

USAWC STRATEGY RESEARCH PROJECT

**MAINTAINING THE LEGAL HIGH GROUND: THE LEGAL IMPLICATIONS OF USING ARMED FORCE
TO COMBAT TERRORISTS**

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The views expressed in this academic research paper are those of the author and do not necessarily reflect the official policy or position of the U.S. Government, the Department of Defense, or any of its agencies.

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ABSTRACT

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President Bush has consistently articulated his administration's policy to seize the initiative and utilize all elements of national power, including armed force, to combat terrorists and the nations that harbor them. The dialogue on the "legality" of striking Iraq as a threat to this country's vital interests as a result of its pursuit of weapons of mass destruction resounds in the media. However, there is significantly less discussion on the lawfulness of striking the terrorist groups which, in effect, declared war against the U.S. and viciously attacked it on September 11, 2001. This paper will demonstrate that although international law does not formally address the acceptability of attacking terrorists or nations which harbor them with armed force, there is sufficient legal justification to conduct these military operations in the global war on terrorism. A survey of treaty, customary international and selected case law will demonstrate the legal space in which the U.S. can aggressively fight its terrorist enemies.

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MAINTAINING THE LEGAL HIGH GROUND: THE LEGAL IMPLICATIONS OF USING ARMED FORCE TO COMBAT TERRORISTS

The war on terror will not be won on the defensive. We must take the battle to the enemy, disrupt his plans, and confront the worst threats before they emerge. In the world we have entered, the only path to safety is the path of action. And this nation will act.¹

We will make no distinction between terrorists and those who knowingly harbor or provide to them.²

—President George W. Bush

President Bush is clear and unequivocal in stating his administration policy to aggressively and offensively combat and defeat the clear and present danger posed by terrorists and the states that harbor them. This policy is a striking departure from the United States' traditional treatment of terrorism as a crime and terrorists as criminals subject to our judicial system, enjoying all the rights inherent within that system. Not so clear are the implications of such a policy under international law.

Although the world changed on September 11, 2002, although, there was no corresponding change in international law. Witnessing the horror of the attacks in New York City and Washington, D.C., international support was nearly unanimous in condemning the attacks and offering support in the U.S war on terrorism. However, the existing legal order prior to Sept. 11th relied almost exclusively on criminal law to deal with terrorists and terrorism. While criminal law was “formally equipped” to deal with terrorists, its use was neither adequate nor “satisfactory” to combat the threat.³ And international law governing armed force was, and is, not formally equipped to address use of force issues related to combating terrorism.⁴ Therefore, can the United States, using military force instead of police and courts, prosecute this global war on terror in a lawful manner? And, if so, how does it go about doing so?

This is no mere academic discussion, as the long-term unintended consequences of US military action may come back to “haunt” this country. Our actions today will certainly “influence expectations as to the acceptability of future actions [by other states] involving use of force”⁵ in their battles against or with groups they see as or

deem to be “terrorists.” As a result, “U.S policymakers must be mindful of the very real and precedential effects” of their chosen course for the war on terrorism.⁶

In the conduct of this war, the United States faces two significant legal dilemmas. The first revolves around the legality of waging war on terrorists and the nations which harbor them. How does a nation justify a “just” war on terrorists under international law? The second dilemma involves the means employed to fight terror once the battle is joined. What does a “just” war on terrorists look like? Unfortunately, there is no “rule book” guiding U.S. action as it negotiates this legal “obstacle course.” Two branches of the international law regulating armed conflict, *jus ad bellum* and *jus in bello*, do not address these urgent questions. Therefore, the United States and its allies are setting out on a bold new path in the international law regulating the use of armed.

While the bodies of law which comprise these branches of international law do not formally or adequately address terrorism, there is ample room within both existing treaty and customary international law for the U.S. to justify military strikes on terrorists. In utilizing armed force in its war on terror, the U.S. must rely on some “elasticity”⁷ in existing use of force provisions within that established international legal order, and should explicitly state at the outset how the law is being applied. A clear articulation of the standard will draw a line around a narrow exception for combating terrorism and not open a “Pandora’s box” for self-serving interpretations of the law that allow for indiscriminate use of force in the future. This paper will address the legal bases available to the United States to justify the lawfulness of its use of armed force in its war on terrorists and will suggest guidelines to assist policy makers in maintaining the legal high ground while aggressively attacking the terrorist enemy.

INTERNATIONAL LAW REGULATING ARMED CONFLICT

As stated earlier, there are two branches of international law regulating armed conflict, *jus ad bellum* and *jus in bello*. *Jus ad bellum* addresses the conditions under which states can legitimately (morally and legally) go to war (thus making the war just). And *jus in bello* is the body of law which governs how wars are fought and the legality of actions taken while at war.

The United Nations Charter is one body of international law regulating *jus ad bellum* issues related to armed conflict. Focused on state-on-state conflict, the charter’s

purpose is “to restrict and regulate the use of armed force by states.”⁸ To that end, the international order devised by the United Nations and its charter was developed with three objectives in mind: the maintenance of an orderly world that emphasizes cooperation among states, a preference for change by peaceful processes rather than coercion, and the minimization of destruction.⁹ Under the United Nations Charter, use of force is prohibited except in very narrowly applied instances. Article 2(4) of the Charter states:

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the Purposes of the United Nations.¹⁰

This Charter (as the body of treaty law addressing jus ad bellum and governing armed conflict) was developed to prevent the ravages of world war which the world experienced twice in the space of thirty years. As the renowned political scientist Hans Morgenthau stated “international law is an ‘ideology of the status quo,’”¹¹ the purpose of which is to maintain the peace and the existing international order. While it certainly mediated superpower conflict, this body of law did little to actually limit international conflict,¹² and did not foresee or account for the emergence of transnational terrorist groups with global reach.

There is a significant exception in the UN Charter which allows the use of force and is generally applicable to the current war on terrorists. Article 51 of the UN Charter allows states to act in self defense and states that:

Nothing in the present Charter shall impair the inherent right of individual or collective self defense if an armed attack occurs against a Member of the United Nations until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by members in the exercise of the right of self defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.¹³

As stated, there are four specified conditions necessary to invoke Article 51. The first requirement is that “an armed attack” has occurred. The second requirement is that armed attack must pose a breach or threat to “international peace and security.” Third, the state exercising the right of self defense must immediately report its actions to the

Security Council. And, fourth, the actions in self defense will cease upon action by the Security Council to “maintain international peace and security.”

Historically, the nature of terrorism and terrorist acts neither rose to the level which threatened the international order nor were they considered to be armed attacks in the context of Article 51. Consequently, the United Nations did not recognize or authorize the use of force as an appropriate response to terrorism and allowed member states to deal with terrorism within their borders as they saw fit. Most states employed their criminal justice system to prosecute terrorists and/or utilized their police and armed forces to quell insurgent elements.

Two primary bodies of law regulate *jus in bello* concerns, the Geneva Conventions (agreements from conventions off 1864, 1928, 1929, 1949, and 1977) and protocols from the Hague Conferences (held in 1899 and 1907). Collectively, these protocols sought to establish the law of warfare codifying generally acceptable and prohibited practices employed in the conduct of warfare.

Again, the framers of these *jus in bello* protocols did not envision a transnational terrorist enemy bent on random violence on a massive scale. As a result, the term terrorist is not found in the protocols of either the Geneva Conventions or Hague Conferences. Obviously, the U.S. should utilize the recognized provisions of Hague and Geneva in the conduct of a just war on terrorism. However, since terrorism and terrorists are not addressed in the “law of land warfare,” the United States opted to define terrorists as unlawful combatants. This designation has created extensive debate. But until there is an accepted formal definition of the legal status of terrorists, the term unlawful combatant is both appropriate and useful. As combatants, terrorists are considered to be legitimate military targets despite hiding behind a veneer of anonymity and secrecy.

The fact that the law, both *jus ad bellum* and *jus in bello*, does not formally or specifically address terrorists or terrorism provides room for significant debate on the propriety of using armed force. Prior to discussing the space available in existing legal norms which allow such action, two key terms in the war on terrorism must be defined. What is a terrorist? And, what is “war” in the context of the struggle against terrorism?

DEFINITIONS – WAR AND TERRORISM

This military action is a part of our campaign against terrorism, another front in a war that has already been joined through diplomacy, intelligence, the freezing of financial assets and the arrests of known terrorists by law enforcement agents in 38 countries. Given the nature and reach of our enemies, we will win this conflict by the patient accumulation of successes, by meeting a series of challenges with determination and will and purpose¹⁴.

— President George W. Bush

Two key terms in the war on terrorism defy clearly recognized definitions – war and terrorism.

War - Many observers fail to view the current challenge as war and, therefore, do not define terrorists as combatants, lawful or otherwise. While it is beyond the scope of this paper to address the legal nuances of domestic U.S. law and the War Powers Resolution, it is clear “Congress can initiate an undeclared state of war against places, persons or things by passing a specific statutory authorization for the use of military force.”¹⁵ And Congress did so on September 14th, 2001, when it passed Senate Joint Resolution 23 authorizing 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...or harbored such organizations by such nations, organizations, or persons.”¹⁶ A US District Judge, Michael B. Mukaysey recently ruled “a formal declaration of war is not necessary in order for the executive to exercise its constitutional authority.”¹⁷ For the purposes of this paper, Joint Resolution 23, the congressional Authorization to Use Armed Force, is recognized as a declaration of limited war where “the President can use military force to destroy a delineated class of entities.”¹⁸ In this case the “delineated class of entities” refers to the terrorists responsible for the attacks and those states that harbor or otherwise support them.

Terrorism - Terrorism is a term which has historically defied definition by the international legal community. Indeed, to this day, despite the Sept. 11th attacks and numerous United Nations actions in respect to terrorism, the terms terrorism and terrorist remained undefined in the U.N. Charter, any resolution or multi-lateral treaty.¹⁹ As previously stated, in 1945, “the drafters of the UN Charter did not contemplate the existence of international terrorists.”²⁰ While the UN did enact thirteen narrowly defined and focused conventions addressing terrorism and specific acts of terrorism (defined as

crimes), it has done little to develop a “comprehensive convention on terrorism.”²¹ States have been motivated against defining terrorism due to a host of self-serving political considerations. Additionally, the non-aligned movement within the UN is reluctant to define terror and terrorism because of the potential damping effect on movements of national liberation. Likewise, numerous “official” (and inconsistent) definitions of terrorism exist in various U.S. Government agencies. Despite the lack of a standardized definition, however, common themes resonate in the various definitions. Elements such as the target (civilians or non-combatants), the nature of the actor (most often sub-national group(s)), the motivation (political), and the audience (a much larger group than those targeted) are very consistent.

The definition used throughout this discussion is “contained in Title 22 of the United States Code, Section 2656(d):

The term terrorism means premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents usually intended to influence an audience.”²²

While not reflecting an international perspective, this definition reflects US law and accurately depicts the nature of both the violent acts of September 11, 2001 and their perpetrators.

With these key terms defined, an analysis of the legal implications of the current U.S. war on terrorism is possible. A brief discussion of historical U.S. reactions is necessary to establish a baseline for historically acceptable measures to combat terrorism.

U.S. HISTORICAL POLICY AND ACTIONS TO DEAL WITH TERRORISM

Unlike terrorists and communist guerillas, we do not believe the end justifies the means. We believe in the rule of law. This nation has long been a champion of international law.

—Former secretary of State George Schultz²³

With few exceptions, the United States historically relied on the criminal justice system to deal with terrorists and terrorism, and not the use of armed force by the military. The US responded to terrorist acts by employing one or a combination of four policy objectives: “using the tools of criminal justice; building new international norms

and enforcement mechanisms through treaty agreements; disrupting terrorist structures through civil sanctions (freezing assets); and prudent use of military force to prevent terrorist attacks and disable infrastructures.”²⁴ The Reagan administration was the first to adopt a policy to use force to combat and “suppress” terrorism when it “enacted [the policy] into law under a 1984 National Security Decision Directive.”²⁵ In fact, prior to September 11th, the United States employed armed force in reaction to only three terrorist events: the bombing of a Berlin disco by Libyan operatives in 1986, an Iraqi assassination attempt against former President George H.W. Bush in 1993, and the embassy bombings in Kenya and Tanzania in 1998.²⁶ Instead of combating terrorism with all elements of its national power in a coordinated strategy, the U.S. limited its policy to “two succinct policy objectives: (1) countering and deterring current threats (prevention) and (2) holding terrorists accountable for their actions (accountability).”²⁷ Recently, a new, lethal and pervasive threat emerged which demonstrated the ineffectiveness of the self imposed limitations on U.S counter-terrorism policy.

THE NEW ENEMY – AL-QAEDA

Different circumstances require different methods, but not different moralities.²⁸

—President Bush at West Point, New York

Our priority will be first to disrupt and destroy terrorist organizations of global reach and attack their leadership; command, control and communications; material support; and finances.²⁹

—President Bush, National Security Strategy

The September 11th attacks required changes in U.S. policy. The events of that day changed the world’s outlook on the dangers of modern terrorism and demanded a different approach to combating the newly defined threat. While terrorism has arguably existed for centuries, modern developments in technology, communications, and transportation make today’s terrorists a more potent threat with truly global reach. And the realization of the threat posed by terrorists struck home, literally and figuratively, with horrifying effect in New York City and the Nation’s capitol. President Bush characterizes that threat in his National Security Strategy, stating that “the gravest

danger our Nation faces lies at the crossroads of radicalism and technology.”³⁰ The personification of that danger is Al-Qaeda and its leader, Usama bin Laden.

Although not fully understood or appreciated, bin Laden “declared war” on the United States in the 1990’s. He organized, trained and deployed a complex network of operatives to prosecute that war. He formed his organization, Al-Qaeda, with the objective to “unite all Muslims to establish a government which follows the rule of the Caliph [an historic and currently non-existent central spiritual leader in Islam] and the only way to do that is to establish the Caliphate³¹ by force.”³² Al-Qaeda’s goal, according to bin-Laden “is to liberate the land of Islam from the infidels and establish the law of Allah.”³³ To that end, bin Laden began issuing fatwas (or religious edicts) calling for an armed struggle against America and “the Jews” which became known as his version of Jihad (literally translated as “struggle” in Arabic). As early as June 1996, he called a truck bomb incident in Dhahran, Saudi Arabia “the beginning of war between Muslims and the United States.”³⁴ He issued another fatwa in August, 1996 and the U.S. State Department finally took notice stating the fatwa articulated an “intention to attack Americans and our allies, including civilians, anywhere in the world.”³⁵ These fatwas continued in a steady stream throughout 1996 and 1997. In February 1998, bin Laden issued a declaration of war, entitled Declaration of the World Islamic Front for Jihad Against the Jews and the Crusaders, which was published on February 23, 1998 by Al-Quds Al-Arabi.³⁶ That declaration reads, in part:

To kill Americans and their allies, both civil and military, is an individual duty of every Muslim who is able, in any country where this is possible, until the Aqsa Mosque [in Jerusalem] and the Haram Mosque [in Mecca] are freed from their grip and until their armies, shattered and broken-winged, depart from all the lands of Islam, incapable of threatening any Muslim.³⁷

While the United States and the rest of the world heard the warnings and declarations of war, they did not adequately recognize or truly appreciate the nature of the threat.

In hindsight, it is apparent bin Laden and Al-Qaeda began a campaign of terror against the U.S. in the early 90’s. He and his group claimed responsibility for (or at least an association with) attacks on the World Trade Center and involvement in the fighting against U.N. and U.S. forces in Somalia in 1993; truck bombs at US embassies in Kenya and Tanzania in 1998; the bombing of the USS Cole in Yemen in 2000; and

other terror operations foiled by police and intelligence organizations. These operations, as violent and deadly as they were, paled in comparison to the spectacular attack on September 11th, 2001. Based on those devastating attacks, Al-Qaeda would no longer be viewed purely as a shadowy, criminal organization, but as a determined and committed enemy joined in battle in a new type of war against the United States and its allies. Bin Laden's Al-Qaeda is now recognized to be an "armed force of sworn members that use military force to further political goals"³⁸ and therefore as combatants

It is now evident Bin Laden built a complex transnational terrorist organization the likes of which the world had never seen. In a December 2002 speech, George J. Tenet, the Director of the Central Intelligence Agency, addressed the Al-Qaeda's pervasive, global reach. He stated that more than 3,000 Al-Qaeda operatives had been apprehended in more than 100 countries since September 11th, 2001.³⁹ Bin Laden was obviously very effective in building an organization comparable to a large "multinational holding company with its headquarters in Afghanistan."⁴⁰ He employed all of the benefits of the globalized society – the ability to move people, money, and information quickly, quietly, and with very little traceability – to deploy a large and pervasive force. His organization is based on a loose alliance of groups and cells which receive financial backing and sponsorship from "the base" (the English translation of al-Qaeda). At the center of the base, reside bin Laden and his board of directors managing the network – its operations and finances.⁴¹ Following the defeat of the Soviet Union in Afghanistan, bin Laden capitalized on the instability of that country and, utilizing the skills and networks he had developed, he recruited, funded, and supported the mujahadin "freedom fighters" who had been involved in the Soviet-Afghan war to pursue another "jihad." The purpose of this "holy war" is to defeat the "Crusaders" of the west and to establish his Caliphate. In the process, Al-Qaeda became the "quintessential practitioner of fourth generation warfare."⁴²

In a matter of hours, as the world witnessed the violent attack on the U.S., it was painfully obvious that relying solely on the legal system to pursue, apprehend and try terrorists as criminals was no longer a viable option. Al-Qaeda was recognized to be much more than a criminal organization. A new security environment had emerged or at least was very much more apparent. The security environment changed with the

understanding of the nature of the threat and danger posed by Al-Qaeda to the United States and its allies. Dr. Richard Shultz, Jr. describes that security environment as one in which “self help is the only realistic alternative, [where] intelligence agencies can provide evidence of terrorist organizations and activity, [and] terrorism and weapons of mass destruction are very real threats, and [their] global reach is real.”⁴³ In this new environment, the weaknesses and inappropriateness of solely employing the criminal justice system of the American legal establishment to combat terrorism is glaringly apparent.

WEAKNESSES OF EMPLOYING CRIMINAL LAW TO COMBAT TERRORISM

Given the goals of rogue states and terrorists, the United States can no longer solely rely on a reactive posture as we have in the past⁴⁴.

—President Bush, National Security Strategy

Prior to September 11th, states dealt with terrorism as crime for several reasons. Acts of terrorism were viewed as isolated criminal acts, not as a series of individual engagements in a coordinated campaign. As previously discussed, acts of terrorism and their effects did not rise to the level where they crossed the threshold to be deemed “armed attacks” or “threats to international peace and security.” Therefore, these attacks did not merit consideration for use of armed force by the United Nations. While condemning terrorism as a criminal activity and addressing steps for the international community to take in reaction to acts of terror, little was done to combat the threat. Terrorism was considered to be a sub-national phenomenon (as it is under U.S. law) instead of a trans-national one. As a result, states were left to their own devices, to apply domestic criminal law and rely on the police of the international community to apply the thirteen narrowly defined conventions, when applicable, to hold terrorists accountable for their actions. This “episodic tit-for-tat, passive defense”⁴⁵ was obviously unsuccessful in light of the cumulative effects of Al-Qaeda’s campaign against the United States and its allies leading up to September 11, 2001.

“Criminal justice must be reactive – always ‘behind the curve.’”⁴⁶ In an effort to allow space in the “personal sphere,” liberal democracies allow their citizens “many

opportunities to experiment with different living styles⁴⁷ and ideologies. Treating terrorist acts as crimes kept the issue “in house” and, with very few exceptions,⁴⁸ did not attract international attention that necessarily accompanies the use of armed force. This approach was appealing to the international community because it maintained the status-quo within the international order. But, this “indulgent, nonviolent accommodation” did not “deter terrorism, but may have actually encourage[d] it.”⁴⁹

Capitalizing on the individual liberties guaranteed by Western liberal democracies, transnational terrorist groups maintained a “protective bubble” around their activities to shield them from discovery by Western law enforcement agencies. While state action was seriously constrained by the restraints on the use of force and other “international commitments and incentives,”⁵⁰ terrorist groups built a vast and complex infrastructure and deployed it across the globe. Bin Laden, as the masterful purveyor of global terrorism, certainly took advantage of that bubble. And Al-Qaeda thrived. While Western governments (particularly the U.S.), attempted to chase down terrorists as criminals involved in isolated terrorist incidents, Bin Laden, in effect, gained more than decade’s head start in deploying and his employing his cells of terrorist operatives. Now the U.S. and its allies are playing catch up, faced with a deadly and ubiquitous transnational group with truly global reach.

The question asked on September 12th is “how do you play by the rules and yet deal effectively with someone who does not?”⁵¹ Usama bin Laden may have underestimated U.S. reaction to Al-Qaeda’s assault on American soil. Years of accommodation and operating in the protective bubble very likely gave him a false sense of security. However, he crossed a critical threshold which allowed the United Nations, U.S., and the court of world opinion to view his acts as going well beyond the scope of mere criminal acts. And the United States “quickly moved beyond a criminal enforcement paradigm in determining how to respond to the attacks.”⁵² President Bush, stating “the best defense is a good offense,”⁵³ changed the U.S counterterrorism mission to defeat and disrupt terrorists, replacing the previous policy of merely preventing terrorist attacks and holding the perpetrators legally accountable.⁵⁴ In light of this policy change, the U.S. can use either its criminal justice system or armed force to deal with terrorists because the September 11th attacks “can be properly characterized

as both a criminal act and an armed attack.”⁵⁵ Thus, the use of military force has become a viable policy option to combat and defeat the terrorist enemy.

“THE LAW” AS IT APPLIES TO AN ARMED RESPONSE TO TERRORISM

The most basic obligations in this new conflict have already been defined by the United Nations. On September the 28th, the Security Council adopted Resolution 1373. Its requirements are clear: Every United Nations member has a responsibility to crack down on terrorist financing. We must pass all necessary laws in our own countries to allow the confiscation of terrorist assets. We must apply those laws to every financial institution in every nation.⁵⁶

—President Bush

Though the existing body of international law does not specifically address terrorism, it provides sufficient elasticity and “space” for interpretation to allow for the U.S. to lawfully combat terror and terrorists through the use of armed force. The legal justification is readily available within both treaty law and that body of law known as customary international law.

U.S. Justification under Treaty Law

As previously discussed, historically, terrorist acts did not generally rise to the level where they were considered “armed attacks” against a state nor did they pose a threat to “international peace and security.” Therefore, terrorism or “the mere harboring of a terrorist group”⁵⁷ was not traditionally recognized as meeting the level of threat to a state’s security which the allowed use of armed force. As a result, states rarely invoked Article 51 to justify their actions against terrorists, and in the event they did, it was widely dismissed and condemned by international opinion.⁵⁸ However, “there is nothing in Article 51...that requires self-defense to turn on whether an armed attack was committed directly by another state.”⁵⁹

There is little debate the Al-Qaeda attacks on the World Trade Center and the Pentagon qualified as “armed attacks” which posed a threat to “international peace and security.” While the United Nations Security Council, in its resolutions following the attacks, “unequivocally condemned” the attacks and for the first time in history declared terrorist acts as a threat to international peace and security,⁶⁰ it did not formally classify

the terrorist acts as “armed attacks”⁶¹ nor did it authorize the use of armed force to combat the threat. However, it is significant, that Security Council Resolutions 1368 and 1373 (on 12 and 28 September, respectively) explicitly and repeatedly “recognized [or reaffirmed] the inherent right of individual or collective self-defense” to “combat by all means threats...caused by terrorist acts.”⁶² And the magnitude of the attacks, the thousands of deaths, many more thousands of injuries, property damage, and disruption of world economic markets costing billions of dollars, were more comparable to the Japanese attack on Pearl Harbor⁶³ than to an isolated criminal act. The fact that international reaction was strong and swift, with multiple international organizations condemning the attacks and 136 countries offering support to the US in the global war on terrorism,⁶⁴ suggests a wide consensus affirming an interpretation of the acts as “armed attacks.”

While the Security Council did not explicitly authorize the use of force, it did make two very important, unprecedented accommodations in Security Council Resolutions 1368 and 1373 which implied consent to use force, and also suggest the Security Council recognized the acts as “armed attacks.” First was the “invocation and reaffirmation of the right of self defense under Art. 51 in [the Resolutions],”⁶⁵ implying a Security Council view that the attacks reached the level of “armed attacks.” Additionally, the formal declaration of a “threat to international peace and security” in those Resolutions reinforced the Council’s recognition that the “triggers” for use of force under Article 51 were in place.

Therefore, in various Security Council Resolutions, the United Nations provided the legal space for the United States to use armed force to combat terrorism. But, while the Security Council invocation of the self defense provision in the U.N. Charter is sufficient justification for U.S. use of armed force, other sources of international law are also available to strengthen the U.S argument for the legality of its actions.

U.S. Justification under Customary International Law

A brief discussion on the definition and sources of customary international law is necessary to describe its appropriateness in the absence of established treaties or agreements. As the name suggests, customary law is based on custom and reflects the

practice of nations consistently exercised out of a sense of legal obligation. There are two elements to customary law: state practice and legal obligation (also known as “*opinio juris*”). State practice is based on what the nation actually does and reflects the sum total of state actions. That state practice must be “general and consistent”⁶⁶ reflecting practice over time. Such practice is relatively easy to identify as it includes actions by its executive, legislative bodies, judiciary and diplomats.⁶⁷ Not as easy to identify is the psychological aspect of the sense of the state’s legal obligation to act (or not act) in a certain manner. It is assumed, in the international legal community, that state practice is based on this legal obligation unless there are statements from the state or its actors stating otherwise.

There are several challenges in both identifying and interpreting customary law. First, there are 192 member nations within the United Nations. What are the norms (not codified in the Charter or other treaties) which are generally recognized by this diverse international community as international customary law? A few examples of customary law include the treatment and immunity of diplomats, limits of sovereignty in territorial waters, a general recognition that torture is unlawful,⁶⁸ and recently various human rights issues. And, with such a diverse population in the international community what are the recognized sources of this type of law? While state practice and *opinio juris* are the formal requirements for customary law to take effect, additional sources of customary law include resolutions by the United Nations General Assembly, international agreements, treaties not yet ratified,⁶⁹ and rulings of the International Court of Justice, among others. A second challenge involves how long a practice needs to be exercised before it becomes customary law. While the recognized standard is general and consistent, suggesting practice over time, there is no defined or prescribed time horizon which dictates when practice becomes customary law. And finally, as in all international law issues, there is no “final arbiter”⁷⁰ to reconcile disputes or claims concerning customary international law (as even decisions of the ICJ are only binding on the parties involved in the specific case). Despite the challenges inherent in applying customary international law, according to Article 38 of the Statute of the International Court of Justice, it ranks second only to treaties as a generally accepted source of law.⁷¹

This description of customary law sets the stage for a discussion of the principle of anticipatory self defense which is based on customary law. The classic and precedent setting case for this principle is the Caroline case which is directly applicable to the current war on terrorism.

The Caroline case resulted from a British attack on a U.S. steamboat on December 29, 1837. The British mission “was to destroy the American steamboat Caroline, which had been carrying supplies to a group of Canadian insurgents” in the vicinity of Niagara Falls, New York.⁷² The British crossed the river from Canada under the cover of darkness, boarded the steamboat, set it on fire and adrift. And it eventually drifted over the Niagara Falls.⁷³ Two US citizens were killed,⁷⁴ and the US protested loudly and nearly went to war with Britain. Lord Ashburton, the British Foreign Minister, in response to the U.S protest, claimed British forces acted in self defense. In a series of correspondence between U.S. Secretary of State Daniel Webster and Ashburton, “Webster outlined what he believed were the conditions for a proper claim of self defense.”⁷⁵ The criteria articulated by Webster in that correspondence became nearly universally accepted as the basis for the law of anticipatory self defense. He stated “there must be a necessity of self defense, instant, overwhelming, leaving no choice of means and no moment for deliberation.”⁷⁶ He also stated the acts in self defense should be “nothing unreasonable or excessive, since the act justified by the necessity of self-defense must be limited by that necessity and kept clearly within it.”⁷⁷ (The Caroline incident was ultimately resolved with Webster’s acceptance of Ashburton’s claim that self-defense was justified.) The resulting Caroline criteria are generally recognized as governing anticipatory self defense are those of “necessity and proportionality.

The necessity criterion suggests two sub-criteria which must be applied prior to an attack in self defense. The first sub-criteria “combines an exhaustion of remedies component with a requirement for a reasonable expectation of future attacks – an expectation that is more than merely speculative.”⁷⁸ While it doesn’t specify use of force as a last resort, it implies no other reasonable option exists to preclude the attack. Secondly, if an attack isn’t reasonably expected, there is no necessity. There is no requirement for an “armed attack” to actually occur to trigger anticipatory self defense. A state doesn’t need to take the first blow in order to respond. However, if no future

attacks are anticipated, use of force may be considered to be a reprisal, which is prohibited by customary international law.

Webster's second criterion, proportionality, specifies "that the use of force or coercion be limited in intensity and magnitude to what is reasonably necessary promptly to secure the permissible objectives of self-defense."⁷⁹ "Because the purpose of self defense is to preserve the status quo, proportionality requires that military action cease once the danger has been eliminated."⁸⁰ There is no mention that the acts in self defense must mirror the original attack or the magnitude of the anticipated attack. Therefore, the standard is the force necessary to defeat the aggressor and neutralize the danger.

As circumstances have changed since Secretary Webster and Lord Ashburton debated the issue in the 1840s, the anticipatory self defense standard has evolved as well. While there is significant debate on the direction and magnitude of the evolution of the standard, its growth is apparent in three significant areas: the imminency of the anticipated attack; the timeliness of the response; and growth in the proportionality criteria. Daniel Webster did not (and, indeed, could not) foresee the speed with which enemies could deploy to strike nor the lethality of the weapons available today. Therefore, most significantly, his articulation of the standard allowing for "no moment for deliberation"⁸¹ is dated. In Webster's day, waiting to see the arrival of the enemy's fleet on the horizon prior to acting was reasonable,⁸² allowing sufficient reaction time and maneuver space to respond. Today, however, that luxury no longer exists. A more reasonable standard is that anticipatory self defense is justified when the circumstances do not provide any other effective or timely defense against the anticipated attack and self help is the only option available.⁸³

Some critics argue the United States response to the September 11th attacks was not timely based on Webster's "instant, overwhelming, leaving no room for deliberation" standard in the Caroline case. Those aspects of warfare or armed force which provided the necessary reaction time to act such as the sails of an opposing Navy on the horizon, an enemy outfitted in resplendent uniforms under unit and national flags are missing in this modern war on terror. Again, Webster did not foresee the existence of transnational terrorist groups with the operational speed and lethality of Al-Qaeda. The discovery of

the extent of the Al-Qaeda network, its ability to immediately and continually attack the U.S. and its vital interests, and its declared and demonstrated intent to do so, made the U.S. response timely.

In addition to the timeliness criteria, the proportionality criteria evolved to address a series of attacks rather than the single isolated attack suffered in the Caroline incident. This expansion of the standard known as “cumulative proportionality” reflects that “the international community generally acknowledges that the proportionality question...may take into consideration an aggregation of past, as well as current attacks.”⁸⁴ The series of attacks clearly demonstrates a manifest intent to continue to attack the victim state, as well as providing the expectation that future attacks should be anticipated.

The Caroline standard, as developed over time, clearly applies to the current war on terrorism. The presence of the “necessity” of action is obvious. As previously discussed, Usama Bin Laden continues to articulate his manifest intent to attack the United States until it “capitulates or is destroyed.”⁸⁵ That intent, coupled with his capability to inflict harm, as demonstrated by a series of attacks over the last decade, provides the expectation the U.S. is justified in anticipating future attacks. Although the time and location of those expected future attacks are unknown, the reasonable expectation of future attacks allows for an aggressive and proportional use of armed force to defeat that threat. Timeliness standards were met as the United States took reasonable steps to identify the perpetrators of the attacks. It then pursued diplomatic measures to apprehend Bin Laden before employing armed force to defeat an identified threat to its citizens, property, and, arguably, its very survival.

A State's Obligation to “Root Out” Terrorists

Despite no universally accepted definition of terrorism, various Security Council Resolutions after Sept. 11th address a state's duty to assist in the prevention and combating of terrorism. Resolution 1368 directs that states “shall refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts... [and] will deny safe haven to those who finance, plan, facilitate, support, or commit terrorist acts, or provide safe havens.”⁸⁶ Three resolutions (1378, 1386 and 1390)

“urge[d] member States ‘to root out terrorism, in keeping with the Charter of the United Nations.’”⁸⁷ In general, the United Nations’ member states are required to take the measures necessary to ensure that actions which are “injurious” or threaten other members are prevented⁸⁸ and, specifically, by various Security Council resolutions, support of terrorism is proscribed. States which do not exercise this duty cannot expect protection or even recognition of their own rights, including sovereignty.⁸⁹ Also, the belligerence of the party provided support and/or haven may transfer to the “host” state making that state accountable to a victim state and the international community as a whole.⁹⁰ This is an area of international law which has proven to be adequately flexible and elastic in recent months allowing for an aggressive use of force to better combat terrorists.

Decisions from several International Court of Justice (ICJ) cases are indirectly applicable to states that harbor terrorists. The ICJ decisions address a state’s obligation to deny their territory to groups which may cause harm to other nations. While not directly applicable to terrorists, the ICJ ruled that Albania was responsible for the actions of others from within their borders in the Corfu Channel case (United Kingdom v. Albania). In its decision, the Court “held Albania responsible for damage caused to British destroyers, flowing from proof of Albania’s knowledge of mine-laying in its territorial waters.”⁹¹ The mere knowledge of the mine laying left Albania responsible for the acts as it had a responsibility to ensure no wrongs were committed against other states from within its borders. (The court did find, however, that British ships violated Albanian territorial sovereignty by conducting minesweeping operations which were a “manifestation of a policy of force.”⁹²) This “mere knowledge” principle found in the Corfu Channel case is applicable to the war on terrorism. Based on that principle, “states that [knowingly] permit their territory to be used as a base of operations for terrorist acts against other countries have committed an international wrong.”⁹³ In 1980, the ICJ found (in the U.S v. Iran) that Iran was liable during the hostage crisis resulting from the student takeover of the US embassy in Teheran. While there was no solid evidence the government of Iran ordered the action, its statements of support were sufficient for the court to hold it liable for the students’ seizure of the U.S. embassy.⁹⁴

States, then, clearly have a legal obligation under various United Nations Security Council Resolutions backed, indirectly, by case law (ICJ rulings), to deny the use of their territory to terrorist groups (notwithstanding the prohibition against providing support and/or safe haven). When and if a “state is unable or unwilling” to suppress terrorism from within its borders it is permissible for the “victim state” to enter that country for the purpose of self defense.⁹⁵ The entry into the “harboring state” and subsequent use of force, however, must be focused on the specific threat posed by the terrorist group and its supporters. Territorial integrity and sovereignty yield to self defense when international obligations are not met.⁹⁶ This use of armed force in a third country to defend against terrorists appears to be gaining wide international support as several historical examples illustrate.

INTERNATIONAL REACTION TO PREVIOUS U.S. STRIKES ON TERRORISTS

In leading the campaign against terrorism, we are forging new, productive international relationships and redefining existing ones in ways that meet the challenges of the twenty-first century.⁹⁷

—President Bush

Historically, the United States has used armed force against transnational terrorist groups in other countries on only three occasions. Interestingly, all were against Bin Laden and Al-Qaeda. The first instance was a pair of strikes in Afghanistan and Sudan in 1998 in reaction to embassy bombings in Africa. The second use of force was Operation ENDURING FREEDOM, the large scale operation in Afghanistan which commenced in 2001 and continues today. And, third, the Predator strike against a senior Al-Qaeda operative in Yemen on November 3, 2002. The international reaction to these strikes provides insight into the perceived legality of each of the actions. “International lawyers continue to look for the ‘international reaction’” to gauge “community intent” and acceptability within the international community.⁹⁸ The cumulative effect of international reaction to these strikes suggests guidelines for use when considering whether the use of force meets international acceptability standards.

Sudan and Afghanistan Strikes - 1998

On August 13, 1998, U.S. embassies in Kenya and Tanzania suffered bomb attacks. These near simultaneous attacks, which appeared to be coordinated, if not synchronized, killed 250 people including 12 Americans. U.S. intelligence agencies quickly identified Usama bin Laden as the primary suspect behind the bomb attacks. Thirteen days after the embassy bomb attacks, on August 20, 1998, President Clinton ordered cruise missile strikes against targets in Sudan and Afghanistan in response to embassy bombings in Kenya and Tanzania. A pharmaceutical factory in the Sudan, identified by U.S. intelligence agencies as being suspected of producing chemical weapons, and terrorist training camps in Afghanistan were selected as targets to disrupt and preempt future terrorist actions. While the international community generally condemned the strikes, the reaction was mixed,⁹⁹ with nearly all of the condemnation aimed at the Sudan target.¹⁰⁰ Various political entities (namely the Sudan, the Group of African States, the Group of Islamic States and the League of Arab States) each sought action by the Security Council to investigate the attacks against the Sudanese pharmaceutical plant, but virtually ignored the attacks in Afghanistan. Questions also arose over the imminency of the attacks against the Sudan factory, as they occurred 13 days after the terrorist bombings in Africa.

There were three bases for the international condemnation of the Sudan attacks. First, there was only a tenuous link between Usama Bin Laden and the Sudanese factory. Second, the relationship between the target (or lack thereof) and the terrorist act was unclear. And, the failure to support the claim that the plant produced chemical weapons (or related agents). While the U.S. did have knowledge of a "past association" between Bin Laden and the plant as well as his financial interests in the Al-Shifa plant (and others throughout Sudan),¹⁰¹ no other direct link was apparent. Critics also argued that bombing a pharmaceutical plant in Sudan had little to do with the bombings in Kenya and Tanzania. An open question is whether the international community would have condemned the Sudan attack if there was a more readily identifiable link between Bin Laden and/or the embassy attacks and the selected target (whether it was the pharmaceutical plant or another target). Additionally, in the post-Sept. 11th context,

would any link to Bin Laden or Al-Qaeda qualify for use of force as long as the conditions for self-defense were met?

The intelligence leading to Al-Shifa as a legitimate target does indeed appear to be faulty. General Henry Shelton, then Chairman of the Joint Chiefs of Staff, stated “the intelligence community was ‘confident’ that the facility was involved in the production of chemical weapons agents” as a result of “convincing information based on a variety of intelligence sources.”¹⁰² Later, however, the Defense Intelligence Agency determined the “decision to bomb the site was based on bad intelligence and bad science.”¹⁰³ The outcome was an international consensus opinion that the U.S. conducted a reprisal (a prohibited act under international law) on a target with little or no relationship to the original terrorist acts. Therefore, the attack was neither proportional nor timely as a response to the African embassy bombings or as a self-defense measure.

International reaction was more muted on the Afghanistan strikes because there was a definable link between terrorist’s training camps, command and control, leadership and bases and the attacks on the embassies in Africa. No argument was raised as to the connection between the camps and the terror network responsible for the embassy bombings or that the subject network constituted an ongoing threat to the United States. Therefore, although the sovereignty of Afghanistan was violated, it was clear to the international community that the U.S attack was justified. The U.S. right of self defense held primacy over the Taliban’s national sovereignty considerations.

Operation ENDURING FREEDOM, Afghanistan – 2001 to Present

The overwhelming international support of U.S actions to defeat the Al-Qaeda forces resident in Afghanistan reflects the acceptance of the legality of U.S. action under international law. One hundred thirty six (136) nations pledged support to the United States for the global war on terrorism.¹⁰⁴ The week after the U.S. commenced its military campaign in Afghanistan, a Washington Post report reflected the scope of international support for the effort.¹⁰⁵ It reported “that 36 countries had offered the U.S. troops and equipment, 44 countries had allowed U.S. use of their airspace, 33 countries were offering landing rights, and 13 countries had permitted storage of equipment.”¹⁰⁶ While the United Nations Security Council did not explicitly authorize the use of armed

force, “the Council’s unprecedented willingness to invoke and reaffirm self-defense under Article 51” may have been the key to both legitimizing military action in Afghanistan¹⁰⁷ and rallying support for a broad and diverse coalition to combat terrorism.

Despite the overwhelming support, some critics questioned the propriety of attacking the Taliban. As the de facto government of Afghanistan, the Taliban enjoyed the sovereignty of a national government (although recognized by only three of 192 United Nations member states). As a result, the critics questioned whether the relationship between the Taliban and Al-Qaeda rose to a level to warrant an armed attack. The weight of the evidence and international reaction suggests a general recognition that Taliban complicity was sufficient to justify the attack. The Taliban regime refused to cooperate with the United Nations or the United States in surrendering Usama Bin Laden, and continued to harbor Al-Qaeda in defiance of various UN Security Council Resolutions. Despite these protests and no Security Council Resolution authorizing the use of force, the wide support from 136 nations demonstrates international recognition that the “Taliban was unwilling or unable to prevent these operations.”¹⁰⁸ The British government’s official dossier on Bin Laden, released on October 4, 2001, also demonstrated the codependent relationship between the Taliban and Usama Bin Laden’s organization. “Bin Laden could not operate his terrorist activities without the alliance and support of the Taliban regime...and the Taliban’s strength would [have been] seriously weakened without Osama bin Laden’s military and financial support.”¹⁰⁹

Another point of contention against the United States’ actions in ENDURING FREEDOM, again relates to the imminency of the attacks as they commenced nearly a month after the armed attacks in the United States. Both the United Nations and the U.S. repeatedly requested and called for the Taliban’s cooperation in handing over Bin Laden for his involvement in the Sept. 11th attacks. And repeatedly, the Taliban refused to either cooperate or comply with the United Nations’ requirement for cooperation. Arguably, the U.S. in pursuing diplomatic relief through the United Nations and direct communication with the Taliban, had “exhausted non-military means”¹¹⁰ prior to employing armed force, as a last resort, to defend itself from terrorists and to prevent future attacks.

Despite the limited criticism of Operation ENDURING FREEDOM, international reaction was extremely supportive and nearly unanimous, suggesting recognition of its acceptability. World leaders recognize the threat posed today against their nations by transnational terrorists and understand their duty and obligation to defeat the threat to protect their citizens. As a result, the international community has been relatively silent in protesting the armed response of the U.S.-led international coalition in Afghanistan during Operation ENDURING FREEDOM. As Frederic Kirgis of the American Society of International Law points out, "the absence of challenge to the US asserted right of self-defense could be taken to indicate acquiescence in an expansion of the right to include defense against governments that harbor or support organized terrorist groups that commit armed attacks in other countries."¹¹¹ Based on the international reaction to date, President Bush's assertion that the United States will use armed force to combat terrorists and will not differentiate between terrorists and those who "knowingly harbor them" appears to be gaining acceptance within the international community. Although it is unlikely this acceptance will be codified in the United Nations Charter, international reaction may well prove to establish this as a principle of customary international law.

Yemen Predator Strike – 2002

On November 3, 2002, an Al-Qaeda leader, Qaed Salim Sinan al-Harethi, was killed in the Marib region of Yemen. While U.S officials have not publicly confirmed his death was the result of an American strike, it is widely believed his death was the result of a Hellfire missile fired from a U.S. Predator unmanned aerial vehicle. Al-Harethi, one of Al-Qaeda's top officials in Yemen, was widely believed to be one of the top planners behind the bombing of the USS Cole in Aden in 2000 and the 2002 bombing of a French oil tanker.¹¹² The operation targeting al-Harethi was reportedly carried out with the assistance of the Yemeni government which provided detailed intelligence on the target.¹¹³ Previously, a Yemeni military operation in the Marib to force local chieftains to turn over Al-Qaeda operatives was unsuccessful with 13 Yemeni soldiers killed in the effort.¹¹⁴

While the first two cases discussed related to jus ad bellum issues, this attack more clearly relates to the jus in bello dilemma since the war on terrorism is on-going

and this was merely one engagement in that war. Critics decry the attack as tantamount to an assassination. But, the international community was practically silent in its reaction. Condemnation came from Anna Lindh, the Swedish Foreign Minister, who called the attack a “summary execution that violates human rights...even terrorists must be treated according to international law.”¹¹⁵ Amnesty International also questioned the attack as “the deliberate killing of suspects in lieu of arrest, in circumstances in which they did not pose an immediate threat.”¹¹⁶ Both of these critics, however, fail to recognize Al-Harethi as a combatant, and seek to treat terrorists of his ilk as criminals subject only to apprehension and trial. Both critics ignore that, in concert with Yemen, other means to apprehend the “suspects” as criminals were either unsuccessful or inadequate to protect the U.S. from future terrorist attack.

Having exhausted non-military and domestic Yemeni efforts, the U.S. was fully justified in striking Al-Harethi as a combatant (lawful, unlawful, or otherwise) in an ongoing campaign as a necessary step to ensure U.S. self defense or survival. The urgency of the situation called for action as Yemeni officials feared the terrorists (Al-Harethi plus five others) were actually enroute to a target to conduct a terrorist attack.¹¹⁷ With or without the cooperation of Yemen, Al-Harethi, as a recognized and acknowledged member of Al-Qaeda, was a legitimate combatant target subject to attack in a nation unwilling or unable to act on its own. And, since the attack occurred in a country unable to effectively combat the threat during the “last window of opportunity,”¹¹⁸ the criteria of necessity and imminence were both met in this situation.

What Does It All Mean? - Lessons Learned

International reaction to these three examples of attacks reflects the limits of acceptability of using armed force against terrorists and provides key lessons on the current and emerging international norms in combating terrorism. This reaction both suggests the limits of acceptable alternatives within the international community and demonstrates the “elasticity” of the norms of international law as they evolve to confront new challenges. And evolve they must. At least one world leader, Prime Minister John Howard of Australia, publicly stated the UN Charter should “be changed to allow pre-

emptive strikes against terrorists...to catch up with new reality.”¹¹⁹ What are the lessons garnered from international reaction to these three previous operations?

First, and most importantly, as demonstrated in the Al-Shifa attack in the Sudan, the required quality of the information and intelligence concerning the intended target should be very high. Decisionmakers must seriously weigh the quality of the intelligence provided before launching a preemptive strike. Some legal commentators argue the quality of the “evidence” should meet “clear and convincing,” “clear and compelling,”¹²⁰ “beyond a reasonable doubt,” or a “preponderance of the evidence” standards familiar from criminal law. The difficulty of establishing objective standards to meet these definitions is obvious. Instead of trying to meet an arbitrary definition of an evidentiary standard one would desire in a court of law, decisionmakers must make a subjective call, weighing the quality of the intelligence against the potential benefits and risks of the operation. Since these decisions involve policy and not necessarily law, the risk calculation is based on the risks to the success of the mission and the force conducting the operation, as well as political risks inherent in a failed attempt or unjustified attack. Accordingly, although a legal evidentiary standard is not required, the quality of the intelligence must be high. The international condemnation for the 1998 Sudan strike demonstrates the need for such a standard, and the political risks to the U.S. when the standard is not met.

Second, the purpose of the operation must be related to defending against terrorist attacks by defeating terrorists before they strike, or defeating existing terrorist organizations once they have attacked (Webster’s necessity criteria). There must be a clear relationship between the target and the terrorist act. This requirement (prior to Sept.11) is again demonstrated in the reaction to the strike on the Al-Shifa pharmaceutical plant in Sudan. After Sept. 11, this standard has expanded significantly as the global reach and pervasive nature of Al-Qaeda have become more apparent. Although relatively few military actions have been conducted to kill or capture terrorists, there is an aggressive effort by the international community to pursue and apprehend terrorists. The apprehension of 3000 Al-Qaeda operatives in over 100 countries in the 15 months clearly demonstrates the international community has moved well beyond a reactive posture in pursuing terrorists suspected of committing specific acts. Instead,

the U.S. and its allies are pursuing a more proactive posture in which individuals or groups with links to Al-Qaeda are identified as criminals and hostile combatants, and that such identification is sufficient cause for action. While a higher standard is necessary for use of force than a police apprehension, the elasticity of the purpose is apparent in the Yemen attack. A combatant is a legitimate military target.

Third, as previously noted, states can be held responsible for the actions of third party transnational terrorists within their borders. Both strikes in Afghanistan (1998 and ENDURING FREEDOM) and the Yemen strike demonstrate international acceptance of the use of armed force to defeat, destroy, and/or disrupt terrorist organizations and, most significantly, states that harbor and/or support these groups. Three Southeast Asian states (Malaysia, Thailand and Indonesia) condemned Prime Minister Howard's statement that he would not hesitate to conduct a preemptive attack if Australian lives or property were at risk. As a result of domestic political realities, demographics, geography and/or limited military/police capabilities each of these nations has significant challenges combating terrorism. States who are unable (or worse unwilling) to adequately combat and defend against terrorists are feeling pressure to act with threats of military actions by states more willing or more able to do so. To that end, President Bush, in his National Security Strategy and numerous speeches, has offered support to any nation who lacks the capability and resources to fight the terrorist threat. That offer notwithstanding, many of these states have domestic political concerns which make combating these groups problematic. It may not be the best interest of these states to accept the proposition that more capable states conduct attacks within their sovereign territory. However, as previously discussed, these nations' rights of sovereignty must yield to self-defense when they lack the will or capability to police terrorist groups within their borders.

Fourth, the proportionality criterion in the Caroline standard has expanded as well. Imminency is no longer a key issue. Al-Qaeda, while still a shadowy amorphous organization, is now much more of a known quantity. The threat posed by this group and recognition of their decade long "jihad" against Western targets makes "cumulative proportionality" an acceptable concept from which to justify self-defense. As a result, those actions required to disrupt and defeat terrorists are on the table as acceptable

options (within reason). Proportionality still plays a huge role, however, in target discrimination to limit collateral damage to innocent civilians and non-combatants.

These lessons, as well as tenets of international law, provide guidelines for policy and decision makers considering use of armed force against terrorists. While treaty and case law make international law appear to be fairly rigid, state action and international reaction serve as a gauge to determine the limits of acceptable state conduct.

PROPOSED GUIDELINES WHEN CONSIDERING USE OF ARMED FORCE AGAINST TERRORISTS

The greater the threat, the greater is the risk of inaction – and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack¹²¹.

—President Bush

There is nearly unanimous consensus the United States is fully justified in its use of armed force to defense itself against its terrorist enemies. However, there is debate on the manner in which that war should be fought. The U.S. policy of targeting terrorists and states that harbor and support them is central in this debate. Use of armed force within another state's sovereign territory is a politically significant measure which requires serious deliberation. The precedential affect of U.S. action sets the stage for other states to act in a similar manner. This may not be in the long term interest of the United States. A prime example of this challenge was demonstrated on November 5, 2002 in the aftermath of the alleged Predator strike in Yemen. State Department spokesmen Richard A. Boucher, defending the U.S. policy of using deadly (armed) force to deal with terrorists, "reiterated American opposition to 'targeted killings' of Palestinian militants by Israeli forces."¹²² He argued different circumstances applied to strikes on terrorists and Palestinian militants, which indeed they do. However, the discrimination between the two sets of circumstances is very fine, and, as a result, the U.S must be circumspect when considering use of armed force against the territorial integrity of another state whether or not the state is the target or not. The following guidelines may prove helpful to a decision or policy maker when considering the use of armed force against terrorists:

1. Purpose. The purpose of the attack must be focused on defending against future terrorist attacks. There must be a definitive link between the target and a terrorist

group with manifest and stated intent to attack U.S. interests, citizens or property. After Sept. 11, the U.S. has wide latitude to employ the force necessary to defeat identified terrorists, organizations and bases. An identified terrorist is a combatant and a legitimate military target subject to attack.

2. Necessity - exhaustion or inapplicability of other reasonable means. Now that the War on Terrorism is joined, the use of force against terrorist groups is not and should not be the last resort. If other means of apprehending and/or defeating the terrorists in question are not deemed to be successful within the required time,¹²³ armed force is a viable option. The time required is a critical component in this calculus, as many of these terrorist targets are very fleeting. Al-Harethi's vehicle in Yemen had Saudi license plates, suggesting he was moving back and forth between nations.¹²⁴ Another key aspect which must be considered is the intelligence value of the target, and whether there is their more benefit in exploiting the potential intelligence from the target than conducting an attack. However, if the target in question is a state which knowingly harbors or supports terrorists, use of force should be a last resort. President Bush's decision to pursue diplomatic channels in effort to deal with the Taliban is a classic example of this type of political effort. And the Taliban rebuff of those efforts as cause for intervention sets a historic precedent.

3. High quality intelligence. With a very limited body of international law governing terrorism, the court of world opinion, for the time being, is the court which counts, not evidentiary standards used in a court of law. Therefore, the decisionmaker should consider the quality of the information and analysis, as well as the reliability of the source, in his risk/benefit calculations concerning the use armed force to combat a specific terrorist or group. Furthermore, the decisionmaker should consider, before taking action, how he will present his justifications for using force to the public.

4. Proportionality. The size of the bullet (or bomb) used to attack terrorists is not in question. The primary proportionality issue is focused on collateral damage and potential death or injury to civilians and non-combatants. Otherwise, the U.S. again has wide latitude to use nearly all the tools available to fight terrorism, employing conventional and special operations forces, air and ground. And based on the concept of "cumulative proportionality" from a series of Al-Qaeda attacks and threats of future

attacks, the U.S. can hunt down terrorists across the globe whether they were directly involved in the Sept. 11 attacks or not as they pose a continuing threat.

5. Asymmetric lethality. A key consideration in a use of armed force decision is a judgment on the target's ability to conduct an attack with asymmetric lethality or consequences. While an attack on an individual or small group of terrorists may, on the surface, appear to be disproportionate, Al-Qaeda's actions show how devastating attacks by small groups with improvised weapons can be. The risk and danger of inaction may indeed be greater than action. The more dangerous the threat, the greater is the need and urgency for action.

CONCLUSION

We did not ask for this mission, yet there is honor in history's call. We have a chance to write the story of our times, a story of courage defeating cruelty and light overcoming darkness. This calling is worthy of any life, and worthy of every nation. So let us go forward, confident, determined, and unafraid¹²⁵.

—President Bush, speech at the United Nations

The global war on terrorism is testing and expanding the recognized limits of international law regarding transnational terrorism which existed prior to Sept. 11. The United States is pushing the limits, testing the elasticity of law, and redefining how governments will deal with terrorists in the future. It is pursuing a two pronged approach to deal with its terrorist enemies – using both a criminal apprehension approach and a military (overt or covert) attack approach. The U.S. is fully justified in combining these approaches because the Sept. 11 attacks were both criminal and an act of war.¹²⁶ In doing so, the U.S. has the option of “invoking either the legal paradigm or the war paradigm at any moment.”¹²⁷ To date, international reaction to U.S. policy prosecuting this war elicited very limited international criticism. In essence, the relatively low level of criticism validates the acceptance of new norms for fighting terrorists.

An area which still needs significant development and growth is the question on how to deal with a new class of combatants on the battlefield. The Bush Administration labels this new class of terrorist criminal-combatant as “unlawful combatants.” International law is currently ill-equipped to deal with this new classification. The duality of the offense, crime and act of war, creates great ambiguity in legal circles on how to

deal with these “citizens.” As a result, legal scholars are prone to put them in a “box” conveniently labeled “criminal.” This label only tells half of the story. How international law ultimately deals with this duality and ambiguity remains to be seen. In the meantime, the U.S. dual paradigm approach is appropriate and the label “unlawful combatant” serves its purpose.

Ultimately, the decision to conduct a military attack on terrorists is a Presidential policy decision. The primary purpose of a government is to ensure its citizens are safe and secure, including aggressive offense to defend against a transnational terrorist threat. However, an aggressive offense can and should be exercised within the bounds of international law. Although a very idealistic argument, the United States should pursue a course where it can simultaneously maintain the legal high ground and defeat Al-Qaeda and its allies. Serious consideration of the guidelines provided above will assist in dominating both the enemy and the legal high ground. To date, U.S. dominates that high ground as its policy and actions against terrorists have firm legal footing.

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