not addressed in direct terms during the Bonn process. Given the number and diversity of potential defendants, any prosecutorial strategy will need to have strictly defined limits and objectives. This raises the prospect of selective prosecutions, a practice which does not *per se* violate international law, provided that appropriate criteria are employed for selecting defendants.¹⁴⁶ In this respect, any future domestic or international prosecutions are likely to face at least three major dilemmas. The first concerns the relevant time period during which past abuses may be investigated and prosecuted. If it extends all the way back to the first phase of Afghanistan's 23-year old civil war, this will create an enormous group of potential defendants. The second is whether prosecutions will be brought only against Afghan perpetrators or whether attempts will be made to extradite and prosecute foreign perpetrators who may have committed war crimes and serious human rights violations.¹⁴⁷ The third dilemma is whether prosecutions will be brought only against members of the Taliban or also against those members of the Northern Alliance and other armed groups suspected of committing war crimes and serious human rights abuses. In the current political configuration, it seems inconceivable that prosecutions will be brought against those warlords and military commanders who now enjoy renewed positions of power either in the central Transitional Authority or in the provincial capitals.

The desperate economic and humanitarian plight of the country, in conjunction with the complexity of both the political landscape and scope of violations,

144. See ICCPR, Art. 2(3). See also *Velasquez Rodriguez* case, Inter-Am. Ct. H.R. (Ser. C) No. 4, para. 174 (1998) (judgment). As it is difficult to envisage either the warlords or surrounding states assuming responsibility for violations of international law and providing reparations to victims, presumably, the new, fiscally-limited Afghan government will need to assume this responsibility.

145. Note that the Restatement (Third) of the Foreign Relations Law of the United States takes the position that a complete failure to punish repeated or notorious violations of rights protected by customary law generates state responsibility for a breach of the law: § 702 and Comment *b*.

146. Most domestic penal systems reflect a priority on prosecuting persons responsible for the most serious offences. Any prosecutorial strategy should not, however, be arbitrarily directed towards any particular group of scapegoats in a system of past atrocities: see K. Davis, *Discretionary Justice: a preliminary inquiry* (Baton Rouge LA, Louisiana State University Press 1969).

147. In relation to Afghan perpetrators currently in custody, see *supra* n. 70.

suggests that Afghanistan is unlikely to prove the exception to the rule. Apart from those individuals in detention and facing trials in US military commissions or domestic courts, this raises the very real likelihood of impunity for the perpetrators of the worst abuses.

The question then arises whether international criminal justice institutions and forms of accountability have any role to play in the Afghan transition, especially given the likely obstacles facing domestic prosecutions. While several commentators have suggested the creation of international justice mechanisms in the wake of 11 September, this has been largely in the context of combating international terrorism. There has been no indication that the Security Council intends to establish an *ad hoc* Tribunal for Afghanistan,¹⁴⁸ and the ICC will have no jurisdiction over any crimes within its mandate committed in Afghanistan prior to July 2002. Furthermore, given the strongly unilateralist stance of the Bush administration towards the ICC and international justice more generally, any proposals for an *ad hoc* Tribunal to prosecute war crimes and other atrocities committed during the Afghan wars would almost certainly be vetoed (especially if such a tribunal were to have jurisdiction over individual violations of humanitarian law alleged to have been committed by US and allied forces).

In any event, both the scale of the atrocities and the number of victims is overwhelming and certainly far too great, even in an ideal world, to carry out international criminal prosecutions of all those individuals who have committed atrocities and serious violations of international humanitarian and human rights law. Any enmity existing between different ethnic and religious groups for past violations is arguably best dealt with by local processes and the imposition of domestic penalties rather than by an international criminal tribunal.

Thus, the only remaining realistic possibility may be the creation, with international assistance, of a special court – perhaps linked to a complementary truth commission – along similar lines to the Special Court and Truth and Reconciliation Commission currently being established in Sierra Leone.

Whatever approach is adopted, the lessons learned to date in applying international justice norms and mechanisms to states in transition suggest that a fully integrated approach is required that pays close attention to the realities and history of the relevant conflict and the need at the local level to reestablish the rule of law and to achieve effective legal and institutional reform.

Lustration and other political mechanisms by which to gradually diminish the official power of the warlords and other individuals implicated in abuses is another means of dealing with violators. In relation to the rebuilding of the Afghan national

148. As noted by Brown, while the creation of *ad hoc* tribunals has advanced the cause of international justice, it has also raised questions of fairness and political privilege. Why, for example, were such tribunals created for the Former Yugoslavia and Rwanda but not for Chechnya, Somalia, Cambodia, or the Persian Gulf War? The answer lies in the source of their creation – the Security Council – and hence the full range of political and strategic factors that influence that body (including the veto of the permanent five members). See B. Brown, 'Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals', 23 *Yale JIL* (1998) pp. 383 at 386.

army and police force, for example, the UN Special Rapporteur on Human Rights, Asma Jahangir, has strongly urged the Karzai administration to establish stringent screening procedures to ensure that individuals suspected of committing atrocities be excluded.¹⁴⁹

4.3 **A truth commission for Afghanistan?**

Given the extraordinary degree of political, social and economic instability and the devastated condition of Afghan judicial and other governmental institutions (which, as discussed, make prosecutions in the immediate term impossible), the question of whether to establish a TRC in post-war Afghanistan has now inevitably arisen.

Hamid Karzai's conception of justice for the Afghan people appears to rest on a combination of truth, reconciliation and presumably reparations for victims.¹⁵⁰ However, official investigations of past abuses leading to some form of societal closure and consensus regarding a troubled history, and acknowledgment of victims by an official institution, appear to be utopian objectives, at least for the immediate future, given the pressing security and humanitarian challenges facing the country.

The findings of early NGO consultations with the Afghan people themselves bear this out and suggest that reconciliation and forgiveness on the one hand and justice and reparations on the other rank well behind the desire for stability, security, protection of basic human rights, education and adequate health and humanitarian services.¹⁵¹ Further, the traditional scenario justifying truth commissions of former evil oppressors and their innocent victims does not apply so neatly in the Afghan context. Truth commissions were established in Latin America because disappearances, torture and other gross violations of human rights were committed in secret. In countries such as Argentina, El Salvador and Chile, authoritarian regimes created state systems designed specifically to conceal the facts and carry out covert acts of terror. Truth commissions were therefore needed to expose the violations, their invisible victims, and the systems that made them possible. In Afghanistan, by contrast, the nature and extent of atrocities committed by each of the different groups of actors are well known.

Similarly, the reasons (although not of course the question of attribution of responsibility) for those atrocities appear to be relatively uncontroversial among Afghans. For these and related reasons, a convincing case for a TRC in Afghanistan must rest not only on the usual truth and reconciliation grounds but less obviously on specific grounds of seeking to link these objectives to further-reaching questions of security (especially lustration processes and subsequent

149. Afghannews.net, 'UN urges Afghanistan to screen police, army recruits', 6 February 2003. Available at www.afghannews.net/news.

150. See UN Press Release, Human Rights Committee, Seventy-fourth session, 18 March 2002.

151. See CESR Report, *supra* n. 4; United States Institute of Peace, *Rebuilding Afghanistan: A Framework for Establishing Security and the Rule of Law*, 11 December 2001.

internationally-assisted prosecutions of key individuals implicated in human rights abuses) and rebuilding the country's legal – especially constitutional and judicial – systems and institutions. In this respect, an Afghan TRC could constitute the first step in the critical process of building a 'culture of rights' in Afghanistan. Early attempts to implement the guiding principles of both the Bonn Agreement and the National Workshop on Human Rights – that is, to establish a transitional justice policy based on 'international human rights standards, Afghan cultural traditions and Islam' – are falling victim to the low priority accorded to rebuilding the justice system on Afghanistan's political agenda.

These difficult problems could be mitigated to some extent by a well-designed TRC fully integrated with the ongoing work of the Judicial and Human Rights Commissions in drafting a new Afghan constitution and undertaking various human rights-related activities. An Afghan TRC, for example, could meticulously document the many abuses of the past, provide a forum for thousands of victims to tell their stories and claim reparations, and seek to entrench in the hearts and minds of all Afghans a forward-looking human rights culture built on the rule of law, democracy and constitutionalism. Such a non-legal victim-oriented institution could also provide a unique forum (apart from the Loya Jirga) for substantive and wide-ranging discussions on how best to reconcile Afghanistan's national laws and practices with its international human rights treaty obligations. In the complex and contentious areas of women's rights and the relationship between religion and human rights, these discussions and deliberations with thousands of Afghans could gradually seek to illustrate the importance of human rights to the future of the country and begin to forge the consensus needed for a broadly-accepted Afghan constitution.¹⁵² Without the involvement of the people themselves in both confronting the repression and abuses of the past and building a normative framework for the future, Afghanistan's constitutional and legal institutions will remain dangerously fragile and irrelevant. In this respect, a broadly conceived Afghan TRC may be a necessary, albeit, insufficient, precondition to both later prosecutions (whether domestic or international) and the ongoing work of drafting a new constitution and rebuilding the legal system.

5. CONCLUSION

A little over a decade ago, Louis Henkin suggested that ours was the 'age of rights', and that human rights was the 'idea of our time'.¹⁵³ If this had indeed been an article of faith amongst the community of nations, on 11 September 2001, the Age of

152. The ICG has similarly argued that '[a]s Afghanistan seeks a balance between secular and religious law, modernity and tradition, it is essential that women are fully represented in the process at all levels. Therefore, they must be involved in all efforts at consultation and the drafting of laws, the commissions, the teaching of law and the rebuilding of the courts.' ICG Report, International Crisis Group, *Afghanistan: Judicial Reform and Transitional Justice*, 28 January 2003, p. 21.

153. L. Henkin, *The Age of Rights* (New York, Columbia University Press 1990) p. xvii.

Rights was dramatically and tragically confronted with what some now see as the emergence of the Age of Terrorism. While acknowledging, for example, that since the end of the Cold War, human rights had become the 'dominant moral vocabulary in foreign affairs', Michael Ignatieff questioned whether after 11 September 'the era of human rights has come and gone'. He noted that 'Rome has been attacked, and Rome is fighting to re-establish its security and hegemony', and that, accordingly, the international human rights movement will have to engage soon in 'the battle of ideas: it has to challenge directly the claim that national security trumps human rights'.¹⁵⁴ That battle of ideas has now begun in earnest and is today being waged in a number of different *fora* and in relation to a number of issues, each raising its own problems and implications for the future promotion and protection of human rights and humanitarian law.¹⁵⁵

Ignatieff has argued that America's 'capacity to shape outcomes in Afghanistan, still less to create a state, is constrained by the way it won the war against the Taliban'.¹⁵⁶ More than any others, two factors – the effects of US imperialism and overriding security concerns – threaten to undermine attempts to establish transitional justice mechanisms and institutions in the fraught political and economic conditions of post-Taliban Afghanistan. The lessons of other transitional societies suggest that addressing individual criminal responsibility for serious violations of international humanitarian and human rights law is pivotal to the creation of a stable, accountable government subject to the rule of law. Without appropriate judicial mechanisms for both past and ongoing atrocities in Afghanistan and the exclusion of war criminals from participation in the transitional government or its new armed forces and police, these objectives will remain elusive.

This article has sought to show how overriding security concerns in the conduct of the US-led 'war on terrorism' are leading to the systematic undermining of long-established principles and protections of international law. This approach to combating international terrorism and 'terrorist states' has troubling implications for future transitional justice policies and institutions in Afghanistan for at least three reasons. First, it will affect the way in which the Afghan authorities interpret and apply the relevant protections and obligations under the Geneva Conventions and human rights treaties. The US category of 'unlawful combatants', for example,

154. M. Ignatieff, 'Is the Human Rights Era Ending?', *New York Times* (5 February 2002).
155. For present purposes it is sufficient to observe that the new US military and political strategy of 'preventive war' and 'anticipatory self defense' has profound implications for the traditional international rules of *ius ad bellum* which, in turn, will affect the future evolution of *ius in bello*. See further P. Danchin, 'Human Rights', in *A Global Agenda: Issues Before the 56th General Assembly of the United Nations* (US/UNA, Rowman & Littlefield Publishers 2002) pp. 1–33 (discussing the new paradigm of terrorism and human rights in a post-September 11 world).
156. M. Ignatieff, 'Nation-Building Lite', *New York Times Magazine* (28 July 2002) at pp. 26, 28–29. Ignatieff further suggests (at p. 29) that the 'winning strategy paired Special Forces teams and air power with local commanders and their militias. When victory came, America thought it had won the war, but the warlords in the Northern Alliance thought they had. Now they dominate the Kabul government and insist that they, rather than the Americans, should shape the peace.'

affects the rights and duties of not only members of the Taliban and Al Qaeda forces but also those of the Northern Alliance and other armed groups. Second, the blanket denial of POW status and the refusal to convene an Article 5 tribunal in cases of doubt affects the status and rights of persons currently being detained by the Afghan authorities. Third, the willingness of the US to derogate from international standards regarding the rights of prisoners offers an unfortunate precedent. Accordingly, the incentives for the Transitional Authority (which has even greater and more pressing security concerns than the US) to comply with international humanitarian and human rights law in designing a transitional justice policy and rebuilding the legal system have been gravely damaged by the post-September 11 actions of the US government. It is difficult to envisage the US playing a positive leadership role in the creation of an enduring and effective post-Taliban system of justice while at the same time maintaining on the one hand its exceptionalist stance towards the international rule of law, human rights and the ongoing struggle for universal justice and on the other its aggressive, imperial security policy regarding the use of force.

While it may well be true that an overly hurried and optimistic transition towards democratization and criminal accountability for warlords could lead to increased ethnic conflict and destabilizing violence,¹⁵⁷ the far greater danger for Afghanistan is that impunity for past abuses will ensure not only future violations but also the continued rule of the gun over the rule of law. Whatever institutional responses are adopted – whether domestic courts, an international *ad hoc* tribunal, a mixed international-national tribunal or a truth commission linked to justice mechanisms – the primary objectives should be the creation of a genuine and popularly supported constitutionalist culture of human rights, the rebuilding of Afghanistan's legal system and the establishment of effective monitoring and accountability mechanisms to deter future abuses. Nation-building and reconstruction in Afghanistan face overwhelming challenges – the legacy of 23 years of brutal war, desperate poverty and a destroyed infrastructure and economic base. The extent to which these processes are likely to result in a durable peace, however, will depend in no small part on the extent to which, in accordance with the terms of the Bonn Agreement, the new Afghan government complies with its obligations under international humanitarian and human rights law.

157. See e.g., J. Snyder, *From Voting to Violence: Democratization and Nationalist Conflict* (New York, W.W. Norton 2002) (arguing that because ethnic conflict is most likely to break the early stages of democratic transitions, outside forces should hold back from promoting democracy and favor instead the 'gradual development of the rule of law, an impartial bureaucracy, civil rights, and a professional media, followed by the holding of free elections').