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ARTICLE: INTERNATIONAL LAW AND THE CHALLENGE OF TERRORISM ¹

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SUMMARY:

... The question of what law (and indeed whether any law) may govern terrorism and responses to terrorism is the core issue raised by the challenge posed since September 11, 2001 to the international collective security system. ... The UNGA approach of 1996 onward was to develop a framework for coordinated international responses to terrorism precisely because of the transnational character *and* ostensibly international agenda of terrorist networks. ... In what follows, I mention three avenues for the plausible extension of international law to better address the need for a coordinated international strategy to address the threat of terrorism. ... However, this essay has argued that terrorism is best conceived as a form of international crime, accordingly revising the laws of war and the rules governing the use of force by (and between) states should not be the primary avenue for fashioning a response to the threat posed by terrorism to the international system. Rather, as was argued above, an international conference convened to develop a commonly agreed international legal definition for terrorism and to clear the path for the drafting and adoption of a comprehensive convention on international terrorism, integrating the existing thirteen conventions criminalizing various types and techniques of terrorism, would be the most constructive path to strengthen multilateral capacity to prevent, investigate and prosecute international acts of terrorism. ...

TEXT:

[*2] The question of what law (and indeed whether any law) may govern terrorism and responses to terrorism is the core issue raised by the challenge posed since September 11, 2001 to the international collective security system. The initial post-September 11 approach chosen by the American government has been to launch a "war on terrorism" that conceives of transnational terror, and responses to it, in terms of international armed conflict. This might naturally lead scholars to turn to the laws of war in considering the legal resources available in the international system to address terrorism. The implication of such an approach, mirroring the American response to September 11th, is that the challenge posed by the emergence of transnational terrorism should be framed in military terms. Recent attacks in the United Kingdom, Spain, Indonesia, Saudi Arabia and Turkey suggest that neither unilateral responses nor the mere use of force in territorially-specific campaigns against particular states have been successful as counter-terrorism measures. While it is clear that the laws of war are necessary and applicable to any military response to acts of terror, ² this essay will argue that military responses are ill-suited to the prevention or suppression of terrorism and that other, non-military forms of international coordination should be prioritized. In particular, this essay will argue for a legalist (rather than a military) paradigm to address the challenge posed to the international system by the threat of terrorism. ³ Such a legalist **[*4]** paradigm conceives of counter-terrorism as a matter of law enforcement rather than military strategy, best prosecuted through courts rather than combat. ⁴ Indeed, developments since 2001 have suggested that domestic efforts within countries focused on improving prevention strategies through intelligence-gathering and enhanced law enforcement efforts have been far more effective than military campaigns in targeting the infrastructure of organizations like al-Qaeda. This essay will argue that at the international level, too, the challenge of terrorism is best met through the development and institutionalization of international criminal law (rather than revisions to the laws of war) and strategies of coordinated intelligence-gathering, policing, prevention and enforcement.

The emergence of al-Qaeda as an international actor has raised disturbing questions about the applicability of international law to new antagonists in the international system. While globalization, particularly in the 1990s, had heralded a new interest in non-state actors -- primarily in the forms of multinational corporations (MNCs) and non-governmental organizations (NGOs) -- the core of international law and international relations remained anchored to an international system comprised of states. ⁵ Legal fictions of "nationality" for essentially non-state actors were strained to provide a framework to take these entities into account without radically shifting the premises of the system as a whole. Although it was increasingly apparent that transnational criminal enterprises confounded this calculation, drug cartels and international mafia operations were viewed as threats that could be addressed through concerted international **[*5]** cooperation in the areas of prevention and enforcement. ⁶ Al-Qaeda has altered this international perception of non-state actors.

The efforts to generate a territorial link to the perpetrators of the September 11th attacks, and to thereby attribute accountability for the attacks to a state or states, even absent any evidence of direct sponsorship, is an expression of the desire to find a conventional framework for an essentially unprecedented challenge. ⁷ But the Afghanistan and Iraq military campaigns have highlighted the disconnect between the territorial objectives of such campaigns and the transregional nature of the threats they would allegedly address. Such campaigns represent a failure to appreciate the paradigm shift occasioned by the September 11th attacks necessitating a shift away from a territoriality principle towards a more truly globalized international structure of law and cooperation to counter transnational threats.

International law encompasses a spectrum ranging from the regulation of functional areas of international interaction to the development of normative consensus on the limits of legitimate international behavior. At the least legalized, **[*6]** most anarchic end of the spectrum, is the geopolitical domain in which existing principles are applied opportunistically by powerful actors seeking to legitimate their interests. Although the geopolitical domain has often been the area in which international law is least effective, the near absence of a territorial link to the perpetrators of the attacks renders other geopolitical mechanisms far less effective in challenging a transnational network. In contrast, the effectiveness of international legal frameworks to structure a coordinated international response to such a network is enhanced.

This essay will set forth an argument that the very novelty of the threat posed by transnational terror networks, coupled with the urgent need to achieve a plausible reduction of that threat, render international law *more*, not less, relevant to fashioning an effective international response. Section I addresses the relationship between threats to international peace and security and the legalization of international order. The second section will compare military strategies for the containment of the threat of transnational terror to available legalist alternatives. Finally, the third section will consider certain international legal resources available to meet the challenge of transnational terror.

I. The legalization of international order

Hiroshima may have marked the last shock to the international system comparable to that of September 11th, a shock suggesting that the very framework for international relations had shifted. In the aftermath of Hiroshima, with states in possession of the means to destroy the planet, the consequences of a war of global scale were widely understood to be unacceptably dangerous, prompting sustained international efforts to alter the rules of the game. A feverish period of international legal development followed the end of World War II ("WWII"), largely geared towards building confidence that concerted international action could prevent a repeat of the massive devastation of the two great wars of the 20th century, and avert an international nuclear holocaust. The decades at the beginning of the second half of the century witnessed the drafting of the Genocide Convention, the Geneva Conventions, the Refugee Convention, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and a spectrum of international and regional human rights covenants, all products of the efforts to **[*7]** fashion an international legal order that would constrain the rights of sovereignty through minimum international standards of justice.

In addition, the extensive talks on disarmament, arms control and nuclear non-proliferation, even at the height of the Cold War, suggested that the nuclear threat had sufficiently altered the nature of international relations as to thoroughly delegitimize certain kinds of aggression. The structure of international protections for human rights and the nuclear non-proliferation regime that emerged attest to a reordering of international relations designed to criminalize atrocity and limit access to weapons of mass

destruction.

While there were major disruptions to the international system in the half century after WWII, none challenged the basic paradigm of a conception of international law (as administered by the United Nations Security Council and the International Court of Justice) regulating international relations, and particularly the legitimacy of *jus cogens* norms.⁸ Any violations of such norms were understood as cognizable within the framework of international law and susceptible to punitive international response through the existing organs of international law.

This structure for international order was destabilized by the emergence of transnational terrorism. The absence of a territorial link to the perpetrators of terrorism undermines accountability mechanisms in international law based on the use of force producing a disorienting effect on statesmen and international jurists alike. While military options relying on imputed territorial accountability have been countenanced, an international legal response has been judged **[*8]** inadequate as a result of the unconventional nature of the crimes in question.⁹ This judgment fails to appreciate the relevance of international law to any coordinated, multilateral approach to combating terror. The shock to the international order occasioned by the attacks of September 11 signaled the urgency of the need to expand the scope of international law and the coordination of international law enforcement in the area of counter-terrorism. Missing this opportunity by adopting a strictly military approach to counter-terrorism would undermine the effectiveness of international law in ways dangerous to international order and may also be detrimental to efforts to prevent and punish acts of terrorism.

II. Two Paradigms for an International Response to Terrorism: military and legalist

Although the international system is confronted with an unprecedented threat, international law is not without resources for developing an effective response. International law, like all bodies of law, develops through the application of precedents to like cases, or the adaptation of precedents to suit new circumstances by way of extrapolation and analogy. There are two relevant precedents to bear in mind in considering how an international response to massive terrorist attacks may be fashioned. The first is the Nuremberg war crimes tribunal, and the *legalist paradigm* that developed out of that precedent, leading to the creation of the International Criminal Tribunal for the former **[*9]** Yugoslavia (the "ICTY"),¹⁰ the International Criminal Tribunal for Rwanda (the "ICTR")¹¹ and ultimately the drafting of the statute for the International Criminal Court (the "ICC").¹² The other is the Kosovo war of 1999, and the *military paradigm* of a coalition that represents a subset of the international community and that operates outside of a United Nations framework to undertake an enforcement action in response to aggression or crimes against **[*10]** humanity.¹³ I will take the former to represent the legalist tradition, and the latter a military approach.

[*11] The international legal community has been somewhat disabled in formulating an adequate response in the first tradition, largely as a result of the absence of a commonly agreed legal definition of terrorism.¹⁴ Despite the apparent pessimism regarding the adequacy of legal mechanisms, however, considerable resources are available to formulate an adequate non-military response. The attacks of September 11th were widely seen by media commentators and international legal scholars alike as demonstrating a series of deficiencies in international law. These include, but are not limited to:

- . the absence of a comprehensive international legal framework to address terrorism;
- . the absence of adequate international criminal law infrastructure to address massive crimes against humanity and/or acts of war, especially by non-state actors;
- . the absence of sufficient international legal mechanisms for regulating, monitoring, prosecuting and punishing non-state actors; and
- . the absence of international police capacities and cooperative arrangements to undertake intelligence gathering and crime prevention at the international or multilateral level.

The immediate response of the international legal community was a retreat from the earlier trend of international legal expansion to keep pace with globalization.

[*12] Yet avenues of response to the challenge of terrorist crimes against humanity had already been proposed and developed during the 1990s by the Sixth (or Legal) Committee of the General Assembly, to suggest an international legal framework within which to conceptualize international responses to the present challenge. ¹⁵ These proposals developed in conjunction with the push to establish a statute for an international criminal court. Even as the ICC statute was being formulated in Rome in 1998, ¹⁶ the General Assembly (UNGA) in New York commissioned an ad hoc committee on international terrorism to begin drafting a new comprehensive convention on international terrorism. The declared goal of the UNGA and its Legal Committee was to convene a high-level conference in 2000 under United Nations auspices to "formulate a joint, organized response of the international community to terrorism in all its forms and manifestations." ¹⁷

The UNGA approach of 1996 onward was to develop a framework for coordinated international responses to terrorism precisely because of the transnational character *and* ostensibly international agenda of terrorist networks. In light of these efforts, then, two questions emerge. First, what international legal mechanisms are available to cope with international terrorist attacks? And second, are these international legal mechanisms preferable to an ad hoc military approach? Let us come at this in reverse order, and ask first what the military approach has been.

One strategy has been to establish a normative division in the international system, aligning some states with an international coalition against terrorism -- a sort of variation on a Kantian pacific federation -- and relegating others to a list of suspected sponsors of terrorism. The former are then admitted into a loose military and diplomatic alliance, while the latter are targeted for military and diplomatic attack.

This sort of response glosses over a number of obvious difficulties, such as **[*13]** defining terrorism, determining how to address state-terrorism as opposed to terrorism by non-state actors that may or may not have state sponsorship, and developing an international coordinated strategy that includes policing capabilities, intelligence gathering and sharing arrangements, and enforcement mechanisms. Arrangements involving sufficient international cooperation to develop effective intelligence-sharing and policing capacities have proven historically to involve enormous obstacles, which is part of the reason that a legal framework on terrorism has been slow in developing, as have frameworks on international narcotics trafficking. The only means of assuring long-term multilateral cooperation in these areas is through an agreed, binding framework.

One short-cut around developing complex mechanisms to cope with the surveillance, policing and enforcement capacities required to combat non-state terrorism has been to develop criteria whereby individual states may be penalized through existing international mechanisms, thereby generating state-level incentives to do the dirty-work of prevention, prosecution and/or punishment. By attributing responsibility to putative state sponsors, international pressure might be brought to bear on individual states to undertake the massive intelligence-gathering, policing and enforcement measures necessary to combat terrorism. Thus, states that are known to have terrorist bases within their borders, or states that appear to be involved in the financing of terrorist networks, would bear the costs of international prevention efforts.

While this alternative may seem attractive at first, and certainly underlies efforts to identify states that "harbor" terrorists, absent a coherent and comprehensive legal framework this approach will encounter significant difficulties. First, if physical location (i.e., provision of a "harbor") is a basis for guilt-by-association then one runs the risk of attributing culpability to Hamburg, London, and parts of Florida, Maryland and New Jersey (not to mention Riyadh and Dubai) in addition to Kandahar or Baghdad who were presumed, at least by the United States and some of its allies, to have provided knowing support to terrorist organizations. Second, if facilitating the financing of terrorist networks is a basis for guilt then, again, many Western financial institutions and banking associations would have to face international scrutiny, pressure and penalties of the kind exerted against Pakistan or Saudi Arabia for their unwitting role in enabling transfers of funds. Clearly, the definitions being used are overly broad or unsound and require precision and systematization.

To bypass these difficulties, however, there has been the invocation of what **[*14]** has become a fairly familiar trope in international affairs, if not in international law: that of civilized nations. The coalition against terrorism is identified as the group of civilized nations admitted as participants in a worldwide battle against terrorism. Those states that either do not or are not permitted to join the coalition are

understood as states that are outside of the family of civilized nations, and may be viewed as (potential) state sponsors of terror.¹⁸ The implications of the current efforts to divide the international system in this way are dangerous, not least because they confirm the worldview of the very terrorist groups that the coalition is seeking to defeat. An approach better-suited to the objective of differentiating forms of terrorism according to their tactics and goals, rather than their ethnic or religious origin, would run a much lower risk **[*15]** of creating new networks between heretofore unrelated groups, and would be less alienating to states whose cooperation may be crucial to any successful effort to combat global terrorism.¹⁹

III. Extending the Boundaries of International Law

Well in advance of September 11th, international jurists had begun to undertake the monumental task of extending the boundaries of international law to develop mechanisms to deal with transnational criminal actors, whether terrorist, mafia or international traffickers in illegal substances. Viewed as the underside of globalization, the transnationalization of crime and the trade in commodities previously controlled exclusively by states (including precious minerals, drugs, and WMDs) was understood to require a coordinated international legal response, involving international policing capacities, intelligence-gathering and prevention work, as well as the further development of international criminal law to prosecute those accused of undertaking such crimes. The UNGA began efforts in earnest to draft a comprehensive convention against international terrorism by the mid-1990s, parallel to the efforts to draft a statute for a permanent international criminal court.²⁰

The first draft that emerged from UNGA efforts was the 1999 draft of the International Convention for the Suppression of the Financing of Terrorism, which was opened for signature in January 2000, and entered into force on April 10, 2002 with 132 signatories and 117 parties.²¹ The convention makes it an international crime for any *person* to intentionally and unlawfully finance the commission of an act that constitutes a terrorist offence. Terrorist offences, **[*16]** in turn, are defined not only within the convention, but also in relation to definitions in *nine* other terrorism related treaties already in effect at the time that the draft of the convention was adopted (by the General Assembly in 2000),²² ranging from the criminalization of attacks on civil aviation to prohibition on bombings. These treaties already provide a basis for prosecution of terrorists under the principles of universal jurisdiction.²³

While the favored metaphor for conceiving of the attacks of September 11th and transnational terrorist attacks thereafter has been that of "war", understanding the attacks as crimes against humanity is more constructive. Understood as a crime against humanity, such attacks immediately invoke a series of international legal remedies that have become familiar in the last decade including: the application of principles of universal jurisdiction, the convening of ad hoc criminal tribunals (or the ICC), and the invocation of UN Security Council collective security powers, to cite a few.

A brief review of the spectrum of relevant international law resources that could be marshaled in support of a coordinated international approach to counter-terrorism and the punishment of acts of terrorism is illustrative of the relevance of the legalist paradigm to the current international context. In what follows, I mention three avenues for the plausible extension of international **[*17]** law to better address the need for a coordinated international strategy to address the threat of terrorism.

International Convention Against Terrorism

The first avenue to be pursued is the immediate adoption of the UN General Assembly proposal to convene an international conference to draft a comprehensive international convention against terrorism, based on the UNGA Legal Committee's preliminary works. Such a conference could produce a working framework to coordinate international policing and intelligence-gathering efforts that would greatly accelerate the process already underway to identify the perpetrators of terrorist attacks, their methods and their organizational structure so as to prevent future attacks. Further, the negotiation process necessitated by the drafting of the convention would permit the airing of a long-overdue international discussion on the definition of terrorism and the methods and goals appropriate for containing the threat of terrorism. The Ad Hoc Committee established by the General Assembly to create a draft of a comprehensive convention on international terrorism has been continuing its work in this regard, providing its most recent report on its activities in April 2005.²⁴ Further, the Committee presented its draft International Convention for the Suppression of Acts of Nuclear Terrorism in the same 2005 report, with

the General Assembly adopting the draft convention by resolution on April 15th, 2005. ²⁵ This new Convention will open for signature on September 14, 2005 and close for signatures on December 31, 2006, with the expectation that it will come into effect in early 2007. The ongoing efforts of the General Assembly's Ad Hoc Committee would be well complemented by the convening of an international conference to resolve the question of adopting a commonly agreed legal definition of terrorism. Indeed, an informal version of such a summit was held in Madrid in March 2005 and in his address at its closing **[*18]** plenary, UN Secretary General Kofi Annan reiterated his call to come to agreement on such a definition. ²⁶

The United States may have set the international community off to a false start by responding to the September 11th attacks by focusing on specific states and terrorist groups as the source of the challenge while missing the opportunity to spearhead collective efforts to generate an international framework with a clear definition of terrorism through which to organize a global response to the broader challenge posed by international terrorism, whether **[*19]** state-sponsored or undertaken by non-state actors. ²⁷ The experiences of battling past non-state forms of criminality, ranging from the piracy and slave-trade of the nineteenth and twentieth centuries to the drugs trafficking and mafia activities of the twentieth and twenty-first centuries has shown the wisdom in taking an international approach from the outset. The United Nation's standard-setting role in some of these areas has been exemplary. An international convention against terrorism, the product of an international standard-setting conference, would send an important normative message likelier to facilitate international coordination and enforcement than threatened exclusion from the ad hoc military coalition of the moment.

International Criminal Tribunal for the Attacks of September 11

The convening of an ad hoc criminal tribunal on the order of the ICTY and the ICTR. for the terrorist attacks on New York and Washington, DC (or for future acts of transnational terrorism) would provide an immediate venue in which the alleged perpetrators of the attacks could be tried for commission of crimes against humanity in the absence of an international criminal court **[*20]** with jurisdiction over the attacks. ²⁸ The convening of such a court is well within the U.N. Security Council's existing powers, and such a court might be constituted to have jurisdiction over non-state actors as well as officials of existing states. The creation of such a tribunal would enhance the internationalization **[*21]** of the enforcement of anti-terrorism laws and underscore the global nature of the crime of terrorism. Prosecutions before an international court would also circumvent the troubling procedural and other derogations from human rights standards that have occurred in the domestic courts of states adopting extraordinary anti-terrorism measures in the wake of attacks. ²⁹ The statute of such a tribunal could establish important precedents.

First such a statute might endorse the principle already being developed by the ICTR of the extension of the definition of a crime against humanity in customary international law to include crimes perpetrated by non-state actors. ³⁰ In addition, pending the outcome of deliberations on the substance of a comprehensive international convention against terrorism, the statute should resolve current ambiguity regarding the definition of international terrorism. In particular, such a definition would have to include a carve-out for national resistance movements on the one hand, and include a criminal theory of conspiracy analogous to the one developed at Nuremberg on the other. These definitional issues are not easily resolved, and setting the United Nations Security Council about the business of entering into consultations on these questions would underscore the urgency of the need for adequate definitions. The statute would also provide an opportunity to resolve jurisdictional issues that might hamper future prosecutions of terrorist crimes before the ICC by extending jurisdiction to all United Nations members under the Council's Chapter VII powers. ³¹ Finally, the statute of the tribunal would offer an occasion for the international community to reinforce the criminalization of the trade in controlled substances or illegal materials, especially where used to finance terrorist activities. For instance, a provision of the Tribunal's statute might include **[*22]** all black-market activities undertaken for the financing of activities that fall within the statute's definition of terrorism, a provision that would encompass the illicit trade in precious commodities. ³²

Extension of the United Nations Security Council's Chapter Seven Powers

Of the mechanisms that deserve mention in this brief survey, the final one is the extension of the UN Security Council's peace and security mandate to include threats to international peace and security emanating from international terrorism and other actions by non-state actors or transnational actors. The

precedents set by Security Council resolutions 1368 (2001) and 1373 (2001) move precisely in this direction,³³ and especially in the case of Resolution 1373, go considerably further in defining an international legal agenda for preventing and punishing terrorism, suggestive of the potential of international **[*23]** law to serve as the best available remedy for terrorism understood as an international crime. Specifically, 1373 envisions action under Chapter Seven of the Charter to:

- . prevent and suppress the financing of terrorist acts;
- . criminalize all forms of state support to terrorist entities and persons;
- . facilitate the exchange of operational information between states to track the movement of terrorist networks and cooperation in intelligence-gathering, investigation, and prevention;
- . generate international mechanisms for obtaining jurisdiction, and enabling extradition and prosecution of alleged perpetrators;
- . address the links between international terrorism and transnational crime, illicit drugs, money-laundering, illegal arms-trafficking and illegal movements of WMDs; and
- . encourage all states to become parties to the relevant international conventions for the prevention of terrorism to develop coordinated mechanisms of prevention and punishment.

This survey is suggestive of some potential avenues for a coordinated international effort at the prevention and suppression of terrorism.³⁴ Several strategies **[*24]** are available for the development and institutionalization of legal frameworks that would greatly facilitate coordinated international action, without eroding norms of non-intervention and limitations on the use of force that may otherwise be too easily swept aside in the rush to embrace a strictly military paradigm.

IV. Conclusion

The Bush administration's assertion of a right to wage pre-emptive unilateral war wherever it may perceive a threat to national (or international) security has destabilized the foundations of an international collective security system already struggling to meet the challenge of terrorism. The record of the invasion and occupation of Afghanistan and Iraq in improving the national security of the United States or international collective security remains uncertain at best.³⁵ The United Nations has been contemplating a serious review of the international collective security system embodied by the organization to address both the weaknesses in the system that may have prompted the U.S. to adopt a pre-emptive war strategy and the fears that have arisen as a result of **[*25]** the new American strategy.³⁶ Perhaps, as Secretary-General Kofi Annan has suggested, the Security Council might develop criteria for the early authorization of coercive measures to prevent a perceived terrorist threat. The Secretary-General's proposed "rethink" of the United Nations collective security system, and the laws of war that underpin it, resulted in the commissioning of a High-Level Panel to make recommendations concerning how the United Nations might meet the new challenges of terrorism, genocide and nuclear proliferation as well as the risks of unilateral strategies of preemption undertaken by powerful member states. The resulting report of the High-Level Panel called for internationalization of the approach to terrorism as a collective security issue.³⁷ Many Europeans also shared the Secretary-General's concerns about the doctrine of preemption while remaining equally concerned about the genuine threat posed by terrorism.³⁸ Some of this reflects an anxiety to head off American unilateralism for fear that it may undermine the existing international security system causing a reversion to a simple self-help system of generalized "preemption." Perhaps as a result of international discomfort with American conduct of the anti-terror campaign since September 11th, the Bush **[*26]** administration recently signaled a possible retreat from its unilateralist and militarist approach, deemphasizing its description of its counter-terrorism efforts as a "war."³⁹ Whether a new American strategy might emerge that embraces a more multilateral and legalist approach remains in question.

Kofi Annan's strategy -- and one shared by other multilateralists -- to cope with the urgent new challenges to the collective security system emphasizes international coordination to develop new criteria to govern the use of force and new mechanisms for rapid responses as threats to international security arise. If the United Nations does ultimately spearhead an international effort to revise or expand the laws of war to

address more specifically the challenges posed by terrorism, it would reinforce the legalist and multilateral approach advocated in this essay.⁴⁰ However, this essay has argued that terrorism is best conceived as a form of international crime, accordingly revising the laws of war and the rules governing the use of force by (and between) states should not be the primary avenue for fashioning a response to the threat posed by terrorism to the international system.⁴¹ Rather, as was argued above, an international conference convened to develop a commonly agreed international legal definition for terrorism and to clear the path for the drafting and adoption of **[*27]** a comprehensive convention on international terrorism, integrating the existing thirteen conventions criminalizing various types and techniques of terrorism,⁴² would be the most constructive path to strengthen multilateral capacity to prevent, investigate and prosecute international acts of terrorism.

Claims that transnational terrorism transcends the capacities of the UN, and international law more generally, often rely on the argument that neither the organization nor the law is equipped to deal with crime by transnational or non-state entities. To the contrary, international law and international organizations enjoy the distinct comparative advantage of being designed to facilitate inter-state interaction and coordination, an advantage with which military strategy can scarcely compete when faced with an enemy that is not organized territorially but through transnational coordination.

The most important insight shared by those who adopt a legalist paradigm in response to terrorism is that there can be no *ad hoc* or unilateral solution to terrorism. The United States may be the most powerful nation in the world today, but events in Afghanistan and Iraq, as well as ongoing international terrorist attacks in the major capitals of the world, suggest that it is not powerful enough to confront the new global challenges alone.⁴³ Nor in the long run can there be a strictly military solution to the challenge of terrorism, with or without revised rules governing the use of force. Terrorism as it has emerged since **[*28]** September 11th is a transnational phenomenon that can only be combated through a concerted, consistent and coordinated international framework. For better or worse, the only viable paradigm available for accomplishing integration and coordination of strategy is that of international law and organization. Efforts to short-cut the development of an international legal framework to cope with terrorism, in favor of military coalitions and a binary division of states between good and evil, though possibly more gratifying to some, run the risk of aggravating the very international divisions that can most easily be exploited to reinforce underground criminal and terrorist enterprise. Entrenching an us-and-them paradigm is the very opposite of coordination -- it is unlikely to yield vital information in the short-run or international security in the long-run. The international community is at a critical juncture that also represents an important opportunity to forge new mechanisms to meet the challenges of the shifting international security context. Missing the opportunity to rally the international community behind efforts to better define and combat terrorism through new approaches to collective security would be a terrible waste.⁴⁴ Fortunately, we have resources within the boundaries of existing international law to seize the opportunity, and constructive proposals to shift those boundaries outward to meet the challenge. Such efforts hold the long-term promise of a more secure international system.

Legal Topics:

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FOOTNOTES:

⁴⁰1 A version of this essay was previously published as *Stretching the Limits of International Law: The*

Challenge of Terrorism, 8(2) ILSA Journal of International and Comparative Law (Spring 2002). The current version of this article is based on a presentation given by the author on a panel addressing the resources available in international law and the laws of war to meet the challenge of terrorism. The panel took place during the 2004 meeting of the Yale Law School Middle East Legal Studies Seminar in Rome, Italy.

² Where they have occurred, such glaring departures from the laws of war as the U.S. strategy of preemptive war and the creation of extra-legal status for prisoners captured in unilateral U.S. military actions have generated significant international criticism. The Guantanamo detainees in particular have become the symbol of what many international observers perceive to be the lawlessness of the American approach. The American efforts to unilaterally revise the laws of war by refusing to apply the Geneva conventions to the detainees in Guantanamo have provoked fierce international resistance by even the closest allies of the Bush administration. After initially defending the treatment of detainees in Guantanamo, under domestic pressure even British prime minister Tony Blair requested that the Bush administration reconsider the proposed military tribunals for detainees and permit visits by the ICRC and by British officials to inspect detention conditions at the camp. See, e.g., Philip Shenon, "Britain Defends U.S. Treatment of Detainees at Guantanamo," *New York Times*, 22 January, 2002, sec. A, p. 12; Katherine Q. Seelye, "Criticized, U.S. Brings Visitors to Prison Camp," *New York Times*, 26 January, 2002, sec. A, p. 8; and Neil A. Lewis, "Bowing to Ally, Bush to Rethink Tribunals for British Subjects," *New York Times*, 19 July, 2003, sec. A, p. 3. The strictly apolitical International Committee of the Red Cross, with its mandate of confidentiality, took the extraordinary step of publicly stating its opposition to the conditions of detention at Guantanamo following one of the rare visits the U.S. has permitted to ICRC officials. See, e.g., Neil A. Lewis, "Red Cross Criticizes Indefinite Detention In Guantanamo Bay," *New York Times*, 10 October 2003, sec. A., p. 1; and Neil A. Lewis, "Red Cross Finds Detainee Abuse at Guantanamo," *New York Times*, 30 November 2004, sec. A., p.1. British courts have declared the detention camp at Guantanamo (renamed Camp Delta, following the negative publicity associated with the previous designation as "Camp X-Ray") a legal black hole. The Bush administration's argument that international law protections do not apply to the detainees at Guantanamo, while widely opposed, has not faced direct challenge before a court. Nonetheless, there have been indications that international pressure based on concerns about the weakening of protections for prisoners of war have led the Bush administration to reconsider the applicability of the Geneva Conventions to combatants captured in the Afghan war. Thom Shanker and Katherine Q. Seelye, "Behind-the-Scenes Clash Led Bush to Reverse Himself on Applying Geneva Conventions," *New York Times*, 22 February, 2002, sec. A, p. 12. Moreover, while no court has challenged the applicability of the Geneva Conventions, the administration's argument that *U.S. legal* protections do not extend to the Guantanamo detainees as foreign nationals held outside U.S. borders has been tested. On June 28, 2004, the Supreme Court handed down its decision in *Rasul v. Bush*, a case brought by 14 of the 600+ detainees still being held at Guantanamo as of 2004. The 14 detainees included two Australian citizens and 12 Kuwaitis (the involvement of another two British citizens, originally party to the suit, ended when they were released from Guantanamo prior to the Supreme Court hearing of the case, as a result of intense diplomatic pressure on the Bush administration by the Blair government). Although they were not U.S. citizens, the Court held that because they were being detained in a territory under the control of the U.S. government, they were entitled to certain protections under U.S. federal law, specifically the right to challenge the basis of their detention through habeas petitions. [Rasul v. Bush, 542 U.S. 466 \(2004\)](#). Linda Greenhouse, "Access to Courts," *New York Times*, 29 June, 2004, sec. A, p. 1. Following increasing international scrutiny of the conditions of detention at Guantanamo and in other detention facilities controlled by the U.S. in Iraq and Afghanistan, the Bush administration has recently indicated that the majority of Guantanamo detainees will be returned to Afghanistan. Neil A. Lewis, "Guantanamo Detention Site Is Being Transformed, U.S. Says," *New York Times*, 6 August 2005; sec. A, p. 8 (citing an agreement between the Pentagon and various governments, including Afghanistan, Saudi Arabia and Yemen, on the transfer of detainees out of Guantanamo and to custody in their countries of origin)

³ Note that while "legalist" is the term used herein in contrast to "military", it is understood that the military paradigm too invokes a body of law -- namely the laws of war. Nonetheless, the shorthand of military/legalist is useful in capturing the two competing alternatives to respond to international terrorism considered in this essay.

⁴ Nothing in the argument presented in this essay is intended to suggest that individual acts of terrorism might not rise to the level of crime against humanity under the paradigm of the laws of war and

international humanitarian law. Rather, the perspective taken in this article challenges the assumption that terrorism, in all its forms and instances, is best treated as an act of war or armed conflict rather than an extremely dangerous form of international criminal action. For an analysis of terrorism as an act of armed conflict to be treated as a crime against humanity, see Derek Jinks, *September 11 and the Laws of War*, 28 *Yale Journal of International Law* 1 (Winter 2003).

¶5 To be sure, an increasing number of scholars throughout the 1990s drew attention to the inability of the Westphalian state-centric model to accurately capture the nature of the post-Cold War international system, particularly in light of the impact of globalization. For an example of an international relations and international law scholar calling for a post-Westphalian reconceptualization of world order, see Richard Falk, *Predatory Globalization: A Critique* (Cambridge: Polity Press, 1999), 20-25.

¶6 For a discussion of such strategies, see, e.g., Phil Williams, *Transnational Criminal Enterprises, Conflict and Instability, Turbulent Peace: The Challenges of Managing International Conflict* (eds. Chester Crocker, Fen Osier, and Pamela Aall) 2001, at 97-111.

¶7 It is worth defining the term "unprecedented" in this context. Typically, commentators have noted that the scale and method of attacks by al-Qaeda are unprecedented. This is not the sense in which the term is intended here. For instance, the method of hijacking planes is one that had become quite conventional over the last 50 years, though of course the use of the planes to attack other structures is an innovation. While the scale of the attack (the four hijackings and attacks totaling almost 3000 deaths) is massive, the attempted bombing of the World Trade Center in 1993 would likely have caused even greater loss of life, had it been successful, but was treated as a conventional form of terrorism at the time that the attempt occurred. What this essay will treat as unprecedented is the identity of the perpetrators of these attacks. While, in the case of the September 11th attacks, the individual hijackers' nationalities and class backgrounds are unusual enough, what is salient about the perpetrators is that they belonged to a *transnational network*, without direct state sponsorship, the objectives of which (allegedly) concern the structure of the international order (and more particularly the consequences of American hegemony for certain regions of the world) and are *not* limited to a domestic or territorially-bounded set of goals. Thus, the link between territoriality and the objectives of political violence is severed in the case of al-Qaeda, creating a truly transnational threat.

¶8 While there is some controversy over which norms enjoy peremptory status, the latter half of the 20th century witnessed the emergence of international consensus over the minimum content of *jus cogens* norms including those enshrined in the London Charter of the Nuremberg Tribunals. These norms include respect for the laws of war (*jus in bello* as compiled in the Hague Regulations), humanitarian law (now largely compiled in the 1949 Geneva Conventions), the prohibition on genocide (now reflected in the Genocide Convention), and the norms governing the applications and enforcement of international legal obligations (such as the norms that treaties that are in force are binding on their parties -- i.e., *pacta sunt servanda*).

¶9 The military response also relies on an international legal basis -- that of the right of self-defense enshrined in Article 51 of the UN Charter. The claim that Afghanistan was a legitimate target of American and British military attacks because that country "harbored" within its territory terrorist groups held responsible by the American government for the September 11th attacks was forwarded by the British and American governments without seeking UN Security Council approval of their interpretation of Article 51. The effort to fit the September 11th attacks into a more conventional paradigm of aggression or armed conflict, attributing responsibility to a state without actually alleging state sponsorship, reflects the general anxiety to find conventional means to fight an unconventional threat. Yet even as the international legal norm of self-defense was invoked, international law was being pronounced inadequate to meet the post-September 11th challenge. This ambivalence suggests both the continued relevance of international law and the need to stretch the limits of the existing framework in order to fashion an appropriate response.

¶10 This is the official abbreviated title for the Tribunal. See U.N. Press Release, No. IT/13, Nov. 30, 1993, and No. IT/30, Feb. 11, 1994. The full title of the ICTY is the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of **International Humanitarian Law** Committed in the Territory of the Former Yugoslavia since 1991. For the Security Council resolution establishing the ICTY, see S. Res. 827, U.N. SCOR, U.N. Doc. S/RES/827 (1993).

¶n11 The full title of the ICTR is the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of **International Humanitarian Law** Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States Between 1 January and 31 December 1994. For the Security Council resolution establishing the ICTY, see S. Res. 955, U.N. SCOR, UN. Doc. S/RES/955 (1994).

¶n12 The Statute for the International Criminal Court was drafted at the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court [hereinafter, "U.N. Diplomatic Conf. of Plenipotentiaries on the Establishment of an ICC"] held in Rome, Italy (1998). See Statute of the International Criminal Court, U.N. Diplomatic Conf. of Plenipotentiaries on the Establishment of an ICC, U.N. Doc. A/CONF. 183/9 (1998).

¶n13 By "Kosovo war" here I mean to refer to the eleven week bombing campaign conducted by NATO against the Federal Republic of Yugoslavia, beginning on March 24, 1999. This campaign was designated "Operation Allied Force" and had many unique features worth bearing in mind. Most importantly, the Kosovo war may represent a precedent for expanding the international legal basis for the use of force. As at least one international legal scholar has noted, Operation Allied Force represented "the first time a major use of destructive armed force had been undertaken with the stated purpose of implementing UN Security Council resolutions but without Security Council authorization." Adam Roberts, *NATO's 'Humanitarian War' Over Kosovo*, 41(3) SURVIVAL 102, 102 (1999). The bombing campaign against Afghanistan by Anglo-American forces -- initially dubbed 'Operation Infinite Justice,' but later renamed 'Operation Enduring Freedom' -- which began on October 7, 2001 resembles the Kosovo campaign in that it did not enjoy direct Security Council authorization, though two resolutions in September express the United Nation's support for efforts to combat terrorism. In the case of the air campaign against Afghanistan, the American representative to the United Nations, Ambassador John Negroponte, presented a letter to the Security Council on October 8, 2001 stating that the attacks against Afghanistan were acts of self-defense under Article 51 of the Charter of the United Nations. See Christopher Wren, "U.S. Advises UN. Council More Strikes Could Come," New York Times, 9 October 2001, sec B, p. 5 (quoting from the Negroponte letter offering "the Bush Administration's justification for the military strikes . . . against the Taliban). Absent evidence establishing state sponsorship of the September 11th attacks on the part of Afghanistan, this invocation of the right of self-defense reflects an expansive interpretation of the Article 51. In particular, while Article 51 recognizes an "inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations" it has not previously been interpreted to permit uses of force against a state not held directly responsible for the attack in question. See UN. CHARTER art. 51. Thus the question arises whether the right of self-defense extends to attacks on states on whose territory non-state actors believed to be responsible for an armed attack may be present. A slightly different approach may be to say that the September 11th attacks combined with the apparent absence of a direct state-sponsor require a broadening of the U.N. Charter's authorization of the use of force to cover actions like Operation Enduring Freedom, and future uses of military force to attack terrorists wherever they may be located. Such a broadened definition of the justified use of force may indeed be necessary but would require careful attention to the repercussions for the norm of nonintervention. Again, refining international legal norms of *jus ad bello* to account for new threats to international security is suggestive of the significance and relevance of international law as a framework for structuring an international response to such threats.

¶n14 The first effort to draft a comprehensive treaty against terrorism was taken up by the United Nations in the early 1970s, but failed in large measure because of the absence of a widely accepted definition of the term "terrorism." As a result, efforts were redirected towards the drafting of more specific conventions preventing and prohibiting certain types of terrorism, such as aircraft hijacking, crimes against protected persons and hostage taking. For an overview of this history and the difficulty of developing a commonly accepted legal definition of terrorism, see the remarks of Hans Correll, Under-Secretary-General for Legal Affairs. Hans Correll, "The international instruments against terrorism: the record so far and strengt hening the existing regime," remarks delivered at a symposium entitled "Combating International Terrorism: The Contribution of the United Nations," (Vienna International Centre, 3 June, 2002) at 3-4 available at <http://www.un.org/law/counsel/english/remarks.pdf>. See also Anne-Marie Slaughter and William Burke-White, *An International Constitutional Moment*, 43 Harvard International Law Journal 1 (Winter 2002): 10-12.

¶n15 For a recent report by the Sixth Committee, including recommendations on measures to eliminate international terrorism and recapitulating the Committee's efforts to develop such measures since 1994, see UNGA/59/514, 18 November 2004 (presenting the Report of the Sixth Committee on Measures to eliminate international terrorism to the UN General Assembly).

¶n16 For a discussion of the drafting of the ICC statute, see supra note 12 and accompanying text.

¶n17 UNGA/L/3103, 24 November 1998.

¶n18 Initially three states -- Iran, Iraq and North Korea -- were singled out by the Bush administration as constituting an "axis of Evil," during President Bush's State of the Union address on January 29, 2002. Subsequently, it has been suggested by the administration that other states, such as Syria, Libya and Cuba, may also enjoy the same sobriquet. The case of Syria is instructive in indicating the limits of the divisive approach adopted by the Bush administration and its detrimental effects on coordinated counter-terrorism efforts. As has been widely remarked, the Syrians played a significant role in furnishing the Bush administration with valuable intelligence information after September 11, but ultimately reduced cooperation with the U.S. when it became clear that American officials were intent on relegating Syria to the wrong side of the with-us-or-against-us paradigm. See, eg., Seymour Hersh, "The Syrian Bet," *The New Yorker*, 28 July, 2003, 32. Even while denouncing the Syrians, however, the Bush administration has also apparently been using Syria to extract information from detainees "rendered" by Americans to Syria for interrogation and detention. See Maher Arar, Statement regarding torture and detention in Syria to the Canadian Broadcasting Company (November 4, 2003)(transcript available at http://www.cbcca/news/background/arar/arar_statement.html); see also, David Cole, "Syria, U.S. Torture Center," *The Nation*, December 1, 2003, 7; and Scott Shane, "The Costs of Outsourcing Interrogation: A Canadian Muslim's Long Ordeal in Syria," *New York Times*, 29 May, 2005, sec. 1, p. 10. The story of the rendition of Canadian citizen Maher Arar to Syria by American authorities is an especially disturbing example of "cooperation" in counter-terrorism efforts, but it is all the more interesting when one considers the circumstances of Arar's release. Syrian authorities, exasperated with American policy in the aftermath of an Israeli air attack on Syrian targets, apparently saw no further reason to keep Arar detained at the behest of the Bush administration and released him. Arar, now living with his family in Ottawa, has filed suit against both Canadian and American officials over his abduction, rendition and torture while in Syrian custody. Nina Bernstein, "U.S. Defends Detentions At Airports," *New York Times*, 10 August, 2005, sec. B, p. 1 (discussing oral arguments in August 2005 in Arar's federal lawsuit).

¶n19 It is possible, for instance, that alleging connections between all Islamist groups increases the incentives of such groups to actually develop connections where none may yet exist, precisely because they may now face a common threat. Rather than relying on a rule-of-thumb distinction that draws lines between Islamist terrorists and all other forms of terror, the more appropriate distinction would be between terrorist groups with a global agenda and those groups with domestic or national goals, whether Islamist or not.

¶n20 On the efforts to draft the ICC Statute, see supra note 12 and accompanying text.

¶n21 This convention came out of a decision by the UN General Assembly to empower an ad hoc committee to prepare a draft of a convention for the suppression of international financing of terrorism in 1998. See UNGA/RES/53/108, 8 December 1998. The full text of the Convention is available at http://www.unodc.org/unodc/resolution_2000-02-25_1.html.

¶n22 The draft convention was adopted by the General Assembly through UNGA/RES/54/109, 25 February, 2000.

¶n23 Today there are twelve major multilateral conventions and protocols related to the combating of terrorism already in effect, in addition to numerous specific UN Security Council binding resolutions issued by the Council under its Chapter VII powers in response to specific incidents of terrorism. The database maintained by the United Nations Office on Drugs and Crime (UNODC) includes all twelve major conventions; the twelve conventions may be accessed at http://www.unodc.org/unodc/terrorism_conventions.html. Examples of the most significant such conventions, particularly for legal definitions of terrorism are: Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, [22 U.S.T. 1641](#); Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23,

1971, [24 U.S.T. 564](#); Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons Including Diplomatic Agents, Dec 14, 1973, [28 U.S.T. 1975](#); International Convention against the Taking of Hostages Dec 17, 1979, T.I.A.S. No. 11,081, 1316 U.N.T.S. 205; Convention on the physical protection of nuclear materials, with annex, Oct. 26, 1979, TIAS No. 11,880; and the International Convention for the Suppression of Terrorist Bombings (UNGA, 1997).

¶n24 Report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996 (A/59/766), UNGA/RES/59/766, 4 April 2005, *available at* <http://daccessdds.un.org/doc/UNDOC/GEN/N05/295/27/PDF/N0529527.pdf?OpenElement>.

¶n25 UNGA/RES/59/290, 15 April 2005 This will constitute the thirteenth individual convention combating a specific type of terrorist act and once again serves as a reminder of the need for a single comprehensive convention on the prevention, prohibition and prosecution of all forms of international terrorism.

¶n26 The Madrid Club -- which was founded by "former prime ministers and presidents of democratic countries" to honor the memories of the victims of the terrorist attacks of March 11, 2004 in Madrid, Spain -- convened the "International Summit on Democracy, Terrorism and Security" from March 8-11, 2004 In his address to the participants of the summt, Kofi Annan noted that he had convened a "High-Level Panel on Threats, Challenges and Change" in 2003 to generate ideas on how the United Nations could be more effective in a changing international security environment. The Panel's report, entitled "A more secure world: our shared responsibility," was made public in 2004 and called for the adoption of a definition of terrorism. Secretary-General Annan reminded the participants at the Madrid Summit that the Panel specifically called for "a definition of terrorism which would make it clear that any action constitutes terrorism if it is intended to cause death or serious bodily harm to civilians and non-combatants, with the purpose of intimidating a population or compelling a Government or an international organization to do or abstain from any act." Kofi Annan, "A Global Strategy for Fighting Terrorism," Keynote address to the Closing Plenary of the International Summit on Democracy, Terrorism and Security, March 10, 2005, *available at* <http://www.un.org/apps/sg/sgstats.asp?nid=1345> (last accessed August 16, 2005). An international conference or summit dedicated to the consideration of this draft definition would greatly assist the completion of a draft comprehensive convention on international terrorism. For the report of the High-Level Panel, see *A More Secure World: Our Shared Responsibility*, Report of the High-Level Panel on Threats, Challenges and Change, 2 December 2004 (United Nations), UNGA/59/565, 2 December 2004, *available at* <http://www.un.org/secureworld/report.pdf>.

¶n27 Indeed, by focusing on specific states and organizations and opting for a militarist approach, the United States may needlessly have raised fears that the label of terrorism would be deployed by states to tar their enemies or legitimate military action against them, undermining the value of a legal definition by which to coordinate multilateral action. Much of the controversy concerning the development of a commonly agreed definition of terrorism is motivated by anxieties that the label "terrorist" will be used by states to delegitimize political opposition groups or to justify unilateral military actions. Many aspects of the militarist paradigm adopted after the September 11th attacks may have served to validate these concerns. The urgent need for a commonly agreed definition is made clear by the increasing difficulty experienced by the United States to mobilize countries to join its anti-terror coalition. As other states disagree with the U.S. definition of which states and organizations should be treated as terrorist and what actions against them would be justified by such a designation, counter-terrorism coalitions become increasingly attenuated. The purpose of a comprehensive convention on international terrorism is precisely to provide a shared normative and legal framework, which would ground efforts to build coalitions for collective counter-terrorism initiatives.

¶n28 The ICC's jurisdiction commenced on July 1, 2002, when its statute came into effect. A separate tribunal would be required for the prosecution of crimes that occurred in advance of that date, including the attacks of September 11. The Bush administration has shown little patience or interest in international initiatives for prosecuting those allegedly responsible for terrorist attacks. Most international jurists have acquiesced in the administration's insistence on exclusive jurisdiction over the attacks of September 11, although the proposed military tribunals have met with criticism due to their incompatibility with international legal standards on the fair treatment of prisoners of war. In light of these criticisms, the Bush administration pushed its position further, arguing that the Geneva Conventions require amendment to account for the special circumstances of prisoners accused of involvement with terrorism. On this argument, see Kim Sengupta, *Geneva Conventions are outdated, says US envoy*, *The Independent* (U.K.),

February 22, 2002 (noting that Ambassador Pierre-Richard Prosper was sent to Europe by the Bush administration to explain the view that the Geneva Conventions "need to be rewritten to deal with the threat of international terrorism"). Initially, the Bush administration took the more aggressive position that **international humanitarian law** is not applicable to prisoners that the U.S. captured in Afghanistan and has detained without charge in a detention camp at Guantanamo Bay, Cuba (see also note 2 above). On the Guantanamo controversy and the applicability of the Geneva Conventions, see Katherine Q. Seelye, "Detainees are not POWs, Cheney and Rumsfeld Declare," *The New York Times*, 28 January 2002, sec A, p. 6; see also, Katherine Q. Seelye, "Powell Asks Bush to Review Stand on War Captives," *The New York Times*, 27 January 2002, sec 1 (noting that Secretary of State Colin Powell broke with other members of the Bush cabinet and took the view that the Geneva conventions are applicable to POWs captured in Afghanistan). Under pressure from European allies, as well as the State Department's lawyers, Bush reversed the initial position; see, e.g., Katharine Q. Seelye, "In Shift, Bush Says Geneva Rules Fit Taliban Captives," *New York Times*, 8 February 2002, sec A; see also Thorn Shanker and Katharine Seelye, "Behind-the-Scenes Clash led Bush to Reverse Himself on Applying Geneva Conventions," *New York Times*, 21 February 2002, sec A, (noting that "NATO allies were so concerned with Mr. Bush's initial decision to reject the conventions that Britain and France warned that they might not turn over Taliban and Al Qaeda fighters captured by their troops in Afghanistan"). However, the administration has not been willing to apply the conventions to Al Qaeda fighters, restricting the applicability to Taliban captives, prompting the International Committee of the Red Cross to issue a public objection. *Agency Differs with U.S. Over P.O.W.s*, *The New York Times*, February 8, 2002. In light of the abysmal legal precedents being set by the U.S. administration in its heavy-handed response, whether in terms of indefinite detention of immigrants, treatment of prisoners of war, or procedural standards in military tribunals, the arguments for an international diplomatic initiative to establish a tribunal in response to transnational terror are increasingly compelling.

²⁹ For a survey of draconian measures taken by the United States in its own anti-terrorism legislation, see Joshua D. Zelman, *Recent Developments in International Law: Anti-Terrorism Legislation Part Two -- The Impact and Consequences*, 11 *Journal of Transnational Law & Policy* 421 (Spring 2002). For a survey of comparable measures taken in the United Kingdom and a contrast with the far less drastic legislation adopted in Germany, see Kim Lane Scheppele, *Other People's Patriot Acts: Europe's Response to September 11*, [50 Loyola Law Review 89 \(Spring 2004\)](#).

³⁰ See Jinks, *supra* note 4, on arguments for treating terrorist acts by non-state actors as crimes against humanity.

³¹ For a detailed discussion of limitations to the ICC's jurisdiction over non-state parties to its statute, see Madeline Morris, *Terrorism and Unilateralism: Criminal Jurisdiction and International Relations*, 36 *Cornell International Law Journal* 473 (2004).

³² One possible precedent for such provisions is the "smart sanctions" imposed by the United Nations Security Council in specific instances of the use of trafficking to finance armed groups. For instance, in March 2001 the Security Council imposed such sanctions on Liberia to prevent illegal trafficking in diamonds, arms and timber by the Liberian government to finance and back the activities of the "Revolutionary United Front" armed rebel group in Sierra Leone. See UNSC/RES/1343 (2001). Such a move would also provide a forum to prosecute violations of the International Convention for the Suppression of the Financing of Terrorism, *supra* note 21.

³³ Resolution 1373 also established the Counter-Terrorism Committee of the UNSC (the "CTC") with a mandate to monitor implementation of the operative provisions of the resolution by Member States and to facilitate enhanced cooperation and coordination between states in their counter-terrorism efforts. Several other resolutions should also be noted, including: Resolution 1267 (1999), which established the Al-Qaida and Taliban Sanctions Committee that continues to monitor financing of terrorism; Resolution 1363 (2001), establishing the Terrorism Monitoring Group, which delivered its first report on measures taken against al-Qaeda to the Security Council on June 26, 2003; and Resolution 1377 (2001), adopting the declaration on the global effort to combat terrorism, which tasks the CTC with promoting best-practices for the areas covered by Resolution 1373, including the preparation of model laws. In all, seventeen Security Council resolutions on specific steps to combat terrorism have been adopted since September 2001 (with eleven other resolutions having been adopted under the Chapter VII powers of the Council between 1989 and September 2001, several of which specifically concerned multilateral strategies to

combat al-Qaeda and the Taliban). "Threats to international peace and security caused by terrorist attacks" has become a permanent agenda item of the Security Council. For a complete list of action by the Security Council concerning terrorism, see <http://www.un.org/terrorism/sc.htm>

ⁿ³⁴ There remains one worrisome issue, however, that has been inadequately addressed by the Security Council's Chapter VII actions concerning terrorism: the failure to require compliance with human rights obligations by member states undertaking counter-terrorism policies. Security Council resolutions on counter-terrorism under the Council's Chapter VII powers do not address human rights obligations and the CTC's mandate does not include the monitoring of performance by member states of obligations under human rights treaties in its review of counter-terrorism measures. While some subsequent Security Council resolutions have included reference to the need to comply with international human rights law, after substantial lobbying by the United Nations High Commissioner for Human Rights, it is not clear that this requirement has been brought under the Council's Chapter VII powers requiring mandatory compliance. For an example of a resolution including a reference to human rights (but issued as a declaration on combating terrorism, rather than a resolution under the Council's Chapter VII powers) see UNSC Resolution 1456 (2003), UNSC/RES/1456 (2003), 20 January 2003. For an account of the interventions by the office of the High Commissioner on Human Rights regarding the need to ensure concurrent efforts to comply with human rights obligations in counter-terrorism policies, see United Nations, Office for the High Commissioner on Human Rights, "Terrorism and Human Rights," <http://www.unhcr.ch/terrorism/> (last accessed on August 16, 2005).

ⁿ³⁵ The July 2005 bombings in London are only the most recent reminder of the degree to which the international security system has been destabilized both by the effects of an accelerating number of international terrorist attacks and by the consequences of the Afghanistan and Iraq invasions. In England, some prominent commentators have drawn a connection between increases in terrorism and the military actions undertaken by the United States and the United Kingdom under the doctrine of preemption. For instance, London mayor Ken Livingstone has publicly stated that the UK's participation in the invasion of Iraq increased the probability of a terrorist attack in London. See Ken Livingstone, "Three Ways to Make Us All Safer," *The Guardian* (UK), 4 August 2005, available at <http://www.guardian.co.uk/attackonlondon/comment/story/0,16141.1542245.00.html>. (last accessed August 16, 2005).

ⁿ³⁶ In his address to the United Nations General Assembly on September 23, 2003, Kofi Annan noted that the international community faced a critical juncture in its approach to international collective security and called for a major reappraisal of the mechanisms available to respond to threats as they emerge. Annan argued that if a robust and flexible new collective security structure can be devised, including the participation of regional organizations, it might answer "the concerns that make some states feel uniquely vulnerable, since it is those concerns that drive them to take unilateral action," which was perceived as a reference to the Bush administration's policy of using pre-emptive force. Annan also noted that the logic of preemption "represents a fundamental challenge to the principles on which, however imperfectly, world peace and stability have rested for the last 58 years." Felicity Barringer, "Annan tells General Assembly that UN must correct its weaknesses," *New York Times*, 24 September 2003, sec A, p.2.

ⁿ³⁷ For a discussion of the High-Level Panel's report, *A More Secure World*, see *supra* note 26 and accompanying text.

ⁿ³⁸ For instance, there was much coverage of European concerns about a second Bush administration during the run-up to the 2004 presidential election. The concerns were reportedly based on European anxiety about the Bush administration's preemption doctrine of national defense and the unilateralist approach taken by the United States in its war on terrorism. See, e.g., Roger Cohen, David Sanger and Steven Weisman, "Challenging Rest of the World with a New Order," *New York Times*, 12 October 2004, sec. A, p.1.

ⁿ³⁹ It was reported in July 2004 that the Bush administration had decided to replace the phrase "global war on terrorism" with the new phrase "global struggle against violent extremism," to describe ongoing efforts to combat international terrorism following the September 11th attacks. There was considerable speculation that this change reflected a decision to shift from the military paradigm of counter-terrorism toward a more multilateral and legalist approach. Subsequently, President Bush reverted to the language of the war on terror casting doubt on analyses suggesting a revision in U.S. anti-terror policy. On the

initial change of phrase, see Eric Schmitt and Thorn Shanker, "New Name for 'War on Terror' Reflects Wider US Campaign," *New York Times*, 26 July, 2005; sec A, p.7. On President Bush's subsequent reversion to the language of the war on terror, see Richard W. Stevenson, "President Makes It Clear: Phrase is 'War on Terror,'" *New York Times*, 4 August 2005; sec A, p. 12.

¶n40 The proposal to extend the Security Council's powers under Chapter VII at the end of Section III above (see note 36, above, and accompanying text) is in keeping with the review the Secretary-General proposed.

¶n41 Moreover, as the Israeli experience has demonstrated, revisions to the laws of war in such areas as the applicability of the Geneva Conventions serve little purpose in preventing or punishing terrorism. While some may find satisfying strategies of collective punishment and the relatively indiscriminate use of force in civilian areas, there is little empirical evidence that they have been effective in counter-terrorism.

¶n42 These include the twelve conventions referenced in note 23, above, and the recently adopted International Convention for the Suppression of Acts of Nuclear Terrorism, which will open for signature in September 2005 (see note 25, above, and accompanying text)./

¶n43 As Harold Koh has argued, with superpower comes "super-vulnerability" as a target for acts of international terrorism. Koh goes on to note that the United States has done little to promote a multilateral or collective security solution to this vulnerability, which, he argues, is the only constructive approach to meet the challenge of terrorism (through what he terms "transnational legal process"). Rather, Koh argues, the United States "has promoted double standards by which other nations are held accountable to human rights standards from which the United States exempts itself." Harold Hongju Koh, *Transnational Legal Process After September 11th*, 22 *Berkeley Journal of International Law* 337 (2004): 350-351. Koh's point underscores the significance of the troubling observation that existing international counter-terrorism efforts do little to require concurrent compliance with human rights obligations, and American unilateral and militarist approaches to counter-terrorism have further undermined human rights compliance. On this point, see note 34 above.

¶n44 Two international legal scholars have suggested that the September 11th attacks generated a "constitutional moment" for the international community to redesign the collective security system and to generate new norms to meet the challenge of terrorism. See Slaughter and Burke-White, *supra* note 14.