

# Terrorism and International Law

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## Introduction

The suicide attack by hijacked airplanes into the World Trade Center and the U. S. Defense Department on September 11, 2001 (hereinafter referred to as the 9/11 incident) cannot make the world aware of threats of terrorism too much. It has long been pointed out that technological development can turn everyday, peaceful materials into weapons with massive lethality<sup>1</sup> and that terrorist activities will become brisk because what is called globalization will make human beings move around the world more easily.

It is speculated that perpetrators and leaders of the 9/11 incident have entered the U. S. or are in hiding outside the U. S. The incident seems to have been planned in several areas outside the U. S. There is a strong possibility that international terrorist networks exist, which is a negative aspect of the borderless age. International cooperation is essential against terrorism, and must have legal and political validity to be approved by all the countries. This is a matter of course in terms of democratic principle, but has following problems.

First, the status of judicial entities under international law is not given to terrorist organizations. Measures are often targeted to terrorist groups as if they were countries laid down in international law, and not a many of them are difficult to explain within the existing framework of international law premised on the system of sovereign states. If terrorism is regarded as war, and military attacks on terrorist organizations play a key role in antiterrorism measures, how does international law interpret this?

Second, antiterrorism measures are mainly designed for maintenance of legal order, and it is necessary to address terrorism with proper legal status attached to terrorists, making legal stability essential. The relations between domestic and international laws must not be confused with that between peacetime and wartime laws. Arbitrary application of laws leads to neglect of human rights, and the use of acts to crack down on unlawful acts of terrorism.

If the above-mentioned issues are handled in the wrong way, legitimacy of antiterrorism measures may be threatened. This can not only hinder antiterrorism international

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<sup>1</sup> For this new concept on arms, that is "*Arms under new concept*," refer to Qiao Liang and Wang Xiangsui (translated by Shinnosuke Sakai and Liu), *Cho-gen-sen (Unlimited War)* (Kyodo News Service, 2001), pp.

cooperation but jeopardize the ideas of democracy, our fundamental values. If a terrorist attack is only a temporary phenomenon, coercive measures may be permitted. However, we have to deal with various types terrorism in the future, and what is needed is measures whose legitimacy can be demonstrated domestically and internationally.

With this framework of mind, this report clarifies problems over terrorism and international law and studies points to note in ensuring validity of antiterrorism measures.

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## I. Applicability of Right of Self-Defense

Following the 9/11 incident, the international community agreed to use the right of self-defense as the ground for the action by the U. S. against terrorists (groups). This was particularly explicit in European nations<sup>2</sup> and Japan,<sup>3</sup> which are allies of the U. S. And other powers and Islam nations also agreed to the right to self-defense.<sup>4</sup>

The problem is whether a similar agreement will be reached in the future. For the following reasons, we have to study carefully whether the right of self-defense will invariably be applied to the groups committing terrorism.

It is evident that the right of self-defense is a right given to nations under international law, and at the same time, it is in a sense a special right. How and when to exercise the right of self-defense is left to the discretion of each country with the exception of the end of the right. The UN charter stipulates that the right of self-defense is a special right that can be exercised until the UN takes appropriate action.

Under these conditions, the right of self-defense can be used arbitrarily to a considerable degree by a nation, which considers it necessary to exercise the right. Of course, self-restraint works on a nation to some extent because its selfish interpretation invites opposition from the international community and that nation is isolated. However, if

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<sup>2</sup> On the following day, September 12, the NATO Council decided to agree to application of Article 5 of the NATO Treaty. NATO Press Release, (2001) 14, 12 September 2001.

<sup>3</sup> For example, Prime Minister Koizumi said in his reply at the Diet that the right of self-defense could be given as the ground for the use of armed force against the 9/11 incident (September 19, 2001, at the Budget Committee of the House of Councilors).

<sup>4</sup> On September 14, Russia and Arab nations announced their support for the U. S.

a nation, which exercises the right of self-defense, exerts very great influence on the international community, and neither other countries nor international organizations have the ability to force the nation concerned to suspend the exercise of the right of self-defense, self-restraint might be limited. If the right of self-defense is exercised on a large scale in a quick manner and causes irreparable damage to a target nation, there is a risk that it will bring about a serious problem in the region concerned.

Solid legal ground must be sought in using the right, and it is desirable that the exercise be as limited as possible because the right of self-defense has such inherent problems.

## 1. Right of Self-Defense in International Law

Outlined in this part is how the right of self-defense in international law has been interpreted and exercised.

The right of self-defense is a right to use armed force of to counter illegal aggression by a foreign country in order to protect its own country.<sup>5</sup> This definition is premised on illegal aggression, or armed attacks by another country. What matters here is an aggressive entity and a form of aggression.

In general, an aggressive entity is a state. This is only natural in view of the fact that international law regulates state-to-state relationships. An international organization, which is recognized as an entity in international law under certain conditions, cannot become an entity regarding the right of self-defense; for it does not have ability or intent to carry out armed attacks on other states. The same reason can apply to individuals and groups of individuals. As individuals or groups of individuals do not have the same legal status as a state, they cannot conduct armed strikes or be subject to exercise of the right of self-defense against armed attacks.

Armed attacks are systematic military operations over a boundary of a state using the army, navy, air force or similar military force, and are of the most significance<sup>6</sup> among the use of armed forces. Specific contents are laid down in the "Definition of Aggression" adopted by the UN<sup>7</sup>

If the requirements to use the right of self-defense are met, a state can exercise the right of self-defense and conduct military counterattacks on its own judgment. However, a certain condition is imposed on military counterattacks. In case a state is being attacked or about to be attacked, it can resort to counterattacks to a necessary extent in order to fight off the armed attacks until the UN Security Council takes appropriate measures.<sup>8</sup> This condition

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<sup>5</sup> Japanese Society of International Law, *Kokusaikankeiho Jiten (International Relation Law Dictionary)* (Sanseido, 1995) "Jieiken (Right of Self-Defense)," pp. 374-375.

<sup>6</sup> Case Concerning Military and Paramilitary Activities in and against Nicaragua, *ICJ Reports 1986*, p. 101, Paragraph 191.

<sup>7</sup> Resolution Concerning the Definition of Aggression, UN General Assembly Resolution 3314 (XXIX), adopted

is time continuity between an attack and a counterattack, immediacy, temporariness of a counterattack until the UN launches proper action, and relativity between an attack and a counterattack.

In international law, the right of self-defense is an exceptional reason for the use of armed forces with considerable restrictions.

## 2. Terrorism

Here, terrorism is discussed in general terms.

Terrorism is generally defined as a means to achieve political objectives by using violence to generate fear among the third party and resorting to systematic and collective intimidation.<sup>9</sup> If terrorists cross over boundaries, it is called international terrorism.

Various people carry out terrorism. Hijack incidents in the 1960s were frequently caused by revolutionists. The mastermind of the 9/11 incident Osama bin Laden and his group, al-Qaeda are Islam fundamentalists.

Fundamentally, the international community has treated terrorist acts as crimes and addressed them as such. International treaties have been established to lay down various terrorist acts as international crimes and crack down on terrorism, reducing and limiting legal and geographical room for terrorism.<sup>10</sup> The fundamental principle is "prosecute or extradite (*aut dedere aut judicare*)."<sup>10</sup> Details of various treaties will be explained later.

## 3. Application of Right of Self-Defense to 9/11 Incident

How is the 9/11 incident, or this kind of terrorism analyzed legally? In fact, the right of self-defense was applied to this incident. Studied here are problems over the application of the right of self-defense as a ground for military operations against terrorist groups and a state protecting the terrorist groups.

The approval of the right of self-defense is premised on the existence of an armed attack. Terrorists (groups) are not recognized as an entity in international law, but can they conduct armed attacks? Or is it possible to regard terrorist acts as armed attacks in accordance with the degree of their scale and damage, regardless of the legal status of actors?

Even the current international law has a framework to link terrorists to armed attacks. "The conduct of a person or a group of persons shall be considered an act of a State under the international law if the person or the group of persons is in fact acting on the instructions

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<sup>8</sup> The UN Charter Article 51.

<sup>9</sup> Note 5, *Kokusaikankeiho Jiten*, "terorizumu (terrorism);" p. 570.

<sup>10</sup> Various treaties have been created on hijacking, management of radioactive materials, and safety of continental shelf platforms, bombing terrorism, and terrorism support funds.

of or under the direction or control of that State in carrying out the conduct."<sup>11</sup> In other words, if a state orders individuals or a group of individuals to carry out a terrorist act, that state is responsible for the terrorism, even if it is not a direct actor. As for the 9/11 incident, if the Taliban government of Afghanistan supported a group of individuals called al Qaeda and helped trigger the incident, al Qaeda's act would be tantamount to an armed attack of the Afghanistan. Consequently, the U. S. subject to the armed attack of al Qaeda could use the right of self-defense and counterattack Afghanistan.

Actually, however, the Taliban government seemed not to use al Qaeda, and this theory cannot work. The Taliban government allowed al Qaeda to use its own territory in exchange for financial assistance, but it cannot be assumed that the Taliban government controlled al Qaeda and made them carry out the 9/11 terrorist attack.

In the meantime, the U. S. seems to have concluded that it regarded the 9/11 incident as an act of aggression and accepted the title to perform armed attacks on terrorists. Probably, it was not the nature of the act itself that served as a ground for the right of self-defense but the magnitude of its influence on society and the number of victims. Otherwise, the U. S. could not have explained the fact that it defined destruction and murders by terrorist groups (treated as criminals) without using weapons as armed attacks and the right of self-defense was used against them. (In this context, the right of self-defense is a legal right and at the same time owns the nature of instincts. Law approves of the right of self-defense, and a need desires the right of self-defense.)

Considering the tradition that the U. S. has regarded terrorism as war against a state and agreed to use the right of self-defense against it, the U. S. seemed not to change the legal interpretation of the right of self-defense.<sup>12</sup> However, many other states were skeptical about this interpretation by the U. S., and it was not considered established, widely-accepted interpretation in the international community.

Nevertheless, Washington's act in response to the 9/11 incident and other countries' approval of the right of self-defense pointed to a possibility that the right of self-defense would be used as a legal ground for counterattacks against terrorism. From now on, each nation might counterattack terrorism with the right of self-defense. In this respect, the 9/11 incident had a huge impact on international law.

However, having the right of self-defense is not always synonymous with using it. This is because to claim the right of self-defense is not enough and to use it entails armed force. Regarding the 9/11 incident, the U. S. sent its troops to areas in Afghanistan, thousands of kilometers away from New York, where terrorists were said to hide them and attacked

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<sup>11</sup> Responsibility of States for internationally wrongful acts (A/Res/56/83, 2002) Article 8.

<sup>12</sup> Note 5 *Kokusaikeiho Jiten* "Terorizumu," and Masahiro Mitsuno, Shunji Taoka and Takayuki Fukuzawa, *20 Seiki no Senso (War in the 20th Century)* (Asahi Sonorama, 1995) pp. 587-588.

their strongholds. Few nations are able to dispatch troops over that long distance. For this reason, the use of the right of self-defense continues to be limited and is not always expected to work effectively.

#### 4. Problems over Use of Right of Self-Defense

Even assuming that the use of the right of self-defense is approved against terrorists (groups), it may involve the following problems.

First, it is not clear in what way the right of self-defense can be exercised against terrorists (groups), which have no territories or people to govern. They are called terrorist groups, but they in fact act mostly as individuals, not as groups. How can the right of self-defense be used against them? Traditionally, the right of self-defense has been used between armed forces of one country and of another. The enemy and territories subject to hostilities are clear. (The UN Security Council Resolutions following the 9/11 incident approved of the individual and collective rights of self-defense, but did not clarify an entity subject to its use.<sup>13</sup>)

Second, as terrorism is in essence planned and carried out covertly, it is difficult to identify real actors. It is even more difficult to identify individuals who support them. There is always a risk of a false charge, whether it is done by accident or by design. As long as some steps are taken to avoid a false charge, validity is questioned. In the case of the conventional right of self-defense, an aggression, which is the cause for using the right of self-defense, is essentially carried out by the armed forces of an invading country, and the right of self-defense is exercised against the organized military acts using weapons.

Third, whether the right of self-defense is imminent or not can become a problem. Even if terrorist attacks are repeated, large-scale ones are often conducted at long intervals. How can the right of self-defense be approved against repetition of such individual acts? Once Israel claimed its right of self-defense as follows. "Each terrorist act by the Palestinians has only minor effect, but if it is repeated, it will be equivalent to an aggression of Israel." With this rationale, Israel tried to justify its attacks against the Palestinians as the right of self-defense. The international community did not regard Israel's attacks as the right of self-defense.<sup>14</sup>

If the right of self-defense is used long after a terrorist act is carried out, a problem may arise over the correlations between self-defense and a terrorist act concerned. As regards the 9/11 incident, the U. S. launched military action against Afghanistan on October 7,

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<sup>13</sup> The UN Security Council Resolution 1368 (September 12, 2001) immediately after the 9/11 incident and the Resolution 1373 (September 28, 2001) both approved of the individual and collective right of self-defense, but made no further reference.

<sup>14</sup> Pellet and Cot, *Komanteru Kokusai Rengo Kensho (La Charte des Nations Unies Commentaire article per article)* (Tokyo Shoseki, 1993) pp. 948-949.

nearly one month after the incident. It is not clear whether this interval is short enough to recognize the attacks as the right of self-defense. The fact that other countries did not object to the U. S. using the right of self-defense regardless of the interval might mean the one-month interval was acceptable. Paradoxically, it raised the problem of how long an interval could be permitted. The Lockerbie incident where the U. S. was the target of terrorism might give some suggestions to this question.

In this incident, a Pan American airplane from London to New York was exploded over the town of Lockerbie in Scotland, killing a total of 270 passengers, crew members and local residents. The explosion was caused by a time bomb planted by two Libyan agents.

The Lockerbie and 9/11 incidents have some things in common. First, a nation was involved in the incident, though the degree varied. Libya was more closely related to the explosion than al Qaeda and the Taliban government. The perpetrators of the explosion were the agents of a Libyan government. Another thing in common is that private facilities and properties were destroyed—an aircraft for the Lockerbie incident and airplanes and high-rise buildings for the 9/11 incident. Also common is the losses of many lives.

The U. S. (and the U.K.) did not use the right of self-defense against Libya but punished the actors as criminals. It was in 1991, two years after the incident, that the judiciary of the two countries indicted the two Libyan agents as suspects of the explosion. This was extraordinary for the U. S. (and ordinary internationally) in view of the U. S. shift to the right of self-defense against terrorism in the 1980s. A possible reason for the indictment is that it took too long to identify the actors and it was considered difficult to use the right of self-defense. By contrast, in 1986, the U. S. stated an airstrike on Libya for only two days from April 14 after a bomb ripped through a disco in Berlin on April 6. The interval was eight days. In 1990, the U. S. mounted cruise missile attacks on Sudan and Afghanistan on August 20. This was in response to the explosion of the U. S. embassies in Kenya and Tanzania on August 7. The interval was about two weeks.

The details after the Lockerbie incident are as follows. The British government demanded the two suspects be extradited to Britain. As the Libyan government refused, the U. S., Britain and France referred the matter to the UN Security Council, which adopted the Resolution 731 urging Libya to hand over the suspects. As Libya continued to comply with the demand, the Security Council decided to impose economic sanctions (the resolutions 748 and 883). Subsequently, the Libyan government agreed with the U. S. and British governments that the two suspects would be tried in the Netherlands under the Scottish law. In accordance with the Security Council Resolution 1192 to that effect, the Libyan government turned the suspects to the Netherlands. In January 2001, one of the suspects was found guilty. Then, an intermediate appeal was dismissed, confirming the decision. He is now in prison in Glasgow. The other was found innocent.

The fourth problem is whether it is enough to disclose information on the grounds for attacks to the limited parties concerned. Even if the evidence is said to have been disclosed to the leaders of the countries concerned, a system is not available for the moment to study the evidence fully, for example, to conclude whether it is common to the parties concerned. In this situation, a question remains to the evidence itself.

It is necessary to consider the above-mentioned problems when applying the right of self-defense to terrorists (groups). It is worth noting that the UN Security Council approving of the individual and collective rights of self-defense still maintains various sanctions against al Qaeda and the Taliban.<sup>15</sup> The Security Council termed terrorism as the most serious threat to international peace and stability, criticized it as a crime with no ground for validity and called for stricter control. This can be seen as a return to the existing policy of measures against conventional terrorist acts, though it is not a complete return. The resolution has also been adopted to apply the chapter 6 of the UN Charter stipulating various activities on threats to peace, destruction of peace and aggression.<sup>16</sup> In this context, it is safe to say that the UN does not regard the right of self-defense as a sole solution.

## II. Legal Status of Arrested Terrorists

This chapter studies what kind of legal interpretations can be given to the treatment of arrested terrorists. So far, terrorists have generally been treated as criminals and have not been given the status of combatants. It was described in the previous chapter that in principle, persons involved in terrorism are regarded as criminals and "prosecute or extradite" under international law. (This principle will be explained in a separate chapter.) Regarding the 9/11 incident, however, the U. S. treated members of al Qaeda and Taliban soldiers arrested in the Afghan operation as unlawful combatants. Considering the U. S. judgment should have an important meaning in using the right of self-defense and staging armed attacks on terrorists (groups) and a nation supporting terrorists (groups).

### 1. Afghan Operation

The Afghan operation launched in October 2001 was a joint military attack by the U. S. and anti-Taliban groups, including U.K. and the Northern Alliance of Afghanistan, against the Taliban government, which virtually controlled most of the Afghanistan territory. This operation can be regarded as a conflict using armed force between nations and, therefore as an international armed conflict.

The treatment of prisoners of war in this kind of armed conflict is laid down in the Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949 (so-called the Third Geneva Convention III).<sup>17</sup>

The Geneva Convention III has the following provisions in its Article 4 A (1) and (3).

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<sup>15</sup>The UN Security Council Resolution 1456 (2003) adopted on January 20, 2003.

<sup>16</sup>The UN Security Council Resolution 1455 (2003) adopted on January 17, 2003. However, activities under the chapter 7 of the UN Charter do not always mean use of armed force.

## Article 4

A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:

- (1) Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces
- (3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power

Under these provisions, prisoners of war are all the members of forces of an enemy country. Previously, certain requirements were imposed on the qualifications of persons engaged in hostilities to the members other than regularly armed forces. This is called the four conditions of belligerents.<sup>18</sup> The Geneva Convention III in 1949 makes no reference to the qualifications and states that militias and members of a volunteer corps can become prisoners of war if they form a part of forces. In other words, they all are regarded as members of forces.

Three countries-Afghanistan, the U. S. and U.K., which were at war in Afghanistan, are all signatories to the Geneva Convention III and are obligated to treat enemy combatants fallen into their power as prisoners of war under the convention. In the Afghan operation, the U. S., which did not recognize the Taliban government, was required to treat detained combatants under the Provision A (3) of Article 4. When qualifications as prisoners of war are in doubt, a proper tribunal must decide their status. Until the decision is made, such persons are subject to the Geneva Convention III (Article 5).<sup>19</sup>

Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

## 2. Treatment of Taliban Soldiers

Taliban soldiers can be regarded as "members of the armed forces" under Article 4 of the Geneva Convention III. In this case, they are given certain protections under the following provisions of the convention.

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<sup>17</sup> The Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, signed on August 12, 1949, and entry into force on October 21, 1950.

<sup>18</sup> Four conditions are;

- that of being commanded by a person responsible for his subordinates;
- that of having a fixed distinctive sign recognizable at a distance;
- that of carrying arms openly;
- that of conducting their operations in accordance with the law and customs of war.

<sup>19</sup> The present Convention shall apply to the persons referred to in Article 4 from the time they fall into the power of the enemy and until their final release and repatriation.

<sup>20</sup> Prisoners of war must at all times be humanely treated. Any unlawful act or omission by the Detaining Power causing death or seriously endangering the health of a prisoner of war in its custody is prohibited, and will be regarded as a serious breach of the present Convention.

First, in general, prisoners of war shall be treated humanely (Article 13).<sup>20</sup> Prisoners of war shall be sent to camps away from the combat zone immediately after they are taken prisoners (Article 19).<sup>21</sup>

A detaining country cannot keep prisoners of war in confinement except when it is necessary for their health (Article 21).<sup>22</sup> On the other hand, prisoners of war are required to comply with the laws applying to the armed forces to a detaining country (Article 82).<sup>23</sup> Prisoners of wars may be prosecuted for its acts conducted before they are taken prisoners in accordance with laws and orders of a detaining country. In this case, prisoners of war are also given benefits under the Geneva Convention III. Prisoners shall keep such benefit even if they are found guilty after prosecution and trials (Article 85).<sup>24</sup> It is necessary to give essential guarantees of independence and impartiality to a court where prisoners are tried, and a court must provide the right and means of protection for prisoners as defendants (Article 84).<sup>25</sup>

Upon the cessation of hostilities, prisoners of war shall be repatriated without delay (Article 118).<sup>26</sup> This shall not apply, however, to cases where the human rights of prisoners may be violated at home. Certain limitations are imposed on liberation and repatriation. Prisoners of war can be detained during the procedures for prosecution against their illegal acts and until a sentence is determined and executed. This also applies to prisoners who are found guilty before the cessation of hostilities, and they can be detained until they serve out their term (Article 119).<sup>27</sup>

### 3. Treatment of al Qaeda Members

Treatment of al Qaeda members, a terrorist group, may vary according to situations.

If members engaged in battles with the U. S. forces as part of the Taliban forces, they can be considered "militias or members of a volunteer corps forming a part of such armed

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<sup>21</sup> Prisoners of war shall be evacuated, as soon as possible after their capture, to camps situated in an area far enough from the combat zone for them to be out of danger.

<sup>22</sup> Subject to the provisions of the present Convention relative to penal and disciplinary sanctions, prisoners of war may not be held in close confinement except where necessary to safeguard their health and then only during the continuation of the circumstances which make such confinement necessary.

<sup>23</sup> A prisoner of war shall be subject to the laws, regulations and orders in force in the armed forces of the Detaining Power; the Detaining Power shall be justified in taking judicial or disciplinary measures in respect of any offense committed by a prisoner of war against such laws, regulations or orders. However, no proceedings or punishments contrary to the provisions of this Chapter shall be allowed.

<sup>24</sup> Prisoners of war prosecuted under the laws of the Detaining Power for acts committed prior to capture shall retain, even if convicted, the benefits of the present Convention.

<sup>25</sup> In no circumstances whatever shall a prisoner of war be tried by a court of any kind which does not offer the essential guarantees of independence and impartiality as generally recognized, and, in particular, the procedure of which does not afford the accused the rights and means of defense provided for in Article 105.

<sup>26</sup> Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.

<sup>27</sup> Prisoners of war against whom criminal proceedings for an indictable offence are pending may be detained until the end of such proceedings, and, if necessary, until the completion of the punishment. The same shall apply to prisoners of war already convicted for an indictable offence.

forces" under Article 4 A (1) of the Geneva Convention III.<sup>28</sup> If they fall into the hands of the U. S. forces as a result of battles, they naturally obtain status as prisoners of war.

Members of al Qaeda are thus treated as prisoners of war, and at the same time prosecuted if they commit illegal acts prior to hostilities as mentioned in the previous section, and a court decides whether they are guilty or not (Article 85).<sup>29</sup> In this case, a court must be independent and fair, and give full protection to prosecuted members of al Qaeda (Article 84).<sup>30</sup> If they are found innocent, a country engaged in a conflict is required to repatriate them immediately after hostilities end (Article 118).<sup>31</sup>

Another problem is about members of al Qaeda who were not incorporated into the Taliban forces and acted separately. If they had kept in contact with the Taliban forces and engaged in battles with the U. S. forces, they could be treated in the same way as the above-mentioned members of al Qaeda who formed part of armed forces under the Geneva Convention III. However, as they did not act together with members of forces, they would have to meet the four conditions<sup>32</sup> usually not required for combatants (Article 4 (2) (a), (b), (c) and (d)). Additionally, there is another category for al Qaeda members-those detained by the U. S. forces, though they did not engage in battles. As they are not combatants, they can be given protection under the Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949 (the so-called Geneva Convention IV).<sup>33</sup> Protected under this convention are those in the hands of warring nations or an occupying nations of which they are not nationals of warring nations or an occupying nations (Article 4).<sup>34</sup> Almost all al Qaeda members fall under this provision, as their nationalities vary, except for the Americans and the Britons.

If al Qaeda members are strongly suspected of committing harmful acts individually to damage the safety of the warring nations or such acts transpire, they are not subject to protection under this Treaty. Still, they can receive at least humanitarian treatment. In case they are prosecuted, they will not lose the right of fair and official trials (Article 5).<sup>35</sup> Moreover, as those under protection cannot give up this right (Article 8).<sup>36</sup> both detaining and detainee sides are obligated to guarantee human rights.

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<sup>28</sup> Refer to section 1 of this chapter.

<sup>29</sup> Note 24.

<sup>30</sup> Note 25.

<sup>31</sup> Note 26.

<sup>32</sup> Note 18.

<sup>33</sup> The Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949 (the Geneva Convention IV), signed on August 12, 1949 and entered into force on October 21, 1950.

<sup>34</sup> Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.

<sup>35</sup> In each case, such persons shall nevertheless be treated with humanity, and in case of trial, shall not be deprived of the rights of fair and regular trial prescribed by the present Convention. They shall also be granted the full rights and privileges of a protected person under the present Convention at the earliest date consistent with the security of the State or Occupying Power, as the case may be.

<sup>36</sup> Protected persons may in no circumstances renounce in part or in entirety the rights secured to them by the present Convention.

#### 4. America's Treatment of Detainees

The U. S. had claimed that all the al Qaeda members and Taliban soldiers detained in Afghanistan would be treated as unlawful combatants, not as prisoners of war under the Geneva Convention III.<sup>37</sup>

Following protests from European countries, Amnesty International, and the International Red Cross, the U. S. recognized the application of the Geneva Convention III. But it used the convention only as a criterion for treatment. The U. S. asserted that al Qaeda is a terrorist group, which is not a contract party of the Geneva Convention III and thus its members are criminals. It also stated that Taliban soldiers lack qualifications as prisoners of war.

The U. S. assertion has, however, some problems. If al Qaeda members were incorporated into the Taliban army to engage in battles, they should be members of armed forces under the Geneva Convention III. If they are not combatants, they will be given protection under the Geneva Convention IV.<sup>38</sup> It is possible to reject the statement that Taliban soldiers do not meet the requirements as combatants and therefore cannot be taken prisoners because the Convention III does not always call for the requirements as combatants on the premise of qualifications for prisoners. There are objections in the U. S. that Taliban soldiers practically fulfilled the requirements as combatants. The four requirements imposed traditionally as combatants are appearance, commander, carried weapons and compliance with the laws of war. The rebutters state Taliban soldiers meet each of the four conditions. First, Taliban soldiers looked as combatants, different from ordinary people in appearance. This is evident from the fact that soldiers of the Northern Alliance could easily distinguish Taliban soldiers. Taliban soldiers were led by some commanders, and carried weapons openly. They also seemed to observe the laws of war. They also say the U. S. gave the status of prisoners to the soldiers who were more dubious about the requirements during the Vietnam War.<sup>39</sup>

In addition, it is pointed out that even if al Qaeda members are unlawful combatants, as the U. S. claims, the U. S. needs to give them various legal protections at a court organized fairly and officially in order to judge their illegal acts according to the following reason. The U. S. has not ratified the 1977 Geneva Protocol I,<sup>40</sup> but should comply with its article 75 because it codifies the international customary law. This article requires that a court organized impartially and officially be used for unlawful combatants.<sup>41</sup> Various rights shall be guaranteed for defendants. In other words, it is necessary to give defendants the rights as

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<sup>37</sup> For example, the statement by Defense Secretary Ramsfeld, Secretary Ramsfeld Media Availability en route to Camp X. (<http://www.defenselink.mil/Jan2002/to127sd2.html>)

<sup>38</sup> For example, International Review on the Red Cross No. 844, pp. 1181-1182. (<http://www.icrc.org>)

<sup>39</sup> R.K. Goldman & B.D. Tittmore, "Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law," *ASIL Task Force Papers* (American Society of International Law, 2002) pp. 28-29.

provided by the International Criminal Tribunal for Rwanda and for the former Yugoslavia.<sup>42</sup> Otherwise, there arises a risk that the validity of a trial will be questioned.

Taliban soldiers and al Qaeda members detained in Afghanistan were sent to the U. S. base in Guantanamo Bay, Cuba. They were handcuffed and blindfolded, which might be against the provision of humanitarian treatment of prisoners. It is unknown whether some members were held in custody out of their health concerns.<sup>43</sup> Possible reasons why they have not yet been released are that battles are going on in Afghanistan and that the procedures are underway for prosecution of Taliban soldiers. In any case, humanitarian treatment is essential and certain protections should be given when they become defendants.

When conventional legal systems and interpretations are studied comprehensively, it is doubtful that the U. S. has the sufficient legal grounds for its assertion.

## 5. Establishment of Military Tribunal

U. S. President Bush has established a military committee<sup>44</sup> under his military order, but the establishment itself is questioned. Its problems will be examined here.

A military committee (so-called military tribunal) is roughly divided into four. What is generally known as a court martial is set up within forces in order to judge crimes of soldiers. Second, a special military court is set up in an occupied country where legal systems do not function fully. Third, a military court is founded on its own land because domestic legal systems do not work effectively due to a civil war or a large-scale disaster, etc. For example, a court set up under the martial law. Fourth, a court is established to try combatants who violate the laws of war. The court set up under Bush's military order belongs to this last category. It is a military committee to try and punish people who violated the laws of war.

The U. S. has founded similar military committees in the past.<sup>45</sup> The latest military committee follows the footsteps of a precedent. In 1942, the President Roosevelt set up a

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<sup>40</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (1977 Geneva Protocol I), signed on December 12, 1977, and entry into force on January 27, 1978.

<sup>41</sup> No sentence may be passed and no penalty may be executed on a person found guilty of a penal offense related to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure.

<sup>42</sup> D.F. Orentlicher & R.K. Goldman, "When Justice Goes to War: Prosecuting Terrorists Before Military Commission," *Harvard Journal of Law & Public Policy*, Vol. 25, No. 2 (Spring 2002), pp. 653-663.

<sup>43</sup> The Geneva Convention III Article 21. Case Concerning Military and Paramilitary Activities in and against Nicaragua, *ICJ Reports 1986*, p. 101, paragraph 191.

<sup>44</sup> Military Order, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism (hereinafter Military Order), 66 Fed. Reg. 57,833 (Nov. 13, 2001). Following the military order, the Defense Department issued the Military Committee Order No. 1 (DoD MCO No. 1 (hereinafter MCO), March 21, 2002) on March 21 the following year.

<sup>45</sup> It is also potentially intended to prepare for possible suspension of legal systems. It has already been made clear by judicial precedents that a military court cannot be set up on the basis of such future risks, making the assertion groundless.

military committee to try Nazi agents who infiltrated into the U. S. for subversive activities during World War áU. The decision of the Federal Supreme Court in favor of that military committee has long been criticized as the renunciation of its right of independent judicial judgment. A similar criticism was leveled against the decision of the Supreme Court to conclude that the presidential order to intern Japanese Americans during the Second World War was legal.<sup>46</sup> It is questionable how valid the latest president order is because it is based on such precedents.

Nevertheless, President Bush's order to set up a military court is considered legal to some extent in that the 1942 presidential order was judged legal. The problem, however, is that the 1942 order permitted only the power of a court to try soldiers on suspicion of violating the laws of war during armed conflicts. Regarding the 9/11 incident, it is possible to try only the actors (many of whom were killed when hijacked planes crashed into the World Trade Centers) and those who violated the laws of war during the ensuing armed conflicts.

However, a wide range of people are subject to trials by the new military committee.<sup>47</sup> Subject to trials are people involved in terrorist acts before the 9/11 incident, acts related to the 9/11 incident and ensuing acts related to the incident. Even if the 9/11 incident was an armed attacks, acts prior to the incident are those committed in time of peace. They are separate from violation of the laws of war during the ensuing armed conflicts.

It is understood from the fact that President Bush began to refer to war for the first time after the incident that the U. S. was not at war with al Qaeda. Under the provisions to set up the new military committee, ordinary people who once provided financial assistance to al Qaeda but were not directly linked to the 9/11 incident will be punished in the same way as war criminals. It is legally groundless to judge crimes other than war crimes at a military tribunal. This is considered to violate the International Covenant on Civil and Political Rights,<sup>48</sup> which recognizes the right of ordinary citizens to be tried impartially under its Article 14.<sup>49, 50</sup>

It should also be noted that the 1942 precedent recognized the right of a defendant to seek judgment of the U. S. Supreme Court in order to ensure legality of prosecution at a military committee. At a military committee trial even during World War áU, suspects could ask the federal legal system to judge the lawfulness of their prosecution.<sup>51</sup>

Moreover, the presidential order to set up the military committee does not define

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<sup>46</sup> Note 42, Orentlicher & Goldman, "When Justice Goes to War," p. 657.

<sup>47</sup> Military Order, Section 2 Definition and Policy.

<sup>48</sup> International Covenant on Civil and Political Rights, adopted at the UN General Assembly on December 16, 1966, and entered into force on March 23, 1976.

<sup>49</sup> Article 14. 1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

<sup>50</sup> For example, in reference to detainees of the British nationality, the British court of appeal pointed out that the U. S. policy evidently violated the principle under international law, citing the International Covenant on Civil and Political Rights. A. Dworkin, "British Court Attacks US Policy on Detainees." (<http://www.crimesofwars.org/onnews/news-ukus.html>)

terrorism, which the committee is to judge as a crime. Tried on the basis of the president's judgment are those considered as members of al Qaeda with no American citizenship, those suspected of taking part in international terrorism doing harm to the U. S., and those who allegedly had them stay in the U. S. deliberately.<sup>52</sup> This provision is vague, providing wide-ranging discretionary powers for the President.

A question is also given to the nature itself of a military committee designed to try a wide range of suspects in terms of time and their activities. A military tribunal has problems over its fairness and independence because it is organized not as an independent judicial organization but as a part of the administration. Judges are military officers,<sup>53</sup> but at the same time members of the Department of Defense, a U. S. government organization, making it difficult to maintain fairness in judgment at the risk of breaking visible and invisible pressures. It is also pointed out that a problem can arise over proper legal procedures<sup>54</sup>, including the adoption of evidence. European nations have long been exposed to threats of terrorism, but none have set up a military committee to try terrorists. This is another reason why the U. S. military committee sounds peculiar. For example, a Moroccan student in Germany was charged with aiding and abetting murders for giving money to the perpetrators of the 9/11 incident. In a trial by a higher court in Hamburg, the prosecution demanded fifteen years' imprisonment for the student, and the court handed a sentence as demanded on February 19, 2003. This is the maximum prison sentence for aiding and abetting murders, and some thirty trials were held from October 2002 until the conclusion of the trial in accordance with the procedures for an ordinary criminal case.<sup>55</sup> Spain refused to hand over a suspect involved in the 9/11 incident unless the U. S. assured that the suspect would be tried at a regular court, not a military tribunal, and that he would not be sentenced to death. Thus, the U. S. military committee itself was subject to direct criticism.<sup>56</sup>

Following these critical views, slight changes were seen on the American side. The procedures for the management of a military committee were announced to the effect that a suspect could ask an outside civilian lawyer for defense, and that a guilty verdict could be appealed to a special retrial court consisting of three judges, not to an ordinary court.<sup>57</sup> Nevertheless, a defendant is at a considerable disadvantage, compared with ordinary trials because (seven) judges are all military officers, as described before; a guilty verdict requires the approval of two-thirds of judges (approval of all the judges for a death sentence);<sup>58</sup>

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<sup>51</sup> Note 42, Orentlicher & Goldman, "When Justice Goes to War," P. 659.

<sup>52</sup> Note 5, *Kokusaikankeiho jiten* "Terorizumu" p. 570. Military Order, Section 2 Definition and Policy.

<sup>53</sup> MCO 4. Commission Personnel A. Members.

<sup>54</sup> MCO 6. Conduct of the Trial D. Evidence.

<sup>55</sup> "Doji Tero Hikoku ni Kinko 15 Nen Kyukei — Doitsu Keisatsu (15 Years' Imprisonment to Suspect of the 9/11 Incident, German Prosecution)" *Jiji Press*, on February 6, 2003, from Berlin. "Tero Shiensha ni Kinko 15 Nen no Hanketsu, Doitsu no Saibansho (15 Years' Prison Term to 9/11 Terrorist Attack Supporter, German Court)" *Asahi Newspaper*, on February 20, 2003. In Morocco, ten-year imprisonment was requested of three al Qaeda (Saudi Arabian) members (February 22, 2003, *the Reuters* from Rabat).

<sup>56</sup> "Amerika Gunjihotei 'Jinken' Meguri Ohshu ni Hanpatsu mo (Opposition to Discussions over 'Human Rights' at U. S. Special Military Tribunal)" *Mainichi Interactive*, on December 4, 2002.

criteria for the adoption of evidence can be lax; and trials can be held behind closed doors for concealment of information. In criminal cases in the U. S., trials are open to the public, and all the jurors must agree to a guilty verdict. As for a trial by an international court, a judge is selected from various countries and suspects are not sentenced to death, as shown in the ongoing trials by International Tribunals for Rwanda and the former Yugoslavia.

There is another problem—a possibility of discrimination in treatment based on nationalities. Even at present, American members of al Qaeda are being tried under ordinary, U. S. legal systems. It will become a problem if judgment of sentences differs between such American members at a U. S. domestic court and those of other nationalities at a military committee. It means different sentences against similar acts by a tribunal in which the U. S. practically gets involved. In fact, in a past trial, an American who provided financial assistance to al Qaeda had the trial canceled in exchange for pleading guilty in another case.<sup>59</sup> The provisions of a military committee make no reference to procedures for plea bargaining, including the availability of such plea bargaining for non-Americans tried by a military committee.

In giving a ruling to individuals who have no right to revise or rescind international law directly, it is considered necessary to protect their human rights. If a nation fails to comply, it must run the risk of the validity for its acts being seriously questioned.

### III. Military Operation against State Sponsoring Terrorist Group

On what ground is it justified to use armed force (military action) against a nation, which intentionally supports terrorists (groups), a terrorist-sponsoring nation, or a nation, which serves as a stronghold for terrorist groups due to its insufficient governability (a failed state). This chapter examines this matter.

#### 1. State's Duty of Territory Control

A state is established when people live in a clearly-demarcated territories, are governed by a governing organization (government) and possess diplomatic capability. The government has the right and obligation to manage such a state properly. The government has the duty to protect the right of its people and to restrict any action to deprive the state of its freedom and independence,<sup>60</sup> while it has the right to choose and develop freely its

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<sup>57</sup> "Gunjihotei de Aru Kaida Nadohimo Hikoku no Kenri Mitomeru, Amerika Kokubo Chokan (Rights of Defendant Recognized for al Qaeda Members at Military Tribunal: U. S. Defense Secretary)," *Mainichi Interactive*, (March 22, 2002).

<sup>58</sup> MCO 6. Conduct of the Trial F. Voting.

<sup>59</sup> "Aru Kaida Shien no Jizenkikin Kanbu, Ichibu Yuzai Mitomeru (Executive of Charity Fund Supporting al

own political, social, economic and cultural systems.<sup>61</sup> In international relations, territorial integrity and political independence of another country must not be violated.<sup>62</sup> These duties are common internationally and should be performed in all sincerity.<sup>63</sup>

The duties each nation must fulfill also cover terrorism. The Declaration on the Principle of International Law concerning Friendly Relations and co-operation (1970) lays down provisions on this matter as follows.

Any State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force.<sup>64</sup>

As regards the 9/11 incident, Afghanistan had the duty to govern its land properly so that the Islam terrorist groups of al Qaeda might not carrying out organized training in that country with a view to terrorist acts in various parts of the world. Nations, which they think will suffer damage, and the international community act jointly against the failure in fulfilling such duty. Specifically, they pressure a nation concerned to correct the violation, and resort to compulsory alternative acts if it fails to perform the obligation. The U. S. military action against Afghanistan in the wake of the 9/11 incident can be regarded as one of these acts.

## 2 Engagement by State

What kind of grounds are used for countries to get engaged in Afghanistan, which admitted maintaining strongholds for terrorists and seemed to have extended financial support?

Engagement is divided into two types-unilateral engagement by a nation which has been subject to terrorism and suffered damage, and joint engagement by several countries, including a nation subject to terrorism. The latest military action in Afghanistan belongs to the latter category.

The ground used for the Afghan operation was the right of self-defense. The U. S. has interpreted the 9/11 incident as the use of armed attack against its own country, and addressed the terrorism with the right of self-defense. The U.K., which has dealt with terrorism jointly with other countries, cited the collective right of self-defense as the ground

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<sup>60</sup> Declaration on the Principle of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, the UN General Assembly resolution 2625 on October 24, 1970, "The principle of equal rights and self-determination of people."

<sup>61</sup> Note 60, "The principle of sovereign equality of States."

<sup>62</sup> Note 61 and the UN Charter Article 2 Provision 4.

<sup>63</sup> Note 60, "The principle that States shall fulfill in good faith and the obligations assumed by them in accordance with the Charter."

<sup>64</sup> Note 60, "The principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any States, or in any other manner inconsistent with

for its action. Several problems, however, have been raised over the exercise of the right of self-defense, and it is unknown whether the right of self-defense continues to be quoted as an appropriate ground for antiterrorism acts.

In the meantime, efforts have been made to seek another reasonable legal basis. It is to use the legal theory of the right of necessity.

The right of necessity is an "act of a state to violate the lawful benefit of another country out of sheer necessity in order to avoid an imminent crisis against its own land."<sup>65</sup> In this case, each nation decides on its own what an imminent crisis is and what kind of emergency measures will be taken to avoid that crisis. It is natural that this act must be self-restraint because it violates the benefit and protection of another countries, and other members of the international community (states and international organizations) make judgment on his decision and the results of that act.

If the right of necessity is used, it generally violates the rights of a third country, which does not commit any illegal acts. As for the 9/11 incident, it is a little bit questionable that Afghanistan can be regarded as such a third country, because it is considered doubtless that the Taliban government in Afghanistan had close relations with the terrorist group of al Qaeda.<sup>66</sup> Nevertheless, it is difficult to conclude that Afghanistan invaded the U. S. on the ground that the Taliban government did not use al Qaeda as a means to achieve its own goals and that Afghanistan, which was virtually controlled by the Taliban government did not wage armed attacks on the U. S. In this context, it is considered reasonable to use the right of necessity rather than the right of self-defense designed to eliminate aggression.<sup>67</sup>

Even if the theory of the right of necessity is applied, certain conditions should be imposed. The use of military force is generally prohibited. If it is used on the ground of the right of necessity, it is necessary to make up for damage suffered by a country subject to armed attacks in order to offset its illegality. As for the Afghan operation in the wake of the 9/11 incident, the land and facilities in that country should be restored to normal, or damages must be paid. Damages, which will be negotiated among the nations concerned, should include compensations for the Afghans.

### 3. Engagement by International Community

In addition to engagement by states, engagement by the international community is available theoretically. Involved in this case will be local organizations and the UN. The basis for engagement may be a collective measure against breach and threat to the

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<sup>65</sup> Note 5, *Kokusaikankeiho Jiten (International Relation Law Dictionary)* (Sanseido, 1995) "Kinkyu Hinan (Right of Necessity)" pp. 185-186.

<sup>66</sup> Close relations between the two have been pointed out in, for example, UN resolutions.

<sup>67</sup> For example, Professor Yozo Yokota of Chuo University states that some kind of interpretation of the 9/11 incident should be presented in international law, though the incident is an unforeseen situation in existing international law. As for the Afghan operation, he points out that it is reasonable to make the right of necessity, not the right of self-defense, for a basis for the operation. (Remarks at a study meeting on "Terrorism and International Law" held at the National Institute for Defense Studies on December 10, 2002.)

international peace and security.

Regarding the 9/11 incident, the UN Security Council reconfirmed in its recent documents on antiterrorism activities that terrorism constitutes one of the serious threats to peace and security.<sup>68</sup> The UN is an organization originally set up to prevent and remove threats and take effective collective steps against the breach of peace in order to maintain international peace and security.<sup>69</sup> Regional rules and duties of local organizations are designed to complement the UN<sup>70</sup>

In any case, a solution of a conflict through armed forces is a final measure, and until that final step is taken, it is necessary to solve a conflict through peaceful means and in accordance with justice and principles of international law.<sup>71</sup>

#### 4. For Justification of Engagement

Thus, engagement to some degree may be accepted, but in order to make sure that engagement will be justified, it is necessary that the international community (including a nation subject to such engagement) regard the situation to be improved after engagement as meaningful. Otherwise, it is impossible to offset the illegality of physical engagement in another country (using military forces) in the international community where mutual non-interference is a principle among nations.

In order to better justify engagement committed out of necessity, the rights of people in a target country should possess must be protected not only after engagement but also during engagement. Of course, if the rights of people and a nation subject to engagement, which should be protected are violated during and after involvement, it must be evaluated in a proper manner. If the violation is made clear consequently, such measures as apology and restoration to an original condition should be made, and when restoration is impossible, compensation must be provided.

In other words, engagement is a temporary deviation from legal principles because it is conducted under the principle of non-intervention in other countries. Generally, such deviation is considered illegal, and some compensation procedures are required to make justification accepted internationally and ensure validity. Such procedures should include appropriate considerations and protection for people in a country subject to intervention as well as an apology, compensations and restoration to an original condition should damage be incurred. The lack of these considerations may easily invite criticism for the intervention as a violation of the principle of non-interference.

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<sup>68</sup> Press Release SC/7638, 20 Jan., 2003.

<sup>69</sup> UN Charter Article 1. Provision 1.

<sup>70</sup> UN Charter Article 52. Provision 1.

<sup>71</sup> Note 69.

#### IV. Validity and Limitations of Antiterrorism Treaties

It is considered effective as antiterrorism measures to treat terrorism as crimes under international law, oblige signatories of the antiterrorism convention to prosecute or hand over terrorists and restrict activities of a specific organization. Military action like the Afghan operation after the 9/11 incident is not likely to be used repeatedly as a countermeasure against terrorism, and its effects remain to be seen. Rather, continuation of hard and steady efforts in time of peace, though are not eye-catching, is the basis of antiterrorism measures.<sup>72</sup> In this context, the significance of antiterrorism treaties has become all the greater.

##### 1. Status Quo of Antiterrorism Treaties

Antiterrorism treaties are roughly divided into two-those designed to restrict acts which are subject to punishment, whoever commits them, and those intended to control a kind of act against a specific individual or a group. The former includes the "Convention for the Suppression of Unlawful Seizure of Aircraft" and the "International Convention against the Taking of Hostages," while the latter includes the "International Convention for the Suppression of the Financing Terrorism."

In the former category, illegal acts under ordinary criminal law are subject to punishment, regardless of the existence of treaties. In general, if a terrorist act takes place within a country, the government concerned carries out investigation and solve the incident. If a terrorist act happens in a foreign country, it is obligatory for a foreign country to hand over suspects and for a country concerned to prosecute them in its own country. There is general approval on illegality and punishability of acts. Therefore, problems do not arise over definition of "what is terrorism?" and "what are terrorists?"

On the other hand, the "International Convention for the Suppression of the Financing Terrorism" is designed to restrict and punish financial assistance in case it is used for terrorists, terrorist groups or terrorist acts. Financial support itself is not a problem. It is subject to restriction if only it is involved in terrorism. The treaty lays down acts subject to restriction and punishment in its attachment listing various existing antiterrorism treaties

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<sup>72</sup> Yoshio Katayama, "9.11 Jiken no Imisuru Mono (What the 9/11 Incident Means)" *Kokusai Anzen Hoshō (International Security)* Vol. 30, No. 1-2 unified issue, October 2002, p. 62.

as described in Article 2 1 (a). It also provides for such acts in Article 2 1 (b). The article refers to the whole gamut of terrorist acts,<sup>73</sup> leaving room for various interpretations.

The "International Convention for the Suppression of the Financing Terrorism" was adopted at the UN General Assembly in December 1999. It needed ratification by 22 countries to go into effect. As described above, Article 2 1 (b) left some room for interpretations. What's more, it was difficult for each nation to carry out restrictions. Only four countries ratified the convention in September 2001. In the wake of the 9/11 incident, the number of signatories increased rapidly, and 22 countries ratified the convention in March 2002. As a result, the treaty took effect the following month. Japan signed the treaty in October 2001, and submitted written acceptance to the UN secretariat in June 2002 after the approval by the Diet the previous month. In July the same year, the convention became effective in Japan.<sup>74</sup>

Before the 9/11 incident took place, the UN Security Council prepared the resolutions (1267 and 1333) calling for the freezing of funds of people related to the Taliban government. After the incident, each member identified terrorists, and the new resolutions (1373 and 1390) were adopted to demand the freezing of assets. Thus, efforts are being made to for global restrictions on terrorist funds.

Citing restrictions on terrorist funds as a top priority, the G7 members called on nations in the world to implement the UN Security Council resolutions and ratify the "International Convention for the Suppression of the Financing Terrorism." They have also provided finance knowhow to control terrorist funds to countries where such knowhow is not available.

## 2 Various Problems over Antiterrorism Treaties

It is easy to obtain an agreement on a treaty subject to illegal acts under ordinary laws, and it is possible to reach an agreement on a treaty to target a specific organization and restrict some acts. However, it is very difficult to work out an agreement on a treaty regulating entire terrorism comprehensively. The case in point is a "comprehensive convention on terrorism" proposed by India and supported by the U. S.

The convention is designed to punish not only perpetrators of terrorist acts but masterminds and leaders of terrorist groups. Terrorist acts are aimed at causing physical and economic damage "irrespective of means." The treaty has drawn criticism because it is too comprehensive to prepare domestic laws. Islamic nations call for a provision to the effect

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<sup>73</sup> "Other acts designed to cause death or severe physical damage to civilians or those who do not join directly in hostilities in an armed conflict; provided, however, this is limited to cases where the objective of the acts concerned is, in the light of its nature or situation, to threaten citizens or to force the government or an international organizations to conduct or not to conduct some acts.

<sup>74</sup> Enforced as terrorism fund control laws following the ratification of the treaty are the revised "Foreign Exchange and Foreign Trade Law," the "Law Concerning Identification of Customers by Financial Institutions"

that the treaty will exclude armed struggles in connection with ethnic self-determination movements and include terrorism by a state. It is self-evident that they have the Palestinian issue in mind. For these reasons, no treaty draft is available with no prospect for its adoption at the UN General Assembly.<sup>75</sup>

In case entire terrorism is subject to a treaty, it is difficult to define terrorism. Usually, the term "terrorism" has negative connotations. Terrorist groups do not have names including the term terrorism. Terrorists do not think that they are terrorists and tend to avoid being called terrorists.<sup>76</sup> There is no general definition of terrorism or international terrorism established under international law. Terrorism has several definitions-by public organizations, by experts and through interviews.<sup>77</sup> The definition by public organizations is directly linked to the exercise of power, and may lead to more restrictions on political and social movements than is necessary.

For example, in South Africa, the African National Congress (ANC) was long regarded as a terrorist group under apartheid. Nelson Mandela, the leader of the ANC, was imprisoned for a long time before he became the first president after the abolition of apartheid and was awarded the Nobel Peace Prize. At present, the ANC is a political party. During the apartheid period, violence was not always unknown to the ANC. But in view of the fact that it contributed to the abolition of apartheid, it is a delicate problem to recognize terrorist groups and affirm relations between terrorist groups and individuals. As shown in deliberations on the above-mentioned "comprehensive terrorism prevention treaty," it is next to impossible to reach a general agreement on the definition of terrorism unless the Palestinian issue is solved.

Needless to say, it is a threat to democracy to suppress legitimate political and social movements or support for such movements as crimes.<sup>78</sup> It may damage appropriateness of international cooperation against terrorism and make it difficult to carry out such cooperation smoothly. Above all, it may mean the denial of democracy, our fundamental value. This is why "one must not become a terrorist to control terrorists." Illegal violent acts must not be used against illegal violent acts.

In the end, it is left to the discretion of each country to define terrorism. Regardless of definitions, the key may lie in recognition of terrorism. After all, interests talk. What is a terrorist? What kind of relation does a person have to be recognized as a terrorist? These are complex and delicate questions. In brief, once recognized, a person is as a terrorist or a group as a terrorist group. If not, there is no obligation to fulfill under a treaty. In this context, it is realistic to leave the definition to the discretion of each country and do what

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<sup>75</sup> Asahi com, (January 30, 2003.)

<sup>76</sup> Bruce Hoffmann (translated by UENO Motomi), *Terrorism* (Tokyo: Hara Shobo, 1999), pp. 35-37.

<sup>77</sup> Koichi Oizumi, *Crisis Management of Multinational Corporations* (Tokyo: Hakuto Shobo, 1990), p. 23.

<sup>78</sup> Mizuho Fukushima, "My Perspective," *Asahi Newspaper*, (May 9, 2002.)

can be done.

In practice, irrespective of antiterrorism treaties, various countries often take antiterrorism measures, as shown in the afore-mentioned UN Security Council resolutions and initiatives by G7. Nonetheless, antiterrorism treaties are meaningful in that they give legitimacy to efforts of various countries. If treaties are available, it is easy to lay down domestic laws and extend cooperation to foreign countries. Of course, whether antiterrorism measures are effective or not depends on the ability of each nation to implement such measures.

### 3. International Antiterrorism Legal Systems

The U. S. treats alleged conspirators of al Qaeda and Taliban it caught as unlawful combatants. As mentioned in the previous chapter, this treatment leaves a question mark. There is no denying the doubt as to whether military action involving ordinary citizens not related to terrorism can be regarded as legitimate as an antiterrorism measure, though it can be explained as the right of necessity. To treat terrorism as a crime by giving suspects of a terrorist act a chance for their defense at trials open to the public as much as possible and address terrorism in this context-it will ensure legitimacy of antiterrorism measures and check an increase in the number of sympathizers.

A representative case regarding international terrorism is the afore-mentioned Lockerbie incident. When a court handed down a decision, 13 years had passed since the incident took place. Hearings were made open to the public, and a lawyer was assigned to the defendants. One of the defendants was found innocent and returned to Libya. The other given the verdict of guilty appealed the decision to a higher court. (The appeal was dismissed, confirming the guilty verdict.) The impartial trial supported the appropriate handling of the incident.

By contrast, members of Taliban and al Qaeda the U. S. caught in Afghanistan in connection with the 9/11 incident have been treated as unlawful combatants and detained indefinitely with no lawyers assigned. They are also subject to punishment under administrative acts. Thus, their human rights have been restricted considerably.<sup>79</sup> If this precedent is established, it may invite a trend that anything can be done once it is labeled as war on terrorism.<sup>80</sup>

Before the 9/11 incident took place, a legal expert at the White House had decided that it was a war de facto, and was legitimate under U. S. laws and international law [to kill Osama

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<sup>79</sup> *BBC News*, (January 27, 2003).

<sup>80</sup> Jacques de Lisle, "The Roles of Law in the Fight against Terrorism," *Orbis*, (Spring 2002), Vol. 46, No. 2, p.309.

bin Laden and his henchmen]. From his viewpoint, to kill bin Laden and his henchmen would not violate the presidential administrative order banning assassination of foreign people.<sup>81</sup>

However, the principle of antiterrorism measures is to observe democratic values, and a clear distinction is made between legitimate antiterrorism measures and arbitrary kidnapping and assassination. Even when exceptions are considered necessary, judgment of a country concerned alone cannot exclude arbitrariness. When this logic is interpreted broadly, a terrorist (sponsor) state or a terrorist organization can commit a murder and claim it as a war. Thus, this logic gives an excuse that a murder is lawful.

Measures with unquestioned validity should be taken for suspects of terrorist acts. It is desirable to hold an ordinary criminal trial. For special cases, it is necessary to consider a trial with consideration given to concealment of sources of evidence submitted by information agencies, and protection and anonymity of witnesses after an agreement is obtained from experts in several countries. Toward this kind of trial, a study will be made on a possibility of setting up a court as an organization of the UN

## Conclusion

The large-scale terrorism of the 9/11 incident is unforeseen and unprecedented, and effective measures are ongoing experience. Still, this may not be an excuse to ignore the existing legal validity. To regard terrorism as an armed attack and exercise the right of self-defense in order to wage armed strikes on a country where a group of alleged perpetrators of a terrorist act and treat individual perpetrators as unlawful combatants-does it mistake the means for the end? In the final chapter, antiterrorism measures in the modern international community are examined comprehensively in the light of the studies in the previous chapters.

The 9/11 incident has the nature beyond the framework of the existing international law because law is premised on acts human beings conduct repeatedly. Therefore, it is difficult to evaluate properly the responses to the incident by the international community, particularly the U. S., under the existing legal systems. This problem requires interpretations in terms of objectives and policies, and this is a strong trend in the U. S. As such interpretations lack legal stability, however, it is necessary to perceive the issue in a consistent manner under the current framework of international law.

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<sup>81</sup> Dilip Hiro, *War Without End* (London: Routledge, 2002), p. 273.

The perpetrators of the 9/11 terror attacks are not an entity under international law, a warring organization discussed in a civil war, or an armed group. They do not control a certain territory or aim at power or secession and independence. Responsibility under international law can be pursued for terrorists only as individuals. The 9/11 incident is not an armed attack. It is an act committed by private citizens, and the means used were civil airplanes, not armed force. It is an act which does not fall under the collective security system of the UN

However, similar incidents are likely to take place, even if they are outside the framework of international law or the UN collective security system. In order to prepare for this risk, an international structure must be set up. The U. S.-led attacks on Afghanistan cannot be explained on the basis of the right of self-defense under international law in spite of the UN Security Council resolutions. The 9/11 incident is neither an armed attack nor an illegal act by an entity under international law. Nevertheless, the assertion that the Afghan operation violates international law does not lead to the solution of the problem.

As similar attacks are highly likely to take place, it is an urgency necessity to study how to address such attacks and explain them legally. The right of necessity under international law provides a more consistent view on terrorism. Therefore, international rules should be laid down to apply the right of necessity to large-scale terrorist attacks. Toward this end, consideration must be given to the following. First, it should be a requirement that the use of armed force be widely understood or supported. Second, due attention must be paid to the human rights of suspects, not to mention victims of armed force among ordinary citizens. In this regard, membership to Rome Statute of the international criminal court is essential.

Constant efforts should be exerted to make various antiterrorism treaties effective, considering the fact that military action has only limited effects and that international cooperation in time of peace is indispensable. Of course, it is difficult to identify terrorists or terrorist groups.

It is essential to punish suspects of terrorist attacks under impartial procedures, whether they are tried by a domestic court or an international tribunal. This is indispensable to ensure the legitimacy of antiterrorism measures.

There is one concern. Assuming that a terror attack is viewed as an armed attack and a counterattack as a war, it is possible to resort to the use of military force under the right of self-defense, regardless of UN Security Council resolutions. And it is possible to treat "enemy combatants" captured as unlawful combatants.

This concern means that arbitrary antiterrorism measures may become common in future. This may be an encouragement of international lynching, not control by law, and the reverse of an objective to carry out antiterrorism measures under international cooperation.

Countries on the other side of terrorism must conduct legitimate antiterrorism measures in order not to give terrorists, or outlaws, an excuse for self-justification.