

# **LEGITIMACY AND LEGALITY: Key Issues in the Fight Against Terrorism**

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## PREFACE

In the wake of the international controversy over NATO's bombing of Kosovo to stop the killing of ethnic Albanians by the forces of Slobodan Milosevic, a special eleven-member international commission was established in 1999 at the initiative of the Swedish Prime Minister, Goran Persson, headed by South African Justice Richard Goldstone. Its purpose was to determine the legitimacy of the military action. NATO's Kosovo mission was not the first military action conducted without authorization by the United Nations Security Council. Several nations have violated the principle of non-interference in the internal affairs of a sovereign state and acted outside international law. In 1979, for example, Tanzania invaded Uganda without U.N. authorization and overturned Idi Amin, an action that was mildly condemned by the international community while leaders privately heaved a sigh of relief for being rid of a bloody dictator. In 1981, again without U.N. authorization, Israel bombed an Iraqi nuclear reactor, an attack that was strongly condemned at the time, but is now widely thought to have slowed down Saddam Hussein's nuclear weapons research program. Despite these and other precedents, the Kosovo mission stimulated a particularly bitter debate about the permissible limits of military intervention.

In 2000, Justice Goldstone's "Independent International Commission on Kosovo" concluded, among other findings, that the NATO action was not legal, but it was legitimate. This is a pivotal finding. It rightly points to one of the most troublesome dilemmas that the international community faces in responding to current security threats: *the widening gap between legality and legitimacy*. This unresolved issue continues to plague leaders today, as they contemplate whether to endorse a preemptive attack on Iraq, support extended security commitments in Afghanistan, step up the fight against terrorism globally and respond to growing humanitarian crises worldwide.

Figuring out how to respond to new security threats is much more complex today than it was in the Cold War. Institutions created to keep the peace *among* nations are now called upon to keep the peace *within* nations. Many international and regional institutions, defense alliances, and peacekeeping nations lack the necessary logistical capabilities and diplomatic consensus to respond effectively. Those that are willing and able to intervene are bereft of uniformly accepted legal standards to secure the authority to act, an especially problematic situation when the U.N. Security Council fails to respond.

While old norms are breaking down, new ones are yet to emerge that have widespread international recognition. Even the very meaning of state sovereignty is changing. It can no longer be seen as an impenetrable shield behind which tyrants and autocrats may do anything they want to their civilian populations and threaten the outside world with impunity. As these uncharted waters are being navigated, international differences are mounting over such problems as global terrorism; rogue states armed with nuclear, chemical and biological weapons; regional chaos caused by failing states; security implications of a health pandemic such as HIV/AIDS; environmental dangers such as global warming; and conflicts arising from widening disparities between the rich and the poor, the strong and the weak, and the North and the South.

A new framework is needed to guide future actions in a way that will close the gap between legality and legitimacy. In this report, Loretta Bondi explores this issue in depth, focusing specifically on the problems that are posed by the fight against terrorism. She tackles three of the most fundamental questions that have emerged since September 11<sup>th</sup>:

- Can preemptive action be justified in the face of a real, but murky, threat from rogue states, such as Iraq, with the capability to acquire weapons of mass destruction and share them with terrorists?
- What are the legal instruments and mechanisms available in combating terrorist networks and how effective are they in the face of different definitions of terrorism?
- How does the international community ensure accountability for those who perpetrate atrocities, from terrorists to genocidal killers?

The Fund for Peace recognizes that this is going to be a protracted debate that will require a great deal of legal, political, and moral dialogue. In this analysis, Loretta Bondi lays out key elements of the debate, and their interplay among different political constituencies. She explains why these issues are important, how they can be addressed, and how the hand of the international community can be strengthened in its fight against terrorism and its political allies.

A handwritten signature in black ink, appearing to read "Pauline H. Baker". The signature is fluid and cursive, with a long horizontal stroke at the end.

Pauline H. Baker  
President  
The Fund for Peace

## INTRODUCTION

*This report provides an overview of the debate surrounding three key issues in the battle against terrorism: the preemptive use of force in self-defense against terrorist attacks, the development of international legal instruments and mechanisms to combat terrorism, and accountability for the crimes. As opposed to other and better developed segments of the discussion that followed the events of September 11<sup>th</sup>, these areas have been insufficiently examined. We are “taking the pulse” of the public discussion in the belief that such gray zones warrant deeper analysis, as well as constant scrutiny on the part of civil society in the U.S. and elsewhere.*

In June 2002, President George Bush sketched a sweeping new doctrine of deterrence based on the imperatives of self-defense. The president pledged to preempt terrorist action with a military “ready to strike at a moment’s notice in any dark corner of the world.” He also expanded on his “axis of evil” notion by drawing a stark world map, predicated on “no neutrality” between right and wrong, good and evil.<sup>1</sup>

The president took care to emphasize that the common defense of liberty and human rights will require the cooperation of “great powers” and democracies around the world. But it remains to be seen whether other nations share Bush’s determination to confront with force terrorist threats “before they emerge.” In fact, U.S. military action based on a preemptive right of self-defense could undermine the cooperation in information sharing and law enforcement that will, in the end, advance the battle against terrorism.

Clearly, in order to be both effective and perceived as legitimate, the U.S. response—military or otherwise—should work out problems before action is undertaken. As it stands now, the new doctrine raises numerous questions pertaining to its legitimacy: What other means short of the use of force are available? What level of threat justifies an anticipatory military response? On what evidence are targets selected? How would force be employed to defuse the threat effectively and proportionally while avoiding harm to civilians? Who would decide whether the preemption was carried out in genuine self-defense rather than motivated by a different political agenda? How can a destructive cycle of attack and reprisal be avoided?

The perception that a small group of officials in the executive branch of the U.S. government might attempt to both ask and answer these questions to the satisfaction of only themselves could spark resistance and resentment even among friends and allies. Parameters for anticipatory self-defense against terrorism should be developed in an international dialogue leading to a shared understanding of prerogatives and limitations. Otherwise, the apparent open-ended meaning of the new doctrine could be misconstrued and used irresponsibly to settle by force such long-standing territorial disputes as Kashmir, or provide cover to “terrorist finger pointing” such as that employed by Robert Mugabe to suppress legitimate opposition in Zimbabwe.

Convincing criteria and proof are needed to assess whether particular countries or forces have a willful and direct hand in the terrorism threat. It will be crucial to ascertain how far the U.S. is willing to go when presented with murky situations. For example, would the U.S. be prepared to violate a state’s sovereignty to hunt down an unaccountable elite that colludes with terrorists for political or economic gain? Would the U.S. intervene directly when a government is unable to deal with rogue elements of its own society in areas where that state’s institutions have little or no territorial control? Can the U.S. ensure that forces—particularly those trained and equipped with U.S. military assistance—will not

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<sup>1</sup> “Remarks by the President at the 2002 Graduation Exercise of the United States Military Academy,” West Point, New York, June 1, 2002, White House Release.

abuse human rights, or when violating them will not be shielded from accountability by donning the cloak of anti-terrorism fighters? Answers to these questions would contribute clarity and calibration to the debate.

So far, the U.S. has failed to identify the parameters guiding its approach and goals. Undoubtedly, the pull and tug between the executive and legislative branches of the U.S. government will force a variety of U.S. viewpoints into public view, and both the press and the non-governmental community will also seek answers. But if the U.S. seriously wants to sustain the cooperative security framework that is needed to combat terrorism, it will also need to reach out to the international community, eliciting views and gathering concerns that can then be reflected in U.S. policy. The U.S. must convince partners that it will work to find the right balance between force projection in self-defense and respect for international norms that limit the legitimate use of force.

The U.S. should make a good faith effort to improve non-military instruments designed to counter terrorism. Such an approach may be fraught with challenges and frustrations, but it must be demonstrated that the use of force is a last rather than first resort. The U.N. Security Council Counter Terrorism Committee (CTC) is one such instrument that should continue to receive U.S. support. Created in September 2001, the CTC oversees compliance with the obligations that the Security Council placed on U.N. member states in response to the al Qaeda attacks against the U.S. These obligations include reporting on the specific steps that states had taken in domestic legislation to combat terrorism. By July 2002, however, some of the 164 reports collected by the CTC outlined patchy and at times confusing legislative frameworks, as well as varying degrees of implementation and enforcement scope. Clearly, effectiveness in the fight against terrorism depends on the harmonization of legal standards and their enforcement.

Against this background, the need for a uniform international legal regime to identify and prosecute terrorists seems both urgent and self-evident. But the international community is still struggling to reach agreement on the draft text of a comprehensive convention on terrorism. This draft document is an attempt to amalgamate and expand on the twelve existing conventions on terrorism, which include certain terrorist acts, without actually defining terrorism. The draft treaty would cover much of the same ground delineated by the post-September 11<sup>th</sup> U.N. Security Council resolutions, but it would carry more weight and bind states to more enduring commitments than the fiats expressed by the Security Council. Yet it remains in limbo because of fundamental disagreements about the question of who is a terrorist and who, instead, is a freedom fighter.

According to a study by the University of Leiden (Netherlands), as many as 109 official and academic definitions of terrorism were common currency up to 1988.<sup>2</sup> These findings and the negotiations of the comprehensive draft convention strongly suggest that existing discrepancies do not reflect merely a problem of semantics solvable by dexterous draftsmanship, but rather profound political divisions, including thus far irreconcilable differences among anti-terror coalition partners.

They also suggest wide divergence regarding how terrorism crimes may be judged in different national jurisdictions. This challenge is compounded by the complex nature of the crime—which may encompass elements of politics, warfare, and propaganda alongside its purely criminal content—and by the fact that not all terrorist attacks are clearly targeted against one nation. When terrorist acts are simultaneously carried out in more than one country, all of the affected states may be able to exercise jurisdiction. This, in turn, could ignite competing claims on such jurisdiction that may hinder the judicial process. The debate on jurisdiction over terrorists' crimes includes possibilities such as a

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<sup>2</sup> Alex P. Schmidt and Albert J. Jongman, *Political Terrorism* (Amsterdam: North Holland Publishing Company, 1988).

revision of the mandate of the nascent International Criminal Court, or the creation of an ad hoc tribunal. The exercise of universal jurisdiction by national courts—along the lines of the Pinochet case—is also at the center of this debate. Options that could confer jurisdiction to regional criminal courts (which might have more legitimacy in terms of proximity to where crimes have been committed, and credibility in terms of impartiality) have not been sufficiently explored.

In the end, it is important to emphasize that these options are not mutually exclusive and can actually reinforce one another. The challenge for the international community is to figure out how to create synergy, not overlap. Above all, respect for due process at every level—national, regional, and international—is of crucial importance to keep in check the temptation of summary justice that preemptive action, targeted against individuals as well as states, may engender.

### **A Note on Methodology**

Research for this report was conducted between March 18, and September 3, 2002. It has deliberately focused on material published by hundreds of sources after September 11<sup>th</sup>, 2001, mainly in the U.S. Occasionally, academic studies and other publications predating al Qaeda's attacks on the U.S. have been employed to illustrate particular issues. This paper does not offer specific recommendations, but suggests policy options in the "In Sum" section that wraps up each chapter.

## I. DEBATE OVER THE DOCTRINE OF PREEMPTIVE ACTION

President Bush reportedly instructed his top national security aides to develop a comprehensive strategy to flesh out the new preemption doctrine outlined in his June 2002 speech.<sup>3</sup> According to news reports, such a doctrine would be aimed at permitting the U.S. to forestall efforts by state and non-state actors to strike at the U.S., and to acquire weapons of mass destruction. Furthermore, the doctrine would encompass options other than direct U.S. military intervention to prevent attacks on U.S. soil or U.S. interests.<sup>4</sup>

Of course, a state's prerogative to act preemptively to forestall attacks long predates the current fight against terrorism.<sup>5</sup> As Secretary of State Colin Powell put it: "Preemption has always been something that was available to us as a nation.... We have always had the option of preemption because of the nature of the forces we have, and our ability to project power."<sup>6</sup> But beyond the intrinsic capacity of the U.S. to use force and use it preemptively, and the applicability of the doctrine to the war in Afghanistan, the Bush administration's articulation of the doctrine's full potential and rationale in response to the elusive threat of terrorism has been—perhaps intentionally—ambiguous.<sup>7</sup> As Henry Kissinger pointed out, such ambiguity "often can help create awareness without encumbering the discussion with the need for decision."<sup>8</sup>

A glimpse of the doctrine's operative framework and some of its basic principles was offered by U.S. Secretary of Defense Donald Rumsfeld who wrote in May 2002:

[D]efending the United States requires prevention and sometimes preemption. It is not possible to defend against every threat, in every place, at every conceivable time. Defending against terrorism and other emerging threats requires that we take the war to the enemy. The best—and, in some cases, the only—defense is a good offense.<sup>9</sup>

In order to achieve this, Rumsfeld envisaged taking "risks and try[ing] new things—so we can deter and defeat adversaries that have not yet emerged to challenge us." Such deterrence in "critical theaters," the Secretary of Defense continued, should be backed by "the ability to swiftly defeat two

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<sup>3</sup> Thomas E. Ricks and Vernon Loeb, "Bush Developing Military Policy of Striking First," *The Washington Post*, June 6, 2002; and David E. Sanger, "Bush to Formalize a Defense Policy of Hitting First," *The New York Times*, June 17, 2002.

<sup>4</sup> *Ibid.*

<sup>5</sup> Lee A. Casey and David B. Rivkin, "Anticipatory Self-defense Against Terrorism Is Legal," *Legal Opinion Letter*, Washington Legal Foundation, December 14, 2001. U.S. presidents have also chosen not to employ the option of anticipatory self-defense. For example, President Clinton was reportedly ready to strike at North Korea during the 1993-1994 nuclear crisis, but decided to pursue negotiations instead; Carol Di Giacomo, "Bush Doctrine of Pre-Emption: Action or Rhetoric," Reuters.com, June 19, 2002.

<sup>6</sup> Colin Powell, *Hearing Before the Committee on Foreign Relations, United States Senate, One Hundred Seventh Congress, Second Session*, July 9, 2002. Scholar Michael Glennon has argued that only the public formulation and acknowledgment of the doctrine are new, but that its rationale traces back at least to the 1986 terrorist bombing of a nightclub in Germany (one American soldier and another patron died in the attack, and 230 people were injured) and the subsequent U.S. air strikes against Libya. Michael J. Glennon, "Preempting Terrorism: The Case for Anticipatory Self-defense," *The Weekly Standard*, January 28, 2002; and correspondence with The Fund for Peace, July 19, 2002.

<sup>7</sup> See, for example, Morton Halperin, *Statement before the Committee on Foreign Relations, Hearing on Iraq, United States Senate, One Hundred Seventh Congress, Second Session*, July 31, 2002.

<sup>8</sup> Henry A. Kissinger, "Iraq Is Becoming Bush's Most Difficult Challenge," *The Chicago Tribune*, August 11, 2002.

<sup>9</sup> Donald H. Rumsfeld, "Transforming the Military," *Foreign Affairs*, May/June 2002.

aggressors at the same time, while preserving the option for one massive counteroffensive to occupy an aggressor's capital and replace its regime.”

Commentary in the U.S. and elsewhere about the notion of preemptive action in self-defense indicates that a blanket embrace of the doctrine's targets, priorities, rationale, imperatives, and inevitability, is not a foregone conclusion.

The range and depth of the controversy that the doctrine may engender can be gauged from the debate unleashed by reports of U.S. plans to attack Iraq which were leaked to the press in July and August 2002. President Bush had vowed to prevent Iraq and other countries “from threatening America or our friends and allies with weapons of mass destruction.”<sup>10</sup> The Iraq leaks prompted the U.S. Senate to hold a two-day hearing during which a wide variety of experts testified, but no administration official participated.<sup>11</sup> This, in turn, opened the floodgates to a steady stream of opinions by policy establishment heavy hitters. At times, public pronouncements by top cabinet officials seemed to indicate different views and even a rift in the assessment of the administration's priorities. For example, Vice President Dick Cheney and Secretary of Defense Donald Rumsfeld appeared to be in favor of preemptive military strikes against Iraq. Secretary of State Colin Powell seemed to support a policy of incrementally tough deterrence instead.<sup>12</sup> In some instances, positions on the pros and cons of U.S. preemptive intervention in Iraq crossed partisan lines. For example, Democratic Senator Joseph Lieberman voiced his support for swift military action against Saddam Hussein's regime and wished that Congress would grant President Bush the authority to carry out such action before the end of 2002.<sup>13</sup> By contrast, staunch Republicans such as Brent Scowcroft, national security adviser to the first President Bush, and Dick Armey, majority leader of the House of Representatives, expressed strong reservations about the wisdom of an attack on Iraq in the face of opposition by U.S. allies and in the absence of a “smoking gun” connecting Saddam Hussein to al Qaeda, or revealing his intention to use weapons of mass destruction against the U.S. and its friends.<sup>14</sup>

Many commentators shared the administration's aspiration of attaining a regime change in Iraq.<sup>15</sup> Henry Kissinger further argued that American hesitation vis-à-vis Iraq may encourage radicals and demoralize moderates in the Arab world. Conversely, Kissinger continued:

The overthrow of the Iraq regime and, at a minimum, the eradication of its weapons of mass destruction, would have potentially beneficial political consequences.... The so-called Arab street may conclude that the negative consequences of jihad outweigh any potential benefit.<sup>16</sup>

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<sup>10</sup> The President's State of the Union Address, The United States Capitol, Washington, D.C., January 29, 2002, available at <http://www.whitehouse.gov/news/releases/2002/01/20020129-11.html>.

<sup>11</sup> Statements for the Senate Hearing on Iraq, Washington, D.C., July 31-August 1, 2002 are available at <http://foreign.senate.gov/hearings/hr020801a.html>.

<sup>12</sup> Dana Milbank, “No Conflict on Iraq Policy, Fleischer Says,” *The Washington Post*, September 3, 2002.

<sup>13</sup> The United States Mission to the European Union, “Senators Air Views about Use of Force Against Iraq,” Brussels, August 5, 2002.

<sup>14</sup> Brent Scowcroft, “Don't Attack Saddam,” *The Washington Post*, August 15, 2002; and Todd S. Purdum and Patrick E. Tyler, “Top Republicans Break With Bush on Iraq Strategy,” *The New York Times*, August 15, 2002.

<sup>15</sup> See, for example, James A. Baker III, “The Right Way to Change a Regime,” *The New York Times*, August 25, 2002; and Richard C. Holbrooke, “Take It to the Security Council,” *The Washington Post*, August 27, 2002. Both the former Secretary of State and the former U.S. Ambassador to the United Nations argued that action in Iraq would require authorization from the U.N. Security Council.

<sup>16</sup> Henry A. Kissinger, “Iraq Is Becoming Bush's Most Difficult Challenge.”

This view found an authoritative echo in Vice President Dick Cheney who joined the debate on Iraq with a major speech at the Veterans of Foreign Wars 103<sup>rd</sup> National Congress on August 26, 2002. Restating the U.S. position on Iraq and Saddam Hussein's connection with terrorism, the Vice President observed:

Deliverable weapons of mass destruction in the hands of a terror network, or a murderous dictator, or the two working together, constitutes as grave a threat as can be imagined. The risks of inaction are far greater than the risk of action.<sup>17</sup>

Against such threats, Cheney pledged to “take the battle to the enemy” and “stop them in their planning.”<sup>18</sup>

Critics, however, were skeptical about equating the objective of a leadership change in Baghdad with the fight against terrorism. “[T]he President is right to underscore the potential nexus between hostile regimes, weapons of mass destruction and terrorists,” noted former National Security Adviser Samuel Berger, but “viewing the Iraqi threat primarily through the prism of the war on terrorism distorts both.”<sup>19</sup> A number of commentators pointed out that the administration still had to present a convincing case to support the legitimacy of its assertion of the right to preemptive self-defense both vis-à-vis Iraq and in the wider fight against terrorism's strategic centers in the world (see below).

While the specifics and the priorities of the new preemptive framework are still on the drawing board, the doctrine's stark outline continues to fuel concern. With increasing urgency, questions have focused on the legal grounds for the use of force, as well as the legality and legitimacy of some of the doctrine's components (particularly the lethal targeting of individual terrorists and their abettors, and military assistance to forces that abuse human rights).<sup>20</sup> Such questions have also probed the apparent lack of specific parameters for the assessment of the threat as well as the obscurity of the doctrine's strategic objectives—that is, beyond the clear need to dismantle al Qaeda and its logistic networks, and the U.S. intent of removing Iraq's Saddam Hussein from power. Finally, there are concerns about the possible unilateralism of the decision-making process both with regard to the exercise of executive powers vis-à-vis Congress, and to the role of the anti-terror coalition.<sup>21</sup>

To complicate matters further, the debate that followed the administration's pronouncements has blurred the distinction between what constitutes preventive, preemptive, and anticipatory action in self-defense by often using such categories interchangeably.<sup>22</sup> Far from being merely academic, these

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<sup>17</sup> “Vice President Speaks at VFW 103rd National Convention, Remarks by the Vice President to the Veterans of Foreign Wars 103rd National Convention,” White House Release, August 26, 2002, available at <http://www.whitehouse.gov/news/releases/2002/08/20020826.html>.

<sup>18</sup> *Ibid.*

<sup>19</sup> Samuel R. Berger, *Testimony Before the Committee on Foreign Relations, Hearing on Iraq, United States Senate, One Hundred Seventh Congress, Second Session*, July 31, 2002.

<sup>20</sup> Stephen Kurkjian, “US Weighs How Far to Go to Preempt Attackers: Military Wants to Know if It Can Shoot First,” *The Boston Globe*, November 27, 2001.

<sup>21</sup> Anne Scott Tyson, “Where Antiterror Doctrine Leads,” *Christian Science Monitor*, February 7, 2002. For a general discussion of the role of Congress, see *Testimony, United States Committee on the Judiciary: Applying the War Powers Resolution to the War on Terrorism*, Washington, D.C., April 17, 2002. See also David B. Rivkin Jr. and Lee A. Casey, “No Declaration of War Needed,” *The Wall Street Journal*, July 26, 2002.

<sup>22</sup> See, for example, *Hearing Before the Committee on Foreign Relations, United States Senate, One Hundred Seventh Congress, Second Session*, Washington, D.C., February 7, 2002, available at:

[http://frwebgate.access.gpo.gov...b/wais/data/107\\_senate\\_hearing](http://frwebgate.access.gpo.gov...b/wais/data/107_senate_hearing). Curiously, in one circumstance Secretary Rumsfeld described the U.S. intervention in Afghanistan to dismantle the Taliban regime as both preemptive and

distinctions are crucial to an understanding of appropriate policies for reducing and fending off the threat, as well as for the justification and timing of action. Analyst F.G. Hoffman has defined preemption as “the proactive application of force to deny the adversary the means” to strike first.<sup>23</sup> Prevention, on the other hand, encompasses a sequentially different set of activities including threat analyses, assessments of the enemy’s capabilities, the development of national security countermeasures that can defuse the threat before a capability is built, and remedies that address the root causes motivating terrorists’ actions. Arguably, anticipatory self-defense may contain elements of both preemption and prevention. For the sake of a faithful rendition of the debate and its implications, however, the following discussion uses “preemption” and “anticipatory self-defense” as coterminous.

### **The Ground Rules for Resorting to Force**

Article 51 of the U.N. Charter recognizes “the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations,” pending U.N. Security Council action. It has been observed that since 1945, two-thirds of the members of the United Nations—126 states out of 189—have fought 291 interstate conflicts in which over 22 million people have been killed. In most of those conflicts, the belligerents have claimed to be acting in self-defense.<sup>24</sup>

Arguably however, Article 51 envisages self-defense only in cases of “actual” attacks and as scholar Tom J. Farer pointed out “... it plainly does not encompass the overthrow of regimes with records of aggressive behavior. Nor does it legitimate the use of force against states deemed unfriendly in order to deny them the weapons systems already deployed by other sovereign states.”<sup>25</sup> Farer concluded that, at this point, “there is simply no cosmopolitan body of respectable legal opinion” that can support the broad concepts of self-defense in the new Bush doctrine.

Some observers noted that the restrictions posed by Article 51 have been superseded by U.N. Security Council Resolutions 1368 of September 12, 2001 and 1373 of September 28, 2001 which, citing the right of self-defense in their preambles, implicitly prefigured the use of force in response to *threats* caused by “terrorist acts,”—and their increase in various regions of the world—not just to actual armed attacks.<sup>26</sup> Such an interpretation has been disputed with the argument that the Security Council

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preventive; Secretary of Defense Donald H. Rumsfeld, Interview with the National Journalists Roundtable, News Transcript from the United States Department of Defense, *DoD News Briefing* August 5, 2002.

<sup>23</sup> F.G. Hoffman, *Homeland Security: A Competitive Strategies Approach* (Washington, D.C.: Center For Defense Information, 2002), p. 41.

<sup>24</sup> Monty G. Marshall, “Assessing the Societal Impact of War” in *From Reaction to Conflict Prevention: Opportunities for the U.N. System*, Fen Osler Hampson and David Malone eds., and Center for Systemic Peace, *Major Episodes of Political Violence, 1946-1999*; both pieces are quoted in Michael J. Glennon, “Preempting Terrorism: The Case for Anticipatory Self-defense;” and “The Fog of Law: Self-defense, Inherence, and Incoherence in Article 51 of the United Nations Charter,” *Harvard Journal of Law & Public Policy*, Vol. 25, March 2002, p. 547 *passim*.

<sup>25</sup> Tom J. Farer, “Beyond the Charter Frame: Unilateralism or Condominium?” *American Journal of International Law*, 359, April 2002.

<sup>26</sup> U.N. Security Council, Resolution 1368, September 12, 2001; and U.N. Security Council, Resolution 1373, September 28, 2001 are available at:

<http://daccess-ods.un.org/doc/UNDOC/GEN/N01/533/82/PDF/N0153382.pdf?OpenElement>, and at:

<http://daccess-ods.un.org/doc/UNDOC/GEN/N01/557/43/PDF/N0155743.pdf?OpenElement>,

respectively. In paragraph 4 of the preamble, Resolution 1373 states that the September 11<sup>th</sup> attacks “like any act of international terrorism constitute a threat to international peace and security.” Similarly, in paragraph 3 of its preamble, Resolution 1368 declares the determination of the Security Council “to combat by all means threats to international peace and security caused by terrorists acts.” Law scholar Romana Sadurska defined a “threat” as “an act that is designed to create a psychological condition in the target of apprehension, anxiety and eventual fear, which will erode the target’s resistance to change...In this sense the threat of force constitutes a form of

is not “functional enough to referee these issues.”<sup>27</sup> It has also been observed that the operative provisions of resolutions 1368 and 1373 do not contain “authorization” language for resorting to force.<sup>28</sup> Instead, scholar Frederic Kirgis has argued, Resolution 1373 in particular is a warning that “the Council itself stands ready to take further steps, which presumably could involve an authorization of some form of armed force that would not necessarily be limited to self-defense, to ensure that the measures taken in the resolution are adequately implemented.”<sup>29</sup>

In short, the ambiguous language of these resolutions has left open to interpretation whether their provisions can be construed as a blanket nod to the exercise of preemptive self-defense beyond the war against al Qaeda, and whether the Security Council’s deliberations might respond more flexibly to the test of history than the provisions of the U.N. Charter.<sup>30</sup>

Other analysts remarked that although the U.N. Charter does not permit anticipatory self-defense, its parameters have been flexibly interpreted in states’ practices.<sup>31</sup> In a review of the Clinton administration’s application of Article 51 to justify military action against Iraq in 1993, Sudan and Afghanistan in 1998, and Kosovo in 1999, Ryan C. Hedrickson observed that “perhaps the world is witnessing an evolution in customary law in that self-defense may be invoked when ethnic cleansing takes place, a head of state is threatened, or when terrorist actors kill innocent people.” As a result, he argued, a new understanding of Article 51 would be required.<sup>32</sup>

Since the U.N. Charter merely refers to states’ inherent right of self-defense without laying down parameters for the exercise of this right, commentators have pointed out that such parameters, including criteria for anticipatory self-defense against an imminent threat even in the absence of an actual armed attack, can be found in sources of customary law.<sup>33</sup> One of the most frequently cited precedents is the so-called *Caroline* case, an incident between the U.S. and Britain that occurred in 1837. This dispute arose when British forces crossed into U.S. territory to destroy the vessel *Caroline* in order to prevent it from ferrying supplies in support of the Canadian insurrection. Two U.S. citizens perished in the action. On that occasion, Secretary of State Daniel Webster stated that a legitimate claim of self-defense should be grounded in “a necessity of self-defense, instant, overwhelming, leaving no choice of means and no moment for deliberation” and that the response should involve “nothing unreasonable or excessive.”

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coercion because it aims at the deliberate and drastic restriction or suppression by one actor of the choices of another.” Romana Sadurska, “Threats of Force,” *The American Society of International Law Journal*, 82 A.J.I.L. 239, April 1988.

<sup>27</sup> Craig Gilbert, “Can U.S. Be First To Strike?” *Journal Sentinel*, March 31, 2002.

<sup>28</sup> Carsten Stahn, “Security Council Resolutions 1368 (2001) and 1373 (2001): What They Say and What They Do not Say,” *European Journal of International Law Discussion Forum “The Attack on the World Trade Center: Legal Responses,”* available at [http://www.ejil.org/forum\\_WTC/index](http://www.ejil.org/forum_WTC/index).

<sup>29</sup> Frederic L. Kirgis, “Addendum: Security Council Adopts Resolution on Combating International Terrorism,” *Terrorist Attacks on World Trade Center and Pentagon, ASIL Insights*, The American Society of International Law, October 1, 2001, available at <http://www.asil.org/insights.htm>. Article 42 of the U.N. Charter empowers the Security Council to “make recommendations, or decide what measures shall be taken... to maintain or restore international peace and security.”

<sup>30</sup> Said Mahmoudi, “Comment on Fox Addendum,” *Terrorist Attacks on World Trade Center and Pentagon, ASIL Insights*, September 24, 2001.

<sup>31</sup> Michael J. Glennon, “The Fog of Law;” Ryan C. Hedrickson, “Article 51 and the Clinton Presidency: Military Strikes and the U.N. Charter,” *Boston University International Law Journal*, Fall 2001, 19 B.U. Int’l L. J. 207.

<sup>32</sup> *Ibid.*

<sup>33</sup> Helen Duffy, *Responding to September 11: The Framework of International Law* (London: INTERIGHTS, 2001), p. 7.

Although the conditions set forth by Webster may now appear too strict, the elements of “necessity,” “imminence of the threat,” and “proportionality,” remain central tenets of self-defense’s rationale and limitations.

“Necessity” implies that all other peaceful means to resolve disputes, in accordance *inter alia* with Article 2(3) of the U.N. Charter, have been exhausted and military action remains the only viable option to deter an attack. Such action, however, should respond to an impending provocation or an imminent aggression and should not be remote in time from such threats.<sup>34</sup> Michael Walzer explained that anticipatory self-defense to forestall an armed attack is necessary and justified if the level of threat is deemed sufficient on the basis of a “manifest intent to injure, a degree of active preparation that makes that intent a positive danger and a general situation in which waiting, or doing anything other than fighting, greatly magnifies the risk.”<sup>35</sup> Does this translate into “the clear and present danger” that advocates of preemptive covert and military action against Iraq, such as U.S. Senator John McCain, have identified?<sup>36</sup> Scholar William Galstone argued that it does not and pointed out that the conditions outlined by Walzer do not pertain to the case of Iraq. In the absence of such conditions, anticipatory self-defense becomes, in Galstone’s view, an “international hunting license” which by subverting international rules of engagement will ultimately undermine the credibility and the security of the United States.<sup>37</sup> Dick Armey, the majority leader of the U.S. House of Representatives, also cautioned that an unprovoked attack against Iraq may violate international law and added:

If we try to act against Saddam Hussein, as obnoxious as he is, without proper provocation, we will not have the support of other nation states who might want to do so...I don't believe America will justifiably make an unprovoked attack on another nation. It would not be consistent with what we have been as a nation or what we should be as a nation.<sup>38</sup>

As for “proportionality,” the concept in essence means that a nation acting in self-defense may use force no greater than that needed to halt the danger posed by an aggressor.<sup>39</sup> The application of proportionality criteria must also carefully balance the intended military advantages against the risk of harming civilians. Analysts have cautioned that, given the nature of terrorists’ threats and their logistical modus operandi, it may be very difficult to hit targets—particularly in densely populated areas—and, at the same time, minimize danger to the wider population.<sup>40</sup> Clearly, proportionality does not mean an eye for an eye: one cannot justify actions that kill hundreds of civilians to preempt a terrorist attack that may cause the same number of deaths.<sup>41</sup> By the same token, a terror operation that may employ weapons of mass destruction or other indiscriminate lethal devices should not be squelched by using the same kind of weaponry. This point is of particular concern since

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<sup>34</sup> Richard G. Maxon, “Nature’s Eldest Law: A Survey of a Nation’s Right To Act in Self Defense,” *Parameters*, Autumn 1995, pp. 55-68.

<sup>35</sup> Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (New York: Basic Books, 1977).

<sup>36</sup> “CIA-Hussein: Lawmakers Back Proposal To Oust Hussein; Baghdad Sneers,” CNN.com, June 17, 2002.

<sup>37</sup> William A. Galston, “Why a First Strike Will Surely Backfire,” *The Washington Post*, June 16, 2002.

<sup>38</sup> Michael Kelly, “Causus Belli,” *The Washington Post Writers Group*, (undated), available at <http://www.postwritersgroup.com/archives/kell0813.htm>; and CBSNews.com, “GOP Ranks Split Over Iraq Invasion,” August 9, 2002.

<sup>39</sup> Richard G. Maxon, “Nature’s Eldest Law.”

<sup>40</sup> Adam Roberts, “Counter-terrorism, Armed Force and the Laws of War,” *Survival*, International Institute for Strategic Studies, vol. 44, no. 1, Spring 2002; see also Michael Glennon, “Forging a Third Way to Fight: Bush Doctrine for Combating Terrorism Straddles Divide Between Crime and War,” *Legal Times*, September 24, 2001.

<sup>41</sup> Adam Roberts, “Counter-terrorism, Armed Force and the Laws of War.”

administration officials reportedly have not discounted the possibility of a “tactical use” of nuclear weapons, although they stated that this option is being studied, but not actively contemplated.<sup>42</sup> Finally, as new and increasingly sophisticated forms of terrorism emerge, proportionality needs to be calibrated accordingly. “What is a proportionally preemptive response to a possible attempt to shut down the telephone system in New York City, or to deny access to Amazon.com or Ebay?” asked F.G. Hoffman paradoxically but not extravagantly.<sup>43</sup>

### **Threat Assessment**

As terrorist groups will likely continue to shift the types of threats and the selection of targets, or even resort to the use of certain types of weapons of mass destruction, the U.S. administration and advocates of muscular preemption argue that the only effective response is to eliminate those capabilities before they are actually used.<sup>44</sup> Modern covert methods of intelligence evaluation and collection, such as satellite imagery and communications intercepts, according to this argument, make it irresponsible to procrastinate in the face of a probable and massively destructive armed attack in order to present convincing proof of a perpetrator’s hostile intent.

Some commentators have warned, however, that to justify the preemptive use of force, convincing proof would be crucial in order to obtain political support both domestically and internationally. They observed that: “Absent credible evidence or widespread public perception of an imminent attack against us, preemptive strikes would likely bring international condemnation.”<sup>45</sup> Moreover, as former Australian Foreign Minister Gareth Evans noted, the wider the range of targets “the stronger the evidentiary foundation has to be if the support of friends and allies is not to fall away.”<sup>46</sup> Evans underlined that, when the use of force may be an option, both the constraint of international law and the discharge of the burden of proof are not just a matter of law and morality, but of “hard-headed national self-interest.”

It is ironic that the new preemption doctrine, predicated on access to compelling information, is being developed at a time in which the methods of intelligence collection, evaluation, and sharing by the U.S. intelligence community have come under fire and intense scrutiny.<sup>47</sup> Despite the streamlining and overhaul announced by the Bush administration, F.G. Hoffman predicts that: “The U.S. will remain increasingly challenged by amorphous networks and individuals that have the ability to strike at global

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<sup>42</sup> Thomas E. Ricks and Vernon Loeb, “Bush Developing Military Policy of Striking First.”

<sup>43</sup> F.G. Hoffman, *Homeland Security*, p. 51.

<sup>44</sup> Secretary of Defense Donald H. Rumsfeld, Interview with the National Journalists Roundtable, News Transcript from the United States Department of Defense, *DoD News Briefing* August 5, 2002. See also remarks by Senator George Allen in *Hearing Before the Committee on Foreign Relations*, February 7, 2002, available at [http://frwebgate.access.gpo.gov...b/wais/data/107\\_senate\\_hearing](http://frwebgate.access.gpo.gov...b/wais/data/107_senate_hearing). On al Qaeda’s efforts to acquire weapons of mass destruction, see Judith Miller, Stephen Engelberg, and William Broad, *Germ: Biological Weapons and America’s Secret War* (New York: Simon and Schuster, 2002), pp. 287-88. In August 2002, CNN’s broadcast of videotapes reportedly used by al Qaeda for training purposes, also indicated that the terrorist organization might have been in possession of chemical agents; CNN broadcast, August 19, 2002.

<sup>45</sup> Michele Flournoy and Vinca LaFleur, “Quick-Stick Doctrine,” *The Washington Post*, June 18, 2002. See also “A Just War? Judeo-Christian and Islamic Perspectives,” a conversation with J. Bryan Hehir, and Roy Mottahedeh, moderated by Alan Berger, American Academy of Arts and Sciences, Cambridge, Massachusetts, December 10, 2001, available at <http://www.Amacad.org/events/justwar> trans; and Zbigniew Brzezinski, “If We Must Fight...” *The Washington Post*, August 18, 2002.

<sup>46</sup> Gareth Evans “Responding to Terrorism: Where Conflict Prevention and Resolution Fit In,” Address at Johns Hopkins University (SAIS), October 9, 2001.

<sup>47</sup> Thomas E. Ricks and Vernon Loeb, “Bush Developing Military Policy of Striking First,” Michael Elliot, “Special Report: The Secret History. They Had a Plan,” *Time*, August 12, 2002.

distances.”<sup>48</sup> Furthermore, Brent Scowcroft and other commentators have warned that a preemptive strategy and a choice of targets not shared with, and by, U.S. allies may backfire and put an end to the cooperation in intelligence sharing and law enforcement that so far has yielded positive results around the world.<sup>49</sup>

In assessing the threat in the context of a preemptive strategy and the wisdom of anticipatory action, some observers have cautioned that precedent should be studied carefully. Scholar Adam Roberts remarked that Israel’s ill-fated 1982-2000 invasion of Lebanon was explicitly undertaken to preempt attacks on Israel’s soil and as a countermeasure in the face of Lebanon’s unwillingness or inability to restrain the terrorists it harbored.<sup>50</sup> The invasion not only failed to meet its stated goal, but also caused horrendous human rights abuses and violations of international humanitarian law, as well as international condemnation of Israel’s conduct. An additional and often cited precedent of preemptive action refers to the 1981 bombing of Iraq’s Osirak reactor by Israel to forestall Saddam Hussein’s nuclear ambitions. The U.N. and the U.S. both condemned Israel at that time because it had acted without any direct provocation. As weapons inspectors discovered ten years later, the preemptive strike may have delayed, but did not deter Saddam Hussein from continuing his weapons of mass destruction program.<sup>51</sup>

Moreover, since it is very difficult to locate all threatening weapons and facilities, a risk exists that some will be missed in a preemptive strike and those will be used in retaliation. It is also possible that some states and non-state actors, threatened with preemptive action, may be all too willing to preempt the preemptors.<sup>52</sup> This may escalate into a cascade of spiraling hostilities or even a full-scale war “with devastating consequences for the United States and its allies. And we would have to weigh the risk of endangering innocent civilians, including many beyond the borders of the targeted country.”<sup>53</sup> In such a scenario, the end game may result in U.S. isolation, condemnation by the international community, and consequently in a propaganda victory for the enemies of the U.S.<sup>54</sup>

### **Limiting Sovereignty?**

The U.N. General Assembly 1970 “Principles of International Law Concerning Friendly Relations and Cooperation Among States” hold that:

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<sup>48</sup> F.G. Hoffman, *Homeland Security*, p. 46; see also Hugo Young, “Messy War on the New Masters of Armageddon,” *The Guardian* (London), June 13, 2002.

<sup>49</sup> Brent Scowcroft, “Don’t Attack Saddam,” *The Wall Street Journal*, August 15, 2002; and William A. Galston, “Why a First Strike Will Surely Backfire.” For an assessment of intelligence and law enforcement cooperation, see Michael Elliott, “The Next Wave,” *Time*, June 24, 2002; and Regina Burns, “Combating Terrorism Continues as Global Priority,” *The Interdependent*, vol. 28, no. 1, Spring 2002.

<sup>50</sup> Adam Roberts, “Counter-terrorism, Armed Force and the Laws of War.”

<sup>51</sup> Statement of International Atomic Energy Agency’s Director General Hans Blix, to the U.N. Security Council, March 11, 1992; and Richard Butler, “Iraq and Weapons of Mass Destruction,” *Statement Before the Committee on Foreign Relations, Hearing on Iraq, United States Senate, One Hundred Seventh Congress, Second Session*, July 31, 2002. See also Khidir Hamza, “The Iraqi Threat,” *Statement Before the Committee on Foreign Relations, Hearing on Iraq, United States Senate, One Hundred Seventh Congress, Second Session*, July 31, 2002.

<sup>52</sup> Ian O. Lesser, “Countering the New Terrorism: Implications for Strategy,” in Ian O. Lesser et al, *Countering the New Terrorism* (Santa Monica: RAND Corporation, 1999), p. 96. See also Michele Flournoy and Vinca LaFleur, “Quick-Stick Doctrine;” and Robert Gallucci, *Statement Before the Committee on Foreign Relations, Hearing on Iraq, United States Senate, One Hundred Seventh Congress, Second Session*, July 31, 2002.

<sup>53</sup> Michele Flournoy and Vinca LaFleur, “Quick-Stick Doctrine.”

<sup>54</sup> United States Institute of Peace, “The Diplomacy of Counterterrorism: Lessons Learned, Ignored, and Disputed,” *Special Report*, United States Institute of Peace, January 14, 2002.

Every State has a duty to refrain from organizing, instigating, assisting, or participating in...terrorists acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts.<sup>55</sup>

In addition, according to the “International Law Commission Draft Articles on State Responsibility,” “Every internationally wrongful act of a State entails the international responsibility of that State,” (Article 1).<sup>56</sup> Article 8 of the Draft Articles further specifies that:

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.<sup>57</sup>

Against this background, is the U.S. entitled to make no distinction between the terrorist and those who harbor them, asked scholar John Cerone?<sup>58</sup> He continued by pointing out that a state’s acquiescence in a pattern of conduct of non-state actors may be invoked by the U.S. as sufficient grounds to attribute such conduct to the state. Cerone concluded by observing that:

[I]f a state is harboring one or more of the terrorists, then it will be in breach of its international legal obligation to prosecute or extradite the offender(s). Such a breach would entitle the US to take proportionate countermeasures, not involving the use of force, against the offending state.<sup>59</sup>

In light of what transpired from the administration’s pronouncements, however, the use of force is a central tenet of the new doctrine aimed at compelling complicit or negligent states to meet their international duties and responsibilities. In other words, when a state fails to prevent homegrown or hosted terrorists from spreading mayhem across the world, the U.S. may confront these threats directly and forcefully wherever they are located and at a time chosen by the U.S.

It has been noted that this position challenges the general scaffolding of international relations as well as “core features of national sovereignty, including [a state’s] exclusive authority to exercise police and judicial powers within recognized frontiers.”<sup>60</sup> It also clashes with Article 2(1) of the U.N. Charter, which affirms the principle of the sovereign equality of all states. Moreover, in 1986, the International Court of Justice (ICJ), the principal judicial organ of the U.N., rejected the validity of a claim that the U.S. had made to justify its intervention in Nicaragua. That intervention, the U.S. maintained, had been carried out in collective self-defense as a response to Nicaragua’s support of Salvadorian rebels. The ICJ ruled that such support could not be construed as an armed attack.<sup>61</sup>

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<sup>55</sup> U.N. General Assembly, Resolution 2625, October 1970.

<sup>56</sup> Although non-legally binding, the draft articles largely reflect the positions of the International Court of Justice and customary law. United Nations General Assembly, International Law Commission, Fifty-third session, Geneva, April 23-June 1 and July 2-August 10, 2001, *State Responsibility: Title and Text of the Draft Articles on Responsibility of States for Internationally Wrongful Acts Adopted by the Drafting Committee on Second Reading Part One, The Internationally Wrongful Act of a State, Chapter 1, General Principles*, A/CN/L.602/Rev 1, July 26, 2001.

<sup>57</sup> *Ibid.*

<sup>58</sup> John Cerone, “Comment: Acts of War and State Responsibility in ‘Muddy Waters’: The Non-state Actor Dilemma,” in *Terrorist Attacks on World Trade Center and Pentagon, ASIL Insights*, The American Society of International Law, September 2001, available at <http://www.asil.org/insights.htm>.

<sup>59</sup> *Ibid.*

<sup>60</sup> Tom J. Farer, “Beyond the Charter Frame.”

<sup>61</sup> John-Alex Romano, “Combating Terrorism and weapons of Mass Destruction: Reviving the Doctrine of a State of Necessity,” *Georgetown Law Journal*, April 1999, 87 Geo. L.J. 1023. See also Helen Duffy, *Responding to*

In the past decade, however, U.N. Security Council decisions, as well as, for example, NATO's actions in Bosnia and Kosovo, and the Economic Community of West African States intervention in Liberia and Sierra Leone, may have led to a significant departure from traditional interpretations of sovereignty prerogatives.<sup>62</sup> In essence, sanctions, inspection regimes, and humanitarian military interventions imposed limitations on sovereignty in order to defuse threats to peace, breaches of the peace, and armed aggression (as envisaged by Chapter VII of the U.N. Charter), and avert or put an end to catastrophic humanitarian crises.<sup>63</sup> These decisions, effectively curtailing the power of a nation to be the sole master and arbiter of its fate, were aimed at coercing states (or ruling clans) to comply with the international community's will. They have opened the door to what scholar Tom Farer describes as the possible emergence of a shared hegemony, or decision-making "condominium" with the United States *primus inter pares* with respect to the rest of the small group of owners."<sup>64</sup>

Could this sovereignty-limiting/anti-rogues "condominium" and its powers be extended to the anti-terror coalition at the request of its senior partner? Farer observed that a process of decision-making must carry a recognized legitimacy and the duty on the part of those affected by it to accept and comply with its implications and consequences.<sup>65</sup> As discussed below, however, it is doubtful that the "condominium" consensus would encompass the whole rationale and aims of the Bush doctrine. And beyond the perimeter of the "condominium," the Organization of the Islamic Conference (OIC) has already warned that the struggle against terrorism should not infringe upon the sovereignty of U.N. member states.<sup>66</sup>

Moreover, impingement on a state's sovereignty prerogatives—even in the name of self-defense—may be regarded in the South of the world as an extension (on security grounds in this case) of the U.S.-led economic globalization drive. This drive has itself already fostered an erosion of the historical concept of sovereignty. It has ignited resentment because it is perceived as a projection of U.S. power reaping benefits largely for the developed North, but harboring little interest in economic and political justice for the rest of the world. Benjamin Barber, author of the book *Jihad vs. McWorld*, remarked:

Ironically, even as the U.S. fosters an anarchic absence of sovereignty at the global level, it has resisted the slightest prospects of surrendering its own national sovereignty; whether to NATO commanders, to supranational institutions such as the international criminal tribunal, or to international treaties such as those banning landmines or regulating fossil fuel.<sup>67</sup>

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*September 11: The Framework of International Law*, pp. 5-6; and Geir Ulfstein, "Terror and International Law," *Security Dialogue* 32(4), pp. 501-504.

<sup>62</sup> The Economic Community of West African States dispatched a peacekeeping Cease-Fire Monitoring Group to try to end the civil wars that erupted in Liberia in 1989 and in Sierra Leone in 1995.

<sup>63</sup> Loretta Bondi, "In Name Only?" in *Smart Sanctions: Targeting Economic Statecraft*, David Cortright and George A. Lopez, eds. (Lanham: Rowman & Littlefield, 2002); Mary Locke and Jason Ladnier, "Criteria for Humanitarian Intervention in Internal Wars: The Debate," *The Fund for Peace Reports*, Washington D.C., December 2001; Thomas F. Frank, "The Institute for Global Legal Studies Inaugural Colloquium: The U.N. and the Protection of Human Rights: When, If Ever, May States Deploy Military Force Without Prior Security Council Authorization," *Washington University Journal of Law and Policy*, 5 Wash. U.J.L. & Pol'y 51, 2001.

<sup>64</sup> Tom J. Farer, "Beyond the Charter Frame."

<sup>65</sup> *Ibid.*

<sup>66</sup> Organization of the Islamic Conference, *Statement on International Terrorism*, Ninth Extraordinary Foreign Ministers' Session, Doha, Qatar, October 10, 2001.

<sup>67</sup> Benjamin Barber, "Ballots vs. Bullets," *Financial Times*, October 20, 2001.

In the context of the war against terrorism, especially in cases not as clear-cut as Afghanistan, this double standard and the rationale that U.S. action would be justified because some states are regarded as less equal than others in the fulfillment of their responsibilities promises to foster more discontent and win sympathies for those who violently challenge the hegemonic power. According to Shibley Telhami, “Today, there is a sense of utter mistrust, not only of the U.S., but of states and international organizations. And there is a sense of pervasive humiliation in the [Middle East] region. This... has led many to find inspiration in non-state militant groups, perfect recruits for terrorism.”<sup>68</sup>

In addition to concerns regarding how the U.S. determines that a curtailment of a state’s sovereignty is needed in order to force cooperation or punish non-compliance, the basis on which states are rewarded for their assistance in the anti-terrorism war effort has also raised questions and warrants closer scrutiny.

### **Other Components of Preemption**

It has been argued that the first line of defense—and consequently preemption—is in the terrorists’ countries of origin.<sup>69</sup> There, local governments and law enforcers have the advantage of a more proximate knowledge of terrorists’ ground, and their logistical support, tactics, and networks.<sup>70</sup> It follows that, whenever needed, the preemption and reaction capacity of the military and law enforcers in affected countries could be bolstered with U.S. equipment and training.

However, such assistance raises concerns if extended to foreign militaries with questionable human rights credentials.<sup>71</sup> For example, Human Rights Watch reported that since September 11<sup>th</sup>, the U.S. has expedited and delivered military assistance to a range of countries with bad human rights records.<sup>72</sup> Only time can tell whether in the long run this course of action has been wise and satisfied the “extraordinary circumstances” that warrant a waiver of the restrictions and requirements under Section 502B of the Foreign Assistance Act of 1961, and the 1976 Arms Control Act.<sup>73</sup> But continuing military support of these governments should be conditioned on an improvement of the human rights situation in their countries. Similarly, the U.S. should ensure that assessments of the behavior of the foreign military units it trains are regularly conducted. Assistance should be withdrawn immediately if these units commit human rights abuses, albeit in the name of the anti-terrorism campaign.<sup>74</sup>

Gareth Evans cautioned that, whatever the short-term benefits of military and intelligence cooperation with abusive governments and forces, in the longer term, a U.S. unconditional embrace of such

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<sup>68</sup> Shibley Telhami, “The Regional Setting of Policy Toward Iraq,” *Statement Before the Committee on Foreign Relations, Hearing on Iraq, United States Senate, One Hundred Seventh Congress, Second Session, July 31, 2002.*

<sup>69</sup> Gareth Evans, “Facing a New Threat,” *Georgetown Journal of International Affairs*, Winter/Spring 2002.

<sup>70</sup> Gareth Evans, “Responding to Terrorism.”

<sup>71</sup> See, for example, International Crisis Group, *Central Asian Perspectives on 11 September and the Afghan Crisis*, International Crisis Group, Osh/Brussels, September 28, 2001.

<sup>72</sup> Human Rights Watch, *United States: Dangerous Dealings. Changes to U.S. Military Assistance After September 11*, Human Rights Watch, vol. 14, no. 1(G), February 2002.

<sup>73</sup> Section 502B forbids the transfer of assistance to governments involved in “a consistent pattern of gross violations” of human rights, Foreign Assistance Act of 1961, *U.S. Code*, vol. 22, secs. 2151-2430(I), 1994. The Arms Export Control Act requires sanctions against states that violate nuclear controls, Arms Export Control Act of 1976, *U.S. Code*, vol. 22, secs. 2751-99(aa-2), 1994.

<sup>74</sup> This requirement is contained in the so-called Leahy Amendment to the yearly Foreign Operations Appropriations Act, which prohibits the transfer of funds and training to units that abuse human rights, *U.S. Statutes at Large* 114(2001).

regimes might trigger more discontent and alienation among already disaffected civilians and, ultimately, provide a more fertile breeding ground for the extremists.<sup>75</sup>

The consequences of U.S. partnership with abusive forces emerged in early 2002 when an investigation conducted by the U.S.-based nongovernmental organization Physicians for Human Rights discovered a mass grave at Dasht-e-Leili in Northern Afghanistan.<sup>76</sup> Witnesses interviewed by the organization alleged that the grave contained the bodies of Taliban captives who, in late November 2001, had surrendered at Kunduz to Northern Alliance forces, the U.S. allies in the war. These findings were corroborated by *Newsweek* magazine, which in August 2002 reported that hundreds of prisoners herded into sealed transport containers might have died of suffocation.<sup>77</sup> Although there was no evidence of U.S. prior knowledge or control over the fate of the prisoners, *Newsweek* reported that “American forces were working intimately with ‘allies’ who committed what could well qualify as war crimes.”<sup>78</sup> However, Physicians for Human Rights’ appeals to both the U.S. and Afghan governments, and the U.N., to secure the grave area and launch a comprehensive criminal investigation into the alleged massacre fell on deaf ears until August 2002, when the Afghan government pledged to undertake an inquiry.<sup>79</sup> This tardy step was considered insufficient by Physicians for Human Rights. Leonard Rubenstein, the organization’s executive director, charged that the U.N. and the U.S. were irresponsibly handing over the investigation “to the Afghans alone at a time when their government is struggling to obtain basic resources.”<sup>80</sup> Rubenstein, concluded that:

The refusal of the United States to acknowledge and investigate the possibility that its military partner murdered hundreds or thousands of prisoners is a terrible repudiation of its commitment to hold perpetrators of war crimes accountable for their deeds.<sup>81</sup>

On moral grounds, he insisted that the U.S. had an obligation to act since the alleged perpetrators of the massacre were the main U.S. allies in Afghanistan.<sup>82</sup> U.S. unresponsiveness to such appeals may also send a signal to abusive forces around the world that, in the fight against terrorism, anything goes and human rights considerations can be conveniently shelved. These forces might determine that the U.S. would be willing to turn a blind eye to their actions, giving a free hand to allies and partners—no matter how egregious their abuses might be.

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<sup>75</sup> Gareth Evans, “Responding to Terrorism.”

<sup>76</sup> Physicians for Human Rights, “Preliminary Assessment of Alleged Mass Gravesites in the Area of Mazar-I-Sharif, Afghanistan,” *A Report by Physicians for Human Rights*, Boston/Washington, D.C., January 16-21 and February 7-14, 2002.

<sup>77</sup> Babak Dehghanpisheh, John Barry and Roy Gutman, “The Death Convoy of Afghanistan,” *Newsweek*, August 26, 2002.

<sup>78</sup> *Ibid.* The article also alleged that Department of Defense officials either obfuscated or responded with false statements to *Newsweek’s* inquiries.

<sup>79</sup> Physicians for Human Rights, “Physicians for Human Rights Calls for End to Stalling of Investigation into Afghan Mass Graves; Urges UN Security Council to Authorize Commission of Inquiry,” Press Release, August 18, 2002.

<sup>80</sup> “Physicians for Human Rights Welcomes Afghan Government’s Pledge to Investigate Mass Grave but Says Afghans Lack Expertise and Resources To Do it Alone; US Response Insufficient; Urges UN to Authorize Commission of Inquiry,” Press Release, August 22, 2002.

<sup>81</sup> Physicians for Human Rights, “Physicians for Human Rights Calls for End to Stalling of Investigation.”

<sup>82</sup> Leonard S. Rubenstein, “Seeking The Truth In Afghan Graves,” *The Washington Post*, August 21, 2002.

Another area of concern pertains to the targeted assassination of terrorists and their abettors that the new doctrine may contemplate. When, on September 14, 2001, Congress passed a resolution<sup>83</sup> sanctioning the use of force not only against states, but also against individual non-state actors, observers pointed out that such a decision may give ground to the repeal of Executive Order No. 12333, which bans political assassination. This 1981 Executive Order states: “No person employed by or acting on behalf of the United States shall engage in or conspire to engage in assassination.”<sup>84</sup>

Advocates of a repeal of that order have reportedly argued that it is better to use military force to kill terrorists and their leaders before they are in a position to strike, rather than apprehend and prosecute them after the deed is done.<sup>85</sup> Such a stance undermines confidence that due process will be respected in the fight against terrorism, however. As scholar Jordan Paust noted: “In times of armed conflict or relative peace, assassination is also impermissible extra-judicial killing that constitutes a serious violation of customary and treaty-based human rights law.”<sup>86</sup> The possibility of repeal has also reportedly alarmed national security specialists who fear the formation of unaccountable special units inside the military.<sup>87</sup> U.S. Senator Patrick Leahy summed up widely shared concerns when he observed that “[a] policy of political assassination is morally repugnant, a violation of international law... It is also ineffective because it creates martyrs whose deaths become a terrorist’s rallying cry for revenge.”<sup>88</sup>

### **The Role of Congress**

In April 2002, testifying before the U.S. Senate, Deputy Assistant Attorney General John Yoo asserted that, in the war against terrorism, the president enjoys broad executive authority to use force. He went on to say that in the face of a highly mobile enemy, “extensive congressional discussion will often be a luxury we cannot afford.”<sup>89</sup> Yoo added, however, that the Bush administration was committed to close consultation with Congress “whenever possible” regarding military action. The hearing had been convened by Senator Russell Feingold to discuss the requirements of the standing congressional use-of-force authorization for the events of September 11<sup>th</sup>, and to debate when “within the limit of the Constitution and the War Power Resolution, new authorizations or consultations would be required as we expand our military operations.”<sup>90</sup>

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<sup>83</sup> Senate Joint Resolution 23, Public Law 107-40 107<sup>th</sup> Congress, September 14, 2001. Sec. 2(a) authorizes the president to “use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.”

<sup>84</sup> Executive Order 12333, United States Intelligence Activities, 2.11, December 4, 1981.

<sup>85</sup> Stephen Kurkjian, “US Weights How Far to Go to Preempt Attackers.”

<sup>86</sup> Jordan Paust, “Addendum: War and Responses to Terrorism,” in *Terrorist Attacks on World Trade Center and Pentagon*, ASIL Insights, The American Society of International Law, September 2001, available at <http://www.asil.org/insights.htm>.

<sup>87</sup> Stephen Kurkjian, “US Weights How Far to Go to Preempt Attackers.”

<sup>88</sup> *Ibid.*

<sup>89</sup> John Yoo in *Testimony, United States Senate Committee on the Judiciary: Applying the War Powers Resolution to the War on Terrorism*.

<sup>90</sup> *Ibid.* The War Power Resolution was adopted in 1973. The resolution states in Section 2(a) “It is the purpose of this joint resolution to fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such situations.” It further states: “The President in every possible instance shall consult with Congress before introducing United States Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and after every such introduction shall consult regularly with the Congress until United States

Over the years, the issue of whether the president can decide to enter into hostilities without the consent of Congress has been hotly debated. The war power debate stems from the tension between the president's constitutional role as commander-in-chief of the armed forces and the Congressional constitutional prerogative to declare war.<sup>91</sup> The April discussion tackled this tension in the context of post-September 11<sup>th</sup> options and faithfully reflected both the imperatives and the anxieties that the anti-terrorism war has engendered. With the impending formulation of Bush's new doctrine on preemption, those controversies acquire additional relevance.

Douglas Kmiec, Dean of the Law School at Catholic University, for example, stated that if the president has to act swiftly and effectively in anticipatory self-defense, that judgment must be made unilaterally without prior consultation with the legislative branch.<sup>92</sup> Others observed that expectations of a supine endorsement by Congress of the executive's *desiderata* are a recipe for discord and national disunity. Such disunity may ultimately undermine the credibility of the U.S. resolve and "augur poorly for winning support from other governments."<sup>93</sup> These analysts argued that precisely the magnitude of the task ahead in the war against terrorism requires the collective judgment of both the executive and the legislative branches. "Major military action with far-reaching objectives such as regime change is precisely the kind of action that constitutionally should be debated and authorized by Congress in advance," stated Jane Stromseth, professor of law at Georgetown University Law Center.<sup>94</sup> She added that: "Authorization, if provided by Congress, ensures that the risks and implications of any such action have been fully considered and that a national consensus to proceed exists. Congressional authorization also ensures American combat forces that the country is behind them, and conveys America's resolve and unity to allies as well as adversaries."

A measure of the contentiousness of this debate can be found in Senate Joint Resolution 41 which was submitted to the U.S. Senate by Senators Arlen Specter and Tom Harkin on July 18, 2002. The resolution called on the U.S. Congress to "consider and vote on a resolution authorizing the use of force by the United States Armed Forces against Iraq before such force is deployed."<sup>95</sup> It also affirmed the "exclusive authority" of Congress "to declare war under Article 1, Section 8 of the United States Constitution."<sup>96</sup> This position was echoed in a concurrent resolution that Senators Dianne Feinstein and Patrick Leahy tabled on July 30, 2002.<sup>97</sup> Were the U.S. to use force against Iraq, Senator Feinstein argued, that determination should be made "only after full debate and consideration of the options and the specific statutory authorization of Congress."<sup>98</sup> During the Senate debate on Iraq at the end of July 2002, Senator Richard Lugar concurred with his colleague and pointed out that the

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Armed Forces are no longer engaged in hostilities or have been removed from such situations." *The War Powers Act of 1973*, Public Law 93-148, 93rd Congress, H. J. Res. 542, November 7, 1973, Joint Resolution, Concerning the war powers of Congress and the President. The absence of any specific congressional authorization has not prevented Republican and Democrat presidents from deploying U.S. forces overseas; David B. Rivkin Jr. and Lee A. Casey, "No Declaration of War Needed."

<sup>91</sup> Michael Glennon notes that Congress "has never lost a war power dispute with the President before the Supreme Court. While the cases are few, in every instance where the issue of decision-making primacy has arisen...the Court has sided with Congress," Michael Glennon's correspondence with Senator Robert C. Byrd, August 20, 2002.

<sup>92</sup> Douglas Kmiec in *Testimony, United States Senate Committee on the Judiciary: Applying the War Powers Resolution to the War on Terrorism*.

<sup>93</sup> Alton Frye, *ibid*.

<sup>94</sup> Jane Stromseth, *ibid*.

<sup>95</sup> Senate Joint Resolution 41, 107<sup>th</sup> Congress, 2<sup>nd</sup> Session, July 18, 2002.

<sup>96</sup> *Ibid*.

<sup>97</sup> Senate Concurrent Resolution 133, 107<sup>th</sup> Congress, 2<sup>nd</sup> Session, July 18, 2002, July 30, 2002.

<sup>98</sup> Ghada Elnajjar, "Senate Begins Hearings on U.S. Policy Towards Iraq," Washington File, July 31, 2002.

“Administration understands that, ultimately, it will have to make the case for its policy decisions.”<sup>99</sup> Scholar Bruce Ackerman, however, was not confident that the President would be genuinely committed to consultations with the legislative branch, despite his public pronouncements. Comparing the approach of the first President Bush with that of his son, Ackerman concluded: “In the face of the father’s multilateralism, the son is constructing a double unilateralism—freed from the restraints of the Security Council abroad and Congress at home, the imperial presidency claims the authority to strike preemptively at any danger.”<sup>100</sup>

Others observed that, beyond rhetorical posturing, Congress might not be willing to concretely challenge the president should he decide to use force without seeking congressional consent. “Republicans have a natural inclination to support giving President Bush broad authority, and Democrats a natural caution about challenging a popular president on major questions of national security,” noted historian Jack Rakove.<sup>101</sup>

In short, the jury is still very much out both with regard to the general prerogatives of the two branches of government in war making, and the application of the law in the aftermath of September 11<sup>th</sup>. Issues of balance between accountability and effectiveness regarding the response to a terrorist threat will remain central to this debate which, however, has yet to reach the wider public.<sup>102</sup>

### **The Role of the International Coalition**

According to Secretary of Defense Donald Rumsfeld, as of June 2002, more than 180 nations (almost the entire membership of the United Nations) have offered or provided assistance in the war on terrorism. About sixty-nine countries were directly contributing to the war effort. Two-thirds of the allies of the North Atlantic Treaty Organization (NATO) had forces directly involved in the war while in excess of ninety governments have arrested or detained some 2,400 terrorists and their supporters.<sup>103</sup> At this point, the coalition is alive and well, and because of the broad support received by the U.S., Rumsfeld concluded “relationships in the world are really being reshaped in ways that can, I believe, contribute to peace and stability over the coming years.”

The shared perception of a common threat and effective cooperation on the ground does not automatically mean, however, that coalition partners would support an evolution of the anti-terror strategy into one that includes preemptive action in self-defense. In fact, it is doubtful whether coalition members would be keen to offer assistance beyond the war against al Qaeda in Afghanistan and the pursuit of its cells and networks on their countries’ territories. It appears that U.S. partners are more amenable to wage their “war on terrorism” as analogous to the “war on drugs” requiring law enforcement and intelligence work rather than standing armies “ready to strike at a moment’s notice in any dark corner of the world,” as President Bush envisaged.<sup>104</sup>

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<sup>99</sup> Ibid.

<sup>100</sup> Bruce Ackerman, “But What’s The Legal Case For Preemption?” *The Washington Post*, August 18, 2002.

<sup>101</sup> Jack Rakove, “Who Declares a War,” *The Wall Street Journal*, August 4, 2002.

<sup>102</sup> Interestingly, a Washington Post-ABC News poll of 1,023 respondents interviewed August 7-11, 2002 found that most Americans do not want to give President Bush the ultimate authority to wage war. Three out of four respondents said that the President should seek authorization from Congress before engaging in hostilities. Richard Morin and Claudia Deane, “Poll: Americans Cautiously Favor War in Iraq,” *The Washington Post*, August 13, 2002.

<sup>103</sup> News Transcript, DoD News Briefing, Secretary of Defense Donald H. Rumsfeld at the Foreign Press Club, Washington, D.C., June 21, 2002.

<sup>104</sup> “Remarks by the President at the 2002 Graduation Exercise of the United States Military Academy.”

European and Middle Eastern leaders have already expressed skepticism about both the immediacy of any threat posed by Saddam Hussein and the wisdom of launching military strikes against Iraq.<sup>105</sup> Such differences came into sharp focus in June 2002, when Rumsfeld reportedly told NATO members that the alliance could no longer wait for “absolute proof” before acting against terrorists and countries armed with weapons of mass destruction. According to press accounts, NATO Secretary General George Robertson replied by pointing out the defensive nature and mandate of the alliance, and by noting that NATO does not go out “looking for problems to solve.”<sup>106</sup>

As the debate on Iraq shifted into high gear in August 2002, European and Middle Eastern leaders became even more vocal in their criticism of the U.S. stance vis-à-vis Iraq. German Chancellor Gerhard Schroeder opened his reelection campaign by stating that his government would not provide troops or money for a U.S. invasion of Iraq.<sup>107</sup> A similar sentiment was echoed in Britain where prominent supporters of Prime Minister Tony Blair, including the chairmen of the Foreign Affairs and Defense Committees of the House of Commons, expressed their reservations about British involvement in military action against Iraq, absent a persuasive clarification of such necessity.<sup>108</sup> Concerns over the regional instability that an invasion might trigger and suspicions about an expanded U.S. presence in the Persian Gulf prompted even Iraq’s archenemies, Kuwait and Iran, to voice opposition to military action against Saddam Hussein.<sup>109</sup>

Morton Halperin, former Director of the Policy Planning Staff at the Department of State, cautioned that support for the U.S. in the fight against terrorism could not be commanded over the long run. “We must earn the right to lead by showing that we care about the interests and views of others and are prepared to work together to craft solutions that respond to others’ perception of threats as well as to our own,” he stated.<sup>110</sup>

To be sure, European partners and allies reportedly took umbrage at Bush’s failure to consult them before issuing his doctrinal statement, and feared that this might herald a new wave of U.S. unilateralism, predicated on a view of the world—the axis of evil—that they have considered simplistic all along.<sup>111</sup> As analyst Robert Kagan observed: “Europeans and Americans differ most these days in their evaluation of what constitutes a tolerable versus an intolerable threat.”<sup>112</sup> It is safe

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<sup>105</sup> Editorial, “War on Iraq Is Wrong,” *The Nation*, July 8, 2002.

<sup>106</sup> Carol Giacomo, “Bush Doctrine of Pre-Emption;” and Thomas E. Ricks and Vernon Loeb, “Bush Developing Military Policy of Striking First.” Within twenty-four hours after the September 11<sup>th</sup> attacks, NATO invoked the Alliance’s Article 5 defense guarantee—this “attack on one” was to be considered an “attack on all.” Philip Gordon observes that in the Afghanistan military campaign, however, “NATO remained on the sidelines—by U.S. choice. The Americans decided not to ask for a NATO operation for both military and political reasons—only the United States had the right sort of equipment to project military forces halfway around the world, and Washington did not want political interference from 18 allies in the campaign,” Philip H. Gordon, “NATO and the War on Terrorism: A Changing Alliance,” *The Brookings Review*, Summer 2002. vol. 20, no. 3 available at <http://www.brookings.edu/press/REVIEW/summer2002/gordon.htm>.

<sup>107</sup> Glenn Frankel, “Britons Grow Uneasy About War in Iraq,” *The Washington Post*, August 7, 2002; and Editorial, “Steps Before War,” *The New York Times*, August 11, 2002.

<sup>108</sup> *Ibid.*

<sup>109</sup> Dilip Hiro, “Iraq Woos Its Neighbors,” *The Nation*, August 19/26, 2002.

<sup>110</sup> Morton H. Halperin, “Collective Security,” *The American Prospect*, vol. 12, no. 18, October 22, 2001.

<sup>111</sup> Robert Kagan, “Power and Weakness,” *Global Policy Program, U.S. Leadership Project*, Carnegie Endowment for International Peace, originally published in *Policy Review*, June/July 2002 and available at :

<http://www.ceip.org/files/Publications/2002-06-02-PolicyReview.asp?p=11&from=pubdate>; Ved P. Nanda, “Europe Split Would Be Fatal,” *Denver Post*, March 13, 2002; and Jeffrey Laurenti, “Iraqi Threats: What Common Cause Across The Atlantic,” paper prepared for the conference “New International Challenges: Reassessing the Transatlantic Partnership,” Istituto Affari Internazionali, Rome, July 20, 2002.

<sup>112</sup> Robert Kagan, “Power and Weakness.”

to assume that if some of the closest allies of the U.S. regard the administration's stance with suspicion and alarm, the U.S. "marriage of convenience" with non-traditional allies in the war against terrorism may become even shakier in the wake of preemptive action. Partners' concerns prompted President Bush to declare from his summer retreat that no military action would be undertaken without consultation.<sup>113</sup> But to be persuasive, these reassurances should be backed with the U.S. administration's concrete commitment to make its case for military action and listen to differing points of view.

Furthermore, observers have pointed out that if the U.S. applies its strategy without clarifying the criteria for striking first, and without sharing the evaluation of targets as well as decisions leading to them, the door may be open to abuses on the part of other countries which may be only too willing to invoke the self-defense prerogative to settle scores across international borders and domestically. In other words, what happens if the doctrine spins out of control and is used by, for example, India against Pakistan, or China against Taiwan?<sup>114</sup> What would prevent repressive regimes' leaders from jumping on the bandwagon of "terrorist finger pointing" to suppress opposition at home and perpetuate themselves in power, as Robert Mugabe of Zimbabwe is doing?<sup>115</sup> Former National Security Adviser Zbigniew Brzezinski echoed these concerns by warning that the application of the new doctrine with a "sudden launching of war" may set "a dangerous example for the world of an essentially Darwinian international system characterized by sudden preemptive attacks."<sup>116</sup>

Others wonder whether alternative instruments of coercion, such as sanctions against rogue states and non-state actors, would be given sufficient chance to work before resorting to more drastic, expeditious, and lethally "surgical" methods.<sup>117</sup>

Michael Glennon recommended the adoption of "prudent defensive strategies calculated to meet reasonable foreseeable security threats that pose a common danger." Such strategies would generate community support, cause adversaries to adapt perceptions, and might ultimately modify their intentions.<sup>118</sup>

#### IN SUM:

If the common security framework and agenda that the U.S. wants to achieve is to be both workable and sustainable, the concerns outlined by a number of scholars and policy experts must be addressed. In order to be accepted as legitimate at home and abroad, the new strategy should tackle crucial questions, including (1) what means short of the use of force are available; (2) what level of threat should trigger an anticipatory military response and on what evidentiary basis; (3) what means of warfare could be employed to defuse the threat effectively and proportionally; and (4) what plans could be put in place to limit hostilities to self-defense and to avoid endangering civilians?

Before implementing any component of the new doctrine, at a minimum, clarity is needed concerning the criteria that the U.S. will adopt to assess whether particular countries or forces are responsible for **acts of commission** (i.e., a willful and direct hand in the terrorist threat), as defined by the "Draft Articles on State Responsibility;" **omission** (i.e., collusion motivated either by the political strategies

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<sup>113</sup> Amy Goldstein, "On Iraq, Bush to Consult With Allies and Congress," *The Washington Post*, August 21, 2002.

<sup>114</sup> David E. Sanger, "Bush to Formalize A Defense Policy of Hitting First."

<sup>115</sup> International Crisis Group, *Zimbabwe at the Crossroads: Transition or Conflict?* An International Crisis Group report, March 22, 2002.

<sup>116</sup> Zbigniew Brzezinski, "If We Must Fight..."

<sup>117</sup> Editorial, "War on Iraq Is Wrong."

<sup>118</sup> Michael J. Glennon "Preempting Terrorism."

of an unaccountable elite, or corruption, or both); or *neglect* (i.e., an institutional inability to deal with elements of society involved in the threat, perhaps in parts of a country where the government has little or no territorial control).<sup>119</sup> Such criteria would lend calibration to a debate that, so far, has thrown countries as diverse as Sudan, Iraq, Somalia, Yemen, the Philippines, and North Korea, as well as a vast array of non-state actors, into the same bag.

Precisely how the concept of anticipatory self-defense must be employed to remain legitimately applicable is at the core of this debate. Naturally, applicability will depend on specific circumstances, but the failure of U.S. shuttle diplomacy to secure agreement on preemptive strikes against states suspected to harbor terrorists should give pause. A common understanding of parameters and criteria defining what is legal and what is legitimate in self-defense, as well as guiding in the selection of targets, has yet to be worked out.

At the same time, avenues of cooperative security should be pursued in addition to forging closer military alliances and supporting improved law enforcement practices overseas. As Farer noted: "...the formality of Security Council authorization is not enough to sustain the [U.N.] Charter indefinitely. [A security] condominium as a successor normative system...would require inclusion of certain additional states." Such an arrangement could be found through mechanisms that have already been activated and through which the "condominium" Farer describes would involve a multiplicity of stakeholders. One such avenue is a comprehensive convention on terrorism. Another is to be sought in systems of justice to hold terrorists accountable for their crimes that would be regarded as both effective and impartial across regional and cultural divides. Both issues are discussed below.

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<sup>119</sup> In regard to "commission," see the "International Law Commission Draft Articles on State Responsibility" mentioned above, United Nations General Assembly, International Law Commission, Fifty-third session, Geneva, April 23-June 1 and July 2-August 10, 2001, *State Responsibility*. In regard to "omission" and "negligence," it has been observed that: "...international law, and human rights law in particular, is moving toward lowering the threshold for holding states accountable for the failure to prevent violations by non-state actors," John Cerone, "Comment: Acts of War and State Responsibility."

## II. A COMPREHENSIVE CONVENTION?

On September 28 2001, with Resolution 1373, the U.N. Security Council, under the powers of Chapter VII of the U.N. Charter, required member states to take specific steps in their legislation to combat the scourge of terrorism.<sup>120</sup> Moreover, the Council created a Counter Terrorism Committee, composed of all Security Council members, with the mandate to oversee compliance with the resolution and address negligence or recalcitrance on the part of member states. As long-time observer Jeffrey Laurenti remarked, the CTC was authorized “to take all necessary steps in order to ensure full implementation” of Resolution 1373, thereby delineating the possibility of “[t]aking enforcement action against willful holdouts that refuse to implement the steps the Council demanded.”<sup>121</sup>

Accustomed to the slow pace with which U.N. Security Council mandatory measures are implemented, and cognizant of the thorniness of the issue, CTC members themselves were surprised at the massive response they received from member states. By July 2002, 164 governments had delivered first reports in compliance with Resolution 1373.<sup>122</sup> Not all reports were equal in depth and quality of information. Some outlined patchy and at times confusing legislative frameworks, and various degrees of implementation and enforcement scope, but their fast delivery was quite unprecedented.<sup>123</sup>

The world’s shock and outrage that followed September 11<sup>th</sup>, as well as the domestic concerns of some states affected by terrorism, may explain the unusual responsiveness of member states. However, in January-February 2002, as the reports to the CTC were eagerly being compiled, member states failed to reach agreement on a parallel effort by the U.N. General Assembly Sixth Committee to gather consensus on the draft text of a comprehensive convention on terrorism. As a result, the Ad Hoc Committee on Measures to Eliminate Terrorism, with a mandate to “harmonize legal structures” for the comprehensive treaty, concluded the round of the negotiations empty handed.<sup>124</sup>

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<sup>120</sup> Resolution 1373 urged states to become parties to relevant conventions and protocols, as well as the International Convention for the Suppression of Terrorist Bombings, and the International Convention for the Suppression of the Financing of Terrorism. It called upon all states to enact domestic legislation necessary to implement the provisions of those convention and protocols, to ensure that the jurisdiction of their courts enabled them to bring to trial the perpetrators of terrorist acts, and to cooperate with, and provide support and assistance to, other states and relevant international and regional organizations. United Nations, Security Council Resolution 1373, September 28, 2001.

<sup>121</sup> Jeffrey Laurenti, “A Transformed Landscape: Terrorism and the U.N. After the Fall of the World Trade Center,” in *Combating Terrorism: Does the U.N. Matter...and How, A Policy Report of the United Nations Association of the United States of America* (New York: The United Nations Association of the United States of America, 2002), p. 24.

<sup>122</sup> These reports can be found at <http://www.un.org/Docs/sc/committees/1373/htm>. In addition to the 164 first reports, the CTC received fifty-seven supplementary reports by July 2002.

<sup>123</sup> U.N. Document, “Secretary-General, Addressing Council Meeting on Counter-terrorism, Says United Nations ‘Stands Four-square’ against Scourge,” Press Release, SG/SM/8105 SC/7277, January 18, 2002. The U.N. Secretary General noted that: “Many States lack the capacity to adopt effective counter-terrorist measures. They are in genuine need of technical and financial assistance if they are to fulfill their obligations.” See also *Presentation by Ambassador Greenstock, Chairman of the Counter-Terrorism Committee (CTC) at the Symposium: Combating International Terrorism: The Contribution of the United Nations*, Vienna, June 3-4, 2002. See also the CTC briefing for Member States, April 4, 2002, at <http://www.un.org/Docs/sc/committees/1373/rc.htm>.

<sup>124</sup> U.N. General Assembly, Resolution 51/210 established an Ad Hoc Committee on Measures to Eliminate Terrorism.

Initiated in February 2000 by India, this draft convention is an attempt to amalgamate and expand on the twelve existing conventions on terrorism, which cover certain terrorist acts without actually defining terrorism (see Appendix). The draft treaty promises to close gaps and to offer a legally uniform regime for the adjudication and prosecution of terrorist activities.<sup>125</sup> It would cover a wider ground than that delineated by the post-September 11<sup>th</sup> U.N. Security Council resolutions. Crucially, it would carry more weight and bind states to more enduring commitments than the fiats expressed by the Security Council.<sup>126</sup> Yet, whereas consensus on Resolution 1373 was prompt and forthcoming, the comprehensive convention remains in limbo.

As U.K. Ambassador and CTC Chairman Jeremy Greenstock explained, one of the main factors that had made consensus on Resolution 1373 possible was that the drafters carved its mandate from the existing and accepted conventions on terrorism, omitting any definition of terrorism.<sup>127</sup> And cleverly so, since the controversial issue of definition was at the core of the disagreement that had sent the draft comprehensive convention back to the drawing board.

The depth of disagreement is not merely a matter of semantics and draftsmanship, although reconciling different texts from different languages and different legal regimes is *per se* a major undertaking. As noted above, a study by the University of Leiden documented as many as 109 official and academic definitions of terrorism which were used up to 1988, the year this research was published.<sup>128</sup> Interestingly, the Leiden researchers found that elements of violence were included in 83.5 percent of the definitions examined, political goals in 65 percent, while 21 percent mentioned arbitrariness and indiscriminate in the choice of targets, and only 17.5 percent referred to the victimization of civilians.<sup>129</sup>

Given the evolution of terrorist attacks, and the internationalization of networks and operations, U.N. member states set out to search for uniform defining standards in a treaty that would make enforcement, legal assistance and extradition more viable. In the hope of reaching common ground, the comprehensive treaty negotiators offered the following definition of a terrorist:

Any person commits [a terrorist act] if that person, by any means, unlawfully and intentionally, causes: (a) Death or serious bodily injury to any person; or (b) Serious damage to public or private property, including a place of public use, a State or government facility, a public transportation system, an infrastructure facility or the environment; or (c) Damage to property, places, facilities, or systems referred to in paragraph 1(b) of this article, resulting or likely to result in major economic loss; when the purpose of the conduct, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or abstain from doing any act...<sup>130</sup>

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<sup>125</sup> U.N. Press Release, "Finalizing Treaty Requires Agreement on 'Armed Forces', 'Foreign Occupation,' Anti-Terrorism Committee Told," L/2993, February 1, 2002.

<sup>126</sup> Resolution 1373 appears to be open-ended in its applicability, but as time goes by, and the shock of the September 11<sup>th</sup> attacks and solidarity with the U.S. wear off, its enforceability may weaken. See Jeffrey Laurenti, "A Transformed Landscape," p. 25.

<sup>127</sup> Ambassador Greenstock's discussion at a meeting organized by the United Nations Association of the United States of America, Washington, D.C., March 6, 2002.

<sup>128</sup> Alex P. Schmidt and Albert J. Jongman, *Political Terrorism*.

<sup>129</sup> *Ibid.*

<sup>130</sup> *United Nations Report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996*, United Nations, A/57/37, January 28-February 1, 2002.

However, the Leiden findings and the negotiations of the comprehensive draft convention strongly suggested that disagreements over the definition reflect profound political divisions. Such divisions hinge upon the often-repeated notion that “one man’s terrorist is another man’s freedom fighter.” Currently, this enduring political quagmire has as its epicenter the question of Palestine.

For example, the “Organization of Islamic Conference Convention on Combating International Terrorism” and the “League of Arab States Arab Convention for the Suppression of Terrorism” support the legitimacy of belligerent activities aimed at liberation and self-determination.<sup>131</sup> This is a notion that, in the context of the draft convention, neither Israel nor the United States would find acceptable. And neither would the comprehensive convention’s drafters whose preamble reads:

[C]riminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstances unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or other nature that may be invoked to justify them...<sup>132</sup>

Such differences in language illuminate a larger dispute on whether any political motive could be recognized as justifying or excusing certain types of violence, particularly attacks against civilians and civilian property.

Against this background, divergence was also most apparent regarding the controversial Article 18 of the draft, which covers the treaty’s scope and relates to the rights, obligations and responsibilities of states under international humanitarian law. At the heart of this matter is what a commentator described as the “regressive narrowing of the concept of terrorism to apply only to violence by non-state movements and organizations, thereby exempting state violence against civilians from the prohibition on terrorism.”<sup>133</sup> This “statist” approach, in the view of the Organization of Islamic Conference, would exonerate armed forces from charges of terrorist tactics against civilians.<sup>134</sup> Opponents retort that the use of such methods during armed conflict is already prohibited by international humanitarian law, including the Geneva Conventions, and by international human rights norms during peacetime. They argue that a specific mention of international humanitarian law in a treaty dealing with terrorism would be unnecessary, redundant, and misleading.

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<sup>131</sup> *Organization of Islamic Conference Convention on Combating International Terrorism* (not yet in force), preamble, available at <http://www.oicn.org/26icfm/c.html>. Likewise, Resolution No. 65/27-P of the Organization of Islamic Conference Convention for Combating International Terrorism reaffirms that “the struggle of peoples under colonialist or alien domination or under foreign occupation, for their national liberation or to regain their right to self-determination, does not constitute an act of terrorism,” Organization of Islamic Conference, *Report and Resolutions on Political, Muslim Minorities and Communities, Legal and Information Affairs*, (Kuala Lumpur, Malaysia, June 27-30, 2002), at [http://www.oic-oci.org/english/fm/27/27th-fm-political\(2\).htm](http://www.oic-oci.org/english/fm/27/27th-fm-political(2).htm); and *League of Arab States Arab Convention for The Suppression of Terrorism Adopted by the Council of Arab Ministers of Interior and the Council of Arab Ministers of Justice, Cairo, April 1998*, preamble, available at : [http://www.leagueofarabstates.org/E\\_News\\_Antiterrorism.asp](http://www.leagueofarabstates.org/E_News_Antiterrorism.asp).

<sup>132</sup> United Nations, Draft Resolution on Measures to Eliminate International Terrorism, A/C.6/56/L.22, November 19, 2001.

<sup>133</sup> Richard Falk, “Ending the Death Dance,” *The Nation*, April 29, 2002.

<sup>134</sup> Specifically, the disagreement in Article 18(2) is over the use of the terms “armed forces” versus “parties” to a conflict. By using the term “parties” to the conflict instead of “armed forces,” the OIC’s version of Article 18 seeks to prevent certain oppressed groups, like the Palestinians, from being singled out for blame and criminalization. See U.N. Press Release, “Finalizing Treaty Requires Agreement on ‘Armed Forces’.”

Human rights advocates have cautioned that the comprehensive treaty should contain an article guaranteeing the conformity of the draft convention to human rights and international humanitarian law. “Such a provision,” they noted, “should state that nothing in the Convention should be construed as impairing, contradicting, restricting or derogating from the provisions of the Universal Declaration of Human Rights, the International Covenants on Human Rights, and other international instruments of human rights law, refugee law, and international humanitarian law applicable to the specific situations and circumstances dealt with by the Convention.”<sup>135</sup>

In light of these objections, is the comprehensive convention doomed? Peace, or at least a peace process, in Palestine is a fundamental precondition to any meaningful and sustained cooperation in the fight against terrorism. However, the debate on the comprehensive convention will go on. Historian Timothy Garton Ash observed that while the definition in the draft comprehensive convention is “unsustainably broad,” support for a treaty has been growing since September 11<sup>th</sup>.<sup>136</sup> For example, an encouraging development occurred at the end of a meeting of the U.S.-India Joint Working Group on Counterterrorism in July 2002. The two countries issued a joint statement affirming that the U.S. and India had “consulted on the possibility of an early finalization of an effective Comprehensive Convention on International Terrorism.”<sup>137</sup> The Coordinator of the Ad Hoc Committee, Richard Rowe (Australia) maintained that unresolved issues would “fall into place if the divergent views could be reconciled on wording in Article 18.”<sup>138</sup> Thus negotiations on the comprehensive treaty, now relegated to the corridors of the U.N., may soon gather additional momentum.<sup>139</sup>

Such momentum may also be accelerated at Egypt’s initiative. In January 2002, Egypt informed the Ad Hoc Committee that “bilateral consultations were being conducted on the question of convening a high-level conference, under the auspices of the UN, to formulate a joint organized response of the international community to terrorism in all its forms and manifestations.”<sup>140</sup> The Egyptian proposal was not met with enthusiasm, but the time of reckoning with it may come sooner than the current somnolence would suggest. According to a leading member of the CTC, the international coalition built in the immediate aftermath of the September 11<sup>th</sup> attacks would be weakened should it continue to operate on the Security Council’s instructions. Moreover, this CTC member stated that in the

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<sup>135</sup> They referred in particular to sections of Article 2 and Article 18. “Human Rights Watch Commentary 2 on the Draft Comprehensive Convention on Terrorism,” October 22, 2001, and Comprehensive Convention Against International Terrorism, *Joint Letter Amnesty International/Human Rights Watch*, New York, January 28, 2002.

<sup>136</sup> Timothy Garton Ash, “Is There a Good Terrorist?” *The New York Review of Books*, November 29, 2001. The historian attempted himself to offer parameters for a definition based on “biography” (who are the terrorists, where are they coming from, what do they really want?); “goals;” “context” (when a group resorts to violence to achieve a goal, he argued, “it...matters hugely what kind of state you are in” and whether “the means of working for peaceful change” are available or not); “methods” (“does the individual or group use violence to realize their personal or political goals? Is that violence targeted specifically at the armed and ununiformed representatives of a state, or does the terrorist group also target innocent civilians? Does it attempt to limit civilian casualties...or does it aim for the mass killing of innocent civilians?” Timothy Garton Ash asked.

<sup>137</sup> “U.S., India Commit to Intensifying Cooperation Against Terrorism,” Joint Statement of US-India Joint Working Group on Counterterrorism, July 18, 2002, available at: <http://usinfo.state.gov/topical/pol/terror/02071804.htm>.

<sup>138</sup> U.N. Press Release, “Finalizing Treaty Requires Agreement on ‘Armed Forces’.”

<sup>139</sup> Regina Burns observes: “However bleak the outlook for an agreement, some [U.N.] members remain optimistic they will find an innovative solution that will define terrorism in all its manifestations. Officials on both sides of the debate underscore the importance of this antiterrorism convention as an instrument to strengthen the legal foundation of the fight against terrorist violence,” Regina Burns, “Combating Terrorism Continues as Global Priority.”

<sup>140</sup> *United Nations Report of the Ad Hoc Committee established by General Assembly Resolution 51/210*, p. 2.

foreseeable future only a “treaty-base” would confer legitimacy to sustainable collective action.<sup>141</sup> Significantly, progress has been achieved at a regional level when, in December 2001, the European Union devised a common legal definition of terrorism that, as it is hoped, could offer useful parameters for wider agreement.<sup>142</sup>

### IN SUM:

The debate on the comprehensive convention will likely not subside, as governments will hopefully comply with the U.N. Security Council exhortation in Resolution 1373 to “cooperate, particularly through bilateral and multilateral arrangements and agreements to prevent and suppress terrorist attacks and take action against the perpetrators of such acts.” Echoing Egypt, the OIC has called for an international conference under U.N. auspices mandated to define terrorism and devise an international plan of action to combat it.<sup>143</sup> A treaty encompassing a shared definition and with a wide scope stemming from international consensus, as well as a U.N. conference built around it, may offer the best springboard, if not the most fertile ground, to ascertain what responses to terrorism are deemed legitimate across geographical and political divides. In this respect, the process of agreement-seeking may be just as important as quick results.

At this stage, the U.S. has the opportunity to help shape the outcome of the debate, heed the call of the OIC, and show that it is willing to work within multilateral legislative frameworks. By the same token, civil society, academia, and nongovernmental organizations need to be part of, and contribute to, this debate which to date has been conducted largely among governments.

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<sup>141</sup> Discussion at a meeting organized by the United Nations Association of the United States of America, Washington, D.C., May 6, 2002.

<sup>142</sup> According to the E.U. definition, terrorist offenses include, “(i) seriously intimidating a population, or (ii) unduly compelling a Government or international organisation to perform or abstain from performing any act, or (iii) seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation: (a) attacks upon a person’s life which may cause death; (b) attacks upon the physical integrity of a person; (c) kidnapping or hostage taking.....(e) causing extensive destruction to a Government or public facility, a transport system, an infrastructure facility, including an information system, a fixed platform located on the continental shelf, a public place or private property likely to endanger human life or result in major economic loss...” See Council of the European Union, Proposal for a Council Framework Decision on Combating Terrorism, Council of the European Union, 14845/1/01 REV 1, December 7, 2001.

<sup>143</sup> Organization of the Islamic Conference, *Statement on International Terrorism*.

### III. ACCOUNTABILITY

A lack of consensus on definitions of terrorism is inextricably connected to different understandings of the nature and content of the crime and, consequently, to questions on what courts—national, military, and international—are suited to administer justice. A measure of this gulf is best illustrated by individual states' definitions of the crime ranging, for example, from the specificity in the U.S. law to the sweeping parameters of Israel's legislation.

According to U.S. law, the term “terrorism” means “[p]remeditated, politically motivated violence perpetrated against non-combatant targets by subnational groups or clandestine agents, usually intended to influence an audience,” while the term “terrorist group” refers to “any group practicing, or that has significant subgroups that practice, international terrorism.”<sup>144</sup> The notion that terrorism is a political offense is not devoid of controversy as it may raise human rights concerns related to, for example, the granting of political asylum to dissidents that have been labeled terrorists by another country, or extradition of suspects to countries where they may face persecution.

By contrast, Israel's statute contains no reference to the political nature of the crime. Nor does it include any specific mention to non-combatant targets. It defines a “terrorist organization” as “a body of persons resorting in its activities to acts of violence calculated to cause death or injury to a person or to threats of such acts of violence.” A member of such an organization is considered “a person belonging to it and includes a person participating in its activities, publishing propaganda” in its favor or furthering its aims, or “collecting moneys or articles” for the benefit of such an organization and its activities.<sup>145</sup> By these standards, it is unclear what would make a terrorist group and its members any different from, for example, a media savvy mafia organization and its goons. Moreover, this law construes the element of propaganda or influence on an audience, in ways that in the U.S. and elsewhere would be considered infringements of the freedom of expression.

Discrepancies such as these are not uncommon even among close allies and have made it difficult to look beyond national jurisdiction in the prosecution of offenses.<sup>146</sup> Compounding such difficulties is the fact that terrorism is multifaceted and often “encompasses elements of politics, warfare and propaganda next to its criminal element,” as Executive Director of the U.N. Office for Drug Control and Crime Prevention Pino Arlacchi pointed out.<sup>147</sup> Given the highly complex nature of the crime and the lack of a shared definition of the offense, it is not surprising that the 1999 statute of the International Criminal Court (which deals with genocide, crimes against humanity and war crimes) did not include acts of terrorism within its purview. In addition, many states maintained that such inclusion could be made only if the ICC statute distinguished between acts of terrorism and the action of liberation and self-determination movements.<sup>148</sup> Similarly, specific anti-terrorism language was left out of the 2000 U.N. “Convention Against Transnational Organized Crime” (and its optional protocols on trafficking in firearms, smuggling of migrants and the buying and selling of women and children for sexual exploitation or sweatshop labor).

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<sup>144</sup> Title 22 of the United States Code, Section 2656f(d); U.S. State Department “Patterns of Global Terrorism Report, 2000,” at <http://www.state.gov/s/cr/rls/pgtrpt/2000/2419.htm>.

<sup>145</sup> Prevention of Terrorism Ordinance No. 33 of 5708-1948 (September 23, 1948), at: [http://www.ict.org.il/counter\\_ter/law/lawdet.cfm?lawid=11](http://www.ict.org.il/counter_ter/law/lawdet.cfm?lawid=11).

<sup>146</sup> An anomalous and interesting exception is represented by the Lockerbie case (see below).

<sup>147</sup> Pino Arlacchi, “Countering Terrorism Through Enhanced International Cooperation,” International Conference of The Terrorism Prevention Branch, United National Office for Drug Control and Crime Prevention, Courmayeur, Italy, September 22-24, 2000.

<sup>148</sup> Antonio Cassese, “Terrorism Is also Disrupting Some Crucial Legal Categories of International Law,” European Journal of International Law Discussion Forum “The Attack on the World Trade Center: Legal Responses,” available at [http://www.ejil.org/forum\\_WTC/index](http://www.ejil.org/forum_WTC/index).

However, in recognition that the victims of the September 11<sup>th</sup> attacks came from dozens of nations, and that some terrorists may also strike simultaneously at the territory, citizens, and property of more than one country (as with the bombings in Kenya and Tanzania), jurists and scholars have been looking increasingly into international options for the prosecution of individual suspects. These reviews have attempted to grapple with questions such as whether terrorism is a global criminal conspiracy that needs to be met by a global criminal-justice system. Some concluded that, in the face of crimes that constitute offenses against all humanity, customary international law allows states to exercise universal jurisdiction and prosecute suspects in national courts “without regard to the nationality of the perpetrator of the victim, location of the crime or other specific link to the prosecuting state.”<sup>149</sup> Such jurisdiction could be extended to include the most grievous acts of terrorism, as required by the existing terrorism conventions.

Currently this view is not reflected in states’ practices. As jurist Antonio Cassese noted, in 1984, in *Tel Oren v. Libyan Arab Republic*, the Court of Appeal of the District of Columbia held that the lack of an agreement on the definition of terrorism as an international crime under customary international law did not warrant universal jurisdiction. On this same ground in 2001, the French High Court (Court de Cassation) quashed a case involving Libyan leader Col. Moammar Gaddafi.<sup>150</sup> Moreover, Human Rights Watch observed that “the key to determining whether a prosecution can *actually* be brought based on universal jurisdiction will be the laws of the particular state in which the case is brought (the “prosecuting state”).<sup>151</sup> This analysis cautions, however, that a number of states will not bring or entertain prosecutions based on a crime not set forth in their own laws—even one recognized under international law.<sup>152</sup>

A complementary view to universal jurisdiction holds that, no matter how acts of terrorism are regarded in national laws, when they constitute crimes against humanity of a widespread and/or systematic nature they should fall under the jurisdiction of the International Criminal Court.<sup>153</sup> However, the ICC may be prevented from taking jurisdiction by a state’s lack of consent, or by a Security Council veto.<sup>154</sup>

In the perspective of a global criminal justice response, an option that scholars and observers increasingly favor pertains to the creation of an ad hoc tribunal by the U.N. Security Council along the lines of The Hague courts on Rwanda and the former Yugoslavia. Aryeh Neier, president of the Open Society Institute, observed that:

Deferring to such an international court could strongly advance American interests. Despite the slow pace with which they have proceeded, the

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<sup>149</sup> See, for example, Douglass Cassell, “Empowering United States Courts to Hear Crimes Within the Jurisdiction of the International Criminal Court,” *New England Law Review*, Vol. 35:2, Winter 2001, p. 427.

<sup>150</sup> Antonio Cassese, “Terrorism Is also Disrupting Some Crucial Legal Categories of International Law.”

<sup>151</sup> Human Rights Watch, “The Pinochet Case: A Wake-up Call to Tyrants and Victims Alike,” Human Rights Watch document, available at <http://www.hrw.org/campaigns/chile98/precedent.htm>. This analysis also notes that: “Piracy was the classic ‘universal’ crime, later joined by slave-trading. But these crimes occurred across borders or on the open seas. Since the end of World War II, the list of crimes giving rise to universal jurisdiction has grown to include many atrocities committed within national borders, such as genocide, torture, ‘apartheid’ and other ‘crimes against humanity’.”

<sup>152</sup> *Ibid.*

<sup>153</sup> Leila Sadat, “International Court Should Try Defendants,” *St. Louis Post-Dispatch*, November 18, 2001. Kenneth Roth observed that “Strictly speaking, the ICC will not use universal jurisdiction but, rather, a delegation of states’ traditional power to try crimes committed on their own territory.” Kenneth Roth, “The Case for Universal Jurisdiction,” *Foreign Affairs*, September/October 2001.

<sup>154</sup> Douglass Cassell, “Empowering United States Courts,” pp. 439-40.

worldwide credibility achieved by the tribunals for ex-Yugoslavia and Rwanda is very high. For the US, achieving such credibility is second in importance only to convicting the guilty.<sup>155</sup>

Analysts such as David Scheffer, former U.S. Ambassador at Large for War Crimes, regard an ad hoc tribunal as “the most potent option” at the international level.<sup>156</sup> Such a tribunal, composed of judges selected by the U.N. General Assembly and polled from “an international roster of candidates representing the major legal systems of the world,” would offer a guarantee of impartiality.<sup>157</sup> The advantage offered by these courts, scholar Anne-Marie Slaughter pointed out, is that they have handed down “an increasingly important body of uniform rules interpreting international treaties and customary law governing war crimes, crimes against humanity, and genocide.”<sup>158</sup> Moreover, the Security Council could exercise its powers to compel states’ cooperation with the tribunal. But again, the lack of consensus on the nature of the crime and the issue of who would be subjected to this tribunal’s jurisdiction present a major obstacle. An additional arduous question is what expertise would be polled from countries of the OIC since some of their legal systems run on the parallel—or at times intersecting—tracks of *Sharia*, the Islamic law, and secular law.<sup>159</sup>

Special courts represent an alternative to U.N. Security Council ad hoc tribunals. In this regard, a precedent for prosecuting acts of international terrorism was established with the so-called Lockerbie case in which the prosecution of the Libyan defendants, accused of the bombing of Pan Am flight 103 in 1988, took place in the Netherlands under Scottish law, and was adjudicated by Scottish judges after Gaddafi agreed to surrender the suspects.<sup>160</sup>

When years of civil war and political decay have compromised the ability of states or entire regions to deliver justice, an additional model of special tribunals is the Special Court for Sierra Leone, a hybrid tribunal, created by the U.N. Security Council at the request of President Ahmad Tejan Kabbah. The Court is composed of Sierra Leoneans and international judges, prosecutors and staff, and is responsible for the prosecution of individuals accused of serious crimes under national and international laws.<sup>161</sup>

Options pertaining to the formation of regional criminal tribunals—which might incorporate aspects of different legal systems into the process thereby providing greater credibility in the non-Western world—have not been sufficiently explored. Nonetheless, the European Union and the Arab League’s agreements on a definition of terrorism might offer a starting point in the search for a common

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<sup>155</sup> Aryeh Neier, “The Military Tribunal on Trial,” *The New York Review of Books*, February 14, 2002.

<sup>156</sup> David Scheffer, “Options for Prosecuting International Terrorists,” *United States Institute of Peace Report*, November 14, 2001. See also Anne-Marie Slaughter, “Al Qaeda Should Be Tried Before the World,” *The New York Times*, November 17, 2001.

<sup>157</sup> David Scheffer, “Options for Prosecuting International Terrorists.”

<sup>158</sup> Anne-Marie Slaughter, “Tougher than Terror,” *The American Prospect*, January 28, 2002.

<sup>159</sup> Interestingly, Harvard University professor Roy Mottahedeh is leading a group of scholars in preparing an “Islamic indictment,” based on the scholastic tradition of *Sharia*, against those responsible for the September 11<sup>th</sup> attacks. Alan Cooperman, “Scholars Plan to Show How Attacks Violated Islamic Law,” *The Washington Post*, January 20, 2002.

<sup>160</sup> U.N. document S/PRST/1999/10, April 8, 1999.

<sup>161</sup> U.N. Security Council, Resolution 1315, August 14, 2000. Article 1 of the Court’s Statute reads: “The Special Court shall, except as provided in subparagraph (2), have the power to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996, including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone.” Statute of the Special Court for Sierra Leone, available at <http://www.sierra-leone.org/specialcourtstatute.html>.

regional venue for prosecution. It is not inconceivable that other regional organizations may follow suit, especially in areas that have been most affected by the phenomenon, or would be willing to tackle it on terms more attuned to regional judicial practices and legal cooperation.

Nancy Paterson, former trial attorney at The Hague Tribunal and a co-author of the indictment against former Yugoslav President Slobodan Milosevic, noted:

If one of the goals of an international trial is to deter future terrorist acts, consideration should be given to the feasibility of creating regional tribunals that incorporate different legal systems. If the regional tribunal is based on a legal system more familiar to the defendants, the legitimacy of the court is more likely to be accepted by the terrorists and their supporters.<sup>162</sup>

These tribunals, Paterson argued, might offer a means to better guarantee that the trials are perceived as fair and impartial and would not be simply denounced as a mockery of justice subservient to Western standards and political agendas. “If the defendants and future terrorists do not accept the legitimacy and jurisdiction of the court, then there can be little hope of using the international criminal justice system to deter future acts of terrorism,” Paterson concluded.

#### **IN SUM:**

Over the years, national and international laws have been tailored or adapted to react to the changing nature of the terrorist threat and demonstrated that a “cookie-cutter approach” is neither possible nor advisable. Furthermore, options involving national courts, their exercise of universal jurisdiction, as well as international jurisdiction in one form or another, are not mutually exclusive.

In the end, the extent of international cooperation against terrorism—judicial or otherwise—is a matter of political will: the political will of recalcitrant states to acknowledge the problem and act upon it, as well as the political will of the United States to listen to others and learn from other countries’ experiences and counsel. The U.S. is right in affirming that terrorism is a phenomenon of global reach that needs a global response. If the fight is to be a collective endeavor in the name of both prevention and justice, that justice must be so regarded by all stakeholders.

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<sup>162</sup> The Fund for Peace conversations with Nancy Paterson, March-July, 2002, Washington, D.C.

## APPENDIX

### Terrorism Conventions

Name	Entry into Force	Text Source
The 1963 Tokyo Convention on Offenses and Certain Other Acts Committed on Board Aircraft	December 4, 1969	<a href="http://www.iasl.mcgill.ca/airlaw/public/aviation_security/tokyo1963.pdf">http://www.iasl.mcgill.ca/airlaw/public/aviation_security/tokyo1963.pdf</a>
The 1970 Hague Convention for the Unlawful Seizure of Aircraft	October 14, 1971	<a href="http://www.iasl.mcgill.ca/airlaw/public/aviation_security/hague1970.pdf">http://www.iasl.mcgill.ca/airlaw/public/aviation_security/hague1970.pdf</a>
The 1971 Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation	January 26, 1973	<a href="http://www.iasl.mcgill.ca/airlaw/public/aviation_security/montreal1971.pdf">http://www.iasl.mcgill.ca/airlaw/public/aviation_security/montreal1971.pdf</a>
The 1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents	February 20, 1977	<a href="http://www.unog.ch/archives/safety1.htm">http://www.unog.ch/archives/safety1.htm</a>
The 1979 Convention on the Physical Protection of Nuclear Material	February 8, 1987	<a href="http://www1.umn.edu/humanrts/peace/docs/materialnuc.html">http://www1.umn.edu/humanrts/peace/docs/materialnuc.html</a>
The 1979 Convention Against the Taking of Hostages	June 3, 1983	<a href="http://www.undcp.org/terrorism_convention_hostages.html">http://www.undcp.org/terrorism_convention_hostages.html</a>
The 1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, (supplements the 1971 Montreal Convention)	August 6, 1989	<a href="http://www.iasl.mcgill.ca/airlaw/public/aviation_security/montreal1988.pdf">http://www.iasl.mcgill.ca/airlaw/public/aviation_security/montreal1988.pdf</a>
The 1988 Rome Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation	March 10, 1988	<a href="http://www.imo.org/Conventions/contents.asp?topic_id=259&amp;doc_id=686">http://www.imo.org/Conventions/contents.asp?topic_id=259&amp;doc_id=686</a>
The 1988 Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (supplements the Rome Convention)	March 1, 1992	<a href="http://www.imo.org/Conventions/contents.asp?topic_id=259&amp;doc_id=686">http://www.imo.org/Conventions/contents.asp?topic_id=259&amp;doc_id=686</a>
The 1991 Convention on the Marking of Plastic Explosives for the Purpose of Detection	June 21, 1998	<a href="http://www.iasl.mcgill.ca/airlaw/public/aviation_security/montreal1991.pdf">http://www.iasl.mcgill.ca/airlaw/public/aviation_security/montreal1991.pdf</a>
The 1997 Convention for the Suppression of Terrorist Bombings	May 23, 2001	<a href="http://www.undcp.org/terrorism_convention_terrorist_bombing.html">http://www.undcp.org/terrorism_convention_terrorist_bombing.html</a>
The 1999 Convention for the Suppression of the Financing of Terrorism	April 10, 2002	<a href="http://www.un.org/law/cod/finterr.htm">http://www.un.org/law/cod/finterr.htm</a>

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