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Symposium: From Pipe Bombs to PhD-s: International Terrorism in the Twenty-First Century

THE UNITED KINGDOM'S RESPONSE TO INTERNATIONAL TERRORISM

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I. INTRODUCTION

The United Kingdom is not unfamiliar with terrorism. Over the last two centuries there have been outbursts of terrorism in and related to Ireland, and the "Thirty Years War" from 1968 to the so-called Good Friday Agreement of 1998 has kept the British people aware of the many important facets of terrorist activity and their impact on the law, on political priorities, on international relations, and on the mood of the nation.

With the rapid emergence of what is loosely called international terrorism in recent years, the complexities grow; and there is an apparently never-ending sequence of terrorist outrages in different parts of the world, perpetrated by a variety of terrorist groups and organizations and stimulating a variety of responses in individual countries whether or not they are directly affected by particular actions. Moreover, there is a growing appreciation of the seemingly endless drift of terrorist activity well into the future. The endless drift also applies to anti-terrorist activity. When interviewed by an American journalist in 1915 about the Great War, David Lloyd George – later to be Prime Minister from 1916 to 1922 – said that there was "neither clock nor calendar" to the British war effort.[1] The phrase itself – "neither clock nor calendar" – can be applied today to terrorism and anti-terrorism alike, with virtually all countries compelled to respond as never before in what may be described, at least formally, as times of peace.

For the United Kingdom, well versed in domestic terrorism and acutely aware of the threat of international terrorism, the challenges of national security in a democratic society are both pressing and changeable. The British government has in recent years responded by reaching for custom-made legislative powers, by seeking international cooperation (ranging from bilateral contacts between London and Dublin to cross-border links within

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1. JOHN GRIGG, LLOYD GEORGE: WAR LEADER 1916-1918 5 (2002).

Europe or world-wide links through the United Nations), and by reassessing and adapting the laws of asylum, immigration, and deportation.

There has, given the rapidity of the responses, been a sense of bewilderment and tentativeness. Consider, for example, the detention of hundreds of individuals, including several British nationals, in Guantanomo Bay, Cuba. The United States has claimed the right, in the words of Donald Rumsfeld, "to detain certain individuals 'for the duration of the conflict,'" a statement which the Foreign Affairs Committee of the House of Commons saw as "pos[ing] the question of whether the 'war against terrorism', unlike a conventional conflict, can ever have an end."[2] One of the detained British nationals, Feroz Ali Abbasi, and his mother sought judicial review in order to compel the Foreign and Commonwealth Office "to make representations on his behalf to the United States Government or to take other appropriate action or at least to give an explanation as to why this has not been done."[3] The Court of Appeal found itself, in hearings last September and its decision handed down on 6 November 2002, obliged to delve into treaty obligations, public international law, human rights, and searching issues of justicibility.[4]

The appellate judges were patently uneasy, not least over recent rulings by courts in the United States on Guantanomo Bay. Lord Phillips, the Master of the Rolls, speaking for the Court of Appeal, suggested that it was objectionable that "Mr Abbasi should be subject to indefinite detention in territory over which the United States has exclusive control with no opportunity to challenge the legitimacy of his detention before any court or tribunal."[5] On the facts before the Court of Appeal, Lord Phillips was satisfied that the Foreign and Commonwealth Office had not been inactive over the position of British citizens in Guantanomo Bay and that appellate decisions in the United States were still to be made.[6] "[T]he issue of justiciability depends []on subject matter and suitability in the particular case,"[7] and in this case it was felt to be inappropriate to order the Secretary of State to make any specific representations to the United States.[8] The Center for Constitutional Rights, New York, concluded that "at present the British

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2. FOREIGN AFFAIRS COMMITTEE, SECOND REPORT, 2002-03 Sess., *Foreign Policy Aspects of the War Against Terrorism*, H.C. 196, para. 230 (Dec. 19, 2002), *available at* http://www.publications.parliament.uk/pa/cm200203/cmselect/cmfaff/196/19602.htm. *See also id.* app. at 7, para. 4 (a Memorandum from the Foreign and Commonwealth Office, which states that "[t]he Government is conscious of the importance of safeguarding the welfare of the British detainees in Guantanomo Bay and of the need to resolve their position"); *Id.* app. at 12, para. 1 (a detailed Memorandum submitted by the New York-based Center for Constitutional Rights expressing "very grave concerns" over the entire situation at Guantanomo Bay).

3. Abbasi v. Sec'y of State, [2002] C.A. Civ. 1598, para. 1. (C.A. 2002) (Lord Phillips, MR; Waller L.J.; Carnwath L.J.).

4. *See id.*

5. *Id.* para. 66.

6. *See id.* para. 107, i., iii.

7. *Id.* para. 85.

8. *Id.* para. 107, i.

courts have considered themselves unable to do more than give their admittedly damning view of the illegality of the detentions, and have not compelled the Foreign Secretary to act in a particular way."[9] The expression of view by a British Court is not unimpressive or unimportant, however, and it may have encouraged the Foreign Affairs Committee of the House of Commons to recommend that the British Government should "continue to press" for the trial of those detained at Guantanomo Bay and to provide further information about the British citizens detained.[10] Developments in the American courts will be monitored and scrutinized, of course, though a recent decision of the Federal Court of Appeals in Richmond, Virginia, demonstrated great deference to the President in the context of the war against terrorism.[11]

A recent example of the British courts skirting the boundaries of justiciability while at the same time allowing the public airing of the issues at stake is the case where the Campaign for Nuclear Disarmament (CND) sought judicial review against the Prime Minister and others in an effort to secure a declaratory ruling as to the true meaning of United Nations Resolution 1441.[12] The spur behind CND was the apparent imminence of war against Iraq,[13] a subject which also occupied much of the time of the Foreign Affairs Committee in December 2002.[14] It was claimed that the Government should not embark on military action against Iraq in the mistaken belief that it was lawful to do so.[15] They sought, in effect, a ruling on a pure point of law.[16] The Divisional Court, however, rejected any temptation to declare the meaning of an international instrument operating purely on the plane of international law, adding that it did not wish "to embark upon the determination of an issue if to do so would be damaging to the public interest in the field of international relations, national security or defence [sic]."[17] "The issue on which CND [sought] a ruling[,]" said Mr Justice Richards, "is one on which the Government has deliberately refrained from expressing any concluded or definitive view."[18] Once again the applicants had to be content with a public airing of the issues but without a substantive ruling in their favor. The *Abbasi* case and the *CND* case reflect the difficulty of securing

9. FOREIGN AFFAIRS COMMITTEE, *supra* note 2, app. 12, para. 31.

10. *Id.* paras. 238-39.

11. *See* United States v. Lindh, 212 F. Supp. 2d 541, 554-58 (E.D. Va. 2002).

12. *See* Campaign for Nuclear Disarmament v. Prime Minister, [2002] H.C. 2777 (Q.B. Div'l Ct. 2002) (Simon Brown L.J., Maurice Kay J., Richards J.).

13. *See id.* para. 2.

14. *See* FOREIGN AFFAIRS COMMITTEE, *supra* note 2, paras. 77-200 (dealing extensively with the Threat from Iraq, Disarming Iraq, and Military Action Against Iraq, along with Oral Evidence, Memoranda and Appendices). Resolution 1441 was adopted by the Security Council on Nov. 8, 2002. U.N. SCOR, 57th Sess., 4644th mtg. at 1, U.N. Doc. S/RES/1441 (2002), *available at* http://www.un.org/Depts/dhl/resguide/scact2002.htm.

15. *See* Campaign for Nuclear Disarmament, [2002] H.C. 2777.

16. *Id.* para. 59.

17. *Id.* para. 47, ii.

18. *Id.* para. 53.

political accountability on serious issues of international law and policy and, at the same time, underline difficulty of securing an alternative mechanism of accountability through the courts. A similar problem exists in wider areas of national security, especially in the face of new-style terrorism.

II. NATIONAL SECURITY: THE IRISH QUESTION AT THE CENTRE

Terrorism in and associated with Northern Ireland from 1968 onwards made many facets of new-style methods familiar to the British people: advanced technology, easier communications, a greater international impact (involving, for instance, countries such as Libya as well as drawing on sympathizers in the United States who were active enough even in the nineteenth century), and the deliberate use of the media, especially television, to offer the "oxygen of publicity" to various groups.[19] In addition, some groups indulged more and more in sinister fundraising on a rapidly evolving basis, so much so that the Northern Ireland Affairs Committee of the House of Commons spoke as follows in mid-2002:

> In addition to traditional fundraising activities such as extortion and armed robbery, paramilitaries from both traditions are increasingly turning their attention to more complex and sophisticated forms of organised [sic] criminal activity such as fuel smuggling and counterfeiting. These probably net the terrorist groups millions of pounds of income each year. Some of the revenue goes to fund individual criminal lifestyles. The remainder buys propaganda and weapons which help terrorists maintain their dominance – often violent – of local communities.[20]

The Committee went on to examine in devastating detail the corrupt side of terrorism which is so often ignored by romanticists and apologists. Authorities in the United States are fully aware of what terrorism brings in its slipstream, and the Committee referred to the trial and conviction of Provisional IRA members in the United States in 2000 for seeking, well after the Good Friday Agreement of 1998, to acquire weapons there; and mention was also made of arrests of alleged Provisional IRA explosives engineers in Colombia, allegedly linked to FARC (the Revolutionary Armed Forces of Colombia) "which has strong links with the Colombian drugs trade."[21] In the

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19. *See* Brind v. Sec'y of State, 1 All E.R. 720 (H.L. 1991).

20. NORTHERN IRELAND AFFAIRS COMMITTEE, FOURTH REPORT, 2001-02 Sess., *The Financing of Terrorism in Northern Ireland*, H.C. 978-I, at 5 (July 2, 2002), *available at* http://www.parliament.the-stationery-office.co.uk/pa/cm200102/cmselect/cmniaf/978/97802.htm (last visited May 6, 2003).

21. *Id.* para. 5.

United Kingdom the trial began only last month of three men alleged to be part of a Real IRA bomb plot,[22] the Real IRA being dissident Republican terrorists in the undergrowth of activity in Northern Ireland in both the Republican and the Loyalist traditions.

The special brand of domestic terrorism associated with Ireland has, over the last three decades, produced considerable legislation, considerable litigation, a plethora of official and unofficial reports and studies, a series of constitutional proposals and agreements, and a cauldron of political controversy over international and national law. The official reports alone provide an arsenal of description and analysis of terrorism, mainly associated with Northern Ireland.[23] The legislation for the last thirty years includes laws specifically related to Northern Ireland[24] and laws related to the United Kingdom as a whole.[25] A major effort to bring the legislation together, to

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22. *See* Stewart Tendler, *Phone Calls 'Link Three Accused to Real IRA Gang,'* THE TIMES (London), Jan. 23, 2003, at 9. The bombings took place in 2001. *See id.* "As the attacks were being planned, members of the gang were allegedly running a racket called 'diesel washing', whereby cheap diesel meant for farmers is sold as normal diesel at enormous profit." *Id.*

23. *See, e.g.*, TRIBUNAL OF INQUIRY, VIOLENCE AND CIVIL DISTURBANCES IN NORTHERN IRELAND IN 1969, 1972, Cmnd. 566 (reporting violence and civil disturbances in Northern Ireland in 1969), *available at* http://cain.ulst.ac.uk/hmso/ scarman.htm; COMMITTEE OF PRIVY COUNSELORS, REPORT OF THE COMMITTEE OF PRIVY COUNSELORS APPOINTED TO CONSIDER AUTHORISED PROCEDURES FOR THE INTERROGATION OF PERSONS SUSPECTED OF TERRORISM, 1972, Cmnd. 4901, *available at* http://cain.ulst.ac.uk/hmso/parker.htm [hereinafter THE PARKER REPORT]; REPORT OF THE ENQUIRY INTO ALLEGATIONS AGAINST THE SECURITY FORCES OF PHYSICAL BRUTALITY IN NORTHERN IRELAND ARISING OUT OF EVENTS ON THE 9TH AUGUST 1971, 1971, Cmnd. 4823, *available at* http://cain.ulst.ac.uk/hmso/compton.htm; REPORT OF THE COMMISSION TO CONSIDER LEGAL PROCEDURES TO DEAL WITH TERRORIST ACTIVITIES IN NORTHERN IRELAND, 1972, Cmnd. 5185, *available at* http://cain.ulst.ac.uk/hmso/diplock.htm [hereinafter THE DIPLOCK REPORT]; REPORT OF A COMMITTEE TO CONSIDER, IN THE CONTEXT OF CIVIL LIBERTIES AND HUMAN RIGHTS, MEASURES TO DEAL WITH TERRORISM IN NORTHERN IRELAND, 1977, Cmnd. 5847, *available at* http://cain.ulst.ac.uk/hmso/gardiner.htm [hereinafter THE GARDINER REPORT]; STANDING ADVISORY COMMISSION ON HUMAN RIGHTS, THE PROTECTION OF HUMAN RIGHTS BY LAW IN NORTHERN IRELAND, 1977, Cmnd. 7009, *available at* http://cain.ulst.ac.uk/hmso/cmd7009.htm; REPORT OF THE COMMITTEE OF INQUIRY INTO POLICE INTERROGATION PROCEDURES IN NORTHERN IRELAND, 1979, Cmnd. 7497 *available at* http://cain.ulst.ac.uk/hmso/bennett.htm; REPORT OF AN INQUIRY INTO LEGISLATION AGAINST TERRORISM, 1996, Cmnd. 3420 (see *infra* note 27 for a more current report on legislation against terrorism).

24. *See* various laws including CIVIL AUTHORITIES (SPECIAL POWERS) ACT (1922), *available at* http://cain.ulst.ac.uk/hmso/spa1922.htm, leading up to the now-repealed NORTHERN IRELAND (EMERGENCY PROVISIONS) ACT (1996) (amended 1998), *available at* http://www.hmso.gov.uk/acts/acts1996/1996022.htm.

25. *See* PREVENTION OF TERRORISM (TEMPORARY PROVISIONS) ACT (1974), *available at* http://www.hmso.gov.uk/acts/acts1989/Ukpga_19890004_en_1.htm, re-enacted finally in the now-repealed PREVENTION OF TERRORISM (TEMPORARY PROVISIONS) ACT (1989), *available at* http://www.hmso.gov.uk/acts/acts1989/Ukpga_19890004_en_1.htm. Periodic review of such legislation was undertaken at various times: *see* Cmnd. 7324 of 1978 (Lord Shackleton); Cmnd. 8803 of 1983 (Lord Jellicoe); and Cmnd. 264 of 1987 (Viscount Colville). The original Act of 1974 was enacted as an immediate response to the Birmingham pub bombings of that year, in which 21 died and over 180 were injured. *See* CLIVE WALKER, THE PREVENTION OF TERRORISM IN BRITISH LAW 31 (2d ed. 1992).

encompass domestic and international terrorism, was the Terrorism Act 2000,[26] which itself followed on an extensive consultation exercise.[27] Well before the Terrorism Act 2000 the "tension between terrorist legislation and human rights" had "generated a remarkable amount of litigation before the Strasbourg court," and the tension is likely to continue.[28] In the United Kingdom as a whole but with regard to Northern Ireland in particular, events since 1968 have deeply influenced approaches to national security (including the involvement of the Security Service, MI5), to police powers, to the maintenance of public order, to the exercise of administrative discretion at its widest level, to ombudsman procedures, to the status of the police, to the systems of prosecution and of trial, to the use of informers, to the employment of the military arm in aid of civil power, and to co-operation in law enforcement with other countries including the Republic of Ireland and the United States.

The various events stretched mechanisms of political accountability to their limits, and pressures were brought to bear in Parliament as well as in the courts. After direct rule from London was re-established for the province in 1972, successive efforts to find a new constitutional settlement culminated in the Good Friday Agreement of 1998 which reaffirmed "total and absolute commitment to exclusively democratic and peaceful means of resolving differences on political issues" and "opposition to any use or threat of force . . . for any political purpose."[29] Despite continuing activity by various paramilitary groups, the slow movement to the decommissioning of illegally-held arms in the possession of paramilitary groups, and the suspension last year of the Northern Ireland Assembly, the Good Friday Agreement has unquestionably improved the situation in Northern Ireland; and furthermore it provided a basis for the adoption of the Terrorism Act 2000.

The Government recognized in 1998 "that the threat from international terrorist groups (and to a lesser extent other groups within this country) means that permanent UK-wide counter-terrorist legislation will be necessary even when there is a lasting peace in Northern Ireland."[30] It was pointed out at the

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26. *See* Terrorism Act 2000, *available at* http://www.hmso.gov.uk/acts/acts2000/20000011.htm (last visited May 6, 2003).

27. *See* LEGISLATION AGAINST TERRORISM, 1998, Cmnd. 4178 (a consultation paper presented by the Secretary of State for the Home Department and the Secretary of State for Northern Ireland), *available at* http://www.archive.official-documents.co.uk/document/cm41/4178/4178.htm (last visited May 6, 2003).

28. *See* A.W. BRADLEY & K.D. EWING, CONSTITUTIONAL AND ADMINISTRATIVE LAW 628 (13th ed. 2003). Chapter 26 of the book provides a valuable account of emergency powers and terrorism. *See id.* at 602-28. The litigation, of course, relates to the European Convention on Human Rights and latterly to the Human Rights Act 1998, which incorporates the Convention into domestic law.

29. THE BELFAST AGREEMENT: AN AGREEMENT REACHED AT MULTI-PARTY TALKS ON NORTHERN IRELAND, 1998, Cmnd. 3883, at 1, para. 4, *available at* http://cain.ulst.ac.uk/events/peace/docs/agreement.htm (last visited May 6, 2003).

30. LEGISLATION AGAINST TERRORISM, *supra* note 27, at vi, para. 6.

time that between 1969 and 30 November 1998, 3289 people died in Northern Ireland as a direct result of Irish terrorism and that between 1972 and 30 November 1998, 121 people were killed in mainland Britain in incidents of Irish terrorism.[31] Between 1976 and November 1998, 94 incidents of international terrorism took place in the United Kingdom and these included the bomb planted on Pan Am Flight 103 which exploded over Lockerbie in December 1988, killing 270 people.[32] Against this background it is not surprising that new comprehensive legislation was brought in to replace the Prevention of Terrorism (Temporary Provisions) Act 1989 and the Northern Ireland (Emergency Provision) Act 1996; and it is not without significance that Parliament in the new legislation abandoned internal exile or banishment orders previously allowed for[33] and also abandoned the discredited powers of detention without trial which had been discontinued for some time despite their re-enactment in 1996.[34]

The Terrorism Act 2000 nevertheless consists of 131 sections and 16 schedules.[35] There is a loose, wide-ranging definition of "terrorism" itself; there is power to proscribe specified organizations linked to terrorism at home or internationally; there is detailed provision on terrorist property and finance; police powers are enhanced; a number of terrorist offences are identified; and Northern Ireland is still provided for explicitly and separately (for example, trial on indictment for scheduled offences continues to be before a court without a jury, an innovation recommended by Lord Diplock in 1972).[36] Already the Act has been invoked in numerous situations. In July 2002, two Indian businessmen were jailed for being members of a proscribed group, namely the International Sikh Youth Federation, which was listed with a number of other foreign groups by virtue of subordinate legislation under the Terrorism Act 2000;[37] a Muslim convert was acquitted after being accused of trying to recruit Islamic terrorists by offering weapons training on his

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31. *Id.* para. 2.2.

32. *Id.* para. 2.3. Twenty-six people were killed in other incidents during that time. *See Id.*

33. *Id.* ch. 5 (Exclusion). On earlier attempts to utilize the law effectively to secure internal banishment, see D.G.T. Williams, *Suspended Sentence at Common Law* [1963] PUBLIC LAW 440, 446-54.

34. *See* BRADLEY & EWING, *supra* note 28, at 615.

35. *See* Terrorism Act 2000, *supra* note 26.

36. *See id.* See *generally* CLIVE WALKER, BLACKSTONE'S GUIDE TO THE ANTI-TERRORISM LEGISLATION (2002).

37. *See Sikh Pair are Jailed Under New Terror Act*, THE TIMES (London), July 20, 2002, at 7. The subordinate legislation was the Terrorism Act 2000 (Proscribed Organizations) (Amendment) Order 2001, SI 2001 No. 1261, which came into force on March 29, 2001. This list includes Al-Qa'ida, Hizbollah, External Security Organisation ETA. *See* WALKER, *supra* note 36, at 43-50.

website;[38] charges under the Act were brought last month after the discovery of the poison, Ricin, in a London flat;[39] during a police raid in Manchester on 14 January 2003, a detective constable, Stephen Oake, was stabbed to death by a suspect;[40] later in January police rapid entry units smashed through the door of the Finsbury Park mosque, which had been the centre of various concerns over several years, and seven men were arrested.[41]

It is not as if pre-2000 laws and pre-2000 events were being forgotten, especially where Ireland is concerned. We have been reminded often of the "two great misfortunes" in Anglo-Irish political relations: "One is that the Irish memory is too long, and the other is that the English memory is too short."[42] Alternatively, we have been assured that the "curse of Ireland has been the length of its memory."[43] Take for instance, the events of Sunday 30 January 1972 when British soldiers opened fire in the streets of Londonderry: thirteen civilians died and "a like number" were injured,[44] and the circumstances of the shooting have remained highly contested and highly charged ever since. An immediate inquiry conducted by the then Lord Chief Justice,[45] who reported in April 1972, satisfied no one, and some of the Lord Chief Justice's findings – that, for instance, "there is no reason to suppose that the soldiers would have opened fire if they had not been fired upon first"[46] – have been strongly challenged. Over a quarter of a century later the Government of the United Kingdom, almost as a prelude to the Good Friday Agreement, set up a new Tribunal of Inquiry headed by Lord Saville of Newdigate, a serving judicial member of the House of Lords, and consisting

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38. Richard Ford, *Muslim Cleared of Attempting to Recruit Terrorists*, THE TIMES (London), Aug. 10, 2002, at 2; Tania Branigan, *Cleared Chef Says He was Terror Case Scapegoat: Jury Dismisses First UK Charges Since Attacks on September 11*, THE GUARDIAN, Aug. 10, 2002, at 2.

39. Steve Bird et al., *Four Appear in Court on Chemical Weapon* Charge, THE TIMES (London), Jan. 14, 2003, at 11.

40. Ian Cobain & Russell Jenkins, *Struggle Ended as Suspect Lashed Out with* Knife, THE TIMES (London), Jan. 16, 2003, at 4. *See also The Algerian Connection*, THE TIMES (London), Jan. 16, 2003, at 23. Powers under the Anti-Terrorism, Crime and Security Act 2001 were also invoked. *See* 397 PARL. DEB., H.C. 2002-03 Sess. (Jan. 15, 2003) 683 (statement by the Home Secretary), *available at* http://www.parliament.the-stationery-office.co.uk/pa/cm200203/cmhansrd/cm030115/debtext/30115-04.htm#30115-04_head0 (last visited May 6, 2003).

41. John Steele et al., *Police Seize Weapons in Mosque Raid Forged Passports and ID Cards Found*, THE DAILY TELEGRAPH, Jan. 21, 2003, at 1. Seven people were arrested under the Terrorism Act. *Id.*

42. 162 PARL. DEB., H.L. (5th ser.) (1949) 947.

43. 149 PARL. DEB., H.C. (5th ser.) (1921) 358.

44. *See* REPORT OF THE TRIBUNAL APPOINTED TO INQUIRE INTO THE EVENTS OF SUNDAY, 30 JANUARY 1972, H.L. 101, H.C. 220, (1972), *available at* http://cain.ulst.ac.uk/hmso/widgery.htm (last visited May 6, 2003) [hereinafter THE WIDGERY REPORT].

45. *See id. See generally* J. BOWYER BELL, THE IRISH TROUBLES: A GENERATION OF VIOLENCE 1967-1992 (1993, paperback ed. 1994), ch. 8 (Bloody Sunday: January 1972); D. WALSH, BLOODY SUNDAY AND THE RULE OF LAW IN NORTHERN IRELAND (2000).

46. THE WIDGERY REPORT, *supra* note 44, at Summary of Conclusions, para. 7.

also of a former New Zealand appellate judge (subsequently replaced by a former Australian appellate judge) and of a former Chief Justice of New Brunswick.[47] That Tribunal, which has been exposed to legal questioning in the ordinary courts (especially over the claimed anonymity of military witnesses),[48] is still sitting and recently, in January 2003, it devoted several sessions to the examination and cross-examination of Sir Edward Heath, who had been the British Prime Minister in 1992.

As if to emphasize that efforts to challenge alleged injustices of the past are not confined to one side of the political or religious divide, the bombing in Omagh on 15 August 1998 "when a large car-bomb exploded in the centre of the town, killing 28 persons and injuring at least 220"[49] has aroused sustained concern. The Real IRA was allegedly responsible, aiming to undermine the peace movement in Northern Ireland, but five individuals allegedly involved have not – for lack of evidence – been prosecuted. However, through the initiative of a firm of lawyers, writs have now been served seeking compensation for families of those killed.[50] It remains to be seen what happens when the case, as expected, reaches the High Court in Belfast later this year.[51]

There is little doubt, however, that the events of 11 September 2001 changed attitudes, perspectives, and responses to the scourge of terrorism, shifting us sharply in the United Kingdom from a predominantly Irish emphasis to a fuller appreciation of the international sweep of terrorism in the twenty-first century. There has long been a European dimension,[52] though the pace of events has changed dramatically since 11 September, with recent

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47. The New Zealand judge, who had to retire through ill-health, was Sir Edward Somers; the Australian judge is the Hon. John Toohey, formerly of the High Court of Australia; the former Chief Justice is the Hon. William. L. Hoyt. *See* R v. Lord Saville of Newdigate, 4 All E.R. 860 (C.A. 1999). *See generally* 642 PARL. DEB., H.L. (2003) 880-82, *available at* http://www.parliament.the-stationery-office.co.uk/pa/ld199900/ldhansrd/pdvn/lds03/text/30107-03.htm#30107-03_star0 (last visited May 6, 2003) [hereinafter 642 PARL. DEB.]. The total cost of the inquiry will be £155 million sterling. *Id.* at 880. The cost of the inquiry has led to controversy, especially after criticism by the Chief Constable of Northern Ireland. *See* David Lister, *Outcry Over Police Chief's Bloody Sunday Comment*, THE TIMES (London), Feb. 19, 2003, at 2.

48. *See* R v. Lord Saville of Newdigate, ex parte A and others, 4 All E.R. 860 (C.A. 1999). For more recent legal action involving the Saville inquiry, see Joshua Rozenberg, *Saville Loses Appeal Over Bloody Sunday Soldier X*, DAILY TELEGRAPH, Feb. 15, 2003, at 16.

49. *See* WALKER, *supra* note 36, at 209. One of the injured subsequently died. *See id.*

50. *See* Paul Mungo, *Legal Action Heroes*, THE TIMES MAGAZINE, Jan. 25, 2003, at 34-37.

51. *See id. See also*, 642 PARL. DEB., *supra* note 47, at 882; David Lister, *Families Challenge Adams Over Omagh Bombing Evidence*, THE TIMES (London), Feb. 11, 2003, at 4.

52. *See* ANTONIO VERCHER, TERRORISM IN EUROPE: AN INTERNATIONAL COMPARATIVE LEGAL ANALYSIS (1992).

arrests for alleged terrorism in Italy, Spain, and France.[53] There is now, however, full recognition of the global dimension reflected in a variety of terrorist attacks in later 2002 alone: the attack in October on a French-registered ship, the *Limburg*, off the coast of Yemen; the attack which destroyed the Sari Club at Kuta Beach, Bali; the attack by Chechen rebels on a Moscow Theatre which ended with the deaths of all the terrorists and 119 hostages; the bombing of the Israeli-owned Paradise Hotel in Mombasa, Kenya, and the firing of two missiles at an Israeli airline taking off from Mombasa on the same day.[54]

The attacks of 11 September 2001 truly brought home the global aspects of terrorism. They demonstrated, in the words of a Select Committee of the House of Commons,

> some of the physical vulnerabilities of western society, but they also highlighted less tangible vulnerabilities in the way in which the shock at the attacks was transmitted rapidly throughout a globalised [sic], interconnected system, costing billions of dollars in economic damage through direct losses, lost growth, instability to certain industries (airline, insurance). The attack(s) also had major knock-on effects in political and social terms, as well as psychological.[55]

Recognition of the global impact has undoubtedly influenced the courts of law in the United Kingdom, as was vividly shown in a case concerning the deportation of a Pakistani citizen in the interests of national security[56] and in another case involving the extradition of two people suspected of terrorist links to the United States.[57] There were several references in one form or another to "the modern world of international terrorism and crime"[58] or to "today's global village where national borders are no impediment to international terrorists and other criminals."[59] For its part, Parliament in London responded to 11 September by enacting a major statute additional to

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53. For a useful itemizing of terrorist arrests in Europe (including the United Kingdom) since September 11, 2001, see Bruce Johnston, *Italy: Little Evidence Britain was to be Targeted*, DAILY TELEGRAPH, Jan. 25, 2003, at 4. On European Union action against terrorism, see FOREIGN AFFAIRS COMMITTEE, *supra* note 2, paras. 23-43.

54. FOREIGN AFFAIRS COMMITTEE, *supra* note 2, paras. 63-69. See a statement and debate on global terrorism and Iraq in 398 PARL. DEB., H.C.(2003) 167, *available at* http://www.parliament.the-stationery-office.co.uk/pa/cm200203/ cmhansrd/cm030121/debtext/30121-04.htm#30121-04_head0 (last visited May 6, 2003).

55. DEFENCE COMMITTEE, SIXTH REPORT, 2001-02 SESS., *Defence and Security in the UK*, H.C. 518-I, para. 118 (2002), *available at* http://www.parliament.the-stationery-office.co.uk/pa/cm200102/cmselect/cmdfence/518/51808.htm (last visited May 6, 2003).

56. Sec'y of State v. Rehman 1 All E.R. 122 (H.L. 2002).

57. Re Al-Fawwaz 1 All E.R. 545 (H.L. 2002).

58. *Id.* para. 63.

59. *Id.* para. 102 (4).

the Terrorism Act 2000 and also by seeking enhanced scrutiny of the actions of the executive, especially through the employment of select committees with self-explanatory titles such as the Home Affairs Committee, the Foreign Affairs Committee, the Intelligence and Security Committee, and the Defence Committee.[60] The executive, entrusted with the initiative and principal responsibility in matters of national security, has obvious global contacts, and on 20 June 2002 the Prime Minister announced a new post of "Security and Intelligence Co-coordinator and Permanent Secretary, Cabinet Office" created to enhance the capacity at the centre of government to co-ordinate security and intelligence and to deal with risks and major emergencies.[61] The political and indeed legal assumptions have changed irreversibly.

III. NATIONAL SECURITY: GLOBAL DEMANDS

The legislation which reached the statute book some three months after 11 September was the Anti-terrorism, Crime and Security Act 2001.[62] This statute has been received with nothing approaching unanimous approval, and the critics have raised issues of proportionality, relevance, human rights, democracy, police powers, the definition of terrorism, and the "legislative morass" resulting from having to take account of two major anti-terrorism laws enacted in successive years.[63] The Act, which consists of 129 sections and eight schedules,[64] has been described by one commentator as "the most draconian legislation Parliament has passed in peacetime in over a century."[65] Some concessions were made during the legislative proceedings – for instance, the proposed new offence of incitement to religious hatred was dropped (at least for the time being) –[66] but the main body of the Bill remained intact, and the resulting statute is formidable in range and depth.

There are provisions on terrorist property and finance, on immigration and asylum, on weapons of mass destruction, on the security of pathogens and toxins, on the security of the nuclear industry, on aviation security, on police powers, and on many other matters. In addition, a wide definition of terrorism

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60. *See Defence and Security in the UK*, *supra* note 55, paras. 33-34.

61. *Id.* para. 183. The first holder of the post is Sir David Omand.

62. *See* Anti-Terrorism, Crime and Security Act 2001, *available at* http://www.legislation.hmso.gov.uk/acts/acts2001/ 20010024.htm (last visited May 6, 2003).

63. *See* WALKER, *supra* note 36, at 7. *See generally*, Helen Fenwick, *The Anti-Terrorism, Crime and Security Act 2001: A Proportionate Response to 11 September?*, 65 MOD. L. REV. 724, 724-62; Adam Tomkins, *Legislating against terror: the Anti-terrorism, Crime and Security Act 2001* [2002] PUBLIC LAW 205-20.

64. *See* Anti-terrorism, Crime and Security Act 2001, *supra* note 62.

65. Tomkins, *supra* note 63, at 205.

66. For criticisms, see HOME AFFAIRS COMMITTEE, 2001-02 Sess., *The Anti-Terrorism, Crime and Security Bill 2001*, H.C. 351, paras. 56-61 (2001), *available at* http://www.publications.parliament.uk/pa/cm200102/cmselect/cmhaff/ 351/35102.htm (last visited May 6, 2003).

is carried over from the Terrorism Act 2000. Previously, in the context of national security, there have been no formal definitions of terms such as 'security', 'espionage', 'subversion' and 'sabotage'; and the term 'terrorism' is a relative newcomer to the field of overlapping threats to national security. The Parker Committee, which reported in 1972 on procedures for the interrogation of persons suspected of terrorism, said that the term "no doubt connotes violence, and violence for political ends"[67] while the Gardiner Commission which reported in 1975 on terrorism and human rights stressed that "[t]he new factor in the long history of dissent is the effectiveness of the weapons its more extreme proponents can command."[68] The Commission anticipated many contemporary assessments of terrorism in speaking of "the relative ease with which arms, money and terrorist skills can cross frontiers, the effect of mass communications in both facilitating and glamorizing [sic] violence, and above all the vulnerability of complex industrial societies."[69] Perhaps it is not surprising that open-ended definitions of terrorism are preferred.

In surveying the complexities of the legislation of 2001, reference could perhaps be made to problems associated with terrorist property and finance and also to the statutory power to detain without trial. In the area of property and finance there is considerable anxiety. Looking specifically at Northern Ireland, the Northern Ireland Affairs Committee commented in June 2002 that "[t]errorism is about gaining power through violence, and money is a means to that end";[70] in July 2002 a Working Group of the Society for Advanced Legal Studies examined in some detail the huge difficulties faced in cutting into the financial streams available to terrorists;[71] and the Foreign Affairs Committee stated in December 2002 that an "important aspect of multilateral co-operation against terrorism has focused on the elimination of sources of terrorist financing," adding that international progress to eliminate sources of funding to al Qaeda and associated terrorist groups has been "frustratingly slow."[72] This state of affairs underlines the enormous commitment of resources required in this area alone.

The issue of detention without trial raises deep misgivings, not least for those aware of detention without trial in both World Wars in the last century. During the Second World War, for instance, "a very considerable number of people were detained by the British government without charge, or trial, or

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67. THE PARKER REPORT, *supra* note 23, para. 1. *See also*, THE DIPLOCK REPORT, *supra* note 23, paras. 3-5.

68. THE GARDINER REPORT, *supra* note 23, para. 7.

69. *Id.*

70. *The Financing of Terrorism in Northern Ireland*, *supra* note 20, para. 1.

71. SOCIETY FOR ADVANCED LEGAL STUDIES, LONDON, *THE FUNDING OF TERROR: THE LEGAL IMPLICATIONS OF THE FINANCIAL WAR ON TERROR, THE INTERDICTION OF TERRORIST PROPERTY WORKING GROUP*, (July 2002). This Report consists of 186 pages.

72. FOREIGN AFFAIRS COMMITTEE, *supra* note 2, paras. 18-19.

term set, on the broad ground that this was necessary for national security. Most were not British citizens, but technically enemy aliens . . . ."[73] One such person detained was Michael Kerr, whose family was forced to flee from Berlin in March 1933: he was later to serve in the Royal Air Force and ended up as a distinguished member of the Court of Appeal.[74] The story of wartime detention, according to Brian Simpson, "illustrates a problem which faces liberal democracies in times of grave crisis – is it essential to their survival that they should temporarily cease to be liberal democracies until the threat is over?"[75] The same dilemma applies today in the face of international terrorism, both in the United States and the United Kingdom. In the United Kingdom the question relates to only a few people: non-British nationals who cannot (by virtue of article 3 of the European Convention on Human Rights) be deported to places where they face torture or inhuman or degrading treatment or punishment and yet are certified as suspected international terrorists. In order to allow for the detention without trial of such persons, the government formally derogated from article 5(1) of the Convention (on fair trial) in accordance with article 15 which permits derogation from most articles "in time of war or other public emergency threatening the life of the nation." Certification by the Home Secretary is subject to appeal to the Special Immigration Appeals Commission (SIAC) which had originally been set up under a statute of 1997. A further appeal from SIAC to the Court of Appeal is provided for in the statute.[76]

Nine people detained under the Act duly appealed to SIAC and succeeded on the ground of discrimination, namely, that the Act and the Human Rights Act 1998 (Designated Derogation) Order 2001 "allow only suspected terrorists who are non-nationals to be detained when there are equally dangerous British nationals who are in exactly the same position who cannot be detained."[77] The right not to be discriminated against, explained Lord Woolf (the Lord Chief Justice) in a further appeal to the Court of Appeal from SIAC, "is now enshrined in article 14 of the [European Convention], but long before the HRA came into force the common law recognised [sic] the importance of not discriminating."[78] Lord Woolf added that the danger of unlawful discrimination "is acute at times when national security is

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73. *Preface to* A.W. BRIAN SIMPSON, IN THE HIGHEST DEGREE ODIOUS: DETENTION WITHOUT TRIAL IN WARTIME BRITAIN at vii (paperback edn. 1994).

74. *See* MICHAEL KERR, AS FAR AS I REMEMBER chs. 29-33 (2002).

75. SIMPSON, *supra* note 73, at 409.

76. For a clear exposition of the detention provisions, see Fenwick, *supra* note 63, at 730-58; Tomkins, *supra* note 63, at 210-19.

77. Andrew Norfolk et al., *Suspects' Win Hits Terror Crackdown*, THE TIMES (London), July 31, 2002, at 1. Earlier arguments are reported in Andrew Norfolk, *New Anti-terror laws 'Deny Basic Human Rights'*, THE TIMES (London), July 18, 2002, at 8.

78. A, X and Y v. Sec'y of State, [2002] C.A. Civ 1502, para. 7 (C.A. Civ. 2002) (Lord Woolf). In that paragraph, Lord Woolf cited Jackson J. in Ry Express Agency v New York, 336 U.S. 106, 112-13 (1949). *See id.*

threatened."[79] In arguing against the SIAC ruling, "Lord Goldsmith [QC, the Attorney-General], said that the attacks on the World Trade Centre and the Pentagon had changed for ever the landscape of terrorism[,]" and he argued that the detention provisions in the 2001 Act represented "a balance between the interests of the suspected individuals and the interests of the community as a whole to be protected from terrorism."[80] In its judgment on 25 October 2002, the Court of Appeal broadly agreed. Lord Woolf, accepting the need for a collective approach to terrorism, spoke of an appropriate degree of deference to the actions of the executive, which he regarded as proportionate to what is necessary. One of his colleagues, Lord Justice Brooke, also noted that it "has been a longstanding feature of international law that a state is entitled to treat non-nationals differently from nationals in time of war or other public emergency threatening its life as a nation."[81]

The courts in the United Kingdom are, by whatever route in national or European or international law, having to come to terms with the global pressures of terrorism. The challenge is to maintain a balance. There is a danger of complacency, of course, but equally there is a danger of overreaction in the face of what seems to be the unknown and the unpredictable.[82] The pressure on the intelligence services in all countries is very great. In a different era, Allen Dulles – the younger brother of John Foster Dulles and for eight years director of the Central Intelligence Agency – wrote that

> it is impossible to predict where the next danger spot may develop. It is the duty of intelligence to forewarn of such dangers, so that the government can take action. No longer can the search for information be limited to a few countries. The whole world is the arena of our conflict.[83]

Yet it is important to bear in mind that emergencies do come to an end – even the Hundred Years War, or the Thirty Years War, or the Wars of the Roses – and we should not dig trenches for all time. At the end of the nineteenth century many people feared the activities of anarchists – indeed, it was an anarchist who assassinated President McKinley on 6 September 1901 – but the

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79. A, X and Y [2002] C.A. Civ 1502, para. 9 (C.A. Civ. 2002) (Lord Woolf).

80. Andrew Norfolk, *Anti-terror Laws 'Have Boosted Global Support Against Al-Qaeda'*, THE TIMES (London), Oct. 8, 2002, at 2.

81. A, X and Y [2002] C.A. Civ 1502, para. 112 (C.A. 2002) (Lord Brooke).

82. *See, e.g.*, ALAN M. DERSHOWITZ, WHY TERRORISM WORKS, ch. 5 (2002) (Striking the Right Balance).

83. ALLEN DULLES, THE CRAFT OF INTELLIGENCE 55 (1963).

threat receded;[84] there were subsequent fears about radicals in politics[85] and later post-war fears about Communists during the McCarthy period in American politics,[86] but in these and other cases of fear and even hysteria the mood changed with the passage of time and the turn of events. For reasons indicated earlier, the present emergency over international terrorism is unprecedented, but realistic and well-informed responses are not incompatible with the demands of balance and proportionality in a democratic country.[87] The courts owe a special responsibility to maintain a watching role in volatile times.

84. *See, e.g.*, JOHN QUAIL, THE SLOW BURNING FUSE: THE LOST HISTORY OF THE BRITISH ANARCHISTS (1978).

85. *See, e.g.*, WILLIAM PRESTON, JR., ALIENS AND DISSENTERS: FEDERAL SUPPRESSION OF RADICALS, 1903-1933 (1963).

86. *See, e.g.*, ERWIN N. GRISWOLD, OULD FIELDS, NEW CORNE: THE PERSONAL MEMOIRS OF A TWENTIETH CENTURY LAWYER 189-94 (1992) (on the McCarthy Period and the Privilege against Self-Incrimination). Griswold writes of "the massive upsurge of concern about communism. It was blown into a sort of firestorm by the activities of Senator Joseph McCarthy of Wisconsin. In retrospect, it is hard to explain why the reaction was so extreme." *Id.* at 189.

87. *See* 1 COMMISSION OF INQUIRY CONCERNING CERTAIN ACTIVITIES OF THE ROYAL CANADIAN MOUNTED POLICE, SECOND REPORT, FREEDOM AND SECURITY UNDER THE LAW, paras. 16-24 (Canadian Government Publishing Centre, 1981) ("Security and the Requirements of Liberal Democracy"). *See also*, LAURENCE LUSTGARTEN & IAN LEIGH, IN FROM THE COLD: NATIONAL SECURITY AND PARLIAMENTARY DEMOCRACY (1994).

THE TERRORIST THREAT: AUSTRALIA'S RESPONSE

The Honorable Mr. Justice Desmond Keith Derrington*

On this subject, there is no such thing as the Australian response. We have a full kaleidoscope of political and social opinions. There are some who would contradict anything I say. The only sensible solution is to offer you the thrust of views that are representative of a strong majority. Interestingly, they are generally diverse in their political allegiances, or they are unaffiliated.

We are very well served with news and commentary from around the world. The level of interest is high. Our modest status demands that we remain aware of world opinion and issues. This helps us to be relatively objective in our understanding of terrorism and its context.

The Australian view is fortified by painful experience. We cannot be dismissed as detached armchair critics. America had its catharsis on September 11, 2001. Australia had its own on October 12, 2002. Eighty-eight young Australians died as the result of the terrorist attack at Bali. Our loss did not match the World Trade Center tragedy in numbers, but to a country of only 20 million, it was egregious enough.

It is necessary first to understand what is meant by terrorism. For present purposes, it may be described as an attack on innocent civilian targets for the purpose of furthering a political cause. It is not resistance to illegitimate oppression by attacking military or governmental targets of the oppressor – that is self-defense. The French Resistance is an example. This is a difficult area when the attack on civilian targets is claimed to be the only means by which this can be further achieved because of the strength of the oppressor.

Secondly, the present discussion will be limited to the current major threat, which excludes terror associated with separatist movements or domestic uprisings, often involving more overt armed conflict as well. The affairs in Northern Ireland, Palestine/Israel, Columbia, and Russia are examples of such domestic uprisings. However, the following discussion may have a certain relevance to those in part.

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In Australia, we were acutely aware of the American agony over the World Trade Center bombing. Our reactions to those tragic events were –

- Very deep *sympathy* for the innocent victims and their families;
- *Disgust* at the inhumanity of the perpetrators;
- General *concern* at such a serious turn in the world's affairs;
- *Understanding* that the United States must respond appropriately, but we *hoped* that it would be suitably thoughtful and restrained. We participated in the war in Afghanistan as a clear case of self-defense by the United States, but we became concerned with certain aspects of the its conduct and its aftermath. Like the English Court of Appeal, we have become particularly concerned with the circumstances at Guantanamo Bay; and
- Objective and broad *recognition* that, despite its appalling nature, such an attack was not simply the aberration of fanatical madmen. There were serious causes that motivated them to sacrifice their own lives, which won them the passionate support of many people. It was accepted that nothing could justify such a grossly inhumane act, but there was recognition of this larger picture.

For a rational and balanced response, it was essential to identify the cause of such a dreadful crime that would also lead its perpetrators to certain martyrdom. Any successful and practical solution demanded understanding of the problem as it really was, and not as we would have liked to have it. This was also necessary in order to give the solution legal validity, and to give the legal solution any moral legitimacy.

It would be blind in reality to ignore the grievous plight of masses of desperate people whose suffering is most cogent to this issue. We have considerable evidence that their humanity has been so eroded by poverty, oppression and hopelessness that they can see no other remedy. Their lives are so wretched that, to them, death is no great loss.

The terrible numbers of Americans and Australians who died in these attacks were insignificant when compared with the numbers of the poor and powerless who die from want of nourishment or medical care, or from oppression that has coincided with our interests. The United States Senate Foreign Relations Committee recently heard that 24,000 people per day die from starvation!

It would be self-indulgent to believe that the death of an American office worker or an Australian tourist has a greater distress value for us than the death of one of these from starvation or disease, or from violence by an oppressive military regime, is to those who already have so little. However we see ourselves, they see us as the wealthy and powerful ones who directly or vicariously oppress them by economic and military force in order to maintain our privilege. And their means of resistance are very limited.

This is so destructive to their moral sense and humanity, that it might inhibit their violence toward other innocent human beings. It is a fecund breeding ground for fanaticism. As it often happens with vulnerable people, fundamentalism then intrudes to offer a remedy, but only through hatred and intolerance. It takes advantage of people in crisis, without hope.

The most serious problem is that in places where the need is greatest, these victims often find that the fundamentalists are the only ones who offer them hope and a form of resistance. If we connive at or assist in the "removal" of their moderate leaders simply because they do not agree with us or are inimical to our interests, we err, and we err badly. We are seen as supporting those who have only added to their misery with torture and death. This leaves them with only the fanatics to fight their cause.

In Australia, we have always been wary of people with a surfeit of evangelical zeal – the defenders of mankind with the only answer. This response is often attractive because it is "strong" (read "fanatical") and "clear" (read "simplistic"). Their zeal often stems from excessive and warped religious belief. They alone can identify absolute good and absolute evil, and God is always on their side.

They demonize their opponents by drumming up hatred and public support for their own extreme acts. They excite fear in their followers, and any dissent is suppressed. They deny rational debate with catchcries, often with a religious flavor to give it a semblance of respectability. Worst of all, they are willing to destroy innocent lives in the name of righteousness. Due to defects in our national character, we do not find this altogether attractive or persuasive.

However, that is not the view of many of the dispossessed. Some fanatics are not weak and powerless, and they are ultimately prepared to do something. Though their atrocities are undoubtedly deplorable, they have conscience of a kind. They leave their comfortable lives – they may even be rich – and they willingly accept privation and death for a cause that they see as just. They are not heroes, but those whose cause they die for see them as heroes.

While the causes remain, there will always be many to replace them, no matter how many are killed. How can they be deterred by fear if they are already willing to martyr themselves?

It is sometimes suggested that this hatred is merely jealousy of the West and its wealth. In some idiosyncratic cases, this may be true, but to use it to explain the general disaffection is self-delusion or propaganda of the worst order. Belief in our own absolute perfection simply compounds the problem.

To add to the problem would be unconscionable. Without the sanction of law that demands respect because it is just, any response that results in the destruction and mutilation of many innocent people is surely counterproductive. It would simply enlarge and justify the terrorist response. "Collateral damage" is a terrible euphemism for such carnage, just as it would be if it were applied to the victims of the World Trade Center or Bali.

This does not predicate inaction. The suggestion that the alternative to an excessive behavior is to do nothing is a base argument that ignores alternative courses of action that avoid such terrible consequences. Certainly, the perpetrators should be pursued and punished with the full force of the law, and all proper preventative measures against further attack should be employed. But the rule of law must not be broken or bent in the process.

It must be preserved in its letter and spirit. If law is observed and exalted only when it does not matter, it is a sham. Its need becomes greatest in times when it is under challenge or when there are strong sentiments of revenge and fear. Then, it is wrong to assert that the laws should be suspended or watered down to meet current convenience.

Such a proposition is worst when it comes from those who wield ultimate power. With power, there is also responsibility. Without responsibility, there is moral corruption. Some robustly aggressive people would describe all this as weak. But J.K. Galbraith once spoke of the reckless position as the position that requires the least moral courage. We must not be the judges in our own cause. Adherence to the rule of law and adherence to justice that is objectively applied when it is contrary to the popular mood is not weak. Those who abandon the rule of law when it suits them have little justification when times change and they want its protection.

The implications of all this for legal philosophy and principle are imperative. International law must address the injustice that is the root cause of the current wave of terrorism and this will require a radical revision of where the law is willing to go. If it does nothing, it will permit the continuation of terrible injustice, and the law itself will become irrelevant. Anarchy will prevail. The law must move incrementally but firmly, or the moves for change will be quick and violent, as we have already witnessed.

Consistently with this, in Australia we see the answer in social, political, and economic justice reinforced by the law. It will not be found in widening the gap between the rich and the poor. The extraordinary amounts spent on a war could largely buy peace and security. It could also provide relief against terrible suffering. Poverty and ignorance must be replaced with something better than our imposition of self-serving globalization. Martyrs are difficult to find for comfortable middle-class causes. If want and hopelessness are absent, they have little stimulus.

The American catastrophe in a way prepared us for ours. Our response to Bali was one of compassion for the victims and their families. When things settled down, it generally followed the national philosophy – "She'll be right, mate."

Roughly translated in its cultural context, it means –

- Don't get too excited;
- Think about what has to be done, do it, and do it properly;
- Fair go – meaning, "Don't go overboard;"
- Keep a sense of humor;
- Then, she'll be right, mate.

The public manifestations have been interesting. After the grief and sympathy, there was a mood of cheeky defiance and some moral outrage; but it was reasonably restrained. The usual few bigots attacked some Muslim mosques and people. Happily, this conduct only earned the disgust of the general community, and the law's response was swift and heavy. Interestingly, polls indicate that Australians were more moved by the American tragedy than we were by our own. After September 11th, it was rather inspiring to see the banks of flowers left anonymously on the stairs of the U.S. Consulate in Sydney.

This difference in response may be attributed to the difference in scale of the tragedies, but we tend to be offhand about our own wounds. More significantly, the attack revealed something that had until then been remote from our thoughts – our vulnerability. It came as a shock. With minor eccentric exceptions, we had never had the local equivalent of the Basques, the I.R.A., the Red Brigade, or even the Timothy McVeighs of this world. The last bombing had been detonated in a garbage bin outside the Hilton Hotel in Sydney. It was planted by a religious zealot and was aimed at a visiting foreign dignitary. It killed a garbage collector, but that was the only tragedy out of the event.

This position of relative comfort had insulated us against the trauma of direct attack and had left us complacent. The shock of realization stirred our emotions at the time. On calmer reflection, we saw it as a price for our political affiliations that we had to expect, if not accept. It was generally accepted that our government's support of American foreign policy was generally accepted. The Bali bombers say that they targeted Australia because of our support of the United States in Afghanistan, to which they attributed the deaths of a large number of Muslim people, including women and children. Our happy goodwill towards everyone, which we expected would be reciprocated, was no shield against this antagonism.

More importantly, our minds became more focused. We were now players in a serious game. We did not shrink from that, but we also saw that we have a problem that cannot be dismissed by simplistic responses. At a deeper level, we saw our loss as the tragic result of a profound problem rather than of a simple "Hate Australia" exercise by a few fanatics. We understood that the attack was not gratuitous. While condemning the terrorism itself, many recognized that its causes must be addressed.

Pragmatically, we shall defend ourselves, but with suitable caution. Our police gave effective aid to the very successful Indonesian investigation of the Bali crime. This was done with sensitivity and with all due recognition of Indonesian sovereignty. There seems to be not the slightest trace of criticism of the legality and propriety of the entire procedure.

Prudence has demanded some domestic security precautions and restraint, which is seen as a necessity. The more elaborate are accepted with a certain wryness. The newspapers carried a photograph of an example of the more extravagant security at the Brisbane airport – two security police and a

dog; but the young policeman seemed to be concentrating his conversational skills on the young policewoman. The dog looked bored.

Our government has outlaid a large sum in telling us that we should be alert but not alarmed. The only thing that alarms us is our government's waste of taxpayers' money. Travel warnings have been given, but Australians have resumed their traditional walkabout.

I was recently in Singapore, where they strive to eliminate poverty and to promote cultural harmony. Despite Australian government warnings, the atmosphere was secure and peaceful, but one small touch went almost unnoticed. After lectures, two of my Muslim students always saw to it that I was accompanied back to my hotel three blocks away. Doubtless, their action was motivated as much by kindness and courtesy as by any fear for my safety, but I suspect that it was also insurance against any unpleasantness.

There was one other notable feature. Every one of the many professional and commercial people there with whom I discussed this issue was of the same views as Australians.

So, in respect of terrorism, we in Australia are almost back to normal, but perhaps with somewhat heightened perceptions as to the need for the development of the law to act to remove the sources of terrorism, which are probably more horrific than terrorism itself. Apart from our terrorizing the English on the cricket field, the current burning topic is whether we should deploy military forces in the Middle East. But that is another matter – entirely.

CONCLUSION

Australia has suffered its own major terrorist attack. After their grieving, Australians believe that it can only be eliminated by striking at its source; and the law must move to that end.

SEPTEMBER 11: ASIAN PERSPECTIVES

James Gomez*

ABSTRACT

Focusing largely on the Southeast Asian region, this paper investigates the developments since the September 11, 2001, attacks both from the side of the government and from the people. Governments in the region consider it strategically, politically, and economically beneficial to support the United States in its war against terrorism. This was the case in the attack against the Taliban regime in Afghanistan. Southeast Asian governments are still largely supportive of the United States in its war against Iraq, despite opposition from France, Germany, Russia, and China. Asian people on the other hand, either individually or represented by academia, NGOs, and others organizations, do not feel empowered to influence their governments' actions. Muslim communities, in particular, feel left out. Even in the large Muslim countries of Indonesia and Malaysia, the political leaders are unable to support the anti-war pressure of the people, despite the risk of being perceived as a supporter of the United States. Even the multiple anti-war protests, outside United States embassies in various countries, have failed to change the governments' position. This paper will discuss the developments that influenced the Southeast Asian region since September 11, 2001, and investigate some of the implications and tensions between the people and governments in Southeast Asia.

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I. INTRODUCTION

In Asia, September 11th translated into immediate sympathy for the lives lost and support for the United States. In fact, the president of the largest Muslim country in the region, Megawati of Indonesia, was one of the first to visit the United States. Pakistan immediately pledged support for the war against terrorism. This was followed by the swift implementation of anti-terrorism resolutions agreed on by the United Nations Security Council. A host of proposed anti-terrorism legislation was introduced in the region to enhance security measures. These include the ability to trace money transfers, increased authority for the police to hold people in custody without charging them with a particular offense, and stiffer penalties for terrorism related offenses.

However, it soon becomes clear that as far as Asia was concerned, there were clearly two broad divisions. At one level, there is the viewpoint of governments and sitting regimes, and on the other level is the perspective of the people. It is clear that both are different. Governments see it as being in their strategic political, economic, and military interest to support the United States in its war against terrorism. It was the case in the attack against on the Taliban regime in Afghanistan. On the question of war with Iraq, the governments are still on the side of the United States, despite of the opposition of other large countries such as France, Germany, Russia, and China. Some governments are willing to add the qualifier that going to war should require prior U.N. approval; others do not take a public stand.

On the other hand, the people, either individually or represented via academia, NGOs and others do not feel empowered to act in any way to influence their governments. Muslim communities, in particular, feel most left out. Even in the large Muslim countries of Indonesia and Malaysia, the political leaders will not give in to the pressure of the people in spite of the risk of being seen as siding with the United States. During the attack on Afghanistan and the run up to the Iraq crisis, there have been numerous anti-war protests, largely outside United States embassies; however, these have not been effective in changing the position of the governments.

This paper looks at the developments that hit the Southeast Asian region since September 11, 2001, and outlines some of the implications and tensions between the people and the governments.

II. TERRORIST NETWORK IN SOUTHEAST ASIA

Southeast Asia claimed its link to the September 11, 2001, bombings in the United States with the arrests of alleged terrorists in Malaysia and Singapore in December 2001. An amateur videotape which was discovered in Afghanistan showed, as a possible target of attack, a subway station in Singapore where United States personnel would pass en route to the United States naval logistic facility.

Later, a document titled "Jihad Operation in Asia," purportedly uncovered by Indonesian intelligence, was reported by Singapore's Straits Times as including plans for simultaneous attacks on United States targets in Singapore, Malaysia, and Indonesia. Singapore's intelligence services, under the political control of the People's Action Party (PAP), linked those arrested and detained in Singapore to an alleged larger regional terrorist network that includes the Philippines, Malaysia, Indonesia, and Thailand.

From these exchanges of intelligence, the Kumpulan Mujahideen Malaysia (KMM), Abu Sayyaf and Moro Islamic Liberation Front in the Philippines, Laskar Jihad in Indonesia and Jemaah Islamiah (JI) were in one way or another attributed to having had links to Osama bin Laden and the al Qaeda network. Information obtained from interrogating the detainees by the Singaporean authorities alleged that members of the JI received training in Afghanistan and Mindanao and also received funding from al Qaeda.

Based on this and other information provided by Singapore authorities, arrests were made in the Philippines. Father Rohim Al-Ghozi was arrested in January 2002, on charges of importing explosives. Al-Ghozi, a former student at Ba'asyir's boarding school, was soon identified as JI's bomb expert and accused of involvement in various bombings across the region. Abu Bakar Bashir was identified as the spiritual head of JI. Abu Bakar Baasyir has been accused of being responsible for unsolved bombings in Indonesia and the Philippines over the last few years, including explosions in Jakarta and Manila in December 2000 that killed thirty-five people. The latest has been his alleged link to the Bali bombings. His former student, Nurjaman Riduan Isamuddin, known as Hambali, is said to be the leader of the KMM.

Additional intelligence information gathered through interrogating those in custody was reported to place Malaysia as a site that used to receive Al Qaeda operatives en route to the September 11th bombing. Almost on a daily basis in Asia, new bits of information emerge that there has been evidence of exchange of training, money, and networking among the various groups identified above in the region and elements in Afghanistan and Pakistan.

The Indonesian archipelago, being home to the world's largest Muslim community, has been repeatedly cited as harbouring terrorists, including the leader of the Laskar Jihad and the head of Jemmaah Islamiah. Pressure was applied on Indonesia by the United States, Singapore, and Malaysia following the arrest of alleged Islamic militants in the latter two countries. The Indonesian government showed some reluctance to act, and Vice President Hamzah Haz held highly publicized meetings with the leaders of alleged terrorist groups, afterward declaring that there are no terrorists in Indonesia. The official Indonesian response has been that Indonesia will handle the situation in its own way and attempts to introduce an Anti-Terrorism Bill in Indonesia were initially met with resistance. Meanwhile, Malaysia and Singapore have made more arrests.

On the other hand, a meeting of the Organization of the Islamic Conference convened by Malaysian Prime Minister Mahathir in Kuala

Lumpur in April 2002, issued a declaration unequivocally condemning acts of terrorism but failed to reach agreement on how to define terrorism. At the same time it also adopted a resolution that specifically rejected the idea that Palestinian resistance to Israel was terrorist in nature.[1]

But the bombing of two night clubs in Bali, with over 180 confirmed deaths in the explosions of Oct. 12, 2002, brought attention back on JI and refocused the terrorist threat back to the region. Suspicion falls on al Qaeda and JI but the alleged JI leader, Abu Bakar Baasyir, denies any involvement or connection to al Qaeda, past recent evidence points to the contrary. Since then, Indonesia has arrested more than a score of people, including Abu Bakar Baasyir, over direct and indirect links to that case.

As the United States led momentum in the war against Iraq grew stronger in March 2003, there were a slew of demonstrations outside United States embassies in various Southeast Asian capitals. These demonstrations have taken place largely in countries with significant Muslim communities such as Indonesia and Malaysia but also elsewhere in Thailand and the Philippines.

Although other countries in the region, such as Burma, Cambodia, Laos, and Vietnam, are largely seen as not having or contributing to a terrorist threat, developments in the other countries of the region are seen differently. This has allowed Southeast Asia as a whole to be dubbed as an alleged terrorist hub, and therefore an extension of the United States war on terrorism.

III. UNITED STATES FOREIGN POLICY AND SECURITY-POLITICAL IMPLICATIONS IN ASIA

Post-September 11th, development refocused United States interest in security matters in Southeast Asia. In the case of the Philippines, this has led to the stationing again of United States troops in the Philippines, to support the government's military efforts in the Muslim south. "Countering terrorism" led to an initial deployment in February 2002, of 500 U.S. Marines on Basilan Island to conduct counter- terrorist training for the Philippines Army fighting the Abu Sayaf. In April 2002, 160 additional U.S. Special Forces troops arrived in the Philippines to reinforce the anti-terrorism activities in the same area. With allegations that this violates the country's 1987 constitution, the American soldiers' presence divided not only public opinion but also the government, a fact made clear in mid- 2002 with the ousting of Vice-President Teofisto Guingona from his cabinet post as foreign minister.

The Philippine government has so far approved the U.S. force's presence only for a limited period to train the Philippine military to effectively combat terrorism, and not to engage in combat. At the end of July, the 500 U.S. troops deployed in February, left the Philippines but new joint

1. *Death Wish*, WASH. POST, Apr. 4, 2002, at 14, *available at* 2002 WL 17587541.

Philippines – U.S. military exercises were scheduled for October. But early in October, an American soldier was killed in Zamboanga City, Philippines when a nail bomb delivered by a local motorcyclist exploded in his face. His death forced the Defense Department to acknowledge that some 260 Special Forces "military advisors" remain in the predominantly Muslim province of Mindanao, following the conclusion of the six-month U.S. – Philippine joint military operation[2]. There have been sporadic reports of clashes with Moro Islamic Liberation Front (MILF) separatist guerrillas but Philippine and U.S. security officials constantly deny that American troops fight alongside Filipino soldiers.

On another front, FBI Chief Robert Mueller visited Indonesia in March and June 2002. In Singapore, former U.S. Ambassador to Indonesia, Paul Wolfowitz, called explicitly for a renewed U.S. engagement with the TNI, the Indonesian Armed Forces.[3] The Bush administration had sought congressional approval to extend eight million dollars to train an Indonesian anti-terrorism unit as a way of extending American influence. Congress, however, had imposed restrictions on cooperation with the TNI because of the history of human rights abuse by the military. The United States has however achieved some success in influencing matters in Indonesia in terms of providing security training for the Indonesian police and military. For instance, in January 2003, the United States Senate voted not to restrict a program for Indonesian military officers to come to the United States for training and education.

Nevertheless, Indonesia and Malaysia – though burdened that they are home to Islamic radicalism – will not welcome U.S. troops because neither wants the domestic backlash. Realizing that it may be difficult to successfully engage all the states in the region bilaterally because of possible political fallout, the United States has focused instead on winning collective support from ASEAN on responding to terrorism. On August 2, 2002, U.S. Secretary of State Colin Powell signed a non-binding agreement with ASEAN that includes support for a tightening of border controls and recognizes the need for a unified approach to stop the flow of terrorist-related material, money, and people. Yet days later, in Jakarta, Powell emphasized the desire of the U.S. administration to resume its cooperation with the Indonesian military, announcing a sum of $50 million assistance "over the next few years" to go mainly to the Indonesian police.

Meanwhile, Singapore remains the staunchest supporter of the United States. Singapore hosts a naval logistic base and has U.S. logistics personnel on the island. Singapore also has an overwhelming Chinese majority, nearly eighty percent, hence its sees the overwhelming Muslim majority of Indonesia

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2. *See* Jordan Green, *U.S. Troops in Philippines*, Z MAG., Dec. 2002, *available at* http://www.zmag.org/ZMagSite/ Dec2002/green1202.htm.

3. Paul Wolfowitz, *Making Friends, Taking Aim*, FAR E. ECON. REV., June 20, 2002, at 22, *available at* 2002 WL-FEER 5170146.

and Malaysia as threat. Even its minority Muslim population is treated with distrust and as a source of potential instability, hence the strong U.S. support. Its citizens, especially the Chinese community are largely pro-United States, making it an exception in the region. Singapore's tight control over freedom of expression also prevents minority voices to emerge by way of anti-war protests against the United States or the ruling PAP. On February 15, 2003, Singapore police prevented six people from carrying anti-war placards for an anti-war protest outside the U.S. embassy. The six had received an SMS, or text message, on their mobile phones to gather outside the U.S. embassy to protest against the U.S. led war on Iraq.

The dominant role of the United States in almost every sphere of global activity has resulted in increasing dissatisfaction with United States unilateralism generally, not just its insistence on playing the leading role in the international response to terrorism. There are voices in the region that are specifically vocal about the United States' position on Palestine and the debate in U.S. government circles about an offensive strike against Iraq. There is also unhappiness over United States' refusal to submit its troops to the jurisdiction of the International Criminal Court. The net outcome is that United States unilateralism is stirring popular resentment in the region of the United States and its foreign policy.

IV. ASEAN, TERRORISM AND SEPTEMBER 11TH

In 1997, the Asian economic crisis was seen as revealing the ineffectual nature of ASEAN but also as presenting a challenge to ASEAN to "get its act together." One of the after-shocks from September 11th in the region concerns the revelation, once again, of the inadequacy of regional mechanisms. Since September 11th, there have been new calls to update ASEAN and there has been a flurry of activity to try to show ASEAN as moving purposefully again. In particular, the ASEAN Regional Forum has been once again brought up as a possible platform for considering long term security challenges posed by terrorism and transnational crimes.

Five years since the economic crisis, ASEAN sees the same lack of preparedness to respond effectively to the new crisis. The question raised is why ASEAN did not detect connections between regional Islamic elements and the September 11th bombing in the United States. There is recognition that there is a need for increased transnational cooperation. Although issues such are transnational crimes had surfaced at regional meetings, cooperation had been slow. For instance, in the run up to the outbreak of September, there were already issues of human trafficking, the drug trade, and weapons sale on the regional conference circuit. However, ASEAN has emphasized the principle of non-interference in member states' domestic affairs and this has been utilized by many of the member states to safe-guard their authoritarian regimes. State internal security surveillance was central to regime security; however, this created an intelligence system obsessed with identifying regime

opponents but which failed to provide earlier detection of activities of Islamic militants. The structure of a "surveillance state" has a built-in system that blinds their ruling regimes to anything other than what they want to see.

Additionally, scholar-bureaucrats nurtured by the ASEAN system through their lack of critical research and their willingness to celebrate the façade of regional cooperation expounded by ASEAN's leaders exacerbated the problem. ASEAN intelligence community reflect the same syndrome: intelligence failed to detect the development of linkages between regional Islamic militant groups and Al Qaeda because this was something not on the agenda of concern to ASEAN leaders. Recent belated attempts to initiate co-operation on terrorist issues in terms of sharing intelligence and instituting cyber security, raise the question whether it can be effective given the limited structure of cooperation within ASEAN.

Ideas have been put forward by a Singapore-based think-tank on how to promote the ASEAN Regional Forum as a region-wide security group able to assist in dealing with the terrorist threat. In particular, the appointment of a well-connected Singaporean diplomat as the new secretary-general of ASEAN starting in 2003 for a period of five years is likely to see a push in this direction. In fact, Indonesia, the Philippines, and Malaysia, three of the five founding members of ASEAN, agreed in May 2002 to share intelligence, resources, and personnel to fight terrorism. Fellow ASEAN members Thailand and Cambodia have also signed the pact. Brunei's expressed interest in joining a Southeast Asian anti-terror pact in January 2003. Yet it is interesting to note that many of the countries in ASEAN do not have extradition treaties. In the case of several arrests that had taken place in Singapore and Indonesia, the respective police representatives were allowed into fly into the others' jurisdiction to question the suspects. Often deportation is articulated as an option in lieu of extradition arrangements.

The move to link up with the European Union and ASEAN for further security cooperation is another example of this trend. An outcome of the United States' retaliation against the September 11 terrorist attacks is the slowdown in dialogue between European & Asian societies within the framework of the ASEM-process. Before September 11th, a lively dialogue between governments and civil societies in Europe and Asia had started from top-level government meetings to grassroots-level community activities. Since September 11th, this process has been neglected as the dynamics have shifted to the United States led war on terrorism. However, things took a different turn when foreign ministers of the European Union and the ASEAN adopted a joint anti-terrorism declaration on January 27, 2003. They vowed to upgrade links between their law enforcers in a joint fight against terrorism and organized crime in particular through cooperation between their police and security agencies, such as Eurapol and its Southeast Asian equivalent, Aseanapol.

However, the reality is that there is a trend for most member states of ASEAN to move toward unilateral and bilateral actions to pursue their

individual interests. In fact, the majority of the ASEAN member countries still fear that strengthening a regional mechanism threatens their sovereignty. Additionally, some of the member states have in mind different versions of a regional grouping, such as Mahathir Mohamad's call for an East Asian Caucus Even in a climate of "terrorist" threat, countries in ASEAN have bilateral problems. There is the ongoing war of words between Malaysia and Singapore over water and territorial claims over the islet, Pedra Blanca. Cambodia and Thailand also went into a diplomatic row over the burning of the Thai embassy and business establishments in Phnom Phen in January 2003.

Far from representing a potentially effective regional cooperation structure, ASEAN is substantially a façade reflecting a romantic vision of a handful of academics and peripatetic regional conference circuit speakers without either popular roots or strong state backing. This absence of a driving force behind ASEAN results in those who have served in the ASEAN secretariat, at the end of their tenure, usually expressing the view that what ASEAN needs is a stronger secretariat! As a result, the people's voices are not adequately heard or effectively represented.

V. CONCERNS FROM THE MUSLIM COMMUNITY

The dominance of government voices in the war against terrorism and the political decision to side with the United States hides a mixture of voices and issues in the Southeast Asian region but which does carry with an strong undertone of anxiety expressed by the Muslim community in the region.

For instance the argument that terrorism is best handled by getting to the root causes is one example. Many feel that the threat of radical Islamic terrorism is not something that can be neutralized by military measures alone. Further that an overly military emphasis would actually inflame Muslim opinion, further increasing sympathy for Muslim militants and thereby destabilizing the multi-ethnic, multi-religious polities in the region. There are two categories of concern. One concern lies in the desire to explore an alternative to retributive measures to cope with international terrorism and reduce the threat of war. A political alternative to the use of violence in response to terrorism is encouraged.

However, the voices of peace activists in Asia were largely muted as they are traditionally not very well known or prominent. Hence, both in terms of the war on terrorism and the possible attack on Iraq, a non-aggressive approach is preferred. The concern stems from the academia and those who were from the anti-globalization movement. They interpret the September 11th attack as symbolizing a widely felt discontent with the "globalization world order." Terrorism was seen as arising from surging global poverty and recommendations were made that this issue be dealt with effectively. In this respect, counter-terrorist strategies were urged to include the elimination of the root causes of poverty. However, this is increasing rejected by some

government in the region (taking a similar line with the United States) that those involved in such terrorist activity are well educated and well off.

The mass media coverage of the September 11th attacks, simplifying dangerously equated global terrorism with Islam, vastly expanding the political profile of the global Islamic community and its internal sects and political sub-groups. To some extent, the "dumbing down" of the media had a part in zooming in on the militant image of Islam. The Western media comments on Islam, and their loose equation of Islam, fundamentalism, and terrorism was immediately, and often provocatively, syndicated world-wide, including in Islamic communities throughout the world. With Islam being so prominent in the region, and given the ethnic and religious diversity of so many of the countries in the region, peace-loving Muslims have had to struggle to disassociate themselves and Islam from terrorism.

In Southeast Asia, Muslims now feel threatened and highly vulnerable. In a region where Islam has been of an accommodating kind, defensive reactions to the targeting of the Muslim community has increased support for more fanatical Muslim organizations. Part of the problem with the image of Islam in the region has to do with the inability of moderate Muslims as well as peace and inter-faith activists promoting tolerance and understanding to project their message. Since September 11th, there have been a number of meetings of academics, activists and religious leaders in the region, but with few exceptions these achieve little or no public impact.

As a result it has increased racial and religious profiling within the region. It is not uncommon to hear stories that Muslim women who wear the headscarf or Muslim men sporting a beard are subject to greater scrutiny at immigration points as well by security agencies in the region. Realizing that this is a problem, attempts have also been made to have more inter-religious and inter-cultural dialogue to ensure that more divisions with the communities are not introduced in what is already a very diverse region. Thus, it is not uncommon to hear calls from the ground to reject any attempt to associate terrorism with any religion, race, or nationality. But the U.S.-led war on terrorism has not been helpful towards this end.

VI. SEPTEMBER 11TH'S IMPACT ON HUMAN RIGHTS AND DEMOCRACY

The fight against terrorism immediately was used to justify a series of controversial policies in the United States, including tougher immigration laws, curtailment of civil liberties, bypassing of normal legal procedures, and increased spending on the military and on intelligence. The United States – following September 11th – has detained "material witnesses" and held hundreds of unnamed illegal immigrants from Islamic countries in undisclosed

locations for undeclared reasons.[4] The British government, too, is seeking to widen its legislated powers of detention. The proposed law, which drew protest from human rights activists, allows the indefinite detention or deportation of a (terrorist) suspect to a third world country.[5]

Meanwhile, governments in the region, reflecting the mood of the United States "war on terrorism," now feel encouraged to extend old internal security arrangements and emphasize the military response to regional separatist movements.[6] This benefits authoritarian regimes in the region as they can use the war on terrorism to pursue their own domestic political agenda. Authoritarian regimes especially have seized the opportunity to assert that their on-going concern for national security has been vindicated. The region's governments were quick to use the new United States concern with terrorism as an effective excuse to renew and extend their curtailment of civil liberties and projects that civil liberty movements in the region will experience a setback.

The deputy prime minister of Malaysia, for example, recently praised the value of the country's Internal Security Act (ISA) in combating threats in the light of September 11th.[7] The ISA has been used by Prime Minister Mahathir Mohamad to detain supporters of jailed former deputy prime minister Anwar Ibrahim and members of Malaysia's Islamic Party As a result, political opposition and peaceful dissent are now more than ever at risk of being crushed (with popular support) after being branded as terrorist movements. Prime Minister Mahathir has seized a number of well publicized opportunities to argue that "the real Islam is not about extremist politics."[8] He also uses such occasions to attempt to discredit the opposition Pan Malaysia Islamic party (PAS) which governs the states of Kelantan and Terengganu and

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4. *See* R. Chandrasekaran & P. Finn, *U.S. Skirts Law on Terror*, INT'L HERALD TRIB., Mar. 12, 2002. *See* Steve Fainaru, *U.S. Jail is Harsh Place for Terror Detainees*, INT'L HERALD TRIB., Apr. 18, 2002, *available at* http://www.iht.com/ihtsearch.php?key=terror+detainees (last visited Mar. 24, 2003). *See also* Steve Fainaru & Amy Goldstein, *U.S. Detention Tactic is Illegal, Court Rules*, INT'L HERALD TRIB., May 2, 2002, *available at* http://www.iht.com/ihtsearch.php?key=fainaru (last visited Mar. 24, 2003).

5. Eric Pfanner, *U.K. Seeks to Widen Powers of Detention*, INT'L HERALD TRIB., Nov. 12, 2001, at 2, *available at* 2001 WL 28584976 (last visited Mar. 20, 2003).

6. *See* Michael Richardson, *Asian Regimes Appear to Use War on Terror to Stem Dissent*, INT'L HERALD TRIB., Nov. 21, 2002, *available at* 2001 WL 28585146 (last visited Mar. 20, 2003); *see also* Barry Wain & Kuala Lumpur, *Southeast Asia: Wrong Target: The United States has returned to Southeast Asia in search of villains but is finding itself involved in local disputes that may have little to do with international terrorism; So it's no surprise to hear critics say that the U.S. is being clumsy and misguided*, FAR E. ECON. REV., Apr. 18, 2002, *available at* 2002 WL-FEER 5169853.

7. Michael Richardson, *War on Terror or War on Dissent?*, INT'L HERALD TRIB., Nov. 21, 2002.

8. Mahathir bin Mohamed, *The Real Islam is Not about Extremist Politics*, INT'L HERALD TRIB., Feb. 8, 2002, *available at* 2002 WL 2884390 (last visited Mar. 20, 2003).

favours [sic] the introduction of Islamic syariah law, as "fostering hatred in their kindergartens and schools."[9]

The same is occurring in China with Beijing justifying its targeting of the western Xinjiang province as part of its anti-terrorism campaign.[10] When UNHCHR Commissioner Mary Robinson openly criticized China about its mistreatment of people in Xinjiang and Tibet, she was rebuffed by Chinese officials including President Jiang Zemin. China's moves to stop Xinjiang and Tibet from breaking away were explained as being part of the global anti-terror battle.[11] The language of terrorism was used by China to label NGO groups negatively. Chinese officials during the meeting of the World Summit on Information Society in Tokyo in January 2003, and in an attempt to block Taiwanese NGOs from participating at the meeting, Chinese officials asked that only United Nations accredited NGOs be allowed participation as they claimed terrorist organizations disguised as NGOs could participate in such meetings.

Anti-terrorist measures did make an impact human rights in the region. Due to the lack of agreement and the absence of effective human rights mechanisms in the region, it is likely that human rights abuses in the region will flourish. Post-September 11th national security laws in the region have been stricter; as a result there has been, since September 11th, rights abuses such as discrimination, detention without trial, increased surveillance, and invasion of privacy. In addition, with the recasting of some existing pre-September 11th issues as terrorist issues, separatist movements, internally displaced people, and illegal immigrant labor all are now more vulnerable.

VII. CONCLUSION

September 11th certainly made it vividly clear that, as a region, Southeast Asia is politically insignificant vis-à-vis the major powers in the world. None of the countries from the region have a seat in the United Nations Security Council. While India's (or even Japan's) claim for a seat is acknowledged, it still does not have a seat. Although China has a seat, traditionally, it abstains when it comes to voting for a war against another country, in this case Iraq. If Southeast Asian governments seem insignificant in the world's political stage, its people remain even more insignificant. It is clear that the people's voices in the region are loud. Whether it is in terms of arguments on how to deal with the so-called terrorist problem or how to

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9. Susan Loone, *Umno or PAS: Which Islamic state is more threatening?*, *at* http://www.Malaysiakini.com (last visited June 6, 2002).

10. *See* Charles Hutzler, *Beijing Outlines Terrorist Links*, ASIAN WALL ST. J., Jan. 22, 2002, *available at* 2002 WL-WSJA 3342882.

11. *No Afghanistan: Beijing is using the U.S. led war on terrorism to justify a new crackdown on separatists in the northwest; It's a strategy that might backfire*, FAR E. ECON. REV., Nov. 29, 2001, *available at* 2001 WL-FEER 24083127.

proceed with the war in Iraq. But vis-à-vis their own individual governments, they remain weak. They are unable to persuade their governments to act in a way that is against the thrust of the United States intentions. September 11th – in more ways than one – has shown the political weakness of the region in relation to the dominant powers on the world stage.

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THE EUROPEAN UNION AND 'SEPTEMBER 11'

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International cooperation is essential in the fight against international terrorism.[1] More than in any other continent, in Europe, such cooperation is strongly institutionalized. European international organizations play a crucial role in this respect.

The most relevant European organizations in this area are undoubtedly the European Union (EU), NATO, and the Council of Europe, and, to a lesser extent, the Organization for Security and Cooperation in Europe (OSCE). This contribution will focus on the role which the EU plays in the fight against international terrorism, especially after the September 11 attacks in the United States (September 11).[2] We will first briefly set out where and how the fight against international terrorism fits in the overall framework of the EU. Subsequently, we will give an overview of the EU's main actions against international terrorism after September 11, with particular emphasis on the measures adopted in the field of criminal law and external relations. Finally, we will make some critical reflections on a number of these actions and end up with some brief concluding remarks. It goes without saying that the present

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1. *See generally The National Security Strategy of the United States of America*, Sept. 2002, *at* http://www. whitehouse.gov/nsc/nss.pdf (last visited May 15, 2003). "[W]e know that to defeat terrorism in today's globalized world we *need* support from our allies and friends." *Id.* at 7 (emphasis added). The role of international, including regional organizations, is also recognized by the Security Council. *See, e.g.*, its resolutions 1377 (UN Doc. S/RES/1377, Nov. 12, 2001, Annex) and 1456 (UN Doc. S/RES/1456, Jan. 20, 2003, Annex, § 7-8).

2. *See generally* Monica den Boer & Jorg Monar, *11 September and the Challenge of Global Terrorism to the EU as a Security Actor*, 40 J. OF COMMON MARKET STUDIES 11 (2002); LEGAL INSTRUMENTS IN THE FIGHT AGAINST INTERNATIONAL TERRORISM: TOWARD A TRANSATLANTIC DIALOGUE (Cyrille Fijnaut et al., forthcoming 2003); Christian Tomuschat, *Der 11. September 2001 und seine rechtlichen Konsequenzen*, 28 EUROPÄISCHE GRUNDRECHTE ZEITSCHRIFT 335 (2001).

contribution's focus on the EU is not intended to play down in any way the important role that the other aforementioned European organizations play in combating international terrorism.[3] Finally, it should be stressed that we do not attempt to provide an exhaustive overview of all EU actions in response to September 11, since this would by far exceed the scope of a contribution such as the present one.

I. THE FIGHT AGAINST INTERNATIONAL TERRORISM IN THE FRAMEWORK OF THE EU

In its earliest stages, the process of European supranational[4] cooperation took place almost exclusively in the economic sphere.[5] This feature is clearly reflected in the setting up of distinct European Communities in the 1950s: the European Coal and Steel Community,[6] the European Economic Community,[7]

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3. *See generally September 11 - One year on. NATO's contribution to the fight against terrorism, available at* http://www.nato.int/terrorism/index.htm (last visited Feb. 27, 2003) (describing the NATO response to Sept. 11), and NATO's *Operation Active Endeavour* (see AFSOUTH, fact-sheet Operation Active Endeavour, *available at* http://www.afsouth.nato.int/operations/Endeavour/Endeavour.htm (last visited June 9, 2003). *See also* Organization for Security and Co-operation in Europe, *Decision on Combating Terrorism and the Bucharest Plan of Action for Combating Terrorism*, MC(9).DEC/1 (Dec. 3-4, 2001), *available at* http://www.osce.org/docs/english/1990-1999/mcs/9buch01e.htm (last visited May 15, 2003); Organization for Security and Co-operation in Europe, *OSCE Charter on Preventing and Combating Terrorism*, MC(10).JOUR/2 (Dec. 7, 2002), *available at* http://www.osce.org/docs/english/1990-1999/mcs/mc10ej02.pdf (last visited May 15, 2003); *Guidelines on Human Rights and the Fight Against Terrorism adopted by the Committee of Ministers*, Council of Europe, 804th mtg., H(2002)0004 (July 11, 2002), *available at* http://www.coe.int/T/E/Human_rights/h(2002)4eng.pdf (last visited May 15, 2003).

4. By 'supranationalism' we mean a process of cooperation between States going beyond traditional intergovernmentalism, which is typically based on decision-making by consensus between sovereign States and a lack of enforcement mechanisms other than peer pressure or mechanisms available under general international law. In particular, supranationalism in the EC is characterized by many areas where decisions can be adopted by the Council (*see infra* note 39) by a qualified majority, with an important role, including often one equal to that of the Council, for the directly elected European Parliament (*see infra* note 50), an exclusive right of initiative and important enforcement powers for the Commission (*see infra* note 53) and by supervision by the independent Court of Justice (*see infra* note 271).

5. However this economic integration clearly served, at least in part, political goals.

6. *See generally* TREATY ESTABLISHING THE EUROPEAN COAL AND STEEL COMMUNITY, Apr. 18, 1951, 261 U.N.T.S. 140. This Treaty expired on July 23, 2002, in conformity with Article 97, which states "[t]his Treaty is concluded for a period of 50 years from its entry into force." *Id.* art. 97.

7. *See generally* TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY, Mar. 25, 1957, 298 U.N.T.S. 11, 1973 [hereinafter EC TREATY] (all subsequent references to the EC Treaty will be to the EC Treaty as modified by the Treaty of Nice, *see infra* note 33).

later renamed the European Community (EC),[8] and the European Atomic Energy Community.[9]

Early initiatives aimed at supranational cooperation beyond the economic sphere, notably the European Defence Community,[10] failed. From the end of the 1940s, such cooperation was conducted in intergovernmental (as opposed to supranational) international organizations, especially NATO,[11] the Western European Union,[12] and the Council of Europe.[13] The latter organization quickly acquired significant expertise in the field of human rights with as its main achievement the European Convention on Human Rights (ECHR),[14] the respect for which is supervised by the European Court on Human Rights (ECtHR).[15] The Council of Europe also invested strongly in international criminal law, resulting in conventions on extradition,[16] mutual

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8. *See* TREATY ON EUROPEAN UNION, Feb. 7, 1992, O.J. (C 224) 1, tit. I, art. A and tit. II, art. G (entered into force on Nov. 1, 1993) [hereinafter EU TREATY].

9. *See* TREATY ESTABLISHING THE EUROPEAN ATOMIC ENERGY COMMUNITY, Mar. 25, 1957, 298 U.N.T.S. 140.

10. *See* TREATY SETTING UP THE EUROPEAN DEFENCE COMMUNITY, May 27, 1952. This treaty did not enter into force because the French parliament rejected it on Aug. 30, 1954, which put an end to plans for a European Political Community for quite some time. *See* KOEN LENAERTS & PIET VAN NUFFEL, CONSTITUTIONAL LAW OF THE EUROPEAN UNION 27 (1999). *See also European Parliament Fact Sheets: The First Treaties*, *available at* http://www.europarl.eu.int/factsheets/1_1_1_en.htm (last visited Apr. 4, 2003).

11. *See* North Atlantic Treaty, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243 (establishing NATO).

12. *See generally* Treaty of Economic, Social and Cultural Collaboration and Collective Self-Defence, Mar. 17, 1948, *available at* http://www.nato.int/docu/basictxt/b480317a.htm as amended by the Protocol modifying and completing the Brussels Treaty, Oct. 23, 1954, *available in consolidated version at* http://www.nato.int/docu/basictxt/b541023u.htm (last visited May 30, 2003) (establishing the Western European Union).

13. *See* Statute of the Council of Europe, May 5, 1949, *available at* http://conventions.coe.int/Treaty/en/Treaties/Html/001.htm (last visited Apr. 4, 2003) (establishing the Council of Europe).

14. *See* Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222 and E.T.S. No. 5, as amended and supplemented by several Protocols, *available at* http://conventions.coe.int (last visited June 9, 2003).

15. Initially also by the European Commission on Human Rights, however this organ was abolished. *See* Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby, May 11, 1994, E.T.S. No. 155, pmbl. para. 3, art. 1. This Protocol also made the jurisdiction of the ECHR compulsory for any party to the ECHR. *See id.*

16. *See generally* European Convention on Extradition, Dec. 13, 1957, E.T.S. No. 24. *See also* Additional Protocol to the European Convention on Extradition, Oct. 15, 1975, E.T.S. No. 86; Second Additional Protocol to the European Convention on Extradition, Mar. 17, 1978, E.T.S. No. 98.

legal assistance,[17] and other matters.[18] As far as terrorism is concerned, this led in particular to the adoption, in 1977, of the European Convention on the Suppression of Terrorism.[19] On May 15, 2003, a protocol to the latter convention was opened for signature.[20]

In the 1970s, though, the Member States of the European Communities developed intergovernmental consultation and cooperation mechanisms amongst themselves on matters relating to foreign policy and criminal cooperation, including issues relevant to terrorism. Formally, these activities took place outside the institutional context of the European Communities.

The first of these mechanisms was European Political Cooperation (EPC), instituted in 1970.[21] EPC dealt with certain foreign policy issues. It was

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17. *See generally* European Convention on Mutual Assistance in Criminal Matters, Apr. 20, 1959, E.T.S. No. 30. *See also* Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, Mar. 17, 1978, E.T.S. No. 99; Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, Nov. 8, 2001, E.T.S. No. 182.

18. *See, e.g.*, European Convention on the International Validity of Criminal Judgments, May 28, 1970, E.T.S. No. 70. *See also* European Convention on the Transfer of Proceedings in Criminal Matters, May 15, 1972, E.T.S. No. 73; Convention on the Transfer of Sentenced Persons, Mar. 21, 1983, E.T.S. No. 112 (supplemented by Additional Protocol to the Convention on the Transfer of Sentenced Persons, Dec. 18, 1997, E.T.S. No. 167, and Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, Nov. 8, 1990, E.T.S. No. 141); Criminal Law Convention on Corruption, Jan. 27, 1999, E.T.S. No. 173; Convention on Cybercrime, Nov. 23, 2001, E.T.S. No. 185. *See generally* Statute of the Council of Europe, *supra* note 13. The Council of Europe's objective "to achieve a greater unity between its members for the purpose of safeguarding and realising [sic] the ideals and principles which are their common heritage" is to be achieved by, *inter alia*, "agreements and common action in . . . legal . . . matters and in the maintenance and further realisation [sic] of human rights and fundamental freedoms." *Id.* art. 1. Member States "must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms . . . ." *Id.* art. 3.

19. *See European Convention on the Suppression of Terrorism*, Jan. 27, 1977, E.T.S. No. 90. Thirty-nine states are party to this convention. *See id.* In 1979 the (then nine) EC Member States concluded the Agreement concerning the application of the European Convention on the suppression of terrorism among the Member States, Dec. 4, 1979, Bull. EC 12-1979, 90-91, 19 I.L.M. 325, 325-26. However, this agreement never entered into force. *See* Italian Report to the Security Council Counter-Terrorism Committee, UN Doc. S/2002/8/Annex, at 11 (1980).

20. *See* Protocol Amending the European Convention on the Suppression of Terrorism, May 15, 2003, E.T.S. No. 190, *available at* http://conventions.coe.int (last visited May 29, 2003). It is one of the results of the work of a working party of the Multidisciplinary Group on International Action against Terrorism, which was, among others, responsible for reviewing the operation of the European Convention on the Suppression of Terrorism. *See Multidisciplinary Group on International Action against Terrorism, available* at http://www.coe.int/T/E/Communication_and_Research/Press/Theme_files/Terrorism/e_GMT.asp#TopOfPage (last visited May 15, 2003). *See also* Council of Europe, Doc. CM(2002)181, Nov. 6, 2002, *available at* http://cm.coe.int/stat/E/Public/2002/cmdocs/2002cm181.htm (last visited May 15, 2003).

21. The European Political Cooperation was adopted by decision of the Foreign Affairs ministers of the Member States on Oct. 27, 1970. *See* Bull. EC 11-1970, at 9-14. *See also* LENAERTS & VAN NUFFEL, *supra* note 10, at 36-37; WOUTER DEVROE & JAN WOUTERS, DE EUROPESE UNIE. HET VERDRAG VAN MAASTRICHT EN ZIJN UITVOERING: ANALYSE EN PERSPECTIEVEN, 608-09 (1997).

given a treaty basis by the Single European Act in 1986.[22] Already in 1986, an EPC working group was set up to examine the political and legal aspects of international terrorism.[23]

The second such mechanism was the biannual meeting of the Home Affairs Ministers (or their equivalents) of the Member States on matters of law and order, set up by a European Council decision of December 1975.[24] This mechanism became known as the TREVI-group (TREVI stands for *'Terrorisme, Radicalisme, Extrémisme et Violence Internationale'*).[25] Its initial purpose was precisely to exchange information on terrorist groupings.[26]

The Maastricht Treaty on European Union of 1992[27] (referred to as Maastricht Treaty) established the EU, which is founded on the European Communities (as its so-called first pillar) and supplemented by two other fields of policy and cooperation, namely the Common Foreign and Security Policy (CFSP, also referred to as the second pillar of the EU)[28] and provisions on justice and home affairs (JHA or third pillar of the EU).[29] In essence, the Maastricht Treaty brought the two aforementioned mechanisms into the institutional framework of the EU. EPC was replaced by CFSP, the scope of which is comprehensive,[30] and which therefore also covers external political relations aspects of the fight against international terrorism.[31] TREVI was

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22. *See* European Single Act, 1987 O.J. (L 169), 1-29 (entered into force July 1, 1987) (Treaty provisions on European cooperation in the sphere of foreign policy, art. 30).

23. *See* Answer to Written Question No. E-2481/93 in the European Parliament by Mr. Vertemati (PSE) on the growth of terrorism, Nov. 30, 1993, European Foreign Policy Bulletin Database, No. 93/488. For a European Political Cooperation action, see, e.g., Statement by an EPC Ministerial Meeting concerning the enquiries into Libyan involvement in the bombing of flights Pan Am 103 and UTA 772, Dec. 2, 1991, European Foreign Policy Bulletin Database, No. 91/426, *available at* http://www.ieu.it/EFPB/Welcome.html (last visited May 30, 2003).

24. *See* Summary of the Conclusions of the European Council of Rome, Dec. 1-2, 1975, published in Bull. EC 11-1975, 1104.

25. *See* LENAERTS &VAN NUFFEL, *supra* note 10, at 41.

26. *See* DEVROE & WOUTERS, *supra* note 21, at 668.

27. *See* EU TREATY, *supra* note 8.

28. *See id.* art. B and tit. V (art. J-J.11) (now EU TREATY art. 2 and tit. V (art. 11-28)).

29. *See id.* art. B and tit. VI (art. K-K.9) and especially art. K.1.9 (now EU TREATY art. 2 and tit. VI (art. 29-42)). Articles 1(11) and 2(15) of the TREATY OF AMSTERDAM (*see infra* note 32), have incorporated some aspects initially covered under the third pillar in the first pillar (*see* EC TREATY, *supra* note 7, tit. IV) and renamed the third pillar Police and Judicial Cooperation in Criminal Matters (*see* EU TREATY, *supra* note 8, tit. VI), although the latter is usually still referred to as JHA.

30. *See* EU TREATY, *supra* note 8, art. 11(1). "The Union shall define and implement a common foreign and security policy *covering all areas of foreign and security policy*...." *Id.* (emphasis added).

31. This also includes the implementation of UN sanctions against States because of involvement in terrorism. For an early case, see Council Decision on the Common Position Defined on the Basis of Article J.2 of the Treaty on European Union with Regard to the Reduction of Economic Relations with Libya, 1993 O.J. (L 295) 7 (initially implemented by Council Regulations 3274, 3275, 1993 O.J. (L 295), respectively at 1-3 and 4-6). For more recent cases, see the decisions discussed *infra* notes 175-76 and 212 and accompanying text.

integrated in the third pillar of the EU. The Treaty of Amsterdam of 1997[32] further consolidated these mechanisms as part of the EU Treaty. Some of these provisions have again been amended by the Treaty of Nice of 2001, which has entered into force on February 1, 2003 (EU Treaty means the EU Treaty as amended by the Treaty of Nice).[33]

In general, terrorism has for the largest part been viewed by EU Member States as a criminal law or justice issue and only to a lesser extent as a foreign relations problem. Thus, the EU has dealt with it mostly within the JHA pillar.[34] However, as the overview below will demonstrate, the EU's terrorism-related actions have, especially after September 11, pervaded all its spheres of activities, from the first (largely economic) pillar to the third pillar.

II. THE EU'S ACTIONS IN RESPONSE TO SEPTEMBER 11: AN OVERVIEW[35]

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32. TREATY OF AMSTERDAM, Oct. 2, 1997, 1997 O.J. (C 340) 1-144 (1999) (entered into force on May 1, 1999). The consolidated EU Treaty, including the amendments by the TREATY OF AMSTERDAM, was published in 1997 O.J. (C 340) 145-72 (1999).

33. TREATY OF NICE AMENDING THE TREATY ON EUROPEAN UNION, THE TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES AND CERTAIN RELATED ACTS, Feb. 26, 2001, 2001 O.J. (C 80) 1-87 [hereinafter TREATY OF NICE] A consolidated version of the EU and EC treaties including the amendments made by the Treaty of Nice is published in 2002 O.J. (C 325), 1-184 (2002). For ratification status, see http://europa.eu.int/comm/nice_treaty/ ratiftable_ en.pdf (last visited May 8, 2003). Moreover, the present Convention on the Future of Europe or European Convention is to propose a new framework and structures for the European Union and is likely to propose a constitutional document abolishing the three-pillar structure. *See* Convention on the Future of Europe or European Convention, *available at* http://european-convention.eu.int and http://europa.eu.int/futurum/index_en.htm (last visited May 15, 2003). This basic choice is adopted in several major contributions to the Convention. *See, e.g.*, Final report of Working Group III on Legal Personality, CONV 305/02 WG III 16, Oct. 1, 2002; Praesidium of the European Convention, Preliminary draft Constitutional Treaty, CONV 369/02, Oct. 28, 2002; For the European Union Peace, Freedom, Solidarity - Communi-cation from the Commission on the institutional architecture, CONV 448/02 CONTRIB 165, Dec. 5, 2002. All three contributions are available at http://european-convention.eu.int and at http:// register.consilium.eu.int (last visited May 15, 2003). *See also* Francois Lamoureux et. al., Feasibility study: Contribution to a preliminary draft Constitution of the European Union, working document produced at the request of President Prodi et. al., Dec. 4, 2002, *available at* http://europa.eu.int/futurum/documents/offtext/const051202_en.pdf (last visited May 8, 2003) (this study does not necessarily represent the views of the Commission) and the latest draft constitution (Praesidium of the European Convention, Draft text of Part One of the Treaty establishing the Constituiton, CONV 724/03, May 26, 2003, *available at,* http://register. consilium. eu.int/pdf/en/03/cv00/cv00724en03.pdf), especially Art. I-6 (last visited May 29, 2003).

34. *See, e.g.*, European Parliament Resolution of Oct. 4, 2001, on the Extraordinary European Council Meeting in Brussels on Sept. 21, 2001, 2002 O.J. (C 87/E) 216-219. "[C]ombating terrorism first of all requires a criminal justice approach . . . ." *Id.* pmbl. § E.

35. For a fairly recent overview of the EU's response, see, e.g., *EU action in response to 11th September 2001: one year after, available at* http://europa.eu.int/comm/110901/index .htm (last visited May 15, 2003); *11 September attacks: the European Union's Broad Response, available at* http://europa.eu.int/news/110901/ index.htm (last visited May 15, 2003); *Terrorism - the EU on the Move, available at* http://www.europa.eu.int/comm/justice_home/ news/ terrorism/index_en.htm (last visited May 15, 2003). *See generally* Steve Peers, *EU Responses to Terrorism*, 52 INT'L & COMP. L. QUARTERLY 227 (2003); Nicola Vennemann, *Country Report on the European Union, in* TERRORISM AS A CHALLENGE FOR NATIONAL AND

The EU's reaction to September 11 has been swift and comprehensive. The main lines of its actions were set out in the conclusions of the Extraordinary European Council, i.e. the summit of the EU Member States' Heads of State or Government and the President of the European Commission,[36] convened on September 21, 2002, in Brussels[37] and in the conclusions of the JHA Council[38] the day before.[39] A total of sixty-eight measures are listed in a 'road map,' which is updated regularly.[40]

A. Cooperation in criminal matters[41]

The larger part of the EU's actions in response to September 11 falls under the heading of cooperation in criminal matters.[42] Although the action taken covers many areas, the Framework decisions[43] on the European Arrest

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INTERNATIONAL LAW: SECURITY VERSUS LIBERTY? (Christian Walter et al., eds., forthcoming 2003), *available at* http://edoc.mpil.de/conference-on-terrorism/country/eu.pdf (last visited May 29, 2003).

36. *See* EU TREATY, *supra* note 8, art. 4. The EU Treaty states that "[t]he European Council shall provide the Union with the necessary impetus for its development and shall define the general political guidelines thereof" and that "[t]he European Council shall meet at least twice a year, under the chairmanship of the Head of State or Government of the Member State which holds the Presidency of the Council." *Id.* The European Council is thus an organ of the EU and is not related to the Council of Europe.

37. *See* Conclusions of the Extraordinary European Council, *available at* http://www.europa.eu.int/comm/justice_home/news/terrorism/documents/concl_council_21sep_en.pdf (last visited May 15, 2003). *See also* European Parliament Resolution of Oct. 4, 2001, on the Extraordinary European Council Meeting in Brussels on Sept. 21, 2001, *supra* note 34 (the European Parliament's reaction to the European Council's action plan).

38. The Council of the EU (also referred to as the 'Council of Ministers') consists of a representative of each Member State at ministerial level, and meets in different formations according to the matter dealt with. It is the EU's main decision making body, although in the first pillar (the EC), it mostly shares this competence with the European Parliament. *See, e.g.*, EU TREATY, *supra* note 8, arts. 5, 13-15, 23, 34; arts. 202-10, 249-52. Unlike the European Council, it is an institution of the EU. *See id.* art. 5, art. 7.

39. *See* Conclusions of the JHA Council, Sept. 20, 2002, *available at* http://www.europa.eu.int/comm/justice_home/news/terrorism/documents/concl_council_20sep_en.pdf (last visited May 15, 2003).

40. The latest update at the time of writing the authors were able to find was in Council document 13909/1/02 REV. 1, Nov. 14, 2002, *available at* http://register.consilium.eu.int (last visited May 15, 2003).

41. *See generally* Tung-Laï, *Les initiatives menées par l'Union dans la lutte antiterroriste dans le cadre du troisième pilier (Justice et affaires intérieures)*, REVUE DU DROIT DE L'UNION EUROPÉENNE 261 (2002).

42. Tung-Laï identifies forty-four out of sixty-eight measures listed in the road map as falling under the JHA heading. *See id.* at 275.

43. According to EU Treaty, Framework decisions may be adopted by the Council for the purpose of approximation of Member States' legislation. *See* EU TREATY, *supra* note 8, art. 34.2(b). They "shall be binding upon the Member States as to the result to be achieved but shall leave to the national authorities the choice of form and methods" and "shall not entail direct effect . . . ." *Id.*

Warrant and Surrender Procedures between Member States (Arrest Warrant Framework Decision)[44] and on combating terrorism (Terrorism Framework Decision)[45] have attracted the most attention and will be discussed in some detail here. Other measures, such as the setting up of Eurojust, increased tasks for Europol and joint investigative teams will be addressed more briefly, except for the EU-U.S. cooperation, which we will also discuss in some more detail.

We would, however, first like to point out that many of the measures taken in the wake of September 11 do not relate to terrorism only but are in fact of a more general nature as they relate to police and judicial cooperation in criminal matters generally. This is, *e.g.*, the case with the Arrest Warrant Framework Decision. Such measures have also in many cases been initiated and prepared well before September 11. The EU Treaty provides the legal basis for most of these actions, in particular through its goal, introduced by the Treaty of Amsterdam, to maintain and develop "an area of freedom, security and justice . . . ."[46]

Pursuant to this goal, the special Tampere European Council of October 1999 adopted very ambitious objectives.[47] September 11 provided the necessary stimulus to finally push through a number of these measures already envisaged at Tampere, including the Arrest Warrant Framework Decision and the setting up of Eurojust.[48] In fact, the two framework decisions which have attracted most attention, had been called for by the European Parliament[49] less than a week *before* September 11.[50] Thus the breadth and speed of the EU's

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44. *See* Council Framework Decision 2002/584 on the European Arrest Warrant and the Surrender Procedures between Member States, June 13, 2002, 2002 O.J. (L 190) 1 [hereinafter Arrest Warrant Framework Decision].

45. *See* Council Framework Decision 2002/475 on Combating Terrorism, June 13, 2002, 2002 O.J. (L 164) 3 [hereinafter Terrorism Framework Decision].

46. EU TREATY, *supra* note 8, art. 2. *See also id.* art. 29.

47. *See Tampere European Council October 15 and 16, 1999 - Presidency Conclusions, available at* http://ue.eu.int (last visited May 15, 2003) [hereinafter *Tampere Council*]. Some of the goals set out in these conclusions can be traced back to the Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice, adopted by the JHA Council of Dec. 3, 1998, 1999 O.J. (C 19), 1-15 (which lists *inter alia* reinforcing "exchanges of information and the coordination of competent authorities of Member States in the fight against [terrorist offenses], using Europol in particular," initiating "a process with a view to facilitating mutual recognition of decisions and enforcement of judgments in criminal matters," establishing "minimum rules relating to the constituent elements and to penalties" of *inter alia* terrorist offenses, promoting "liaison arrangements between prosecuting/investigating officials specialising [sic] in the fight against organised [sic] crime in close cooperation with Europol," and considering "whether substantive and formal improvements can still be made to extradition procedures including rules to reduce delays").

48. *See Tampere Council*, *supra* note 47, §§ 35, 46.

49. On the powers of the European Parliament, *see especially* EU TREATY, *supra* note 8, arts. 5, 21, 39; *see also* EC TREATY, *supra* note 7, arts. 189-01, 249-52.

50. *See* European Parliament Recommendation 2001/2016 on the Role of the European Union in Combating Terrorism, 2002 O.J. (C 72/E) 135-141.

action in the field of JHA is partly due to developments predating September 11. Obviously, this in no way diminishes the importance of the measures adopted.

1. The Arrest Warrant Framework Decision[51]

A first significant decision is the adoption of the Arrest Warrant Framework Decision. As already mentioned, this instrument is not limited to terrorism, but it is regarded as part of the list of anti-terrorist measures. Even after September 11, it proved difficult to reach an agreement about it. The Commission[52] already submitted a proposal for this framework decision on September 19, 2001.[53] On September 21, 2001, the Extraordinary European Council directed the JHA Council to flesh out an agreement on this framework decision at the latest by December 6-7, 2001.[54] At its meeting on those dates, the JHA Council failed to agree on the Arrest Warrant Decision because Italy opposed the compromise reached by the fourteen other Member States, which was moreover subject to parliamentary scrutiny in a number of countries and to renewed consultation by the European Parliament.[55] On November 29, 2001, when it was first consulted,[56] the latter institution had proposed forty-four amendments to the Commission proposal and had called for renewed consultations if the Council intended to amend the Commission proposal

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51. *See also* Emmanuel Barbe, *Le mandat d'arrêt européen: en tirera-t-on les conséquences?*, (Gilles de Kerchove & Anne Weyembergh eds., 2002); Rob Blekxtoon, *Europees arrestatiebevel*, 77 NEDERLANDS JURISTENBLAD 1058, 1058-61 (2002); Rob Blekxtoon, *Europees arrestatiebevel*, 77 NEDERLANDS JURISTENBLAD 357, 357-58 (2002); D. Flore, *Le mandat d'arrêt européen: première mise en oeuvre d'un nouveau paradigme de la justice pénale européenne*, JOURNAL DES TRIBUNAUX 273, 273-81 (2002); B. Loïck, *Le mandat d'arrêt européen*, REVUE DU MARCHÉ COMMUN, No. 465, 106, 106-10; Herman Van Landeghem et al., *Europees aanhoudingsmaandaat, in* ASPECTEN VAN EUROPEES FORMEEL STRAFRECHT 165-88 (Gert. Vermeulen ed., 2002); J.M. Reijntjes, *Europees arrestatiebevel*, 77 NEDERLANDS JURISTENBLAD 712, 712-13 (2002); HERMAN VAN LANDEGHEM ET AL., *Europees aanhoudingsmaandaat*, 165-88 (2002); Gert Vermeulen, *U vraagt, wij draaien . . . . Europees aanhoudingsbevel leidt tot blinde overlevering verdachten en veroordeelden*, 56 DE JURISTENKRANT 2, 2.

52. On the role of the (European) Commission, *see especially* EU TREATY, *supra* note 8, arts. 5, 27, 36(2); EC TREATY, *supra* note 7, arts. 211-19, 256.

53. *See* Proposal for a Council Framework Decision on the European Arrest Warrant and the Surrender Procedures Between the Member States, COM(01)522 final, 2001 O.J. (C 332/E) 305-19.

54. *See* Conclusions of the Extraordinary European Council, *supra* note 37, para. 2.1.

55. *See* Council Doc. 14867/1/01 Rev 1, COPEN 79, CATS 50, Dec. 10, 2001, *available at* http://register.consilium.eu.int (last visited May 15, 2003).

56. The European Parliament has no decision-making powers in respect of framework decisions and other decisions concerning cooperation in criminal matters but is only consulted. *See* EU TREATY, *supra* note 8, art. 39.

substantially.[57] On the same day, the European Parliament had called on the Council to resort to closer cooperation (i.e. the mechanism which allows, under certain conditions, a limited number of Member States to adopt measures if not all Member States wish to take part[58]) *"in the event that unanimity cannot be attained or ... can only be attained by substantially weakening the proposal"*[59] and there was indeed briefly talk of this possibility after the failure to reach agreement in the JHA Council. However, as Italy dropped its opposition fairly quickly, the Committee of Permanent Representatives (COREPER)[60] was able to conclude on December 12, 2001, that a provisional agreement existed on the December 6/7 compromise, although it was understood that Italy would make a declaration upon adoption of the decision by the Council.[61] After being consulted again, the European Parliament approved the Council's draft without amendment on February 6, 2002.[62] Given this decision and the withdrawal of all parliamentary scrutiny reservations, the Council finally adopted the framework decision on June 13, 2002. Member States have to implement it by December 31, 2003,[63] although they may chose to do so earlier and several Member States have declared that they would avail themselves of this option.[64]

On a theoretical level, the introduction of a European arrest warrant and surrender procedures instead of traditional extradition reflects a paradigm shift

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57. *See* European Parliament Legislative Resolution on the Commission Proposal for a Council Framework Decision on the European Arrest Warrant and the Surrender Procedures between the Member States, Nov. 29, 2001, 2002 O.J. (C 153/E) 284 and the corresponding Report of the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs, A5-0397/2001, Nov. 14, 2001, *available at* http://www.europarl.eu.int (last visited May 30, 2003).

58. *See* EU TREATY, *supra* note 8, art. 40-40b *juncto* art. 43-44a, (as modified by TREATY OF NICE, *supra* note 33).

59. *See* European Parliament Legislative Resolution on the Commission Proposal for a Council Framework Decision on the European Arrest Warrant and the Surrender Procedures between the Member States, *supra* note 57, § 4.

60. COREPER is the organ which prepares most Council decisions. *See* EC TREATY, *supra* note 7, art. 207. In the field of JHA, COREPER shares this role to some extent with the Committee of Senior Officials. *See* EU TREATY, *supra* note 8, art. 36.

61. *See* Council Doc. 14867/1/01 Rev 1 Add 1, COPEN 79, CATS 50, Dec. 12, 2001, *available at* http://register.consilium.eu.int (last visited May 15, 2003).

62. *See* European Parliament Legislative Resolution A5-0003/2002 on the Draft Council Framework Decision on the European Arrest Warrant and the Surrender Procedures between the Member States, Feb. 6, 2002, 2002 O.J. (C 284E) 193-194. The corresponding report (A5-0003/2002, Jan. 9, 2002, *available at* http://www.europarl.eu.int (last visited May 30, 2003)) contains no substantive discussion but does include a minority opinion. *See id.*

63. Arrest Warrant Framework Decision, *supra* note 44, art. 34.

64. According to press reports, France, Belgium, Portugal, Luxembourg, the U.K., and Spain agreed to bring forward the entry into force of the European arrest warrant and adopt the necessary legislation in the first three months of 2003. *See, e.g.*, Michael Mann, *Six countries to bring in EU arrest warrant early*, THE FINANCIAL TIMES ONLINE, Feb. 14, 2002. The UK introduced its implementing legislation, the Extradition Bill, in the House of Commons on Nov. 14, 2002. *See* Extradition Bill (2002) (U.K.), *available at* http://www.homeoffice.gov.uk/extraditionbill/documents.htm (last visited Feb. 15, 2003). On the implementation in Belgium, see *infra* note 268.

in legal cooperation between Member States. Traditionally, such cooperation is based on the rule that one State does not execute or enforce decisions of another State. If such an enforcement was sought, an agreement had to be reached. In the case of extradition, this was usually accomplished through extradition treaties. In contrast, the European Arrest Warrant Decision is based on the principle (subject to limitations and exceptions, see *infra*) that Members States automatically recognize each others' judicial decisions ordering the arrest of a person.[65] Fundamentally, this principle is based on the close level of integration between EU Member States, and their mutual trust in each others' legal systems.[66] This is very clearly spelled out in the preamble, which states:

> The mechanism of the European arrest warrant is based on a high level of confidence between Member States. [Its] implementation . . . may be suspended only in the event of a severe breach by one Member State of the principles set out in Article 6(1) of the Treaty on European Union, established by the Council pursuant to Article 7(1) of that Treaty . . . .[67]

It is submitted that this, rather than any possible practical amelioration in respect of securing persons sought or convicted, is the major significance of this decision.

Nevertheless, the question may be asked whether the European arrest warrant will make a real difference in practice, especially in light of the significant number of extradition treaties that already existed between EU Member States.[68] Building on the (Council of Europe) European convention

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65. *See* Arrest Warrant Framework Decision, *supra* note 44, pmbl. 6, art. 1(2). *See also* Lorna Harris, *Mutual Recognition from a Practical Point of View: Cosmetic or Radical Change?*, *in* L'ESPACE PÉNAL EUROPÉEN: ENJEUX ET PERSPECTIVES 105-11 (Gilles de Kerchove & Anne Weyembergh eds., 2002).

66. *See generally* Guy Stessens, *The Principle of Mutual Confidence between Judicial Authorities in the Area of Freedom, Justice and Security* 93-03, *in* de Kerchove & Weyembergh, *supra* note 51, at 93-03. (2002). For divergent views as to whether this confidence is justified or not. *See* J.M. Reijntjes, *supra* note 51, at 712-13; *contra* R. Blekxtoon, *supra* note 51, at 1058-61 and G. Vermeulen, *supra* note 51, at 2.

67. The preamble of the 1996 EU Extradition Convention (*see infra* note 74) already states "EXPRESSING their confidence in the structure and operation of their judicial systems and in the ability of all Member States to ensure a fair trial . . . ." *Id.*

68. Similarly, the EU Member States have concluded a number of conventions amongst them in other areas of international criminal law, many of which are already covered to some extent by Council of Europe conventions. *See, e.g.*, the Agreement concerning the Application of the European Convention on the Suppression of Terrorism among the Member States, *supra* note 19; the Convention between the Member States of the European Communities on the Enforcement of Foreign Criminal Sentences, Nov. 13, 1991, *available at* http://ue.eu.int/ejn/data/vol_a/accords_ce/SN03556en.html (last visited May 15, 2003); the Agreement on the Application among the Member States of the European Communities of the Council of Europe Convention on the Transfer of Sentenced Persons, May 25, 1987, *available at*

on extradition,[69] the EU Member States have concluded amongst them no less than three multilateral treaties supplementing this convention.[70] The first of these treaties simplified and modernized the transmission of extradition requests[71] whereas the second simplified the extradition procedure when the person sought consented to his/her extradition.[72] The third EU convention on extradition is of a more general nature and significantly curtails certain

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http://ue.eu.int/ejn/data/vol_a/accords_ce/CPEIen.html (last visited May 15, 2003); the Agreement between the Member States of the European Communities on the Transfer of Proceedings in Criminal Matters, Nov. 6, 1990, *available at* http://ue.eu.int/ejn/data/vol_a/accords_ce/CPEinfractionsen.html (last visited May 15, 2003); the Convention between the Member States of the European Communities on Double Jeopardy, May 25, 1987, *available at* http://ue.eu.int/ejn/data/vol_a/accords_ce/CPEIIen.html (last visited May 15, 2003); and the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, May 29, 2000, 2000 O.J. (C 197), 3-23 (adopted by Council Act of May 29, 2000, establishing in accordance with Article 34 of the Treaty on European Union the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, 2000 O.J. (C 197), 1-2 and the Protocol to the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, Oct. 16, 2001, 2001 O.J. (C 326) 2-8, adopted by Council Act of Oct. 16, 2001, establishing, in accordance with Article 34 of the Treaty on European Union, the Protocol to the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, 2001 O.J. (C 326) 1). For a non-conventional instrument, see Joint Action of June 29, 1998, adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on Good Practice in Mutual Legal Assistance in Criminal Matters, 1998 O.J. (L 191) 1-3.

69. *See* European Convention on Extradition, *supra* note 16.

70. Furthermore, it should be mentioned that a large number of Member States are also party to the Convention of June 19, 1990, applying the Schengen Agreement of June 14, 1985, between the Governments of the States of the Benelux Economic Union, The Federal Republic of Germany and the French Republic, on the Gradual Abolition of Checks at their Common Borders, which contains provisions concerning extradition in its Articles 59-66. *See* 2000 O.J. (L 239) 19-62. The Treaty of Amsterdam has integrated this 1990 convention, as part of the 'Schengen *acquis,*' into the framework of the EU. See the Protocol (No. 2) (to the Treaty of Amsterdam) integrating the Schengen *acquis* into the framework of the European Union and the Annex thereto defining the 'Schengen acquis', 1997 O.J. (C 340) 93-96 (i.e. essentially the 1985 and 1990 agreements, accession agreements thereto and "Decisions and declarations adopted by the Executive Committee established by the 1990 Implementation Convention, as well as acts adopted for the implementation of the Convention by the organs upon which the Executive Committee has conferred decision making powers."). *Id.* For the full Schengen Acquis, see Council Decision of May 20, 1999, concerning the definition of the Schengen acquis for the purpose of determining, in conformity with the relevant provisions of the Treaty establishing the European Community and the Treaty on European Union, the legal basis for each of the provisions or decisions which constitute the acquis, 1999 O.J. (L 176) 1-16. *See especially* The Schengen *acquis* as referred to in Article 1(2) of Council Decision 1999/435/EC, 2000 O.J. (L 239) 1-473.

71. Agreement between the Member States of the European Community on the Simplification and Modernisation of Methods of Transmitting Extradition Requests, May 26, 1989, *available at* http://ue.eu.int/ejn/data/vol_a/accords_ce/EPC0019en.html (last visited May 15, 2003).

72. Convention, drawn up on the basis of Article K.3 of the Treaty on European Union, on simplified extradition procedure between the Member States of the European Union, Mar. 10, 1995, 1995 O.J. (C 78) 2-7 (adopted by Council Act of Mar. 10, 1995, drawing up the Convention on simplified extradition procedure between the Member States of the European Union, 1995 O.J. (C 78) 1) [hereinafter 1995 EU Extradition Convention].

restrictions traditionally found in extradition treaties.[73] It *inter alia* abolishes, in principle, the political offence exception between Member States, although it allows Member States to limit this abolition to the terrorist offenses listed in the European Convention on the Suppression of Terrorism[74] and a considerable number of Member States have opted for this limited abolition only.[75] This convention also obliges Member States to extradite their own nationals, although in this respect too it allows reservations, of which most Member States have made use.[76] It further allows Member States to declare that they will, in principle, renounce the rule of speciality (i.e. the rule that extradition is only granted for the offence for which it is requested),[77] a rule which is in any event set aside by this convention when there is no risk of a deprivation of liberty or when the extradited person waives this rule,[78] and permits re-

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73. Convention, drawn up on the basis of Article K.3 of the Treaty on European Union, relating to extradition between the Member States of the European Union, Sept. 27, 1996, 1996 O.J. (C 313) 12-23 (adopted by Council Act of Sept. 27, 1996, drawing up the Convention relating to extradition between the Member States of the European Union, 1996 O.J. (C 313) 11) [hereinafter 1996 EU Extradition Convention].

74. European Convention on the Suppression of Terrorism, art. 5. Even in this case there is no obligation to prosecute if extradition is sought for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion. *See id.* para 3. The Explanatory Report states in this respect:

> The possibility that these circumstances will apply between the Member States of the European Union in the course of an extradition procedure is probably academic. However, since respect for fundamental rights and liberties is an absolute principle of the European Union and, as already said, lies behind the progress which the Union intends to accomplish this Convention, it was considered that the text should not depart from the aforesaid traditional rule of protecting persons against criminal proceedings affected by political discrimination and that the validity of that rule had to be explicitly stressed.

The Explanatory Report, May 26, 1997, 1997 O.J. (C 191), 13-26 art. 5.

Article 5(4) precludes Member States from making use between them of the possibility, open under Article 13 of the European Convention on Terrorism, enabling a State to qualify certain terrorist offense as a political offense. *See id.* art. 5(4).

75. In particular Austria, Denmark, Greece, Ireland, Luxembourg, and the Netherlands. See their declarations *available at*, the Treaty Office of the EU Council, http://db.consilium.eu.int/accords/home.asp?lang=en (last visited Dec. 12, 2002).

76. European Convention on the Suppression of Terrorism art. 7, which also allows a reservation granting conditional extradition of nationals. Austria, Germany, Greece, and Luxembourg declared that they would not extradite nationals and Denmark also made use of the possibility to refuse extradition of nationals. Belgium, Spain, the Netherlands, Portugal, and Finland declared that they would extradite nationals only under strict conditions, including the serving of any sentence to deprivation of liberty in the requested State. Sweden imposed strict conditions for the extradition of nationals and, in addition, reserved the right to refuse to extradite them altogether. Ireland stated that it would only extradite nationals on the basis of reciprocity. *See* reservations and declarations, *available at* the Treaty Office of the EU Council, http://db.consilium.eu.int/accords/home.asp?lang=en (last visited Dec. 12, 2002).

77. European Convention on the Suppression of Terrorism, art. 11. Only Austria, Germany and the UK have done so, all on a reciprocal basis. *See* reservations and declarations, *available at* the Treaty Office of the EU Council, http://db.consilium.eu.int/accords/home.asp?lang=en (last visited Dec. 12, 2002).

78. *See* EU TREATY, *supra* note 8, art. 10.

extradition between Member States, unless a Member State declares that it will not permit this.[79] In sum, the 1996 EU Extradition Convention limits obstacles to extradition to a considerable extent in principle, but still leaves Member States quite some room to retain a number of these obstacles.

It must be stressed that these three treaties have not yet been ratified by all Member States,[80] despite repeated calls to this effect.[81] Moreover, these treaties will only enter into force when all Member States have ratified them, although Member States, which ratify may declare that they will apply them already before that entry into force between themselves and those other Member States which make the same declaration.[82] Fortunately, most Member States which have ratified these treaties have made such a declaration.[83] Yet, even the inclusion of the goal to take all the necessary steps for the two conventions on extradition to enter into force on January 1, 2002, set by the September 20, 2002, JHA Council after the September 11 attacks,[84] has not been achieved. Seen against this background, the choice for a new regime adopted by way of a framework decision is understandable.

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79. *See id.* art. 12. This article adds that such a declaration will not apply where the person concerned consents to be re-extradited or where art. 13 of the 1995 EU Extradition Convention provides otherwise. *See generally* 1995 EU Extradition Convention, *supra* note 72. Belgium, Denmark, Greece, Luxembourg, Portugal, Sweden, and Finland have made a declaration retaining the rule of non re-extradition except in case of waiver. Some of these Member States also make the extradition of nationals subject to the condition that they not be re-extradited (*e.g.*, Finland). The Netherlands has retained the non re-extradition rule only for its nationals and, in some cases, residents. See the reservations and declarations, available at http://db.consilium.eu.int/accords/home.asp?lang=en (last visited Dec. 12, 2002)

80. According to data provided by the Treaty Office of the EU Council the 1995 and 1996 Conventions are still not ratified by two Member States (France and Italy) and are not yet in force for five and four Member States respectively. *See* 1995 EU Extradition Convention, *supra* note 72. *See also* 1996 EU Extradition Convention, *supra* note 73. Even the 1989 convention appears to be ratified by only ten of the fifteen current Member States. *See id.*

81. For example, the JHA Council Action Plan of Dec. 3, 1998,which listed amongst the measures to be taken within two years of entry into force of Treaty of Amsterdam (i.e. by May 1, 2001) "ensuring that the two existing conventions on extradition adopted under the TEU are effectively implemented in law and in practice." JHA Council Action Plan of Dec. 3, 1998, *supra* note 47. Sections 45(c)) and 35 of the 1999 Tampere European Council conclusions, urging Member States to "speedily ratify the 1995 and 1996 EU Conventions on Extradition." *Tampere Council*, *supra* note 47. *See also* The European Parliament Resolution of Mar. 13, 1998, on Judicial Cooperation in Criminal Matters in the European Union, 1998 O.J. (C 104), 267-272, in which the European Parliament "[r]equests the national governments and parliaments to make every effort to ensure that ratification procedures for conventions on judicial cooperation within the European Union are speeded up." *Id.* at 271.

82. *See* 1995 EU Extradition Convention, *supra* note 72, art. 16. *See also* 1996 EU Extradition Convention, *supra* note 73, art. 18.

83. Only Ireland and Greece, and Portugal with respect of the 1996 Convention only, have not made such declarations. *See* information from the Treaty Office of the EU Council, *available at* http://db.consilium.eu.int/accords/home.asp?lang=en (last visited Dec. 12, 2002).

84. See Conclusions and Plan of Action, *supra* note 39, at II.1.

The scope of application of the Arrest Warrant Framework Decision[85] is set out in Article 2, which states in § 1:

> A European arrest warrant may be issued for acts punishable by the law of the issuing Member State[86] by a custodial sentence or a detention order for a maximum period of at least 12 months or, where a sentence has been passed or a detention order has been made, for sentences of at least four months.[87]

As far as the potential or imposed punishment in the issuing or requesting Member State is concerned, this provision uses an identical threshold as the European Convention on Extradition and is a little broader than the 1996 EU Extradition Convention in this respect.[88] However, the main difference with these two earlier conventions (and extradition treaties in general) lies in the fact that, in principle, under the Arrest Warrant Framework Decision, it is not necessary that the offence concerned is also punishable under the law of the executing[89] Member State: in other words, no "double criminality" is required.[90] However, for offences not listed in Article 2 § 2 the executing State *may* require that the acts for which the European arrest warrant has been issued constitute an offence under the law of the executing Member State.[91] It remains to be seen how much use will be made of this facility in Member States' implementing legislation.[92] Article 2 § 2 lists thirty-two offences for which double criminality may not be required if these offences are punishable in the issuing Member State by a custodial sentence or a detention order for a maximum period of at least three years. These crimes include *inter*

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85. *See generally* Arrest Warrant Framework Decision, *supra* note 44.

86. The "issuing (Member) State" is the State of which the judicial authority has issued the European arrest warrant. It is approximately the equivalent of the "requesting State" in extradition.

87. *See* Arrest Warrant Framework Decision, *supra* note 44, art. 2 (1).

88. The 1996 EU Extradition Convention does not include the four months penalty already pronounced. *See* 1996 EU Extradition Convention, *supra* note 73, art. 2(1). *See also* European Convention on Extradition, *supra* note 16, art. 2(1).

89. The "executing (Member) State" is the State of which the authorities are asked to execute the European arrest warrant. It is approximately the equivalent of the "requested State" in extradition.

90. The European Convention on Extradition demands that the offense be punishable under the laws of the requesting Party *and of the requested Party* by deprivation of liberty or under a detention order for a maximum period of at least one year. *See* European Convention on Extradition, *supra* note 16, Article 2(1). Article 2(1) of the 1996 EU Extradition Convention requires that the offense also be punishable under the law of the *requested* Member State by deprivation of liberty or a detention order for a maximum period of at least six months. *See* 1996 EU Extradition Convention, *supra* note 73, art. 2(1).

91. *See* Arrest Warrant Framework Decision, *supra* note 44, art. 2 (4).

92. Framework decisions are binding as to the result but leave to the national authorities the choice of form and methods. *See generally* EU TREATY, *supra* note 8, art. 34.2 (b).

alia terrorism, a number of offences which may relate to terrorist activities, such as kidnapping, illegal restraint and hostage-taking, illicit trafficking in nuclear or radioactive materials, laundering of the proceeds of crime, illicit trafficking in weapons, munitions and explosives, unlawful seizure of aircraft/ships and sabotage and a number of other offences, *e.g.*, fraud, murder, racism, corruption, illicit trafficking in narcotic drugs and psychotropic substances and crimes within the jurisdiction of the International Criminal Court. This list may be extended in the future pursuant to Article 2 § 3.

There are three grounds for *mandatory* non-execution of an arrest warrant: (1) the offence is covered by amnesty in the executing State and that State had jurisdiction over the offence;[93] (2) the requested person has been finally judged in respect of the conduct concerned in a Member State and, if he/she has been sentenced, the sentence has been served, is being served, or may no longer be executed according to the law of the sentencing State; and (3) the requested person cannot, by reason of his/her age, be held criminally responsible for the offence under the law of the executing State.[94]

There are also a number of grounds for *optional* non-execution. First, as mentioned above, in some cases double criminality may still be required. Second, there are a number of grounds for refusal which broadly can be regarded as applications of the double jeopardy prohibition (*ne bis in idem*).[95] Third, the executing State may refuse execution if the offence concerned is statute-barred according to its own law and it had itself jurisdiction over this offence.[96] Fourth, the executing State may refuse execution if it undertakes to execute itself the sentence or detention to which the requested person has been condemned if that person is a national or resident of the executing State or is staying in that State (in fact, this amounts rather to a transfer of sentence than a real refusal).[97] Finally, a refusal to execute is also permitted for offenses committed in whole or in part in the territory of the executing Member State and for offenses committed outside the territory of the issuing Member State which are not punishable extraterritorially according to the law of the executing Member State.[98]

The fact that the requested person has the nationality of the executing State is not a ground for refusing execution,[99] although execution may in this case (and also when the requested person is a resident of that State) be subject

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93. *See also* 1996 EU Extradition Convention, *supra* note 73, art. 9.

94. *See* Arrest Warrant Framework Decision, *supra* note 44, art. 3.

95. *See id.* arts. 4(2), 4(3), 4(5).

96. *See id.* art. 4(4). This solution is essentially the same as the one provided by art. 8 of the 1996 EU Extradition Convention. *See* 1996 EU Extradition Convention, *supra* note 73, art. 8.

97. *See* Arrest Warrant Framework Decision, *supra* note 44, art. 4(6).

98. *See id.* art. 4(7).

99. It is not listed as a ground for non-execution. *See id.* art. 4.

to the condition that any sentence imposed be served in the executing State.[100] The abolition of the nationality-based exception is undoubtedly one of the main achievements of the European arrest warrant, which will require constitutional changes in some Member States. Another ground for refusal that is not retained is that of tax offenses.[101]

The principle of speciality is retained, though it is subject to several exceptions and States may declare that they will renounce these principles on the basis of reciprocity unless they indicate otherwise.[102] The same goes for the rule of non re-extradition. However, in respect of re-extradition to an EU Member State, the rule of non re-extradition is severely restricted.[103]

It should be noted that a decision on the execution of a European arrest warrant and the actual surrender in case of a decision to execute such a warrant, are subject to strict time limits.[104] Furthermore, upon arrest, a requested person must be informed of the warrant and its content, has the right to counsel and to an interpreter if necessary, and if he or she does not consent to surrender, has the right to be heard by the executing judicial authority.[105]

2. *The Terrorism Framework Decision*

The Commission submitted a proposal for a framework decision on combating terrorism on September 19, 2001.[106] On September 21, 2001, the Extraordinary European Council agreed that the EU had to adopt a common definition of terrorism.[107] On October 19, 2001, the Ghent European Council called for agreement on this definition to be reached by December 6-7, 2001.[108] At its meeting on December 6-7, 2001, the JHA Council reached a provisional

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100. *See id.* art. 5(3). Article 5 also allows execution to be made conditional for judgments *in absentia* and for offenses punishable by a life sentence. *See id.*

101. Thus again going beyond existing treaty obligations: fiscal offenses are only covered by the European Convention on Extradition "if the Contracting Parties have so decided in respect of any such offense or category of offenses." *See* European Convention on Extradition, *supra* note 16, art. 5. The 1996 EU Extradition Convention requires extradition for "offenses which correspond under the law of the requested Member State to a similar offense," but allows Member States the possibility to limit this to "offenses in connection with excise, value-added tax or customs." 1996 EU Extradition Convention, *supra* note 73, art. 6. However only Greece and, not surprisingly, Luxembourg, have made use of this facility to limit extradition for fiscal offenses. *See* Declaration of Greece and Luxembourg, *available at* http://db.consilium.eu.int/accords/home.asp?lang=en (last visited Dec. 12, 2002).

102. *See* Arrest Warrant Framework Decision, *supra* note 44, art. 27

103. *See id.* art. 28.

104. *See id.* arts. 17, 23.

105. *See id.* arts. 11, 14.

106. *See* Proposal for a Council Framework Decision on Combating Terrorism, 2001 O.J. (C 332/E) 300-304 [hereinafter Proposal for a Council Framework Decision].

107. *See* Conclusions of the Extraordinary European Council, *supra* note 37, para. 2.1.

108. *See* Ghent European Council, *Declaration by the heads of State or Government of the EU and the President of the Commission. Follow-up to the September 11 attacks and the fight against terrorism, available at* http://ue.eu.int. (last visited Apr. 1, 2003)

political agreement on the framework decision, subject to renewed consultation[109] of the European Parliament and to parliamentary scrutiny in Ireland, Sweden, and Denmark.[110] The European Parliament had, after its first consultation, proposed no less than forty-two amendments to the Commission proposal and called for renewed consultations if the Council intended to amend the Commission proposal substantially.[111] After being consulted again, the European Parliament consented with the Council's draft without amendment on February 6, 2002.[112] Given this decision and the withdrawal of all parliamentary scrutiny reservations, the Council finally adopted the decision on June 13, 2002.

The Terrorism Framework Decision harmonizes the Member States' definitions of terrorism and obliges them to criminalize terrorist offenses thus approximated (art. 1), including directing, or participating in, a terrorist group (art. 2), as well as linked offenses (art. 3), and inciting, aiding and abetting and attempting (art. 4). It also obliges them to ensure that legal persons can be held liable for terrorist offenses (art. 7), and are subject to "effective, proportionate and dissuasive penalties," of which it gives some examples (art. 8). Furthermore, the Terrorism Framework Decision sets standards for the penalties to be imposed ("effective, proportionate and dissuasive criminal penalties, which may entail extradition"), including a minimum for the maximum penalties over some of the offenses listed (art. 5). It establishes jurisdictional rules to ensure effective prosecution of these offenses (art. 9). Finally, it contains rules concerning reduced penalties for terrorists who renounce terrorism and cooperate with the authorities to prevent or combat it (art. 6) and relating to the protection of, and assistance to, victims of terrorist offenses (art. 10).

Two particularly important features of the Terrorism Framework Decision merit further attention: its definitions of "terrorist offenses"[113] and of "terrorist group"[114] on the one hand, and its rules on jurisdiction over terrorist

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109. The European Parliament only had to be consulted. *See* EU TREATY, *supra* note 8, art. 39. *See also, supra* text accompanying note 57.

110. Council Doc. 14845/1/01 Rev 1, DROIPEN 103, CATS 49, Dec. 7, 2001, *available at* http://register.consilium.eu.int (last visited Apr. 1, 2003).

111. *See* European Parliament Legislative Resolution on the Commission Proposal for a Council Framework Decision on Combating Terrorism, 2002 O.J. (C 153/E) 275 [hereinafter European Parliament Legislative Resolution]. *See also*, Corresponding Report of the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs, A5-0397/2001, Nov. 14, 2001, *available at* http://www.europarl.eu.int (last visited May 30, 2003) [hereinafter Corresponding Report].

112. *See* European Parliament Legislative Resolution on the Draft Council Framework Decision on Combating Terrorism, 2002 O.J. (C 284E) 192-193. The corresponding report A5-0003/2002, Jan. 9, 2002, *available at* http://www.europarl.eu.int (last visited May 30, 2003), contains no substantive discussion but does include a minority opinion.

113. *See* Terrorism Framework Decision, *supra* note 45, art. 1(1).

114. *See id.* art. 2.

offenses on the other hand.[115] Article 1 of the Terrorism Framework Decision defines 'terrorist offenses' as follows:

> [. . .] intentional acts referred to below in points (a) to (i), as defined as offenses [sic] under national law, which, given their nature or context, may seriously damage a country or an international organisation [sic] where committed with the aim of:
>
> — seriously intimidating a population, or
>
> — unduly compelling a Government or international organization to perform or abstain from performing any act, or
>
> —seriously destabilizing or destroying the fundamental political, constitutional, economic or social structures of a country or an international organization, shall be deemed to be terrorist offenses:
>
> (a) attacks upon a person 's life which may cause death;
>
> (b) attacks upon the physical integrity of a person;
>
> (c) kidnapping or hostage taking;
>
> (d) causing extensive destruction to a Government or public facility, a transport system, an infrastructure facility, including an information system, a fixed platform located on the continental shelf, a public place or private property likely to endanger human life or result in major economic loss;
>
> (e) seizure of aircraft, ships or other means of public or goods transport;
>
> (f) manufacture, possession, acquisition, transport, supply or use of weapons, explosives or of nuclear, biological or chemical weapons, as well as research into, and development of, biological and chemical weapons;
>
> (g) release of dangerous substances, or causing fires, floods or explosions the effect of which is to endanger human life;
>
> (h) interfering with or disrupting the supply of water, power or any other fundamental natural resource the effect of which is to endanger human life;
>
> (i) threatening to commit any of the acts listed in (a) to (h).[116]

115. *See id.* art. 9.
116. *See id.* art. 1.

This definition, which had essentially already been agreed upon in December 2001,[117] is broader than the definition in the Commission proposal in that it contains three disjunctive aims whereas the latter only listed two cumulative aims (i.e. that the offenses be committed "with the aim of intimidating them and seriously altering or destroying the political, economic, or social structures of a country").[118] On the other hand, it only includes the last aim listed when directed against the *fundamental* political, constitutional, economic, or social structures, thereby taking into account to some extent the European Parliament's proposed amendment, which, in its first resolution, called for "political, economic, or social structures of a country" to be replaced by "fundamental freedoms, democracy, respect for human rights, civil liberties and rule of law on which our societies are based."[119] The possibilities of interpreting this definition overly broadly are limited by Article 1.2, which is part of the definition and states "This Framework Decision shall not have the effect of altering the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union."[120]

We will not go into detail about the definition of terrorist groups, nor about the provisions on the liability of legal persons,[121] but will merely quote the relevant provision (*i.e.* art. 2):

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117. *See* Council Common Position of Dec. 27, 2001, on the Application of Specific Measures to Combat Terrorism, 2001 O.J. (L 344) 93-96 art. 1(3).

118. Proposal for a Council Framework Decision, *supra* note 106, art. 3(1).

119. European Parliament Legislative Resolution, *supra* note 111. *See also* Corresponding Report, *supra* note 111, amend. 17.

120. Further, the JHA Council stated

> [w]hen defining terrorist aims, the Council opted for a wording that strikes a balance between the need to punish terrorist offenses effectively and the need to guarantee fundamental rights and freedoms, ensuring that the scope could not in any circumstances be extended to legitimate activities, for example trade union activities or anti-globalisation [sic] movements.

JHA Council Conclusions of Dec. 6 and 7, 2001, *available at* http://ue.eu.int (last visited Apr. 1, 2003).

121. *See* Terrorism Framework Decision, *supra* note 45, art. 7.

> 1. Each Member State shall take the necessary measures to ensure that legal persons can be held liable for any of the offenses referred to in Articles 1 to 4 committed for their benefit by any person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, based on one of the following: (a) a power of representation of the legal person; (b) an authority to take decisions on behalf of the legal person; (c) an authority to exercise control within the legal person. 2. Apart from the cases provided for in paragraph 1,each Member State shall take the necessary measures to ensure that legal persons can be held liable where the lack of supervision or control by a person referred to in paragraph 1 has made possible the commission of any of the offenses referred to in Articles 1 to 4 for the benefit of that legal person by a person under its authority.

Id. Compare International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, art. 5, *available at* http://untreaty.un.org/English/Terrorism/Conv12.pdf (last visited May 15, 2003).

> 1. For the purposes of this Framework Decision, 'terrorist group 'shall mean: a structured group of more than two persons, established over a period of time and acting in concert to commit terrorist offenses [sic]. 'Structured group 'shall mean a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure.
> 2. Each Member State shall take the necessary measures to ensure that the following intentional acts are punishable:
> (a) directing a terrorist group;
> (b) participating in the activities of a terrorist group, including by supplying information or material resources, or by funding its activities in any way, with knowledge of the fact that such participation will contribute to the criminal activities of the terrorist group.[122]

In respect of jurisdiction, the Terrorism Framework Decision contains rules requiring, or in one case permitting, States to establish jurisdiction over terrorist offenses in certain circumstances and it includes rules on how to deal with positive conflicts of jurisdiction (i.e. cases where more than one member State is competent).

The grounds on the basis of which Member States must assert jurisdiction over terrorist offenses are very broad. Article 9(1) states:

> Each Member State shall take the necessary measures to establish its jurisdiction over the offenses referred to in Articles 1 to 4 where:
> (a) the offense is committed in whole or in part in its territory. Each Member State may extend its jurisdiction if the offense [sic] is committed in the territory of a Member State;
> (b) the offense is committed on board a vessel flying its flag or an aircraft registered there;
> (c) the offender is one of its nationals or residents;
> (d) the offense is committed for the benefit of a legal person established in its territory;
> (e) the offense is committed against the institutions or people of the Member State in question or against an institution of the European Union or a body set up in accordance with the Treaty establishing the European

122. *Compare* 1996 EU Extradition Convention, *supra* note 74, art. 3(4). *See also* Joint action of Dec. 21, 1998, adopted by the Council on the Basis of Article K.3 of the Treaty on European Union, on Making it a Criminal Offense to Participate in a Criminal Organization in the Member States of the European Union, 1998 O.J. (L 351) 1-3.

> Community or the Treaty on European Union and based in that Member State.[123]

Moreover, Article 9.5 states that art. 9 "shall not exclude the exercise of jurisdiction in criminal matters as laid down by a Member State in accordance with its national legislation."[124] In adopting such a broad obligation to establish jurisdiction, the Council went beyond the Commission proposal[125] and followed the European Parliament's suggested amendments[126] in this respect.

Three of the jurisdiction clauses stand out. First, "*Each* Member State may extend its jurisdiction if the offence is committed in the territory of *a* Member State."[127] This is a quite novel provision, allowing for a kind of 'regional universal jurisdiction.'[128] Second, the duty for Member States to establish jurisdiction over terrorist offenses committed abroad not just by their nationals, but also by their residents,[129] also goes beyond what is common in international criminal law instruments.[130] Third, the duty to establish jurisdiction over terrorist offences committed against an EU institution or body which is based in that Member State is also novel.[131]

These broad provisions on jurisdiction will obviously entail many cases where more than one Member State has jurisdiction over the same offence. The Terrorism Framework Decision provides some guidance as to which State is to prosecute in such a case. This is to be decided by consultation, taking sequential account of the following factors: the State in the territory of which the offence has been committed; the State of which the perpetrator has the

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123. *See* Terrorism Framework Decision, *supra* note 45, art. 9(1).

124. *See id.* art. 9.5

125. *See* Proposal for a Council Framework Decision, *supra* note 106, art. 10-12.

126. *See* European Parliament Legislative Resolution, *supra* note 111; *see also* Corresponding Report, *supra* note 111, amends. 39, 40.

127. Terrorism Framework Decision, *supra* note 45, art. 9.1(a) (emphasis added).

128. *See* Jan Wouters & Frederik Naert, *The EU's Criminal Law Approach to Terrorism -What has been achieved so far?*, 6 CHALLENGE EUROPE, *available at* http://www.theepc.be/challenge/topdetail.asp?SEC=documents&SUBSEC=&REFID=621 (last visited Apr. 1, 2003).

129. *See* Terrorism Framework Decision, *supra* note 45, art. 9.1(c).

130. It is a basis for jurisdiction which is, *e.g.*, neither present in the International Convention for the Suppression of Terrorist Bombings, Dec. 15, 1997, *available at* http://untreaty.un.org/English/Terrorism.asp (last visited May 15, 2003) nor in the International Convention for the Suppression of the Financing of Terrorism (*see supra* note 121) although both of these conventions recognize the residence of a perpetrator as an optional basis for jurisdiction if he/she is stateless (see respectively art. 6.2(c) and art. 7.2(d)).

131. The wording "committed against" seems to imply that the offense must not necessarily have been carried out on the territory of the State concerned (it might *e.g.*, be targeted at an official of the Council who is on mission outside the EU). It should be noted that terrorist offenses against international organizations are included in Articles 1.2 and 2.1(b) of the International Convention for the Suppression of the Financing of Terrorism. *See* International Convention for the Suppression of the Financing of Terrorism, *supra* note 121. Even so, the jurisdictional clauses of this convention do not mention grounds of jurisdiction based on a link with an international organization. *See id.*

nationality or in which he/she is a resident; the State where the victims are from and the State where the perpetrator is found.

Finally, pursuant to Article 9.3,

> Each Member State shall take the necessary measures also to establish its jurisdiction over the offenses referred to in Articles 1 to 4 in cases where it refuses to hand over or extradite a person suspected or convicted of such an offence to another Member State *or to a third country.*[132]

This is an application of the *'aut dedere aut judicare'* principle which has already been laid down in a considerable number of international instruments on terrorism.[133]

3. Other measures

a. Enhancing the role of Europol

The establishment of Europol (the European Police Office) was provided for in Article K.1(9) of the Maastricht Treaty, which envisaged that it would (mainly) serve for the exchange of information in the areas of drug trafficking, terrorism, and other serious forms of international organised crime. Pursuant to this provision, a Europol Drugs Unit was initially set up by a ministerial agreement concluded at the TREVI Ministerial Meeting in Copenhagen on June 2, 1993,[134] and started working in January 1994.[135] Subsequently, in 1995, the Europol Convention was concluded.[136] This convention endows Europol as a separate legal personality[137] with limited treaty-making

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132. *See* Terrorism Framework Decision, *supra* note 45, art. 9.3 (emphasis added).

133. *See, e.g.*, European Convention on the Suppression of Terrorism, *supra* note 19, art. 6-7; International Convention for the Suppression of Terrorist Bombings, *supra* note 130, art. 6-8; International Convention for the Suppression of the Financing of Terrorism, *supra* note 121, art. 7-10.

134. *See* Bull. EC 6-1993, 1.4.19. *See also* WOUTERS & DEVROE, *supra* note 2, at 700-02.

135. See Europol, *The European Police Office - fact sheet, available at* http://www.eurpol.eu.int (last visited Feb. 15, 2003). This unit was later regulated by Joint Action of Mar. 10, 1995, adopted by the Council on the basis of Article K.3 of the Treaty on European Union concerning the Europol Drugs Unit, 1995 O.J. (L 62) 1-3, which expanded this Unit's competence to illicit trafficking in radioactive and nuclear substances; crimes involving clandestine immigration networks and illicit vehicle trafficking; together with the criminal organizations involved and associated money-laundering activities (art. 2(2)), and Joint Action of Dec. 16, 1996, adopted by the Council on the basis of Article K.3 of the Treaty on European Union extending the mandate given to the Europol Drugs Unit, 1996 O.J. (L 342) 4.

136. Convention on the establishment of a European Police Office, 1995 O.J. (C 316) 2-32 (adopted by Council Act of July 26, 1995, drawing up the Convention based on Article K.3 of the Treaty on European Union, on the establishment of a European Police Office, 1995 O.J. (C 316) 1) [hereinafter Europol Convention].

137. *Id.* art. 26(1)-(2).

capacity,[138] and defines Europol's objective as "improv[ing] [. . .] the effectiveness and cooperation of the competent authorities in the Member States in preventing and combating terrorism, unlawful drug trafficking and other serious forms of international crime. . ." where an organized criminal structure is involved and two or more Member States are affected "in such a way as to require a common approach by the Member States. . . ."[139] This convention was entered into force on October 1, 1998, and Europol took up its full activities as of July 1, 1999.[140]

Thus, terrorism is specifically mentioned as a serious crime for which Europol is to have competences. Nevertheless, it was not amongst Europol's original first tasks, which included especially unlawful drug trafficking. Europol was to deal with crimes committed or likely to be committed in the course of terrorist activities against life, limb, personal freedom, or property within two years at the latest following the entry into force of the Europol Convention unless the Council unanimously instructed Europol to deal with such terrorist activities before that period had expired.[141] The Council so instructed Europol in December 1998.[142]

The next step in the development of Europol was the 1997 Treaty of Amsterdam, which amended the EU Treaty so as to confirm a future *operational* role of Europol: the Council was to enable Europol "to facilitate and support the preparation, and to encourage the coordination and carrying out of specific investigative actions by the competent authorities of the Member States, including operational actions of joint teams comprising representatives of Europol in a support capacity."

Although terrorism is therefore not a new competence for Europol, the organization's role in fighting this form of crime was strengthened after September 11 by the setting up of a terrorism unit within Europol,[143] as well

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138. *Id.* art. 26(3). *See also infra* note 187 and accompanying text.

139. *Id.* art. 2(1).

140. Communication Concerning the Taking Up of Activities of Europol, 1999 O.J. (L 185) 1 (1999).

141. Europol Convention, *supra* note 136, art. 2(2). This was a compromise between those Member States which insisted on granting Europol competences for terrorism (such as Spain) and those who objected to this (such as the United Kingdom). *See* WOUTERS & DEVROE, *supra* note 21, at 702.

142. Council Decision of Dec. 3, 1998, instructing Europol to deal with Crimes committed or likely to be committed in the Course of Terrorist Activities against Life, Limb, Personal Freedom or Property, 1999 O.J. (C 26) 22. Europol was to do so "from the date of taking up its activities in accordance with Article 45(4)," *i.e.*, July 1, 1999. Communication concerning the Taking Up of Activities of Europol, 1999 O.J. (L 185) 1.

143. *See* Conclusions of the JHA Council, Sept. 20, 2001, *supra* note 39, §.10. It may be noted that there existed already a Directory of specialized counter-terrorist competences, skills and expertise to facilitate counter-terrorist cooperation between EU Member States. *See* Joint Action of Oct. 15, 1996, adopted by the Council on the basis of Article K.3 of the Treaty on European Union concerning the creation and maintenance of a Directory of specialized counter-terrorist competences, skills and expertise to facilitate counter- terrorist cooperation between the Member States of the European Union, 1996 O.J. (L 273) 1-2.

as by additional financing.[144] As we will see below, Europol's capacity to cooperate with authorities of third States, in particular the U.S., has also been enhanced. In addition, although this is not related to terrorism, Europol's competence has been extended to other forms of serious crime.[145] Furthermore, a start has been made in implementing the operational role which the Treaty of Amsterdam assigned to Europol with the Council Framework decision of June 13, 2002, on joint investigation teams.[146] To enable Europol's participation in these joint investigation teams, the Council has drawn up the Protocol amending the Convention on the establishment of a European Police Office (Europol Convention) and the Protocol on the privileges and immunities of Europol, the members of its organs, the deputy directors and the employees of Europol.[147] Finally, the Commission has very recently submitted a proposal for Europol to take a number of specific measures, in particular setting up a European Union Bomb Data Network, a Communication Network for Special Intervention Units and an Operation Control Centre and developing a common methodology for terrorism threat and risk assessments, to step up and coordinate the fight against terrorism and to provide financing thereof.[148]

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144. Europol Supplementary and Amending Budget for 2002 (New counter-terrorism activities), adopted by the Council on Feb. 28, 2002, 2002 O.J. (C 74) 1-4. *See also infra* note 149 and accompanying text.

145. Council Decision of Dec. 6, 2001, extending Europol's mandate to deal with the serious forms of international crime listed in the Annex to the Europol Convention, 2001 O.J. (C 362) 1.

146. Council Framework Decision, 2002 O.J. (L 162), 1-3. In Article 1(12) this decision includes the possibility of participation by bodies set up pursuant to the Treaties, such as Europol, in joint investigation teams set up by Member States. In 2000, the Council had already recommended that "Member States, [...] make full use of the possibilities for Europol support for joint investigative teams." Council Recommendation of Nov. 30, 2000 to Member States in respect of Europol's assistance to joint investigative teams set up by the Member States, 2000 O.J. (C 357) 7-8. The 2000 European Union the Convention on Mutual Assistance in Criminal Matters also contains a provision concerning foresees joint investigation teams. *See* 2000 O.J. (C 197) 13. *See also* Council recommendation of May 8, 2003, on a model agreement for setting up a joint investigation team (JIT), 2003 O.J. (C 121) 1-6.

147. *See* Protocol amending the Convention on the establishment of a European Police Office (Europol Convention) and the Protocol on the privileges and immunities of Europol, the members of its organs, the deputy directors and the employees of Europol, 2002 O.J. (C 312) 2-7. On Europol and joint investigation teams, *see* L. Groffils, et al., *Europol en gemeenschappelijke onderzoeksteams* 27-39 (Gert Vermeulen ed., 2002).

148. Proposal for a Council Decision on the financing of certain activities carried out by Europol in connection with cooperation in the fight against terrorism, COM(02)439 final, 2002 O.J. (C 331/E) 111-114. The European Parliament has approved this proposal without amendments. *See* European Parliament legislative resolution on the proposal for a Council decision on the financing of certain activities carried out by Europol in connection with cooperation in the fight against terrorism, Dec. 5, 2002, provisional version, *available at* http://www.europarl.eu.int (last visited Feb. 15, 2003).

b. Creating Eurojust

Judicial cooperation in criminal matters within the EU, which was first included as an EU objective in the Maastricht Treaty,[149] developed more or less in parallel with police cooperation. On the basis of that same Treaty,[150] a number of conventions were concluded, including the ones on extradition highlighted above.[151] Furthermore, a framework was created to improve judicial cooperation between the Member States through the exchange of liaison magistrates,[152] as well as a European Judicial Network (EJN), which was, *inter alia*, to facilitate the establishment of appropriate contacts between national contact points, organize periodic meetings of the Member States' representatives, and constantly provide a certain amount of up-to-date background information.[153]

The EU Treaty, as amended by the Treaty of Amsterdam, contains more detailed provisions on judicial cooperation in criminal matters in its Article 31. On this basis the Council set up a Provisional Judicial Cooperation Unit,[154] which led to the establishment of Eurojust in February 2002.[155] Eurojust, a 'unit' with legal personality[156] composed of one prosecutor, judge, or police officer, seconded from every Member State, will mainly stimulate and improve the coordination between the competent authorities of the Member States of investigations and prosecutions concerning two or more Member States (or under certain conditions a Member State and a non-Member State) in relation to serious crime, in particular by facilitating the execution of mutual legal assistance and the implementation of extradition requests,[157] has received a

149. EU TREATY (original version), *supra* note 8, art. K.1(7).

150. *Id.* art. K.3.

151. *See supra* notes 68 and 71-73 and accompanying text.

152. Joint Action 96/277/JHA of Apr. 22, 1996, concerning a Framework for the Exchange of Liaison Magistrates to Improve Judicial Cooperation between the Member States of the European Union, 1996 O.J. (L 105) 1-2.

153. Joint Action of June 29, 1998, adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on the creation of a European Judicial Network, 1998 O.J. (L 191) 4-7.

154. Council Decision of Dec. 14 , 2000, setting up a Provisional Judicial Cooperation Unit, 2000 O.J. (L 324) 2-3.

155. Council Decision of Feb. 28, 2002, setting up Eurojust with a view to reinforcing the fight against serious crime, 2002 O.J. (L 63) 1-13. With regards to financing, amendments to this decision have been proposed by the Commission. *See* Commission Proposal for a Council Decision amending Decision 2002/187/JHA setting up Eurojust with a View to reinforcing the Fight against Serious Crime, COM(02) 406 final, July 17, 2002, 2002 O.J. (C 331/E) 67. The Rules of Procedure of Eurojust are published in 2002 O.J. (C 286), 1-7. On Eurojust, see, e.g., A. Meyfroot et al., *Jurisdictierecht en Coördinatie van Vervolgingen in* ASPECTEN VAN EUROPEES FORMEEL STRAFRECHT 54-68 (Gert Vermeulen ed., 2002) and, specifically concerning terrorism, Michèle Coninsx, *Judicial cooperation in the EU and the fight against terrorism: the role of Eurojust, in* Fijnaut et al., *supra* note 2.

156. Council Decision of Feb. 28, 2002, *supra* note 156, art. 1.

157. *Id.* art. 2, 3.

solid treaty basis in Articles 29 and 31 EU Treaty now that the Treaty of Nice has entered into force.

c. Preventing and disrupting the financing of terrorism

In December 2001, the EC broadened the scope of its 1991 money laundering Directive,[158] which only obliged Member States to prohibit money laundering for drug related offences,[159] to money laundering related to any 'serious crime.'[160] Although, curiously, the amended Directive does not *specifically* mention terrorism as such a serious offence, it is likely to be regarded as such by most Member States.

In respect of the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds from crime, all current EU Member States are party to the 1990 Council of Europe Convention on laundering, tracing, seizure, and confiscation of proceeds of crime.[161] Furthermore, by a Joint Action of 1998 the Member States enhanced their cooperation in this field, *inter alia* by limiting the use of reservations under the above mentioned Council of Europe Convention and by encouraging direct contacts between investigators, investigating magistrates and prosecutors.[162] In June 2001, a Framework Decision was adopted amending this Joint Action and further strengthening cooperation in this area.[163] Moreover, a political agreement has been reached, subject to some parliamentary scrutiny reservations, on a Framework Decision on confiscation of crime-related proceeds, instrumentalities, and property.[164] Furthermore, a Draft Framework Decision on the execution

158. Council Directive 91/308/EEC on Prevention of the Use of the Financial System for the Purpose of Money Laundering, 1991 O.J. (L 166) 77-83.

159. *See id.* art. 1.

160. European Parliament and Council Directive 2001/97/EC amending Council Directive 91/308/EEC on Prevention of the Use of the Financial System for the Purpose of Money Laundering, 2001 O.J. (L 344) 76-82. *See also id.* pmbl., nos. 7-10.

161. *See* Council of Europe Convention on Laundering, Tracing, Seizure and Confiscation of Proceeds of Crime Nov. 8, 1990, E.T.S. No. 141.

162. Joint Action of Dec. 3, 1998, adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on Money Laundering, the Identification, Tracing, Freezing, Seizing and Confiscation of Instrumentalities and the Proceeds from Crime, 1998 O.J. (L 333) 1-3.

163. Council Framework Decision of June 26, 2001, on Money Laundering, the Identification, Tracing, Freezing, Seizing and Confiscation of Instrumentalities and the Proceeds of Crime, 2001 O.J. (L 182) 1-2.

164. *See* Conclusions of the JHA Council of Dec. 19, 2002, *available at* http://ue.eu.int (last visited May 15, 2003). For the initial proposal, see the Initiative of the Kingdom of Denmark with a View to the Adoption of a Council Framework Decision on Confiscation of Crime-related Proceeds, Instrumentalities and Property, 2002 O.J. (C 184) 3-5. For the latest progress, see EU Council Doc. 5299/03, Jan. 23, 2003, *available at* http://register.consilium.eu.int (last accessed May 29, 2003).

in the European Union of confiscation orders is being negotiated,[165] as well as a Draft Framework Decision on the execution in the European Union of orders freezing property or evidence.[166]

However, it has been pointed out that these more traditional means of fighting crime and its proceeds will not always be effective in the fight against international terrorism, in particular because some international terrorist organizations derive a lot of their funding through legal methods and money laundering is based on the illegal origin of the money.[167] In order to address this problem, the OECD's Financial Action Task Force on Money Laundering (FATF) proposed, in its Special Recommendations on Terrorist Financing, that "Each country should criminalise the financing of terrorism, terrorist acts and terrorist organisations. Countries should ensure that such offenses are designated as money laundering predicate offenses."[168] Yet, as one commentator has remarked, even making terrorist financing a predicate

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165. *See* the Initiative of the Kingdom of Denmark with a view to the adoption of a Council Framework Decision on the execution in the European Union of confiscation orders, 2002 O.J. (C 184) 8-14. It appears that the negotiations are rather sensitive, as many of the documents relating to these instruments are not or only partially publicly available in the Council's register. The most recent complete draft which is entirely publicly available in the register is EU Council Doc. 13772/02, Nov. 11, 2002, *available at* http://register.consilium.eu.int (last assessed May 29, 2003). However, this document should be read with amendments put forward in later documents (a search in the register on 'confiscation orders' will list these documents). For the European Parliament's opinion, see European Parliament legislative resolution on the initiative of the Kingdom of Denmark with a view to the adoption of a Council Framework Decision on the execution in the European Union of confiscation orders, Nov. 20, 2002, not yet published in the O.J. but available at http://www.europarl.eu.int.

166. *See* the Initiative by the Governments of the French Republic, the Kingdom of Sweden, and the Kingdom of Belgium for the adoption by the Council of a Framework Decision on the execution in the European Union of Orders Freezing Assets or Evidence, 2001 O.J. (C 75) 3-8. This initial proposal did not cover terrorist offenses. *See id.* art. 2. In its proposed amendments of Sept. 20, 2002, the European Parliament broadened the scope of application to any offense which is punished, under the law of the issuing State, by deprivation of liberty or a detention order for a maximum period of at least six months, which would probably include terrorist offenses in most Member States. *See* the Suggested Amendments and the European Parliament Legislative Resolution on the Initiative by the Governments of the French Republic, the Kingdom of Sweden, and the Kingdom of Belgium for the Adoption by the Council of a Framework Decision on the Execution in the European Union of Orders Freezing Assets or Evidence, 2002 O.J. (C 77/E) 91-94. According to the Legislative Observatory, the subsequent Council proposal did expand the scope of the decision beyond the initial proposal and brought it largely in line with that of the European arrest warrant, which was welcomed by Parliament, which did, however, again suggest some amendments on June 11, 2002. *See* Legislative Observatory, *available at* http://wwwdb.europarl.eu.int/dors/oeil/en/search.shtm (last visited Jan. 2, 2003). The text which looks set to be adopted can be found in Council Doc. 7369/03, COPEN 26, Apr. 15, 2003, see Council Doc. 8258/03, COPEN 36, Apr. 16, 2003, *available at* http://register.consilium.eu.int (last visited May 29, 2003).

167. Michael Kilchling, *Financial Counterterrorism Initiatives in Europe in* Fijnaut et al., *supra* note 2.

168. *See* OECD's Financial Action Task Force on Money Laundering, Special Recommendations on Terrorist Financing, Oct. 31, 2001, *available at* http://www.fatf-gafi.org/SRecsTF_en.htm (last visited May 15, 2003) [hereinafter OECD Special Recommendations].

offence for money laundering is not without difficulty: in particular, it would be difficult to distinguish the financing as a proper and predicate offence on the one hand, and as money laundering on the other hand.[169] The FATF recommendations also propose the freezing of assets of terrorists and the seizure and confiscation of property "that is the proceeds of, or used in, or intended or allocated for use in, the financing of terrorism, terrorist acts or terrorist organizations."[170]

Even before September 11, the EU had not been completely idle in respect of specific action relating to the financing of terrorism. In particular, one may recall that in 1999, the Council urged Member States to intensify their cooperation in combating the financing of terrorist groups, especially through an improved exchange of information.[171] Such exchanges of information in the field of financing of terrorism may benefit from a 2000 Council Decision concerning arrangements for cooperation between financial intelligence units of the Member States.[172]

Obviously, after September 11, more forceful action was taken at the EU level. Article 2 of the Terrorism Framework Decision obliges Member States to criminalize participation in the activities of a terrorist group, including "by funding its activities in any way, with knowledge of the fact that such participation will contribute to the criminal activities of the terrorist group,"[173] and the Council Common Position of December 27, 2001, on combating terrorism obliges Member States to criminalize "the wilful provision or collection [...] of funds by citizens or within the territory of each of the [EU Member States] with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts" and the freezing of funds of persons or entities involved in terrorism.[174] Additionally, two other legal instruments provide for the freezing of the funds of terrorist persons or entities who are listed by the Council under these separate but related instruments.[175] Finally, ten of the fifteen Member States have ratified

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169. *See* Kilchling, *supra* note 167.

170. *See* OECD Special Recommendations, *supra* note 168 (emphasis added).

171. Council Recommendation of Dec. 9, 1999 on Cooperation in Combating the Financing of Terrorist Groups, 1999 O.J. (C 373) 1.

172. Council Decision of Oct. 17, 2000, Concerning Arrangements for Cooperation between Financial Intelligence Units of the Member States in Respect of Exchanging Information, 2000 O.J. (L 271) 4-6.

173. *See* Terrorism Framework Decision, *supra* note 45, art. 2.

174. Council Common Position of Dec. 27, 2001, on the Application of Specific Measures to Combat Combating Terrorism, 2001 O.J. (L 344), 90-92, arts. 1-3.

175. *Id.* at 93-96 (updated subsequently by Council Common Position of May 2, 2002, updating Common Position 2001/931/CFSP on the Application of Specific Measures to Combat Terrorism 2002 O.J. (L 116), 75-77; by Council Common Position of June 17, 2002, updating Common Position 2001/931/CFSP on the Application of Specific Measures to Combat Terrorism and Repealing Common Position 2002/340/CFSP, 2002 O.J. (L 160) 32-35; by Council Common Position of Oct. 28, 2002, updating Common Position 2001/931/CFSP on the Application of Specific Measures to Combat Terrorism and Repealing Common Position 2002/462/CFSP, 2002 O.J. (L 295) 1-4 and by Council Common Position of Dec. 12, 2002,

the International Convention for the Suppression of the Financing of Terrorism[176] and the other five have signed it.[177]

d. Other measures

We cannot give an exhaustive list here of all other measures adopted. However, we would like to mention the Council Decision on the implementation of specific measures for police and judicial cooperation to combat terrorism,[178] the EU's creation of a mechanism for peer evaluation of the national arrangements in the fight against terrorism within the framework of international cooperation between Member States[179] and of a common scale for assessing threats for visiting public figures.[180]

4. EU-U.S. cooperation[181]

International cooperation in the fight against international terrorism in the area of criminal law, including police and judicial cooperation, is obviously not limited to cooperation between Member States but also extends to cooperation between the EU Member States on the one hand and third States on the other. While the U.S. is not the only third State relevant in this

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updating Common Position 2001/931/CFSP on the Application of Specific measures to Combat Terrorism and Repealing Common Position 2002/847/CFSP, 2002 O.J. (L 337), 93-96 and Council Regulation (EC) No. 2580/2001 on Specific Restrictive Measures directed against Certain Persons and Entities with a View to Combating Terrorism, 2001 O.J. (L 344) 70-75 amended by Commission Regulation (EC) No 745/2003 of Apr. 28, 2003, amending Council Regulation (EC) No 2580/2001 on specific measures directed against certain persons and entities with a view to combating terrorism, 2003 O.J. (L 106), 22-23 and as currently implemented by Council Decision of Dec. 12, 2002, implementing Article 2(3) of Council Regulation (EC) No. 2580/2001 on Specific Restrictive Measures directed against Certain Persons and Entities with a View to Combating Terrorism and repealing Council Decision 2002/848/EC, 2002 O.J. (L 337) 85-86). The list established pursuant to the former instrument includes EU-based terrorist organizations (such as ETA and several (Northern) Irish groups), whereas that established pursuant to the latter does not.

176. *See* International Convention for the Suppression of the Financing of Terrorism, *supra* note 121.

177. *See* U.N.T.S., *available at* http://untreaty.un.org (last visited May 30, 2003).

178. Council Decision of Dec. 19, 2002, on the implementation of specific measures for police and judicial cooperation to combat terrorism in accordance with Article 4 of Common Position 2001/931/CFSP, 2003 O.J. (L 16), 68-70.

179. Council Decision of Nov. 28, 2002, establishing a mechanism for evaluating the legal systems and their implementation at national level in the fight against terrorism, 2002 O.J. (L 349) 1-3.

180. *See also* Council Recommendation of Dec. 6, 2001, setting a common scale for assessing threats to public figures visiting the European Union, 2001 O.J. (C 356) 1-2.

181. *See generally* Dorine Dubois, *The Attacks of 11 September: EU-U.S. Cooperation in the Field of Justice and Home Affairs*, 7 EUROPEAN FOREIGN AFFAIRS REVIEW 317, 317-35 (2002).

respect, it is certainly the most important one and we will therefore examine the EU-U.S. cooperation in some more detail.

Despite their essentially similar political and economic system and their many shared fundamental values, the EU and U.S. do not always manage to cooperate well in the field of international criminal law. This is most visible in respect of the International Criminal Court, but it goes beyond that. For instance, the differences over the death penalty (and 'death row') have led to obstacles for extradition from EU Member States (and other European countries, in particular those party to the ECHR) to the U.S. Even differing standards of data protection cause problems for Transatlantic cooperation.[182]

September 11 has provided an incentive to attempt to overcome some of these obstacles. Moreover, it appears to have prompted a more unified EU response: whereas cooperation in the field of international criminal law traditionally takes place between individual Member States and the U.S. (although common European standards increasingly limit the margin of action for individual Member States), there are now initiatives to adopt EU-U.S. agreements and create increasing contacts between EU organs and U.S. authorities.

Thus, an agreement has been concluded between Europol and the U.S. on December 11, 2001, the purpose of which is "to enhance the cooperation of the [EU] Member States, acting through Europol, and the [U.S.] in preventing, detecting, suppressing, and investigating serious forms of international crime in the areas mentioned in Article 3,[183] in particular through

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182. *Id.* at 331-32. The European standards are mainly set out in the following instruments: Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, Jan. 28, 1991, E.T.S. No. 108. All EU Member States are a party to this Convention. *See* Council of Europe Treaty Office, *available at* http://conventions.coe.int (last visited Jan. 22, 2003); Additional Protocol to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, regarding supervisory authorities and transborder data flows, Nov. 8, 2001, E.T.S. No. 181 (not yet entered into force but has been signed by eleven EU Member States and ratified by two (Germany and Sweden)). *See* Council of Europe Treaty Office, *available at* http://conventions.coe.int (last visited May 30, 2003) and Council of Europe Recommendation R (87) 15 of the Committee of Ministers to Member States Regulating the Use of Personal Data in the Police Sector, Sept. 17, 1987, *available at* http://cm.coe.int/ta/rec/1987/87r15.htm (last visited May 15, 2003). *See also* European Parliament and Council Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data, 1995 O.J. (L 281) 31–50. The latter instrument does, however, not apply to the processing of personal data in the field of JHA and criminal law. *See id.* Article 3(1) states:

> This Directive shall not apply to the processing of personal data in the course of an activity which falls outside the scope of Community law, such as those provided for by tits. V and VI of the Treaty on European Union and in any case to processing operations concerning public security, defence [sic], State security [...] and the activities of the State in areas of criminal law. . . .

Id.

183. Article 3 of the agreement (*infra* note 185) lists a number of crimes covered, including "crimes committed or likely to be committed in the course of terrorist activities against life, limb, personal freedom or property". *Id.*

the exchange of strategic and technical information."[184] This agreement also provides for contact points and liaison officers.[185] In fact, Europol has established a liaison office in the U.S.[186] The above mentioned differences in data protection standards have entailed longer negotiations on a similar agreement on the exchange of personal data, which was excluded from the first agreement.[187] This second agreement was concluded on December 20, 2002.[188] Furthermore, negotiations have also been opened on a cooperation agreement between Eurojust and the relevant U.S. authorities[189] and there is a U.S. liaison magistrate to Eurojust.[190]

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184. Agreement between the United States of America and the European Police Office, Council Doc. 13359/01 EUROPOL 82, Oct. 31, 2001, art. 1, *available at* http://register.consilium.eu.int (last visited Feb. 15, 2003). *See also* Council Doc. 13364/01 EUROPOL 83, Nov. 23, 2001, *available at* http://register.consilium.eu.int (last visited Feb. 15, 2003); Europol, *USA and Europol join forces in fighting terrorism*, Dec. 11, 2001, *available at* http://www.europol.eu.int (last visited May 15, 2003). *See also* Dubois, *supra* note 181, at 329.

185. *See* Agreement between the United States of America and the European Police Office, *supra* note 184, art. 4, 8.

186. *See* Europol, *Europol opens liaison office in Washington D.C.*, Aug. 30, 2002, *available at* http://www.europol.eu.int (last visited May 15, 2003). On Europol's relations with third States and third bodies, *see* Europol Convention, *supra* note 136, art. 42; Council Act of Nov. 3, 1998, laying down rules governing Europol's external relations with Third States and Non-European Union related Bodies, 1999 O.J. (C 26) 19-20 and Act of the Management Board of Europol of Oct. 15, 1998, laying down the Rules governing Europol's External Relations with European Union-related Bodies, 1999 O.J. (C 26) 89-90. *See also* Council Decision of Mar. 27, 2000, authorizing the Director of Europol to enter into Negotiations on Agreements with Third States and non-EU related Bodies, 2000 O.J. (C 106) 1 (amended by Council Decision of Dec. 6, 2001, 2001 O.J. (C 358) 1 and Council Decision of June 13, 2002, 2002 O.J. (C 150) 1).

187. *See* Agreement between the United States of America and the European Police Office, *supra* note 184, art. 1 *in fine*.

188. Supplemental Agreement between the United States of America and the European Police Office on the Exchange of Personal Data and Related Information, Council Doc. 15231/02 EUROPOL 104, Dec. 5, 2002, *available at* http://register.consilium.eu.int (last visited Feb. 15, 2003). Informal explanatory notes, which may not reflect the final text in all respects, may be found in Council documents 13696/02 EUROPOL 83, Nov. 4, 2002 and 13696/1/02 EUROPOL 83, Nov. 28, 2002, also both *available at* http://register.consilium.eu.int (last visited Feb. 15, 2003). *See also U.S. and Europol sign a second cooperation agreement*, Dec. 20, 2002, *available at* http://www.useu.be (last visited May 15, 2003); Europol, *USA and Europol sign a full co-operation agreement*, Dec. 20, 2002, *available at* http://www.europol.eu.int (last visited May 15, 2003). For a criticism of this agreement, see S. Peers, *Analysis of the Supplementary Agreement between Europol and United States, Statewatch analysis No. 15*, Nov. 2002, *available at* http://www.statewatch.org/news/2002/nov/analy15.pdf (last visited May 15, 2003). On data protection standards and the communication of data to third States and third bodies see Europol Convention, *supra* note 136, arts. 14, 18; Council Act of Mar. 12, 1999, adopting the Rules governing the Transmission of Personal Data by Europol to Third States and Third Bodies, 1999 O.J. (C 88) 1-3 (1999) (amended by Council Act of Feb. 28, 2002, amending the Council Act of Mar. 12, 1999, adopting the Rules governing the Transmission of Personal Data by Europol to Third States and Third Bodies, 2002 O.J. (C 76) 1-2); Council Act of Nov. 3, 1998, laying down rules concerning the Receipt of Information by Europol from Third Parties, 1999 O.J. (C 26) 17-18.

189. *See* Commission Briefing of Sept. 9, 2002, *supra* note 35.

190. Dubois, *supra* note 181, at 328.

Moreover, the EU and the U.S. are negotiating an agreement on EU-U.S. cooperation in criminal law matters, in particular extradition and mutual legal assistance. The mandate given to the EU's Presidency[191] by the JHA Council in April 2002, was the following:

> The negotiating mandate covers in particular, extradition, including the temporary surrender for trials and mutual legal assistance including exchange of data, the setting up of joint investigation teams, the giving of evidence (via video conference) and the establishment of single contact points.
>
> As regards extradition, the Union will make any agreement on extradition conditional on the provision of guarantees on the non-imposition of capital punishment sentences, and the securing of existing levels of constitutional guarantees with regards to life sentences.
>
> The future agreement should in all cases safeguard the efficiency of the existing bilateral agreements between the Member States and the USA.[192]

Some of the most difficult issues in these negotiations will undoubtedly be the death penalty, although that issue may be resolved by guarantees that a possible death sentence would not be carried out, and trial by military commissions.[193]

Nevertheless, it appears that the EU and the United States are very close to concluding this agreement: according to the conclusions of the JHA Council of May 8, 2003:

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191. The EC Treaty, Article 203 states "[t]he office of President [usually referred to as 'the Presidency'] shall be held in turn by each Member State in the Council for a term of six months in the order decided by the Council acting unanimously." *Id.* The Presidency has an important function in the external representation of the EU, in particular under the CFSP, and is assisted by the Secretary-General of the Council who shall exercise the function of High Representative for the common foreign and security policy (at present Javier Solana). *See* EU TREATY, *supra* note 8, art. 18.

192. *See* Conclusions JHA Council of Apr. 25-26, 2002, *available at* http://ue.eu.int (last visited May 15, 2003). For some information as to how these negotiations are taking place, see Dubois, *supra* note 181, at 329-30.

193. *See, e.g.*, the objections raised by the European Parliament in its European Parliament Resolution of Dec. 13, 2001, on EU Judicial Cooperation with the United States in Combating Terrorism, 2002 O.J. (C 177/E) 288-290, 3. With respect to military commissions, it is noteworthy that, according to the Conclusions JHA Council, "[b]oth parties respect the right to a fair trial by an impartial tribunal established pursuant to law." Conclusions JHA Council, Feb 27/28, 2003, *available at* http://ue.eu.int (last visited May 15, 2003). On the likely compromise over the death penalty, the JHA Council conclusions state that "[t]he draft agreement contains a provision that prohibits extradition if the death penalty will be imposed or executed." *Id. See also* U.S. mission to the EU, *Death penalty no block to EU-U.S. extradition, U.S. says*, Mar. 22, 2002, *available at* http://www.useu.be (last visited May 15, 2003).

> The Presidency [. . .] informed delegations that the Justice and Home Affairs Council should take the decision authorizing the Presidency to sign the draft Agreements at its next meeting on 5-6 June 2003, with a view to sign them in the context of the EU-U.S. Summit which will be held on 25 June 2003 in Washington.[194]

B. External relations[195]

In the area of external relations, the EU has also been quite active in combating terrorism. In the September 21, 2001, Extraordinary European Council conclusions, the EU stated that its CFSP will have to integrate further the fight against terrorism and the European Council asked the General Affairs Council to systematically evaluate the EU's relations with third countries in the light of the support which those countries might give to terrorism. We will focus here on the most prominent aspects of EU action in this area.

First of all, the EU has strongly supported the U.S. in its initial reaction to September 11, i.e. the military campaign against Afghanistan and the steps taken within the UN, in particular in the UN Security Council. At the September 21, 2001, Extraordinary European Council, the EU stated that "[o]n the basis of Security Council Resolution 1368, a riposte by the U.S. is legitimate. The Member States of the Union are prepared to undertake such actions, each according to its means. The actions must be targeted and may also be directed against States abetting, supporting or harbouring terrorists."[196]

The thirteen States which are candidates for accession to the EU also aligned themselves with these conclusions.[197] Thus the EU, like NATO[198] and

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194. Conclusions JHA Council, May 8, 2003, *available at* http://ue.eu.int (last visited May 30, 2003). The most recent draft text of the agreement, which seems to be the one likely to be adopted, is contained in EU Council Doc. 8295/03 CATS 20 USA 29, Apr. 9, 2003, *available at* http://register.consilium.eu.int (last visited May 30, 2003).

195. *See generally* Benoit Loïck, *La lutte contre le terrorisme dans le cadre du deuxième pilier: un nouveau volet des relations extérieures de l'Union européenne*, REVUE DU DROIT DE L'UNION EUROPÉENNE 283, 283-13 (2002); Simon Duke, *CESDP and the EU Response to 11 September: Identifying the Weakest Link*, 7 EUROPEAN FOREIGN AFFAIRS REVIEW 153, 153-69 (2002).

196. Conclusions of the Extraordinary European Council, *supra* note 37.

197. Press release by the Belgian Presidency, Sept. 22, 2001 [on file with author].

198. Which, for the first time in its history, invoked art. V of the North Atlantic Treaty, *i.e.* the mutual assistance provision. Already on Sept. 12, 2001, the North Atlantic Council, NATO's main decision-making body, adopted a declaration stating "if it is determined that this attack was directed from abroad against the United states, it shall be regarded as an action covered by Article 5 of the Washington Treaty, [...]." NATO, Sept. 12, 2001, *available at* http://www.nato.int (last visited May 15, 2003)). Subsequently, on Oct. 2, 2001, Lord Robertson, NATO's Secretary-General, announced that "it has now been determined that the attack against the United States on September 11 was directed from abroad and shall therefore be regarded as an action covered by Article 5 of the Washington Treaty" Lord Robertson's Statement, *available at* http://www.nato.int (last visited May 15, 2003).

the OAS,[199] supported the (legality of the) military campaign against Afghanistan by the U.S. and a number of its allies.[200] Moreover, in line with the September 21 conclusions, *individual Member States* joined the U.S.-led military campaign.[201] The EU *as such* did, however, not take part militarily in this campaign (we will come to the reasons for that in our assessment below), although it did take action on the military plain by making the (Common) European Security and Defence Policy ((C)ESDP), i.e. the EU's military and civilian crisis management mechanism,[202] operational[203] and by adopting a

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199. *See especially Terrorist Threat to the Americas*, OEA/Ser.F/II.24, RC.24/RES.1/01, Sept. 21, 2001, *available at* http://www.oas.org (last visited May 15, 2003); *Support for the measures of individual and collective self-defence established in resolution RC.24/RES. 1/01*, OEA/Ser.F/II.24, CS/TIAR/RES. 1/01, Oct. 16, 2001, *available at* http://www.oas.org (last visited May 15, 2003).

200. This support was repeatedly confirmed, see, e.g., by the General Affairs Council on Oct. 8, 2002, (conclusions *available at* http://ue.eu.int (last visited May 15, 2003)). *See also* Conclusions Ghent European Council, Oct. 19, 2001, *available at* http://ue.eu.int (last visited May 15, 2003). "The European Council confirms its staunchest support for the military operations which began on 7 October and which are legitimate under the terms of the United Nations Charter and of Resolution 1368 of the United Nations Security Council." *Id.*

201. EU Countries which provided combat troops taking active part in 'operation enduring freedom' include the UK, Denmark, and Germany, and the UK and France have taken part in the air campaign in this operation. Other EU Member States provided various other contributions. *See* Coalition Information Centre, *Campaign Against Terrorism. A Coalition Update*, Mar. 11, 2002, *available at* http://www.fco.gov.uk (last visited May 15, 2003); U.S. mission to the EU, fact sheets dated Feb. 26, May 23, June 7 and 14, and Oct. 24, 2002, *available at* http://www.useu.be (last visited May 15, 2003).

202. The TREATY OF AMSTERDAM enabled the development of CESDP. *See* EU TREATY, *supra* note 8, arts. 2, 17 (before amended by the Treaty of Nice). On the basis of these EU Treaty provisions, the CESDP was launched at the EU level (following a 1998 French-British initiative) at the Cologne European Council of June 1999. *See* Conclusions Cologne European Council Summit, §§ 55-56, Annex III, *available at* http://ue.eu.int (last visited May 15, 2003). It has subsequently developed and the progress made is codified in the EU Treaty by the Treaty of Nice. *See* EU TREATY, *supra* note 8, art. 17. The CESDP does not include collective defense but 'only' covers crisis management, in particular "humanitarian and rescue tasks, peacekeeping tasks and tasks of combat forces in crisis management, including peacemaking." *Id.* art. 17(2). *See also infra* notes 306 and following and accompanying text. For a thorough overview and analysis of the CESDP, see SIMON DUKE, THE EU AND CRISIS MANAGEMENT DEVELOPMENT AND PROSPECTS (2002).

203. The ESDP was declared operational, albeit in a limited manner, by the 'Declaration on the Operational Capability of the Common European Security and Defence Policy, adopted at the Laeken European Council on Dec. 14-15, 2001, Annex II, *available at* http://ue.eu.int (last visited May 15, 2003). The General Affairs and External Relations Council of May 19-20, 2003, declared ESDP more or less fully operational by stating that

> the Council confirmed that the EU now has operational capability across the full range of Petersberg tasks, limited and constrained by recognized shortfalls. These limitations and/or constraints are on deployment time and high risk may arise at the upper end of the spectrum of scale and intensity, in particular when conducting concurrent operations. These limitations and constraints on full achievement of the Headline and Capability Goals could be alleviated if the recommendations on meeting the shortfalls are followed-up.

Conclusions, *available at* http://ue.eu.int (last visited May 30, 2003).

'Declaration on the contribution of CFSP, including ESDP, in the fight against terrorism.'[204]

Furthermore, the EU has contributed a substantial amount of humanitarian aid to Afghanistan and has pledged major financial support for reconstruction in Afghanistan.[205] It has also flexed its diplomatic muscle to help assemble a wide international coalition in the fight against terrorism. In particular, on October 17, 2001, the General Affairs Council decided to intensify the EU's relations with the countries neighbouring Afghanistan and with the Central Asian countries, to continue a political dialogue with the Arab countries and to aim to relaunch the middle East peace process.[206] In this context, a series of visits, in various compositions (including by Heads of Government or foreign ministers of Member States), to these regions took place. Maintaining close contacts with Afghanistan's neighbours is also part of the mandate of the EU Special Representative for Afghanistan.[207] Furthermore, the EU has rewarded some countries for their efforts in combating terrorism, *e.g.*, by granting them increased financial assistance and/or trade concessions and/or by concluding (or starting to negotiate) agreements to that effect with such countries.[208]

However, even as it was providing such strong support, the EU strongly stressed the important role of the UN in the fight against international terrorism. For instance, in the September 21, 2001, Extraordinary European Council conclusions it is also stated that the EU "calls for the broadest possible global coalition against terrorism, *under United Nations aegis.*"[209] Pursuant to its general support for multilateral institutions, in particular the UN,[210] the EU has adopted a constructive stance towards fighting terrorism both in the

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204. *See* Seville European Council Conclusions, June 21-22, 2002, Annex V, *available at* http://ue.eu.int (last visited May 15, 2003).

205. For details, *see The EU's relations with Afghanistan, available at* http://europa.eu.int/comm/external_ relations/afghanistan/intro/index.htm (last visited May 15, 2003).

206. *See* Conclusions General Affairs Council, Oct. 17, 2001, *available at* http://ue.eu.int (last visited May 15, 2003). The aim to restart the Middle East peace process was in fact already mentioned in the conclusions of the Sept. 21, 2001 European Council.

207. *See initially* Council Joint Action of Dec. 10, 2001, Concerning the Appointment of the Special Representative of the European Union, 2001 O.J. (L 326) 1-2, art. 2(d) and *later* Council Joint Action of Dec. 10, 2002, amending and extending the mandate of the Special Representative of the European Union in Afghanistan, 2002 O.J. (L 334) 3, art. 3(c).

208. This concerns in particular Pakistan, Iran, and Afghanistan. *See* Commission briefing of Sept. 9, 2002, *EU action in response to 11th September 2001: one year after*, *supra* note 35. *See, e.g.*, Council Decision of Dec. 17, 2001, on the signing, on behalf of the Community, and provisional application of an Agreement in the form of a Memorandum of Understanding between the European Community and the Islamic Republic of Pakistan on transitional arrangements in the field of market access for textile and clothing products and the Memorandum of Understanding between the European Community and the Islamic Republic of Pakistan on transitional arrangements in the field of market access for textile and clothing products, Oct. 15, 2001, 2001 O.J. (L 345) 80 and 81-90.

209. Conclusions of the Extraordinary European Council, *supra* note 37 (emphasis added).

210. EU TREATY, *supra* note 8, art. 11 requires that the EU respect "the principles of the [UN] Charter." *Id.*

Security Council and the General Assembly. In particular, the EU and its Member States have first of all themselves implemented the relevant Security Council resolutions.[211] Secondly, the EU has also offered other countries assistance in the implementation of these resolutions, in particular Resolution 1373,[212] and is already providing such assistance.[213] Likewise, the EU has been actively seeking to reach agreement on a comprehensive anti-terrorism Convention at UN Level.[214]

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211. For implementation by the EU, see especially the instruments cited *supra* in notes 169-170 and, in respect of the Taliban and Al-Qaida, Council Common Position of Nov. 15, 1999, concerning restrictive measures against the Taliban, 1999 O.J. (L 294) 1 and Council Common Position of Feb. 26, 2001, concerning additional restrictive measures against the Taliban and amending Common Position 96/746/CFSP, 2001 O.J. (L 57) 1-2 (amended by Council Common Position of Nov. 5, 2001, concerning restrictive measures against the Taliban and amending Common Positions 1996/746/CFSP, 2001/56/CFSP and 2001/154/CFSP, 2001 O.J. (L 289), 36 both repealed by Council Common Position of May 27, 2002, concerning restrictive measures against Usama bin Laden, members of the Al-Qaida organization and the Taliban and other individuals, groups, undertakings and entities associated with them and repealing Common Positions 96/746/CFSP,1999/727/CFSP,2001/154/CFSP and 2001/771/CFSP, 2002 O.J. (L 139) 4-5 as amended by Council Common Position of Feb. 27, 2003, concerning exceptions to the restrictive measures imposed by Common Position 2002/402/CFSP, 2003 O.J. (L 53) 62). The Common Position of May 27, 2002, as amended by Common Position of Feb. 27, 2003, is currently implemented by Council Regulation (EC) No. 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban, and repealing Council Regulation (EC) No. 467/2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan, 2002 O.J. (L 139), 9-22 (last amended (at the time of writing) by Commission Regulation (EC) by Council Regulation (EC) No. 561/2003 of Mar. 27, 2003 amending, as regards exceptions to the freezing of funds and economic resources, Regulation (EC) No. 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban, 2003 O.J. (L 082), 1-2 and Commission Regulation (EC) No. 866/2003 amending for the 18th time Council Regulation (EC) No. 881/2003 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban, and repealing Council Regulation (EC) No. 467/2001, 2003 O.J. (L 124) 19-22). In fact, the EU as such has submitted two reports to the Security Council Counter-Terrorism Committee in addition to the reports submitted by its Member States. *See* EU Report, *available at* http://www.un.org/Docs/sc/committees/1373/1373reportsEng.htm (last visited May 15, 2003).

212. U.N. SCOR, 56th Sess., 4385th mtg., UN Doc. S/RES/1373, (2001).

213. *See* Declaration on the contribution of CFSP, including ESDP, in the fight against terrorism, *supra* note 202, § 4; the supplementary report of the EU to the Security Council Counter-Terrorism Committee, UN Doc. S/2002/928, 7, *available at* http://ods-dds-ny.un.org/doc/UNDOC/GEN/N02/533/27/PDF/N0253327.pdf?OpenElement (last visited May 15, 2003) and, for more detailed information, the EU document 'EC external assistance: UN Security Council Resolution 1373', Feb. 25, 2002, *available at* http://europa-eu-un.org (last visited May 15, 2003).

214. *See, e.g.*, Conclusions of the Extraordinary European Council, *supra* note 37, para. 2.4. For a detailed discussion of the EU's position on such a comprehensive treaty, see P. Rietjens, *Reviewing the UN conventions on terrorism. Towards a comprehensive terrorism convention: Role and attitude of the EU*, *in* Fijnaut et al., *supra* note 2.

As mentioned above, the EU has declared that it would include terrorism in its relations with all third countries. This has already led to some results. We have, *e.g.*, already mentioned above the JHA aspects of the enhanced EU-U.S. cooperation in this respect and EU support for the coalition against international terrorism.[215] There are many other examples. For instance, the EU is including anti-terrorism clauses in its agreements with third States,[216] such as Article 90 of the EU-Algeria agreement, which states that "Parties agree to cooperate with a view to preventing and penalising acts of terrorism" and provides a number of means to do so, including "the implementation in its entirety of United Nations Security Council resolution 1373 and other related resolutions."[217] The EU has also stressed cooperation in the fight against international terrorism in Joint Declarations with several countries, regional groupings or organizations.[218]

Finally, the EU has adopted a comprehensive approach to fighting terrorism: "The [EU] will step up its action against terrorism through a coordinated and inter-disciplinary approach embracing all Union policies."[219] The EU has recognized that this also requires a solution for underlying problems: "[t]he fight against terrorism requires of the Union that it play a greater part in the efforts of the international community to prevent and stabilise regional conflicts," and "[t]he integration of all countries into a fair

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215. In the immediate aftermath of September 11, the EU and U.S. stated: "We will mount a comprehensive, systematic and sustained effort to eliminate international terrorism." Joint U.S.-EU Ministerial statement on Combating Terrorism, Washington, Sept. 20, 2001, *available at* http://europa.eu.int/comm/external_relations/us/news/minist_20_09_01.htm (last visited May 15, 2003).

216. See Declaration on the contribution of CFSP, including ESDP, in the fight against terrorism, *supra* note 202, § 4.

217. Euro-Mediterranean Agreement establishing an Association between the European Community and its Member States, of the one part, and the People's Democratic Republic of Algeria, of the other part, Council Doc. 6786/02, Apr. 12, 2002, *available at* http://europa.eu.int/comm/external_relations/algeria/docs/index.htm (last visited May 15, 2003). A similar clause is contained in the EU-Chile agreement. *See* Agreement establishing an Association between the European Community and its Member States, of the one part, and the Republic of Chile, of the other part, Nov. 18, 2002, 2002 O.J. (L 352) 3, art. 15 (approved on behalf of the EC by Council Decision of Nov. 18, 2002, on the signature and provisional application of certain provisions of an Agreement establishing an association between the European Community and its Member States, of the one part, and the Republic of Chile, of the other part).

218. *See, e.g.*, the Statement at the occasion of the Third EU-India Summit, Copenhagen, Oct. 10, 2002, *available at* http://europa.eu.int/comm/external_relations/india/sum10_02/stat.htm (last visited May 15, 2003); Press Release First Mexico-EU Summit in Madrid on May 18, 2002, *available at* http://europa.eu.int/comm/external_relations/mexico/intro/ma05_02.htm (last visited May 15, 2003); Joint Communique issued at the 12th GCC-EU Joint Council / Ministerial Meeting, Granada, Feb. 27-28, 2002, *available at* http://europa.eu.int/comm/external_relations/gulf_cooperation/intro/12thgcc_eu.htm (last visited May 15, 2003) and the Declaration on Cooperation against International Terrorism, included in the conclusions of the fourth Asia-Europe Meeting (ASEM) Summit, Copenhagen, Sept. 22-24, 2002, *available at* http://europa.eu.int/comm/external_relations /asem/asem_summits/asem4/1.htm (last visited May 15, 2003).

219. Conclusions of the Extraordinary European Council, *supra* note 37.

world system of security, prosperity and improved development is the condition for a strong and sustainable community for combating terrorism."[220] This was repeated at the first anniversary of September 11: "We will [. . .] seek to build a just international order that promotes peace and prosperity for all."[221]

In line with this approach, the EU has taken some steps to address the root causes of terrorism. In particular, the European Council has

> note[d] with satisfaction the Council's undertaking to examine the means and the timeframe for each Member State's achievement of the UN official development aid target of 0,7% of GNP and its commitment to continuing its efforts to improve development cooperation instruments, particularly in the countries affected by crisis or conflict.[222]

It has also committed itself to enhance the cultural dialogue with other civilizations[223] and to "devoting greater efforts to conflict prevention."[224] Furthermore, the EU is taking a positive stance in the World Trade Organization's Doha Development Round, including on cheap access to medicines for developing countries.[225] Finally, one should take note in this context of some EU measures predating September 11, such as the 'Everything But Arms' initiative, adopted in February 2001, which gradually abolishes all

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220. *Id.*

221. Declaration by Heads of State and Government of the European Union, the President of the European Parliament, the President of the European Commission, and the High Representative for the Common Foreign and Security Policy, Sept. 11, 2002, *available at* http://europa.eu.int/comm/external_relations/110901/jnt_dec_09_02.htm (last visited May 15, 2003).

222. Conclusions of the Laeken European Council, § 54, *available at* http://ue.eu.int (last visited May 15, 2003).

223. *See, e.g.*, Declaration, *supra* note 221. "The terrorist attacks of 11 September have given rise to the most comprehensive international cooperation in decades . . . . This unique solidarity must be sustained and supported, also through dialogue of cultures." *Id.*

224. *See* Declaration on the contribution of CFSP, including ESDP, in the fight against terrorism, *supra* note 202, § 7. Conflict prevention has been an EU priority for some years now, see in particular the EU Program for the prevention of violent conflicts, approved by the European Council of Göteborg, June 16, 2001. See Conclusions European Council Meeting June 16, 2001, Annex, *available at* http://ue.eu.int (last visited May 15, 2003); Commission Communication on Conflict Prevention, COM(01) 211final.

225. *See, e.g., EU seeks to break the current deadlock on WTO access to medicines: a multilateral solution is needed*, Jan. 9, 2003, *available at* http://europa.eu.int/comm/trade/csc/pr090103_en.htm (last visited May 15, 2003). *See generally Trade and Development. Access to essential medicines: Next steps in our dialogue*, *available at* http://europa.eu.int/comm/trade/csc/med.htm (last visited May 15, 2003).

import duties for all products originating in the least developed countries[226] and should boost their exports significantly.[227]

C. Other Measures

Other EU actions taken with relevance for the fight against terrorism include mainly measures to prepare against bacteriological, chemical, radiological and nuclear terrorism and measures in the field of air transport security.

1. Measures concerning bacteriological, chemical, radiological and nuclear terrorism[228]

Cooperation on civil protection is not new within the EU.[229] In particular, the EU already had some mechanisms in place before September 11 in respect of civil protection and disease control, namely the Community mechanism to facilitate reinforced cooperation in civil protection assistance interventions (Community Civil Protection Mechanism),[230] although this was

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226. Council Regulation (EC) No. 416/2001 amending Regulation (EC)No. 2820/98 applying a multiannual scheme of generalized tariff preferences for the period July 1, 1999, to Dec. 31, 2001, so as to extend duty-free access without any quantitative restrictions to products originating in the least developed countries, 2001 O.J. (L 60), 43-50. *See also EU's Generalised System of Preferences, available at* http://europa.eu.int/ comm/trade/miti/devel/ eba.htm (information on this initiative) (last visited Feb. 15, 2003).

227. It has reportedly been estimated by the World Bank that this initiative could result in a 15-20% annual growth in the exports of least developed countries, increasing their exports by around five billion Euro per year: see Pascal Lamy, *From Doha to Cancun*, June 5, 2002, *available at* http://europa.eu.int/comm/trade/speeches_ articles/spla109_en.htm (last visited Feb. 15, 2003).

228. For an overview, see *EU actions: Emergency preparedness, available at* http://europa.eu.int/news/110901/civil.htm (last visited May 15, 2003).

229. Action relating to civil protection was incorporated in Article 3(t) of the EC Treaty by the Maastricht Treaty, although the EC was not granted any specific powers to take measures in this field, and could thus only do so on the basis of the former Article 235 EC Treaty (now EC Treaty art. 308), which states:

> If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures.

DEVROE & WOUTERS, *supra* note 21, at 560-61. The Treaty of Amsterdam only changed the numbering of the relevant article to EC TREATY, *supra* note 7, art. 3.1(u). For initiatives in the field of civil protection predating the Maastricht Treaty. *See* DEVROE & WOUTERS, *supra* note 21, at 560-61.

230. Community Civil Protection Mechanism is established by Council Decision of Oct. 23, 2001, establishing a Community Mechanism to facilitate reinforced Cooperation in Civil Protection Assistance Interventions, 2001 O.J. (L 297) 7-11. *See also* Council Decision 1999/847/EEC establishing a Community action program in the field of civil protection, 1999 O.J. (L 327) 53-57. This Council Decision established a Community action program in the field

only to enter into force on January 1, 2002,[231] and the network for the epidemiological surveillance and control of communicable diseases in the Community (hereinafter 'Communicable Diseases Network').[232]

The general purpose of the Community Civil Protection Mechanism is to provide, on request, support in the event of major emergencies, or the imminent threat thereof and to facilitate improved coordination of assistance intervention provided by the Member States and the Community.[233] In order to do so, the Commission was, *inter alia*, to

> (a) establish and manage a monitoring and information centre accessible and able to react immediately 24 hours a day and serving the Member States and the Commission for the purposes of the mechanism;
> (b) establish and manage a reliable common emergency communication and information system to enable communication and sharing of information between the monitoring and information centre and the contact points designated for that purpose by the Member States;
> (c) establish the capability to mobilise and dispatch, as quickly as possible, small teams of experts responsible for
> - assessing the situation for the benefit of the Member States, the monitoring and information centre and the State requesting assistance
> - facilitating, when necessary, coordination of assistance operations on site and liaising, when necessary and appropriate, with the competent authorities of the State requesting assistance;
> (d) set up a training programme, with a view to improving the coordination of civil protection assistance intervention by ensuring compatibility and complementarity between the intervention teams . . . or as appropriate other intervention support . . ., and by improving the competence of experts for assessment.
> (e) pool information on the capabilities of the Member States for maintaining a production of serums and vaccines or other necessary medical resources and on the stocks which might be available for intervention in the event of a major

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of civil protection for the period Jan. 1, 2000, to Dec. 31, 2004. *See id.* art. 1.

231. Council Decision of Oct. 23, 2001, *supra* note 230, art. 11.

232. European Parliament and Council Decision 2119/98/EC setting up a Network for the Epidemiological Surveillance and Control of Communicable Diseases in the Community, 1998 O.J. (L 268) 1-7. For later relevant decisions, see *infra* notes 237-239.

233. Council Decision of Oct. 23, 2001, *supra* note 230, art. 1.

emergency and compile this information in the information system;[234]

The Communicable Diseases Network has as its objective "to promote cooperation and coordination between the Member States, with the assistance of the Commission, with a view to improving the prevention and control, in the Community, of the [specified] categories of communicable diseases" and is to be used for "the epidemiological surveillance of these diseases, and an early warning and response system for the prevention and control of these diseases."[235] It was later decided to reserve the early warning and response system of this network for certain defined events, or indications for such events "which, by themselves or in association with other similar events, are or have the potential to become public health threats."[236] Furthermore, the range of diseases covered was expanded[237] and case definitions were agreed upon.[238]

Enhanced cooperation since September 11 is largely based on these two existing mechanisms. For instance, in response to September 11, within a few hours, more than 1000 rescuers, with all appropriate equipment from the fifteen Member States, as well as from Norway and Iceland were ready to be dispatched to the USA, even though the Community Civil Protection Mechanism had not entered into force at that time.[239] In October 2001, at a meeting chaired by the Commission, the Directors-General for civil protection in the Member States adopted an action plan which brought forward the introduction of this mechanism, by setting up a group of nuclear, biological and chemical (NBC) experts, reinforcing the existing network of twenty- four hour contact points, better inter-agency cooperation at national and Community level, especially with the health services, setting up a system of systematic exchange of information, focusing in particular on accidents and on threats of terrorist attacks and setting up a Task Force of national experts to

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234. *Id.* art. 4(a)-(e).

235. Decision of the European Parliament and of the Council of Sept. 24, 1998, *supra* note 233, art. 1.

236. Commission Decision of Dec. 22, 1999, on the Early Warning and Response System for the Prevention and Control of Communicable Diseases under Decision No. 2119/98/EC of the European Parliament and of the Council, 2000 O.J. (L 021) 32-35, art. 1. Annex I to this decision defines the events covered and annex II details the procedures for information, consultation and cooperation under the early warning and response system.

237. By Commission Decision of Dec. 22, 1999, on the communicable diseases to be progressively covered by the Community network under Decision No. 2119/98/EC of the European Parliament and of the Council, 2000 O.J. (L 28) 50-53, which contains a list of diseases in Annex I and criteria to diseases to be covered in annex II.

238. *See* Commission Decision of Mar. 19, 2002, laying down Case Definitions for Reporting Communicable Diseases to the Community Network under Decision No. 2119/98/EC of the European Parliament and of the Council, 2002 O.J. (L 86) 44-62. The case definitions are listed in the Annex to this decision.

239. *See generally* Commission communication, Civil protection - state of preventive alert against possible emergencies, COM (2001) 707 final.

reinforce the Commission's Civil Protection Unit in order to create the monitoring and information centre provided for under the mechanism.[240] Pursuant to this plan, the monitoring and information centre which was to be established under the Community Civil Protection Mechanism was launched on October 29, 2001,[241] and action was taken concerning the gathering of information on nuclear, bacteriological, and chemical expertise and regarding the gathering of information on serum and vaccines.[242]

Subsequently, on November 15, 2001, the Health Ministers requested the Commission to develop an Action Programme addressing the following five priorities:

> (1) Develop a mechanism for consultation in the event of a crisis linked to the bio-terrorist risk and a capacity for the deployment of joint investigation teams;
> (2) Set up a mechanism for information on the capacities of European laboratories with respect to the prevention of and fight against bio-terrorism;
> (3) Set up a mechanism for information on the availability of serums, vaccines and antibiotics, including concerted strategies for developing and using those resources;
> (4) Set up a European network of experts responsible in the Member States for evaluating, managing and communicating risks;
> (5) Promote the development of vaccines, medicines and treatments.[243]

A number of these measures were addressed in a Commission Communication of November 2001, which "[set] out the main lines of action desirable for improved co-operation across the European Union."[244] In particular, the Communication stated that

> [t]he Commission . . . intends to nominate in its midst a high profile European co-ordinator who will be namely responsible for the management of the Community mechanism for co-ordination of actions in the field of civil protection. In this capacity, he will have to co-ordinate the activation,

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240. *Margot Wallström announces an action plan to deal with large-scale terrorist attacks*, EU Press Release IP/01/1413, Oct. 12, 2001, *available at* http://europa.eu.int (last visited May 15, 2003).

241. COM (2001) 707 final, *supra* note 239, at 4.

242. *Id.* at 4. *Civil Protection in the EU: Commission co-ordination reinforced*, EU Press Release IP/01/1685, Nov. 28, 2001, *available at* http://europa.eu.int (last visited May 15, 2003).

243. COM (2001) 707 final, *supra* note 239, at 5.

244. *Id.* at 2.

> implementation and follow-up of the many available community initiatives. . . .[245]

Furthermore, it said that "in the health sector, the Commission, following the invitation by the Health Ministers, is establishing an action programme. . . ."[246] This programme, the Programme of cooperation on preparedness and response to biological and chemical agent attacks (health security), was adopted in December 2001, and has as overall aim "to coordinate and support the public health/health security preparedness and response capacity and planning of the Member States against biological and chemical agent attacks."[247] Its objectives are to:

> Set up a mechanism for information exchange, consultation and coordination for the handling of health-related issues related to attacks in which biological and chemical agents might be used or have been used;
>
> Create a EU-wide capability for the timely detection and identification of biological and chemical agents that might be used in attacks and for the rapid and reliable determination and diagnosis of relevant cases, in particular by building on systems already available and aiming at long-term sustainability;
>
> Create a medicines stock and health services database and a stand-by facility for making medicines and health care specialists available in cases of suspected or unfolding attacks;
>
> Draw-up rules and disseminate guidance on facing-up to attacks from the health point of view and coordinating the EU response and links with third countries and international organisations.[248]

To achieve these objectives, the programme lists a number of actions to be taken and sets out a time framework of eighteen months for doing so, starting in May 2002.[249] Moreover, a fourteen member strong Task Force has been set up by the Commission, comprising eight experts nominated by the Member States through the members of the Health Security Committee (which

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245. *Id.* at 10.

246. *Id.* at 11.

247. Program of Cooperation on Preparedness and Response to Biological and Chemical Agent Attacks, Dec. 17, 2001, developed by the Council and the Commission and the Commission's website on bio-terrorism, *available at* http://europa.eu.int/comm/health/ph/programmes/bio-terrorism/index_en.html (last visited Feb. 15, 2003).

248. *Id.* at 1.

249. *Id.* at 2-7.

is also a new body comprised of high-level representatives of the Member States and charged with raising the alert, exchanging information rapidly and coordinating health responses in case of emergency following a deliberate release of biological or chemical agents to cause harm)[250] entrusted with the implementation of this programme.[251] Furthermore, in May 2002, the European Parliament and the Council reached an agreement regarding a new programme of Community action in the field of public health 2003-2008 in which activities relevant to the EU response to bio-terrorism are foreseen.[252] Work is also in progress on creating or pooling strategic stockpiles, evaluating manufacturing capacity for vaccines, sera and antibiotics, and developing new medicines and vaccines, in consultation with the pharmaceuticals industry.[253] Moreover, a Group of scientific experts on the fight against biological and chemical terrorism was established, comprised of representatives from the ministries of research and defence of the Member States and from the European Commission, initially to "make a joint assessment of knowledge and capacity regarding bio-defence and what additional research is needed, in particular through better co-ordination of research activities within the Member States and at Community level."[254] Obviously, the EU is also cooperating in these areas on the international plane, including with the G7/8 and the WHO.[255]

Finally, a comprehensive Programme for improving cooperation within the EU on protecting the population against bacteriological, chemical, radiological and nuclear terrorist threats, was adopted, on June 13, 2002, by the Council and the Commission.[256] This programme, which "constitutes a political and not a legal instrument"[257] and "is expected in future to operate under conditions of strict confidentiality, in particular as regards some of the more sensitive matters it deals with,"[258] aims at increasing the efficiency of national and Community measures to combat CBRN threats by: improving co-operation and co-ordination between Member States, the Council and the

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250. Council Doc. 15873/02 § 65, Dec. 20, 2002, *available at* http://register.consilium.eu.int (last visited Feb. 15, 2003).

251. *Id.* § 65.

252. *Id.* § 66. *See* European Parliament and Council Decision 1786/2002/EC adopting a program of Community Action in the Field of Public Health (2003-2008) - Commission Statements, 2002 O.J. (L 271) 1-12.

253. *Id.* § 83; *see also* COM (2001) 707 final, *supra* note 239, at 6-7; and Commission communication 'Civil Protection - Progress made in implementing the program for preparedness for possible emergencies', COM (2002) 302, at 5-7.

254. *Commission establishes Group of scientific experts on the fight against biological and chemical terrorism*, EU Press Release IP/01/1810, Dec. 12, 2001, *available at* http://europa.eu.int (last visited May 15, 2003). For progress by this group, *see* COM (2002) 302, *supra* note 253, at 7-8.

255. *See, e.g.*, COM (2002) 302, *supra* note 253, at 6.

256. Council Doc. 15861/02, Dec. 20, 2002, *available at* http://register.consilium.eu.int (last visited Feb. 15, 2003). *See also* point 43 of the updated road map (*supra* note 40).

257. Council Doc. 15861/02, *supra* note 256, at 2.

258. *Id.* at 1.

Commission; facilitating the provision of practical assistance to Member States at their request, particularly when the scale of the disaster is beyond their individual capacity of response and creating new instruments if necessary.[259] Pursuant to this programme, a detailed inventory has been drawn up of relevant EU instruments.[260]

Moreover, in its communication of June 2002, the Commission *inter alia* details measures taken and planned to set up an emergency communication and information system, to strengthen the Monitoring and Information Centre and to enhance training and exercises for intervention teams.[261]

2. *Air transport security*

Several measures have been taken regarding transport safety,[262] especially the adoption of common rules on civil aviation security,[263] but also the setting up of the European Aviation Safety Agency,[264] and EU action within the International Civil Aviation Organization.[265]

The Regulation on common rules on civil aviation security has as it main objective "to establish and implement appropriate Community measures, in order to prevent acts of unlawful interference against civil aviation" by "the setting of common basic standards on aviation security measures and the setting up of appropriate compliance monitoring mechanisms."[266] It sets out these common standards in some detail in the Annex to the Regulation and

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259. *Id.* at 1-2. It comprises seven objectives:

> 1. Strengthening risk analysis and assessment of CBRN threats and their lines of propagation; 2. Developing preventive measures with a particular focus on vulnerable sectors; 3. Ensuring quick detection and identification of CBRN attacks and providing all those concerned with appropriate information; 4. Using and further developing all necessary instruments for mitigating and repairing the consequences of an attack (e.g. developing vaccines, sera and antibiotics for human and animal use and reinforcing existing stocks); 5. Strengthening the scientific basis of the programme [sic] (research and development activities); 6. Co-operating with third countries and international organizations [sic]; 7. Ensuring an efficient co-ordination and implementation of the programme's [sic] instruments.

Id. at 2.

260. *Id.*

261. COM (2002) 302, *supra* note 253, at 3-5.

262. For an overview, see *EU Actions: Air Transport Security*, *available at* http://europa.eu.int/news/110901/airtrans.htm (last visited May 15, 2003).

263. *See* European Parliament and Council Regulation (EC) 2320/2002 establishing Common Rules in the Field of Civil Aviation Security, 2002 O.J. (L 355) 1-21.

264. European Parliament and Council Regulation (EC) 1592/2002 on Common Rules in the Field of Civil Aviation and Establishing a European Aviation Safety Agency, 2002 O.J. (L 240) 1-21. These rules and the Agency's competence concern *safety* (covering issues such as airworthiness and environmental protection) rather than *security*.

265. *EU Actions: Air Transport Security*, *supra* note 262.

266. European Parliament and Council Regulation (EC) 1592/2002, *supra* note 264, art. 1.

obliges Member States to adopt a national civil aviation security program to ensure the application of these standards and a national civil aviation security quality control program so as to ensure the effectiveness of its national civil aviation security program (articles 4 and 5 and Annex). Concerning compliance, it *inter alia* authorizes the Commission to conduct airport inspections (art. 7).

III. SOME CRITICAL REFLECTIONS

A. Cooperation in criminal matters

In the field of cooperation in criminal matters, considerable progress has been made in a relatively limited time after September 11, at least by EU standards. However, as we have indicated above, much of this quick progress was to a large extent only possible because of the extensive preparatory work that had already been carried out prior to that date. Obviously, this does not diminish the importance of many of the measures adopted, which have led one commentator to remark that the EU has probably become a credible actor for the U.S. in this field.[267]

One of the main challenges will be to safeguard the overall consistency and effective implementation of the many measures adopted. In view of the comprehensiveness of these measures and the speed with which they have often been adopted that may not turn out to be an easy task.[268]

However, the more fundamental concern is probably safeguarding human rights, especially as more and stricter anti-terrorism measures are adopted and restrictions to international cooperation are increasingly lifted. We have already seen above that differences in human rights standards between the U.S. and the EU (and its Member States) have not evaporated because of the increased focus on fighting terrorism. This is hardly surprising given that human rights are part of the common legal tradition of all EU Member States and are in many respects supervised at the international level, in particular by the ECtHR. The Committee of Ministers of the Council of Europe has even adopted specific 'Guidelines of the on human rights and the fight against terrorism.'[269] In the EU itself too, human rights occupy a central

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267. Dubois, *supra* note 181, at 324-27.

268. In particular the implementation of Framework Decisions. For example, Belgium (like a number of other Member States, see *supra* note 64) has declared that it would move forward the entry into force of the European arrest warrant, but has only introduced a bill to that effect in parliament on Apr. 2, 2003, making it most unlikely that it will achieve an early entry into force. *See* Chamber of Representatives, Doc. 50 2443/001, *available at* http://www.senate.be (last visited May 30, 2003).

269. *See Guidelines on Human Rights, supra* note 3. It might be interesting to compare these guidelines with the Inter-American Commission on Human Rights' REPORT ON TERRORISM AND HUMAN RIGHTS (OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr. Oct. 22, 2002, *available at* http://www.cidh.oas.org/Terrorism/Eng/toc.htm (last visited May 30, 2003)).

position, as respect for these rights is one of the principles on which the EU is founded.[270] This is clearly pronounced in Articles 6[271] and 7[272] of the EU Treaty, as amended by the Treaties of Amsterdam and Nice, and in the Charter of Fundamental Rights of the European Union.[273] While the legal status of the latter is not yet fully determined at the time of writing,[274] the former provisions are part of the EU Treaty itself and consequently already enjoy constitutional status.

Thus, human rights arguably trump any secondary EU legislation, including treaties between Member States in the EU's third pillar (JHA) and framework decisions. Therefore it seems that a Member State would be entitled to refuse the execution of a European arrest warrant if such execution would violate its human rights obligations, even if the Arrest Warrant Framework Decision, in its preamble, only provides a basis for this "in the event of a serious and persistent breach by [a] Member State of the principles

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270. EU TREATY, *supra* note 8, art. 6(1). *See also* the very extensive case law of the European Court of Justice on the protection of human rights as general principles of Community law: LENAERTS & VAN NUFFEL, *supra* note 10, at 539-50.

271. The first two paragraphs of this provision state:

> The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States. 2. The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.

EU TREATY, *supra* note 8, art. 6.

272. Article 7 contains an enforcement mechanism, allowing the Council to suspend certain of the rights deriving from the EU Treaty in case of a serious and persistent breach by a Member State of principles mentioned in Article 6(1). The Treaty of Nice has inserted a paragraph permitting the Council to address appropriate recommendations to a State which has been found to run a clear risk of a serious breach of the same principles.

273. Charter of Fundamental Rights of the European Union, Dec. 7, 2000, 2000 O.J. (C 364) 1-22. For a discussion, see, e.g., SPECIAL ISSUE: EUROPEAN CHARTER OF FUNDAMENTAL RIGHTS, 8 MAASTRICHT JOURNAL OF EUROPEAN AND COMPARATIVE LAW 3 (2001).

274. The conclusions of the Nice European Council, stated that "the question of the Charter's force will be considered later." Conclusions of the Nice European Council, § 2, Dec. 7-9, 2000, *available at* http://ue.eu.int (last visited May 15, 2003). The legal status of the Charter of Fundamental Rights is one of the issues now being discussed in the European Convention, where there appears to be a large consensus for incorporating it into the future EU Constitutional Treaty. *See, e.g.*, Final report of Working Group II (Incorporation of the Charter/accession to the ECHR), CONV 354/02 WG II 16, Oct. 22, 2002, 2, *available at* http://european-convention.eu.int (last visited May 15, 2003); the Summary report of the plenary session, Brussels, Oct. 28 and 29, 2002, CONV 378/02, Oct. 31, 2002, 9, *available at* http://european-convention.eu.int (last visited May 15, 2003). This approach was also adopted in the Praesidium of the European Convention, Preliminary draft Constitutional Treaty, CONV 369/02, Oct. 28, 2002, art. 6, *available at* http://european-convention.eu.int (last visited May 15, 2003), and in Art. I-7 of the latest draft constitution (Praesidium of the European Convention, Draft text of Part One of the Treaty establishing the Constitution, CONV 724/03, May 26, 2003, *available at* http://register.consilium.eu.int/pdf/en/03/cv00724en03.pdf (last visited May 30, 2003)).

set out in Article 6(1) of the [EU Treaty], determined by the Council pursuant to Article 7(1) of the said Treaty . . . ."[275] However, there may be difficulties in enforcing this primacy of human rights, not only in respect of measures adopted under the CFSP, where the European Court of Justice (hereinafter 'ECJ')[276] has no jurisdiction (and where the European Parliament also has very little to say),[277] but also in respect of certain measures adopted in the field of cooperation in criminal matters (third pillar), where the ECJ has only limited competences.[278] Therefore the appropriate legal basis of any EU action, which conditions *inter alia* which decision-making procedure applies and/or under which pillar action is undertaken, should be subject to close scrutiny.[279]

The situation is different in respect of decisions taken by the EU to implement Security Council decisions, e.g. relating to sanctions, because Article 48 UN Charter obliges EU Member States to carry out such obligations through the EU where appropriate[280] and the obligations under the UN Charter prevail over the EU and EC Treaty by virtue of Article 103 UN Charter. Therefore, if a Security Council resolution (or other decision) itself were to curtail or violate certain human rights or would oblige the EU and/or its Member States to curtail or violate certain human rights, this would bring the EU and its Member States in a constitutionally very delicate situation.[281] EU Member States should therefore very carefully consider human rights concerns when acting in the Security Council.[282] In fact, to some extent this appears to be the case. For example, some safeguards for individual's rights have been adopted by the Security Council Sanctions Committee on Al-Qaida and the Taliban[283] reportedly thanks to strong EU pressure.[284] Moreover, in several

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275. On this mechanism of EU Treaty Article 7, see *supra* note 272.

276. On the ECJ, *see* especially EC TREATY, *supra* note 7, arts. 220-45 and EU TREATY, *supra* note 8, arts. 5, 35.

277. *See id.* art. 21.

278. *See id.* art. 35.

279. Note in this respect the criticism of the European Parliament on the choice of legal basis of some of the measures adopted against terrorism: European Parliament resolution of Feb. 7, 2002, on the Council's decision of Dec. 27, 2001, on measures to combat terrorism, 2002 O.J. (C 284/E) 313-14.

280. Article 48(2) of the UN Charter states that decisions concerning action required to carry out the decisions of the Security Council for the maintenance of international peace and security "shall be carried out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they are members." UN CHARTER art. 48(2). *See also* EU TREATY, *supra* note 8, art. 11 (requiring that the EU respects the UN Charter (see *infra* note 282)).

281. Obviously, in international law the problem is further complicated to the extent that the human rights concerned are considered to be of a *ius cogens* nature.

282. Where two EU Member States are permanent members (France and the United Kingdom, *see* UN CHARTER art. 23) and where normally one, or even two, Member State(s) is/are non-permanent members on a rotating basis (currently Germany and Spain).

283. For details on the changes in the procedure, see the Statement of the Chairman of the Security Council Committee established pursuant to resolution 1267 (1999) on de-listing procedures of Aug. 16, 2002, Press Release SC/7487 AFG/203, *available at* http://www.un.org/News/Press/docs/2002/sc7487.doc.htm (last visited May 15, 2003). Further changes were

cases[285] the legality of EU measures implementing a Security Council resolution is currently contested before the European Court of first Instance.[286]

B. External relations

The EU's reaction in relation to the military response to terrorism is more problematic and raises a number of issues, including the non-involvement of the EU as such in the military campaign in Afghanistan and the EU's appraisal of the legality of this campaign.

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made on Nov. 8, 2002, see UN, *Security Council Committee established pursuant to resolution 1267 (1999) approves new guidelines*, Press Release SC 7571, Nov. 15, 2002, *available at* http://www.un.org/News/Press/docs/2002/sc7571.doc.htm (last visited May 15, 2003) and the new Guidelines of this Committee, *available at* http://www.un.org/Docs/sc/committees/1267/1267_guidelines.pdf (last visited May 15, 2003). For a critical view, even after these changes, see, e.g., R. Wessel, *Debating the 'Smartness' of Anti-Terrorism Sanctions: The UN Security Council and the Individual Citizen in* Fijnaut at all; *supra* note 2. One should also note that Security Council resolution 1452 provides, albeit rather lately, for an exception to the freezing of assets for funds necessary for "basic expenses" (unless the Committee rejects this within 48 hours after notification) and even for certain extraordinary expenses approved by the Committee. *See* U.N. SCOR, 57th Sess., 4678th mtg., UN Doc. S/RES/1452 (2002). To allow for these exceptions, the EU adopted Council Common Position of Feb. 27, 2003, concerning exceptions to the restrictive measures imposed by Common Position 2002/402/CFSP, and Council Regulation (EC) No 561/2003 of Mar. 27, 2003, see *supra* note 211. One may wonder why it took the EU two, respectively three, months to decide that the EU will allow the exceptions permitted by resolution 1452.

284. *See* Hoyos, *U.S. backs down over freezing terror assets*, THE FINANCIAL TIMES ONLINE, Aug. 16, 2002.

285. *See* Case T-306/01, Abdirisak Aden, Abdulaziz Ali, Ahmed Yusuf and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities. (so far the only decision in this case is the Order of the President of the Court of First Instance of May 7, 2002, *available at* http://www.curia.eu.int (rejecting an application for interim measures because there was no urgency) (last visited May 15, 2003); Case T-206/02, Congrès National du Kurdistan v. Council of the European Union, 2002 O.J. (C 247) 13; Case T-228/02, Organisation des Modjahedines du peuple d'Iran v. Council of the European Union, 2002 O.J. (C 247) 20; Case T-229/02, Osman Ocalan on behalf of Kurdistan Workers Party (PKK) and Serif Vanly on behalf of Kurdistan National Congress (KNK) v. Council of the European Union, 2002 O.J. (C 233) 32 and Case T-47/03, Jose Maria Sison v. Council of the European Union and the Commission of the European Communities, 2003 O.J. (C 101), 41-41 (so far the only decision in this case is the Order of the President of the Court of First Instance of May 15, 2003, *available at* http://www.curia.eu.int (rejecting an application for interim measures because there was no urgency and noting that the application for interim measures brought against the Commission was removed from the register by order of the President of the Court of First Instance of May 7, 2003 (last visited May 30, 2003)). *See also* Wessel, *supra* note 283.

286. The Court of First Instance is distinct from the European Court of Justice and "has jurisdiction to hear and determine at first instance actions or proceedings referred to in Articles 230, 232, 235, 236, and 238, with the exception of those assigned to a judicial panel and those reserved in the Statute for the Court of Justice." EC TREATY, *supra* note 7, art. 225 (as amended by the TREATY OF NICE, *supra* note 33). *See* Council Decision 88/591/ECSC, EEC, Euratom of Oct. 24, 1988, establishing a Court of First Instance of the European Communities, 1988 O.J. (L 319) 1-8 and 1989 O.J. (L 241) 4 (corrigenda) (as amended repeatedly).

From a legal and institutional point of view, it is understandable that the EU as such did not take part in the campaign in Afghanistan. This is so because, at present, its competence in this field only covers the 'Petersberg tasks', i.e. humanitarian and rescue tasks, peacekeeping tasks and tasks of combat forces in crisis management, including peacemaking, which were inserted in Article 17(2) EU Treaty by the treaty of Amsterdam. While we hold the view that, contrary to what is sometimes suggested,[287] this allows for peace enforcement action,[288] it clearly does not extend to (collective) self-defense.[289] Since the campaign in Afghanistan was justified by the U.S. and its allies as action taken in self-defense,[290] even if this may be questioned (see *infra*), the EU as such could not join such action. Moreover, since the EU must respect

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287. *See, e.g.*, DUKE, *supra* note 202, at 206 n. 122.

288. Tasks of combat forces implies military action but not (only) peacekeeping: that notion was well established when the Petersberg tasks were formulated and would have been used if peacekeeping had been envisaged. Therefore what remains is peace enforcement. This is also consistent with, *inter alia*, the French and German wording of EU Treaty Article 17(2) (respectively *rétablissement de la paix* and *friedensschaffender Massnahmen*). This position was also expressed by the Belgian ambassador to the EU in a speech on Mar. 8, 2001, and the (then) British Secretary of State *See* Select Committee on Defence, *Eighth Report*, May 11, 2000, *available at* http://www.parliament.the-stationery-ffice.co.uk/pa/cm199900/cmselect/cmdfence/264/26402.htm, § 41(last visited Feb. 15, 2003). *But see* the position of British Select Committee on Defence itself. *See id.* § 42; F. Pagani, *A New Gear in the CFSP Machinery: Integration of the Petersberg Tasks in the Treaty on European Union*, 9 EUR. J .INT'L L. 741, 741-42 (1998).

289. According to EU Treaty Article 2, one of the EU's objectives is "the progressive framing of a common defence policy, which might lead to a common defence" and EU Treaty Article 17(1) states that "The common foreign and security policy shall include all questions relating to the security of the Union, including the progressive framing of a common defence [sic] policy, which might lead to a common defence [sic], should the European Council so decide." Such a decision has not yet been adopted, as was reaffirmed at the Seville European Council in June 2002. *See Declaration of the European Council in response to the National Declaration by Ireland*, Annex, § 4, *available at* http://ue.eu.int (last visited May 15, 2003). Therefore a common defense is not yet covered by the ESDP. However, the Western European Union [hereinafter WEU, as established by the amended Brussels Treaty] is based on a mutual assistance clause. This organization was "an integral part of the development of the Union providing the Union with access to an operational capability notably in the context of paragraph 2 [i.e. the Petersberg tasks defined therein]" according to EU Treaty Article 17(2) before the entry into force of the Treaty of Nice (*supra* note 33), but is no longer mentioned in EU Treaty Article 17(2) (as amended by the treaty of Nice) because the EU has developed its own crisis management mechanism. *See also infra* note 301, including on future perspectives.

290. *See* Letter dated Oct. 7, 2001, from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, UN Doc. S/2001/946, Oct. 7, 2001, *available at* http://www.un.int/usa/s-2001-946.htm (last visited May 15, 2003); Letter dated Oct. 7, 2001, from the Chargé d'affaires a.i. of the Permanent Mission of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council, *available at* http://www.ukun.org (last visited May 15, 2003); NATO's decision that Article V of the North Atlantic Treaty applied (*see supra* note 198 and accompanying text).

the UN Charter,[291] it can only join a military enforcement action other than self-defense if such an action is authorized by the Security Council. Therefore it could have joined the military campaign if it had been authorized by the Security Council. However, this was not the case.[292] Finally, in order to guarantee the complementary nature of ESDP and NATO, ESDP[293] is not meant to play a role when NATO as a whole is engaged,[294] which was the case here (even if the military contribution by NATO as such was rather limited[295]).

In the light of this, it may seem legitimate that the German and British Heads of Government and the French Head of State held a mini-summit on October 19, 2001, (just before the Ghent European Council) and in London on November 4, 2001, (albeit in slightly enlarged format[296]).[297] However, these meetings roused considerable protest. That protest is not entirely unfounded: the European Council decided, at its September 21, 2001, meeting, that action by the Member States "will require close cooperation with all the [EU]

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291. Not only because its Member States are bound by the UN Charter but also because of EU Treaty Article 11, which states that under the CFSP the Union is to "preserve peace and strengthen international security, *in accordance with the principles of the United Nations Charter*" (emphasis added). This was *inter alia* confirmed in the Conclusions of the Helsinki European Council, § 26, *available at* http://ue.eu.int (last visited May 15, 2003) "The Union will contribute to international peace and security in accordance with the principles of the United Nations Charter. The Union recognises [sic] the primary responsibility of the United Nations Security Council for the maintenance of international peace and security." *Id.*

292. We do not see resolutions 1368 and 1373 (*infra* notes 299-00) as containing such a mandate, a view which appears to be shared by most commentators. For a detailed argumentation to this effect, see Carsten Stahn, *Security Council Resolutions 1368 (2001) and 1373 (2001): What They Say and What They Do Not Say*, *available at* http://www.ejil.org/forum_WTC/ny-stahn.html (last visited Feb. 15, 2003); Jonathan I. Charney, *The Use of Force Against Terrorism and International Law*, 95 AM. J. INT'L L 835, 335 (2001); Frederic L. Kirgis, 'Security Council Adopts Resolution on Combating International Terrorism,' Oct. 1, 2001, addendum to F.L. Kirgis, 'Terrorist Attacks on the World Trade Center and the Pentagon,' ASIL Insight, Sept. 2001, *available at* http://www.asil.org/insights/insigh77.htm#addendum7 (last visited May 15, 2003); Frederic Mégret, *War'? Legal Semantics and the Move to Violence*, 13 EUR. J. INT'L L. 361, 374-75 (2002); Olivier Corten & Francois Dubuisson, *Opération "Liberté Immuable": une extension abusive du concept de légitime défense*, 106 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 51, 53-54 (2002). *But see* Jordan Paust, *Security Council Authorization to Combat Terrorism in Afghanistan*, Oct. 23, 2001, comment to Frederic L Kirgis, ASIL Insight, Sept. 2001, *available at* http://www.asil.org/insights/insigh77.htm#comment4 (last visited May 15, 2003).

293. *See supra* notes 202 and 289 and accompanying text.

294. *See, e.g.*, the Conclusions of the Helsinki European Council, Dec. 10-11, 1999, § 27, *available at* http://ue.eu.int (last visited May 15, 2003).

295. The U.S. has mainly asked for support from individual nations on a bilateral basis and NATO as such has only contributed in a limited way, mostly by sending an AWACS unit to the U.S. and a naval force to the Mediterranean. *See NATO's Response to Terrorism*, Dec. 6, 2001, NATO Press Release M-NAC-2 (2001)159, Dec. 6, 2001. *See also* Duke, *supra* note 195, at 163-64.

296. At the last minute, the Spanish and Italian Heads of Government were invited too, as were the EU's High Representative for the CFSP (Javier Solana), the Belgian prime minister (in his capacity as holder of the EU Presidency at that time) and the Dutch prime minister.

297. *See also* Duke, *supra* note 195, at 161-62.

Member States." In light of this decision the justification invoked by French president Chirac, namely that these mini-summits were held for "military reasons which only concern ourselves,"[298] is questionable. Refusal by the bigger Member States to even consult all Member States on military action may also lead to a reluctance on behalf of the smaller Member States to engage the EU as such in the future. In any event, issues and action which exceed the confines of self-defense, such as broader political goals, humanitarian aid and reconstruction, clearly fall within the competences of the EU and are therefore not matters to be settled by the big Member States only.

This brings us to an important point: under the EU Treaty, the European Council has the power to decide to extend the CFSP and ESDP[299] to a common defense, in which case it shall "recommend to the Member States the adoption of such a decision in accordance with their respective constitutional requirements."[300] At present, this decision has not yet been taken.[301] However, one may question whether this is tenable. Imagine for instance that the target on September 11 had been based in Brussels or Paris. Would any EU Member State have stayed on the sidelines? In a Union which is to safeguard its "common values, fundamental interests, independence and integrity"[302] and in which Member States are very closely integrated and share the same fundamental values, this is, in our view, inconceivable. Thus it seems only logical that the EU, in time, does also grow to a full-fledged collective defense organization. While this appears unlikely in the short run, there seems to be fairly widespread support in the ongoing European Convention[303] for a less far-reaching solidarity clause along the following lines:

> 1. The Union and its Member States shall act jointly in a spirit of solidarity if a Member State is the victim of terrorist attack or natural or man-made disaster. The Union shall mobilise all the instruments at its disposal, including the military resources made available by the Member States, to:
> (a) - prevent the terrorist threat in the territory of the Member States;

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298. Translation by the authors of the following French quote in LE MONDE EN LIGNE, Oct. 20, 2001: "raisons strictement militaires et qui ne concernent que nous."

299. *See supra* notes 202 and 289 and accompanying text.

300. EU TREATY, *supra* note 8, art. 17.1.

301. *See supra* note 289, especially *Declaration of the European Council in response to the National Declaration by Ireland.* This is unlikely to change as a result of the Convention on the Future of Europe, though it is possible that the Convention will propose that a number of Member States be allowed to establish such a common defense amongst themselves, see Art. I-40 § 2 and § 7 of the latest draft constitution (Praesidium of the European Convention, Draft text of Part One of the Treaty establishing the Constitution, CONV 724/03, May 26, 2003, *available at* http://register.consilium.eu.int/pdf/en/03/cv00724en03.pdf (last visited May 30, 2003)).

302. EU TREATY, *supra* note 8, art. 11.

303. *See* Final Report of Working Group III, *supra* note 33.

- protect democratic institutions and the civilian population from any terrorist attack;
- assist a Member State in its territory at the request of its political authorities in the event of a terrorist attack;

(b) - assist a Member State in its territory at the request of its political authorities in the event of a disaster.

2. The detailed arrangements for implementing this provision are at Article [. . .], of Part Three, Title B, of the Constitution.[304]

Secondly, the question arises whether the EU position vis-à-vis the legality of the military campaign was correct under international law. We will not address this extensively here,[305] but we nevertheless wish to point out a few issues. First, while the UN Security Council did respectively recognize and reaffirm the right of self-defense in its resolutions 1368[306] and 1373,[307] adopted in response to the September 11 attacks, it did not make a finding that this right was applicable to these attacks. That should not come as a surprise given the difficulty in attributing the September 11 attacks to the Taliban, in particular when measured by the standard set out by the International Court of Justice in the *Nicaragua* case,[308] which, despite some apparent relaxation by

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304. Art. I-42 of the latest draft constitution (Praesidium of the European Convention, Draft text of Part One of the Treaty establishing the Constitution, CONV 724/03, May 26, 2003, *available at* http:/register.consilium.eu.int/pdf/en/03/cv00724en03.pdf (last visited May 30, 2003)). *Compare* Final report of the working group on Defense, CONV 461/02 WG VIII 22, Dec. 16, 2002, *available at* http://register.consilium.eu.int/pdf/en/02/cv00/00461en2.pdf (last visited Feb. 15, 2003), § 57-59; Summary report on the plenary session, Brussels, Dec. 20, 2002, CONV 473/02, Dec. 23, 2002, § 32, *available at* http://european-convention.eu.int (last visited May 15, 2003).

305. For a more elaborate discussion of the legality of the military campaign against Afghanistan, see, amongst many other contributions, Antonio Cassese, *Terrorism is also Disrupting Some Crucial Legal Categories of International Law*, 12 EUR. J. INT'L L. 993, 993-01 (2001); Jonathan I. Charney, *The Use of Force Against Terrorism and International Law*, 95 AM. J. INT'L L 835, 835-39 (2001); Luigi Condorelli, *Les attentats du 11 septembre et leurs suites: ou va le droit international?*, 105 REVUE GÉNÉRALE DROIT INTERNATIONAL PUBLIC 829, 829-48 (2001); Corten & Dubuisson, *supra* note 292, at 51-77; Thomas M. Franck, *Terrorism and the Right of Self-Defense*, 95 AM. J. INT'L L 839, 839-43 (2001); Giorgio Gaja, *In What Sense was There an "Armed Attack"?*, *available at* http://www.ejil.org/forum_WTC/ny-gaja.html (last visited Feb. 15, 2003); Sean D. Murphy, *Terrorism and the Concept of "Armed Attack" in Article 51 on the U.N. Charter*, 43 HARVARD INT'L L.J. 41, 41-51 (2002); Stahn, *supra* note 292; and several other relevant contributions on the European Journal of International Law discussion forum *The Attack on the World Trade Center: Legal Responses*, *at* http://www.ejil.org/forum_WTC/index.html (last visited Feb. 15, 2003) and at Jurist, *at* http://jurist.law.pitt.edu/terrorism/terrorismacad.htm (the 'Commentary' section of the 'Terrorism' section) (last visited May 15, 2003).

306. U.N. SCOR, 56th Sess., 4370th mtg., UN Doc. S/RES/1368, (2001).

307. U.N. SCOR, 56th Sess., 4385th mtg., UN Doc. S/RES/1373, (2001).

308. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, § 195. "[T]he Court does not believe that the concept of 'armed attack' includes . . . assistance to rebels in the form of the provision of weapons or logistical or other support." *Id.*

the International Criminal Tribunal for the former Yugoslavia,[309] was recently more or less reaffirmed by the International Law Commission.[310] Second, even if the attacks could be attributed to the Taliban, a response thereto must be in accordance with the conditions set out in article 51 UN Charter. In light of the central role of the Security Council in the UN collective security system, the readiness of the Security Council "to take all necessary steps to respond to the terrorist attacks of 11 September 2001, and to combat all forms of terrorism, in accordance with its responsibilities under the Charter of the United Nations"[311] and its determination "to take all necessary steps in order to ensure the full implementation of [resolution 1373], in accordance with its responsibilities under the Charter,"[312] an explicit authorization by the Security Council would have been more appropriate. This is all the more true as the military campaign did not only aim at eliminating Al-Qaida's terrorist bases in Afghanistan, but included the political goal of regime change.[313] Admittedly, the international community seems to have endorsed the legality of the military campaign,[314] although it remains to be seen whether this signifies a change in the law rather than an exceptional reaction to exceptional events.[315] Third, the EU's use of the term 'riposte' in the conclusions of the

309. ICTY, Appeals Chamber, Prosecutor v. Dusko Tadic, IT-94-1, July 15, 1999, § 97-145, *available at* http://www.un.org/icty (last visited May 15, 2003). The relaxation was, in any event, rather limited: the ICTY held in this case that attributability required "more than the mere provision of financial assistance or military equipment or training." *Id.* § 137.

310. *See* Draft articles on Responsibility of States for Internationally Wrongful Acts, art. 8, *available at* http://www.un.org/law/ilc/reports/2001/2001report.htm (last visited May 15, 2003). "The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct." *Id. juncto* cmts. 3, 5. "Such conduct will be attributable to the State only if it directed or controlled *the specific operation* and the conduct complained of was an integral part of that operation" and "in any event it is a matter for appreciation in each case whether *particular conduct* was or was not carried out under the control of a State, to such an extent that the conduct controlled should be attributed to it." *Id.* (emphasis added).

311. U.N. SCOR, 56th Sess., 4370th mtg. at § 5, UN Doc. S/RES/1368, (2001).

312. U.N. SCOR, 56th Sess., 4385th mtg. at § 8, UN Doc. S/RES/1373, (2001).

313. According to a document released by UK Foreign Secretary Jack Straw on Oct. 16, 2001, and cited in the House of Commons Library the aims of operation Enduring Freedom include: "sufficient change in the leadership to ensure that Afghanistan's links to international terrorism are broken" and "reintegration of Afghanistan as a responsible member of the international community and an end to its self-imposed isolation." *Operation Enduring Freedom and the Conflict in Afghanistan: An Update*, Research Paper 01/81, Oct. 31, 2001, 12-13, *available at* http://www.parliament.uk/commons/lib/research/rp2001/rp01-081.pdf (last visited May 15, 2003).

314. *See especially* the EU, NATO, and OAS positions cited *supra* notes 198-200 and accompanying text.

315. One may note that the UN Security Council resolutions passed after September 11 in response to other major terrorist acts do not themselves mention the right to self-defense, although they reaffirm resolution 1373 which, as mentioned above, reaffirms this right. *See* U.N. SCOR, 57th Sess., 4624th mtg., UN Doc. S/RES/1438 (2002), U.N. SCOR, 57th Sess., 4632nd mtg., UN Doc. S/RES/1440 (2002), U.N. SCOR, 57th Sess., 4667th mtg., UN Doc.

September 21, 2001, European Council is most unfortunate, as the use of force in order to punish is not the same as self-defense and is not allowed under international law.[316] Fortunately, this term has been dropped in the conclusions of later meetings.

Finally, in tackling the root causes of terrorism, the EU already was very active before September 11, *e.g.*, in particular in the field of conflict prevention and trade and development. The above-mentioned 'Declaration on the contribution of CFSP, including ESDP, in the fight against terrorism'[317] stresses the importance of some of these actions for the fight against terrorism. More recent EU actions also send out a positive signal. However, one should also take into account that tackling the root causes will be a formidable task for many years, probably even decennia, to come. Moreover, it is an area where the results are often beyond the exclusive control of the EU. It is therefore essential that the EU engage the U.S. to forge a common approach. One can only hope that the (rather limited) reference in Security Council resolution 1556 to some of the underlying problems[318] is an indication of some progress in this regard.

C. Other measures

As we have not discussed the aviation security measures in detail, we will not assess these measures either. We will also be fairly brief in respect of the civil protection measures. EU action in this field is fairly recent but appears to be developing at a considerable pace, except perhaps in respect of

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S/RES/1450 (2002) and U.N. SCOR, 58th Sess., 4706th mtg., UN Doc. S/RES/1465 (2003), in respect of the Bali bombing, the Moscow hostage taking, the Kenya hotel and airport attacks and the Bogota bomb attack.

316. Declaration on Principles of International Law concerning Friendly Relations and Co-operation amongst States in accordance with the Charter of the United Nations, U.N. GAOR, 25th Sess., G.A. Res. 2625 (XXV) at Annex 1.I.6 (1970); U.N. SCOR, 19th Sess., 1111th mtg. at § 1, UN Doc. S/RES/188, (1964) and U.N. SCOR, 23rd Sess., 1407th mtg. at § 3, UN Doc. S/RES/248 (1968). *See also* C. GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 118-19 (2000). *Compare* YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 194-03 (2001), who regards 'defensive armed reprisals' as permissible if they "qualify as an exercise of self-defence [sic] under Article 51" and argues that such legitimate reprisals must aim to deter renewed armed attacks. *Id.*

317. *See* Seville European Council Conclusions, *supra* note 204.

318. *See* U.N. SCOR, 58th Sess., 4688th mtg. at Annex, § 10, UN Doc. S/RES/1456 (2003):

> [The Security Council also] emphasizes that continuing international efforts to enhance dialogue and broaden the understanding among civilizations, in an effort to prevent the indiscriminate targeting of different religions and cultures, to further strengthen the campaign against terrorism, and to address unresolved regional conflicts and the full range of global issues, including development issues, will contribute to international cooperation and collaboration, which by themselves are necessary to sustain the broadest possible fight against terrorism
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> . . . .

Id.

stockpiling vaccines etc., where progress appears to be rather slow and concrete results are few. Also, while the Commission's example of the quick availability of resources in reaction to September 11[319] suggests that the assembling of resources works quite well, it was reported in the press that cooperation on the ground, as tested in an exercise, was rather problematic.[320] Given that the training and exercise program has only started recently, that is perhaps understandable. Yet it is hardly comforting should a major response be needed in the near future. Thus, it would appear that in this area there is still some way to go in implementing the different action plans.

IV. CONCLUSION

The EU has reacted to the September 11 events by fairly quickly adopting an impressive number of measures, in many policy areas. It has achieved the most progress in the field of cooperation in criminal matters, although the jury is still out on whether the measures adopted will all be effectively implemented and vigilance will be required to ensure overall consistency and continuing respect for human rights, democratic oversight and the rule of law. In the field of external relations the record is more ambiguous, in particular concerning the EU's reaction to the military campaign in Afghanistan. Finally, in respect of civil aviation security, civil protection and fighting the root causes of terrorism significant progress has been made, though much remains to be done.

319. *See* COM (2001) 707, *supra* note 239 and accompanying text.

320. Thomas Fuller, *Unified response to attack eludes Europe*, THE INTERNATIONAL HERALD TRIBUNE, Jan. 14, 2002.

TRYING TERRORISTS – JUSTIFICATION FOR DIFFERING TRIAL RULES: THE BALANCE BETWEEN SECURITY CONSIDERATIONS AND HUMAN RIGHTS

Emanuel Gross*

INTRODUCTION

The terrorist attack against the United States on September 11, 2001, breached the balance between human rights and national security. This breach has had a dual effect: It has led to the impairment of the constitutional rights of the citizens of the United States itself,[1] and also to the impairment of the basic rights of non-U.S. citizens, suspected or accused of terrorist offenses, who are to be tried before special military tribunals to be established in accordance with an executive order[2] issued by U.S. President George W. Bush.

The President of the United States, presiding over a power that is the symbol of democracy for many other Western nations, has explained in the executive order concerning the trial of terrorists: "[I] find consistent with section 836 of title 10, United States Code, that *it is not* practicable to apply in military commissions under this order the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts."[3]

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1. *See* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (U.S.A. Patriot) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001); *see also* Emanuel Gross, *The Influence of Terrorist Attacks on Human Rights in the United States: The Aftermath of September 11, 2001*, 28 N.C. J. INT'L L. & COM. REG. 1 (2002).

2. *See* Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57, 833 (2001).

3. *Id.* § 1(f) (emphasis added).

One may ask why it was found necessary not only to establish special tribunals to try terrorists, but also to desist from observing the constitutional safeguards granted to accused persons facing trial? The answer apparently lies in concern for the efficiency of the hearing and achieving deterrence at the expense of the pursuit of justice and refraining from convicting innocent persons. In so doing, absolute priority is given to national security. Is this an appropriate course of action for a democratic nation contending with terrorism? One should recall the comments of Israeli Supreme Court President, Professor Aharon Barak:

> It is the fate of democracy that it does not see all means as justified, and not all the methods adopted by its enemies are open to it. On occasion, democracy fights with one hand tied. Nonetheless, the reach of democracy is superior, as safeguarding the rule of law and recognition of the freedoms of the individual, are an important component in its concept of security. Ultimately, they fortify its spirit and strength and enable it to overcome its problems.[4]

U.S. society's acquiescence to according priority to considerations of efficiency and deterrence because of the needs of national security is understandable (if not justifiable) in view of the many fatalities caused by the attack of September 11. In the long term, however, the dangers posed by the creation of a special tribunal for a specific offense should act as a warning to society in America and other places, including Israel,[5] of the potential danger involved in creating a special tribunal for what is a *specific,* but not necessarily *special,* offense, and the reason for this is that terrorism is only a metaphor.

A society that distinguishes between classes of offenders, with the deliberate objective of increasing the efficiency of the hearing and deterring others from participating in the commission of similar offenses, broadcasts moral weakness. There is a danger that by showing a negative attitude towards persons accused of terrorism, society will avoid a conscientious application of trial procedures. In taking this path society demonstrates moral weakness. The danger of the "slippery slope" arises when society adjusts to this weakness. Today, the justification given for the new measures is that because of the extraordinary terrorist attacks, procedural constitutional rights must be sacrificed in the just war against terrorism even at the price of harm to the innocent. Tomorrow, attacks by atypical sex offenders will be regarded as justifying the establishment of special tribunals and the modification of the

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4. High Court of Justice [H.C.] 5100/94, Public Committee Against Torture in Israel v. Government of Israel, 53(4) P.D. 817, 840 (Heb.).

5. For an extensive discussion of special tribunals for terrorists in Israel, see *infra* Part Two.

constitutional safeguards set out in the rules of procedure and evidence that have been arduously put together over hundreds of years, all in order to promote the efficiency of the hearing and deterrence. Where will this downhill slide end? Will we eventually agree to put political opponents on trial for treason, applying special criminal procedures? Changes to the nature of the trial forum, its composition and procedures may indicate that the stability of society, its basic values, and the rules which society shaped are in danger. A regime cannot possess a genuine democratic character and adhere to Due Process of Law if its principles are applied on a discriminatory basis.

Perhaps what is at issue here is not discrimination but rather simple Aristotelian equality – equal treatment for the equal and different treatment for the different. The terrorists breach every possible rule and law; therefore, why should they enjoy the privilege of being protected by rules, which they refuse to acknowledge?

The violation of rights is not a violation of the rights of a terrorist on trial but rather an infringement of the rights of a person *suspected* or *charged* with terrorist offenses who is now on trial. Every person suspected of a crime is suspected of having breached a rule or certain law – the approach to every crime must therefore be identical.

I do not seek to argue that one cannot violate the constitutional safeguards of a person suspected of a terrorist offense who has been put on trial, but rather that the violation must be proportional, for a proper purpose and compatible with the basic values of society. Even if there is justification for a separate tribunal for terrorists, such justification cannot provide grounds for allowing different rules of procedure more efficient than the ordinary rules. The outcome would be to completely negate the concept of due process in criminal law, and from there the path to the conviction of innocent persons is extremely short.

Such an outcome would be contrary to the balancing formula which I regard as proper – the prohibition on disproportionate or excessive injury to a suspect, an injury which even if intended for a proper purpose, namely, to safeguard national security, is completely contrary to the basic values of a democratic society.

The questions, which forum should try terrorists and which procedural rules should be applied by that forum, are not purely technical; on the contrary, these issues are substantive and the answers to them will have repercussions for the character and democratic strength of the society which operates such trial procedures.

Trying terrorists is nothing more than the trial of criminal offenders motivated or inspired by a certain ideology. There is no reason whatsoever for trying criminal offenders in a manner different to that which has been established over many years by the criminal system. Any attempt to deviate from ordinary judicial procedures requires a justification that does not exist here. Deviating from such procedures comprises nothing more then an attempt to exploit the criminal law to violate human rights for what is an

improper purpose and certainly in a manner that is neither compatible with democratic values nor proportional to the offense.

PART ONE

The scope of jurisdiction of the United States to try its enemies at a time when it is conducting a war outside its own borders

Terrorism is an international phenomenon. Terrorists are scattered throughout the entire world. Their desire to harm the citizens of a particular state does not necessitate their actual presence in that state. Is a democratic country, within the framework of its war against terrorism, entitled to try every terrorist who is a member of a terrorist organization and who operates against that country or against another democratic country? Does this right embrace terrorists who are not located within the territory of the trying country? The United States has apparently answered these questions in the affirmative: "[a]ccording to the executive order, the military tribunal can be used to try *any* suspect who is not an American citizen and has been identified by [George W.] Bush as a member of al Qaeda, participated in acts of terrorism against the U.S. or harbored terrorists."[6]

Today, the extraterritorial jurisdiction of a state to try terrorists is derived from a consequential test – the damage test. This is a test that was shaped by customary international law. It asserts that if the location of the damage or target to be harmed is in a certain state then that state has the power to place on trial the terrorists who were involved in the terrorist operation.[7]

In this manner and in the light of the fact that the terrorist attack of September 11 took place within the territory of the United States, it is possible to justify the demand of the United States for extraterritorial jurisdiction over every terrorist connected to the attack. As these persons are no longer alive, merely acknowledging jurisdiction over those actually perpetrating the attack, cannot be seen as exhausting jurisdiction. Their deaths were an integral part of the terrorist action in which they participated. The entire force of the extraterritorial jurisdiction lies in the trial of those people who are located outside the borders of the United States and who assisted in the planning and execution of the operation, the purpose of which was to cause harm to the United States and serious injury to its citizens.

The damage test is not the only test that justifies extraterritorial jurisdiction. Customary international law has acknowledged a number of additional principles (underlying a number of which is the principle of

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6. Vanessa Blum, *When the Pentagon Controls the Courtroom*, THE RECORDER, Nov. 27, 2001, at 3 (emphasis added).

7. *See generally* Caryn L. Daum, *The Great Compromise: Where to Convene the Trial of the Suspects Implicated in the Pan am Flight 103 Bombing Over Lockerbie, Scotland*, 23 SUFFOLK TRANSNAT'L L. REV. 131, 135 (1999).

damage) that deal with extraterritorial jurisdiction. It should be pointed out that international law sets limits on the right of a state to demand jurisdiction over offenses committed outside its borders. The extent of the limits depends on the nature and character of the crime.[8] As we shall see, the development of the phenomenon of international terrorism and its centrality in the lives of nations may lessen the scope of the restrictions placed by international law on the demand of a state for extraterritorial jurisdiction over terrorists.

It is customary to talk of five fundamental grounds for extraterritorial jurisdiction:[9]

1. *The territorial principle*: This principle has been universally identified by international law in respect of all types of crimes.[10] Under it a state has jurisdiction over crimes committed within its borders. The nationality of the victims or the perpetrators is immaterial to the right of adjudication.[11] In other words, the United States has jurisdiction over terrorists who are caught within its territory even if they are not American citizens.

2. *The protective principle*: A state has the right to claim extraterritorial jurisdiction when a national interest is threatened by any act, irrespective of the place of occurrence of that act.[12] A threat to the security of the nation is a recognized interest.[13] The multifaceted network of terrorism that spreads over the entire world sees causing harm to the United States as its primary goal.[14] Accordingly, the United States can argue in its favor that it has extraterritorial jurisdiction over terrorists located outside its territory by virtue of their membership in a terrorist organization.

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8. *See* Zephyr Rain Teachout, *Defining and Punishing Abroad: Constitutional Limits on the Extraterritorial Reach of the Offenses Clause*, 48 DUKE L.J. 1305, 1310 (1999).

9. *See Research in International Law Under the Auspices of the Faculty of the Harvard Law School, Jurisdiction with Respect to Crime*, 29 AM. J. INT'L L. 443, 445 (Supp. 1935). These grounds were first identified collectively in research conducted in Harvard in 1935. *See id.*

10. *See* Wade Estey, Note, *The Five Bases of Extraterritorial Jurisdiction and the Failure of the Presumption Against Extraterritoriality*, 21 HASTINGS INT'L & COMP. L. REV. 177, 177 (1997).

11. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 303 (5th ed. 1998).

12. *See* United States v. Columba-Colella, 604 F.2d 356, 358 (5th Cir. 1979); IAIN CAMERON, THE PROTECTIVE PRINCIPLE OF INTERNATIONAL CRIMINAL JURISDICTION 2 (1994).

13. *See* Flatow v. Islamic Republic of Iran, 999 F. Supp. 1, 33 n. 7 (D.D.C. 1998) (stating that American "victims of foreign state sponsored terrorism" may invoke protective jurisdiction in civil actions against those governments based on the "national security interests" involved).

14. *See* Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 96 AM. J. INT'L L. 236, 239 (2002) (citing the declarations of Osama Bin Laden: "[T]errorizing the American occupiers [of Islamic Holy Places] is a religious and logical obligation.").

That membership causes them to pose a threat to a crucial national interest – national security.

3. *The universality principle*: This confers extraterritorial jurisdiction over certain crimes, such as genocide, that are universally defined as punishable crimes by virtue of the degree of abhorrence to which they give rise.[15] Since these crimes threaten humanity as a whole, every nation has the right and even the duty to try the perpetrators of these crimes.[16] War crimes are recognized as crimes to which the universality basis applies.[17] As we shall see below, it is possible to identify terrorist acts as war crimes. Accordingly, the United States may claim extraterritorial jurisdiction over terrorists whom it has captured outside its borders within the context of its war against terror, by virtue of the universal principle.

4. *The passive personality principle*: Jurisdiction will extend in accordance with the nationality of the victim. The state has power to punish all those who have caused harm to its citizens and breached its laws, irrespective of the place where the harm occurred.[18] To some extent this principle covers the same ground as the damage test. Both tests permit a state to exercise extraterritorial jurisdiction over terrorists because they have caused harm and damage to its citizens, except that the damage test ascribes importance to the place of occurrence of the damage and grants jurisdiction in cases where the damage occurred within the territory of the state.

5. *The nationality principle*: Under this principle a state has jurisdiction over its citizens who committed crimes, irrespective of the place of commission of the offense.[19] This principle is not central to the issue of extraterritorial jurisdiction over terrorists and indeed is not clearly identified by the international community;[20] accordingly, no further elaboration will be given to it here.

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15. *See* Beverly Izes, Note, *Drawing Lines in the Sand: When State-Sanctioned Abductions of War Criminals Should Be Permitted*, 31 COLUM. J.L. & SOC. PROBS. 1, 11 (1997).

16. *See id.*

17. Demjanjuk v. Petrovsky, 776 F.2d 571, 582 (6th Cir. 1985) (stating in the context of war crimes allegedly committed by a former Nazi concentration camp guard that "some crimes are so universally condemned that the perpetrators are the enemies of all people" and concluding that "any nation which has custody of the perpetrators may punish them according to its law").

18. John G. McCarthy, Note, *The Passive Personality Principle and Its Use in Combating International Terrorism*, 13 FORDHAM INT'L L.J. 298, 299-00 (1989-1990).

19. *See* CAMERON, *supra* note 12.

20. *See generally* Geoffrey R. Watson, *Offenders Abroad: The Case for Nationality-Based Criminal Jurisdiction*, 17 YALE J. INT'L L. 41 (1992).

In the light of the various principles it may be said that customary international law establishes the right of the United States to exercise jurisdiction over terrorists who caused it harm or who are interested in causing it harm and therefore endanger its security.

PART TWO

Perception of the legal system and procedural justice in a democratic state

Much criticism has indeed been directed against the establishment of a special tribunal for an apparently special offense – terrorism. Why are many shocked by the notion of a special tribunal to try a certain group linked to a certain offense? It is conceivable that the courts may operate on the basis of classifying people by their relationship to a particular type of offense, thereby allowing us to single out offenses (together with population groups). This would enable us to create special courts for immigrants, special courts for minorities, as well as special courts for terrorists. It is highly likely that the system would operate very efficiently – so why reject it?

The answer to this question lies in the ideology underlying the legal system in a democratic state. The object is not the establishment of a legal system per se. A legal system is only a means through which to realize democratic values.[21] In its absence, one would have a governmental mechanism likely to endanger democracy and its values, as would be the case were it to decide upon a legal system structured on the basis of classes of offenses. The objective is democracy itself, and this must be the subject matter of government. The courts are the "watchdogs" of democracy and the values underlying it.

Equality is one of the basic values in every democratic regime. It follows that the principle of equality is a fundamental value in every enlightened legal system: "Equality is a basic value for every democratic society to which the law of every democratic country aspires for reasons of justice and fairness to realize."[22] Its primary purpose is to guarantee equal application of the law: equality before the law. "Every person will achieve justice within the framework of law. We do not discriminate between one person and another; all are equal before us. We protect all persons; all minorities; all majorities."[23]

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21. *See* Aharon Barak, *They gave the State of Israel all that they had, in* THE COURT – FIFTY YEARS OF ADJUDICATION IN ISRAEL 13 (Min. of Def., 1999).

22. H.C. 6698/95, Adel Qa'adan and others v. Israel Land Authority, 54(1) P.D. 258, 275 (Heb.).

23. Barak, *supra* note 21, at 14.

CONCLUSION

Indeed, terrorists must pay for their acts. The offense of terror is no different than any other criminal offense. Therefore, there is no justification for trying terrorists separately in separate courts, operating special rules of procedures and evidence that differ from those applicable in the civilian legal system. An agreement to try terrorists before the regular courts is not a sufficient guarantee of due process or achievement of justice. The emphasis must be on prohibiting the establishment of special rules of procedure and evidence for terrorists. In Israel, a special provision exists that permits violation of the right of a person suspected of offenses against the security of the state, which is to meet with an attorney.[24] Another provision in Israel enables notification of the fact of the arrest to be delayed for a relatively long period.[25] These provisions are specific to a particular type of offense, albeit the hearings in relation to the provisions are conducted before the ordinary courts. Because the hearings are likely conducted within the existing court system and not before a special tribunal, the exception to the procedures prevailing in relation to persons suspected of non-security offenses is balanced from the moment the indictments are filed. From that point, the greater safeguards are available to the defendant. For example, the prosecution is required to disclose all the investigative materials to the defendant,[26] including the fact that certain evidence has been classified as privileged.[27] The significance of the privilege (imposed because of the fear of harm to national security or another important public interest) lies in the fact that the prosecution cannot use the evidence. However, the defendant has the right to attempt to persuade the court that his defense will be harmed if the privilege is not removed and that uncovering the truth outweighs national security.[28]

As terror offenses are criminal offenses, offenses which touch upon issues of life and death, it is a core principle in this field of law that defendants are given a full opportunity to defend themselves against any

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24. *See* Criminal Procedure Law, sec. 35 (1996) (Heb.). This section permits delaying a meeting between a person suspected of national security offenses and his attorney for up to twenty-one days, in contrast to Section 34 of the same Law that permits delaying a meeting between a person suspected of other offenses and his attorney for up to forty-eight hours at the most. *See id.*

25. *See id.* sec. 36. This section permits the delay of notification for up to fifteen days compared to Section 33 of the same Law that requires notification without delay of the arrest of persons suspected of offenses which are not security offenses. *See id.*

26. *See* Criminal Law Procedure (Consolidated Version) Law, 1982, sec. 74 (Eng.).

27. *See* Cr.A. 1152/91, Siksik v. State of Israel, 46(5) P.D. 8, 20 (Heb.).

28. *See* Evidence Ordinance [Consolidated Version] (Aryeh Greenfield, trans. 2000), secs. 44(a) & 45 (1971).

evidence in the hands of the prosecution.[29] This right is derived from the essence of a democratic regime. Indeed, a democratic state cannot exist without security. It is possible to erode the rights of the defendant in the name of the security of the state and its citizens. However, a democratic state will only permit such an erosion of rights where the accused is guaranteed a just and fair trial. Accordingly, where there is privileged evidence, some of which is of critical and substantive importance to the determination of the guilt or innocence of the accused, it would be proper to disclose this evidence.[30] The fact that the defendant has been accused of terror offenses does not impair the need to disclose this evidence; such disclosure is compatible with the interests of the individual and the entire democratic society in ensuring due process.

In judging terrorists it is more important to preserve rules of procedure which are identical to the rules applicable in every other criminal proceeding than to proclaim that the terrorists should be tried before the ordinary civil courts; yet concurrently permit the proceedings to be conducted in accordance with special rules of procedure. In view of the growth of the phenomenon of terrorism, we believe that it is possible to justify the existence of a special tribunal that will deal exclusively with the trial of terrorists. However, the motive for the establishment of such a tribunal should be to deal with terrorism in a focused manner with the purpose of promoting a just trial. This also meets the needs of public and national security which require concerted action to be taken against terrorism before the latter strikes again, without placing society at risk by reason of delays ensuing from the pressure of work within the civilian legal system.

More precisely, my support for the establishment of a separate tribunal is not support for the application of different legal procedures and rules of evidence. To the contrary, we have shown how the character of a judicial forum, its composition, and the nature of its activities influence the procedural rights of the defendant. When we deal with the criminal process, with issues of liberty, this influence may have an additional far reaching effect:

> Often the line separating a procedural defect from a defect which may have an influence on the outcome of the trial is not too clear. Indeed, it is difficult to deny that in many cases the existence of a serious procedural defect creates a presumption of influence on the outcome of the proceedings. Moreover, the outcome of the proceedings is not a legal

29. *See* H.C. 428/86, Barzilai v. Government of Israel and 521 others, 40(3) P.D. 505, 569 (Heb.).

30. *See* M.A. 8383/84, Livny et al. v. State of Israel, 38(3) P.D. 729, 738 (Heb.).

> determination which exists in the air. It also entails a determination regarding the proper manner of conducting the proceedings and preserving the rights of the persons litigating before the court. Thus, a serious procedural defect is to a large extent a serious substantive defect.[31]

The United States understood the grave impact of the provisions of the executive order on the actual fairness of the criminal process. Accordingly, the order issued by the Department of Defense attempted to make the proceedings before the military tribunal correspond more closely to the criminal proceedings conducted in the civilian legal system. Although this attempt has not been completed, it should be applauded. The fact that the rules of evidence differ substantively in civilian and military tribunals and the fact that there is no separation of powers inside the court – the judges, prosecutors and even defense attorneys come from the same military system are obstacles to the existence of fair criminal proceedings. The order issued by the Department of Defense has not succeeded in overcoming these obstacles.

The phenomenon of international terrorism puts democratic society to a test with the most difficult aspect being which of the following two interests will prevail: the interest in national security or the interest in pursuing a fair trial. This question sets a trap; it hints that the answer requires one interest to be chosen, thereby completely negating the other. A democratic state cannot fall into this trap. It is the state's responsibility to find the proper balance between these two interests in a manner that guarantees the safety of the public by placing terrorist suspects on trial and only convicting a person on the basis of rules of procedure which mandate a conviction based on the disclosure of the truth. The truth, the acquittal of the innocent and the conviction of the guilty, is what will guarantee public safety.

In order for a democratic state to achieve victory in its war against terror, it does not need to alter the balances it has created between these competing interests:

> What message does it send to the world when we act to change the rules of the game in order to win? If we are acting justly, with faith in our cause and truth on our side, then we will prevail. We don't need to change the rules. They are sufficient for our purpose and fairly crafted to ensure a legitimate outcome.[32]

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31. M/H 7929/96, Kozli et al. v. State of Israel, 99(1) Tak-El 1265 (Heb.).

32. Michael J. Kelly, *Understanding September 11th – An International Legal Perspective on the War in Afghanistan*, 35 CREIGHTON L. REV. 283, 291-92 (2002).

EXECUTIVE EXCESS V. JUDICIAL PROCESS: AMERICAN JUDICIAL RESPONSES TO THE GOVERNMENT'S WAR ON TERROR

Michael J. Kelly*

We may assume that the threat to Hawaii was a real one; we may also take it for granted that the general declaration of martial law was justified. But it does not follow from these assumptions that the military was free [to violate the] Constitution . . . especially after the initial shock of the sudden Japanese attack had been dissipated.

From time immemorial despots have used real or imagined threats to the public welfare as an excuse for needlessly abrogating human rights. That excuse is no less unworthy of our traditions when used in this day of atomic warfare or at a future time when some other type of warfare may be devised.

The . . . constitutional rights of an accused individual are too fundamental to be sacrificed merely through a reasonable fear of military assault. There must be some overpowering factor that makes a recognition of those rights incompatible with the public safety before we should consent to their temporary suspension.

— Justice Murphy's concurring opinion in the U.S. Supreme Court decision against application of martial law in Hawaii *Duncan v. Kahanamoku* (1946), quoted in District Judge Edmunds' decision to open INS deportation hearings against the government's request to keep them secret. *Detroit Free Press v. Ashcroft* (2002).

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I. INTRODUCTION

In the aftermath of the September 11th terrorist attacks in the U.S., federal authorities were quickly presented with the problem of how to legally handle the diverse group of individuals taken into custody – from American citizens fighting on foreign battlefields to Americans at home with allegiances to al Qaeda, from foreign nationals of Islamic faith inside the United States to foreign combatants caught during the invasion of Afghanistan. What happens to them? Are they all treated similarly? Do they all have the same basic set of legal rights? Should they be prosecuted, detained for questioning, deported, or held indefinitely during hostilities?

Initially, there was a determination that Americans captured at home or abroad on the wrong side of the government's War on Terror would be tried in regular courts as well as foreign nationals captured inside the United States, while foreign al Qaeda and Taliban members caught abroad would be detained as "unlawful combatants" and unsympathetic Islamic foreigners found in violation of INS regulations would simply be deported.

Thus, John Walker Lindh, the American Taliban, and Zacarias Moussaoui, a French national al Qaeda member caught in Minneapolis, were arraigned and charged in federal courts. However, as the cases against them began to simultaneously unfold, tapping more government resources, and risking exposure of intelligence data, the Administration decided to switch tracks and begin shunting Americans into military imprisonment for indefinite detention without access to counsel instead of facing the specter of an unpredictable and time-consuming adversarial process. Consequently, Yassar Hamdi, another American Taliban, and Jose Padilla, an American al Qaeda member, found their way into naval brigs instead of courtrooms.[1]

Immigrants, by virtue of their status as non-citizens, are treated worse. Hundreds of Middle Eastern and South Asian men were rounded up in a huge dragnet, held in secret for months, interrogated, subjected to closed immigration hearings, and then summarily deported. Thousands of others who could not be arrested on technical visa or traffic violations were "invited" to appear

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1. *See* Jess Bravin, *White House Seeks to Expand Indefinite Detentions in Military Brigs, Even for U.S. Citizens*, WALL ST. J., Aug. 8, 2002:

> Stung by the courtroom circus that yet another accused terrorist, Zacarias Moussaoui, has created, and the aggressive defense marshaled by John Walker Lindh before he plea-bargained his way out of a possible life sentence, the Bush administration is preparing to expand its policy of indefinitely detaining in U.S. military jails people it designates as 'enemy combatants.' Such prisoners – whether Americans or foreigners captured in the U.S. – aren't afforded the same constitutional rights as criminal defendants, or even the limited rights allowed in military tribunals. . . . Officials said they selected brigs in South Carolina and Virginia [for Hamdi and Padilla] partly because they fall under the jurisdiction of courts that are more conservative and presumably more sympathetic to the administration.

Id.

before U.S. Attorneys in their districts for questioning as to any knowledge or involvement with al Qaeda, the Taliban, the September 11th attacks, or terrorism generally.

Indeed, not only has the administration been hijacked by a bunker mentality since 9/11, but the Justice Department in particular has demonstrated its zealous intent to pursue those responsible for the attacks by altering constitutional and legal checks on its power where possible and violating other constraints were necessary. Such abuse of power has not gone unnoticed by the public. When asked in an Associated Press poll conducted in August, 2002, "[h]ow concerned are you that new measures enacted to fight terrorism in this country could end up restricting our individual freedoms?" Sixty-three percent replied they were concerned or somewhat concerned and only 35% replied they were either unconcerned (15%) or not too concerned (20%), while 2% "didn't know."[2]

So whose job is it to protect individual liberties from being trampled into the dust by the government in its zealous pursuit of bogeymen, be they communist sympathizers during the Cold War or terrorist sympathizers during the War on Terror? Since the days of John Marshall, the federal judiciary has recognized its constitutional responsibility to tell Congress and the President when they are stepping over the line delineating their respective powers and order them to take a step back. Several initiatives have been undertaken in court both by and against the government in its War on Terror. However, due to the reactive and deliberative nature of our judicial system, this branch of government necessarily responds more slowly to events than the other two branches.

Thus, a year and a half after the attacks, there has been no meaningful constitutional challenge to the USA Patriot Act or other legislative initiatives: the executive has not yet empanelled any military tribunals, most of the thousand INS detainees have been released or deported, the Lindh case has been settled, the Moussaoui case has been stayed, Hamdi and Padilla have been relegated to solitary confinement, and the Attorney General's aggressive detention, surveillance, and deportation programs have enjoyed some judicial support and some sporadic judicial resistance – yielding decidedly mixed legal results.

Nonetheless, it remains useful to survey the current lay of the post 9/11 judicial landscape, if for no other purpose than to gauge the potential involvement of that branch and to get a sense of where litigation may ensue and what the outcome may be.

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2. Associated Press Poll, *War on Terrorism* conducted Aug. 2-6, 2002. (N=1001 adults nationwide, MoE ± 3), *available at* http://www.pollingreport.com/ (last visited Mar. 22, 2003); AP, *Terrorist Attacks Prompt Changes in Americans' Legal Rights After Sept. 11*, DAILY RECORD (Omaha), Aug. 29, 2002, at 4.

II. ARTICLE III FEDERAL COURTS

Long ago, the United States Supreme Court declared, "[o]urs is the accusatorial as opposed to the inquisitorial system. Such has been the characteristic of Anglo-American criminal justice since it freed itself from practices borrowed by the Star Chamber from the Continent whereby an accused was interrogated in secret for hours on end."[3] In practice, this premise is embodied in substantive and procedural mandates derived from our constitutional system of government, and applicable to all criminal proceedings.

Article III federal courts are the bulwark of freedoms in our legal system ensuring the basic canon of the Forth, Fifth, and Sixth Amendments against illegal searches, seizures, and self-incrimination, and guaranteeing a speedy trial, access to court, access to counsel, access to a jury, and the right to confront adverse witnesses and evidence. The panoply of protections emanating from these Amendments breaths life and meaning into the fundamental notions of due process and equal justice, and are applicable to all who come within the jurisdiction of American courts.

The challenge in the post-9/11 aggressive prosecutorial environment will be ensuring that two centuries of precedent interpreting constitutional protections and carving a delicate balance between truth-seeking and equal justice in the criminal process are not vitiated in the name of expediency and scapegoating.

A. Fumbling Into the Court System – The Lindh & Moussaoui Cases[4]

John Walker Lindh is an American citizen, the son of a wealthy San Francisco area family. He was captured in Afghanistan fighting for the Taliban. A convert to Islam after reading the autobiography of Malcolm X, Lindh moved to Yemen, enrolled in a madrasah and later answered the call to jihad – fighting with Islamic fundamentalist groups in Kashmir and Kunduz.[5] After his capture, Lindh was held for about a month in Camp Rhino outside

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3. Watts v. Indiana, 338 U.S. 49, 54 (1949).

4. The case of "shoe-bomber" Richard Reid is not discussed here as it raises no new significant issues not already raised in the Lindh and Moussaoui cases. The divergent areas of the Reid indictment relate to his actions on board an aircraft – namely attempting to detonate an explosive contained in the sole of his shoe. His case was heard before the federal district court in Boston and was resolved with an agreement giving him sixty years to life in exchange for a plea of guilty. Reid admitted he attended terrorist training camps in Afghanistan and was a follower of Osama bin Laden. *See Reid Indictment and Legal Documents, at* http://news.findlaw.com/legalnews/us/terrorism/cases/index2.html (last visited May. 8, 2003); *see also* Associated Press, *Venting Hate, Voicing Regret; Staying Loyal to bin Laden*, NEWSDAY (N.Y.), Oct. 5, 2002, at A4.

5. *See* Rene Sanchez, *John Walker's Restless Quest is Strange Odyssey*, WASH. POST, Jan 14, 2002, at A1.

Kabul and then transported back to the U.S. to face criminal charges for his actions on behalf of the Taliban, namely conspiracy to kill U.S. nationals outside the U.S., providing material support to a foreign terrorist organization, and engaging in prohibited transactions.[6] He was indicted in Virginia federal district court on February 5, 2002.[7]

Because Lindh was processed through the U.S. criminal justice system, he was entitled to the same constitutional protections afforded every U.S. citizen, including the right to counsel and the right to be fully advised of the charges against him.[8] Represented by competent criminal defense counsel, one of the first constitutional challenges to Lindh's detainment and prosecution alleged that the criminal charges were vague, ambiguous, and not sufficiently stated so as to provide fair notice of the charges against him. Consequently, Lindh's attorneys filed a motion for a bill of particulars requesting the government identify the:

- nationals and military personnel he is alleged to have conspired to kill
- date, time and place where he agreed to join the illegal conspiracy
- exact nature of the material support and resources he is alleged to have provided to the conspiratorial enterprise
- specific illegal activity he was alleged to have advanced by his support or services

Essentially, Lindh sought to compel the government to state its charges with more specificity to ensure the indictment alleged criminal conduct and was not simply a vehicle to prosecute him for mere association with an unpopular group.[9] The judge, however, rejected the defense motion.[10]

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6. *See* Brooke A. Masters, *American Taliban Suspect Appears in Alexandria Court*, WASH POST, Jan. 25, 2002, at A1; *see also* Brooke A. Masters & Patricia Davis, *Walker's Long Trip Ends at Alexandria Jail*, WASH. POST, Jan. 24, 2002, at A13; *see generally* 18 U.S.C. §§ 2332(b), 2339 (2003); 31 C.F.R. §§ 545.201, 545.204 (2003); Exec. Order No. 13,129, 64 Fed. Reg. 129 (July 7, 1999); 50 U.S.C. §§ 1702, 1705 (2003); 18 U.S.C. § 2 (2003).

7. *See* Brooke A. Masters & Dan Eggen, *Lindh Indicted on Conspiracy, Gun Charges*, WASH. POST, Feb. 6, 2002, at A1.

8. *See* Brooke A. Masters & Edward Walsh, *U.S. Taliban Fighter to Have His Rights, Rumsfeld Says; Experts Warn Against Preferential Legal Treatment*, WASH. POST, Dec. 5, 2001, at A13.

9. *See* Defendants Motion for a Bill of Particulars, United States v. Lindh, Crim. No. 02-37-A (E.D. Va. 2002); *see also* Defendant's Motion of Mar. 15, 2002, *available at* http://news.findlaw.com/hdocs/docs/lindh/uslindh31502 mot4bop.pdf (last visited Mar. 24, 2003).

10. *See* Naftali Bendavid, *U.S.: No Evidence Lindh Killed Agent; Prison Riot Victim Cited in Indictment*, CHICAGO TRIB., Apr. 2, 2002, at A7.

Lindh also attacked the government's use of incriminating statements allegedly made while he was a captive in Afghanistan.[11] The legal basis for these arguments was the fifty-five-day delay between Lindh's capture and his arrival in the U.S., where he was finally allowed access to legal counsel. Lindh alleged that he was subject to coercive interrogation tactics at Camp Rhino and held incommunicado for fifty-five days. Lindh further contended that, because there was no justifiable reason for the delay in presenting him for arraignment in U.S. court (even though the government had begun preparing its case against him), any statements made during that period of unlawful confinement should be inadmissible.

The case continued for five months with the government struggling to refine and present its case against Lindh while also maintaining the secrecy of classified information. Finally, on July 15, 2002, in a move that surprised most observers, a plea agreement between the government and Lindh was announced. Under the agreement, Lindh plead guilty to two counts in the indictment (supplying services to the Taliban and carrying explosives in the commission of a felony) in exchange for serving two consecutive ten-year sentences and fully cooperating with the government in its investigation of al Qaeda. While prosecutors hailed the accord as eminently fair and a "victory in the war on terrorism," it did not escape notice that the government's willingness to bargain coincidentally escalated as constitutional infirmities in its case were gradually revealed.[12]

The second case concerns Zacarias Moussaoui, the suspected "20th hijacker" who failed to follow through on his part of the 9/11 terrorist attacks. Moussaoui, a thirty-five year-old French national of Moroccan descent, was a member of al Qaeda and alleged co-conspirator of the nineteen Islamic hijackers that carried out the attacks that destroyed the World Trade Center and damaged the Pentagon. In February 2001, Moussaoui entered the U.S. and enrolled in flight school in Norman, Oklahoma. However, he failed out of his training program and subsequently re-enrolled at another flight school in Minnesota. While at the Minnesota school, Moussaoui expressed an unusual interest in learning to fly larger aircraft, constantly peppering his instructors with questions about specifications and technical operations. Eventually, Moussaoui's detailed questions relating to complex aircraft systems aroused suspicion and those misgivings were relayed to the FBI. In August 2001, Moussaoui was arrested on visa and immigration violations.[13]

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11. *See* Brooke A. Masters & Dan Eggen, *Walker Statements a Trial Issue; Defense Will Contest Interviews with FBI*, WASH. POST, Jan. 17, 2002, at A14.

12. *See* Neil A. Lewis, *Traces of Terror: The Captive; Admitting He Fought in Taliban, American Agrees to 20-year Term*, N.Y. TIMES, July 16, 2002, at A1.

13. *See* Suzanne Daley, *Mysterious Life of a Suspect from France*, N.Y. TIMES, Sept. 21, 2001, at B1; *see also* David Johnston & Philip Shenon, *F.B.I. Curbed Scrutiny of Man Now a Suspect in the Attacks*, N.Y. TIMES, Oct. 6, 2001, at A1; *see also* Philip Shenon, *Flight School Warned F.B.I. of Suspicions*, N.Y. TIMES, Dec. 22, 2001, at B1.

As evidence of his involvement in 9-11 mounted, Moussaoui was transferred to the federal prison in Alexandria, Virginia, where, on January 3, 2002, he was arraigned on six counts of conspiracy to commit murder and terrorism in connection with the terrorist attacks. Perhaps foreshadowing the bizarre twists and turns the case would eventually take, when apprised of the charges against him and asked how he would plead, Moussaoui refused "in the name of Allah" to enter a plea, prompting the judge to enter a not guilty plea on his behalf.[14]

In the ensuing months Moussaoui has flooded the court with handwritten motions impugning the motives and competency of his attorneys and making derogatory remarks about the trial judge in his case. Indeed, his invective against his court-appointed attorneys was so offensive that the judge eventually permitted Moussaoui to represent himself on the condition that he have an attorney act as his co-counsel.[15]

After a series of legal battles concerning whether Moussaoui's proceedings would be televised and whether he was competent to stand trial, Moussaoui shocked the court by electing to plead guilty to four of the charges against him, only to abruptly shift course when advised of the consequences of his guilty plea. Due to the wrangling and legal issues connected with the preparation of his own case, Moussaoui's trial was initially delayed until January 2003 to facilitate his review of the massive amount of evidence the government plans to introduce during his trial. However, the delay was extended until March 2003 due to the embarrassing disclosure of classified FBI documents related to the case that were inadvertently left in Moussaoui's cell by government officials who were questioning him last Fall.[16]

Is it likely that Moussaoui will receive a plea deal similar to Lindh's? After all, comparing the facts of the cases, Lindh was on the battlefields of Afghanistan, bearing arms, face to face with American soldiers, prepared to fight and presumably kill on behalf of his radical beliefs. By contrast, Moussaoui was, at best, a religious zealot whose own ineptitude exposed him as a "suspicious" individual, leading to his arrest and, thereby, rendering him useless to the 9/11 plot. Indeed, his handwritten diatribes fashioned as court pleadings and his bitter outbursts in court have led many to question his mental competency.[17] Lindh's guilty conduct was witnessed first hand by soldiers who captured him in Afghanistan, while Moussaoui's alleged guilt is

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14. David Johnston, *A Nation Challenged: The Legal Case; Not-Guilty Plea is Set for Man in Terror Case*, N.Y. TIMES, Jan. 3, 2002, at A1.

15. *See* Neil A. Lewis, *Moussaoui's Defense Plan Complicates Terror Trial*, N.Y. TIMES, Apr. 26, 2002, at A12; *see also* Philip Shenon, *Sept. 11 Defendant Who Wants to Represent Himself is Busy Doing So*, N.Y. TIMES, Apr. 30, 2002, at A22.

16. *See* Philip Shenon, *Judge Agrees to New Delay In Trial in Conspiracy Case*, N.Y. TIMES, Oct. 1, 2002, at A20.

17. *See* Philip Shenon, *A Nation Challenged: The Detainees; Terror Suspect Says He Wants U.S. Destroyed*, N.Y. TIMES, Apr. 23, 2002, at A1; *see also* Neil A. Lewis, *Defense Seeks Extensive Tests on Mental Health of Suspect*, N.Y. TIMES, Apr. 25, 2002, at A16.

contained in reams of documents yet to be presented at trial and the government is seeking the death penalty against him.[18]

Both men are alleged to have known about the September 11th plot. Why then does it appear that the government is taking a hard-line aggressive prosecutorial stance in Moussaoui's case? Could it be that Moussaoui is not only the alleged 20th hijacker, but ultimately symbolic of all the other 9/11 hijackers as well? America needs a 9/11 defendant; a physical being in the defendant's chair representing those who callously inflicted pain and anguish on innocent victims through heinous acts of terrorism. With his appearance, demeanor, and resolute adherence to radical Islamic beliefs, Moussaoui fits the bill quite nicely. He is also a foreigner, whereas Lindh is American. He is one of them, he knew them, he conspired with them, and for that, he may pay with his life.

B. Americans as "Enemy Combatants" – The Hamdi & Padilla Cases

> *The power of citizenship as a shield against oppression was widely known from the example of Paul's Roman citizenship, which sent the centurion scurrying to his higher-ups with the message: 'Take heed what thou doest – for this man is a Roman.'*
>
> – Associate Justice Robert H. Jackson, U.S. Supreme Court[19]

It is psychologically troubling for Americans to learn that fellow Americans wish their country ill. It is more troubling to learn that these citizens would join organizations such as the Taliban and al Qaeda to carry their ill-wishes into action. However, it is shocking to learn that our federal government is stripping U.S. citizens of their supposedly guaranteed due process rights under the banner of national security. However, that is exactly what is happening to Jose Padilla and Yassar Hamdi – leading to what may become a split in the federal circuit courts over whether the executive branch is acting beyond its power by affixing labels to citizens that effectively suspend their constitutional rights.

Jose Padilla, a.k.a. Abdullah al-Muhajir, is of Hispanic origin. He is an American citizen, born in Puerto Rico, who recently left the country and joined al Qaeda. He was apprehended in May 2002, re-entering the country in Chicago with plans to detonate a "dirty" radiological bomb in furtherance of al Qaeda's unholy cause. Attorney General Ashcroft first labeled him a

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18. *See* Philip Shenon & Benjamin Weiser, *Prosecutors Seek a Death Sentence in Terrorism Case*, N.Y. TIMES, Mar. 19, 2002, at A1; *see also* Philip Shenon & Neil A. Lewis, *U.S. to Seek Death Penalty for Moussaoui in Terror Case*, N.Y. TIMES, Mar. 29, 2002, at A20.

19. Edwards v. California, 314 U.S. 160, 171 (1941) (Jackson, J., concurring).

"material witness" as a pretext to hold him indefinitely without prosecuting; however, when a New York federal judge ruled such use of the material witness statute inappropriate, Padilla was redesignated an "enemy combatant" and turned over to the Defense Department. He has since been denied access to counsel and is undergoing interrogation in a South Carolina military prison.[20]

Yasser Esam Hamdi is of Arabic origin, born in Louisiana when his father was employed there. He is an American citizen who left the country with his Saudi family as a child. It is unclear whether he ever returned. But he eventually joined al Qaeda and sought to do harm to fellow Americans. He was captured in Afghanistan, transferred to Guantanamo Bay, Cuba and then shuttled to a military base in Virginia upon discovery of his citizenship. He too has been labeled an enemy combatant and a decision by a federal judge that he is entitled to a public defender is now being challenged by the Defense Department on appeal. Meanwhile, he continues to linger in solitary confinement in a Naval brig outside of Norfolk, Virginia.[21]

What will become of the two Americans detained indefinitely, without access to counsel, incommunicado—in direct violation of their Fifth Amendment due process rights and Sixth Amendment rights to counsel? If they are not tried in federal courts like Lindh, where can they be prosecuted? President Bush's Military Order establishing tribunals in the Defense Department currently excludes the possibility of trying American citizens[22]— a political concession designed to tamp down on public resistance to the order. In hindsight, it works to block trial of either Padilla or Hamdi by military tribunal unless the order is revised, which may be politically impossible.

Consequently, by labeling them "enemy combatants," the government must try them, if it decides to do so, before regular military courts under the Uniform Code of Military Justice. This is provided for in the Geneva Convention.[23] But to take this route opens the door to criticism that American citizens are accorded treaty rights while non-Americans receive second-rate justice – because both Americans and non-Americans were captured as enemy combatants.[24]

Alternatively, the government can just throw away the key and let them languish indefinitely. So far, the government's justification has been merely

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20. *See* Adam Liptak, *Traces of Terror: The Courts; Questions on U.S. Action in Bomb Case*, N.Y. TIMES, June 11, 2002, at A18.

21. *See* Adam Liptak et al., *After Sept. 11, a Legal Battle on the Limits of Civil Liberty*, N.Y. TIMES, Aug. 4, 2002, at A1.

22. *See* President's Military Order, 66 Fed. Reg. 57,833 (Nov. 15, 2001) [hereinafter Military Order].

23. *See* Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 287 art. 84, *available at* http://www1.umn.edu/humanrts/instree/y3gctpw.htm (last visited Mar. 24, 2003).

24. *See* Michael J. Kelly, *Understanding September 11th – An International Legal Perspective on the War in Afghanistan*, 35 CREIGHTON L. REV. 283, 289-92 (2002).

a veiled effort to extract information from them. As the Justice Department argued in its case to dismiss Jose Padilla's *habeas* petition:

> The detention of enemy combatants is critical to preventing additional attacks on the United States, aiding the military operations, and gathering intelligence in connection with the overall war effort.[25]

In the case of enemy combatant Hamdi, whose cause has gone farther in the courts than that of Padilla, Judge Robert G. Doumar of the federal district court in Norfolk, Virginia twice ordered the government to allow Hamdi access to a lawyer. The government refused to comply and appealed the orders to the 4th Circuit Court – which stayed the orders and returned the case to the judge Doumar, who then asked the government to show him evidence that Hamdi qualified as an enemy combatant. Frustrated that they did not receive a rubber stamp, the government refused to do this as well, claiming the need to protect classified information, and appealed that order.[26]

The 4th Circuit Court of Appeals ruled on January 8, 2003, that because Hamdi was captured overseas fighting for the Taliban, he could be held indefinitely as an enemy combatant by the military, effectively without access to an attorney, based solely on the government's assertion that he is one – and this cannot be challenged by him or anyone else acting in representative capacity.[27] While acknowledging the continued right of judicial review even in wartime, the court essentially noted that this had little meaning given the sweeping deference due the President under the constitution:[28]

> The constitutional allocation of war powers affords the president extraordinarily broad authority as commander in chief and compels courts to assume a deferential posture in reviewing exercises of this authority . . . .The safeguards that all Americans have come to expect in criminal prosecutions do not translate neatly to the arena of armed conflict. In fact if deference is not exercised with respect to military judgments in the field, it is difficult to see where deference would ever obtain.[29]

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25. Karen Branch-Brioso, *Fight over Rights Rages On*, ST. LOUIS POST-DISPATCH, Sept. 8, 2002, at B1.

26. *See id.*

27. *See* Neil A. Lewis, *Threats and Responses: The Courts; Detention Upheld in Combatant Case*, N.Y. TIMES, Jan. 9, 2003, at A1.

28. *See* Tom Jackman, *Judges Uphold U.S. Detention of Hamdi; Courts Must Yield to Military on 'Enemy Combatants' 4th Circuit Rules*, WASH. POST, Jan. 9, 2003, at A1.

29. Lewis, *supra* note 27, at A1.

Hamdi retains his habeas rights as an American citizen, but any inquiry into his detention must remain "extremely limited."[30] Moreover, the court held that Geneva Convention protections that guaranteeing combatants the right to have their status reviewed by a competent tribunal were unavailable to Mr. Hamdi because those treaty provisions are not self-executing and, therefore, give rise to no individually assertable rights, only state and government rights.[31]

There is no definitive ruling yet on Padilla's fate – he was captured in Chicago. The 2nd Circuit Court of Appeals is considering similar arguments on his fate. Because Mr. Padilla was being held in New York as a material witness before he was reclassified an enemy combatant, that jurisdiction has remained seized of his case despite the government's attempts to transfer the case, as it has the prisoner, to South Carolina.[32] Depending on their ruling, there could be a circuit split on the status of Americans as enemy combatants.

However, if the 2nd Circuit rules similarly to the 4th Circuit, those decisions could constitute a green light from the judicial branch for the Administration to move ahead with creation of its proposed enemy combatant designation committee, first reported last year. For Americans suspected of false allegiance, the Attorney General, Secretary of Defense, and CIA Director will decide whether a suspect is to be relegated to indefinite detention in military custody as an "enemy combatant." If the suspect is a foreigner, the National Security Advisor will join this new Ashcroft-Rumsfeld-Tenet Triumvirate in its decision.[33]

So how does the government decide who is an enemy combatant? What are the criteria? That is for the Administration to know and for Americans not to ask about. Solicitor General Ted Olsen, whose wife was killed in the 9/11 terrorist attacks, defends the decision to keep the criteria a secret, explaining "[t]here will be judgments and instincts and evaluations and implementations that have to be made by the executive that are probably going to be different from day to day, depending on the circumstances."[34]

Secret criteria, based on instinct, that change day to day? That sounds suspiciously like the secret and ever-changing criteria determined by congressional cabals led by Sen. McCarthy a half century ago to determine who was a communist sympathizer and then publicly destroy them. Indeed, history should make us wary whenever a self-anointed portion of the government presumes to define "un-American" and then hold citizens accountable for activities that fall under such a designation.

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30. *Id.*

31. *See id.*; *see also* Hamdi v. Rumsfeld, 316 F.3d 450 (4th Cir. 2003).

32. *See* Jess Bravin, *Judge Declares Padilla Has Right to Counsel*, WALL ST. J., Dec. 4, 2002.

33. *See* Bravin, *supra* note 1.

34. Charles Lane, *In Terror War, 2nd Track for Suspects; Those Designated 'Combatants' Lose Legal Protections*, WASH. POST, Dec. 1, 2002, at A1.

Significantly, the only authority the government can show to support its retrograde detention policy is the sixty-year-old Supreme Court opinion in *Ex Parte Quirin*. There, the Court decided that Americans working in collusion with German Nazi saboteurs seeking to destroy industrial targets in the U.S. could be tried by military commissions instead of civilian courts.[35] Widely criticized, *Quirin* had rested on the trash heap of other infamous and unjust decisions like *Plessy v. Ferguson*, *(Dred) Scott v. Sanford*, and *Korematsu v. United States*, until it was resurrected by the Attorney General in his desperate attempt to justify the detention policies of his department in the absence of any other authority.[36]

Politically, however, the legal position of indefinite detention is untenable in the long term. Nevertheless, it is the likely outcome for two of these U.S. citizens. The compelling question generated by this action concerns why indefinite detention of Americans by the military inside the United States is necessary. The only reason identified beyond the government's national security rationale deduced by legal scholars is one of judicial efficiency – they simply can not or will not undertake the tremendous effort to mount full scale prosecutions and discovery efforts in each of these cases and the many more that are likely to occur.[37] In effect, they may as well have shrugged and

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35. *See* Ex Parte Quirin, 317 U.S. 1 (1942).

36. *See* Diane F. Orentlicher & Robert Kogod Goldman, *The Military Tribunal Order: When Justice Goes to War: Prosecuting Terrorists Before Military Commissions*, 25 HARV. J. L. & PUB. POL'Y 653, 657 (2002):

> Much like the Supreme Court's validation of President Roosevelt's decision to intern American citizens of Japanese descent during World War II, *Quirin* has long been criticized as an abdication of independent judicial judgment during war time and an unwarranted surrender of constitutional rights. Even the author of the Court's opinion, Chief Justice Stone, reportedly had grave misgivings about the judgment he penned.

Id.

37. *See* Adam Liptak, *Accord Suggests U.S. Prefers to Avoid Courts*, N.Y. TIMES, July 16, 2002, at A14:

> Legal scholars found it hard to identify a rationale that would call for an ordinary criminal prosecution of Mr. Lindh but military detention of Mr. Padilla and Mr. Hamdi. The search for a unifying principle becomes even more difficult if Zacarias Moussaoui and Richard C. Reid are added to the mix . . . . Efforts to distinguish the treatment of these prisoners on consistent grounds tend to fail. The distinguishing factor is not citizenship: Mr. Moussaoui is French, and Mr. Reid is British; the others claim American citizenship. Nor is it the place of arrest: Mr. Lindh and Mr. Hamdi were captured in Afghanistan, the others in the United States. Nor is it the nature of the central criminal charge: Mr. Moussaoui, Mr. Reid and Mr. Padilla are accused of attempting or conspiring to commit terrorist acts, the others of fighting on the wrong side abroad.
>
> 'You do worry about equal treatment and having a consistent theory about who ends up where,' said Ruth Wedgwood, a law professor at Yale. The only factor that seems to explain the disparity in how the men were treated is time. The later detentions were military, suggesting that the government may now view ordinary trials as more trouble than they are worth.

Id.

suggested that perhaps during "wartime" anything is possible – even in America.

It was wrong in the 1940s to inter 120,000 Japanese Americans without charges, evidence, trials, or the ability to demonstrate their allegiance to America. It was wrong in the 1950s to arrest, harass, and destroy the reputations of American "communists" without evidence of traitorous intent or false allegiance. It is wrong today to snatch Americans off the street, designate them "enemies," and throw them into military brigs without access to counsel, courts, the evidence against them, or the opportunity to refute the designation, be they Taliban, communists, Japanese, purple, or polka-dotted.

C. Other Federal Court Rulings

Federal courts have begun ruling in cases beyond the "headliners" of Lindh, Moussaoui, Hamdi, and Padilla. Several members of what the Justice Department styles "al Qaeda sleeper cells" within the U.S. have been arrested and indicted in Oregon and New York.[38] District courts have also taken up cases involving the status of immigrants and closed deportation hearings within the INS system as well as cases involving the ability of captured foreign detainees at Guantanamo Bay, Cuba to petition for release.

1. Domestic Terrorist Cells – The Buffalo & Oregon Cases

On September 14, 2002, three days after the first anniversary of the devastating 9/11 terrorist attacks, federal law enforcement agents arrested six Arab-American men in Lackawanna, New York, a Buffalo suburb. All of the suspects, who are American born and of Yemeni descent, were charged with operating a terrorist cell in western New York, and knowingly and unlawfully providing material support to al Qaeda by attending a terrorist training camp in Afghanistan, where Osama bin Laden allegedly lectured the men about the alliance of the Islamic jihad and al Qaeda.[39]

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38. For the sake of brevity and to reduce repetitiveness of issues, the federal indictments of James Ujaama in Seattle in August 2002, for allegedly planning to create a training camp in Oregon, and the four foreign nationals arrested in Detroit for alleged conspiracy to obtain weaponry and intelligence and create safe houses and fake I.D.'s are not discussed. However, for further reading on these cases, please see Timothy Egan, *Riddle in Seattle: Is Man Held by U.S. a Terrorist or Just a Hustler?*, N.Y. TIMES, Oct. 6, 2002, at A24; *see also* United States v. Ujaama (W.D. Wash. 2002); *see also* Grand Jury Indictment, *available at* http://news.findlaw.com/hdocs/docs/terrorism/usujaama 82802ind.pdf (last visited Mar. 23, 2003); *see also* Danny Hakim, *4 Are Charged with Belonging to a Terror Cell*, N.Y. TIMES, Aug. 29, 2002, at A1.

39. *See* United States v. Goba, Mosed, Taher, Galeb, Al-Bakri and Alwan (W.D. NY 2002); *see also* Grand Jury Indictment of May 2002, *available at* http://news.findlaw.com/hdocs/docs/terrorism/ussattar040902ind.pdf (last visited Mar. 24, 2003).

Coincidentally, the Buffalo suspects are alleged to have attended the same terrorist training camp as John Walker Lindh, who, as part of his plea arrangement with the government, agreed to cooperate fully with authorities investigating terrorism at home and abroad. It is not known what role Lindh might have played in leading the government to its investigations in Buffalo. Pleas of not guilty have been entered for all of the men, and their cases are currently pending in the federal criminal court system.[40]

A month later, four more Americans were arrested in Portland, Oregon and indicted in federal court along with two others (one citizen extradited back to the U.S. from Malaysia and another non-citizen still at large) for plotting to join al Qaeda and Taliban fighters in their "jihad" against America.[41] The six individuals allegedly developed a plan to go to Afghanistan and take up arms against coalition forces, having trained with Chinese rifles in Oregon to prepare for the trip, but the plan never came to fruition.[42]

According to the FBI, there was no indication that the alleged members of the Portland cell sought to attack targets within the United States, "[t]hey had not gotten to a point where they were identifying targets or anything like that." The tip that led to these arrests came from a Hamas sympathizer of Palestinian origin who is serving thirty months in prison on weapons and fraud charges.[43]

Why were the alleged members of neither the Buffalo nor Portland cells tagged with the label "enemy combatant" and transferred to the Defense Department? That is an open question. However, three possible reasons present themselves. First, there was clearly much more FBI surveillance undertaken in these cases, several months' worth actually, to build up a strong evidentiary case against them. In contrast, there was little evidence compiled against Hamdi and Padilla – certainly not enough to withstand an Article III federal court's scrutiny.

Second, when the alleged terrorist cells in Buffalo and Portland were broken up and their cadre arrested, the courts hearing challenges in the Hamdi and Padilla cases had not spoken on the extent of the executive's power to do what it had done with those two citizens. Consequently, the cautious approach

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40. One of the defendants, Faysal Galab, entered a plea agreement on January 10, 2003, with prosecutors. In exchange for dropping his indictment to a lesser charge, he supplied information on the other five cell members and agreed to testify against them, admitting attending the al Farooq terrorist training camp in Afghanistan with them and was told afterwards to deny it. *See* Robert F. Worth, *Accused Member of Terror Cell Near Buffalo Agrees to Guilty Plea*, N.Y. TIMES, Jan. 11, 2003, at A9.

41. *See* United States v. Battle, Ford, Bilal, Al Saoub and Lewis, No. CR 02-399 HA (D. Or 2002); *see also* Grand Jury Indictment of Oct. 31, 2002, *available at* http://news.findlaw.com/hdocs/docs/terrorism/usbattle100302ind.pdf (last visited Mar. 24, 2003); *see also* Associated Press, *Malaysia to Deport 5th Oregon Suspect*, N.Y. TIMES, Oct. 8, 2002, at A15.

42. *See* Eric Lichtblau, *4 in U.S. Charged in Post-9/11 Plan to Join al Qaeda*, N.Y. TIMES, Oct. 5, 2002, at A1.

43. *See id.*

was to proceed along the path of charging these new defendants with multiple violations of Title 18 Section 2339 prohibiting support of a terrorist organization. But if the 2nd Circuit follows the lead of the 4th Circuit and extends judicial approval of the government's enemy combatant designation and detention policy to citizens captured in the homeland, it would be no surprise if the Attorney General directs agents to detain and then turn over future terrorist-supporting suspects to the military.

Third, the secret criteria for designating an American as an enemy combatant may require positive action in furtherance of an attack. Hamdi was captured abroad with a weapon fighting against coalition forces, and Padilla was captured in Chicago seeking targets for a radiological bomb plot. Conversely, there is no indication that any of the suspects apprehended in either Buffalo or Portland were physically participating in a terrorist action against the U.S. Of course, this is mere guesswork since the criteria for deciding who falls into enemy combatant status is unknown to the public and could change on a daily basis according to Solicitor General Olsen.[44]

Nonetheless, the chief law that these and future defendants not designated enemy combatants will face as they are prosecuted by Assistant U.S. Attorneys is a constitutionally problematic one. The Antiterrorism and Effective Death Penalty Act of 1996 criminalized providing "material support" to any group designated by the government as a terrorist group.[45] Material support is statutorily defined as providing to the illegal organization any of the following: "[C]urrency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, except medicine or religious materials."[46]

According to Georgetown's Professor David Cole, this statute is unconstitutionally overbroad – effectively chilling protected activities.[47] Moreover, he argues, the lack of any intent element in the crime itself unfairly relieves the prosecution of proving in court that defendants actually meant to do the country harm through their perhaps misguided actions:

> It allows the government to obtain convictions for so-called terrorist crimes without proving any intent to engage in or further terrorism. The government need only show that the individual provided a proscribed group with some 'material support,' which . . . can be mere attendance at a training camp. The law is written so broadly that it would make it a crime to write a column or to file a lawsuit on behalf of a

44. *See* Lane, *supra* note 34, at A1.
45. *See* 18 U.S.C. § 2339A (2003).
46. *Id.* § (b).
47. *See* David Cole, Opinion, *Fight Terrorism Fairly*, N.Y. TIMES, Oct. 19, 2002, at A17.

> proscribed organization, or even to send a book on Gandhi's theory of non-violence to the leader of a terrorist group in an attempt to persuade him to forego violence.[48]

At least two federal district courts in California have ruled this part of the statute unconstitutional. Prior to the War on Terror, in 1998, the court for the Central District of California held the portion of the statute's material support definition in section (b) that prohibits providing personnel and training to terrorist organizations was impermissibly vague and thus stricken from the statute.[49] In that case, several American groups were "supporting" two foreign groups listed as terrorist organizations – the Kurdistan Worker's Party (PKK), an ethnically distinct secessionist group in southeast Turkey, and the Liberation Tigers of Tamil Eelam (LTTE) in Sri Lanka.[50]

The court's reasoning for finding the act vague was that the statute did "not . . . appear to allow persons of ordinary intelligence to determine what type of training or provision of personnel is prohibited. Rather, [it] appears to prohibit activity protected by the First Amendment—distributing literature and information and training others to engage in advocacy."[51]

Four years later, in June 2002, the federal district court in Los Angeles dismissed the Justice Department's case based on the same statute against seven individuals accused of diverting charitable donations to the People's Mujahedeen[52] – a group implicated in the takeover of the U.S. embassy in Iran in 1979 that is still listed as a terrorist organization even though it opposes the current regime in Teheran.[53] The basis for his determination that the statute was unconstitutional rested on the inability of such groups designated as "terrorist" to contest that designation:

> [T]he law gives these groups 'no notice and no opportunity' to contest their designation as a terrorist organization, a violation of due process, Judge Takasugi ruled. 'I will not abdicate my responsibilities as a district judge and turn a

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48. *Id.*

> America has had these kinds of laws before. In the McCarthy era, Congress and the states passed numerous statutes that made it a crime to have an association with the Communist Party. But the Supreme Court repeatedly ruled that only those individuals who specifically intended to further the party's unlawful ends could be punished. Guilt by association, the court proclaimed, is 'alien to the traditions of a free society and to the First Amendment itself.'

Id.

49. *See* Humanitarian Law Project v. Reno, 9 F. Supp. 2d 1176 (C.D. Cal. 1998).

50. *See id.* at 1180-81.

51. *Id.* at 1204.

52. *See* Greg Winter, *Judge Drops Case Against 7 Tied to Group Called Terrorist*, N.Y. TIMES, June 24, 2002, at A13.

53. *See* Greg Winter, *A Nation Challenged: Fund-Raising; Aiding Friend or Iranian Foe is Issue in Case*, N.Y. TIMES, Mar. 22, 2002, at A13.

> blind eye to the constitutional infirmities' of the law . . . . Because the government made its list of terrorist organizations in secret, without giving foreign groups a chance to defend themselves, the defendants, 'are deprived of their liberty based on an unconstitutional designation that they could never challenge,' he said.[54]

It is unclear whether the government will appeal this case;[55] but it is clear that the administration cannot continue to rely principally on a flawed statute without risking the loss of significant convictions. Consequently, it would not be surprising to find this case taken up by the 9th Circuit Court of Appeals – the first step in making it way to the Supreme Court; nor would it be surprising to hear Attorney General Ashcroft proposing some amendments to the existing law or new anti-terrorism laws altogether in the next legislative session.

2. Immigrant Status – The Haddad & North Jersey Media Cases

> And if a stranger sojourn with thee in your land, ye shall not do him wrong. The stranger that dwelleth with you shall be unto you as one born among you, and thou shalt love him as thyself.
> — Leviticus 19:33

During the months immediately following 9/11, the federal government dispersed its agents throughout the country to implement the largest single dragnet in American history. It succeeded in rounding up approximately 1200 men of mostly Arabic and South Asian origin that it then detained for questioning. Many of these individuals were arrested for technical violations of their immigration status. No names were released of those detained and all hearings on their immigration status and requests for deportation were held in secret.[56]

By November 2001, a federal gag order had been issued prohibiting officials from discussing the detainees and even forbidding defense attorneys from taking documents out of the courtroom. Due to the secrecy of the process, no government oversight or review of the actions occurred. There was no possibility of appeal from the hearings. Immigration courts, as executive branch bodies that are part of the Justice Department—not part of the Article III federal judiciary—had no choice but to comply with the Department's directives.

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54. Winter, *supra* note 52, at A13.

55. *See id.*

56. *See* Susan Sachs, *Judge Rejects U.S. Policy of Secret Hearings*, N.Y. TIMES, May 30, 2002, at A21.

Several court challenges were mounted against the government's detention policies – specifically attacking the decision not to release the names of individuals held, secrecy of the immigration hearings, and misuse of the material witness statute to hold individuals indefinitely without filing charges against them and allowing them access to counsel. The results have been decidedly mixed, as the courts continue to wrestle with the proper balance between equal justice and national security. Consequently a split in the Circuits has occurred that can only be resolved with a Supreme Court ruling. At the end of October 2001, the ACLU filed a request for information under Freedom of Information Act (FOIA) concerning the identity of the individuals. The executive branch remained non-responsive. In December, the group filed suit in federal district court, seeking to compel the government's compliance with FOIA. To justify its secrecy, the Justice Department argued that the nature of its actions were necessary for national security reasons—that identifying the detainees would alert terrorists as to how the investigation was proceeding and could aid in future terrorist plots. The decision by Judge Gladys Kessler came down in August of 2002 against the Justice Department, holding that the government had to release the names of the detained individuals. However, she stayed her order pending appeal.[57]

She noted that "[s]ecret arrests . . . are a concept odious to a democratic society."[58] Judge Kessler's rationale rested on the importance of verification that the government was operating within the bounds of the law, and it was her sworn duty as a member of the judicial branch to make sure that the executive branch acted appropriately. She said:

> The court fully understands and appreciates that the first priority of the executive branch in a time of crisis is to ensure the physical security of its citizens. . . . [But] the first priority of the judicial branch must be to ensure that our government always operates within the statutory and constitutional constraints which distinguish our democracy from a dictatorship.[59]

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57. *See* American Civil Liberties Union, *ACLU Joins in FOIA Request for Information on Detainees, Says Government Has Refused to Answer Previous Inquiries*, *available at* http://archive.aclu.org/news/2001/n102901a.html (Oct. 29, 2001) (last visited Mar. 24, 2003); *see also* Amy Goldstein, *A Deliberate Strategy of Disruption; Massive, Secretive Detention Effort Aimed Mainly at Preventing More Terror*, WASH. POST, Nov. 4, 2001, at A01; *see also* American Civil Liberties Union, *In First Lawsuit Filed Regarding Mass Detentions, Civil Liberties Groups Demand Release of Essential Information Under FOIA*, *available at* http://archive.aclu.org/news/2001/n120501b.html (Dec. 5, 2001) (last visited Mar. 24, 2003).

58. Adam Liptak et al., *After Sept. 11, a Legal Battle On the Limits of Civil Liberty*, N.Y. TIMES, Aug. 4, 2002, at A1.

59. Linda Greenhouse, *Judicial Restraint; The Imperial Presidency vs. The Imperial Judiciary*, N.Y. TIMES, Sept. 8, 2002, at D3. *See also*, Neil A. Lewis, *Judge Orders U.S. to Release Names of 9/11 Detainees*, N.Y. TIMES, Aug. 3, 2002, at A1.

On behalf of the Ashcroft Justice Department, an Assistant Attorney General chastised the judge for her ruling in a remarkably strong-worded statement that questioned not only the judge's patriotism, but also accused her of helping terrorists succeed in their mission:

The Department of Justice believes today's ruling impedes one of the most important federal law enforcement investigations in history, harms our efforts to bring to justice those responsible for the heinous attacks of September 11 and increases the risk of future terrorist threats to our nation.[60]

By the time of Judge Kessler's ruling, all but seventy-four of the detainees had been deported or released. Most, like the 131 Pakistani's who were secretly spirited back to their homeland on a chartered Portuguese jet, left the U.S. quietly, without fanfare and without a public hearing of their cases.[61] Later that month, the American Bar Association voted to oppose the secret detention of foreign nationals within the U.S. Unfortunately, neither of these actions came in time to help the other one thousand nameless individuals who were held, interrogated and disposed of by the government without judicial or public scrutiny.[62]

Five months after the ACLU action was filed, the *Detroit Free Press* together with the *Detroit News* and Michigan Congressman John Conyers commenced an action in Detroit's federal district court to open up the secret immigration hearings against Ann Arbor resident Rabih Haddad – a native of Lebanon who had overstayed his tourist visa. In April, Judge Nancy G. Edmunds ruled in favor of the newspapers to open the hearings. In so doing, she relied on both history and practice in the absence of law to the contrary:

> The statutory and regulatory history of immigration law demonstrates a tradition of public and press accessibility to removal proceedings. From the start of the federal government's regulation of immigration in the last quarter of the nineteenth century, the governing statutes and regulations have expressly closed exclusion hearings (i.e. hearings to determine whether an alien may enter the United States), but have *never* closed deportation hearings (i.e. hearings to determine whether an alien already within the country may remain . . .).[63]

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60. Steve Fainaru & Dan Eggen, *Judge Rules U.S. Must Release Detainees' Names*, WASH. POST, Aug. 3, 2002, at A1.

61. *See* Steve Fainaru, *U.S. Deported 131 Pakistanis In Secret Airlift; Diplomatic Issues Cited; No Terror Ties Found*, WASH. POST, July 10, 2002, at A1.

62. *See* Josh Meyer, *Bar Assn. Assails U.S. on Detainees*, L.A. TIMES, Aug. 14, 2002, at 1.

63. Detroit Free Press v. Ashcroft, 195 F. Supp. 2d 937, 943 (E.D. Mich 2002) (emphasis in original).

On appeal, the 6th Circuit agreed with Judge Edmunds. The decision, handed down at the end of August, found that the modicum of enhanced national security argued by the government as a basis to continue deportation hearings in secrecy was vastly outweighed by society's interest in public and press oversight of how the government wields its delegated power. Indeed, Judge Damon J. Keith scolded the Justice Department, stating that "[d]emocracies die behind closed doors."[64] He specifically emphasized the rationale of this important concept in his opinion:

> Since the end of the 19th Century, our government has enacted immigration laws banishing, or deporting, non-citizens because of their race and their beliefs. While the Bill of Rights zealously protects citizens from such laws, it has never protected non-citizens facing deportation in the same way. In our democracy, based on checks and balances, neither the Bill of Rights nor the judiciary can second-guess government's choices. The only safeguard on this extraordinary governmental power is the public, deputizing the press as the guardians of their liberty.
>
> Today, the Executive Branch seeks to take this safeguard away from the public by placing its actions beyond public scrutiny. Against non-citizens, it seeks the power to secretly deport a class if it unilaterally calls them 'special interest' cases. The Executive Branch seeks to uproot people's lives, outside the public eye, and behind a closed door . . . . The First Amendment, through a free press, protects the people's right to know that their government acts fairly, lawfully, and accurately in deportation proceedings.
>
> When government begins closing doors, it selectively controls information rightfully belonging to the people. Selective information is misinformation. The Framers of the First Amendment 'did not trust any government to separate the true from the false for us' (citing prior Supreme Court opinions). They protected the people against secret government.[65]

New Jersey's federal district court judge John Bissell essentially agreed with Judge Kessler's determination to open government immigration hearings when he ruled in May 2002 that the government could only close such

64. Detroit Free Press v. Ashcroft, 303 F.3d 681, 683 (6th Cir. 2002).
65. *Id.* at 682-83. (emphasis added)

hearings on a case-by-case basis, not under a blanket secrecy order.[66] In the case of *North Jersey Media Group v. Ashcroft*, several media outlets and the ACLU sued to open the hearings on the basis of due process violations and the public's right to monitor the actions of government officials.[67]

The government appealed the decision to the 3rd Circuit Court of Appeals and sought a stay during appeal. A three-judge panel from the 3rd Circuit denied the government's motion,[68] but the Justice Department appealed this to the Supreme Court, arguing in its brief that "[t]his is an extraordinary case, touching on the nation's very ability to defend itself against the continuing threat of hostile attack from myriad and unknown sources" – referring to the value that releasing the names of those detained could have for terrorist cells.[69] The Justices eventually granted the stay to keep the hearings secret during appeal. No opinion accompanied the Supreme Court's order.[70] Three months later, the 3rd Circuit ruled in Philadelphia that the INS blanket secrecy order was appropriate[71] given the deference due to the executive branch – reversing Judge Bissell's decision to open the hearings on a vote of two to one.[72] Chief Judge Edward Becker, writing for the court, noted:

> We are keenly aware of the dangers presented by deference to the executive branch when constitutional liberties are at stake, especially in times of national crisis . . . . On balance, however, we are unable to conclude that openness plays a positive role in special-interest deportation hearings at a time when our nation is faced with threats of such profound and unknown dimension.[73]

The plaintiff's attorney criticized the court for accepting the government's "parade of horribles" and Hofstra University law professor Eric Freedman added that "Closed proceedings are always more convenient to the executive branch . . . . The real scandal here . . . is that history, law, policy and the precedents of the Supreme Court, to say nothing of the Constitution,

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66. *See* Sachs, *supra* note 56, at A21.

67. *See id.*

68. *See Appeals Panel Upholds Ruling for Open Court*, N.Y. TIMES, June 19, 2002, at A19.

69. Susan Sachs, *Ashcroft Petitions Justices for Secrecy in Deportations*, N.Y. TIMES, June 22, 2002, at A9.

70. *See Supreme Court Allows Secrecy to Stand in Deportation Cases*, N.Y. TIMES, June 29, 2002, at A10.

71. *See* North Jersey Media Group, Inc, et al. v. Ashcroft, No. 02-2524 (3rd Cir. 2002), *available at* http://news. findlaw.com/hdocs/docs/terrorism/ashnjmg10802opn.pdf (last visited May 8, 2003).

72. *See* Adam Liptak & Robert Hanley, *Court Upholds Secret Hearings on Deportation*, N.Y. TIMES, Oct. 9, 2002, at A1.

73. *Id.*

require the opposite result."[74] Most of the 752 people specifically detained on immigration violations have been deported or released – only 81 remain in custody.[75]

3. The 'Material Witness' Dilemma

The government's alternate policy of indefinitely detaining people in secrecy as "material witnesses" when there are no immigration violations to hold them on was also questioned by a New York federal district court in May. Judge Shira A. Scheindlin ruled that the Justice Department overreached its power in detaining a Jordanian man, Osama Awadallah – a student in California with a green card, as a material witnesses who authorities believe might have information for grand juries investigating terrorism. The judge determined that a person may only be held with probable cause under the material witness statute – which the judge ruled had not been applied correctly. Moreover, Judge Scheindlin ruled that such "witnesses" could only be detained after an indictment was returned.

The material witness statute was designed to allow for detention of an individual who had information critical to criminal proceeding that was in progress if that individual could not be compelled to testify in any other way. The judge wrote, "Since 1789, . . . no Congress has granted the government the authority to imprison an innocent person in order to guarantee that he will testify before a grand jury conducting a criminal investigation." She relied on a prior statement by Attorney General Ashcroft that he would utilize this rarely invoked law aggressively to prevent, disrupt and delay new terrorist attacks to support her conclusion that this misuse was improper: "*Relying on the material witness statute* to detain people who are presumed innocent under our Constitution *in order to prevent potential crimes* is an illegitimate use of the statute."[76] Ashcroft rejected the decision as an anomaly.

Two months later, while the government was appealing Scheindlin's decision to the 2nd Circuit Court of Appeals, Judge Michael B. Mukasey, also of the New York federal district court, ruled in favor of the administration – characterizing the previous ruling by Scheindlin as an incorrect interpretation of the statute. According to Mukasey's decision, the government could proceed to use the statute to indefinitely detain individuals in secrecy in pursuit of its war on terror. With such conflicting decisions at the district level, it will

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74. *Id.*

75. *See id.*

76. *See* Benjamin Weiser, *Judge Rules Against U.S. on Material Witness Law*, N.Y. TIMES, May 1, 2002, at A10 (emphasis added); *see also* Steve Fainaru & Amy Goldstein, *Judge Rejects Jailing of Material Witnesses; Ruling Imperils Tool in Sept. 11 Probe*, WASH. POST, May 1, 2002, at A1.

be up to the 2nd Circuit to clarify whether the law is being manipulated or followed appropriately.[77]

Nonetheless, public opinion is steadily coalescing against Mr. Ashcroft's legal initiatives to detain non-citizens. Professor David Cole of Georgetown University Law Center, summed it up this way, "It's really unprecedented that we have locked up several hundred individuals in secret. It's as close to 'disappearing' individuals [like in South American dictatorships] as we in this country have ever come. They don't want us to know how much they're just shooting in the dark on this investigation."[78] And editorials, such as this one from the St. Louis Post-Dispatch, have begun to pepper newspapers across the country since litigation against secret detentions by the government has ensued:

> I[n] this country, we don't imprison people unless there is evidence they committed a crime. We don't hold detention hearings behind closed doors. We don't imprison people for crimes they might commit in the future. All these things are fundamental.
>
> Yet since Sept. 11, Attorney General John D. Ashcroft has used the federal material witness law in exactly those ways, locking up two dozen people. Last week, a federal judge in New York called Mr. Ashcroft's tactics 'illegitimate.'
>
> A material witness is not a crime suspect, but has information that is important to a prosecution. If the witness might flee, prosecutors can lock him up to get a sworn statement. But Mr. Ashcroft has used the law more broadly, imprisoning people he thinks might commit a crime.
>
> Last week's ruling freed Osama Awadallah, a Jordanian with a legal resident alien's green card who attended college in California. The FBI found his first name and old telephone number in a car used by one of the Sept. 11 hijackers. The government says he lied when asked during a polygraph exam if he had advance knowledge of the Sept. 11 attacks. A judge held him as a material witness.
>
> For 20 days, Mr. Awadallah was shuttled among four prisons, held in solitary confinement, shackled, strip-searched and held incommunicado. On Oct. 10, while handcuffed to a chair, he testified before a grand jury he had met two of the hijackers, but could remember the name of only one, Nawaf

77. *See* Steve Fainaru, *Judge: U.S. May Jail Material Witnesses; N.Y. Ruling Conflicts with Decision in Prior Case in Same Federal Court*, WASH. POST, July 12, 2002, at A12.

78. Margaret Graham Tebo, *Courts Wrestle with Keeping Secret Detainees*, 88 A.B.A.J. 46 (2002).

> Al-Hazmi. He denied knowing another hijacker, Khalid Al-Mihdar, even after the government produced a college examination book in which Mr. Awadallah had written 'Khalid.' He was charged with perjury.
>
> Last week, U.S. District Judge Shira A. Scheindlin ruled the detention illegal. She said the material witness law only applied after a criminal case starts -- not to the grand jury investigation before it starts. Holding an innocent person during a grand jury investigation might violate the Fourth Amendment's requirement that an arrest be based on evidence of a crime, she said.
>
> Mr. Ashcroft is appealing. He notes that many other judges have approved the use of the material witness law during grand juries. He says that locking up material witnesses is essential to disrupting new terrorist attacks.
>
> But even if Mr. Ashcroft's use of the law was justified in the first confusing days after Sept. 11, it certainly has been abused since. Consider the case of Abdallah Higazy, an Egyptian-born student who was arrested as a material witness on Dec. 17 when he returned to a hotel near the World Trade Center to retrieve possessions left behind on Sept. 11. The FBI confronted him with a ground-to-air radio found at the hotel.
>
> After three weeks of detention, Mr. Higazy seemed to confess and was charged with interfering with an investigation. But a few days later, another hotel guest claimed the radio. The government released Mr. Higazy in prison garb and with a $3 subway fare.
>
> Compounding these abuses is the secrecy that has shrouded the use of the law. The Justice Department won't say how many people have been held as material witnesses. Nor are the court proceedings involving material witnesses open to the public.
>
> We all want to be safe, but in this country, we hold certain values fundamental. The Justice Department's tactics are fundamentally wrong.[79]

As of November 2002, the government had jailed forty-four people as "material witnesses" – holding them indefinitely without access to counsel or under indictment by a grand jury. Nine of these are still known to be in

79. Editorial, *At What Cost?*, ST. LOUIS POST-DISPATCH, May 6, 2002, at B6.

custody, twenty-nine have since been released and it is unclear what happened to the other six. The Justice Department has no comment on the matter.[80]

4. Battlefield Detainees – The Guantanamo Bay Cases

Camp Delta, a prison camp at the U.S. Naval Base in Guantanamo Bay, Cuba, is home to 620 detainees captured largely during the American-led invasion of Afghanistan in 2001. The newly constructed Camp Delta is a more permanent facility than Camp X-Ray, the makeshift maze of cages that served as the original detention center. The detainees are either members of al Qaeda or Taliban fighters – most are Saudi Arabian, but there are at least forty-three nationalities represented. None have appeared before any sort of tribunal to have their status determined as combatants, none have access to counsel or their home governments, and none have been accorded legal rights guaranteed under international law – although all have been treated humanely and are kept in good physical condition.[81]

The basic rule is that both citizens and non-citizens who are arrested as suspects in criminal activity are arraigned and processed through Article III civilian courts. Both are usually accorded *habeas corpus* relief. Outside the United States, the rules change. In wartime, non-citizen prisoners of the enemy's forces who are captured in battle and detained abroad are processed for any criminal activity according to the terms of the Uniform Code of Military Justice – which is brought into application through the terms of the Third Geneva Convention on Treatment of Prisoners of War.[82]

Because the Bush administration did not want its detainees accorded POW status, even though they were captured as byproducts of America's war on terrorism, the invasion of a foreign country and the occupation of that country,[83] the Defense Department labeled them "unlawful combatants" and argued that the treaty protections do not apply,[84] therefore the UCMJ process does not apply. Consequently, the administration believes it can run them through the military commissions to be established under the President's November 13th Military Order,[85] where they will enjoy fewer rights as

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80. Washington Post, *Nearly Half of 'Material Witnesses' Haven't Testified*, OMAHA WORLD-HERALD, Nov. 24, 2002, at 16A.

81. *See* Jeffrey Kaye, *The Detainees*, NEWSHOUR WITH JIM LEHRER – PBS, Jan. 22, 2003, *available at* http://www. pbs.org/newshour/bb/military/jan-june03/detainees_1-22.html (last visited Apr. 6, 2003).

82. *See generally* Geneva Convention, *supra* note 23.

83. *See* Thom Shanker & Katherine Q. Seelye, *Behind-the-Scenes Class Led Bush to Reverse Himself on Applying Geneva Conventions*, N.Y. TIMES, Feb. 22, 2002, at A12: "By denying captives full Geneva protections, the administration said, it could more thoroughly interrogate them to uncover future terrorist plots, bring a wide array of charges against them, try them before military tribunals and administer the death penalty." *Id.*

84. *See* William Glaberson, *Critics' Attack on Tribunals Turns to Law Among Nations*, N.Y. TIMES, Dec. 26, 2001, at B1.

85. *See generally* Military Order, *supra* note 22.

defendants what they would enjoy in front of a regular Court Martial or Article III federal court.

The administration's definition and use of the legal status "unlawful combatant" is broad. Apparently, Taliban detainees (who the government now recognizes as covered by the Geneva Convention as the *de facto* army of Afghanistan, but not as POW's) and al Qaeda detainees (who the government says are not covered by the treaty) are both "unlawful combatants" because they failed to follow the rules of warfare.[86] If they are not POW's, then by implication, they are not recognized as members of the armed forces – which would make them civilians.

As civilians, their status would be covered by the Fourth Geneva Convention protecting of civilians during armed conflict.[87] These treaty terms would accord them rights to be tried, if they are to be tried, by regularly constituted civilian courts (Article III federal courts). The administration has not specifically addressed this argument, but is likely to broaden its definition of "unlawful combatant" even further – analogizing the detainees to spies and mercenaries who could traditionally be summarily executed under historical practice in warfare. What does this process do to American justice? What does it do to how America is perceived by other people around to the world?

VI. NON-ARTICLE III COURTS

Beyond the normal courts established by Congress under Article III of the Constitution, other judicial bodies either have already impacted the government's War on Terror or may do so in the near future.

A. Foreign Surveillance Intelligence Court

In May 2002, the Foreign Surveillance Intelligence Court (FSIC), a statutorily created body pursuant to an act of the same name, handed down a shocking decision. Although the government was granted the eavesdropping authority it requested, (none have been turned down in the court's twenty-two-year history, including the 932 requests made last year),[88] the decision was surprising because it actually castigated the Justice Department for breaching the wall separating intelligence gathered for criminal prosecution and that gathered for actual foreign intelligence purposes. It also chastised the FBI and Justice Department for providing it with false or erroneous information on

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86. *See* Thom Shanker & Katherine Q. Seelye, *Word for Word/The Geneva Conventions, Who is a Prisoner of War? You Could Look it Up. Maybe.*, N.Y. TIMES, Mar. 10, 2002, at D9.

87. *See generally* Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287, *available at* http://www1.umn.edu/humanrts/instree/y4gcpcp.htm (last visited Mar. 24, 2003).

88. New York Times, *New Power in Terror Inquiries Put to Use*, OMAHA WORLD-HERALD, Nov. 24, 2002, at 16A.

which to base search warrants and wiretap authorizations on at least seventy five occasions. The court rejected the Attorney General's assertion that the new USA Patriot Act allowed the FBI much more leeway in its domestic surveillance capability.[89]

However, on appeal to a three-judge review panel selected by Chief Justice Rehnquist, the ruling by the lower panel on the government's surveillance capability was overturned, and the lower court was ordered to "issue a new ruling giving the government the powers it seeks."[90] The review panel held that no such artificial wall continued to exist between intelligence use by investigators and prosecutors. Digesting the opinion of the review panel that comports with the Attorney General's argument, Creighton University's Professor Mack notes the problematic consequences:

> Essentially, the FISA review court's opinion would have the American public believe that the government has been obstructed at every twist and turn in its pursuit, investigation, and prosecution of terrorist activity, when, in fact, history reveals that just the opposite is true. The courts have been extraordinarily solicitous of the government's efforts, providing them with broad latitude to pursue counterterrorism objectives. It bears repeating that the lower FISA court has *never denied* a request for a FISA warrant. . . . What the lower FISA court recognized and, indeed, what all Americans should legitimately fear is that the Executive branch is disingenuously using its September 11th failures in conjunction with the hastily drafted and poorly crafted Patriot Act to 'give the government a powerful engine for the collection of foreign intelligence information targeting U.S. persons.'
>
> There is no question that Congress bungled its legislative responsibility by hurriedly enacting a far-reaching statute without debate or analysis. There is also no question that the Executive Branch, which goaded Congress into its haste, now seeks to use this legislative failure as a means to specifically target U.S. citizens. But perhaps most importantly, there is also no question that a secret FISA appellate court structure, with judges hand selected by the Chief Justice . . . that hears only the government's evidence, and grants only the government a right to appeal is a singularly inappropriate forum to resolve issues that threaten the fundamental rights

89. *See Feds Get Wide Wiretap Authority*, CBS News, *available at* http://www.cbsnews.com/stories/2002/08/23/attack/printable519606.html (Nov. 18, 2002) (last visited Apr. 6, 2003).

90. *Id.*

> and values of all U.S. citizens. The only question that remains is how much further our justice system will be derailed in pursuit of the war on terrorism.[91]

B. Executive Military Tribunals

As of this writing, the Bush administration has not empanelled any of the military commissions that it has laid the legal groundwork for by promulgating its Military Order[92] and the supporting DOD regulations.[93] Thus, it remains unclear how these courts will function in reality beyond the rules that establish them. However, it is becoming clear that Article III federal courts are reluctant to interfere in their jurisdiction or operation so long as the defendants remain outside the sovereignty of the U.S.

At least two federal district court judges have determined they have no jurisdiction to issue writs of *habeas corpus* in response to requests on behalf of detainees in Guantanamo Bay. A. Howard Metz of the federal bench for California's Central District Court, ruled in February 2002, that neither he nor any other federal court judge could exercise their jurisdiction outside the sovereignty of the United States – which is where the naval base at Guantanamo Bay legally sits. He relied on prior decisions in the 1990s by the 11th Circuit Court of Appeals and the federal district court for Connecticut to determine that Guantanamo Bay, while under U.S. jurisdiction and control of the U.S., remained under the sovereignty of Cuba according to the terms of the lease agreement between those two countries.[94]

Judge Colleen Kollar-Kotelly, of the U.S. District Court for the District of Columbia agreed in July 2002, ruling that the Kuwaitis, Australians, and Britons seeking habeas relief for their relatives being detained in Cuba could not seek it in the federal courts for the same reasons articulated by Judge Metz. In dismissing their case, she suggested that international law might provide them some relief, but that would have to be worked out at the government-to-government level through their home countries.[95]

Given this ruling, it is apparent that the administration will not seek to empanel a military tribunal and begin a trial inside the United States or its

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91. Raneta Lawson Mack, *First Time Unlucky: The Jurisprudential Misadventures of the Foreign Surveillance Intelligence Court of Review*, Op-Ed, *Jurist Law Professors' Forum*, *at* http://jurist.law.pitt.edu/forum/ forumnew75.php (Nov. 26, 2002) (last visited Apr. 6, 2003).

92. *See generally* Military Order, *supra* note 22.

93. *See* Katharine Q. Seelye, Government Sets Rules for Military on War Tribunals, N.Y. TIMES, Mar. 21, 2002, at A1; *see also* Dep't of Defense, Military Comm'n Order No. 1 (Mar. 21, 2002), *available at* http://www.defenselink. mil/news/Mar2002/d20020321ord.pdf (last visited Mar. 24, 2003).

94. *See* Coalition of Clergy v. Bush, 189 F. Supp. 2d 1036 (D. Ca. 2002).

95. *See* Neil A. Lewis, *Judge Rebuffs Detainees at Guantanamo*, N.Y. TIMES, Aug. 1, 2002, at A20.

territories, even though the President's Military Order allows it to do so. They simply would not want to risk interference from a federal court. Thus, if and when such tribunals appear, they will likely be "off site" in Afghanistan, another country, or in Camp X-Ray on Guantanamo Bay itself. An aircraft carrier or other warship would not likely suffice as a viable venue immune from the reach of federal district courts as warships are commonly considered part of the territory of the sovereign to whom they belong.[96]

C. A National Security Court?

Harvey Rishikof, a law professor at Roger Williams University and former FBI counsel has proposed the creation of a new national security court dedicated to handling the difficult issues that have confronted federal courts and embroiled the government in a nest of legal challenges over its actions since the September 11th attacks. The basis for his proposal is two-fold: (1) the continuing war on terrorism is taking its toll on the federal court system, which is not designed to hold secret trials based on classified national security-related evidence, and (2) the alternative of trying terrorists in non-UCMJ tribunals only alienates our allies, who are vehemently against it, and creates a double-standard for non-Americans.[97]

While he concedes that federal courts functioned well in the Oklahoma City bombing case and the first World Trade Center attack, Rishikof argues that the system itself is unable to adapt in the long-term to such a continuing terrorist conflict as we now find ourselves in:

> The people we are fighting do not fit into our traditional legal classifications. We can continue to improvise our way through, compromising our federal criminal procedures and alienating our allies, or we can demonstrate our commitment to the rule of law by creating an institution that can handle new challenges without damaging our constitutional principles.[98]

As to structure, Rishikof suggests expanding the jurisdiction of the current Foreign Intelligence Surveillance Court, which is staffed by eleven federal judges on a rotation basis and approves secret search and seizure warrants based on classified intelligence and providing for a route of appeal up to the Supreme Court. Moreover, a pool of specialized defense attorneys with prior clearances to participate could be drawn from to provide counsel.

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96. *See* Lauritzen v. Larsen, 345 U.S. 571 (1952) ("a ship is constructively a floating part of the flag-state"); *see also* U.N. Convention on the Law of the Sea, Art. 91 & 92, 21 I.L.M. 1261 (1982).

97. *See* Harvey Rishikof, *A New Court for Terrorism*, N.Y. TIMES, June 8, 2002, at A15.

98. *Id.*

The advantages he cites that would stem from such a court include designation and fortification of an existing courthouse to hold terrorism trials – thus, streamlining physical security concerns, and the possibility of taking the court on the road to conduct hearings in remote locations – such as Camp X-Ray.[99]

While Professor Rishikof must be commended for the creativity of his suggestion, it must be noted that such a proposal runs directly counter to our American culture of open judicial proceedings, the fairness and legality of which are guaranteed by public scrutiny. This proposal, though well-intended, likely raises more thorny constitutional and judicial process questions than it ultimately answers. Would there be a specialized pool of pre-screened jurors that have special clearance? What would that do to the *voir dire* selection process?

Rishikof correctly points out that there are other specialized courts in the federal system for bankruptcy, tax, patents, international trade, and copyrights. However, these examples fail to support creation of a secret tribunal because they do not operate outside public scrutiny. Allowing secret hearings for issuance of search and seizure warrants, as now happens with the FISA court, sets the outside limits of what our legal and political values permit. Allowing secret trials based on secret evidence with secret outcomes and no public scrutiny to ensure fairness breaches those limits.

A federal courthouse, designated and fortified, as Rishikof suggests, holding unidentified prisoners in cells below ground, sitting as a massive windowless concrete bunker to which access is restricted – be it in downtown Boston or rural Virginia, belongs more to the landscape of Soviet Russia or Communist China than to America. The Bush administration has, in its responses to 9/11, provided enough legal symbols of what the American legal system is *not* fundamentally about (the USA Patriot Act, the Military Tribunals, and the withdrawn TIPS program to enlist neighborhood informants). America does not need a lasting physical symbol such as this National Security Court to give it permanent form.

VII. THE SUPREME COURT – AN ULTIMATE DESTINATION

While cases challenging the government's authority to indefinitely detain individuals, secretly surveil them, hold them as material witnesses, or summarily deport them are percolating in the lower federal courts, no case derived from America's post 9/11 War on Terror has yet made its way to the Supreme Court. However, given the gravity of civil liberty abuse at stake, it is extremely likely that several soon will. Consequently, it is important to gauge the tenor of the current bench on such subjects. Since Chief Justice Rehnquist has given these issues considerable thought, albeit in historical context, his are the most significant writings to consider here.

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99. *See id.*

In 1998, Rehnquist published a book entitled *All Laws but One* that discusses the place of civil liberties in wartime. He could not have known three years later how relevant that legal analysis would be. This book discusses civil liberties in wartime within the United States. Most of it covers the Civil War, with the remainder discussing both World Wars. Rehnquist's proposition is that one of war's necessities for a successful conclusion may be the temporary curtailment of civil liberties.[100]

This amounts to a sophisticated chicken and egg argument – if our country is not secure, then freedom does not matter because there is no country. In fact, the title of the book refers to a speech by Lincoln where he asked the rhetorical question: "Are all the laws, but one, to go unexecuted, and the government itself to go to pieces, lest that one be violated?" when he was justifying the suspension of *habeas corpus*. Rehnquist allows for this silence of the laws in time of war because it has always been balanced with responses by both the public and the legal community.

His whole argument, then, essentially rests on faith that this will always continue to be the case, handily disregarding Justice Brandeis' admonition, "experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent."[101] Shortly after his book's publication, Rehnquist noted in an address to the students at Drake University Law School:

> The courts, for their part, have largely reserved the decisions favoring civil liberties in wartime to be handed down after the war was over. Again, we see the truth in the maxim Inter Arma Silent Leges – in time of war the laws are silent. To lawyers and judges, this may seem a thoroughly undesirable state of affairs, but in the great scheme of things it may be best for all concerned. The fact that judges are loath to strike down wartime measures while the war is going on is demonstrated both by our experience in the Civil War and in World War II. This fact represents something more than some sort of patriotic hysteria that holds the judiciary in its grip; it has been felt and even embraced by members of the Supreme Court who have championed civil liberty in peacetime. Witness Justice Hugo Black: he wrote the opinion for the Court upholding the forced relocation of Japanese Americans in 1944, but he also wrote the Court's opinion striking down martial law in Hawaii two years later.

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100. *See generally* WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME (1998).

101. Olmstead v. United States, 277 U.S. 438, 478 (1928).

> While we would not want to subscribe to the full sweep of the Latin maxim – Inter Arma Silent Leges – . . . perhaps we can accept the proposition that though the laws are not silent in wartime, they speak with a muted voice.[102]

In a review of the book four years after its publication, New York Times reporter Adam Cohen noted,

> if Mr. Rehnquist the jurist sees the world as Mr. Rehnquist the historian does, there's cause for concern . . . . [The book's] central message is that in wartime, the balance between order and freedom tips toward order. In recounting the history, Justice Rehnquist gives all the arguments for order, and far too few for freedom. The people whose liberties are taken away are virtually invisible.[103]

As the U.S. Supreme Court begins to consider questions of equal justice and civil liberty as they are balanced against the executive's wartime administrative prerogatives, prior articulated opinions on the matter become increasingly important as a barometer of where the justices stand. Consequently, the Chief Justice's book, together with his public statements like those delivered at Drake above and his court opinions on citizenship and its content like in the *Verdugo-Urquidez* case, corroborate one another as reflective of his mind regarding this critical balance.

In the 1990 case of *United States v. Verdugo-Urquidez*, the Supreme Court held that the Fourth Amendment did not apply to search and seizure by federal agents of property owned by a nonresident alien that was located in Mexico. Writing for the majority, Rehnquist concluded that the term "people" in the Fourth Amendment referred only to U.S. citizens – who were, therefore, the only individuals in whom Fourth Amendment rights could possibly vest. Conversely, Fifth Amendment rights that vested in "persons" and Sixth Amendment rights that vested in "the accused" could be relied on by citizens and non-citizens alike. This dichotomy together with the territorial limitation of constitutional rights mitigated against Verdugo-Urquidez being protected.[104]

This holding is consonant with his book's determination disapproving the Supreme Court's *Korematsu* line of cases in 1942-43 authorizing a curfew and detention of Japanese on the West Coast only because those cases lumped together Issei (Japanese immigrants) with Nisei (Japanese Americans). In his

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102. William H. Rehnquist, *Remarks of the Chief Justice of the United States*, 47 DRAKE L. REV. 201, 208 (1999) (delivering the Dwight D. Opperman Lecture at Drake University School of Law, Sept. 18, 1998).

103. Adam Cohen, *Justice Rehnquist's Ominous History of Wartime Freedom*, N.Y. TIMES, Sept. 22, 2002.

104. *See* United States v. Verdugo-Urquidez, 494 U.S. 259 (1990).

view, the government had much more leeway to deal with the prior class of individuals rather than the latter class based simply on their status.[105]
While the Chief Justice has not spoken on such issues definitively since 9/11, it may be assumed that he holds to the reasoning presented in his 1998 book and his 1990 opinion in the *Verdugo-Urquidez* case. Although he is just one of nine justices who may decide how civil liberties are balanced against national security, or equal justice is balanced against maintaining order, his persuasive effect on the conservative wing of the Supreme Court cannot be underestimated. Thus, it appears that defenders of the USA Patriot Act, and administration officials issuing orders and rules under it, will at least find a sympathetic ally in the Chief Justice should they find themselves in the Supreme Court while the war on terrorism is in progress.

VIII. CONCLUSION

In his testimony before the Senate Judiciary Committee following the September 11th terrorist attacks, Attorney General Ashcroft warned against questioning the Administration's conduct of its War on Terror:

> To those who scare peace-loving people with phantoms of lost liberty, my message is this: Your tactics only aid terrorists, for they erode our national unity and diminish our resolve.[106]

It is precisely a deep sense of patriotism that motivates authors such as me to question the exercise of power by my government. The arrogance of power demonstrated by the Bush Administration in its legal responses to the terrorist attacks suffered by this country on September 11th 2001, encapsulated by the notion demonstrated time and again that it holds a monopoly on the right course of action and any opposition to or fair questioning of that course amounts to treason, cannot be allowed to continue unchallenged in this, the greatest of the world's democracies.

History is littered with the remains of shattered nations whose leaders consolidated power in times of adversity while entreating the people to "trust them" to do the right thing. Crassus manipulated the Roman Senate into making him Consul to defeat the revolt of Spartacus, which he engineered to threaten the city – the first step in transforming Republican Rome to Imperial Rome. Lenin implored the Russians to trust him and his provisional committee to lead them through the interim phase of socialism toward communism when the Bolsheviks took over in 1917. Stalin repeated this entreaty several years

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105. *See generally* Rehnquist, *supra* note 100.

106. Dan Eggen, *Ashcroft Defends Anti-Terrorism Steps; Civil Liberties Groups' Attacks 'Only Aid Terrorists,' Senate Panel Told*, WASH. POST, Dec. 7, 2001, at A1.

later. Hitler used it to calm the German people on his accession to power in 1933. While we may trust the current executive to lead this country's war on terror, does that mean we write a blank check? What about the next executive, and the one after that? Does accumulated power get handed back when the present executive's term is over?

The executive branch's accrual of power to itself has not been checked by the legislature, which is paralyzed for fear of seeming unpatriotic; and the first decisions by the federal judiciary, the only remaining bulwark against increasing executive power,[107] are just now beginning to come down – with mixed results and clearly not enough force to restore the balance yet.[108] The administration's entreaty to trust it not to abuse its growing authority has not been challenged by a cowed public – only the press has dared question it, as in this New York Times editorial of December, 2001:

> The administration has argued that even if the powers it is seizing are broad, it will not use them abusively. This has been a constant theme of Mr. Ashcroft and the administration in general – that they are people who can be trusted to use these broad, repressive rules wisely. That is not the way the American system works. This is a nation built around the rule of law, not faith in the goodness of particular officials.[109]

Fundamental rights of American citizens have been curtailed without their knowledge. By rewriting FBI rules crafted to curb abuses of the J. Edgar Hoover era, the Justice Department has given that agency the power to unleash its agents into the private lives of Americans without any indicia of illegal activity, let alone the former low-level pre-snooping requirements of reasonable suspicion or probable cause. Citizens can also now be detained as "material witnesses" indefinitely, without being charged, without access to counsel, incommunicado and in solitary confinement.[110]

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107. *See* Greenhouse, *supra* note 59.

> I[n] its aggressive conduct of the war on terrorism's domestic front, the Bush administration has encountered few obstacles from Congress or public opinion. Rather, it is federal judges, across the ideological spectrum, who have responded with skepticism . . . it actually should come as no surprise to find the judiciary in a restraining role.

Id.

108. *See id.* The Bush administration's legal strategy has been to defend its positions "categorically: no judicial review, no right to counsel, no public disclosure, no open hearings." *Id.*

109. Editorial, *Justice Deformed: War and the Constitution*, N.Y. TIMES, Dec. 2, 2001, at 14.

110. *See* Michael Moss & Ford Fessenden, *America Under Surveillance: Privacy and Security; New Tools for Domestic Spying, and Qualms*, N.Y. TIMES, Dec. 10, 2002, at A1; *see also* Philip Shenon & David Johnston, *Threats and Responses: The Investigation; Seeking Terrorist Plots, the F.B.I. is Tracking Hundreds of Muslims*, N.Y. TIMES, Oct. 6, 2002, at A1.

Alternatively, when courts have challenged the use of that method, Attorney General Ashcroft has substituted in the label of "enemy combatant" to justify handing those Americans over to Secretary Rumsfeld's Defense Department – which threw them into military brigs and wrapped their detention in the shroud of secrecy. Does that mean that these Americans have been stripped of their citizenship? No. However, it does mean that the U.S. military is holding American civilians against their will. Whatever happened to the doctrine of *posse comitatus*, restricting the military's domestic police powers? The Bush Administration vowed in its 2002 National Security Strategy to review that doctrine for possible alteration.[111]

Are these Americans being interrogated? Are they being tortured? We don't know the answers to these questions. All we know is that they are Americans who have been summarily denied their rights as citizens. The government contends that it has the ability to use either of these labels to apprehend Americans off planes, streets and even out of their own homes based on undisclosed surveillance, secretly "process" them and them into prison or a military jail indefinitely without a lawyer.

Court rulings that may find their way onto the Supreme Court's docket next term are growing. The Foreign Surveillance Intelligence Court has approved the secret collection of evidence against citizens not associated with criminal activity. The 4th Circuit has determined their indefinite detention by the military to be appropriate for citizens overseas. The 2nd Circuit must decide whether this is appropriate for citizens detained at home. The 6th Circuit demanded an end to secret deportation hearings by the INS, but the 3rd Circuit approved this process.

Basic rights of non-citizen residents in the U.S. have also been infringed wholesale. Protection against preventive or indefinite detention, privacy of the attorney-client relationship, rights to a jury trial, appeal and public hearings have all been swept aside by more Ashcroft initiatives implemented by the INS. Non-citizens outside the U.S. are not even accorded hearings guaranteed them under the Geneva Conventions. Hundreds now languish at Camp Delta in Guantanamo Bay, Cuba undergoing military, FBI and CIA interrogation without access to counsel.

These detainees, known by the new sobriquet "unlawful combatants" could remain at this improvised but expanding prison forever – just beyond the territorial reach of American federal courts, where no *habeas corpus* rights apply. They are victims of a legal status created by our government that refuses to acknowledge them as prisoners of war even though they were captured in the War on Terror which Congress acknowledged through Joint Resolution as the constitutional equivalent of a declared war.

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111. *The National Security Strategy of the United States of America* (Sept. 2002), *available at* http://www. whitehouse.gov/nsc/nss.pdf (last visited Apr. 6, 2003).

The government is also using its power to control information as a means of restricting public access to public records. Under new rules issued by Ashcroft to executive agencies directing them to read the parameters of the Freedom of Information Act as narrowly as possible while the administration's war on terrorism continues, many formerly available documents are being reclassified and withheld from public scrutiny.[112] As the following newspaper account shows, even mundane requests are increasingly denied:

> When United Nations analyst Ian Thomas contacted the National Archives in March to get some 30-year-old maps of Africa to plan a relief mission, he was told the government no longer makes them public. When John Coequyt, an environmentalist, tried to connect to an online database where the Environmental Protection Agency lists chemical plants that violate pollution laws, he was denied access. And when civil rights lawyer Kate Martin asked for a copy of a court order that has kept secret the names of some of the hundreds of foreigners jailed since Sept. 11, the Justice Department told her the order itself was secret. 'They say, 'there's a secrecy order barring us from telling you this. But the language of the secrecy order is secret, so you'll just have to take our word for it." she says.[113]

Without access to basic information, the public, the press, non-governmental organizations and civil society itself cannot sufficiently assess the motives, actions or justifications of our public officials. And if we cannot do that, then we cannot challenge those motives, actions or justifications as illegal or otherwise unacceptable. Public debate in this free democracy is thereby reduced to charges and countercharges based on hearsay and speculation. This is the breeding ground of paranoia. Indeed, this is why individuals routinely avoided talking to Western reporters in closed societies.

All Americans, indeed most people around the world, understand that there is an inherent tension between the desire to have a free society and a secure one. In a time of clear threat to our nation, there is a natural tendency to favor a secure one. However, if we compromise our most basic freedoms in order to have this "secure" society, are we truly any better off? Are we consciously trading one type of society for another? Did not the free societies emerge victorious over the closed societies in World War II? In the Cold War? Were not the excesses by our government in the name of security during those times later condemned as unnecessarily excessive? Is it not true now

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112. *See* Adam Clymer, *Government Openness at Issue as Bush Holds on to Records*, N.Y. TIMES, Jan. 3, 2003, at A1.

113. Laura Parker et al., *Secure often Means Secret; Post 9/11 Government Stingy with Information*, USA TODAY, May 16, 2002, at 1A.

that how we as a society react to the threat we face inevitably defines us as a people? Thomas Jefferson prophetically noted in his first inaugural address, delivered in 1801 - a time when it was still very much unclear whether this grand experiment known as "America" would succeed:

> Equal . . . justice; . . . freedom of religion; freedom of the press, and freedom of person under protection of habeas corpus, and trial by juries impartially selected. These principles form the bright constellation which has gone before us and guided our steps through an age of revolution and reformation. The wisdom of our sages and blood of our heroes have been devoted to their attainment. They should be the creed of our political faith, the text of civic instruction, the touchstone by which to try the services of those we trust; and should we wander from them in moments of error or of alarm, let us hasten to retrace our steps to regain the road which alone leads to peace, liberty, and safety.[114]

114. Thomas Jefferson, *First Inaugural Address*, Mar. 4, 1801, *available at* http://www.homeofheroes.com/ presidents/inagural/3_Jeff_1.html (last visited Apr. 6, 2003).

PUSHING THE LIMITS

Michael D. Carrington*

We presently find ourselves pushing legal, technical, and human limits to prevent terrorist attacks from occurring again in America. After September 11, 2001, Americans finally began listening to terrorist experts. These experts advised the United States government to tighten security measures;[1] strengthen existing laws;[2] enact emergency legislation;[3] and utilize the elite military forces for retaliation, preemption, and/or prevention.[4]

The tactics, equipment, and processes to accomplish this formidable task are currently evaluated, changed, and created in an environment of urgency, if not crisis. I will present a practical security/law enforcement perspective regarding these efforts, their current framework, and their future development. The central issue is the relationship between sustaining order in a post 9/11 America and maintaining our constitutional freedom.

I. THREAT ASSESSMENT AND MANAGEMENT

Threat management depends on the assessment results. The assessment depends on having reliable information and making informed judgments. The justification for new and revised procedures will depend on the credibility and acceptance of the assessment. When assessing possible threats, the first and most elementary step is to identify the threat. Possible threats may be crime, natural disaster, technology failure, or terrorism. In the case of terrorism, the terrorist actor must be identified. Analyzing a threat that China may pose, for example, is much simpler than the analyzing the threat from loosely defined terrorist groups. "Intelligence on the military programs of nation-states is

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1. *See, e.g.*, Enhanced Border Security and Visa Entry Reform Act of 2002, Pub. L. No. 107-173, 116 Stat 543 (2002) (codified at 8 U.S.C. §§ 1701-1775).

2. *See, e.g.*, Uniting And Strengthening America by Providing Appropriate Tools Required To Intercept And Obstruct Terrorism Act (USA Patriot Act) of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001).

3. *See, e.g.*, Emergency Supplemental Appropriations – Response to Terrorist Attacks On September 11, 2001, Pub. L. No. 107-38, 115 Stat. 220 (2001).

4. *See, e.g.*, Authorization For Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001)(codified at 50 U.S.C. § 1541).

comparatively more static and large enough to be covered by a variety of intelligence means."[5] The threat posed by terrorists is "fluid and elusive" and much harder to keep under continuous scrutiny.[6]

A. Identifying the threats and vulnerabilities

After identifying the outside threat, the threatened entity, nation-state, or large company must conduct a self-evaluation, identifying its own weaknesses and vulnerabilities. Unfortunately, the United States' vulnerability has been evidenced many times prior to September 11, 2001, for example: On February 26, 1993, Ramzi Yousef and co-conspirators detonated a bomb in a parking garage below the World Trade Center in New York City killing six people and injuring 1000; on April 19, 1995, Timothy McVeigh detonated a rented truck full of explosives in front of the Murrah Federal Building in Oklahoma City, Oklahoma killing 168 people; on July 27, 1996, an unknown person(s) detonated pipe bombs in Atlanta, Georgia at the Summer Olympics killing two people and injuring 112; and on October 12, 2000, a terrorist group steered a tug alongside the USS Cole while in the Yemeni port to refuel and detonated a bomb killing seventeen U.S. sailors and injuring thirty-nine others. The United States is no stranger to terrorism, both on its own soil and abroad. Furthermore, the American vulnerabilities have been exposed on numerous occasions, and are in fact published in an annual report by the Counterterrorism Threat Assessment and Warning Unit National Security Division of the Federal Bureau of Investigation.[7] The United States at large, however, did not truly understand its own true vulnerability until September 11, 2001, when 2998 Americans were tragically killed by terrorists, who crashed commercial airliners into the World Trade Center. This attack demonstrated the unpredictability and fluidity of terrorists. "An open society such as ours cannot eliminate completely danger from all aspects of life."[8]

After determining the threat and the threatened entity's vulnerabilities, assessment of the probability of the actual attacks and events must take place. The probability of actual attacks is now a part of our everyday lives. On February 7, 2003, the United States Presidential Office of the Press Secretary released Homeland Security Presidential Directive – 3, which created a

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5. John V. Parachini, Statement Before the House Subcommittee on National Security, Veterans Affairs, and International Relations Combating Terrorism: Assessing Threats, Risk Management, and Establishing Priorities (July 26, 2000), *available at* http://www.cns.miis.edu/pubs/reports/paraterr.htm (last visited Mar. 7, 2003).

6. *See id.*

7. *See generally* Federal Bureau of Investigations, FBI Publications – Terrorism in the United States, *available at* http://www.fbi.gov/publications/terror/terroris.htm (last visited Mar. 8, 2003).

8. Parachini, *supra* note 5.

national security advisory system.[9] This advisory system instituted five threat levels with associated colors ranging from green, low risk of terrorist attacks to red, severe risk of terrorist attacks. This system is similar to tactical alerts utilized by the U.S. military, in which various threat conditions are posted and various security measures are enacted to coincide with each respective threat level.[10] In determining the threat level, the U.S. government makes a decision on the following conditions:

> [a] decision on which Threat Condition to assign shall integrate a variety of considerations. This integration will rely on qualitative assessment, not quantitative calculation. Higher Threat Conditions indicate greater risk of a terrorist act, with risk including both probability and gravity. Despite best efforts, there can be no guarantee that, at any given Threat Condition, a terrorist attack will not occur. An initial and important factor is the quality of the threat information itself. The evaluation of this threat information shall include, but not be limited to, the following factors:
> To what degree is the threat information credible?
> To what degree is the threat information corroborated?
> To what degree is the threat specific and/or imminent?
> How grave are the potential consequences of the threat?[11]

However, Gavin de Becker, a national security expert, states that the Homeland Security Alert System is strictly political, and "[i]t is viewed by virtually all serious professionals in the field of security and threat assessment with disdain."[12] Furthermore, according to de Becker, the system's primary flaw is analogous to a doctor advising a patient of the severity of the illness but not the cure. The Bush administration has provided a public alert system,

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9. Homeland Security Presidential Directive-3, (Mar. 12, 2002), *available at* http://www.whitehouse.gov/news/releases/2002/03/20020312-5.html (last visited Mar. 8, 2003) [hereinafter Directive – 3].

10. One scale is called Defense Condition (DEFCON), which alerts military personnel on the possible threat of war and the Terrorists Force Protection Condition (FPCON)(formally called the Terrorist Threat Condition (THREATCON)). Each of these systems has a threat level assigned to varying degrees of possible attack. The FPCON scale ranges from normal, no threat to FPCON DELTA, which indicates that a terrorist attack has occurred and intelligence suggests that an attack is imminent. DELTA is generally a local condition, because the threat is intended for that specific installation. Most military bases find themselves in a FPCON CHARLIE versus DELTA during times of heightened terrorist threat awareness. *See also* Secretary of Air Force, Air Force Anti-Terrorism Standards, Attach. 4 at 59 (2002), *available at* http://wwwsam.brooks.af.mil/web/af/courses/amp/cluebag/afi10-245%20Anti-terrorism.pdf (last visited Mar. 8, 2003).

11. Directive – 3, *supra* note 9.

12. Jennifer Barrett, *High Alert*, NEWSWEEK WEB EXCLUSIVE, Feb. 13, 2003, *available at* http://www.msnbc.com/news/872585.asp (last visited Mar. 8, 2003).

but has failed to inform the American public of the meaning of this threat information.[13] Parachini stated, "[w]hile some hedge against the unpredictability of the future is commendable, we must not confuse prudent measures with efforts to avoid political blame for failure to take necessary precautions. . . . However, a balance must be struck between responsible preparedness and mere political hedging."[14]

After assessing the likelihood of an attack it must be determined if the attack is certain, highly probable, moderately probable, improbable, or probability unknown. Once this determination is made, the possible damage that may be inflicted by the attack should be assessed. This analysis must be made critically with possible losses kept in mind. In security language the final result should be a plan to manage the risks. Accomplishing this in companies can be difficult, much less in the context of our "Homeland!" Thus, the question arises are we betting lives on predictions made in the most complex of environments?

II. WHO'S RUNNING THE SHOW

Organizing law enforcement and security activities to prevent terrorist activities has proven difficult for the United States government. The fragmentation and decentralization of American law enforcement and security agencies are significant factors. Consider, for example, "turfs." During the development of the Homeland Security Department, it was recognized that many federal, state, and local agencies would have to share information. Until September 11th, many agencies did not share information, and many believe that if there was broader communication between the agencies – maybe the lives lost on September 11th could have been prevented.[15] However, "[f]ederal agencies are making progress in overcoming 'cultural' barriers and turf wars that once prevented them from sharing key information or data related to homeland security . . . ."[16]

The discussion of the details is underway and is very "devilish." There is great pressure for results and the present limits on procedures are for some being stretched beyond "reasonableness." The private security model has always been more oriented to preventing and mitigating "bad things." Most public law enforcement resources have traditionally been dedicated to responding to requests for service and crimes already committed. The incredible technology available to law enforcement and security efforts brings with it many issues, including its "proper use."

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13. *See id.*

14. Parachini, *supra* note 5.

15. *See* Maureen Sirhal, *Agencies are Overcoming Data-Sharing Barriers, Officials Say, available at* http://www.govexec.com/dailyfed/0303/030403td1.htm (last visited Mar. 8, 2003).

16. *Id.*

III. BASIC SECURITY

Tightening security usually begins with some basic security principles revolving around first, defining who should be allowed "in" and second, determining the activities in which they should be allowed to engage. In the context of the United States this discussion is very interesting and complex. We are pushing our equipment, and the people on all sides are trying very hard suddenly to tighten security at everything from borders to Super Bowls. This results in false positives and negatives. Information monitoring and gathering procedures change with the elevated threat level. The technology is here. How will it be used? Big brother and lots of other people are watching and listening. Electronic databases are immense and growing daily, and include all of us. The private sector is very involved in gathering and storing this information as well.

Economics and politics are obviously critical to these issues and their outcomes. It is a guns and butter type discussion with danger and threat levels driving the priorities. The security perspective is fairly straightforward when you accept the view that there is great danger. This gives weight to the other side of the equation and the priorities and procedures should facilitate the prevention of bad things. Billions of dollars, millions of security workers, hi tech equipment refinement, and utilization to include substantial monitoring and recording of most public activities and some private and personal activities too. My message: Get used to it, it is here to stay.

IV. FINDING THE GROOVE

The framework for all these activities are our political and legal systems which apportion and limit government and private power in ways reflecting our "peoples" wishes. The current limits are being pushed and are hardly recognizable for some. Citizens have supported these "pushes" because they want to be made safe or at least feel safer. Emergency situations requiring special restrictions and procedures are provided for and are more easily agreed upon and understood by those affected. New rules and limits reflecting the new threat level and technology are needed. If America is to fight a war against terrorism, it probably needs proper anti-terrorism laws. Finding and agreeing on the "groove" will not be easy. The discussion has hardly begun. Which raises the question, give me liberty or . . . ?

OCCURRENCES: THE WORLD TRADE CENTER INSURANCE QUESTION

Desmond Keith Derrington*

On September 11, 2001, an aircraft flew into one of the main towers of the World Trade Center complex, causing severe immediate damage to it, but not to the other main tower in the complex. About seventeen minutes later, a second aircraft flew into the other tower, also causing severe immediate damage to it. Later, but as part of the continuous progress of the initial damage, each tower collapsed, causing further catastrophic damage to the point of total destruction of the towers and other associated buildings.

The attack involving each aircraft was thought to be, and for present purposes may be accepted as having been, intentional and part of a larger coordinated act of terrorism directed at both towers and certain other targets of political significance.

The complex was insured under a policy that was unlimited in the aggregate but limited to US$3.546 billion for "any one occurrence." That limited figure will probably not be sufficient to cover the loss of either building, much less the loss of both. The issue presently being litigated between the insurers and the insured is whether, within the meaning of the policy, there was one occurrence or two.

The general thrust of the insured's argument is obvious – that there were two separate occasions of destruction at different times when different aircraft destroyed different buildings. Since they were physically separate, it is irrelevant, except that both buildings came within the coverage of the same policy, that they were part of the same complex. In the event of real ambiguity, it might also be argued, the *contra proferentem* principle will resolve the issue in favor of the insured. In the United States, there seems to be greater resort to this rule[1] than in Australia[2] or England, where it is regarded as a rule of last resort; but in this case it may even come to that. It

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* The Honorable Mr. Justice Desmond Keith Derrington was appointed as Justice of the Supreme Court in Queensland, Australia in 1982. He served until 2000. The Honorable Mr. Justice Derrington received his Bachelor of Laws from the University of Queensland and was admitted as Barrister-at-Law in 1954. He received his commission as Queen's Counsel in 1973. He currently teaches law at his alma mater, the University of Queensland, Australia. The Honorable Mr. Justice Derrington has published extensively on the law of liability insurance and is a frequent guest speaker at national and international conferences. He was a Visiting Fellow at Wolfson College, Cambridge in 1993 and a Visiting Scholar at Cornell University in 1995.

1. *See, e.g.*, Westchester Resco Co. v. New England Reinsurance Corp., 818 F.2d 2, 3 (2nd Cir. 1987).

2. *See* the review of the principles applicable to the resolution of ambiguities of interpretation collected by Kirby, J., *in* Johnson v. American Home Assurance Co. (1998) 192 CLR 266, 272-76.

would of course work in favor of the insured if this terminology of the policy had been proffered by the insurer.[3]

The construction point would be far more satisfactorily resolved if that can be achieved according to more satisfying, that is, substantial, canons of construction associated with the objective ascertainment of the common intention of the parties by reference to the words that they used. Again in the United States, the reasonable expectation of the insured plays a greater part in the construction of insurance policies than it does in Australia or England. This is somewhat more meritorious than the *contra proferentem* rule, but justification for its invocation here may be also prove to be doubtful because this insurance contract may well have been negotiated at arm's length by the insured's professional advisers. In that case, there is room for the countervailing argument that if there were any expectation, then the advisers would have ensured that the policy said so; and it does not. However, other related rules and reasoning of the more persuasive kind are certainly available. Together they require the word, "occurrence" to be construed in its circumstantial as well as its grammatical context, and with reason and commonsense in the light of the commercial purpose of the contract.

In *Australian Casualty Co. v Federico*,[4] Chief Justice Gibbs confirmed that the ordinary rules of construction applied to a policy of insurance so that, as in the case of any other commercial contract, a court may take the more reasonable of two alternative interpretations that are open on the words used. That is, one that is more in accord with the probable intention of the parties. He noted specifically that "the trend is, if anything, to adopt a liberal interpretation in favor of the assured so far as the ordinary and natural meaning of the words used by the insurers permits this to be done."[5]

The insurers' argument will probably be that the acts of destruction were simply different manifestations and part of the same event or occurrence[6] because they were orchestrated and related parts of the same attack and took place within the same time frame and at the same location. This has been called 'The Pearl Harbor Concept.' That is, that all the occasions of destruction were merely incidental parts of an integrated and continuous attack involving a number of aircraft, and it is immaterial that they engaged in separate acts of destruction. This will be more fully discussed below, but it is beneficial at this stage to understand the thrust of the essential issue.

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3. Whether it was so proffered is not known. In an insurance contract of this size, the insured's broker frequently submits terms, and it is not inconceivable that this applied to the relevant clause.

4. *See* Australian Casualty Co. v. Federico (1986) 160 CLR 520 (referring to the citation in Mt. Albert City Council v. New Zealand Municipality Co-operative Ins. Co. Ltd. (1983) NZLR 193; 25 HALSBURY'S LAWS OF ENGLAND, § 594, n. 1 (4th ed.)).

5. *Id.*

6. *See* Hartford Accident & Indemnity Co. v. Wesolowski, 305 N.E.2d 907 (N.Y. 1973), 33 N.Y.2d 169, 172–73. In New York the terms seem to be largely interchangeable with accident and with each other. *See id.*

The construction of the policy in this case will depend on the terms of the insuring clause, as influenced by other related contextual features,[7] and it is this latter feature that renders some authorities valueless or less valuable because of the differences in this respect that will be found in them.[8] The words will not be given any technical or strictly grammatical meaning that conflicts with its purpose, as the parties should have understood it, in the factual context in which the contract was made. Its commercial purpose was plainly the protection of the insured against the risk of loss through the damage to or destruction of all or part of the several structures of the complex, and it is to that purpose that occurrence must be related.[9] Equally, the insurer's purpose in limiting the risk to which it was exposed and upon which it assessed the premium must be accorded appropriate weight.

Even if there had been an express expansive or limiting definition of the term, or perhaps one that makes it mean something that it does not ordinarily mean, this too must undergo the construction process in which these other influences may operate. The contextual influences include the influence of other provisions of the policy, or implications to be drawn by the specific usage of the term in the provision. The relevant commercial purpose will vary

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7. *See* Montrose Chemical Corp. v. Admiral Ins. Co., 913 P.2d 878 (Cal. 1995).

8. For example, in Government Ins. Office of NSW v. Leighton-Atkinson Joint Venture (1981) 146 CLR 206, where the term, occurrences in a deductibles clause was considered, it was referred to as arising out of a number of what were described as causes, which clearly implied that the causes could not be the occurrences referred to. *See id.* Further, the causes were successive but quite distinct storms. *See id.* In each relevant issue the occurrences were a serious storm that caused damage to the property, followed by less severe storms while it was under repair causing further damage to the property that would not have occurred but for the original damage. *See id.* Consequently, the analogy breaks down to some extent by comparison with the position that would have obtained if the damage had been sustained at various times during one storm. In a number of other cases such as *Axa Reinsurance (UK) Ltd. v. Field* (1996) 1 WLR 1026, (1996) 3 All ER 517, the waters are muddied by the presence of an additional feature aggregating the losses of occurrences arising from one originating cause, but it is still possible to obtain some assistance from the Courts' treatment of 'occurrences' before considering whether they arose from a common cause. *See id.*

9. *See* Forney v. Dominion Ins. Co. Ltd. (1969) 1 WLR 928, 934; (1969) 1 Lloyd's Rep 502, 508; Kuwait Airlines Corp. v. Kuwait Ins. Co. Ltd. (1996) 1 Lloyd's Rep 664; Dawson's Field Award (29 Mar. 1972) discussed in *Kuwait Airlines Corp.* at 685; Distillers Co. Biochemicals (Aust.) Pty Ltd. v. Ajax Ins. Co. Ltd. (1973) 130 CLR 1; Mann & Holt v. Lexington Ins. Co. C.A. 256 para. 36 (C.A. Civ. 2000); (2001) 1 Lloyds Rep 1; 1 All ER (Comm.) 28 (which was a first party policy for the protection of property). *See also* Gann v. Tai Ping Ins. Co. Ltd. (1999) 2 All ER (Comm.) 54; Groupama Navigation et Transports v. Catatumbo CA Seguros (1999) 2 All ER (Comm.) 970; (2000) 2 All ER (Comm.) 193. There is some apparently conflicting dicta in Schiffshypothekenbank Zu Luebeck, A.G. v. Norman Philip Compton (a.k.a. "The Alexion Hope" case) (1988) 1 Lloyd's Rep 311, 319 (Nourse, L.J., stated that it was not necessarily an adventure or a peril but in *Kuwait Airlines Corp.*, Rix, J., did not regard this as any inhibition from considering the term from the point of view of the insured).

according to the peril insured against.[10] In this case, the peril is the insured's loss from damage to or destruction of the property through the risks described.

Sensibly, because of the multiplicity of occurrences that may be associated with a loss, the term must have some restriction on its scope, and if this is not express, it should be implied as a matter of ordinary practical business necessity. First, the occurrence referred to must be associated with the insured risk; and, secondly, that association must be causal, for a mere temporal nexus would have no rational point to it. The causal connection adopted in insurance law, in the absence of expression to the contrary,[11] is proximate cause.[12]

For example, in liability insurance where the peril is the insured's loss through incurring liability to a third party, that occasion of incurring liability is the occurrence. It is not the insured's wrongful act but the infliction of harm on the third party that attracts the insured's liability, which may sometimes be separate from the wrongful act, and much later.[13] Similarly, even though occurrence may be defined by the policy to include continuous or repeated exposure to substantially the same conditions, this would not bring multiple claims within the class of a single occurrence simply because they can all be traced back to a single action or decision such as the insured's or another's decision to follow a single course of conduct.[14]

Under the policy in the present case, the extent of the insurer's liability to indemnify was to be limited to the stipulated sum per occurrence, but the complex consisted of several structures, and the aggregation of claims under the policy was unlimited. There can be no argument that the parties contemplated the possibility that during the policy period there could be separate occasions of damage to different components of the complex, each

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10. The court will construe a term in the light of the hazard insured against. *See* Champion Int'l Corp. v. Continental Casualty Co. 546 F.2d 502, 505 (2nd Cir. 1976); Union Carbide Corp. v. Travelers Indemnity Co. 399 F.Supp 12, 17 (W.D. Pa. 1975); Transport Ins. Co. v. Lee Way Motor Freight Inc. 478 F.Supp 1325 (D. N.J. 1980).

11. Such a contrary expression sometimes appears in relation to a reference to a series of occurrences that, for example, may be specified as arising from the same original cause. That is a different point.

12. *See* Lawrence v. Accidental Ins. Co. (1881) 7 QBD 216, 220; Becker Gray & Co. v. London Ins. Corp. (1918) AC 101; Lloyds TSB General Ins. Holdings Ltd. v. Lloyds Bank Group Ins. Co. Ltd. C.A. 1643 § 42 (Cal. Civ. 2001).

13. *See* Remmer v. Glen Falls Indemnity Co., 295 P.2d 19 (Cal. Ct. App. 1956); Montrose Chemical Corp., 913 P.2d at 878; Distillers Co. Biochemicals (Aust.) Pty Ltd. v. Ajax Ins. Co. Ltd. (1974) 130 CLR 1 (where the various incurrence of liability by the insured was the result of its distribution of a drug, but that was not the "occurrence" though it was the common factor that caused the infliction of harm on the various consumers of the drug that was the basis of the insured's liability to be regarded as a series).

14. *See* Stonewall Ins. Co. v. Asbestos Claims Management Corp., 73 F.3d 1178, 1212 (2nd Cir. 1995). *But see* Consolidated Edison Co. v. Employers' Ins. Co. of Wausau (1997) WL 727486.

up to the amount of the limit. The insured will argue that this is their understanding of the terms of the agreement upon signing it.

The precise circumstances of this terrorist attack, and particularly the possibility that two aircraft would be flown into the two towers,[15] were surely unforeseen by the parties. However, they would have considered the possibility of some form of terrorism because of past unhappy experience at the same property.[16] The present issue would not have been considered absurd if it had been raised when drafting the policy. The possibility that both major buildings would be the targets of a coordinated attack would have been a foreseeable risk, even though outside the range of past experience. This is the general set of background circumstances known to both parties on which they based their contract.

When it is used in a policy, the word, occurrence, may be used to identify the trigger of coverage, or it may be used as a factor in the limitation of the amount of the coverage; and, in a vertical division of coverage, it may establish when an underlying coverage will be exhausted and the next layer begins. It may also be used to identify the occasion for the application of a deductible. Although this form of machinery may benefit one party over another in a particular case, it may not necessarily do so generally. Its favor may depend on the exigencies of the particular occasion. There is nothing unfair about this since the possibility of benefit may be offset by the possibility of detriment. Even if that is not so, it may be balanced by other considerations when the parties set the terms of their agreement, for example, a lower premium.

When it is used in this way, occurrence is flexible and adaptable to different usages, and it is for this reason that in any particular case contextual factors and/or the circumstantial matrix of the contract, including its commercial purpose, may influence its connotation. As it has been indicated above, the commercial purpose in this form of insurance is the protection of the insured against loss through the destruction of or damage to its insured property, and so in that context, "occurrence" must refer to the happening of damage or destruction to that property. For example, in the case of a planned hi-jacking and subsequent destruction of the aircraft, in respect of the insurance of the aircraft's owners, neither the plan nor the hijacking would be the "occurrence" within the terms of such a policy since that would not have come about until the occasion of destruction.[17]

In some usages, the word will expressly refer to the happening of the harm as the peril insured against. In respect to this dispute, "occurrence"

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15. The possibility of collision by an aircraft was foreseen by the architect in the precautions taken in the construction of the buildings. There had been an earlier occasion when a small aircraft had collided with the Empire State Building.

16. There had been an attack by the use of a car bomb in the basement parking garage of one of the buildings.

17. *See* Caudle v. Sharp (1995) LRLR 443 per Norse, L.J.; *Kuwait Airlines Corp*, at 684.

would mean that the occasion of destruction by each aircraft would be an occurrence within that meaning. In other usages, the same may be implied, such as when the "occurrence" is referred to as the result of an identified cause, for example, 'an occurrence arising out of a terrorist attack.' In such an expression, the occurrence cannot be the same thing as the cause out of which it arises.

If a usage has the effect of equating the term with a larger cause of the loss rather than an immediate and direct cause, it is the force of such an implied definition that has that result. However, its presence may imply that but for that presence, the occasion of each infliction of loss would be an occurrence within the ordinary meaning of the term. Alternatively, it may still be possible to argue with merit that when the term is identified with the cause of the loss, it may be confined to the proximate cause, the immediate and direct cause that results in each occasion of harm, and that it is only the reference to a 'series of similar causes' that has the expansive effect of the definition.[18] Except when the terms of the contract otherwise require, insurance law looks to proximate cause and does not trace causation back to its metaphysical beginning.[19]

In other usages, an occurrence may be expressly defined to include all losses or damage attributable to a single cause or a series of similar causes. This is useful, and primarily designed, to control the case where there are a number of small repetitive inflictions of harm from a repetitive or continuing cause. This might be suggested to apply to the present circumstances in that the successive destructive events were the repetition of the continuing cause, namely, the terrorist conspiracy. That would depend on whether the conspiracy was the "cause" referred to. In the former sense, it would protect the insurer from a large claim exceeding the limit but made in the form of a large number of small claims that do not exceed it; and the insured would benefit in respect of the application of the same reasoning to the deductibles clause.

It helps in the construction process to consider how the parties would have relevantly interpreted the contract, as they should have objectively understood it, if at the time of its formal completion, they were asked the meaning of its words in relation to circumstances broadly of this nature. At that time, their minds would have been focused on the commercial purpose of the contract, which was to provide protection of the insured against such risks within the limits of the cover. Conversely, any limit on its amount was to afford reasonable protection for the insurer, associating the extent of its obligations with the amount of the premium charged. For example, if the loss

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18. *See* Lloyds TSB General Ins. Holdings Ltd. v. Lloyds Bank Group Ins. Co. Ltd. C.A.1643 § 42 (Cal. Civ. 2001).

19. *See* Album Realty Corp. v. American Home Ass. Co, 607 N.E.2d 804 (N.Y. 1992), 80 N.Y.2d 1008, 1010; 592 N.Y.S.2d 657, 658 (1992).

from one of these destructive incidents had exceeded the limit, as it may well have done, then there is clear opportunity for the application of the limit.

It is instructive to contemplate the consequence if there had been but one incident that directly destroyed only one building, but its collapse had then destroyed the other building. The element of unity inherent in such a connection and continuity would have meant that there was only one "occurrence," and the consequential destruction was part of it. This is in fact what happened to other of the minor buildings of the complex, but it did not happen in this way in respect of the two major buildings. There were two distinct occasions of destruction in the sense that the second did not flow on from the first, and they required two distinct acts to cause them. Insofar as the loss to which the limit is applied must be causally linked to the "occurrence" referred to, it is also plain that the proximate cause of each loss was a separate act of actual destruction, and that the overall terrorist plan that orchestrated them both was at one step more remote. Further, it was at the point when the first act of destruction was perpetrated that the insurer became liable for that loss and all loss consequent on that destructive happening.[20]

The implications of this are consistent with what would have been the answers given by the parties at the time of the contract if they had been asked the question posited above. The term had multiple interconnected purposes. It identified the monetary limit, which was for the insurer's benefit; but it also meant that if there were more than one occurrence, then the limit would not apply to the totality of the indemnity to be provided under the policy. While the insurer's interest in having a limit of liability for any one occurrence had valid objective importance within that intended scope, the insured's interest in protection against multiple losses must have been of manifest importance. When the issue of singularity or multiplicity arises, as distinct from the limit within a single occurrence, the insured's interests might be thought to have been logically dominant at that point.

This is demonstrable further by reference to the other aspect of limitation of the amount of the indemnity. As the explicit terms of the cover show, the insurer did not seek to have the protection of a limit in respect of multiple losses that might rise from separate occurrences. Consistently, when the issue is not the limit for a single loss but whether there is more than one loss, the protection reserved by the insurer for itself should not be given a tortured extension, or even a liberal reading, as against the insured

On the issue as to the limit in respect of a single loss, the limitation should be read in a way that serves it plain purpose for the insurer's benefit, so far as it goes; but on the issue of what is meant by its reference to

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20. In Kelly v. Norwich Union Fire Ins. (1990) 1 WLR 139, Croom-Johnson conveniently voiced the obvious when he stated that: "[The word 'events'] referred to any of the events which bring about the liability of the insurance company once the policy has become effective." *Id.* at 146. He was dealing with a different situation where the damage was not necessarily the peril covered.

indemnity per occurrence, it should not be read so liberally. As it has been explained, the thrust of its structure and expression is that at this point the limitation on the extent of the insurer's obligation is itself being delineated. Its purpose at that stage is the establishment of the range of the insurer's benefit from the term. While the purpose of imposing a limit on the insurer's obligation should be sympathetically admitted as an influence on the issue as to whether there is such a limitation, the same consideration does not apply to the issue of the degree of the limitation. As the construction advanced by the insurer has a more restrictive effect on the indemnity to be provided than the alternative construction to which the expression is open, it might be thought that the one adopted should conform to the thrust of its immediate purpose, that is, to enlarge the insured's cover. To construe the limitation aspect expansively in favor of the insurer runs counter to this, and this weakness is particularly important in its competition with the claims of the insured to the dominance of the positive aspects of cover.

This approach is in conformity with high Australian authority,[21] which, in respect of exclusion and limitation clauses,[22] has pointed out that the decisions clearly establish that the interpretation of such clauses is to be determined by construing the clause in accordance with its ordinary and natural meaning, read in the light of the contract as a whole, so giving due weight to the context in which the clause appears, including the nature and object of the contract and, where appropriate, construing the clause *contra proferentem* in case of ambiguity. It is also in conformity with the general trend to adopt the construction more favorable to the insured referred to in *Federico*.[23]

Even if this very important consideration were disregarded, on this issue as to the connotation of the expression, the weight of commercial purpose should favor the insured's position because of the primacy of the policy's purpose of covering loss over the subsidiary purpose of limiting the insurer's liability in that respect, and the even more secondary aspect of extending that limitation to unusual circumstances. The choice as to the preferable construction should attribute greater weight to the primary purpose.[24]

The "Pearl Harbor" argument has some superficial attraction, but it relates to a totally different factual context, far removed from that of an

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21. *See* Darlington Futures Ltd. v. Delco Australia Pty Ltd. (1986) 161 CLR 510.

22. To the extent that the relevant clause here has the effect of limiting the extent of the amount of the insurer's obligation, it comes within this description in substance.

23. *See Federico*, 160 CLR at 520.

24. This argument, and its derivatives suitable to the occasion, does not seem to have been considered in the authorities. The reason may be that it is so untenable that it was not even advanced, but then its subtlety may have meant that it was overlooked in favor of other reasons to the same result.

insurer's agreement with its insured to provide indemnity against loss. In a judgment approved by the Court,[25] Waller LJ said:

> [The word 'event'] in its ordinary meaning can describe an historical event like the Hundred Years War. But since the clause in an insurance contract is concerned with losses arising out of an event, that context 'straightaway implies some causative element and some degree of remoteness, or lack of remoteness, which must be established in the circumstances of the particular case.'[26]

The Hundred Years' War is certainly different from a sustained attack over a brief period of time, as in Pearl Harbor and in the present case, but the same discrimination would see a difference between Pearl Harbor and this case. Further, it should not be assumed that Pearl Harbor should be considered as a single occurrence for all purposes. If it is considered simply in relation to occasions of damage to property as a general focus, it is very debatable whether it should not be regarded as a series of occasions of such damage from a common cause. *A fortiori* if is considered in the context of an insurance contract under which the parties were arranging the indemnity for the loss of property from separate occurrences.

In this, it is suggested, lies the solution to the issue. The construction must be influenced by the commercial insurance context in which the words were agreed. It did not receive specific attention in recent English cases that are very much in point, particularly because they discuss the meaning of "*occurrence*" in the context of a first-party policy for indemnity against property loss, though the conclusion and reasoning of the last three, the most authoritative, are mostly reflective of this approach.

In *Dawson's Field Award*[27] Sir Michael Kerr confronted the question in respect of loss suffered as the result of the destruction of four hi-jacked aircraft, one of which was blown up at Cairo airport, and three at Dawson's Field. The relevant passage of the policy referred to loss sustained in respect of "*each and every loss . . . and/or occurrence and/or series of occurrences arising out of one event.*"[28]

He was plainly moved by the integration of the event in continuity of time and action. He said:

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25. *See* R.E. Brown v. GIO Ins. Ltd. C.A. 17, at 5 (Cal. Civ. 1998).

26. *See* Caudle v. Sharp (1995) Lloyd's RLR 433, 438 per Evans, L.J. (Evans, L.J., also pointed out that the First World War and even the Ice Age could be called an event, but not in such an insurance context).

27. *See* Dawson's Field Award, Mar. 29, 1972.

28. *Id.*

I consider that I have two approach the present problem by putting myself in the position of an informed observer at Dawson's Field on 12th September 1970, watching the preparations for the blowing up of the aircraft, the evacuation of the immediate vicinity and the blowing up of the aircraft. During this period he would of course have seen in a multiplicity of actions and events including a number of separate explosions which destroyed the aircraft. Would he then say that they destruction of the aircraft was one occurrence or a series of occurrences? The answer must be subjective. No one contended that each explosion was a separate occurrence. In my view there was one occurrence, one event, one happening; the blowing up of three aircraft in close proximity more or less simultaneously, within the time span of a few minutes, and as a result of a single decision to do so without any one being able to approach the aircraft between the first explosion and their destruction. I cannot regard this and as a 'series of occurrences'. . .

I have already dealt with the Respondents' contention that the proximate cause of the destruction of the aircraft were [sic] the hijackings, which I cannot accept. I accept their contention that if the aircraft became total losses by hijacking [which I reject] then the hijackings could not be aggregated for any purpose under the Clauses. It would be impossible to treat the hijackings as a single occurrence. I also reject the contention faintly and more or less formally advanced by the Claimants that the hijackings arose out of one event, viz. - the PFLP' s overall plan. I agree that the plan cannot by itself constitute an event. But it was then said on behalf of the Respondents that the destruction of the aircraft at Dawson's Field could also not be said to have arisen out of one event, because the only unifying event could have been the decision or order to blow up the aircraft. But in my view this approach is much too narrow, though this view must admittedly be coloured [sic] by my view about 'occurrence'. The destruction of the aircraft arose from the decision or order to detonate the explosive charges in them which was thereupon carried out in the way described above. If three aircraft become total losses because of a decision or order to

> blow them up together is carried out, why is the carrying out of the destruction or order not one event?[29]

In *Kuwait Airways Corporation v Kuwait Insurance Co.* [30] the Court analyzed the authorities on the meaning of "*occurrence*" in the insurance context in respect of the capture and removal of a fleet of Kuwaiti aircraft by the invading Iraqis. The relevant phrase was "*any one occurrence, any one location,*" and the question was whether the capture of fifteen aircraft that Kuwait airport was one occurrence or fifteen occurrences. Rix J. said:

> It seems to me that these authorities justify the following proposition. An 'occurrence'(which is not materially different from an event or happening, unless perchance the contractual context requires some distinction to be made) is not the same as a loss, for one occurrence may embrace a plurality of losses. Nevertheless, the losses' circumstances must be scrutinised [sic] to say whether they involve such a degree of unity as to justify their being described as, or as arising out of, one occurrence. The matter must be scrutinised [sic] from the point of view of an informed observer placed on the position of the insured. In assessing of the degree of unity regard may be hand to such factors as cause, locality and time and the intentions of the human agents. An occurrence is not the same thing as a peril, but in considering the viewpoint or focus of the scrutineer one may properly have regard to the context of the perils insured against. [31]

The last allusion clearly relates to the nature of the policy and the influence that that feature has upon the construction of its terms. The need to have regard to the insured's point of view in discriminating between the undoubted variety of connotations of the term had been earlier explained when, after referring to analogous examples such as air-raids or a submarine attack on a convoy, he said:

> On which side of the line each of these is to be placed depends . . . on the position in which the person who has to

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29. *Id.* It is a pity that he did not place the trained observer in the position of an observer of the conclusion of the contract, and contemplated what the observer would have thought the parties objectively intended as to the meaning of occurrence in that context in relation to events such as he recounted.

30. *See* Kuwait Airways Corp. v. Kuwait Ins. Co. (1996) 1 Lloyd's Rep. 664.

31. *Id.* at 686. This identification of the element of unity is adopted and applied in Mann v. Lexington Ins. Co. C.A. 256 (Cal. Civ. 2000)

> make the determination is placed and on the way in which he will therefore approach the question. The crews of a submarine and of ships which are attacked and sunk in a convoy would no doubt regard each attack and sinking as a separate occurrence. An admiral at Naval Headquarters might regard the whole attack and its results as one occurrence; a historian almost certainly would. An earthquake may have a number of tremors producing different times and in different places; the victims would no doubt regard each tremor as a separate occurrence but others might not. Whether or not something that produces a plurality of loss or damage can properly be described as one occurrence therefore depends on the position and viewpoint of the observer and involves the question of the degree of unity in relation to cause, locality, time, and, if initiated by human action, the circumstances and purposes of the persons responsible.[32]

His various references to cause, locality, time and the intentions of the human agents have countervailing influences in the present case. In respect of each loss, the cause was a separate act of destruction, which was reflected in some time difference, and although that interval was relatively small and both attacks were all part of the same overall plan, the perpetrators of the actual destruction were respectively engaged on different missions despite their common purpose and related performance. It is not as though they had control of the whole area and carried out their several acts of destruction as part of a unified and integrated act, such as the controlled and progressive destruction of several items of property in their hands.[33] There was a certain unity of location in that the two buildings were part of the same complex and adjacent, and as such represented a single icon that was intended to be destroyed in total; but each was a separate structure that required a separate attack for the purpose of the overall plan, and, *from the insured's point of view*, represented a separate item of property that was lost.

Another precedent that is somewhat but imperfectly analogous, is to be found in *Mann v Lexington Insurance Co.*[34] where the insured's properties that were located in different places in a single country were destroyed over a period of two days in riots that were said to be part of a single planned purpose, but the occasions of destruction were found to amount to separate occurrences. The differences in location and time from those features in the present case are apparent, but the differences in degree do not necessarily

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32. Kuwait Airways Corp.,1 Lloyd's Rep. at 685.

33. As was the position in this *Kuwait* case and in the *Dawson's Field Award*, to which this judgment referred.

34. *See* Mann v. Lexington Ins. Co. C.A. 256 (Cal. Civ. 2000).

constitute a difference in kind in respect of those elements. The unity of purpose of the perpetrators was identical in principle, and this authority establishes that it alone is not decisive. The result depends on the totality of the relevant elements and their relative weights in the context of the relevant point of view.

Another possible analogy that deserves investigation is the infliction of two distinct episodes of damage during the course of a single storm. Care must be taken to ensure the quality of the analogy by eschewing circumstances where the distinct episodes of harm are the progressive consequence of a continuous destructive force, such as the erosion of the support of a building that causes sequential episodes of damage as the removal of support reaches distinct critical stages, each leading to partial and progressive damage. More analogous would be the causing of separate damage to different buildings during one storm by separate lightening bolts or by two separate flood surges.

The insured will be comforted by a well-known New York case,[35] where two "*accidents*" were found when two adjacent buildings of the insured were successively damaged when protecting walls of their respective basements collapsed, with a fifty-minute interval, from the flooding of a single construction trench by the waters of a single rainstorm. The decision seemed to rely on the separate occasions of destruction of the respective walls, the risk of which feature was, of course, the focus of and *raison d'etre* for the insurance cover. The present circumstances favor the insured's case even more because in the case cited, the destructive force, the flood, was continuous and operative on both properties at the same time. Here, the application of destructive force was distinct and separate on each occasion, which enlarges and emphasizes the feature of separateness.

There are some other precedents providing reasoning that by analogy serve as a useful guide, but their use must be accompanied by the usual strong caveat against the automatic adoption of the construction in another case of a different, or even an identical, form of words in a different grammatical and circumstantial context.[36] It is nevertheless useful to consult analogous cases on the use of this term in liability insurance cases, not for the meaning of the word but for the principled approach to the task of construction. In this exercise, however, it is vital to observe the distinction between the peril covered by such policies and that in the present case.

The principle is the same and the result will be seen to be the same providing the peril is correctly identified. In first party cover, essentially the insurer promises to pay money on the happening of an event that causes loss, the risk of which has been insured against.[37] It follows that this feature must

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35. *See* Arthur A. Johnson Corp. v. Indemnity Ins. Co., 164 N.E.2d 704 (N.Y. 1959), 7 N.Y.2d 222.

36. *See* Fire & All Risks Ins. Co. Ltd. v. Powell (1966) VR 513, 517; *Montrose Chemical Corp.*, 913 P.2d at 878.

37. *See id.*

have considerable influence when the issue is the construction of the reference to an "*occurrence*" that is related to the determination to the amount of the indemnity that the insured is to receive.

Here the peril is the insured's loss through the destruction of or damage to the insured property and the occurrence that is relevant is that which is proximately causal of that harm, even though the initiating cause may be removed in time and the harm may be delayed. If a building catches fire through faulty electrical wiring performed some years before, the relevant occurrence is the fire and not the electrician's remote negligent act or omission, despite that the latter was the cause of the former.

In liability insurance, the peril is the insured's loss through incurring liability to a third party.[38] Sometimes that liability arises through the insured's negligent infliction of harm on the person or property of the third party, and again in those cases, the liability is incurred, not necessarily when the wrongful act is committed but when it causes damage to the other that gives rise to the liability. In that situation, the occurrence is the mishap causing the injury and not the injury itself.[39] This has a profound effect on the construction of "*occurrence*" in that context because the occurrence that must have the relevant causal nexus with the peril is the happening of harm to the third party, and not necessarily the occurrence of the insured's act or omission causing that harm, which may be more remote.[40] This construction is based on business efficiency and reasonableness.[41] This is vital in some cases where the requirement that the occurrence trigger must be within the policy period has led to litigation on this issue.

In this context, it has also led to the result that in respect of a mishap/collision involving a vehicle causing separate injury to several people, it has been found that there have been several '*accidents*,' whereas when a vehicle struck one person who then struck another and they both fell under the wheels of the vehicle, there was but one "*occurrence*."[42] The influence of the purpose of the policy on this construction is manifest throughout the judgments of the Court of Appeal in the *Tramways* case. In Lord Esher M.R.

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38. The delay in the insurer's obligation to provide indemnity until the establishment of that liability through judgment, award, or settlement is a different matter and not relevant to this issue.

39. *See* Forney v. Dominion Ins. Co. Ltd. (1969) 1 WLR 928, 934.

40. *See* Loughelly Iron & Coal Co. v. McMullen (1934) AC 1; Williams v. Milotin (1957) 97 CLR 474, 565; Bowling v. Wienert (1978) 2 NSWLR 182, 291; FAI General Ins. Co. Ltd. v. Hendry Rae & Court (1993) 115 FLR 50, 67, 74; GIO General Ins. Co. Ltd. v. Newcastle City Council (1996) 38 NSWLR 558, 572, on app (1997) 191 CLR 84; Della Vedova v. HIH Casualty & General Ins. Ltd. (1997) 9 ANZ Ins. Case 61.383; Windsurf Pty Ltd. v. HIH Casualty & General Ins. Ltd. (1999) 61.447.

41. *See* GRE Ins. Ltd. v. Bristile Ltd. (1991) 5 WAR 440.

42. *See* South Staffordshire Tramways Co. Ltd. v. Sickness & Accident Ass. Assn. Ltd. (1891) 1 QB 402; Allen v. Land Guarantee & Accident Co. Ltd. (1912) 28 TLR 254. The latter purports to follow the former, but the distinction is very fine and even doubtful.

in his very brief judgment began by reciting the nature of the insuring clause of the policy that spoke of claims for personal injury made against the assured in respect of accidents caused by its vehicles.

In fidelity and employee dishonesty cover, a limit as to the amount of the cover will usually be set by reference to an "*occurrence*," but in that class of insurance there is only one covered "*occurrence*" in a series of embezzlements by an employee pursuant to a common scheme or episode of dishonesty.[43] It is recognized in the authorities on the subject that this result will vary between different classes of cover, and in this class, it is not surprising to find such a result because the concept of occurrence is more closely associated with the defalcations of the employee, whereas in the World Trade Center cover, it is associated with the destruction of the insured's property.

There are some other useful references of oblique, and therefore limited, relevance. For example, *Axa Reinsurance (UK) Ltd v Field*[44] has limited utility because of the constricting nature of the form of the hearing before the House of Lords, and the issues involved. However, after reaffirming that an excess of loss reinsurance policy need not be assumed to follow the original policy as to the risk covered, the House pointed out the obvious, that an "*event*" is not the same thing as "*an originating cause.*"[45] "*In ordinary speech, an event is something which happens at a particular time, at a particular place, in a particular way.*"[46] And "*a cause is . . . something altogether less constricted.*"[47] "*It can be a continuing state of affairs; it can be the absence of something happening.*"[48] That was sufficient to resolve the issue there, and it is of limited use here in its emphasis on the difference between an event and its cause and how the nature of the two may vary.

There are several other cases involving the issue of what is comprehended by "*a series of occurrences*," often qualified by association with a common causal nexus, when that expression appears in a policy, but usually their discussion is predicated upon the acceptance that the occurrences are separate, and any discussion on the meaning of "*occurrence*" may be

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43. *See* Business Interiors Inc v. Aetna Casualty & Surety Co., 751 F.2d 361 (10 Cir. 1984); Christ Lutheran v. State Farm Fire & Casualty, 471 S.E.2d 124 (N.C. Ct. App. 1996); Valley Furniture v. Transportation Ins. Co., 26 P.3d 952 (Wash. Ct. App. 2001); Jefferson Parish v. Fidelity & Deposit Co., 673 So.2d 1238 (La. Ct. App. 1996); Howard Weil Labouisse Friedrichs v. Ins. Co., 557 F.2d 1055 (5th Cir. 1977); Peco Energy Co. v. Boden, 64 F.3d 852 (3rd Cir. 1995); American Commerce Ins. v. Minn. Mut. Fire, 551 N.W.2d 224 (Minn. 1996); Pasternak v. Boutris, 99 Cal. App. 4th 907 (Cal. Ct. App. 2002). *But see* Slater v. U.S. Fidelity & Guaranty Co., 400 N.E.2d 1256 (Mass. 1980). This case stands alone and does not appear to be correct.

44. *See Axa Reinsurance (UK) Ltd.*, 1 WLR at 1026.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

contaminated for present purposes by the serious difference of the context and the purpose of the relevant provision. This said, it may well be a powerful argument in favor of the view taken above that it was open to the insurer to use such a reference to a series if it were intended to comprehend a number of arguably separate events within a single trigger of cover; *and it failed to do so*. The obvious inference is often favored by the judges in construction issues.

CONCLUSION

If the World Trade Center litigation were to be held in Australia or England, the result would probably favor the insured for two main reasons in principle:

- Having regard to the commercial purpose of the policy, an objective view of the meaning of "occurrence" in this context, but taken from the insured's point of view, would not attribute to the expression an extension of the insurer's limitation of its obligation that would roll these two occasions of destruction into one for the purpose of the limitation. Rather, the tenor of the provision at the point of the use of the expression is towards enlarging the extent of the cover.
- The relevant factors do not exhibit such a degree of unity of the total occasion to justify its denotation as one "occurrence" within its meaning in this context.

ASSASSINATING SADDAM HUSSEIN: THE VIEW FROM INTERNATIONAL LAW

Louis René Beres, Ph.D.*

With war against Iraq an increasingly probable event,** the question of assassination looms large in American operational planning. Whether or not such high-level political killing of Saddam Hussein would be in the overall best interests of the United States or its allies is certainly a vital question, but one I will now leave for others. The question to be considered here asks rather if such assassination could be permissible under international law. Following a general jurisprudential assessment of this question, I will examine this issue of permissibility with special reference to counter-terrorism.

Understood as tyrannicide[1] (killing a tyrant) *within* a country, assassination has often been accepted as lawful. Support for such a form of assassination can be found in Aristotle's POLITICS, Plutarch's LIVES, and Cicero's DE OFFICIIS. According to Cicero:[2]

> There can be no such thing as fellowship with tyrants, nothing but bitter feud is possible: and it is not repugnant to nature to despoil, if you can, those whom it is a virtue to kill; nay, this pestilent and godless brood should be utterly banished from human society. For, as we amputate a limb in which the blood and the vital spirit have ceased to circulate, because it injures the rest of the body, so monsters, who under human guise, conceal the cruelty and ferocity of a wild

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** Professor Beres' paper was presented at the symposium, before the war with Iraq began.

1. *See generally* THE TERRORISM READER: A HISTORICAL ANTHOLOGY 7-43 (Walter Lacquer ed., 1978).

2. *See* M.T. Cicero, *De Officiis*, *in* THE TERRORISM READER: A HISTORICAL ANTHOLOGY, *supra* note 1, at 16.

> beast, should be severed from the common body of humanity.[3]

The eighteenth century Swiss scholar, Emmerich de Vattel, in *The Law of Nations*, recalls "the essential object of civil society" is to "work in concert for the common good of all."[4] Hence, he inquires:

> Could the society make use of its authority to deliver irrevocably itself and all its members to the discretion of a cruel tyrant? Surely not; since it would lose all rights of its own if it undertook to oppress any part of the citizens. When, therefore, it confers the supreme and absolute power of government without express reserve, there is necessarily an implied reserve that the sovereign will use that power for the welfare of the people and not for their destruction. If he makes himself the scourge of the State he disgraces himself; he becomes no better than a public enemy, against whom the Nation can and should defend itself. And if he has carried his tyranny to the extreme, why should the life itself of so cruel and faithless an enemy be spared?[5]

Even before Vattel, the English poet, John Milton accepted the argument of tyrannicide in justifying the execution of Charles I. According to Milton's *Tenure of Kings and Magistrates*, "[t]yrannicide, that is the killing of a tyrant,

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3. *Id.* Elsewhere, Cicero - citing approvingly to the Greeks, offers further support for tyrannicide:

> Grecian nations give the honors of the gods to those men who have slain tyrants. What have I not seen at Athens? What in the other cities of Greece? What divine honors have I not seen paid to such men? What odes, what songs have I not heard in their praise? They are almost consecrated to immortality in the memories and worship of men. And will you not only abstain from conferring any honors on the saviour [sic] of so great a people, and the avenger of such enormous wickedness, but will you even allow him to be borne off for punishment? He would confess - I say, if he had done it, he would confess with a high and willing spirit that he had done it for the sake of the general liberty; a thing which would certainly deserve not only to be confessed by him, but even to be boasted of.

This is taken from Cicero's speech in defense of Titus Annius Milo, a speech offered on behalf of an instance of alleged tyrannicide committed by Milo, leader of Lanuvium. *See* M. T. Cicero, *The Speech of M. T. Cicero in Defense of Titus Annius Milo, in* SELECT ORATIONS OF M.T. CICERO 208 (C.D. Yonge trans., 1882).

4. These requirements of comity are associated with Vattel's notion of "mutual aid." According to The Law of Nations, "[s]ince Nations are bound mutually to promote the society of the human race, they owe one another all the duties which the safety and welfare of that society require." *See* EMMERICH DE VATTEL, THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW Vol. III, xii (George D. Gregory trans., 1916) (1758).

5. *Id.* at xii.

is not only lawful, but also laudable."[6] Of course, as a practical matter, the criteria that can clearly distinguish tyrannical from non-tyrannical rule are very difficult to identify. When John Wilkes Booth leaped onto the stage at Ford Theater after assassinating President Lincoln, he shouted: "*Sic semper tyrannis*!" Thus always to tyrants!

Without appropriate criteria of differentiation, judgments concerning tyrannicide are inevitably personal and subjective. The hero of Albert Camus' *The Just Assassins*, Ivan Kaliayev, a fictional adaptation of the assassin of the Grand Duke Sergei, says that he threw bombs, not at humanity, but at tyranny. How shall he be judged? Seneca is reputed to have said that no offering can be more agreeable to God than the blood of a tyrant. But, who is to determine authoritatively that a particular leader is indeed a tyrant?[7] Dante confined the murderers of Julius Caesar to the very lowest depths of hell, but the Renaissance rescued them and the Enlightenment even made them heroes.[8] In the sixteenth century, tyrannicide became a primary issue in the writings of the Monarchomachs, a school of mainly French Protestant writers. The best-known of their pamphlets was *Vindiciae contra Tyrannos*, published in 1579 under the pen name of Junius Brutus, probably Duplessis Mornay, who was a political advisor to the King of Navarre.

The most well-known British works on tyrannicide are George Buchanan's *De Jure Regni apud Scotos*, published in London in 1579, and Saxby's *Killing No Murder*, which appeared in 1657. Juan de Mariana, in *The King and the Education of the King*, says:

> [B]oth the philosophers and theologians agree, that the prince who seizes the state with force and arms, and with no legal right, no public, civic approval, may be killed by anyone and deprived of his life and position. Since he is a public enemy and, afflicts his fatherland with every evil, since truly, and in a proper sense, he is clothed with the title and character of tyrant, he may be removed by any means and gotten rid of by as much violence as he used in seizing his power.[9]

In the nineteenth century, a principle of granting asylum to those whose crimes were "political" was established in Europe and in Latin America. This principle is known as the "political offense exception" to extradition. But a specific exemption from the protection of the political offense exception--in effect, an exception to the exception--was made for the assassins of heads of state and for attempted regicides. At the 1937 Convention for the Prevention

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6. *See* JOHN MILTON, TENURE OF KINGS AND MAGISTRATES (1648).

7. I am indebted to Walter Laqueur's THE TERRORISM READER for its extended discussion of tyrannicide. *See* Lacquer, *supra* note 1, at 7-43.

8. *See id.* at 8.

9. *See* JUAN DE MARIANA, THE KING AND THE EDUCATION OF THE KING (1699).

and Repression of Terrorism, the murder of a head of state, or of any family member of a head of state, was formally designated as a criminal act of *terrorism.*[10]

The so-called attentat[11] clause, which resulted from an attempt on the life of French Emperor Napoleon III, and later widened in response to the

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10. For current conventions in force concerning terrorism, see Convention on the Prevention and Punishment of Crimes against Internationally Protected Person, Including Diplomatic Agents, Dec. 14, 1973, 28 U.S.T. 1975, T.I.A.S. *reprinted in* 13 I.L.M. 43 (1974); Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95; Convention on Offences and Certain Other Acts Committed on Board Aircraft (Tokyo Convention), Sept. 14, 1963, 20 U.S.T. 2941, 704 U.N.T.S. 219; Convention for the Suppression of Unlawful Seizure of Aircraft (Hague Convention), Dec. 16, 1970, 22 U.S.T. 1641; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Montreal Convention), Sept. 23, 1971, 24 U.S.T. 564; International Convention Against the Taking of Hostages, G.A. Res. 34/146, U.N. GAOR, 34th Sess., Supp. No. 46, at 245, U.N. Doc. A/34/46 (1979); European Convention on the Suppression of Terrorism, Jan. 27, 1977, E.T.S. 90. On December 9, 1985, the United Nations General Assembly unanimously adopted a resolution condemning all acts of terrorism as "criminal." Never before had the General Assembly adopted such a comprehensive resolution on this question. Yet, the issue of particular acts that actually constitute terrorism was left largely unaddressed, except for acts such as hijacking, hostage-taking, and attacks on internationally protected persons that were criminalized by previous custom and conventions. *See* United Nations Resolution on Terrorism, G.A. Res. 40/61, U.N. GAOR, 40th Sess., Supp. No. 53, at 301, U.N. Doc. A/40/53 (1985).

11. The "attentat" clause, included in many treaties, provides that the killing of the head of a foreign government or a member of his family, is not to be considered as a political offense. Some treaties extend the exclusion to any murder or to attempts on any life. Here, the political offense exception to extradition is excluded wherever any killing has taken place. In the absence of an attentat clause in a particular treaty, a state may refuse to extradite persons requested by another state on the ground that the crime in question was political. According to the European Convention on Extradition (Dec. 13, 1957, Council of Europe, Europ. T.S. No. 24:), Article 3, paragraph 3, "The taking or attempted taking of the life of a Head of State or a member of his family shall not be deemed to be a political offense for the purposes of this Convention." Most extradition treaties deny extradition of persons accused or convicted of relative political offenses, i.e. offenses involving one or several common crimes connected with a political act. Assassination is an example of such an offense. The courts of particular states solve the problem of applicability of non-extradition of political criminals by ascertaining the degree of connection between the common crime and the political act. Whether or not the degree of connection required for the act is to be regarded as political, and thus non-extraditable, depends entirely upon the particular test adopted by each individual state. There are three fundamental tests here: (1) the "incidence test" of Anglo-American law, which requires that the crime be part of, or incidental to, a political revolt or disturbance (although Anglo-American decisions involving East European refugees have indicated that extradition will be denied even in the absence of a political revolt or disturbance when the possibility of political persecution can reasonably be demonstrated); (2) the "political objective test" of French law, which requires that the crime be directed against the political organization or structure of the state; and (3) the "political motivation test" of Swiss law, which requires that the crime be assessed in light of the predominant surrounding circumstances and especially the motivations of the offender. A number of major treaties in force stipulate that, for purposes of extradition, political offenses shall not include crimes against humanity, certain crimes of war identified in the 1949 Geneva Conventions and comparable violations of the laws of war not already provided for in these conventions.

assassination of President James Garfield in the United States, limited the political offense exception in international law to preserve social order. Murder of a head of state or members of the head of state's family was thus designated as a common crime, and this designation has been incorporated into Article 3 of the 1957 European Convention on Extradition. Yet, we are always reminded of the fundamental and ancient right to tyrannicide, especially in the post-Holocaust/post-Nuremberg world order.[12] It follows that one could argue persuasively under international law that the right to tyrannicide is still overriding and that the specific prohibitions in international treaties are not always binding.

From the standpoint of international law, assassination can become an international crime (possibly an instance of terrorism), when it is carried out against a state official, by a national of the same state and within the territory of that state, only where the assassin flees to another state and requests for extradition are issued and/or where the assassin receives assistance from another state. If, however, the assassination is carried out by a national of another state, whether the location of the killing is the territory of the victim, the territory of the perpetrator or some other state altogether, it is immediately a matter of international law. Although, as we shall soon see, such an assassination is almost always a crime under international law it could conceivably be an instance of a very limited right of "humanitarian intervention."[13] For this to be the case, however, it would be necessary, *inter alia*, that the victim had been guilty of egregious crimes against human rights, that these crimes were generally recognized and widely-documented, and that no other means existed to support the restoration of basic human rights.

To this point, we have been dealing with assassination as tyrannicide, with the killing of a head of state or high official by a national of the same state. We have seen that the support for such forms of assassination can be

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12. *See Report of the International Law Commission,* Principles of International Law Recognized in the Charter and Judgment of the Nuremberg Tribunal, U.N. GAOR, 2nd Sess., (1950); U.N. GAOR, 5th Sess., Supp. No. 12, at 11, U.N. Doc. A/1316.

13. The doctrine of humanitarian intervention has elicited a variety of international law reactions. For sources supporting humanitarian intervention, see Tom J. Fatrer, *An Inquiry Into the Legitimacy of Humanitarian Intervention, in* LAW AND FORCE IN THE NEW INTERNATIONAL ORDER 185, 198 (Lori Fisler Damrosch & David J. Scheffer eds., 1991) (discussing humanitarian intervention for human rights violations); Michael J. Bazyler, *Reexamining the Doctrine of Humanitarian Intervention in Light of Atrocities in Kampuchea and Ethiopia*, 23 STAN. J. INT'L L. 547, 597-11 (1987) (setting forth criteria for humanitarian intervention); Robert Lillich, *Forcible Self-Help by States to Protect Human Rights*, 53 IOWA L. REV. 325, 345 (1967) (justifying humanitarian intervention because existing international mechanisms provide inadequate protection). *Contra* IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 340 (1963) (observing that the disappearance of humanitarian intervention from modern practice presents a beneficial development); LOUIS HENKIN, HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY 105 (1968) (stating law against intervention); PHILIP C. JESSUP, A MODERN LAW OF NATIONS: AN INTRODUCTION 169 (1948) (discussing intervention by state to protect one's own nationals).

found in certain established traditions in political philosophy but that there is virtually no support in the prevailing international law of extradition.[14] Although some treaties are vague enough that such assassination might be interpreted as a political offense, and therefore not subject to extradition requests, others subscribe to the attentat principle, which provides a specific exception to the exception—in cases involving assassination of heads of state or their families.

Another possible line of support for assassination as tyrannicide can be extrapolated from the current international law of human rights.[15] Despite the existence of a well-developed, and precisely codified regime of human rights protections, victims of human rights abuse in particular states have little, if any, redress under international law. Indeed, in the absence of an effective centralized enforcement capability,[16] international law relies upon insurgency[17] and humanitarian intervention[18] as the ultimate guarantors of

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14. *See* M. CHERIF BASSIOUNI, INTERNATIONAL CRIMINAL LAW: A DRAFT INTERNATIONAL CRIMINAL CODE (1986); CHRISTOPHER L. BLAKESLEY, TERRORISM, DRUGS, INTERNATIONAL LAW AND THE PROTECTION OF HUMAN LIBERTY (1992); and Christopher L. Blakesley & Otto Lagodny, *Finding Harmony Amidst Disagreement Over Extradition, Jurisdiction, the Role of Human Rights and Issues of Extraterritoriality Under International Criminal Law*, 24 VAND. J. TRANSNAT'L L.1 (1991).

15. *See* Universal Declaration of Human Rights, Dec. 10, 1948, G.A. Res. 217 A (III), U.N. GAOR, at 71, U.N. Doc. A/810, (1948); European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950 T.S.5; Convention Relating to the Status of Refugees, *done* July 28, 1951, 189 U.N.T.S. 137 (This Convention should be read in conjunction with the Protocol Relating to the Status of Refugees, adopted by the General Assembly on Dec. 16, 1966, and entered into force, Oct. 4, 1967); Convention on the Political Rights of Women, *done* Mar. 31, 1953, 27 U.S.T. 1909, 193 U.N.T.S. 135; Declaration on the Granting of Independence to Colonial Countries and Peoples, Dec. 14, 1960, G.A. Res. 1514 (XV), U.N. GAOR, Supp. No. 16, at 66, U.N. Doc. A/4684 (1961); International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, 660 U.N.T.S. 195, *reprinted in* 5 I.L.M. 352 (1966); International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 19, 1966, G.A. Res. 2200 (XXI), 21 U.N. GAOR, Supp. No. 16, at 49, U.N. Doc. A/6316 (1967), *reprinted in* 6 I.L.M. 360 (1967), International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, G.A. Res. 2200 (XXI), 21 U.N. GAOR, Supp. No. 16, at 52, U.N. Doc. A/6316 (1967), *reprinted in* I.L.M. 368 (1967); American Convention on Human Rights, *done* Nov. 22, 1969, O.A.S. Treaty Series No. 36, at 1, O.A.S. Off. Rec. OEA/Ser. L/V/II. 23 Doc. 21 rev. 6 (1979), *reprinted in* 9 I.L.M. 673 (1970). The Universal Declaration of Human Rights, The International Covenant on Civil and Political Rights (together with its Optional Protocol of 1976), and the International Covenant on Economic, Social and Cultural Rights-known collectively as the International Bill of Rights-serve as the touchstone for the normative protection of human rights.

16. Nonetheless, under the terms of Article 56 of the U.N. Charter, member states are obliged "to take joint and separate action in cooperation with the Organization" to promote human rights. U.N. CHARTER art. 56.

17. International law makes clear that not all forms of insurgency are impermissible, i.e. terroristic. Although, specially-constituted U.N. committees and the U.N. General Assembly have repeatedly condemned acts of international terrorism, they exempt those activities that derive from:

> the inalienable right to self-determination and independence of all peoples under colonial and racist regimes and other forms of alien domination and the

essential human rights. It follows that where humanitarian intervention cannot be reasonably expected, individuals within states have only themselves to provide for proper enforcement of their codified human rights.

What about "humanitarian intervention" and assassination? Can agents of one state legally assassinate officials of other states under the rules of humanitarian intervention? Or is such assassination always a self-evident violation of international law in the present world order?[19]

To a certain extent, the answers to these questions depend upon the absence or presence of a condition of belligerency (war) between the states involved.[20] In the absence of this condition, assassination of political figures

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> legitimacy of their struggle, in particular the struggle of national liberation movements, in accordance with the purposes and principles of the Charter and the relevant resolutions of the organs of the United Nations.

Report of the Ad Hoc Committee on International Terrorism, U.N. GAOR 28th Sess., Supp. No. 28, A/9028 (1973). This exemption, from the 1973 General Assembly Report of the Ad Hoc Committee on International Terrorism, is corroborated by Article 7 of the General Assembly's 1974 Definition of Aggression. *See* The Resolution on the Definition of Aggression, G.A. Res. 3314 (XXIX), U.N. GAOR, Supp. No. 31 at 142, U.N. Doc. A/9631 (1975), *reprinted in* 13 I.L.M. 710 (1974). *See also* Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States, G.A. Res. 2625 (XXV), U.N. GAOR, Supp. No. 28, at 121, U.N. Doc. A/8028 (1971), *reprinted in* 9 I.L.M. 1292 (1970). For a comprehensive and authoritative inventory of sources of international law concerning the right to use force on behalf of self-determination, see Aureliu Cristescu, *Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities*, The Right to Self-Determination: Historical and Current Development on the Basis of United Nations Instruments, E/CN.4/Sub.2/404/Rev. 1, United Nations, New York (1981).

18. While the theory of international law still oscillates between an individualist conception of the State and a universalist conception of humanity, the post-World War II regime of treaties, conventions, and declarations concerning human rights is necessarily founded upon a reasonably broad doctrine of humanitarian intervention. It is the very purpose of this regime to legitimize an allocation of competences that favors the natural rights of humankind over any particularistic interests of state. As violations of essential human rights are now incontestably within the ambit of global responsibility, the subjectivism of State primacy has been unambiguously subordinated to the enduring primacy of international justice.

19. The concept of "world order" as an organizing dimension of academic inquiry and as a normative goal of international law has its contemporary intellectual origins in the work of Harold Lasswell and Myres McDougal at the Yale Law School; GRENVILLE CLARK & LOUIS B. SOHN, WORLD PEACE THROUGH WORLD LAW (2nd ed. 1966); and the large body of writings by Richard A. Falk & Saul H. Mendlovitz. For works by this writer, who was an original participant in the World Law Fund's World Order Models Project, see LOUIS RENE BERES & HARRY TARG, CONSTRUCTING ALTERNATIVE WORLD FUTURES: REORDERING THE PLANET (1977). *See also* PLANNING ALTERNATIVE WORLD FUTURES: VALUES, METHODS, AND MODELS (Louis Rene Beres & Harry Targ eds., 1975); LOUIS RENE BERES, PEOPLE, STATES, AND WORLD ORDER (1981); and LOUIS RENE BERES, REASON AND REALPOLITIK: U.S. FOREIGN POLICY AND WORLD ORDER (1984).

20. Under international law, the question of whether or not a state of war actually exists between states is often ambiguous. Traditionally, it was held that a declaration of war was a necessary condition before "formal" war could be said to exist. Hugo Grotius, for example, divided wars into declared wars, which were legal, and undeclared wars, which were not. *See* HUGO GROTIUS, THE LAW OF WAR AND PEACE, bk. III, chs. III, V, and XI (1625). By the beginning of the twentieth century, the position that war obtains only after a conclusive

in another state may represent the crime of aggression or the crime of terrorism. Regarding aggression, Article 1 of the 1974 U.N. Resolution on the Definition of Aggression defines this crime, as "the use of force by a State against the sovereignty, territorial integrity or political independence of another state, or in any other manner inconsistent with the purposes of the United Nations."[21] In view of the binding rule of nonintervention codified in the Charter[22] that would normally be violated by transnational assassination, such killing would generally qualify as aggression. Moreover, assuming that transnational assassination constitutes an example of "armed force," the criminalization, as aggression, of such activity may also be extrapolated from Article 2 of the Definition of Aggression,

> [t]he first use of armed force by a State in contravention of the Charter shall constitute *prima facie* evidence of an act of aggression although the Security Council may in conformity with the Charter conclude that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances . . . .[23]

Let us now turn to the status of transnational assassination under international law when a condition of war exists between the states involved. According to Article 23(b) of the regulations annexed to Hague Convention IV of October 18, 1907, respecting the laws and customs of war on land: "It is especially forbidden . . . to kill or wound treacherously, individuals

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declaration of war by one of the parties, was codified by Hague Convention III. More precisely, this convention stipulated that hostilities must not commence without "previous and explicit warning" in the form of a declaration of war or an ultimatum. *See* Hague Convention III, Relative to the Opening of Hostilities, 1907, art. 1, 3 NRGT, 3 series, 437. Currently, of course, declaration of war may be tantamount to declarations of international criminality (because of the criminalization of aggression by authoritative international law), and it could be a jurisprudential absurdity to tie a state of war to formal declarations of belligerency. It follows that a state of war may exist without formal declarations, but only if there is an armed conflict between two or more states and/or at least one of these states considers itself at war.

21. *See* Resolution on the Definition of Aggression, G.A. Res. 3314 (XXIX), 29 U.N. GAOR, Supp. No. 31, at 142, U.N. Doc. A/9631, art. 1, (1975), *reprinted in* 13 I.L.M. 710.

22. *See* U.N. CHARTER art. 2, paras. 7, 59. *See also* Declaration on Principles of International Law concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, *adopted* Oct. 24, 1970, G.A. Res. 2625 (XXV), U.N. GAOR, Supp. No. 28, at 121, U.N. Doc. A/8028 (1971), *reprinted in* 9 I.L.M. 1292 (1970); G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 122-23, U.N. Doc. A/8028 (1970); *see also* Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, G.A. Res. 2131 (XX), U.N. GAOR, U.N. Doc. A/RES/2131 (XX)/Rev. 1 (1966).

23. *See* Resolution on the Definition of Aggression, G.A. Res. 3314 (XXIX), 29 U.N. GAOR, Supp. No. 31, at 142, U.N. Doc. A/9631 (1975), *reprinted in* 13 I.L.M. 710 (1974).

belonging to the hostile nation or army."[24] U.S. Army Field Manual 27-10, *The Law of Land Warfare*, which has incorporated this prohibition, authoritatively links Hague Article 23(b) to assassination at Paragraph 31, "[t]his article is construed as prohibiting assassination, proscription or outlawry of an enemy, or putting a price upon an enemy's head, as well as offering a reward for an enemy 'dead or alive.'"[25]

From the point of the convergence between international and U.S. municipal law,[26] the Hague Convention IV is a treaty of the United States that has received the advice and consent of the Senate and is, therefore, the "supreme law of the land" under Article 6 of the Constitution (the "Supremacy Clause"). Indeed, even if Congress were to enact a statute that expressly repealed the rule found at Hague Regulation Article 23(b), that would not permit U.S. officials to legalize assassinations.[27] This is because, among other things, the Nuremberg Tribunal (1945) expressly ruled that the obligations

24. Hague Convention (IV) Respecting the Laws and Customs of War on Land, U.S.T.S. 539, 2 A.J.I.L. Supp. 90, *entered into force* Jan. 26, 1910.

25. U.S. DEPT. OF THE ARMY, THE LAW OF LAND WARFARE (1956).

26. There are many sources that point to the convergence of national and international law. According to Article VI of the U.S. Constitution, "All treaties made . . . under the authority of the United States shall be the supreme law of the land . . . ." U.S. CONST. art. VI, cl. 2. Although Article VI refers exclusively to treaties, the process of *incorporation* has also been extended by several decisions of the Supreme Court to international law in general. As this means that all of the international rules against assassination are now the law of the United States, any attempt to modify prohibitions against assassination would also appear to be in violation of American municipal law. Nevertheless, as we shall see, there are certain circumstances where "Higher Law" and other peremptory expectations of justice may be overriding.

27. Under U.S. law, assassination is prohibited at Executive Order 12,333 of the United States (Dec. 4, 1981) which stipulates, at Part 2, Paragraph 2:11: "No person employed by or acting on behalf of the United States Government shall engage in, or conspire to engage in, assassination." *See* Exec. Order No. 12,333, 3 C.F.R. 200 (1988), *reprinted in* 50 U.S.C. § 401 (1988).

codified at the Hague Regulations had entered into customary international law[28] as of 1939.[29]

It appears, then, impossible for any state to legalize assassination, and the leaders of any recalcitrant state would be subject to prosecution as *hostes humani generis*,[30] "common enemies of mankind" in any state that claimed appropriate jurisdiction.[31] Significantly, U.S. law recognizes and reinforces these obligations under international law. According to Paragraph 498 of Field Manual 27-10, any person, whether a member of the armed forces or a

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28. Article 38(1)(b) of the Statute of the International Court of Justice describes international custom as "evidence of a general practice accepted as law." In this connection, the essential significance of a norm's customary character under international law is that the norm binds even those states that are not parties to the pertinent codifying instrument or convention. With respect to the bases of obligation under international law, even where a customary norm and a norm restated in treaty form are apparently identical, the norms are treated as separate and discrete. During the merits phase of *Military and Paramilitary Activities in and Against Nicaragua*, the International Court of Justice (ICJ) stated: "Even if two norms belonging to two sources of international law appear identical in content, and even if the States in question are bound by these rules both on the level of treaty-law and on that of customary international law, these norms retain a separate existence." Military and Paramilitary Activities (Nicaragua v. U.S.), 1986, I.C.J. 14 (June 27). Further, in many states, customary international law is binding and self-executing, but an act of the legislature is required to transform conventional law into municipal law.

29. Affirmation of the Principles of International Law Recognized by the charter of the Nuremberg Tribunal, *adopted* Dec. 11, 1946, G.A. Res. 95 (I), U.N. GAOR, at 1144, U.N. Doc. A/236 (1946). From the point of view of the United States, the Nuremberg obligations are, in a sense, doubly binding. This is the case because these obligations represent not only current normative obligations of international law, but also the higher law obligations engendered by the American political tradition. By its codification of the principle that fundamental human rights are not an internal question for each State, but an imperious postulate of the international community, the Nuremberg obligations represent a point of perfect convergence between the law of nations and the jurisprudential/ethical foundations of the American Republic.

30. *See* Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980) ("The torturer has become - like the pirate and slave trader before him - *Hostes humani generis*, an enemy of all mankind."). *Id.* at 890.

31. The principle of universal jurisdiction is founded upon the presumption of solidarity between the states in the fight against crime. It is mentioned in the Corpus Juris Civilis; GROTIUS, *supra* note 20, bk. II, ch. 20; and in EMERICH VATTEL, LE DROIT DES GENS bk. I, ch. 19 (1758). The case for universal jurisdiction (which is strengthened wherever extradition is difficult or impossible to obtain) is also built into the four Geneva Conventions of Aug. 12, 1949, which unambiguously impose upon the High Contracting Parties the obligation to punish certain grave breaches of their rules, regardless of where the infraction was committed or the nationality of the authors of the crimes. *See* Geneva Convention (I) relative to the Treatment of Prisoners of War, art. 49, 75 U.N.T.S. 135, *entered into force* Oct. 21, 1950; *see also* Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, art. 50, 75 U.N.T.S. 85, *entered into force* Oct. 21, 1950; *see also* Geneva Convention relative to the Protection of Civilian Persons in Time of War, art. 146, 75 U.N.T.S. 287, *entered into force* Oct. 21, 1950. In further support of universality for certain international crimes, *see* M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE 91, 91 (3rd ed. 1996). *See also* RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 402-04, 443 (Tentative Draft Nov. 5, 1984); 18 U.S.C. § III 6(c) (2003).

civilian, who commits an act that constitutes a crime under international law, is responsible for the crime and is liable to punishment.[32] Paragraph 501 of the same Field Manual, based upon the well-known judgment of Japanese General Yamashita, stipulates that any U.S. government official who had actual knowledge, or should have had knowledge, that troops or other persons under his control were complicit in war crimes and failed to take necessary steps to protect the laws of war was guilty of a war crime.[33] And Paragraph 510 denies the defense of "act of state" to such alleged criminals by providing that, though a person who committed an act constituting an international crime may have acted as head of state or as a responsible government official, he is not relieved, thereby, from responsibility for that act.[34]

These facts notwithstanding, there are circumstances wherein the expectations of the authoritative human rights/counterterrorist regime must override the ordinary prohibitions against transnational assassination - both the prohibitions concerning conditions of peace and conditions of war. The most apparent of such circumstances are those involving genocide[35] and related crimes against humanity.[36] If, after all, the assassination of a Hitler[37] or a Pol Pot could save thousands or even millions of innocent people from torture and murder - it would be a far greater crime not to attempt such an assassination than to actually carry it out.[38]

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32. *See* U.S. DEP'T OF THE ARMY, *supra* note 25, ¶ 498.

33. *See id.* ¶ 501.

34. *See id.* ¶ 510.

35. *See* Convention on the Prevention and Punishment of the Crime of Genocide, *opened for signature* Dec. 9, 1948, *entered into force* Jan. 12, 1951, 78 U.N.T.S. 277.

36. *See id.* Regarding the history of U.S. commitment to the Convention, it was submitted to the Senate by President Harry S. Truman in June 1949. The Convention languished in that body until February 19, 1986, when the Senate consented to ratification with the reservation that legislation be passed that conforms U.S. law to the precise terms of the Treaty. This enabling legislation was approved by Congress in October 1988, and signed by President Reagan on November 4, 1988. This legislation amends the Criminal Code of the United States to make genocide a Federal offense. It also sets a maximum penalty of life imprisonment when death results from a criminal act defined by the law. This follows the practice of implementing legislation already well-established with respect to other categories of crimes under international law.

37. According to Franz Neumann, "[i]f one analyzes the reaction of public opinion to the attempt on Hitler's life (July 20, 1944) one is struck by the fact that the right to assassinate him was never questioned by the Western world, which merely complained of the lack of its success." Franz Neuman, *On The Limits of Justifiable Disobedience in* THE DEMOCRATIC AND THE AUTHORITARIAN STATE 150 (1957).

38. Although the reasonableness of such assassination might be based entirely on the expectations of *Nullum crimen sine poena*. "No crime without a punishment," it would be substantially greater where particularly egregious crimes are still underway and/or are still being planned. Here assassination would represent an expression of humanitarian intervention and/or anticipatory self-defense.

Yet, our real objection to Saddam Hussein has little or nothing to do with his brutal pre and post-war reigns of terror in Iraq.[39] When Saddam destroyed large numbers of Kurds and other allegedly dissident Iraqis before and after his takeover of Kuwait, there was barely a murmur in Washington.[40] Indeed, the first Bush administration and certain members of Congress deliberately overlooked these monstrous violations of human rights in the presumed interests of an American Realpolitik.[41]

Why, precisely, might we now seek to rid the world of this particular tyrant? Since "humanitarian intervention" may not apply, what grounds for assassination, if any, exist under international law?[42] To answer this question

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39. For a comprehensive consideration of Iraqi crimes committed during the Gulf War, see Jordan J. Paust, *Suing Saddam: Private Remedies for War Crimes and Hostage-Taking*, 31 VA. J. INT'L L. 351 (1991); Louis Rene Beres, *The United States Should Take the Lead in Preparing International Legal Machinery for Prosecution of Iraqi Crimes*, 31 VA. J. INT'L L. 381 (1991); William V. O'Brien, *The Nuremberg Precedent and the Gulf War*, 31 VA. J. INT'L L. 391(1991); and John Norton Moore, *War Crimes and the Rule of Law in the Gulf Crisis*, 31 VA. J. INT'L L. 403 (1991).

40. *See* Patrick E. Tyler, *U.S. to Help Retrieve Data on Iraqi Torture of Kurds*, N.Y. TIMES, May 17, 1992, at 3Y; *see also* David A. Korn, *Genocide of the Kurds*, CHRISTIAN SCIENCE MONITOR, Mar. 13, 1992, at 18; *see also* Chris Hedges, *Deep in the Marshland of Iraq, Flame of Revolt Still Flickers*, N.Y. TIMES, Mar. 15, 1992, at 1, 6.

41. *See Mass Killings in Iraq: Hearings Before the Committee on Foreign Relations*, 102nd Congress, 2nd Sess. 51 (1992). *See also* Louis Rene Beres, *After the Gulf War: Iraq, Genocide and International Law*, 69 U. DET. MERCY L. REV. 13 (1991); Louis Rene Beres, *Iraqi Crimes and International Law: The Imperative to Punish*, 21 DENV. J. INT'L L. & POL'Y 335 (1993); Louis Rene Beres, *Iraqi Crimes During and After the Gulf War: The Imperative Response of International Law*, 15 LOY. L.A. INT'L & COMP. L. REV. 675 (1993); Louis Rene Beres, *Iraqi Deeds and International Law: The Question of Punishment*, 14 JERUSALEM J. INT'L RELATIONS 22 (1992); Louis Rene Beres, *Prosecuting Iraqi Crimes Against Israel During the Gulf War: Jerusalem's Rights Under International Law*, 9 ARIZ. J. INT'L & COMP. L. 337 (1992); Louis Rene Beres, *Prosecuting Iraqi Crimes: Fulfilling the Expectations of International Law After the Gulf War*, 10 DICK J. INT'L L. 425 (1992); Louis Rene Beres, *Prosecuting Iraqi Crimes Under International Law: An American Constitutional Imperative*, 15 HOUS. J. INT'L L. 91 (1992); Louis Rene Beres, *Prosecuting Iraqi Gulf War Crimes: Allied and Israeli Rights Under International Law*, 16 HASTINGS INT'L & COMP. L. REV. 41 (1989); Louis Rene Beres, *Toward Prosecution of Iraqi Crimes Under International Law: Jurisprudential Foundations and Jurisdictional Choices*, 22 CAL. W. INT'L L. J. 127 (1991); *see* Beres, *supra* note 35, at 381-90; Louis Rene Beres, *Prosecuting Iraqi Crimes Under International Law: An American Constitutional Imperative*, Occasional Paper, The Joan B. Kroc Institute for International Peace Studies, University of Notre Dame (1992); Louis Rene Beres, *Punishing Genocide and Crimes Against Humanity After the Gulf War: Iraqi Crimes and International Law*, 41 Occasional Paper, Graduate Institute of International Studies, Programme For Strategic and International Security Studies, Geneva, Switzerland (1992).

42. Ironically, the United Nations, which is responsible for most of the post-Nuremberg codification of the international law of human rights, has sometimes been associated with increased *limits* on the doctrine of humanitarian intervention. These limits, of course, flow from the greatly reduced justification for the use of force in the Charter system of international law, especially the broad prohibition contained in Article 2 (4). Yet, while it cannot be denied that humanitarian intervention might be used as a pretext for naked aggression, it is also incontestable that a too-literal interpretation of 2 (4) would summarily destroy the entire corpus of normative protection for human rights--a corpus that is coequal with "peace" as the central

authoritatively, we should now consider the idea of assassination as anticipatory self-defense.[43]

International law is not a suicide pact. The right of self-defense by forestalling an attack was already established by Hugo Grotius in Book II of *The Law of War and Peace* in 1625.[44] Recognizing the need for "present danger" and threatening behavior that is "imminent in a point of time," Grotius indicates that self defense is to be permitted not only after an attack has already been suffered, but also in advance - where "the deed may be anticipated."[45] Or as he says a bit further on in the same chapter: "It be lawful to kill him who is preparing to kill . . . ."

Let us recall here also Pufendorf's argument in *On the Duty of Man and Citizen According to Natural Law*:

> Where it is quite clear that the other is already planning an attack upon me, even though he has not yet fully revealed his intentions, it will be permitted at once to begin forcible self defense, and to anticipate him who is preparing mischief, provided that there be no hope that, when admonished in a friendly spirit, he may put off his hostile temper; or if such admonition be likely to injure our cause. Hence, he is to be regarded as the aggressor, who first conceived the wish to injure, and prepared himself to carry it out. But the excuse of self-defense will be his, who by quickness shall overpower

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objective of the Charter. Moreover, in view of the important nexus between peace and human rights, a nexus in which the former is very much dependent upon widespread respect for human dignity, a too-literal interpretation of 2 (4) might well impair the prospects for long-term security. It must be widely understood that the Charter does not prohibit all uses of force and that certain uses are clearly permissible in pursuit of basic human rights. Notwithstanding, its attempt to bring greater centralization to legal processes in world politics, the Charter system has not impaired the long-standing right of individual States to act on behalf of the international legal order. In the continuing absence of effective central authoritative processes for decision and enforcement, the legal community of humankind must continue to allow, indeed, must continue to *require* humanitarian intervention by individual States.

43. For writings by this author on anticipatory self-defense under international law, see Louis Rene Beres, *On Assassination as Anticipatory Self-Defense: Is It Permissible?*, 70 U. DET. MERCY L. REV. U. 13 (1992); Louis Rene Beres, *On Assassination as Anticipatory Self-Defense: The Case of Israel*, 20 HOFSTRA L. REV. 321 (1991); Louis Rene Beres, *Preserving the Third Temple: Israel's Right of Anticipatory Self-Defense Under International Law*, 26 VAND. J. TRANSNAT'L L. 111 (1993); Louis Rene Beres, *After the Gulf War: Israel, Preemption and Anticipatory Self-Defense*, 13 HOUS. J. INT'L L. 259 (1991); Louis Rene Beres, *Israel and Anticipatory Self-Defense*, 8 ARIZ. J. INT'L & COMP. L. REV. 89 (1991); Louis Rene Beres, *After the Scud Attacks: Israel, 'Palestine,' and Anticipatory Self-Defense*, 6 EMORY INT'L L. REV. 71 (1992).

44. *See* Hugo Grotius, *Of The Causes of War; and First of Self Defense, and Defense Of Our Property reprinted in* 2 CLASSICS OF INTERNATIONAL LAW 168-75 (Carnegie Endowment Trust 1925) (1625).

45. *See* HUGO GROTIUS, THE LAW OF WAR AND PEACE 169-85 (Francis W. Kelsey trans., 1925) (1625).

> his slower assailant. And for defense, it is not required that one receive the first blow, or merely avoid and parry those aimed at him.[46]

But what particular strategies and tactics may be implemented as appropriate instances of anticipatory self-defense? Do they include assassination? The customary right of anticipatory self-defense has its modern origins in the Caroline incident, which concerned the unsuccessful rebellion of 1837 in Upper Canada against British rule (a rebellion that aroused sympathy and support in the American border states).[47] Following this case, the serious threat of an armed attack has generally been taken to justify militarily defensive action. In an exchange of diplomatic notes between the governments of the United States and Great Britain, then U.S. Secretary of State Daniel Webster outlined a framework for self-defense that did not require an actual attack. Here, military response to a threat was judged permissible so long as the danger posed was "instant, overwhelming, leaving no choice of means and no moment for deliberation."[48]

Today, some scholars argue that the customary right of anticipatory self-defense articulated by the Caroline has been overridden by the specific language at Article 51 of the UN Charter.[49] In this view, Article 51 fashions a new and far more restrictive statement of self-defense, one that does rely on the literal qualifications contained in the expression "if an armed attack occurs." This interpretation ignores that international law cannot compel a state to wait until it absorbs a devastating or even lethal first strike before acting to protect itself. The argument against the restrictive view of self defense is reinforced by the apparent weakness of the Security Council in offering collective security against an aggressor - a weakness that is especially apparent in the case of Iraq.

But we are still left with the problem of demonstrating that assassination can be construed, at least under certain very limited circumstances, as an appropriate expression of anticipatory self-defense. To an extent, the enhanced permissibility of anticipatory self-defense that follows generally from the growing destructiveness of current weapons technologies may be paralleled by the enhanced permissibility of assassination as a particular preemptive strategy. Indeed, where assassination as anticipatory self-defense may actually prevent a nuclear or biological or other highly destructive form

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46. *See* SAMUEL PUFENDORF, ON THE DUTY OF MAN AND CITIZEN ACCORDING TO NATURAL LAW, bk. 1, ch. 5 (James Tully ed., Michael Silverthorne trans., 1991).

47. *See* J. MOORE, A DIGEST OF INTERNATIONAL LAW 409 (1906).

48. *Id.* at 412.

49. Article 51 states that "[n]othing 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 measures necessary to maintain international peace and security." U.N. CHARTER, art. 51, para. 1.

of warfare, reasonableness dictates that it could represent distinctly or even especially *law-enforcing* behavior.

Of course, for this to be the case, a number of particular conditions would need to be satisfied. First, the assassination itself would have to be limited to the greatest extent possible to those authoritative persons in the prospective attacking state (in our deliberations, Saddam Hussein). Second, the assassination would have to conform to all of the settled rules of warfare as they concern discrimination, proportionality[50] and military necessity. Third, the assassination would need to follow intelligence assessments that point persuasively to preparations for unconventional or other forms of highly destructive warfare. And fourth, the assassination would need to be founded upon carefully-calculated judgments that it would, in fact, prevent the intended aggression, and that it would do so with substantially less harms to civilian[51] populations than would alternative forms of anticipatory self-defense.

Significantly, the current Bush administration is already on record as favoring a broadened concept of anticipatory self-defense. On September 20, 2002, the President issued *The National Security Strategy for the United States of America*.[52] This new American doctrine asserts that traditional notions of deterrence will not work against the new kind of enemy. "We must," says the document, "adapt the concept of imminent threat to the capabilities and objectives of today's adversaries."[53] This timely and essential "adaptation" means nothing less than striking first against particularly dangerous adversaries whenever necessary.

Should this broadened idea of anticipatory self-defense include assassination? In view of President Bush's insistent allegations that Saddam

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50. The principle of proportionality has its origins in the Biblical *Lex Talionis* (law of exact retaliation). The "eye for eye, tooth for tooth" expression is found in three separate passages of the Torah. In contemporary international law, the principle of proportionality can be found in the traditional view that a state offended by another state's use of force can - if the offending state refuses to make amends - take "proportionate" reprisals. *See* INGRID DETTER DE LUPIS, THE LAW OF WAR 75 (1987). Evidence of the rule of proportionality can also be found in Article 4 of the United Nations Covenant on Civil and Political Rights of 1966. Similarly, Article 15 of the European Convention on Human Rights provides that in time of war or other public emergency, contracting parties may derogate from the provisions, on the condition of rules of proportionality. And the American Convention on Human Rights allows at Article 27(1) such derogations "in time of war, public danger or other emergency which threatens the independence or security of a party" on condition of proportionality.

51. Pursuant to the 1949 Geneva Convention IV, civilians are "persons taking no active part in the hostilities, including members of the armed forces who have laid down their arms and those *hors de combat* by sickness, wounds, detention, or any other cause." Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 3, para. 1, 75 U.N.T.S. 287.

52. *See The National Security Strategy of the United States of America*, *available at* http://www.whitehouse.gov/nsc/ nss.html (last visited Apr. 10, 2003).

53. *Id.*

Hussein supports terrorist enemies of the United States,[54] would such assassination be an authoritative expression of counter-terrorism? Normally we think of anticipatory self-defense in terms of military operations against enemy forces and infrastructures.[55]

What, precisely, are the Bush administration allegations? Regarding Saddam Hussein's support for international terrorism,[56] Iraq is one of seven countries that have been designated by the Secretary of State as state sponsors of terrorism. UN Security Council Resolution 687 prohibits Saddam Hussein from committing or supporting terrorism, or allowing terrorist organizations to operate in Iraq.[57] Saddam Hussein, alleges President Bush, continues to violate these United Nations Security Council expectations:

> In 1993, the Iraqi Intelligence Service (IIS) directed and pursued an attempt to assassinate, through use of a powerful car bomb, former U.S. President George Bush and the Emir of Kuwait. Kuwaiti authorities thwarted the terrorist plot and arrested 16 suspects, led by two Iraqi nationals.

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54. *See generally* the many stories reporting Secretary of State Colin L. Powell's presentation to the United Nations Security Council on Wednesday, February 5, 2003. For example see *The Case Against Iraq,* NEWSHOUR WITH JIM LEHRER – PBS, Feb. 5, 2003, *available at* http://www.pbs.org/newshour/bb/middle_east/jan-june03/case_2-5.html (last visited May 18, 2003). In that presentation, Powell argued, correctly, that Iraq has not complied with Resolution 1441 (which offered it a "final opportunity" to disarm voluntarily) and that it is in league with various terrorist organizations.

55. According to Title II, Sec. 201 (4) of The Comprehensive Terrorism Prevention Act of 1995: "The President should use all necessary means, including covert action and military force, to disrupt, dismantle and destroy infrastructures used by international terrorists, including terrorist training facilities and safe havens." The Comprehensive Terrorism Prevention Act of 1995, S. 735, 104th Cong., 1st Sess., U.S. Senate (1995).

56. Here we must also recall Saddam Hussein's infliction of eco-terrorism in Kuwait at the end of the Gulf War. For an exhaustive and authoritative assessment of Iraqi crimes against the environment, including the torching of Kuwaiti oil wells, see *The Environmental Aftermath of the Gulf War: A Report Prepared for the Committee on Environment and Public Works, Gulf Pollution Task Force, by the Environment and Natural Resources Policy Division, American Law Division, and the Science Policy Research Division of the Congressional Research Service*, 102nd Cong., 2nd Sess., S.PRT, 102-84, Mar. 1992, Washington D.C.: U.S. Govt., 1992. [hereinafter *Environmental Aftermath*]. The Senate Gulf Pollution Task Force reviewed the applicable principles of international law that governed Iraq's actions, and reaffirmed, *inter alia*, the fundamental principle of responsibility for transnational harm. This principle is grounded in the expression of customary international law that "[a] State is bound to prevent such use of its territory as, having regard to the circumstances, is unduly injurious to the inhabitants of the neighboring State." *Id. See generally* MUHAMMAD SADIQ & JOHN C. MCCAIN, THE GULF WAR AFTERMATH: AN ENVIRONMENTAL TRAGEDY (1993).

57. Other Security Council resolutions condemn terrorism in general. For example, Security Council Resolution 1373 (2001) calls for suppressing financing and improving international cooperation. This Resolution also creates a special committee to monitor implementation. *See Security Council Resolution 1373,* United Nations Website, *available at* http://www.un.org/News/Press/docs/2001/sc7158.doc.htm (last visited Apr. 10, 2003).

> Iraq shelters terrorist groups including the Mujahedin-e-Khalq Organization (MKO), which has used terrorist violence against Iran and in the 1970s was responsible for killing several U.S. military personnel and U.S. civilians.
>
> Iraq shelters several prominent Palestinian terrorist organizations in Baghdad, including the Palestine Liberation Front (PLF), which is known for aerial attacks against Israel and is headed by Abu Abbas, who carried out the 1985 hijacking of the cruise ship *Achille Lauro* and murdered U.S. citizen Leon Klinghoffer.[58]
>
> Iraq shelters the Abu Nidal Organization, an international terrorist organization that has carried out terrorist attacks in twenty countries, killing or injuring almost 900 people. Targets have included the United States and several other Western nations. Each of these groups has offices in Baghdad and receives training, logistical assistance and financial aid from the government of Iraq.
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> In April 2002, Saddam Hussein increased from $10,000 to $25,000 the money offered to families of Palestinian suicide/homicide bombers. The rules for rewarding suicide/homicide bombers are strict and insist that only someone who blows himself up with a belt of explosives gets the full payment. Payments are made on a strict scale, with different amounts for wounds, disablement, death as a "martyr" and $25,000 for a suicide bomber . . . .
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> Former Iraqi military officers have described a highly-secret training facility in Iraq where both Iraqis and non-Iraqi Arabs receive training on hijacking planes and trains, planting explosives in cities, sabotage and assassinations.[59]

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58. This PLO murder of an American in a wheelchair led to a case in U.S. federal court holding that the PLO fails to meet the internationally-accepted definition of a state. *See* Klinghoffer v. S.N.C. Achille Lauro, 937 F.2d 44, 47 (2d Cir. 1991) *citing* National Petrochemical Co. v. M.T. Stolt Sheaf, 860 F. 2d 551, 553 (2d Cir. 1988) *cert. denied*, 489 U.S. 1091 (1989), (*quoting* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, Sec. 201 (1987)). In *Klinghoffer*, the PLO characterized itself as "the embodiment of the nationhood and sovereignty of the Palestinian people . . . ." and "The State of Palestine is the state of Palestinians wherever they may be." *Klinghoffer*, 937 F.2d at 46-47. The court considered these assertions as further evidence that the PLO lacked the requisite characteristics of a state. *See id.* at 47.

59. *See* President George W. Bush, *Saddam Hussien's Support for International Terrorism*, The White House, Nov. 4, 2002 *available at* http://www.whitehouse.gov/infocus/iraq/decade/sect5.html (last visited May 18, 2003). *See also* Frank Gaffney, *Iraq and Al Qaeda*, WASH. TIMES, Jan. 28, 2003.

Should Saddam Hussein be assassinated to protect the United States against terror, especially against weapons of mass destruction attacks? In view of the persistent failure of the international community to secure his compliance with indispensable Security Council expectations regarding weapons of mass destruction, the only alternative to such methods will very likely be Iraqi aggression involving chemical, biological, and nuclear arms, or Iraqi-assisted terrorism.[60] Unless we are willing to accept such aggression and terrorism, terrorism that could be extended by selected Arab/Islamic groups granted CBN agents by the Iraqi dictator - assassination of Saddam could surely be the least injurious and most righteous option. Regarding terror groups that could be armed with Iraqi mass-destruction technologies and weapons in the absence of precise regime-targeting by the United States, these groups could potentially inflict great harms upon our own country, further strengthening the American case for assassination as anticipatory self-defense.

It is often necessary, under international law, to offend certain norms in order to implement others. There are circumstances wherein assassination, usually regarded as a violation of myriad customary and conventional rules, represents the only impediment to Nuremberg-category crimes. These circumstances are important, and need to be considered carefully, in the ongoing matter of Saddam Hussein.

Abhorrent as it may seem, assassination does have a proper place in the enforcement of international law. To be sure, this place is small and residual, but it must be acknowledged nonetheless. Although an ideal world legal order would contain neither victims nor executioners,[61] such an arrangement of global power and authority is assuredly not yet on the horizon. We do not live

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60. The argument that Saddam Hussein's WMD threat to the United States is closely linked to the terror threat has been made repeatedly by the Bush administration. Speaking to the Council on Foreign Relations on January 23, 2003, Deputy Secretary of Defense Paul Wolfowitz said:

> [t]he threat posed by the connection between terrorist networks and states that possess these weapons of mass terror presents us with the danger of a catastrophe that could be orders of magnitude worse than September 11th. Iraq's weapons of mass terror and the terror networks to which the Iraqi regime are linked are not two separate themes - not two separate threats.

U.S. Dept. of State, *Iraq is Still Unwilling to Disarm, Wolfowitz Says*, *available at* http://usinfo.state.gov/topical/pol/conflict/wolfir23.htm (last visited May 18, 2003).

61. This phrase is taken from ALBERT CAMUS, NEITHER VICTIMS NOR EXECUTIONERS (Dwight McDonald ed., 1968). Confronting what he called "our century of fear," Camus asked us all to be "neither victims nor executioners," living not in a world in which killing has disappeared ("we are not so crazy as that"), but one wherein killing has become illegitimate. *See id.* at 1. This is a fine expectation, to be sure, but not one that can be taken as realistic. Deprived of the capacity to act as *lawful executioners*, both states and individuals within states, facing aggression and/or egregious human rights violations, would be forced by Camus' reasoning to become victims. The problem with Camus' argument is that the will to kill remains unimpressed by others' commitments to "goodness." This means that both within states and between them, executioners must have their rightful place, and that without these executioners there would only be *more victims*.

in the best of all possible worlds, and persistent avoidance of defensive war with Iraq at all costs will ultimately produce war and terrorism by Iraq at altogether terrible costs to us and to certain of our allies. Moreover, a war fought to remove Saddam from power - a war shaped by the assassination imperative—could be vastly less injurious than a war fought to bring total defeat to Iraq.[62] In this sense, contrary to conventional wisdom on the matter, assassination could actually represent a substantially life-saving use of armed force in world politics.[63]

So optimally, we would remove Saddam Hussein with minimal harm to all others. Interestingly, such a dual objective was already examined in classic international legal thought by Samuel Pufendorf:

> As for the force employed in war against the enemy and his property, we should distinguish between what an enemy can suffer without injustice, and what we cannot bring to bear against him, without violating humanity. For he who has declared himself our enemy, inasmuch as this involves the express threat to bring the worst of evils upon us, by that very act, so far as in him lies, gives us a free hand against himself, without restriction. Humanity, however, commands that, so far as the clash of arms permits, we do not inflict more mischief upon the enemy than defense, or the vindication of our right, and security for the future, require.[64]

Assassination, like war, will not simply go away. The point, therefore, is not to pretend and to manipulate, but to try to operate within clear constraints, with precise objectives and according to jurisprudentially correct

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62. Nonetheless, in some classical texts, bringing total defeat to an aggressor state such as Iraq would be entirely consistent with international law. Emmerich de Vattel, for example, extends the principle of *Hostes humani generis* from individuals to nations, and even insists that collective wrongdoers be dealt with just as harshly as individuals. Hence, he argues:

> Nations which are always ready to take up arms, when they hope to gain something thereby, are unjust plunderers; but those who appear to relish the horrors of war, who wage it on all sides without reason or pretext, and even without other motive than their savage inclinations, are monsters, and unworthy of the name of men. They should be regarded as enemies to the human race, just as in civil society persons who follow murder and arson as a profession commit a crime not only against the individuals who are victims of their lawlessness, but against the State of which they are the declared enemies. Other Nations are justified in uniting together as a body, with the object of punishing, and even of exterminating, such savage peoples.

VATTEL, *supra* note 4, at 93.

63. Here we may take special note of the following: *Ubi cessat remedium ordinarium, ibi decurritur ad extraordinarium.* "Where the ordinary remedy fails, recourse must be had to an extraordinary one." *See* BLACK'S LAW DICTIONARY 1520 (6th ed. 1990).

64. *See* SAMUEL PUFENDORF, ON THE DUTY OF MAN AND CITIZEN ACCORDING TO NATURAL LAW, Vol. II 139(Frank Gardner Moore trans., 1964).

standards. Ideally, our leaders, in conjunction with others in the United Nations, would soon set to work on a "Draft Code" concerning assassination. An expected outcome of such a codification effort, which would have substantial precedent in international criminal law,[65] could be a stricter regulation of assassination as a transnational activity and corollary reductions in associated peripheral harms (reductions bringing assassination within the ambit of humanitarian international law).

The only alternative is "business as usual," pretending that assassination is not a juridical matter of concern. Such pretense will not inhibit the incidence of assassination and it will ensure a continuing incapacity to bring such forms of killing under effective legal guidelines and controls. If we can accept that so intrinsically an ungovernable activity as war should be regulated by law, we should also be able to accept codified regulations for assassination (which can, of course, be undertaken within war).

In the matter of Saddam Hussein, assassination options should be conceived and implemented with respect to fully permissible expectations of anticipatory self-defense. Acknowledging that this is not yet the "best of all possible worlds," we must always understand that sometimes the reluctance to use such seemingly violent options would only produce more corpses. As President Bush likely understands, failure to assassinate Saddam now can only result in large-scale losses of innocent life later, losses that could be generated by terrorism as well as by aggressive war.

In the event that the United States waits until the onset of war to commence assassination attempts against Saddam Hussein, it could argue correctly that even an enemy official - so long as he operates within the military chain of command - is a proper combatant and is not an enemy *hors de combat.* By this reasoning that certain enemy officials can be lawful targets, assassination can be supported if there are no coincident violations of the Law of War.

Adherents of the position that assassination of enemy officials in wartime may be permissible could offer two plausible bases of jurisprudential support. First they could argue that such assassination does not evidence behavior that is designed "to kill or wound treacherously," as defined at Article 23(b) of Hague Convention IV.[66] Second, they could argue that there is a "higher" or *jus cogens* obligation to assassinate in particular circumstances that transcends pertinent treaty prohibitions. To argue the first would

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65. *See generally Draft Articles on the Draft Code of Crimes Against the Peace and Security of Mankind*, Dec. 4, 1954. U.N. Doc. A/46/405 (1991), 30 I.L.M. 1554 (1991); *reprinted in* 2 Weston II.E.5.(as revised by the International Law Commission, through 1991).

66. *See* Hague Convention IV, Respecting the Laws and Customs of War on Land, with Annex of Regulations, *done* Oct. 18, 1907, *entered into force* for the United States, Jan. 26, 1910, 36 Stat. 2277, 1 Bevans 631.

focus primarily on a "linguistic" solution. To argue the second would be to return to the historic natural law origins of international law.[67]

Natural law remains, beyond any doubt, the foundation of all international law.[68] This understanding was reaffirmed explicitly at Nuremberg.[69] Although the indictments of the Nuremberg Tribunal were cast in terms of positive law, the actual judgments of the Tribunal unambiguously reject the proposition that the validity of international law depends upon its "positiveness," that is - upon its precise and detailed codification. The words used at Nuremberg - "So far from it being unjust to punish him, it would be unjust if his wrongs were allowed to go unpunished"[70] - stem from the peremptory principle: *Nullum crimen sine poena*, "No crime without a punishment."[71] This principle stands in sharp contrast with the central idea of jurisprudential "positivism," that is, the exclusive idea of law as the command of a sovereign.

The aforementioned arguments concerning assassination as anticipatory self-defense are strengthened by the underlying and important expectations of

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67. For a comprehensive assessment of the natural law origins of international law by this writer, see Louis Rene Beres, *Justice and Realpolitik: International Law and the Prevention of Genocide*, 33 AM. J. JURIS. 123 (1988). This article was adapted from a presentation by this writer at the International Conference on the Holocaust and Genocide, Tel-Aviv, Israel, June 1982.

68. Vattel identifies the immutability of certain peremptory norms (*jus cogens*) with their basis in Natural Law:

> Since, therefore, the necessary Law of Nations consists in applying the natural law to States, and since the natural law is not subject to change, being founded on the nature of things and particularly upon the nature of man, it follows that the necessary Law of Nations is not subject to change. Since this law is not subject to change, and the obligations which it imposes are necessary and indispensable, Nations can not alter it by agreement, nor individually or mutually release themselves from it.

VATTEL, *supra* note 4, at 4.

69. *See International Conference on Military Trials* 223, London 1945. Report of Robert H. Jackson, Department of State, I.O.C.S. II, European, 1. The Judgment of the IMT of October 1, 1946 rested upon the four Allied Powers' London Agreement of August 8, 1945, to which was annexed a Charter establishing the Tribunal. Nineteen other states subsequently acceded to the Agreement. In addition to the forty-two volumes of official documents on the *Nuremberg Trial of the Major War Criminals Before the International Military Tribunal* published by that Tribunal (1947-49), the United Nations War Crimes Commission selected and edited eighty-nine additional cases, published in fifteen volumes as *Law Reports of Trials of War Criminals* (1947-49).

70. *See* A. D'ENTREVES, NATURAL LAW: AN INTRODUCTION TO LEGAL PHILOSOPHY 106 (1970). *Nullum crimen sine poena* is the principle that distinguishes between criminal and civil law. Without punishment there can be no distinction between a penal statute and any other statute. *See* Redding v. State, 85 N.W. 2d 647, 652 (Neb. 1957) (concluding that a criminal statute without a penalty clause is of no force and effect). The earliest statements of *Nullum crimen sine poena* can be found in the ancient Code of Hammurabi (c. 1728-1686 B.C.); the Laws of Eshnunna (c. 2000 B.C.); the even-earlier Code of Ur-Nammu (c. 2100 B.C.); and the *Lex Talionis* or law of exact retaliation presented in three separate passages of the Jewish Torah or Biblical Pentateuch.

71. BLACK'S, *supra* note 63, at 1068, 1155, 1385.

natural law—expectations that are always peremptory, are always above the particular constraints of human lawmaking and always of special relevance to Americans. For Blackstone, writing in the Fourth Book of his *Commentaries*, "Of Public Wrongs," it was essential to transform "the eternal, immutable laws of good and evil" into a practical and operational code.[72] As a starting point for understanding the common law, the *Commentaries* reveal that all international law, or what Blackstone calls the Law of Nations, is "deducible" from natural law and therefore binding upon each and every state.[73] Thus, each state is called upon "to aid and enforce the law of nations, as part of the common law, by inflicting an adequate punishment upon offenses against that universal law. . . ."[74]

When Thomas Jefferson set to work on the Declaration of Independence, he drew freely upon Aristotle, Cicero, Grotius, Vattel, Pufendorf, Burlamaqui and - especially - John Locke. Asserting the right of revolution whenever government becomes destructive of "certain unalienable rights," the Declaration posits a natural order in a world whose laws are external to human will and which are discoverable through human reason. Although, by the eighteenth century, scholars had come to view God as having withdrawn from immediate contact with humankind (thereby transforming God into the "Prime Mover" of the universe), "nature" provided an apt substitute. Reflecting the decisive influence of Isaac Newton, whose PRINCIPIA was first published in 1686, all of creation was now taken as an expression of Divine Will. Hence, the only way to know God's will was to discover natural law. Locke and Jefferson had deified nature and denatured God.

The theory of natural law, which is found, *inter alia*, in the Declaration and in the Bill of Rights, is based on clarity, self-evidence and coherence. Its validity cannot be challenged by considerations of power politics. To ignore any assassination imperatives that might lie latent in these documentary foundations of the United States - in particular, as we may be facing terrorist harms inflicted by weapons of mass destruction - would be illogical and self-contradictory, as it would nullify the immutable and universal law of nature from which these documents derive.

We observe, therefore, that U.S. responsibility to ensure punishment[75] and defend against terrorism derives not only from the explicit expectations of international law, but also from the natural law foundations of American

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72. *See* WILLIAM BLACKSTONE, BLACKSTONE'S COMMENTARIES ON THE LAWS OF ENGLAND, bk. 4 ch. I. (Wayne Morrison ed., 2001).

73. *See id.*

74. *Id.* at 73.

75. Imposing punishment for crimes is an essential part of all international criminal law. Ongoing venues for such punishment are the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR). *See generally* Andrew N. Keller, *Punishment for Violations of International Criminal Law: An Analysis of Sentencing at the ICTY and ICTR*, 12 IND. INT'L & COMP. L. REV. 53 (2001).

municipal law.[76] In the strictest sense, the natural law foundations of our municipal law are not a distinct alternative to international legal norms, but rather a distinct source of international law. According to Article 38 (c) of the Statute of the International Court of Justice, international law stems in part from "the general principles of law recognized by civilized nations."[77] This means nothing less than that the U.S. Declaration of Independence and Bill of Rights represent an authoritative source of international legal norms. Indeed, contemporary international law displays an even more explicit debt to these documents by identifying an "International Bill of Rights"[78] at the very cornerstone of a binding, worldwide human rights regime - a regime that includes, *inter alia*, freedom from terrorism-inflicted harms. It follows from all this that any U.S. initiative to punish and prevent aggression, terrorism and related crimes against humanity by assassination of Saddam Hussein could represent essential support for international law directly and for our own founding principles.

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76. According to Clinton Rossiter:

> Yet, the most compelling explanation is the American's deep-seated conviction that the Constitution is an expression of the Higher Law, that it is in fact imperfect man's most perfect rendering of what Blackstone saluted as 'the eternal, immutable laws of good and evil, to which the creator himself in all his dispensations conforms; and which he has enabled human reason to discover, so far as they are necessary for the conduct of human actions.'

EDWARD S. CORWIN, THE "HIGHER LAW" BACKGROUND OF AMERICAN CONSTITUTIONAL LAW, vi Prefatory Note (1928).

77. *See* U.N. CHARTER, *done* San Francisco, June 26, 1945, *entered into force* for the United States, Oct. 24, 1945, 59 Stat. 1031, T.S. No. 993, 3 Bevans 1153, 1976 Y.B.U.N. 1052.

78. The International Bill of Rights consists of the human rights provisions of the UN Charter; the Universal Declaration of Human Rights; the two International Covenants on Human Rights and the Optional Protocol to the Covenant on Civil and Political Rights. *See generally* Louis Henkin, *The International Bill of Rights: The Universal Declaration and the Covenants*, *in* INTERNATIONAL ENFORCEMENT OF HUMAN RIGHTS 1 (R. Bernhardt & J.A. Jolowicz eds., 1987).

OSAMA BIN-LADEN, *JIHĀD*, AND THE SOURCES OF INTERNATIONAL TERRORISM

J. M. B. Porter*

I. INTRODUCTION

Two documents released in the 1990s—the 1996 "Declaration of War against the Americans Occupying the Land of the Two Holy Places"[1] and the 1998 "Declaration of the World Islamic Front"[2]—provide key insights towards understanding Osama bin-Laden's vision of modern Islamacist terrorism.[3] These texts provide the philosophical and theological framework of *jihād* as utilized by bin-Laden to justify international terrorism; they make clear that he sees the United States as not just an enemy but as a modern-day Crusader bent on occupying the holy places of Islam.[4] Bin-Laden's use of Crusade imagery in these texts is significant: he saw the American presence in Saudi Arabia before, during, and after the 1991 Gulf War as a "Crusader" occupation of the holy places of Islam and therefore "a clear declaration of war on God, his messenger [Mohammad], and Muslims."[5] To explain this metaphor, I will

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1. See the translation at *U.S. Hails Capture of Suspected Sept. 11 Mastermind*, ONLINE NEWSHOUR, *available at* http://www.pbs.org/newshour/terrorism/international/fatwa_1996.html (last visited Mar. 24, 2003).

2. See the translation at *Text of Fatwah Urging Jihad Against Americans*, *available at* http://www.ict.org.il/articles/fatwah.htm (last visited Mar. 24, 2003) [hereinafter *Text of Fatwah*]; my thanks to Professor Glenn Reynolds of the University of Tennessee School of Law for this reference. The Arabic-language text of this document is available at *World Islamic Front for Jihad Against Jews and Crusaders: Initial "Fatwa" Statement*, *at* http://www.library.cornell.edu/colldev/mideast/fatw2.htm (last visited Apr. 7, 2003) [hereinafter *World Islamic Front*].

3. For an introduction to the conflict between Islamic and Western societies, see BERNARD LEWIS, WHAT WENT WRONG? THE CLASH BETWEEN ISLAM AND MODERNITY IN THE MIDDLE EAST 1 (2002).

4. *See Text of Fatwah*, *supra* note 2. For the Crusades, *see generally* BERNARD HAMILTON, THE CRUSADES: SUTTON POCKET HISTORIES 1 (1998); JONATHAN RILEY-SMITH, THE CRUSADES: A SHORT HISTORY 1 (1987); and CAROLE HILLENBRAND, THE CRUSADES: ISLAMIC PERSPECTIVES 1 (1999).

5. *See Text of Fatwah*, *supra* note 2.

briefly investigate the Islamic idea of *jihād* before and during the Crusades, and how the idea of *jihād* began to take on a double meaning, as both a form of moral self-improvement and as holy war on behalf of the Islamic faith. I shall also analyze bin-Laden's use of the concept of *jihād*, tracing its development and evolution from the earliest days of Islamic empire to the present day to show how this concept has been used and transformed by radicalized Islamacists, thus providing a historical background to international terrorism in the late twentieth and early twenty-first century.[6]

II. WHAT IS *JIHĀD*?

"*Jihād* is perhaps the most loaded word in the lexicon of Islam's relations with the West;"[7] its precise meaning has caused a great deal of controversy among Western scholars of Islam. Commonly translated as "holy war,"[8] *jihād* literally means to strive, to exert oneself, to struggle, or to take extraordinary pains;[9] it can mean a form of moral self-improvement as well as holy war on behalf of the Islamic faith.[10]

A. *Greater jihād*

Scholars make a distinction between the so-called "lesser *jihād*" of religiously-grounded warfare and the "greater *jihād*" against evil,[11] a distinction that originated with the Prophet Mohammad who told his followers

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6. *See generally* Lawrence Wright, *The Man Behind Bin Laden*, THE NEW YORKER, Sept. 16, 2002, at 56-85; *see also* Bernard Lewis, *License to Kill: Usama bin Laden's Declaration of Jihad*, FOREIGN AFFAIRS 77.6 (Nov./Dec. 1998) at 14-19.

7. Martin Kramer, *Jihad 101*, THE MIDDLE EAST QUARTERLY 9.2 (Spring, 2002), *available at* http://www.meforum.org/article/160 (last visited Apr. 7, 2003).

8. Strictly speaking, there is no term in classical Arabic which means holy war. BERNARD LEWIS, THE POLITICAL LANGUAGE OF ISLAM 71 (1988). The closest equivalent would be "*harb muqaddasah*," a term which does not appear in the Qur'ān or any other classical Arabic text. *Id.* at 71-72; *see also* Richard Ostling, *Scholars Say Osama Bin Laden is Beyond the Bounds of Islamic Teachings on War*, ASSOCIATED PRESS (Sept. 21, 2001).

9. *See* REUVEN FIRESTONE, JIHAD: THE ORIGIN OF HOLY WAR IN ISLAM 16 (1999). *See generally* OXFORD ENCYCLOPEDIA OF THE MODERN ISLAMIC WORLD 369-73 (1995); *see also* Douglas E. Streusand, *What Does Jihad Mean?* THE MIDDLE EAST QUARTERLY 4.3 (Sept. 1997), *available at* http://www.meforum.org/pf.php?id=357(last visited Apr. 7, 2003). *But see* Noor Mohammad, *The Doctrine of Jihad: An Introduction* 3 J.L. & RELIGION at 381-98, who argues that *jihād* is a form of "political housekeeping through the elimination of the rule of those considered to be 'un-Islamic.'" *Id.* at 395-96.

10. The consequences of this definitional problem are highlighted by Daniel Pipes, Commentary: *Jihad and the Professors*, *at* http://commentary.org/ppipes.htm (last visited Apr. 8, 2003).

11. *See* MALISE RUTHVEN, ISLAM: A VERY SHORT INTRODUCTION 115 (1997); *see also* FIRESTONE, *supra* note 9, at 17.

after a battle that "We return from the lesser *jihād* to the greater *jihād*," a more difficult and important struggle for one's soul.[12]

The Washington-based Council on American-Islamic Relations follows this interpretation, stating that "*[j]ihād* does not mean holy war:"[13] instead, it "is a central and broad Islamic concept that includes struggle against evil inclinations within oneself, struggle to improve the quality of life in society, struggle in the battlefield for self-defense (*e.g.*, having a standing army for national defense), or fighting against tyranny or oppression."[14]

If "militancy is not the essence of *jihād*," then the west sees *jihād* as an Islamic war against Christians only because western thought has been heavily influenced by the Crusades and medieval Christian ideas about holy war.[15] However, the doctrine of *jihād* was codified during the Muslim conquests of the eighth century,[16] long before Pope Urban II preached the First Crusade in 1095.[17]

B. Lesser jihād

"[T]he interpretation of *jihād* as intellectual struggle is a political accommodation not well founded on Islamic theology."[18] As Bernard Lewis has noted, "the overwhelming majority of classical theologians, jurists, and traditionalists [who study the *hadith* tradition] . . . understood the obligation of *jihād* in a military sense."[19] In the Qur'ān, the word *jihād* is frequently followed by the phrase "in the path of God" in order to describe warfare against the enemies of Islam, thus "sacraliz[ing] an activity that otherwise might have appeared as no more than the tribal warfare endemic in pre-Islamic

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12. JOHN L. ESPOSITO, UNHOLY WAR: TERROR IN THE NAME OF ISLAM 28 (2002). *See also* Roxanne L. Euben, *Jihad and Political Violence*, CURRENT HISTORY, Nov. 2002, at 368.

13. *See About Islam and American Muslims*, Council on American-Islamic Relations home page, *at* http://www.cair-net.org/asp/aboutislam.asp (last visited Mar. 24, 2003).

14. *Id.*

15. AHMED RASHID, JIHAD: THE RISE OF MILITANT ISLAM IN CENTRAL ASIA 1-2 (2002). *See also* Roy Parviz Mottahedeh & Ridwan al-Sayyid, *The Idea of the Jihad in Islam before the Crusades, in* THE CRUSADES FROM THE PERSPECTIVE OF BYZANTIUM AND THE MUSLIM WORLD 23-29 (Angeliki E. Laiou & Roy Parviz Mottahedeh eds., 2001) (reviewing the nature and normative theories of *jihād* from the first Islamic century through and beyond the crusading period).

16. *See id.* at 26 (how *jihād* as "obligatory aggressive war" became the prevalent opinion in the second half of the eighth century); *see also* Euben, *supra* note 12, at 368 (Qur'ānic passages from the later, Medinan, period take precedence over earlier, Meccan, revelations and thus *jihād* is to be interpreted as active warfare).

17. *See generally* RILEY-SMITH, *supra* note 4, at 1-17.

18. Andrew Grossman, *Finding the Law; Islamic Law (Sharia)*, *available at* http://www.llrx.com/features/islamiclaw.htm (last visited Apr. 7, 2003). *See also* Abu Fadl, *Greater and Lesser Jihad*, NIDA'UL ISLAM, *available at* http://www.islam.org.au/articles/26/jihad.htm (last visited Apr. 9, 2003); *but see* the Muslim apologia at *What is Jihad*, CURRENT ISSUES IN ISLAM, *available at* http://www.unn.ac.uk/societies/islamic/_current/main.htm (last visited Mar. 24, 2003).

19. LEWIS, *supra* note 8, at 72.

Arabia;"[20] the word *jihād* has for centuries meant "fighting in God's path" in ordinary Muslim usage.[21] Generally speaking, *jihād* became understood as meaning "any act of warring authorized by legitimate Muslim authorities on behalf of the religious community and determined to contribute to the greater good of Islam or the community of Muslims, either in part or in whole."[22]

Its explicit political aim is the establishment of Muslim rule in a world divided into Muslim and non-Muslim camps, the *Dar al-Islam* (House of Islam) and *Dar al-Harb* (House of War).[23] While this implies perpetual warfare between Muslims and non-Muslims, it does not mean the eradication or conversion of the latter, for the Qur'ān specifically forbids conversion by force.[24]

The suppression of other faiths implicit in *jihād* is part of a struggle to establish God's rule on earth by continuous military action against non-Muslims in order to create an opportunity for Muslims to create a just political and social order.[25] This doctrine was applied by the Prophet Muhammad himself from the earliest days of the Islamic faith; not only did it continue to be applied for over a century until the last days of the Umayyad caliphate, it also provided the ideological framework for the caliphate,[26] a caliphate that some have argued that Osama bin-Laden intended to restore.[27]

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20. *See* Streusand, *supra* note 9. *But see* Euben, *supra* note 12, at 367-68 (the means of struggle or striving "in the path of God" are varied in the Islamic sources and it is unclear if *jihād* is justified only in self-defense or if "expansionist conquests against unbelievers" is also permitted); *see also* RUDOLPH PETERS, JIHAD IN CLASSICAL AND MODERN ISLAM 21-23 (1996).

21. KHALID YAHYA BLANKINSHIP, THE END OF THE JIHAD STATE: THE REIGN OF HISHAM IBN 'ABD AL-MALIK AND THE COLLAPSE OF THE UMAYYADS 293 n. 3 (1994). "[A]ctual war against unbelievers, whether idolaters or peoples of the book, had no theoretical limit and was most certainly implemented." *Id.* Reuven Firestone, *Conceptions of Holy War in Biblical and Qur'ānic Tradition*, J. REL. ETH. 99, 188 (1996). The first authoritative codification of Islamic law was in the nineteenth century. *See* MOTTAHEDEH & AL-SAYYID, *supra* note 15, at 23.

22. FIRESTONE, *supra* note 9, at 18.

23. *See* Streusand, *supra* note 9.

24. *See id.* The Qur'ānic verse is "Let there be no compulsion in religion." 'ABDULLAH YŪSUF 'ALĪ, THE MEANING OF THE HOLY QUR'ĀN (10th ed. 1999) [hereinafter *The Holy Qur'ān*] 2:256; *but see* IBN KHALDUN, THE MUQUDDIMAH 183 (167), who states, "in the Muslim community, holy war is a religious duty, because of the obligation to convert everybody to Islam either by persuasion or by force."

25. *See* Streusand, *supra* note 9. It does not matter if non-Muslims embrace Islam or if they agree to pay the *jizya*, the poll-tax paid as protection money by non-Muslims, although those who accepted Islam received the most favorable treatment. *See* BLANKINSHIP, *supra* note 21, at 11; *see also* J. J. SAUNDERS, A HISTORY OF MEDIEVAL ISLAM 33 (1965).

26. *See* BLANKINSHIP, *supra* note 21, at 11; *see also* SAUNDERS, *supra* note 25, at 33. The caliph is the political successor to Mohammad. *See* RUTHVEN, *supra* note 11, at 13.

27. *See, e.g.*, James Buchan, Special Supplement, *Terror In America Osama bin Laden: Inside the Mind of a Terrorist*, THE OBSERVER, Sept. 16, 2001, at 9. *But see* Timothy R. Furnish, *Bin Ladin: The Man Who Would Be Mahdi*, THE MIDDLE EAST QUARTERLY 9.2 (Spring 2002), *available at* http://www.meforum.org/article/159 (last visited Apr. 7, 2003) (as bin-Laden has neither a territorial base nor the support of respected Islamic jurists, his claim to the caliphate has limited support outside his al-Qaeda movement; however, there is precedent for self-declared Madhist movements, most recently Muhammad Ahmad in Sudan in 1881 and

1. The Holy Qur'ān and hadith

The Qur'ān, of course, is the foundation of Islam; for the pious Muslim it is not the word of the Prophet Mohammad, but the unadulterated word of God revealed to the Prophet through the Archangel Gabriel.[28] The doctrine of *jihād* is clearly spelled out in the Qur'ān: although the Qur'ān expressly forbids the killing of unarmed noncombatants,[29] Muslims are required to "fight in the cause of God" against unbelievers[30] or to make monetary contributions to the war effort.[31] The sayings of Mohammad, or *hadith*, are second main source of Islamic religious law and doctrine.[32] In the *hadith* tradition, *jihād* clearly means warfare: there are 199 references to *jihād* in the Bukhari *hadith* collection, and all 199 assume that *jihād* means fighting and war.[33]

2. The Kharijites

This was clearly the case during the first centuries of Islam. The Kharijites—their name means "those who go out"[34]—or Seceders were the first radical Islamic splinter group.[35] Perhaps best described as "ethical maximalists,"[36] they adopted a radical and militant form of *jihād*, believing that they were "God's army fighting a *jihād* against the forces of evil."[37] For the Kharijites, the Qur'ānic instruction to "Enjoin[] what is right and forbid[] what is wrong"[38] must be applied literally and without qualification; Muslims who did not share their strict and uncompromising beliefs were sinners, apostates, and the enemies of God.[39] The Kharijites were on the margins of Islamic society, both theologically and literally.[40]

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the 1979 seizure of the Great Mosque in Mecca that was part of an attempt to overthrow the Saudi monarchy).

28. *See* EMORY C. BOGLE, ISLAM: ORIGIN AND BELIEF 7 (1998).

29. *See The Holy Qur'ān* 2:190-192.

30. *See id.* at 2:190, 244; 9:38-41.

31. *See id.* at 57:10.

32. *See* RUTHVEN, *supra* note 11, at 21, 39. *See generally* M. Cherif Bassiouni & Gamal M. Badr, *The Shari'ah: Sources, Interpretations, and Rule-making*, 1 UCLA J. ISLAMIC & NEAR E. L. 135; *see also* IGNAZ GOLDZIHER, INTRODUCTION TO ISLAMIC THEOLOGY AND LAW, (Andras & Ruth Hamori trans., 1981).

33. *See* MUHAMMAD IBN ISMA'IL BUKHARI, THE TRANSLATION OF THE MEANING OF SAHIH AL-BUKHARI, (Muhammad Muhsin Khan trans., 1981), *available at* http://www.usc.edu/dept/MSA/fundamentals/ hadithsunnah/bukhari/052.sbt.html (last visited Apr. 7, 2003).

34. *See* SAUNDERS, *supra* note 25, at 66.

35. *See* RUTHVEN, *supra* note 11, at 56.

36. ANNEMARIE SCHIMMEL, ISLAM: AN INTRODUCTION 76 (1992).

37. *See* ESPOSITO, *supra* note 12, at 42.

38. *The Holy Qur'ān* 3:104.

39. *See* ESPOSITO, *supra* note 12, at 42.

40. Kharijite adherents survived in Oman and especially in North Africa. *See* SCHIMMEL, *supra* note 36, at 77; *see also* JOHN ALDEN WILLIAMS, THE WORD OF ISLAM 172-87 (1994).

III. INTERPRETATIONS OF *JIHĀD*

A. Crusaders, Mongols, and Ibn Taymiyah

1. The Crusades

Bin-Laden's constant references to the Crusades in his pronouncements against the West both before and after September 11th is in line with recent Muslim—particularly Arab—scholarship which reinterprets the Crusades in light of the nineteenth and twentieth century history of colonialism, Arab nationalism, and the creation of the Israeli state.[41] But the Crusaders' capture of Jerusalem initially attracted little attention in the Muslim world; although religiously significant,[42] under Muslim rule Jerusalem was never politically or administratively important.[43] Jerusalem was also in the middle of a conflict between the Isma'ili Shi'ite Fatamids in Egypt and the Sunni 'Abbasids in Baghdad, a struggle amplified by the Seljuq succession crisis that followed the death of Malikshah in 1092.[44] The Muslim world did not see the Crusades as being something separate from the long series of enemies—Turks and Bedouin—that they regularly fought in the Holy Land.[45] The Seljuq Turks saw the First Crusade as a distraction from their conflict with the Fatamids in Egypt; the Fatamids—who controlled Jerusalem in the 1090s—saw the arrival of European Crusaders as possible allies against the Seljuqs.[46] Medieval Muslim writers do not reveal a sense of shock or religious loss and humiliation:[47] the Syrian chronicler al-Azimi records simply that in 1099 "[the Crusaders] turned to Jerusalem and conquered it from the hands of the Egyptians."[48] The great counter-Crusade of the Muslim leader Saladin did not begin until nearly a century later, and only then in response to the constant raids on Muslim caravans to Mecca by the Crusader Reynald of Châtillon, lord of Kerak in what is now southern Jordan.[49] Furthermore, the Crusader

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41. *See* HILLENBRAND, *supra* note 4, at 589-16. For the significance of bin-Laden's historical allusions, see Bernard Lewis, *The Revolt of Islam*, THE NEW YORKER, Nov. 19, 2002, at 50.

42. As the site of Muhammad's "Night Journey." *See* WILLIAMS, *supra* note 40, at 43-46.

43. *See* Carole Hillenbrand, *The Crusades Then and Now*, *at* http://www.caabu.org/press/briefings/crusades.html (last visited Apr. 7, 2003).

44. *See* HILLENBRAND, *supra* note 4, at 17, 38.

45. *See* BERNARD LEWIS, ISLAM IN HISTORY: IDEAS, PEOPLE, AND EVENTS IN THE MIDDLE EAST. 116-17 (2nd ed. 1993).

46. *See* Robert Irwin, *Muslim Responses to the Crusades*, HISTORY TODAY, April 1997, at 44.

47. *See* EMMANUEL SIVAN, INTERPRETATIONS OF ISLAM: PAST AND PRESENT 76 (1985).

48. *See* HILLENBRAND, *supra* note 4, at 64.

49. *See id.* In 1182-83 Reynald attacked Muslim shipping on the Red Sea and the Arabian ports that served the Holy Cities of Mecca and Medina; in 1184-85 he attacked a caravan of pilgrims to Mecca in violation of a treaty guaranteeing safe passage for pilgrims.

Kingdom of Jerusalem had "transgressed Islamic sacred space" by occupying the holiest Islamic buildings in Jerusalem, decorating the Dome of the Rock with crosses and statues and billeting the Templars in the al-Aqsa mosque.[50]

2. *Ibn Taymiyah and the Mongols*

The Crusades also produced a legal philosopher whose writing profoundly influenced modern radical Islamic ideology.[51] Ibn Taymiyyah (1268-1328) advocated and participated in jihad against both Crusaders and Mongols,[52] the latter, under the leadership of Genghis Khan's grandson Hulagu Khan, conquered and looted Baghdad and deposed the 'Abbasid Caliph Musta'sim in 1258.[53] Like the Kharijites before him and Osama bin-Laden after him, Ibn Taymiyyah believed that Muslims who did not live according to God's laws are unbelievers who should be excluded from the Muslim community.[54] He also built upon the long Islamic tradition—dating back to the Kharijites—of proclaiming *jihād* against Islamic rulers considered to be insufficiently Muslim,[55] in his case, the Mongols, who had adopted Islam but continued to observe their own traditional laws and not shari'ah, or Islamic law.[56] This provided the justification for Ibn Taymiyyah's *fatwah* against the Mongols: as they had not implemented shar'ia, they were apostates and as such, Muslim subjects of the Mongols were obliged to wage *jihād* against them.[57] Ibn Taymiyyah's anti-Mongol "war theology" was phrased in terms general and abstract enough to allow modern Islamicists to follow his lead in declaring *jihād* against both un-Islamic Muslim rulers and the West.[58]

B. *Twentieth-century Islamicists*

1. *Hasan al-Banna' and Mawlana Mawdudi*

This is the position adopted by Sayyid Qutb, "the Godfather . . . of Islamic radicalism,"[59] who built upon the works of Ibn Taymiyyah, Hasan al-Banna',[60] and Mawlana Mawdudi[61] to create the ideological framework of

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See id. at 292-93; *see also* Lewis, *supra* note 6, at 17.

50. *See* HILLENBRAND, *supra* note 4, at 296-97.

51. *See* Streusand, *supra* note 9; *see also* ESPOSITO, *supra* note 12, at 45.

52. *See* Streusand, *supra* note 9.

53. *See* SAUNDERS, *supra* note 25, at 181-82; *see also* Streusand, *supra* note 9.

54. This is an implied death sentence. *See* JOANNES J. G. JANSEN, THE DUAL NATURE OF ISLAMIC FUNDAMENTALISM 33 (1997); *see also* Streusand, *supra* note 9.

55. *See* Streusand, *supra* note 9.

56. *See* JANSEN, *supra* note 54, at 36; *see also* ESPOSITO, *supra* note 12, at 46.

57. *Id.*

58. *Id.*

59. *See* ESPOSITO, *supra* note 12, at 56.

60. The founder of the Egyptian Muslim Brotherhood (1928).

61. The founder of the Pakistani *Jamaat-i-Islami* (1941).

jihād in the twentieth century.[62] For Hasan al-Banna' (1906-1949), the founder of the Muslim Brotherhood in Egypt, *jihād* described the process of reform, not revolution, first against European colonialism and later against corrupt, un-Islamic Muslim states: he saw *jihād* as defending the Muslim community and Islam itself against colonialism and injustice.[63] Mawlana Mawdudi (1903-1979), the founder of the *Jamaat-i-Islami* in Pakistan and the first modern Islamicist writer to systematically study *jihād*, blamed British and French colonialism for the decline of Muslim rule in the Near East and South Asia; he believed that nationalism (particularly Hindu secular nationalism) threatened Muslim identity and unity by replacing Muslim identity with one based on language or ethnicity.[64] Both Mawdudi and al-Banna' saw *jihād* as the means to bring about the Islamization of society and the world; for Mawdudi *jihād* was also something of a war of liberation to create a just Islamic state.[65] Furthermore, Mawdudi approved of Ibn Taymiyyah's formulation that "ostensibly Muslim rulers who neglect or transgress Islamic law or portions thereof can be deemed infidels and legitimately killed."[66]

2. *Sayyid Qutb*

But it is Sayyid Qutb (1906-1966) who is the intellectual father of *jihād* in the modern age. A champion of Islamic revival, he joined the Muslim Brotherhood in 1951, shortly after his return to Egypt from the United States.[67] His advocacy of pan-Islamic radicalism brought him into conflict with Gamal Abdel Nasser, an Arab nationalist who seized control of the Egyptian government in July 1952. Imprisoned and tortured in the aftermath of the Brotherhood's failed attempt to assassinate Nasser in October 1956, Qutb developed his revolutionary rhetoric in prison, where he wrote his most influential work, *Milestones*. Initially circulated in *samizdat* form, when it was finally published in 1964 it was almost immediately banned; the mere possession of a copy could lead to arrest for sedition.[68]

Qutb took the core of al-Banna' and Mawdudi's arguments and reshaped them in his call for action. The force of Qutb's rhetoric came from his "radical and imaginative break with the present" which "demolished the utopian

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62. *See* ESPOSITO, *supra* note 12, at 50.

63. *See id.* at 54. *See generally* Wright, *supra* note 6, at 56-85.

64. *See* ESPOSITO, *supra* note 12, at 54.

65. *See* Streusand, *supra* note 9.

66. *See* Euben, *supra* note 12, at 371, *citing* MAWLANA MAWDUDI, A SHORT HISTORY OF THE REVIVALIST MOVEMENT OF ISLAM 63-69 (Al-Ash'ari trans., 1972).

67. *See* Wright, *supra* note 12, at 61.

68. *See id.* at 62; *see also* ESPOSITO, *supra* note 12, at 58. *Milestones* was used as evidence against him at his trial and led to his death sentence and execution in August 1966. *See id.* The judge at his trial "offered the accused all the guarantees of fairness characteristic of a military court in a dictatorial state trying defendants broken by torture." GILLES KEPEL, MUSLIM EXTREMISM IN EGYPT: THE PROPHET AND PHARAOH 34 (John Rothschild trans., 1985).

thinking that underpinned [Arab] authoritarian nationalism . . . ."[69] For Qutb, the creation of an Islamic government was a divine commandment, and there could be no middle ground between the Dar al Islam and the Dar al-Harb: a Muslim must either reject ignorance and embrace *jihād* or be counted among the enemies of God.[70] Qutb saw *jihād* as the armed struggle defending Islam: the true enemy of Islam was the West, as illustrated by the Crusades, European colonialism, and the neo-colonialism of the Cold War era.[71]

3. Muhammad al-Farag

Critical to understanding bin-Laden's worldview is an obscure manifesto entitled *The Neglected Duty* by Muhammad al-Farag, a member of *Al-Jihad*, the organization responsible for Sadat's assassination.[72] For al-Farag, a Muslim lives in an Islamic polity only if its rulers follow Islamic law; rebellion against un-Islamic states is permissible and supported by a saying of the Prophet Muhammad: "If you have proof of infidelity [you] must fight it."[73] Al-Farag dismisses all peaceful ways put forward to establish an Islamic polity—the only way to do so is by *jihād*.[74]

Al-Farag's concept of *jihād* influenced many Islamicist revolutionaries, including Osama bin-Laden, who most likely learned of al-Farag's ideology through his second-in-command, the fugitive Dr Ayman al-Zawahiri, who appears with bin-Laden on a videotape where they discuss the *jihād* operations of September 11th.[75]

IV. OSAMA BIN-LADEN

Osama bin-Laden was born in 1957, the seventeenth son and one of the fifty-four children fathered by Muhammad bin-Oud bin-Laden, a Yemeni-born laborer who had won the favor of the Saudi royal family and whose construction company was given the contract to extend and maintain the holiest of Islamic sites, the Grand Mosque in Mecca.[76] After high school in Jedda, Osama studied engineering at Abdul Aziz University in the early 1970s,

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69. GILLES KEPEL, JIHAD: THE TRAIL OF POLITICAL ISLAM 26 (Anthony F. Roberts trans., 2002).

70. *See* ESPOSITO, *supra* note 12, at 60. *See also* Ruthven, *supra* note 11, at 10-11, 125, 135.

71. *See* ESPOSITO, *supra* note 12, at 61.

72. Ahmed S. Hashim, *The World According to Usama Bin Laden*, 18 NAVAL WAR COLLEGE REV. 11 (2001).

73. *Id. citing* JOHANNES J. G. JANSEN, THE NEGLECTED DUTY: THE CREED OF SADAT'S ASSASSIONS AND ISLAMIC RESURGENCE IN THE MIDDLE EAST (1986).

74. *See* Euben, *supra* note 12, at 371.

75. *See* Hashim, *supra* note 72, at 19; *see also* Wright, *supra* note 12, at 85.

76. *See* KEPEL, *supra* note 69, at 314; Jane Mayer, *The House of Bin Laden*, THE NEW YORKER, Nov. 12, 2001, *available at* http://newyorker/printable/?fact/011112fa_FACT3 (last visited Apr. 8, 2003).

regularly visiting Beirut to take advantage of the bars, casinos, and nightclubs of the "Paris of the Middle East."[77] Despite his drinking and womanizing in Beirut, he began showing a deeper interest in Islam, reflecting both the influence of his teachers at Abdul Aziz University—where his compulsory course in Islamic Studies was taught by Sayyid Qutb's brother Muhammad—and the Lebanese civil war, which broke out in 1975.[78] When the Soviets entered Kabul in 1979, bin-Laden raised money for the *mujahedeen*, eventually moving to Peshawar, Pakistan, where he helped organize thousands of volunteers for the Afghani *jihād* against the Soviets with the support of Mawdudi's *Jamaat-i-Islami*.[79] By 1986 bin-Laden had established a base of several jihadist camps in Afghanistan itself, this base, or in Arabic al-Qaeda, became the umbrella organization for bin-Laden's Islamic movement.[80]

A. Declaration of War Against the Americans Occupying the Land of the Two Holy Places

The philosophical basis for bin-Laden's opposition to the United States can be found in two documents: the "Declaration of War against the Americans Occupying the Land of the Two Holy Places" and "The Declaration of the World Islamic Front for *Jihād* against the Jews and the Christians."[81] In the first document, better known as the "Ladenese Epistle," bin-Laden declares that Muslims around the world have been massacred, their lands seized, and their wealth looted:

> [T]he people of Islam have suffered from aggression, iniquity, and injustice imposed on them by the Zionist-Crusader alliance . . . Their blood was spilled in Palestine and Iraq. The horrifying pictures of the massacre of Qana, in Lebanon, are still fresh in our memory. Massacres in Tajikistan, Burma, Kashmir, Assam, the Philippines, Somalia, Eritrea, Chechnya, and in Bosnia-Herzegovina took place, massacres that send shivers in the body and shake the conscience.[82]

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77. *See* KEPEL, *supra* note 69, at 314; *see also* YOSSEF BODANSKY, BIN LADEN: THE MAN WHO DECLARED WAR ON AMERICA 3 (1999).

78. *Id.* Islamicists in Saudi Arabia claimed that the Lebanese civil war was God's punishment for the sins of Beirut. *See id.*

79. *See* KEPEL, *supra* note 69, at 314-15.

80. *See id.*

81. *See supra*, notes 1-2 and accompanying text.

82. *Id.*

As the United States provided some of the weapons used in these attacks, as at Qana,[83] or did not intervene to save the lives of Muslim civilians, as in Bosnia-Herzegovina and Chechnya, in bin-Laden's eyes the United States is to blame for their deaths.[84]

The focus of bin-Laden's anger was not the deaths of Muslim civilians but the continued American military presence in Saudi Arabia. Before the Saudi King Fahd invited coalition troops led by the United States, bin-Laden, like most other Islamicist *jihadis*, regarded the Ba'athist Iraqi leader Saddam Hussein as an apostate who should be deposed; bin Laden went so far as to offer the services of his followers in defense of Saudi Arabia after the invasion of Kuwait.[85] After the arrival of American troops in Saudi Arabia, the picture changed dramatically: Muslims must put aside their differences, for "if there is more than one duty to be carried out, then the most important should receive priority" and for bin-Laden, "there is no more important duty than pushing the American enemy out of the holy land."[86]

Bin-Laden quotes Ibn Taymiyyah, who argued that "when Muslims face a serious threat, they must ignore minor differences and collaborate to get the enemy out of the *dar-al-Islam*."[87] Likewise, a *fatwah* issued by the Tehran-sponsored "Partisans of the Sharia" supports bin-Laden's fight against the "Crusader-Zionist" alliance and provides additional theological and legal justification for supporting Saddam Hussein.[88] "[T]he Jews and the Christians have no business [in Iraq and Arabia] and have no legitimate, recognized mandate. Their presence poses a threat and their blood can be shed with impunity. In short, every Muslim must try in earnest to drive them away in humiliation."[89] Escalating the *jihād* against the United States justifies co-operating with Iraq.[90]

In accordance with the Qur'ānic injunction against killing unarmed non-combatants, the "Ladenese Epistle" concentrates on attacking American military forces in Saudi Arabia, including the possibility of acquiring weapons of mass destruction:

> Acquiring weapons for the defense of Muslims is a religious duty. . . . It would be a sin for Muslims not to try to possess

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83. The death of hundreds of Lebanese civilians at Qana was part of the Israeli Operation Grapes of Wrath in 1996. *See* Hashim, *supra* note 72, at 24.

84. *See id.*

85. *See* KEPEL, *supra* note 69, at 316.

86. *See The Response: After the September 11th Attacks*, *available at* http://www.pbs.org/newshour/terrorism/ international/fatwa_1996.html (last visited Mar. 26, 2003).

87. *See* Hashim, *supra* note 72, at 24.

88. *See* BODANSKY, *supra* note 77, at 227.

89. *Id.*

90. *See id.*

> the weapons that would prevent the infidels from inflicting harm on Muslims.[91]

Bin-Laden also argues that terrorism against American forces is legitimate, stating that "terrorizing you [that is, the United States], while you are carrying arms on our land, is a legitimate and morally demanded duty."[92] At this point, bin-Laden is targeting only American military personnel stationed in Saudi Arabia, not American civilians. With the publication of "The Declaration of the World Islamic Front" in 1998 this was to change dramatically.

B. The Declaration of the World Islamic Front

On February 23, 1998, the London-based Arabic language newspaper *Al-Quds al-Arabi* published an edict signed by Osama bin-Laden and the leaders of militant Islamicist groups in Egypt, Pakistan, and Bangladesh.[93] Entitled "The Declaration of the World Islamic Front for *Jihād* against the Jews and the Christians," this edict opens with quotations from the more militant passages of the Qur'ān and the *hadith*, and then declares that "[t]he Arabian Peninsula has never . . . been stormed by any forces like the crusader armies now spreading in it like locusts, consuming its riches and destroying its plantations."[94] The declaration makes clear that bin-Laden sees the United States as not just an enemy but as a modern-day Crusader bent on occupying the holy places of Islam:

> So now they come to annihilate . . . this people and to humiliate their Muslim neighbors.
> . . . if the Americans' aims behind these wars are religious and economic, the aim is also to serve the Jews' petty state and divert attention from its occupation of Jerusalem and murder of Muslims there.
> The best proof of this is their eagerness to destroy Iraq, the strongest neighboring Arab state, and their endeavor to fragment all the states of the region such as Iraq, Saudi Arabia, Egypt, and Sudan into paper statelets and through

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91. *Interview with Osam bin Laden*, TIME, Dec. 23, 1998. Excerpt available at *Who is Osama bin Laden and What Does He Want*, FRONTLINE, *available at* http://www.pbs.org/wgbh/pages/frontline/shows/binladen/who/edicts.html (last visited Apr. 8, 2003). For information regarding bin-Laden's attempts to get weapons of mass destruction, see Kimberly McCloud & Matthew Osborne, *WMD Terrorism and Usama Bin Laden*, *at* http://cns.miis.edu/pubs/reports/Binladen.htm (last visited Apr. 8, 2003).

92. *See Bin Laden's Fatwa*, ONLINE NEWSHOUR, *available at* http://www.pbs.org/newshour/terrorism/international/fatwa_1996.html (last visited Apr. 8, 2003).

93. The Arabic language text of this document can be found at *World Islamic Front*, *supra* note 2. *See generally* Lewis, *supra* note 6, at 14-19.

94. *See Text of Fatwah*, *supra* note 2.

> their disunion and weakness to guarantee Israel's survival and the continuation of the brutal crusade occupation of the Peninsula.[95]

These crimes amount to "a clear declaration of war on God, his messenger, and Muslims."[96] In the Qur'ān, the passages that refer to *jihād* as armed struggle can be divided into two categories: defensive and offensive.[97] In the case of a defensive war, *jihād* is an individual obligation, that is, responsibility for the defense of the community is the personal duty of all Muslims. However in offensive wars, the religious duty of *jihād* is a collective obligation: "the duty of the Caliph, and thus the obligation on the Muslim Community, is met when there are enough eligible volunteering to carry out the *jihād*."[98]

Indeed, "The Declaration of the World Islamic Front" closes with a *fatwah* against the United States:

> The ruling to kill the Americans and their allies—civilians and military—is an individual duty for every Muslim who can do it in any country in which it is possible to do it, in order to liberate the al-Aqsa Mosque [in Jerusalem] and the holy mosque [the Haram Mosque in Mecca] from their grip, and in order for their armies to move out of all the lands of Islam, defeated and unable to threaten any Muslim.[99]

By declaring that Muslims are now fighting a *defensive* war against the American and Zionist "Crusaders," bin-Laden is declaring that *jihād* against the United States is the duty of every Muslim, and the obligation is "incumbent on each person, as they are capable of participating."[100]

V. CONCLUSION

More examples of bin Laden's thinking emerged after the September 11th attacks, but the Declaration of the World Islamic Front remains the fundamental statement of his motivation for jihad against United States and the West. His appeal is to the Islamic tradition of defensive jihad where it is an individual duty for all Muslims to take up arms against invaders. It also sets out the foundation for not just September 11th but also for other terrorist

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95. *Id.*
96. *Id.*
97. *See* ESPOSITO, *supra* note 12, at 64.
98. John Kelsay, *Religion, Morality, and the Governance of War: The Case of Classical Islam*. J. REL. ETHICS 123, 126 (1990).
99. *See Text of Fatwah*, *supra* note 2.
100. Kelsay, *supra* note 98, at 126.

attacks linked to bin-Laden's al–Qaeda group, including the bombings of U.S. embassies in Nairobi, Kenya, and Dar-es-Salaam, Tanzania, in 1998 and the attack on the U.S.S. Cole in Aden, Yemen, in 2000. It is also justification for future attacks by "every Muslim who can do it in any country in which it is possible to do it," including the so-called shoe-bomber Richard Reid[101] and perhaps also John Allen Muhammad and John Lee Malvo, accused of fourteen "sniper" attacks in the area surrounding Washington, DC.[102]

This extreme interpretation of the idea of defensive jihad implicitly rejects much of the actual history of Muslim societies faith. By treating the simple presence of Christians and Jews in dominantly Muslim societies as an act of aggression, it does not leave room for the toleration of "people of the book" that is prescribed in the Qur'ān. Furthermore its reading of Islamic law is narrow and unyielding on doctrine and behavior alike: social developments identified with modernity are rejected as un–Islamic, even if large numbers of Muslims have accepted them without losing their faith.[103]

According to bin-Laden's *fatwah*, the United States is an aggressor against all of Islam because of the presence of American troops in Saudi Arabia. That U. S. troops are there by agreement of the Saudi government and that their purpose is to protect that country from the aggression of a neighbor bin-Laden himself once called to overthrow is immaterial. Likewise, the blockade against Iraq is viewed as an assault on the Iraqi people, even though Saddam Hussein's diversion of resources for his own purposes is the real cause of Iraqi suffering. The same could also be said of bin-Laden's hostility to American support for "the Jews' petty state" and Israel's "occupation of Jerusalem and murder of Muslims." For bin-Laden, the United States has become the embodiment of the *dar al–harb*, the house of war, engaged in aggression against Islam, even though millions of Muslims live in the United States and enjoy freedom of religion within its borders. By calling for any and all Muslims to kill any and all Americans, "civilians and military" alike "in any country in which it is possible to do it," bin-Laden's *fatwah* takes the radical line of jihad to new extremes.

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101. Reid, a British convert to Islam, attempted to detonate explosives concealed in his shoes while onboard an American Airlines flight from Paris to Miami. Michael Evans & Damian Whitworth, *Shoe Bomber Sparks Travel Terror Alert*, THE TIMES (London), Dec. 24, 2001. It is unclear if he had any connection to any organized terrorist group, but upon his release from a British jail, he attended the same Brixton mosque as Zacarias Moussaoui, accused of conspiracy in the September 11th plot. Julian Borger, *Shoe-bomber Reid to Plead Guilty*, THE GUARDIAN, Oct. 3, 2002.

102. Muhammad and Malvo, probably members of a Nation of Islam spin-off group called the "Five Percent Nation of Gods and Earths" had no visible connections to organized Islamic terrorist groups, but espoused sympathy for "gihad" [sic] in their letter to police before they were captured. Blaine Harden, *Retracing A Trail: The Role Of Religion: Impact of Suspects's Faith On Action Is Unclear*, N.Y. TIMES, Oct. 27, 2002, at A1.

103. *See* Roxanne L. Euben, *Premodern, Antimodern or Postmodern? Islamic and Western Critiques of Modernity*, REV. OF POL. 429, 429-59 (1997).

Yet bin-Laden lacks the religiously mandated authority to issue a *fatwah* to wage such holy war: he does not bear the mantle of succession to the Prophet. This is why he must describe the war against the United States as a defensive war: if the United States is guilty of "aggression," then the limits imposed on warfare by the Qur'ān and Islamic tradition, including the prohibitions on the intentional killing of unarmed noncombatants and the use of fire in warfare, are not in effect.[104] Bin-Laden's *jihād* places Islam against America, the West, and ultimately the rest of the non–Islamic world; his *jihād* also seeks to overthrow the mainstream views of Islamic tradition.[105]

104. Fire is prohibited as a weapon among Muslims because it is the weapon God will use in the last days. *The Holy Qur'ān* 82:14-15.

105. *See* ROGER SCRUTON, THE WEST AND THE REST: GLOBALIZATION AND THE TERRORIST THREAT (2002).