

TERRORISM AND THE RULE OF LAW

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Nature hath made men so equall, in the faculties of body, and mind; as that though there bee found one man sometimes manifestly stronger in body, or of quicker mind then another; yet when all is reckoned together, the difference between man, and man, is not so considerable, as that one man can thereupon claim to himselfe any benefit, to which another may not pretend, as well as he. For as to the strength of body, the weakest has strength enough to kill the strongest, either by secret machination, or by confederacy with others. . . .

—Thomas Hobbes, *Leviathan*, Ch. XIII

I. INTRODUCTION: TRAGEDY AND ITS RESPONSE

Ever since the murderous attacks on the World Trade Towers, the Pentagon, and U.S. Airlines flight 93, scholars have wrestled with their legal ramifications.¹ Although much of the early writing on the subject was largely reactive in nature, it is now appropriate to pause and consider the broader implications of the September 11th attacks for international law and international relations in general. In this regard, it has become apparent that not only were the attacks devastating in terms of loss of human life and their impact on the United States, but that they, and the

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1. Daryl A. Mundis, *Agara: Military Commissions, The Use of Military Commissions to Prosecute Individuals Accused of Terrorist Acts*, 96 AM. J. INT'L L. 320, 320-58 (2002); M. Cherif Bassiouni, *Focus September 11, 2001—Legal Responses to Terror, Legal Control of International Terrorism: A Policy Oriented Assessment*, 43 HARV. INT'L L.J. 83, 83-103 (2002); Jordan J. Paust, *Antiterrorism Military Commissions: Courting Illegality*, 23 MICH J. INT'L L. 1, 1 (2001).

U.S. response they have evoked, have the potential to irreparably damage international law and international institutions, with deeply troubling and even dire consequences for world peace, stability, and the international rule of law.

It is the premise of this Essay that by characterizing the September 11th attacks as acts of war rather than as terrorism or crimes against humanity, the United States has lost what could have been an extraordinary opportunity to strengthen international legal norms and combat international terrorism. Instead, the U.S. government has relied upon these terrorist acts to justify the pursuit of a unilateralist agenda that, contrary to the language and the spirit of the United Nations Charter, appears to reject any legal constraints on the use of American power abroad. It is worth considering, as an aside, that this departure from the Charter framework, without anything to substitute in its place, may lead to increasing and even catastrophic violence on a global scale.² A full discussion of the potentially dismal future that could result is beyond the scope of this Essay, which confines itself to suggesting that rather than viewing the attacks of September 11th as acts of war, they should have been treated as international crimes for which the perpetrators should be apprehended, tried and, if convicted, punished. Moreover, it suggests that only by increasing its efforts to strengthen international norms and institutions will the United States ultimately achieve its goal of successfully combating international terrorism.

II. TERRORISM AND THE RHETORIC OF WAR

Shortly following the horrific attacks on the twin towers, the Pentagon, and U.S. Airlines flight 93, President Bush, addressing a Joint Session of Congress, outlined the policy of the government to conduct a “war on terror” that will “begin[] with al-Qaeda, but . . . does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated.”³ With regard to the Taliban specifically, the President spelled out several ultimatums, none of which were “open to negotiation or discussion.”⁴ In particular, the Taliban regime was to “hand over the

2. See Tom J. Farer, *Beyond the Charter Front: Unilateralism or Condominium*, Editorial Comment, 96 AM. J. INT’L L. 359, 364 (2002).

3. George W. Bush, Presidential Address to a Joint Session of Congress (Sept. 20, 2001), at <http://www.globalsecurity.org/military/library/news/2001/09/mil-010920-usia01.htm> (last visited Sept. 8, 2003) [hereinafter September 20th Presidential address].

4. *Id.*

terrorists, or . . . share in their fate.”⁵

As a matter of international law, the government’s position with regard to the terrorist attacks was less clear, but appeared to be essentially as follows. First, the attacks amounted to an “armed attack” against the United States of America, which entitled the United States to invoke article 51 of the U.N. Charter in self-defense and take military action against those who had committed the attacks, any regime that harbored them, or other terrorists that have in the past or could in the future attack the United States.⁶ Additionally, the attack created a state of “war” between the United States and some other entities, although it is not entirely clear whether the war was with the al Qaeda terrorist network, the Taliban regime, the State of Afghanistan, or some combination thereof.⁷

This was the rationale invoked in support of the military operation (“Operation Enduring Freedom”) in Afghanistan which began on October 7, 2001,⁸ and presumably was also the basis upon which the administration

5. *Id.*

6. There appears to have been a general consensus on September 11th and immediately after that the acts of September 11th amounted to an “armed attack” against the United States, within the meaning of article 51 of the United Nations Charter due to their scale and effect, although the implications of that finding are unclear given that they were carried out by non-state actors. Confirming a speech given the day after the attack, Lord Robertson, NATO Secretary General, stated that

it has now been determined that the attack against the United States on 11 September was directed from abroad and shall therefore be regarded as an action covered by article 5 of the Washington Treaty, which states that an armed attack on one or more of the Allies in Europe or North America shall be considered an attack against them all.

Secretary General Lord Robertson, Statement at NATO Headquarters, (Oct. 2, 2001), at <http://www.nato.int/docu/speech/2001/s011002a.htm> (last visited Jan. 21, 2003); NATO Press Release No. 124, Statement by the North Atlantic Council, (Sept. 12, 2001), at <http://www.nato.int/docu/pr/2001/po1-124e.htm> (last visited Jan. 21, 2003).

7. For example, Section 1(A) of the President’s Military Order of November 13, 2001, provides: “International terrorists. . . have carried out attacks on United States diplomatic and military personnel and facilities abroad and on citizens and property within the United States on a scale that has created a state of armed conflict that requires the use of the United States Armed Forces.” Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001) [hereinafter “Military Order”]. Subsequently, the administration suggested that the state of armed conflict may have commenced a decade ago, and reiterated its position that an “armed conflict” existed between the U.S. government and the al Qaeda organization. Pierre-Richard Prosper & Michael A. Newton, *The Bush Administration View of International Accountability*, 36 NEW ENGLAND L. REV. 891, 898-99 (2002).

8. The operation was initially code-named “Infinite Justice,” but was changed to Operation “Enduring Freedom” on September 25, 2001 after Muslim clerics objected that only Allah could mete out infinite justice. *Operation Infinite Justice*, at <http://globalsecurity.org/military/ops/infinite-justice.htm> (last visited Sept. 7, 2003). The terminology used by the administration to describe the war has often had religious overtones and some have suggested that the code name “Infinite Justice” was deliberately chosen as a reference to the “fundamentalist Christian doctrine of retribution.” *Notes from the Editors*, MONTHLY REVIEW Nov. 2001, <http://www.monthlyreview.org/nfte1101.htm> (last visited Sept. 7, 2003). *But see Operation Infinite Justice*, *supra* <http://www.globalsecurity.org/military/>

asserted the right to pursue military operations in the Philippines, and subsequently against the three so-called “axis of evil” countries:⁹ Iran,¹⁰ Iraq¹¹ and North Korea.¹² The U.S. position was formally communicated to the United Nations in a letter dated October 7, 2001:

ops.infinite-justice.htm (last visited Jan. 21, 2003) (stating that “the name [Infinite Justice] can be traced back to the 1998 Operation Infinite Reach air strikes against Osama bin Laden’s facilities in Afghanistan and Sudan”).

9. These three countries were named in the State of the Union Address of President George W. Bush on January 29, 2002. In the *National Security Strategy of the United States of America*, published by the White House in September 2002, the “Bush Doctrine” was expanded to include not only responses to terrorism after the fact as a matter of self-defense, but cases of preemptive self-defense to prevent terrorists from “doing harm against our people and our country.” The White House, *The National Security Strategy of the United States of America* (Sept. 15, 2002), at <http://www.whitehouse.gov/nsc/nsall.html> (last visited Sept. 7, 2003).

10. In March 2003, the Bush Administration expressed its “deep concern” that Iran’s nuclear program was for the purpose of developing atomic weapons, and not for peaceful purposes. *White House Distrusts Iran on Nuclear Power*, ST. LOUIS POST-DISPATCH, Mar. 11, 2003, at A7. More recently, the Bush Administration has encouraged internal dissent within Iran, hoping that protests will lead to a change of government and ultimately to abandonment of Iran’s potential nuclear program. Jonathon Wright, *Bush Takes Risks in Iran Policy, Analysts Say*, REUTERS NEWS, June 20, 2003.

11. Following the refusal of the United Nations to approve action against Iraq, on March 18, 2003 President Bush declared that among other things, Iraq has “a deep hatred of America . . . [a]nd has aided, trained and harbored terrorists, including operatives of al Qaeda,” “Saddam Hussein and his sons must leave Iraq within 48 hours,” or war, led by the United States, will result. Subsequently, in a letter to the Security Council, John Negroponte, U.S. Ambassador to the United Nations announced that, “[C]oalition forces have commenced military operations in Iraq.” Letter from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, Mar. 20, 2003, at http://www.un.int/usa/s2003_351.pdf (last visited Sept. 7, 2003). The U.S. relied on Iraq’s breaches of Security Council Resolutions 678, 687, 1411. *Id.* Negroponte states that the “actions . . . are necessary steps to defend the United States and the international community from the threat posed by Iraq and to restore international peace and security in the area.” *Id.*

12. Relations between the United States and North Korea have become particularly tense over the last year, since North Korea admitted in October 2002 that it had an illicit uranium enrichment program, shortly thereafter repudiated the Nuclear Non-Proliferation Treaty, fired two test missiles into the Sea of Japan, and demanded a non-aggression pact from the United States. *North Korea: Expecting Trouble?*, THE ECONOMIST, Mar. 2003, at 37. In response to North Korea’s repudiation of the Nuclear Non-Proliferation Treaty, the Bush Administration has been divided on how to proceed in its negotiations with North Korea. U.S. intelligence believes that North Korea is developing technology for nuclear warheads small enough to fit atop the country’s growing arsenal of missiles. The U.S. has pressed the U.N. Security Council to approve a statement condemning North Korea for reviving its nuclear weapons program, but China and Russia have blocked the action. The North Korean government continues to insist instead on bilateral talks with the United States Irwin Arief, *North Korea complains to U.N. about U.S. “hostile acts,”* REUTERS NEWS, July 14, 2003. *See also* Glenn Kessler, *North Korea’s Nuclear Ambitions are Urgent Issue, Powell Says*, WASH. POST, June 19, 2003. Although President Bush has said he wants a “diplomatic solution to the problem,” he has also stated that he “would not foreclose any option, including military ones” President Roh has stated that “any preemptive strike against the North’s nuclear facilities could prove disastrous.” David E. Sanger, *U.S. Fears Warhead Gains by Pyongyang Unit Miniaturization Would Allow Missiles to Strike Wider Areas*, INT’L HERALD TRIB., July 2, 2003, 2003 WL 56179302.

The attacks on 11 September 2001 and the ongoing threat to the United States and its nationals posed by the Al-Qaeda organization have been made possible by the decision of the Taliban regime to allow the parts of Afghanistan that it controls to be used by this organization as a base of operation.

Despite every effort by the United States and the international community, the Taliban regime has refused to change its policy. From the territory of Afghanistan, the Al-Qaeda organization continues to train and support agents of terror who attack innocent people throughout the world and target United States nationals and interests in the United States and abroad.

In response to these attacks, and in accordance with the inherent right of individual and collective self-defence, United States armed forces have initiated actions designed to prevent and deter further attacks on the United States. These actions include measures against Al-Qaeda terrorist training camps and military installations of the Taliban regime in Afghanistan.¹³

There have been suggestions for some time by senior officials of the United States government that the rubric of war should apply to acts of international terrorism, although the current administration has capitalized on this war rhetoric to a greater degree than previous governments. Foreshadowing President Bush's response to the acts of September 11th, after the attacks on the two U.S. Embassies in Tanzania and Kenya, then Secretary of State Madeline Albright suggested that international terrorism would be the "war of the future."¹⁴ Ten years earlier, Abraham Sofaer, then legal advisor to the U.S. Department of State, argued that the legal rules surrounding the use of force, the concept of armed attack, and respect for territorial integrity impose "serious limits on strategic flexibility," and could not be permitted to "interfere with legitimate national security measures."¹⁵

13. Letter dated 7 October 2001 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2001/946, (2002) [hereinafter Letter of October 7, 2001].

14. Tyler Raimo, *Winning at the Expense of Law: The Ramifications of Expanding Counter-Terrorism Law Enforcement Jurisdiction Overseas*, 14 AM. U. INT'L L. REV. 1473, 1484 n.57 (1999) (quoting Tim Butcher & Hugh Davies, *U.S. Strike Was "First Blow in the War of The Future": Washington Seeks Support for Long Campaign Against Global Terrorism*, WASH. POST, Aug. 22, 1998, at A1).

15. Abraham D. Sofaer, *Terrorism, the Law and National Defense* 126 MIL. L. REV. 89, 90-122 (1989).

Although using the language of war and describing the September 11th attacks as war crimes may be a convenient rhetorical device to describe the struggle to cripple international terrorist organizations, it is not consonant with existing and well-established principles of international law.¹⁶ As I have noted in earlier writings, under the international law instruments criminalizing violations of the laws and customs of war, including the Rome Statute for the International Criminal Court, an individual cannot legally commit a “war crime” unless a state of “armed conflict” exists.¹⁷ As the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) found in the *Tadić* case, “an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.”¹⁸ It is apparent from this definition that a transnational group of terrorists is not engaged in “armed conflict,” in the legal sense of the word, but is engaging in organized crime.

Requiring the existence of an armed conflict for the application of the laws and customs of war is not simply a legal technicality that may be casually brushed aside. Prior to reaching that threshold, internal or even cross border disturbances do not become the province of international humanitarian law, but must be resolved internally if they occur within a state,¹⁹ or by diplomacy or other means if they occur transnationally.²⁰ The

16. The U.S. position also permitted the President to argue that any foreigners captured as a result of the military operations could be tried as war criminals in military tribunals established for that purpose, which would have been impossible had they been charged with violations of “ordinary” criminal laws against terrorism and mass murder. Somewhat inconsistently, the Bush administration, having established military jurisdiction by declaring the terrorist attacks to be constitutive of a state of armed conflict, subsequently sought to deprive any individuals captured as a result of Operation Enduring Freedom of the protection of the Geneva Convention Relative to the Treatment of Prisoners of War by arguing that they were “unlawful combatants.” This Essay will not address this particular ramification of the treatment of the September 11th attacks as acts of war.

17. Leila Nadya Sadat & Richard S. Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L.J. 381, 434 (2000).

18. Prosecutor v. Duško Tadić, Case No. IT-94-1-AR72, *Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, ¶ 70 (Oct. 2, 1995) [hereinafter *Tadić*].

19. In fact, during the Rome Diplomatic Conference, states were adamant in insisting that sporadic acts of violence or rebellion would not trigger the application of international humanitarian law, and article 8(d) reinforces that view. It provides that the provisions of the Statute on non-international armed conflict falling within common article 3 of the four Geneva Conventions would not apply to “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.” Rome Statute of the International Criminal Court, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, July 17, 1998, art. 8(d), U.N. Doc. A/CONF.183/9 (1998) [hereinafter *Rome Statute*]. See also *id.* art. 8(f) (providing that for other violations of the laws and customs applicable in “armed conflicts not of an international character,” the Statute only applies “when there is protracted armed conflict

laws of war do not apply to such disorders, nor are individuals potentially criminally liable under the laws of war for crimes they may commit during them. Although individuals could be answerable for crimes against humanity, provided that the elements of the crime are present, because it is an offense not predicated on the existence of an armed conflict for its application. Ironically, the administration's suggestion that the members of al Qaeda are engaged in "armed conflict"²¹ could be interpreted to imply that the "conflict" waged by al Qaeda is not itself illegal in nature, but that it is the means used which are problematic, a thesis with which most observers would disagree.²² Moreover, reducing or eliminating the "armed conflict" threshold for the application of the laws of war would not appear to be in the best interests of the United States. For example, the United States often conducts military actions, such as the 1998 bombing raids in the Sudan and Afghanistan, without real concern as to allegations that they constitute war crimes, because those uses of force, which are both short in duration and limited in scope, do not rise to the level of an armed conflict.²³ Eliminating the "armed conflict" threshold for the application of the laws of war could also suggest that covert operations, if discovered, could either initiate a state of armed conflict within the target country, or, at the very least, be subject to the laws of war.

Setting aside the question whether the use of force by the United States in Afghanistan was a lawful measure of self-defense under the U.N. Charter, the question remains whether the Bush Doctrine is supported by

between governmental authorities and organized armed groups or between such groups.").

20. The Geneva Conventions refer, in common article 2, to their application "to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties." See, e.g., Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 2, 6 U.S.T. 3516, 75 U.N.T.S. 287. Hague Convention (No. IV) Respecting the Laws and Customs of War on Land, and Annex, provides that "the provisions contained in the Regulations referred to in Article 1, as well as in the present Convention, do not apply except between Contracting Powers . . ." Hague Convention (No. IV) Respecting the Laws and Customs of War on Land, and Annex, Oct. 16, 1907, art. 2, 36 Stat. 2277, T.S. No. 539.

21. See *supra* note 7.

22. When the United States military invaded Afghanistan on October 7, 2002, a state of armed conflict was clearly invoked, and international humanitarian law applied, and would, under the definition set out in the *Tadić* opinion, exist "from the initiation of such armed conflict[] . . . until a general conclusion of peace is reached." *Tadić*, *supra* note 18, at ¶ 70.

23. For this reason, the 1998 bombing raids on the Sudan and Afghanistan would not fall within the prohibitions of the Rome Statute for the International Criminal Court, even though some might characterize them as illegal uses of force under article 2(4) of the Charter. Sadat & Carden, *Uneasy Revolution*, *supra* note 17, at 429 n.294, 434-36. Cf. W. Michael Reisman, *International Legal Response to Terrorism*, 22 HOUSTON J. INT'L L. 3, 8 (1999). Those supporting the use of force argue that the criminal enforcement model is part of the problem, not the solution. Abraham D. Sofaer, *Playing Games with Terrorists*, 36 NEW ENGLAND L. REV. 903, 904 (2002).

international law.²⁴ The obvious difficulty of this doctrine is that it posits the use of armed force in self-defense, without the constraints of Security Council authorization, against criminal organizations operating in the territory of a sovereign state when that state has not, as a matter of law, perpetrated an armed attack against the United States. Even if the attacks of September 11th are considered armed attacks by a state for purposes of the U.N. Charter to justify the U.S. military response against Afghanistan, this fact alone would not support attacks against other states as preventive measures. Indeed, the pre-emption doctrine now advocated by the Bush administration is clearly in direct contravention of article 2(4) of the U.N. Charter, and undermines the most fundamental principles of the international legal order—the prohibition on the use of force and the sovereign equality and territorial integrity of states.

In addition, it is not difficult to imagine the corrosive effect that adopting the U.S. view as a matter of international law would have on international peace and security. Under the Bush doctrine, if the government decided to prosecute the “war” against al Qaeda operatives worldwide, it could potentially result in military incursions in any of the sixty countries in which al Qaeda members are reportedly found.²⁵ It cannot seriously be argued that the U.N. Charter envisaged that a country would be able to use force on such a basis against nearly one-third of the United Nations’ member states without prior Security Council authorization.²⁶ In addition, international law is largely a product of state practice and reciprocity. To put it neatly, should the U.S. view prevail, the doctrine of unilateral self-defense against terrorist attacks could presumably be applied by any country, including, for example, Indonesia, India, Israel, Pakistan, Russia, and China, which have each recently suffered terrorist attacks. The potentially destabilizing effect of the Bush doctrine, if taken to its logical extension, is therefore quite substantial. As Professor Schachter wrote some years ago:

The right of self-defense, “inherent” though it may be, cannot be autonomous. To consider it as above or outside the law renders it

24. The letter to the United Nations refers to any terrorist organization “of global reach.” Letter of October 7, 2001, *supra* note 13.

25. James Dao, *A Nation Challenged: The Threats; Defense Secretary Warns of Unconventional Attacks*, N.Y. TIMES, Oct. 1, 2001 (late ed.), at B5; Robert D. McFadden, *A Nation Challenged: An Overview: Nov. 18, 2001; Seeking a Kabul Coalition, Killings in Kunduz and Bodies in the Rubble*, N.Y. TIMES, Nov. 19, 2001 (late ed.), at B1.

26. See, e.g., Oscar Schachter, *Self-Defense and the Rule of Law*, 83 AM. J. INT’L L. 259, 273 (1989).

more probable that force will be used unilaterally and abusively. No state or people can face that prospect with equanimity in the present world [S]elf-defense must be regarded as limited and not only legitimated by law The political will that is necessary depends on understanding both the danger of unbridled force and the necessity of legal and institutional control It is through such concrete measures that international law may in time strengthen the national security of all states.²⁷

It is true that the lack of any real objection to the military campaign initiated on October 7, 2001 suggests that the world community viewed the United States' actions in Afghanistan as legitimate acts of self-defense for which no Security Council authorization was required and, therefore, as implicit support for the Bush Doctrine, writ large. However, the vociferous objection of most of the United Nations' membership to subsequent U.S. proposals to effectuate "regime change" in Iraq,²⁸ an action justified at least in part as a question of "self-defense," suggests that no such new understanding was established either by the attacks of September 11th or "Operation Enduring Freedom." Moreover, although the rhetoric of a legal "war against terrorism" was well-accepted by many leading academics and policy makers in the United States (particularly right after September 11), foreign commentators, particularly in Europe and the Middle East, have been much more skeptical of this claim. Indeed, many Europeans find the American use of the term unsupported by law and have expressed alarm at the implications of a "global war" against terrorism, even if they have supported the military response against the Taliban and al Qaeda in Afghanistan.²⁹ Finally, even if one can stretch the

27. *Id.* at 277.

28. The Turkish Parliament rejected the U.S. request to stage troops on the Iraqi border; the Arab League agreed on a final statement rejecting any war against Iraq; while France and Russia indicated their intent to veto a Resolution calling for the use of force against Iraq, and the U.S. therefore decided to proceed to war without a Resolution from the Security Council. Joel Brinkley, *Turkey's 'No' Frustrates War Plans: Arab Leaders Add to Setbacks for U.S. Policy*, INT'L HERALD TRIB., Mar. 3, 2003, at 1; Jon Sawyer, *Bush: Exile or War; President Gives Saddam Hussein 48 Hours to Leave Iraq, or else U.S. Will Invade*, ST. LOUIS POST-DISPATCH, Mar. 18, 2003, at A1. According to press reports, the countries appearing to back the use of force were Albania, Bulgaria, Croatia, Czech Republic, Denmark, Estonia, Hungary, Italy, Latvia, Lithuania, Macedonia, Poland, Portugal, Romania, Slovakia, Slovenia, Spain and the United Kingdom. Geoffrey Kemp, *Colin Powell and the Gangs of Europe*, IN THE NAT'L INTEREST, Feb. 12, 2003, at <http://www.inthenationalinterest.com/articles/vol2issue6/vol2issue6kempfv.html> (last visited, Sept. 17, 2003).

29. See generally Georges Abi-Saab, *There is no Need to Reinvent the Law, in A Defining Moment & International Law since September 11*, Crimes of War Project, at <http://www.crimesofwar.org/sept-mag/sept-abi.html> (last visited Sept. 3, 2003); Antonio Cassese, *Terrorism is Also Disrupting Some Crucial Legal Categories of International Law*, 12 EUR. J. INT'L L.

meaning of article 51 to encompass armed attacks by non-state actors, a proposition that is neither self-evident nor without controversy,³⁰ there is no evidence, other than assertions by a limited number of countries, including the United States, that this principle permits a country to wage war against states in which terrorists are located on the grounds that the terrorists have created an armed conflict to which the U.S. is responding.

To the extent the international community supported the U.S. military response to the September 11th attacks, I believe it did so on the understanding that a fairly classical interpretation of the doctrine of self-defense applied because the Taliban could be considered legally responsible for al Qaeda's crimes.³¹ Alternatively, it could take comfort in

993 (2001); Luigi Condorelli, *Les Attentats du 11 Septembre et leurs suites: où va le droit international?*, 105 REVUE GÉNÉRAL DE DROIT INTERNATIONAL PUBLIC 829 (2001); Frédéric Mégret, 'War'? *Legal Semantics and the Move to Violence*, 13 EUR. J. INT'L L. 361 (2002).

30. The argument for suggesting that article 51 supports military attacks against non-state actors rests upon the differences in wording of article 51 and article 2(4). Because article 51 does not include the words "Member State," whereas article 2(4) does, they are asymmetric. This asymmetry has led some writers to conclude that this difference implies that although article 2(4) only forbids attacks against *Member States*, article 51 permits military responses in self-defense even against non-state actors. See, e.g., Sean D. Murphy, *Terrorism and the Concept of "Armed Attack" in Article 51 of the U.N Charter*, 43 HARV. INT'L L. J. 41, 50 (2002). However, although articles 2(4) and 51 are indeed asymmetric, there appears to be no textual support in the Charter or its *travaux préparatoires* for the proposition that criminal actions committed by non-state actors fall within article 51 of the Charter. None of the major commentaries on the U.N. Charter appear to support this reading of articles 2(4) and 51. See, e.g., THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 106-28, 661-78 (Bruno Simma ed., 1994); CHARTER OF THE UNITED NATIONS 43-55, 342-53 (Leland M. Goodrich et al. eds., 1969); LA CHARTE DES NATIONS UNICS 115-28, 771-95 (Jean-Pierre Cot & Alain Pellet eds. 2d ed., 1991) [hereinafter PELLET COMMENTARY]. Indeed, Casesse's commentary on article 51 in the PELLET COMMENTARY suggests precisely the opposite. PELLET COMMENTARY, at 772. This is perhaps because such an interpretation would, in most circumstances, violate the Charter and its purposes. Any sustained military action by a state in response to a terrorist attack against a non-state actor, will violate the prohibition of article 2(4) because the territory attacked will almost always be that of a Member State. Unless the state upon whose territory the terrorist group appears to be headquartered is itself responsible for the attack, to use force against that state in response to a terrorist attack that appears to emanate from a group found in that state can be likened to the collective punishment of the citizenry of the state in question. For the view that non-state actors may commit armed attacks that trigger the application of article 51, see generally Jordan J. Paust, *Use of Armed Force Against Terrorists in Afghanistan, Iraq, and Beyond*, 35 CORNELL INTL. L.J. 533 (2003).

31. The United Kingdom published a paper on October 4, 2001, detailing the links between al Qaeda and the Taliban. *British Release Evidence Against bin Laden* http://www.salon.com/news.../2001/10/04/british_evidence/print.htm (last visited Oct. 5, 2001). Of course, under the current law of State Responsibility, establishing Afghan liability for actions of al Qaeda, may be difficult. Although articles 4 to 11 (attribution of conduct to a state) and the holding of the International Court of Justice in the *Nicaragua* case do not appear to suggest an immediate theory of responsibility given that the Taliban did not appear to direct, control or acknowledge or adopt the actions of al Qaeda, if it can nevertheless be said that the Taliban permitted al Qaeda to engage in acts of international terrorism and that it breached its obligation to prevent al Qaeda's actions in a "gross and systematic" fashion, it could perhaps be argued that the Taliban was responsible for al Qaeda's activities. A full discussion of this problem is beyond the scope of this Essay.

the adoption of Security Council Resolutions 1368 and 1373 which, although notably silent on the use of force, recognize “the inherent right of self defense.”³² Support, either tacit or explicit, for the Afghanistan campaign seems to be limited to the particular facts of that case. Such support included two Security Council resolutions expressing support for the principle of self-defense; persistent calls to the Taliban, the *de facto* government of the country to “hand over” the suspected terrorists; a convincing public, prima facie case against the suspected terrorist organization; a government that was unrecognized by the United Nations and nearly every other country in the world;³³ and prior demands to that government from the Security Council demanding bin Laden’s surrender for other crimes.³⁴

III. TERRORISM AS AN INTERNATIONAL CRIME

We have seen that although an argument can be made that the acts of September 11th may be characterized as acts of war to which states may respond in self-defense, unless very narrowly framed, that theory fits uneasily within the framework of the United Nations Charter. Moreover, particularly if it is extended beyond the facts of the particular case, it has some very negative implications for the maintenance of international peace and security. Although not the principle focus of this Essay, it is worth noting that this argument may also give rise to several additional legal consequences.³⁵

32. The meaning of the Resolution is extraordinarily ambiguous, although at least some governments have indicated that it has provided legitimacy to the U.S. led invasion of Afghanistan. See *Bush Vows to Keep Pressure on bin Laden, Nov. 6: Briefing with French President Chirac at White House*, at <http://www.uninfo.state.gov/topical/pol/terror/01110619.htm> (last visited Sept. 3, 2003) (statement of French President Jacques Chirac).

33. Indeed, some have argued that the U.S. did not invade Afghanistan at all, but simply responded to an invitation from the recognized government to remove the Taliban from power. See Judy Aita, *Islamic State of Afghanistan Willing to Hunt Bin Laden, U.N. Ambassador says Afghans Tired of Taliban, Usama bin Laden*, U.S. Department of State International Information Programs (Sept. 18, 2001), at <http://usinfo.state.gov/topical/pol/terror/01091804.htm> (last visited Sept. 3, 2003).

34. S.C. Res. 1267, U.N. SCOR, 55th Sess., 4051st mtg., U.N. Doc. S/Res/1267 (1999); S.C. Res. 1333, U.N. SCOR, 55th Sess., 4251st mtg., U.N. Doc. S/Res/1333 (2000).

35. *U.S. Asks Agency To Dismiss Complaint About Cuba Prisoners*, WALL ST. J., Apr. 18, 2002. “President George W. Bush has designated six captives suspected of involvement in terrorism as eligible to be tried before military tribunals, setting in motion the process that officials say will soon lead to the use of the first such tribunals by the United States in more than 50 years.” Neil A. Lewis, *Bush Moves to Begin Military Trials of Terror Suspects*, INT’L HERALD TRIB., July 5, 2003. However, the response from overseas has created further speculation as to the Bush Administration’s approach to the issue. *Just Don’t Kill Them: American Military Justice, Seen From Overseas*, THE ECONOMIST, July 12, 2003, at 28. See also *Unjust, Unwise, UnAmerican—Why America’s Military Tribunals are Wrong*, THE ECONOMIST, July 12, 2003, at 9.

First, to the extent that al Qaeda is treated as an enemy state that is “at war” with the United States, it would follow that its attacks on military targets, such as the U.S.S. Cole and even the Pentagon, were arguably lawful, which they clearly would not be if they were simply characterized as the acts of organized international criminals. Of course, treating these acts as war crimes rather than crimes of international terrorism has certain domestic consequences that the government may see as desirable, such as the opportunity to subject the accused to military, rather than civilian courts; the general enlargement of the President’s power over the investigation and prosecution of the accused, including detention abroad, rather than in U.S. jails; the avoidance of the Posse Comitatus act³⁶; and the continued ability to use military force to attempt to apprehend the terrorists and attack the terrorist networks. The question that remains, however, is whether it is necessary or even desirable to bend the law in such a way both domestically and as a matter of international law for the United States to achieve its legitimate security goals.

A decade or two ago, the answer to this question might have been less clear. Although the second half of the twentieth century witnessed tremendous growth in the normative content of international criminal law with the adoption of several important counter-terrorism treaties, including a series of treaties relating to air safety and airplane hijacking, maritime navigation, fixed platforms on the continental shelf, hostage taking, and the safety of internationally protected persons,³⁷ the international

36. 18 U.S.C. § 1385 (2002). The Posse Comitatus Act provides that “[w]hoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.” *Id.*

The term, which literally means “power of the county,” refers to the common law right of the sheriff to commandeer the assistance of citizens in enforcing the law. U.S. troops were used to enforce domestic law up until the years of Reconstruction after the Civil War, when, as a result of the soldiers’ excesses, a successful movement was waged in Congress to eliminate the practice. The act was passed in its original form in 1878 and was codified at 10 U.S.C. § 15 (current version of 18 U.S.C. § 1385 (2002)). Brian L. Porto, Annotation, *Construction and Application of Posse Comitatus Act (18 U.S.C.A. § 1385), and Similar Predecessor Provisions, Restricting Use of United States Army and Air Force to Enforce Laws*, 141 A.L.R. FED. 409 (2003).

37. See Tokyo Convention on Offenses and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, 20 U.S.T. 2941, 704 U.N.T.S. 219; Hague Convention on the Suppression of Unlawful Seizure of Aircraft (Hijacking), Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105; Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Sabotage) *opened for signature* Sept. 23, 1971, 24 U.S.T. 564, 974 U.N.T.S. 177; Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (*opened for signature* Mar. 10, 1988), 1678 U.N.T.S. 349; Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf *opened for signature* Mar. 10, 1988, 1678 U.N.T.S. 201 (1988); International Convention against the Taking of Hostages *opened for signature* Dec. 17, 1979, T.I.A.S. No. 11081, 1316 U.N.T.S. 205; Convention on the Prevention and Punishment of

community was, nonetheless, not united in its condemnation of international terrorism. Persistent debates remained whether there was any uniform definition of the crime. In particular, members of the non-aligned group of countries argued for the exclusion of violent actions undertaken by groups fighting in the struggle of national liberation movements.

Moreover, despite the significant progress made in criminalizing particular offenses through the adoption of international treaties, there is little doubt that enforcement of those treaties was problematic. Most anti-terrorism conventions impose a form of “universal jurisdiction by treaty,”³⁸ which grants any state to which the alleged terrorist travels jurisdiction to prosecute him or her. Additionally, these treaties generally impose upon states the duty to try or extradite international terrorists (*aut dedere aut judicare*), and in this manner create a net through which the terrorist has difficulty escaping. Yet these instruments notwithstanding, legal experts vigorously debated whether terrorism could generally be considered a universal jurisdiction crime, due, in part, to the difficulties concerning its definition, described above. Additionally, the crucial enforcement mechanism of the counter-terrorism treaties, *aut dedere, aut judicare*, was generally not believed to be a norm of customary international law, although certain prominent scholars argued to the contrary.³⁹ Thus, to the extent a terrorist remained on the territory of a “friendly” or incompetent state, that is, a state which was either powerless or not inclined to investigate and punish the criminal in question, that terrorist could largely avoid the application of international law.

Many of these difficulties have been ameliorated in recent times, due to the tremendous progress not only with regard to the enforcement of international norms condemning terrorism, but in parallel areas of international criminal law. To begin with, in 1993 and 1994 the Security Council took the unprecedented step of establishing the two ad hoc tribunals for the Former Yugoslavia and Rwanda.⁴⁰ Although there was

Crimes Against Internationally Protected Persons, Including Diplomatic Agents *opened for signature* Dec. 14, 1973, 28 U.S.T. 1975, 1035 U.N.T.S. 167.

38. JORDAN J. PAUST ET AL., *INTERNATIONAL CRIMINAL LAW: CASES AND MATERIALS* 157 (2d ed. 2000).

39. See generally M. CHERIF BASSIOUNI & EDWARD M. WISE, *AUT DEDERE, AUT JUDICARE: THE DUTY TO EXTRADITE OR PROSECUTE IN INTERNATIONAL LAW* (1995).

40. The ICTY was Established by S.C. Res. 808, U.N. SCOR, 48th Sess. 3175th mtg. at 2, U.N. Doc. S/Res/808 (1993). The Tribunal's statute appears in an Annex to the Secretary-General's report. *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, S.C. Res. 808, U.N. SCOR, 48th sess., U.N. Doc. S/25704/Add. 1 (1993). The Security Council adopted the Secretary-General's draft of the statute without change in Resolution 827. S.C. Res. 827, U.N. SCOR, 48th sess. 3217th mtg., U.N. Doc. S/Res/827 (1993); The ICTR was Established by Security Council

initial scepticism as to whether those tribunals would be able to indict and apprehend those thought most culpable in the wars and atrocities committed in Rwanda and the former Yugoslavia, they have been effective and successful, even if not perfect, institutions. Building upon those precedents, the International Criminal Court Treaty was proposed, negotiated, and adopted and entered into force decades sooner than most would have thought possible.⁴¹ Those institutions' jurisdiction does not encompass the crime of terrorism, except to the extent that acts of terrorism could be considered crimes against humanity. But the Lockerbie trial, which did address acts of terrorism, is an example of international enforcement that was successfully undertaken by the international community.

The last decade also brought progress in achieving an international consensus on the per se illegality of widespread attacks on civilian populations. In 1994 the General Assembly took the position that "criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable."⁴² The Declaration also required states to "refrain from organizing, instigating, assisting or participating in terrorist acts in territories of other states, or from acquiescing in or encouraging activities within their territories directed towards the commission of such acts."⁴³ The 1994 Declaration was followed two years later by a second Declaration along the same lines, suggesting the general willingness of the international community to address the problem of terrorism and terrorist havens.⁴⁴

The attacks of September 11th, like the tragic wars in the Former Yugoslavia, the Rwandan genocide, and the horrific bombing of Pan Am 103, presented the world with yet another opportunity to further strengthen the enforcement of international criminal law norms, and fill the gap in enforcement that has plagued efforts to control international terrorists. Indeed, if we leave aside the question whether the acts of September 11th

Resolution 955, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453rd mtg., at ¶ 2, U.N. Doc. S/Res/955 (1994).

41. See generally LEILA NADYA SADAT, *THE INTERNATIONAL CRIMINAL COURT AND THE TRANSFORMATION OF INTERNATIONAL LAW: JUSTICE FOR THE NEW MILLENNIUM* (2002); Sadat & Carden, *supra* note 17.

42. Declaration on Measures to Eliminate International Terrorism, G.A. Res. 49/60, U.N. GAOR 6th Comm., 49th Sess., 84th plen. mtg., U.N. Doc. A/49/60 (1994).

43. *Id.*

44. Declaration on Measures to Eliminate International Terrorism, G.A. Res. 51/210, U.N. GAOR 6th Comm., 51st Sess., 88th plen. mtg., U.N. Doc. Res/51/210 (1996).

were armed attacks or war crimes, they could clearly be characterized as acts of international terrorism⁴⁵ and crimes against humanity.⁴⁶ They involved the intentional killing (murder) of several thousand civilians and appear to have been carried out pursuant to a widespread and arguably systematic attack against a civilian population pursuant to the policy of the al Qaeda criminal organization, thus fulfilling the definition of crimes against humanity in the Rome statute for the International Criminal Court.⁴⁷ Moreover, there is no doubt that the attacks violated several of the international terrorism conventions referred to earlier,⁴⁸ and that the perpetrators could be prosecuted in U.S. courts under several different federal statutes.⁴⁹

45. This Essay, admittedly, does not address the often difficult question of terrorism's definition. For a discussion of this question, see generally James A.R. Nafziger, *The Grave New World of Terrorism: A Lawyer's View*, 31 DENV. J. INT'L. L. & POL'Y 101 (2003).

46. To the extent that the al Qaeda movement indiscriminately targets persons of particular nationalities for extermination, its actions could even be considered genocidal in character. *See also id.* at 108.

47. Rome Statute, *supra* note 19, art. 7(1)(a).

48. *See supra* note 37 and accompanying text.

49. Obviously, the death of the Sept. 11 hijackers precludes their prosecution. However, the indictments of other notable terror suspects are instructive regarding possible criminal charges brought against their accomplices. For example, the indictment of John Phillip Walker Lindh included the following charges: conspiracy to murder nationals of the United States, in violation of 18 U.S.C. § 2332(b)(2) (2002); conspiracy to provide material support and resources to foreign terrorist organizations (Harakat ul-Muhahideen and al Qaeda), in violation of 18 U.S.C. § 2339(b) (2002); conspiracy to contribute services to al Qaeda, in violation of 31 C.F.R. §§ 595.205 and 595.204 and 50 U.S.C. § 1705(b) (2002). Lindh pled guilty to a charge of supplying services to the Taliban, in violation of 50 U.S.C. § 1705(b) (2002), 18 U.S.C. § 2 (2002). *United States v. Lindh*, 227 F. Supp.2d 565 (E.D. Va. 2002). Richard Reid was indicted for attempted use of a weapon of mass destruction, in violation of 18 U.S.C. § 2332a(a)(1) (2002); attempted homicide, in violation of 18 U.S.C. § 2332 (2002); placing explosive devices on an aircraft, in violation of 49 U.S.C. §§ 46505(b)(3) and (c) (2002); attempted murder, in violation of 49 U.S.C. § 46506(1) (2002) and 18 U.S.C. § 1113 (2002); interference with flight crew members and attendants, in violation of 49 U.S.C. § 46504 (2002); attempted destruction of aircraft, in violation of 18 U.S.C. §§ 32(a)(1) and (7) (2002); using destructive device during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c) (2002); and attempted wrecking of mass transportation vehicle, in violation of 18 U.S.C. § 1993(a)(1) and (8) (2002). Note that Reid's motion to dismiss the final charge has been granted. *United States v. Reid*, 206 F. Supp.2d 132 (Mass. 2002). Finally, Zakarias Moussaoui was indicted for the following: conspiracy to commit acts of terrorism transcending national boundaries, in violation of 18 U.S.C. §§ 2332b(a)(2) and (c) (2002); conspiracy to commit aircraft piracy, in violation of 49 U.S.C. §§ 46502(a)(1)(A) and (a)(2)(B) (2002); conspiracy to destroy aircraft, in violation of 18 U.S.C. §§ 32(a)(7) and (34) (2002); conspiracy to use weapons of mass destruction, in violation of 18 U.S.C. § 2332(a)(a) (2002); conspiracy to murder United States employees, in violation of 18 U.S.C. §§ 1114 and 1117 (2002); and conspiracy to destroy property, in violation of 18 U.S.C. §§ 844(f), (i), (n) (2002). *United States v. Moussaoui*, 333 F.3d 509, 509 (E.D. Va. 2003). The prosecution in the case was recently barred from seeking the death penalty and from bringing forth testimony that Moussaoui "had any involvement in, or knowledge of, the September 11 attacks" as a sanction for the United States' refusal to allow enemy combatant detainees to testify on Moussaoui's defense. *United States v. Moussaoui*, 2003 U.S. Dist. LEXIS 17253 at 16 (U.S. Dist., 2003).

The U.S. government and the international community generally characterized the attacks of September 11th as criminal acts, as evidenced by the Security Council Resolutions adopted after the fact. Security Council Resolution 1373 is extraordinary in this regard. First, building upon the experience of the past decade, the Council assumed that the offenses were crimes of universal international jurisdiction that could be defined by the international community (and presumably could be the subject of adjudication by an international tribunal) and followed by international enforcement action. That is, the Security Council, invoking its Chapter VII authority, has suggested, through its pronouncements after the fact, that the acts of September 11th amounted to international crimes over which the international community (and presumably states, a subject beyond the scope of the present Essay) may assert universal international jurisdiction.⁵⁰ Although this is consistent with the position the Council has taken in asserting jurisdiction over the crimes committed in the Former Yugoslavia and Rwanda, it is a dramatic extension of those precedents because it suggests that they now apply to acts of international terrorism.

Moreover, as alluded to above, there was substantial debate prior to September 11th, 2001, whether terrorism was a universal jurisdiction crime at all. Many national tribunals had opined that it was not, and the *Princeton Principles of Universal Jurisdiction*, adopted in January 2001, nine months prior to the attack, omitted terrorism from the list of crimes over which States could presumptively exercise universal jurisdiction.⁵¹ Whether Resolution 1373 is the codification of custom, instant custom, or a new form of Security Council “legislation,”⁵² its adoption suggests a sea change in *opinio juris* on the issue of terrorism as a universal jurisdiction crime, enacted against the backdrop of a custom that had already been evolving in that direction.

In addition, Resolution 1373 appears to suggest that the principle *aut dedere, aut judicare* is also a matter of customary international law. That is, to the extent a crime is a universal jurisdiction crime, this principle appears to apply as a matter of customary international law. This would

50. SADAT, *supra* note 41, at ch. 5.

51. THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION, Principle 2(1) (Princeton Program in Law and Public Affairs, 2001). The Restatement of Foreign Relations Law (Third) suggests that certain acts of terrorism are increasingly accepted as universal jurisdiction crimes, such as “assaults on the life or physical integrity of diplomatic personnel, kidnapping, and indiscriminate violent assaults on people at large.” RESTATEMENT THIRD OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 cmt. (a) (1986).

52. See generally Paul C. Szasz, *The Security Council Starts Legislating*, 96 AM. J. INT’L L. 901 (2002).

represent a tremendous advance in the enforcement of international criminal law norms by national legal systems. Resolution 1373 also provides that states must “deny safe haven to those who finance, plan, support, or commit terrorist acts or provide safe havens,” suggesting, like General Assembly Resolutions 49/60 and 51/210,⁵³ that states may not serve as safe havens for terrorists without running afoul of international law. The question that remains is, of course, what consequences flow from a state’s breach of this obligation.

Given the general prohibition in the U.N. Charter against the unilateral use of force by states in resolving international disputes, the course of action that appears most consistent with the existing framework of international law is to request the Security Council to intervene in cases involving terrorist attacks launched from one state against the territory of another. Although some have made the case for the legality of the October 7th military response of the United States despite the absence of any explicit authorization of the Security Council, it should be noted that the facts of that case are quite unique. The Afghanistan situation involved attacks significant both in scale and symbolism, prior demands from the Security Council to the Taliban to turn over the individuals suspected of their organization, at least some evidence of complicity between the terrorist organization and the de facto government of Afghanistan, virtually universal and worldwide condemnation of the attacks themselves, and few questions as to their source. In other cases, the responsibility of a state may be much less evident, and the unanimity of the international community much less sure. In the case of September 11th, the United States could have obtained a third Security Council Resolution to enforce Resolution 1373. This final Resolution, like the famous Resolution 678 that authorized operation Desert Storm, would have required the Taliban regime of Afghanistan to turn over Osama bin Laden and his accomplices, based upon evidence establishing the equivalent of “probable cause”⁵⁴ that he and the al Qaeda network were responsible for the attacks of September 11th. The resolution could have set a deadline for doing so, and authorized states to use “all necessary means” to effectuate his capture if the Taliban refused to surrender him, just as Resolution 678 did in 1990 with regard to

53. See *supra* notes 42-44 and accompanying text.

54. For the argument that “clear and convincing evidence” of a State’s complicity should be the standard for a unilateral action based on self-defense in response to a terrorist attack launched from the territory of that State, see Mary Ellen O’Connell, *Evidence of Terror*, 7 J. CONFLICT & SECURITY L. 19, 21-28 (2002). This is not quite the same issue as what evidence should be required in order for the Security Council to issue the equivalent of an “arrest warrant” for the capture of a suspect in a case of international terrorism.

the Iraqi invasion of Kuwait.⁵⁵ There is no doubt that this hypothetical international “arrest warrant” would have been issued by the Security Council at the United States’ urging—the world expressed both its sorrow and solidarity with the United States in the wake of the September 11th attacks, and at the time Resolutions 1368 and 1373 were adopted, bin Laden was threatening the United Nations as a future target of his terrorist network. In this way, the U.S.-led military action and response to international terrorism would have set an important precedent and would have reinforced the normative content and institutional framework of international law.

IV. CONCLUSION

The temptation to jettison legal constraints is understandable when faced with a hostile enemy that does not itself obey the law. Perhaps there are times when law fails, or when civil disobedience is appropriate if law itself becomes illegal or immoral. But the attacks of September 11th did not present such a case. Indeed, the hideousness of the acts themselves so shocked the international community that they provided a unique opportunity to strengthen a growing international consensus condemning attacks on civilians whatever the motivation.⁵⁶ This is not to suggest that a military response was necessarily illegal under the circumstances, only that any military actions taken must, to be effective in the long term, employ force in service of the rule of law. The ultimate test of America’s strength will not be its ability to respond militarily to threats all over the world, threats that are by definition, random, designed to inflict terror, and carried out by very small numbers of individuals willing to die in the process of carrying out their criminal design. Instead, America’s strength will lie in its ability to persuade others to join its cause against international terrorism and to establish international institutions and international norms to do so, norms which states are willing to enforce domestically.⁵⁷

The attacks of September 11th presented the United States with an extraordinary opportunity to reshape the norms of international law to

55. S.C. Res. 678, U.N. SCOR, 45th Sess. U.N. Doc. S/Res/678 (1990). For an excellent treatment of recent Security Council practice involving Chapter VII see Mary Ellen O’Connell, *The U.N., NATO, and International Law after Kosovo*, 22 HUM. RTS. Q. 57, 67-70 (2000).

56. Anne-Marie Slaughter, *The Future of International Law: Ending the U.S.-Europe Divide*, in A DEFINING MOMENT—INTERNATIONAL LAW SINCE SEPTEMBER 11, Crimes of War Project, <http://www.crimesofwar.org/sept-mag/sept-contrib.html> (last visited Sept. 6, 2003).

57. Cf. JOSEPH S. NYE, JR., *THE PARADOX OF AMERICAN POWER* (2002).

promote their effective enforcement. International conventions against terrorism that proved ineffective to the extent terrorists could take refuge in states that had either unwillingly or willingly become accomplices to their action were to be enforced by Security Council action in the event that other means proved ineffective, and the terrorists' activities threatened the maintenance of international peace and security. Moreover, international military action, guided by law and explicitly authorized by a Resolution of the Security Council, would seemingly have proven no less effective than a military campaign launched on more ambiguous terms. Viewing the anti-terrorism campaign in Afghanistan as an international criminal law enforcement operation, rather than an act of retribution would also have created a positive precedent for future cases. The present unilateralist approach provides states wishing to do so with the opportunity to eliminate dissidents and those otherwise opposed to their rule, including governments or rebels in neighboring states, by labeling them "terrorists," and therefore not subject to the normal legal constraints that govern the use of force.⁵⁸ This erosion of the rule of law is in the interest of no state in the world, not even the world's only superpower. While the terrorists of September 11th may have been self-styled warriors, they and their ilk are not combatants engaged in international armed conflict, but pathological criminals that require arrest and deterrence.⁵⁹ Although it is now fashionable to suggest that we must abandon liberal regimes in favor of a new Hobbesian reality when faced with the menace of ruthless international criminals, Hobbes himself did not suggest that "going it alone" was the solution to survival in the state of nature. Instead, because even the strongest man can be felled by the weakest, with a knife in the back as he sleeps, cooperation and trust are prerequisites for survival in a world where life is, otherwise, nasty, brutish and short.⁶⁰

One can only hope that, with time, the United States government will return to the measured process of building effective multilateral regimes, and abandon the unilateralist path it now appears to tread. There may be a place or even a need for the use of force in response to the deadly acts of

58. This has occurred in Russia, in China, in Israel, and in Uzbekistan, for example.

59. See also Reisman, *supra* note 23, at 3.

60. Of course, under Hobbes' scheme, for cooperation to work there must be some power of enforcement, which is why he has often been cited for the proposition that the state of nature is preferable to cooperation in international affairs, unless it can be argued that the current collective security mechanism of the U.N. or the new International Criminal Court can provide such an enforcement mechanism. Thanks to Professor Larry May for bringing his wonderful analysis of Hobbes to my attention. See LARRY MAY, *CRIME AND HUMANITY: PHILOSOPHICAL REFLECTIONS ON INTERNATIONAL CRIMINAL LAW* (forthcoming).

international terrorists, but military power must be employed judiciously and subject to the constraints of international law. Bombing bin Laden may salve the pain of those victimized by his crimes, but it is unlikely either to bring him to bay or prevent the commission of future atrocities.⁶¹ This is particularly true if the military action and subsequent policies of the U.S. government further erode respect for the rule of law, and lessen the moral leadership that the United States could otherwise provide.

61. Cf. Michele L. Malvesti, *Bombing bin Laden: Assessing the Effectiveness of Air Strikes as a Counter-Terrorism Strategy*, 26 FLETCHER FOR. WORLD AFF. 17 (2002).