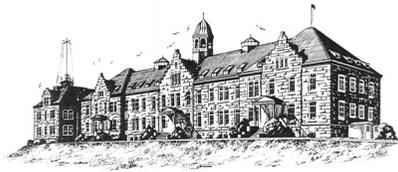


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**International Law Challenges:  
Homeland Security and Combating Terrorism**

Thomas McK. Sparks and Glenn M. Sulmasy  
Editors



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## Foreword

**T**he International Law Studies “Blue Book” series was initiated by the Naval War College in 1901 to publish learned essays, treatises, and articles that contribute to the broader understanding of international law. This volume, the 81st of the series, contains papers addressing the issues discussed and debated at a colloquium hosted here at the Naval War College from June 23 to 25, 2004, entitled *International Law Challenges: Homeland Security and Combating Terrorism*.

This colloquium’s charter was to study and debate various international law issues affecting homeland security, homeland defense, and the combating of terrorism. Renowned international law scholars and practitioners of all stripes—academics, military officers, government officials, and those representing various political persuasions—participated in collegial but often spirited and always fruitful discussions and examinations of these issues. A vastly increased understanding and appreciation of the role of international law in the ever-changing 21st century resulted.

This colloquium received generous support from the Israel Yearbook on Human Rights; the Roger Williams University Ralph R. Papitto School of Law, Bristol, Rhode Island; the Lieber Society on the Law of Armed Conflict of the American Society of International Law; the Pell Center for International Relations and Public Policy of Salve Regina University, Newport, Rhode Island; and the Naval War College Foundation. Without this much-appreciated support, this noteworthy and highly productive event would not have been possible.

On behalf of the Secretary of the Navy, the Chief of Naval Operations, and the Commandant of the Marine Corps, I extend our sincere thanks and appreciation to the participants, contributing authors, editors, and supporting organizations for their contributions to this successful gathering and to the publication of this outstanding addition to the historic “Blue Book” series.

J. L. SHUFORD  
Rear Admiral, U.S. Navy  
President, Naval War College



# Introduction

In June 2004, the Naval War College hosted a colloquium entitled *International Law Challenges: Homeland Security and Combating Terrorism*. This colloquium was made possible with the support of the Israel Yearbook on Human Rights; the Roger Williams University Ralph R. Papitto School of Law, Bristol, Rhode Island; the Lieber Society on the Law of Armed Conflict of the American Society of International Law; the Pell Center for International Relations and Public Policy of Salve Regina University, Newport, Rhode Island; and the Naval War College Foundation. Without the support and assistance of these organizations, this event would not have been the success that it was, and this volume would not be before you as it is. I sincerely appreciate their support.

As noted in the Introduction to Volume 79 of the “Blue Book” series, the events of 9/11 brought home to the United States that, perhaps unlike any time in the past, the “tyranny of distance” could not be relied upon to protect its citizens from harm. That volume, *International Law and the War on Terror*, contained the proceedings of a colloquium hosted by the Naval War College in June 2002.

This colloquium, held two years later, examined actions taken since then, e.g., the Proliferation Security Initiative, a response to the growing challenge posed by the proliferation of weapons of mass destruction, their delivery systems, and related materials worldwide; and measures initiated to increase the control and security of maritime borders. Additionally, with the growing insurgency and increasing terrorist acts in Iraq, issues of occupation law, which the United States had last applied following World War II, played a prominent role in the discussions of the colloquium participants.

I thank the editors—Captain Thomas Sparks, US Coast Guard and Commander Glenn Sulmasy, US Coast Guard—for their substantial efforts in the publication of this volume. I also would like to recognize two long-time supporters of the Naval War College and the International Law Department, whom they credit with completing “the lion’s share of the substantive editing of this volume”: Professor Emeritus Jack Grunawalt and Captain Ralph Thomas, JAGC, US Navy (Ret.). Without question, their dedication, conscientiousness, and perseverance were principally responsible for the production of this volume. Additionally, I thank the conference coordinator, Commander Glenn Sulmasy, US Coast Guard, for his superb efforts in organizing the event.

Additionally, a special thank you is necessary to Rear Admiral Jacob Shuford, President of the Naval War College; Dr. James F. Giblin, Jr., the College's Provost; and Dr. Kenneth Watman, Dean of the Center for Naval Warfare Studies, for their leadership and support in the planning and conduct of the conference and the publication of this volume.

The "Blue Book" series is published by the Naval War College and distributed throughout the world to academic institutions, libraries, and both US and international military commands. This volume, *International Law Challenges: Homeland Security and Combating Terrorism*, is a fitting and necessary addition to the series as the United States and its coalition partners continue to wage this "long war."

DENNIS L. MANDSAGER  
Professor of Law & Chairman  
International Law Department

# Preface

In the summer of 2004, a sense of normalcy had returned to the homeland of the United States. One could say the “sleeping giant” that had awakened on 9/11 had fallen back “asleep.” Military victories in Afghanistan and in Iraq had been achieved. Operation Enduring Freedom (OEF) and Operation Iraqi Freedom (OIF) were officially declared as examples of military successes. Domestically, the USA PATRIOT Act had been passed and was implemented. The reorganization of the government had occurred and the National Security Strategy of 2002 had become part of US strategic culture. US Northern Command (NORTHCOM) had been created. Establishment of the Department of Homeland Security resulted in the merging of 22 federal government agencies and a department staffed by over 177,000 personnel. Bringing the war on terror to the enemy overseas was seen as necessary to protect the homeland. This new war, one that mixes law enforcement and armed conflict, was the challenge of the 21st century and the United States was preparing for a long-term struggle. The Bush Administration clearly articulated its belief that in “taking the fight” to the terrorists overseas, our homeland would be more secure.

With this in mind, legal scholars, practitioners, judge advocates and warriors gathered in Newport, Rhode Island at the US Naval War College in late June to review, debate, and challenge the myriad legal issues surrounding the evolving reality of the Global War on Terror.

The need for a reasoned, rational legal regime to enhance domestic security became critical after 9/11. Jihadists, and the Global War on Terror itself, do not fit squarely into existing laws or custom. The predominant enemy we now fight is neither warrior nor criminal but a hybrid of both. In addition, the war being waged is at times against lawful combatants (e.g., the armed forces of Iraq) and at times against entities deemed illegal combatants. Some of these “enemy combatants” would have protections afforded by the law of armed conflict and some would not. A growing nexus between international law and the concept of homeland security had emerged. Ambiguity as to this intersection of international law and national security law (homeland security) provided a unique backdrop for two and a half days of intense debate and intellectual exchange on the seminal legal issues of our times.

The Honorable Ryan Stiles, Associate Counsel to the President and Deputy Counsel to the White House’s Homeland Security Council, initiated the debate

with a discussion of the relationships between international law and homeland security. He further articulated the need for the Global War on Terror to be viewed as warfare and one not suited for a law enforcement response—a different tack from pre-9/11 approaches to combating terror. His talk set the stage for what turned out to be a recurring, stimulating debate during the colloquium.

The case is made that it is critical for US (and Western) policy makers to understand that the Global War on Terror is in fact a war and not a law enforcement action. The events of 9/11 arguably displayed the manifest failure of employment of a law enforcement response to the threats of international terror. Some have gone so far as to claim that the West's previous law enforcement only responses created, in large part, the bold actions taken by al-Qaeda at the end of the 20th century and the beginning of the 21st. The colloquium revealed, however, that considerable angst and cynicism remains regarding some of these assertions. Nonetheless, most agreed that the magnitude of the events of 9/11 and the repeated world-wide attacks and attempted attacks of the jihadists (primarily al-Qaeda) have demonstrated the relative weakness of past approaches and have fueled demands for new policies and tactics that continue today.

In its response, the US government offered new, sometimes controversial approaches. The colloquium brought together military and civilian experts, all leaders in their respective fields, to assess and debate these approaches and the legal issues that dominated the military liberation of Iraq and the regime change that was underway as the colloquium began, e.g.:

- Maritime border security issues;
- The law of the sea and the Proliferation Security Initiative (PSI);
- Application of the law of armed conflict to certain military operations and occupations;
- Lawfulness of the military commissions underway in Guantanamo Bay, Cuba;
- The new strategy of “pre-emption” and anticipatory self-defense; and
- The lawfulness of targeting individual terrorists which was the subject of a spirited debate between Mr. Kenneth Roth, Executive Director of Human Rights Watch and Professor Bob Turner of the Center for National Security of the University of Virginia School of Law.

A special highlight of the colloquium was an address by the Assistant Secretary of Defense for Homeland Defense, the Honorable Paul McHale. His description of the coordination between the combatant commander (NORTHCOM) and the

Department of Homeland Security was most informative and appreciated by the participants.

It was a privilege to have so many fine representatives from myriad perspectives present to challenge these critical issues. Assembling this international group over the previous year was certainly not an easy task, but when our distinguished panelists from around the world were gathered together the fruits of that effort were very apparent. Exploring the nexus between homeland security and international law made for an invigorating experience. Scholars and representatives from across the political spectrum made for lively discussions.

Sincere thanks must go to Professor Emeritus Jack Grunawalt and Captain Ralph Thomas, JAGC, US Navy (Ret.) for their tireless efforts on behalf of the Naval War College and this “Blue Book” in particular. Their knowledge of the issues and editing skills were critical in making this book a reality. Also, a special thanks to Professor Dennis Mandsager for his foresight in directing an exploration of this evolving area of the law.

Thomas McK. Sparks  
Captain, US Coast Guard

Glenn M. Sulmasy  
Commander, US Coast Guard



# PART I

KEYNOTE ADDRESS



# I

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## The International Dimensions of Homeland Security

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Ryan P. Stiles\*

**A**s I think we all know from the news and recent statements by both Attorney General Ashcroft and Secretary Ridge, we are entering an unprecedented period of threat as we go into the summer; a threat that is projected to continue through this November's elections. So what we're doing here has practical implications and will apply in the real world where terrorists routinely flout international law.

My goal for this morning is not to overlap with the discussions of the panels that will occupy much of the next three days of this conference. They will address many of the supporting issues regarding international implications of homeland security. My goal is to frame the debate: how, from a US Government perspective, the Bush Administration looks at homeland security and its objectives, and then to look at some specific ideas and concepts about how homeland security interacts with the international dimensions.

To frame the debate we must define homeland security. I think many people unfortunately skip that first definitional issue. The United States definition of homeland security is found in President Bush's July 2002 *National Strategy for Homeland Security*,<sup>1</sup> which was released as part of the Administration's proposal for creating a Department of Homeland Security. If you haven't read it, I encourage you to do so. The *Strategy* defines homeland security as "a concerted national

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\* Deputy Counsel, Homeland Security Council, the White House.

effort to prevent terrorist attacks within the United States, reduce America's vulnerability to terrorism and minimize the damage and recovery from attacks that do occur."<sup>2</sup> Each piece of this definition is attached to a specific concept that requires additional analysis.

**“Concerted national effort.”** Obviously the federal government has a critical role to play in homeland security. Yet the federal government alone cannot possibly protect the United States from future terrorist attacks. The Administration's approach to homeland security is based on the principles of shared responsibility and partnership with Congress, state and local governments, the private sector and the American people.

The concept of the first responder is one of the critical issues and one of the most difficult concepts in homeland security because the federal government is often not the first responder. In many cases, it will never be the first responder because anywhere from 80 to 90 percent of our critical infrastructure is in the hands of state and local governments, and the private sector.<sup>3</sup>

The federal government depends not only on partnerships with state and local governments but additionally with the private sector. It is a daunting task to coordinate all of those things, including such challenges as incompatible communication equipment. Federal government entities must be able to communicate with the first responders who inevitably have their own independent and different communications systems.

**“Prevent.”** The first priority of homeland security is to prevent terrorist attacks. Post-9/11, the Federal Bureau of Investigation (FBI) (and the Department of Justice (DOJ) as well) transformed itself from being a traditional law enforcement agency to making its number one goal the prevention of terrorist attacks. That necessitates a shift in concept and a shift in tactics for the FBI; that shift is a good one.

It also makes the Department of Justice and the FBI's tasks significantly more difficult. Furthermore, it makes it increasingly difficult when we respond and deal with individual terrorists in the United States. In the past, most law enforcement consisted simply of investigation and response to terrorist attacks. If a terrorist attack occurred, the DOJ and FBI would investigate, identify the perpetrators, and put them on trial. This responsive mode did have limited success and did produce some convictions.

Now, however, the Department of Justice's success in accomplishing its new mission is challenged, if measured by a conviction rate, because now their intent is to prevent those attacks in the first place. By interrupting terrorist attacks before they occur, the DOJ will not have that clear chain of evidence that produced post-attack convictions. Now *intent* must be established before an attack occurs. That

means by necessity that the Department of Justice is probably going to lose a lot more cases in the short-term since they don't have the evidence trail they were able to produce during the post-attack trials because the plot has indeed been foiled.

That's not necessarily a bad thing, however. The Department of Justice is meticulous about which cases they bring to trial and which they don't. It is not a decision made by the individual US Attorney offices. Each terrorism case is scrutinized both in those offices and by the Criminal Division at Main Justice in Washington, D.C.

**"Terrorist attacks."** Homeland security is focused on terrorism in the United States. Terrorism is defined in the United States in a variety of ways but a definition that captures some of the core concepts of terrorism would be "any premeditated unlawful act, danger to human life or public welfare that is intended to intimidate or coerce civilian populations or governments."<sup>4</sup>

This definition captures the core concepts shared in the various iterations of the United States Code. As I'm sure many of the international practitioners here know, defining terrorism in the first instance is probably one of the most pressing problems facing the international community.

The United States has attempted to define the term at least for those who carry out attacks in this country. I think one of the key challenges for the international community is to develop an agreed upon definition of "terrorism." It is nearly impossible to eradicate something without having a definitional basis of what it is that's to be eradicated.

**"Reducing America's Vulnerability."** The United States is an ever-evolving, ever-changing target. As we shore up our defenses in one area, terrorists exploit vulnerabilities in other areas. A good example of that was a program called the Transits Without Visa Program that was shut down by the federal government in the summer of 2003 because of some specific intelligence that terrorists may be looking at that program as a way to enter the United States.<sup>5</sup>

An example of that program is an individual flying from South America to Europe who stops over in the United States for a connecting flight. Traditionally that person wasn't required to have a visa to "transit" the airport in the United States. However, that presented a seam for terrorists to exploit because they wouldn't have to go through the screening process with the Department of State or Department of Homeland Security. Thus, an individual could get on a plane in another country and, in some instances, land at an airport in the United States and simply walk unchallenged right out of the airport.

So you had a double vulnerability. One, terrorists would be on planes, which we know they like to use to attack the United States; and two, operationally they enter

the country in a fairly easy fashion. The United States has now closed that gap, although I do think a more secure program is probably in the offering at some point.

Once that program was ended, the terrorists looked for new vulnerabilities. So it is a constant challenge to make sure that when closing one gap or seam, new gaps and seams are not created. Avoiding new vulnerabilities is of great concern to those in the White House. Accordingly, when conducting our policy evaluations we work hard to ensure that the new, fresh policies do not inadvertently open a bigger seam when we close a smaller one.

“**Minimizing the damage.**” As I mentioned at the outset, the greatest chance to respond effectively and minimize loss of life resides with our first responders, generally not with federal government entities. We’re working with our state and local governments and the private sector to make sure they have their own homeland security plans to deal with whatever event may occur.

“**Recovery.**” It is the intent of the United States Government to build and maintain various financial, legal and social systems that will ensure recovery from all forms of terrorism.

Responding to attacks on the homeland has been a vexing problem for the United States for the last 40 or 50 years. The old thinking about what type of attack would occur was focused primarily on nuclear strikes. Under that conceptualization, there would be the strike, the government would have to go somewhere, emerge at some later date and then repopulate the institutions.

Of course with the nuclear strike it was assumed that there would be an advance warning of an impending attack, so that continuity of government operation plans were premised on having some period of time to make preparations for the attack.

Now we have an entirely different model for attack and recovery: a “no-notice” event potentially aimed at decapitating the United States Government, to include the President and his staff, the cabinet departments, Congress and others. That model also means that we must look at other methods of making sure that our institutions survive because we’re not going to be able to have 24 hours or even five or six hours to place those in key leadership positions in secure places.

Homeland security and national security are two obviously related concepts. But there is a core distinction. National security looks towards guaranteeing the sovereignty and independence of the United States with the values and institutions intact. This is slightly different from “homeland security.” To provide the overarching strategy to ensure our national security, President Bush issued the *National Security Strategy of the United States*.<sup>6</sup> If read together with the *National*

*Strategy for Homeland Security*, you'll see they reflect an integrated concept, and that homeland security is a concept—not just a Department.

Within the concept of homeland security are the Continuity of Operation plans mentioned earlier; Critical Infrastructure and Protection, which is principally exercised within the United States, although some infrastructure is shared with Canada and Mexico, and defense against weapons of mass destruction (WMD). These obviously have to be dealt with if they enter the United States, but once they arrive on our shores we're already in trouble. Thus, much of the WMD efforts are focused overseas as we combat terrorism.

Another weapon of great concern is MANPADS (man-portable air defense systems). These short-range, ground-to-air missiles are one of the greatest threats to aviation around the world today. They're cheap, increasingly available on the black market, and exist in large numbers. Civil aircraft are virtual "sitting ducks" to terrorists who possess MANPADS. The United States is working to strengthen security over existing stockpiles and to prevent their continued proliferation. We are also working on measures to reduce the vulnerability of both military and civil aircraft to these weapons.

Prior to the establishment of the Department of Homeland Security (DHS) on November 25, 2002, funding for what we today call homeland security was spread throughout the government. But even in fiscal year 2003, the first year following the Department's establishment, only 51 percent of what the Office of Management and Budget considers homeland security spending was spent at DHS.<sup>7</sup> For fiscal year 2004, that figure is up to about 60 percent. In terms of actual total dollars, funding dramatically increased after September 11th, with about twice as many dollars devoted to homeland security in fiscal year 2003 as compared to the preceding year.

One organization of which you may be unaware is the Homeland Security Council (HSC). In October of 2001, the President created the Office of Homeland Security within the White House. Governor Tom Ridge became its head as a White House-appointed official.<sup>8</sup> Then when Congress created the Department of Homeland Security, Governor Ridge became "Secretary" Ridge and left the White House to become a cabinet secretary.

At the same time, the Office of Homeland Security transformed into the Homeland Security Council. The HSC's primary role is to serve as confidential adviser to the President on homeland security matters in much the same way as the National Security Council does on national security and foreign policy matters.

The Homeland Security Council's member's primary responsibility is to coordinate interagency efforts to ensure that the homeland is safe. HSC members work closely with the DHS staff, but also spend much of their time working with colleagues at the Department of State, Department of Justice, and the Central

Intelligence Agency. The reason, of course, is that the Department of Homeland Security can't do homeland security at the federal level by itself. It must coordinate its functions with those of other government agencies. Those functions are often based on funding priorities. I suspect I surprise no one when I say those agencies often don't agree on the best way forward. When that occurs a mediator is required and that's generally the role of the HSC.

The Homeland Security Council was built on the concept of the National Security Council,<sup>9</sup> which was created in 1947 by the National Security Act. The NSC and HSC are parallel organizations and sit side by side; one coordinating national security, the other homeland security. The NSC has no operational capacity, neither does the HSC. We simply try to resolve disputes and push efficient policy decision-making to secure the homeland.

America must pursue a sustained, steadfast, and systematic international agenda to counter the global terrorist threat and improve our homeland security. If the United States is 100 percent effective in homeland security, we will still have failed because most of the threats will be emerging overseas. If we aren't working cooperatively with our other States—our international partners—then we have really no chance at preventing terrorists from reaching our borders. If we can't screen cargo before it gets here, if we can't screen passengers before they step off the plane, ultimately we will lose the fight because those individuals will find methods to attack us even if we're secure within the borders. Thus the international agenda for homeland security is extremely important. We have to win our "away" games as well as our "home" games.

The following table lists the major homeland security initiatives with international dimensions.

#### **Major Homeland Security Initiatives with International Dimensions**

- Create "Smart Borders"
- Combat fraudulent travel documents
- Increase security of international law enforcement cooperation
- Intensify international law enforcement cooperation
- Help foreign nations fight terrorism
- Expand protection of transnational critical infrastructure
- Amplify international cooperation on homeland security S&T
- Amplify international cooperation in response to attacks
- Review international obligations to international treaties and laws

Many of these initiatives don't touch on the military components, which are more "overseas combating terrorism" than "homeland combating terrorism." I do this intentionally because I think our later panels will speak to those issues.

I also wanted to emphasize the international dimensions in a lot of projects that probably don't have a lot of visibility and are unknown to most people. The first is the creation of Smart Borders. We have a 5,500-mile border with Canada, a 1,900-mile border with Mexico, and 95,000 miles of shoreline. According to the 2000 census each and every year the United States admits 500 million people, including 330 million non-citizens through our borders.<sup>10</sup>

Our Smart Borders initiative must be able to deal with that flow of people, as well as the 11.2 million trucks and 2.2 million rail cars that cross the border annually. The Department of Homeland Security is spearheading the effort to create Smart Borders. America requires a border management system to keep pace with its expanding trade, while protecting the United States and its territories not only from terrorist attacks, but also illegal immigration, illegal drugs and other contraband.

The future of Smart Borders must integrate actions abroad to screen goods and people prior to their arrival in sovereign US territory. The border control agencies of the federal government also must have seamless information chain systems that permit communication among and between themselves and federal, state, and local law enforcement communities.

I want to address two specific programs within the Smart Borders initiative. One is the US-VISIT program that deals with land borders into the United States. The law requires that an automated entry/exit program be implemented at the 50 busiest land ports of entry by December 31, 2004 and all ports of entry by December 31, 2005.

The 50 busiest land ports of entry process 94 percent of the foreign visitors who enter and exit the United States through established border crossing. The concept of US-VISIT, which is being run by the Department of Homeland Security, is a continuum of security measures that begin before an individual enters the United States and continue through arrival and departure from the United States.

US-VISIT incorporates eligibility determinations made both by the Department of Homeland Security and, of course, the Department of State. Using biometrics such as finger scans and digital photographs, DHS will determine whether the person applying for entry to the United States is the same person who is issued the visa by the Department of State.

Additionally, the biometric and biographical data are checked against a watch list, thereby improving DHS's ability to make admissibility decisions, as well as the Department of State's ability to make visa determinations. US citizen entry

procedures are currently in place at 115 airports and 14 seaports. This year US-VISIT will be expanded to the 50 busiest land ports.

Since US-VISIT was launched in January 2004, it has already achieved some successes—mostly in the non-terrorist area to include drug smugglers, gangsters, and child molesters. Since the US Government stood up DHS, the Department of State has intercepted more than 200 people with prior suspected criminal or immigration violations. They include convicted rapists, drug traffickers, convicted armed robbers and numerous individuals committing visa fraud. The “non-terrorists” of today are creating pathways for the entry of bona fide terrorists of tomorrow.

Another important initiative to create smart, secure borders is addressed in section 343 of the Trade Act of 2002, as amended by section 108 of the Maritime Transportation Security Act, which requires that regulations be promulgated providing for the transmission to US Customs and Border Protection through an electronic data interchange system. The new system will provide information concerning cargo that is brought into or taken out of the United States prior to arrival or departure. This helps target specific cargos for potential, especially biological and chemical, weapons for inspection when they arrive at our borders. Of course, we can't have trucks backed up for miles on the Mexican border awaiting entry. If we wait until the cargo arrives at the point of entry to see what's on the manifest, we will have failed. We also will have failed our international partners because we will not have helped them facilitate their own internal economic stability.

A second major initiative is combating fraudulent travel documents. The Department of Justice, in conjunction with the Department of State, is spearheading this effort. They announced a new program that will contribute substantially to travel document security and our ability to impugn the movement of terrorists and other criminals. During the processing of travelers at ports of entry, if a hit occurs against the Interpol database, the hit will be verified with US authorities before action is taken against a bearer of such a passport. This is a significant step in the direction of curbing not only terrorism but also identity theft and other types of identity fraud. Travel document fraud, including the fraudulent application and use of the US passport, represents a serious and growing threat to our national security. However, it is not the individual who has stolen them who is necessarily the terrorist or expected terrorist. Often they are middlemen who steal passports and passport numbers, create fraudulent documents and sell them to the terrorists.

So we can't only concentrate on who we know or suspect of being international terrorists. We have to go at the middlemen who are facilitating the preparation of those fraudulent travel documents. Currently the Interpol database contains 1.6 million records reported by 41 different participating member countries. Of the 1.6 million records, approximately 60 percent are passports while 40 percent are

national identification documents. The United States has provided about 300,000 documents to that Interpol database. Although this is a relatively new initiative, it has had great success with the number of entries into the database increasing rapidly.

Contained within the initiative to combat fraudulent travel documents is the issue of biometric passports. The Administration has asked Congress to pass legislation to extend for two years the October 26, 2004 deadline by which countries must produce biometric passports to participate in the Visa Waiver Program. The problem is when Congress passed the law establishing the October 26, 2004 deadline it didn't have a complete understanding of what is required to produce an effective biometric passport. Biometric passports address a key weakness in our system for identifying terrorists. There are really two concepts. First, is the person standing before me the person that is identified in the travel documents? Second, is that person a good guy or bad guy?

If you fail at either one of those ends, you aren't going to catch known and suspected terrorists. A person may have perfectly good travel documents that aren't on any watch list. But if that person is someone other than the individual he purports to be, the validity of the travel documents is meaningless. That is the issue biometric passports are trying to address.

It is estimated that 13 million visitors from visa waiver countries enter the United States each year. Travelers from visa waiver countries are allowed to enter the United States for up to 90 days for business or pleasure using only a passport.

Our international partners tell us this is one of the key issues for them because it permits entry to citizens of those countries that the Department of State and Department of Homeland Security has determined as having secure documents. The Visa Waiver Program allows citizens of those countries easier entry into the United States. They don't have to go through the extended visa process. They can come in simply with their passport. We're working hard with our international partners to make sure this program continues in place while those countries come up with the technology and the decision-making necessary to continue to participate in the Visa Waiver Program.

The next issue I want to address is the increase in security of international shipping containers through a program called Container Security Initiative (CSI). Containerized shipping is a critical component of global trade because about 90 percent of the world's trade is transported in cargo containers.<sup>11</sup>

In the United States almost half of incoming trade by value arrives by containers on board ships. Nearly seven million cargo containers arrive on ships and are offloaded in U.S. seaports every year. In post-September 11th America, Container Security Initiative programs are key components to our homeland defense, based

on the idea that it makes sense to extend our zone of security outward so that American borders are the last line of defense and not the first.

Through CSI, maritime containers that pose a risk of compromise by terrorists are identified and examined at foreign ports before they are shipped to the United States. In so doing, the United States hopes to prevent terrorist attacks from being carried out by preventing the arrival of dangerous materials to the United States in the first instance.

CSI consists of four core elements: (1) using intelligence to identify and target containers that pose a risk; (2) prescreening those containers that pose a risk in the port of departure rather than the port of arrival in the United States; (3) using detection technology to screen containers that pose a risk; and, finally, (4) using smarter, tamper-resistant containers.

Obviously this would be an impossible initiative without our international partners. When we look to our international partners, despite what you may read on occasion, we have tremendous cooperation on all levels in all these initiatives I've discussed. They're brought into the decision-making process in the first instance and their considerations are taken into account. I think for the most part we've done a good job in working both through multilateral and bilateral negotiations to make sure their concerns are addressed.

Intensifying international law enforcement cooperation occurs on many levels. Perhaps the most important area is terrorist financing; the ability to freeze assets. The Patriot Act<sup>12</sup> greatly assists our international efforts to freeze assets, but obviously law enforcement cooperation occurs at intelligence and other levels as well.

I must again emphasize that the United States is committed to coordinating with our international partners to combat terrorism. As part of that coordination, the United States provides specialized training and assistance to help build the capability to combat terrorism. This occurs not only for military forces but also in the civilian agencies. Additionally, the United States hosts seminars to help our international partners draft their legislation, and to provide assistance regarding issues like MANPADS and bioweapons. The United States also provides equipment from time to time and science and technology advice on enhancing border security.

We're also expanding the protection of transnational critical infrastructure, especially with Canada and Mexico. As the events of August 2003, when failures in the power grid caused blackouts in large areas of northeastern United States and Ontario, Canada bore out, if you have an event in the United States that cascades to our neighbors, that is a big problem.

But it is a greater problem if it were to be part of a terrorist attack preventing first responders who rely on the power grid to respond and execute their initiatives. Because we share such a large border with our friends in Canada and Mexico, a lot of

our security, especially cybersecurity and obviously electrical security, crosses that border. So we work with them to help make sure that those systems are more secure from terrorist attack.

We also amplify international cooperation on homeland security through science and technology, a key concept being biosensors and also sensors of nuclear radioactive material. We work on science and technology with our international partners and once that technology is developed, we provide that to those friendly nations as well so that we can assist them in combating terrorism on their own shores as well as here. Other countries which haven't yet been targeted by terrorism still have an interest in ensuring that biological, chemical and nuclear weapons aren't being transited through their country.

We also work on improved cooperation and response to attacks. Last May, the United States staged a massive terrorist attack simulation to test our new plans. Canadian officials were involved in role playing. The scenario provided for simulated terrorist attacks in Seattle and Chicago. The hypothetical Chicago attack occurred at a Chicago Bulls–Toronto Raptors basketball game.

After the game the Raptors and their supporting contingent got back on their plane and returned to Canada, only then to realize that an attack had been carried out. So they had already spread the agent that was released in Chicago. This simulation allowed for cross-national planning on how the two countries could carry out a coordinated response, e.g., determining whether or not the border could be or should be shut down.

The United States, at the federal government level, looks to make sure we're positioned to deal with almost any imaginable scenario. We've gotten very good at doing "red cell" planning to hypothesize the full variety of attacks, although there is still considerable room for improvement. We'll never know until the next attack occurs, but the United States Government is very focused on making sure that there are preparations made for any kind of attack.

Finally, reviewing international obligations, international treaties and laws. We also work on a bilateral basis to negotiate and renegotiate Mutual Legal Assistance Treaties (MLATs). These assist US law enforcement agencies in gathering and exchanging information and evidence with foreign authorities for use in criminal trials.

We have many different international fora we can use to secure our international objectives. Obviously the United Nations plays an important role, as well as the Organization of American States and other regional groups, the G-8, and the International Civil Aviation Organization (ICAO).

One of the great concerns of the G-8 is the MANPADS threat. ICAO handles biometric passport issues. I am too technically illiterate to assist the determination

of whether there should be a 32-bit contactless chip embedded in a passport, but I do know we must have one uniform, worldwide readable document so we don't have some countries developing a technical form of passport.

In conclusion, as President Bush states, "We will not achieve these goals overnight. . . . [But] we will prevail against all who believe they can stand in the way of America's commitment to freedom, liberty, and our way of life."<sup>13</sup> But as we strive to reach those goals a key component is our international efforts. We will not secure America if we only secure the homeland from within our hard borders. We have to work with our international partners. We've had great success so far and we continue to hope to have that kind of success in the future.

Now many critics have said that the war on terror is not a winnable war, but the same critics said that about the Cold War as well. We must eradicate terror as an accepted tactic in warfare. Some people say again that's impossible, but I ask you to compare other forms of warfare and tactics that were previously acceptable and widespread, but now, for the most part, have been eradicated or substantially reduced as a tactic of war. Look at slavery, piracy, and genocide. Today these are among the universal crimes, but for hundreds, if not thousands, of years these were looked upon as acceptable methods of conducting war.

It's going to take a long time to drive terrorism into the same dustbin, but the US Government is giving its best to put an end to this evil. We again thank our international partners for their help in making us secure in our homeland and we will continue to work with them to secure theirs as well. Thank you.

### *Notes*

1. Office of Homeland Security, National Strategy for Homeland Defense (July 2002), available at <http://www.whitehouse.gov/homeland/book/>.
2. *Id.* at 2.
3. Homeland Security Presidential Directive/Hspd-17, Critical Infrastructure Identification, Prioritization, and Protection ¶ 3 (Dec. 17, 2003), available at <http://www.whitehouse.gov/news/releases/2003/12/print/20031217-5.html>.
4. National Strategy for Homeland Security, *supra* note 1, at 2.
5. The Transit Without Visa program was suspended on August 2, 2003. US Department of Homeland Security, Press Release, Aug. 2, 2003 ("Recent specific intelligence indicates that terrorist groups have been planning to exploit these transit programs to gain access to the U.S. or U.S. airspace without going through the consular screening process."), available at [http://travel.state.gov/visa/visa\\_1248.html](http://travel.state.gov/visa/visa_1248.html).
6. Various news organizations reported that the classified "Continuity of Operations" Plan was activated after 9/11. See, e.g., Barton Gellman & Susan Schmidt, *Shadow Government Is at Work in Secret; After Attacks, Bush Ordered 100 Officials to Bunkers Away From Capital to Ensure Federal Survival*, WASHINGTON POST, Mar. 1, 2002, at A01.

7. Office of the President of the United States, The National Security Strategy of the United States (Sept. 2002), *reprinted in* 2002 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 947, *available at* <http://www.whitehouse.gov/nsc/nss.pdf>.
8. Office of Management and Budget, 2003 Report to Congress on Combating Terrorism 3 (Sept. 2003), *available at* [http://www.whitehouse.gov/omb/inforeg/2003\\_combat\\_terr.pdf](http://www.whitehouse.gov/omb/inforeg/2003_combat_terr.pdf).
9. *Id.*
10. Homeland Security Presidential Directive-1, Organization and Operation of the Homeland Security Council (Oct. 29, 2001), *available at* <http://www.whitehouse.gov/news/releases/2001/10/20011030-1.html>.
11. For information on the Bush Administration's organization of the National Security Council, see National Security Presidential Directive-1, Organization of the National Security Council System (Feb 13, 2001), *available at* <http://www.fas.org/irp/offdocs/nspd/nspd-1.htm>.
12. National Strategy for Homeland Defense, *supra* note 1, at 21.
13. *Id.* at 12.
14. Pub. L. No. 107-56, 115 Stat. 272 (2001).
15. George W. Bush, The White House, July 16, 2002, *in* National Strategy for Homeland Defense, *supra* note 1.



# **PART II**

**COMPARATIVE APPROACHES TO SECURITY  
AND  
MARITIME BORDER CONTROL**



## II

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# Comparative Approaches to Security and Maritime Border Control

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Dale Stephens\*

Remarkably perhaps, the question of maritime border protection attracted an unprecedented level of political debate during the course of the Australian federal election of November 2001, ultimately becoming a significant issue in deciding the outcome of that contest. Indeed, the election became, in essence, a referendum on the Federal Government's revised policy concerning strict maritime border protection measures designed to prevent the influx of illegal migrants arriving by sea into Australia. This issue was principally ignited by the Australian Government's stance in denying the admission into Australia of 433 illegal migrants rescued by the Norwegian container ship *MV Tampa*<sup>1</sup> in August of that year and the subsequent passage by the Australian Parliament, on September 26, 2001, of omnibus border protection legislation that provided for a robust legal regime.<sup>2</sup> This new legislative scheme infused the Australian Defence Force (ADF) with significantly greater authority to intercept and remove suspected illegal entry vessels from Australia's maritime zones. There is no doubt that the reverberations of the attacks of September 11, 2001 (hereinafter referred to as 9/11), which were intensely felt within Australia at the time, also heavily influenced approaches to the

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issue of maritime border protection by both the Government and the Australian population. Such reverberations, in conjunction with the emotions generated by the Bali bombings of October 2002,<sup>3</sup> continue to largely influence approaches to maritime border protection issues within the Australian body politic, though not without criticism by significant segments of the Australian public.

The unprecedented level of political debate relating to maritime border protection at the time of the election has been matched by an equally intense academic debate as to the lawfulness of actions taken by the ADF in intercepting incoming vessels carrying unlawful immigrants and denying them entry into Australia. The lawfulness of the actions undertaken by the ADF in implementing the Government's stringent border protection policies were also the subject of domestic litigation (which occurred while such operations were ongoing) within the Australian Federal Court, as well as a fulsome and comprehensive Senate Inquiry following the 2001 election.

The legal issues, which have been hotly debated with respect to these events, are possibly familiar to an American audience. They concern questions of constitutional capacity, especially the extent of executive power to direct military operations under the constitution in the face of potentially contrary legislative direction. They also touch on issues of international law relating to law of the sea rights and obligations and, of course, issues concerning the incorporation of international law within domestic law and the priority of either domestic or international law in operational decision making.

### *The Australian Defence Force and its Law Enforcement Role*

The Australian Defence Force generally, and the Royal Australian Navy (RAN) in particular, have a solid tradition of exercising law enforcement powers on behalf of the Commonwealth Government. Unlike restraints imposed upon parts of the US military, there is no comparable Posse Comitatus Act<sup>4</sup> limitation on the use of the ADF or RAN to enforce federal law. To the contrary, provisions of Australian Commonwealth law specifically authorize military members to exercise necessary law enforcement powers. Indeed, when the issue was peripherally raised in a constitutional context in the 1970s, a justice of the High Court of Australia noted in *dicta* that he could not conceive of any inherent limitation on the use of the ADF to enforce laws of the Commonwealth Government.<sup>5</sup> Such a reflection is entirely consistent with Australian constitutional interpretive methodology dating to the 1920s, which has traditionally given full effect to the terms of Commonwealth laws provided they are based upon a requisite head of constitutional power. Concomitantly, the courts have been slow to impose any implied personal rights or

obligations arising from the Constitution which might act to restrict ADF law enforcement capacity. Indeed, there is no equivalent of the Fifth or Fourteenth Amendments to the US Constitution in the Australian Constitution nor is there the same historical experience that led to the passage of the Posse Comitatus Act in the United States, namely post–Civil War Reconstruction and the fear of martial excess.<sup>6</sup>

As a result of the broad constitutional capacity of the ADF to enforce Commonwealth laws, there has developed a relatively large, though disparate, corpus of law that guides RAN maritime law enforcement operations, particularly that of the patrol boat force operating off of northern Australia. In essence, the ADF has responsibility under Commonwealth legislation for such diverse areas as fisheries, customs, migration, and quarantine control, and more generally for issues such as anti-piracy. Notwithstanding this broad range of subject matter, the powers exercisable by the ADF differ according to the particular subject, thus the specific piece of legislation under which operations are being conducted will shape the powers and responsibilities of ADF officers. Importantly, there exist significant differences between various applicable pieces of legislation.

Fisheries enforcement has traditionally occupied the central focus of ADF law enforcement operations and has involved both major and minor RAN vessels. Thus, Australia routinely deploys a major fleet unit to its territories of Heard and McDonald Islands located in the Southern Indian Ocean (approximately 4100 kilometers southwest of Perth, Western Australia) to intercept major foreign fishing vessels engaged in wide-scale commercial fishing activities. Such deployments have led to some dramatic enforcement actions including one in particular, which is believed to be the longest hot pursuit in recorded history.<sup>7</sup> More generally, fisheries enforcement largely occurs in the northern Australian Exclusive Economic Zone (EEZ) with respect to lower scale illegal fishing activity. For example, in the first four months of 2004, there were 48 interceptions of foreign illegal fishing in that region.<sup>8</sup> With respect to customs enforcement, the ADF usually acts in conjunction with the Australian Federal Police, typically focusing on maritime drug interdiction operations. In 2003 for example, the RAN deployed a guided missile frigate with a contingent of Special Air Service (SAS) troops on board to successfully intercept a North Korean freighter that had landed 150 kilograms of heroin on the southern Australian mainland.

### ***MV Tampa* and Border Protection**

As previously mentioned, the *Tampa* incident generated considerable debate within Australian political and legal circles. The timing of that incident, coinciding as it did with 9/11, witnessed a subtle revision of approach regarding the question

of illegal entry—from one of mere migration control to one with greater national security overtones. This in turn has influenced the nature of legal analysis of the international and domestic legal rights that may be exercised in maritime border control actions and has influenced contemporary policy and legal choices.

### **The *MV Tampa* Case**

On August 26, 2001, the Norwegian container ship *Tampa* rescued 433 people from a grossly overloaded and sinking Indonesian-flagged wooden-hulled vessel in the Indian Ocean. That vessel had been attempting to reach Australia from Indonesia as part of a people-smuggling operation and, accordingly, the persons on board did not possess lawful entry visas. Having rescued the crew and passengers, the *Tampa's* Norwegian master intended to return them to an Indonesian port to disembark them, when a decision was made to divert to Australian territory. The master then sought to drop them at Christmas Island, an Australian territory close to Indonesia. Representatives of the Australian Government contacted the ship and informed the master that the ship did not have permission to enter Australian waters and could not disembark the migrants. The master responded by claiming that some of the migrants on board were suffering from dire medical emergency and thus relied upon the right of “distress” to demand entry into the port facilities. Australian authorities countered by preparing medical teams to fly out to the vessel to address the alleged medical emergencies. During the course of planning the provision of medical assistance, the ship steamed into the Australian territorial sea surrounding Christmas Island and was then boarded by 45 SAS soldiers who traveled by fast boat to the vessel. Through a dramatic standoff during the next few days, the vessel was visited by the Norwegian Ambassador to Australia who received a note from the migrants outlining their assertions of refugee status. Proceedings were simultaneously filed in the Federal Court by public interest lawyers seeking an order of *habeas corpus* to compel the Australian Government to bring the migrants into Australian jurisdiction. The Government sought to prevent such access. The migrants appeared to be from a number of countries, including Afghanistan, Iraq, Kuwait, Sri Lanka and Pakistan.

After several days, the illegal migrants were voluntarily transferred to an Australian naval vessel and transported to the island nation of Nauru where representatives of Australia and the United Nations High Commissioner for Refugees (UNHCR) subsequently processed their applications. The Australian Government was aware that this was the commencement of a wave of vessels carrying persons seeking refugee status and ultimately implemented Operation Relex, which was designed to prevent entry into Australian internal waters by such craft.<sup>9</sup> Approximately a dozen vessels attempted to transport illegal migrants to Australia

following the *Tampa* incident; the ADF/RAN successfully intercepted all of these vessels.<sup>10</sup>

### **Legal Issues Raised**

The ability to intercept vessels carrying unlawful migrants is addressed within the 1982 United Nations Convention on the Law of the Sea (Law of the Sea Convention) in Article 33, which permits a coastal State the authority to exercise “the control necessary” within the contiguous zone to prevent infringement of immigration laws. Accordingly, as a matter of international law there can be no question of attracting state responsibility on the part of the coastal State for the interference with navigational rights of vessels infringing such laws. Additionally, such authority exists, *a fortiori*, in the territorial sea where Article 19(g) expressly notes that the loading/unloading of persons contrary to coastal State immigration laws “is prejudicial to the peace, good order or security” of that State and constitutes passage which, under Article 25, a coastal State may “take the necessary steps” to prevent.

The difficulty confronting the Australian action lay with the application of domestic law concerning ADF powers. The Australian Migration Act provided for a highly formalized procedure with which “Commanders” of duly commissioned ships were required to comply in order to exercise powers relating to the detention of illegal immigrants. Moreover, the Act seemed to generally contemplate that persons detained would be conveyed into Australian Migration Act jurisdiction (i.e., land territory) rather than removed from it. On the day SAS forces boarded the *Tampa*, the SAS were not acting in accordance with powers pursuant to the Migration Act. They were neither duly appointed “Commanders” for the purposes of the Act nor were they in command of a commissioned ship as required by the Act, but rather were acting pursuant to specific Government direction under the executive power of the Constitution. This executive power is exercisable in circumstances of, *inter alia*, national security and is identical to the type of power President Truman unsuccessfully sought to exercise in the *Youngstown* case.<sup>11</sup> The difficulty facing the Commonwealth in relying upon the executive power in the context of the *Tampa* interception was that it was squarely the type of situation described by Justice Jackson in the *Youngstown* case as being one where the Legislature had passed specific legislation, which essentially directed an incompatible regime. As with the result reached in the *Youngstown* case, it seemed to be a very precarious basis upon which to base military action. Indeed, a single Judge of the Australian Federal Court that decided the *Tampa* case in the first instance determined the matter against the Commonwealth.<sup>12</sup> Subsequently, however, the matter was decided in favor of the federal Commonwealth Government on appeal by a 2-1 majority.<sup>13</sup> The opinion of

one the majority Justices on appeal expressly acknowledged that the Commonwealth possessed sufficient constitutional authority by use of the executive power to prohibit illegal entry in terms that seemed to correlate such denial with national security goals. It was a remarkably wide reading of prerogative powers and, significantly, was handed down on September 16, 2001. It seems very plausible that the events of 9/11 did influence judicial thinking, especially as the author of the opinion envisaging such a wide interpretation of prerogative powers was not expected to have decided the matter in the way he did.<sup>14</sup>

The decision has been criticized by some academic commentators for failing to properly have regard to implicit international obligations contained within the 1951 Refugee Convention<sup>15</sup> to which Australia is party.<sup>16</sup> Indeed, the issue seems to have been discussed in the literature as highlighting new and possibly intractable tensions between national security concerns arising from the “war on international terrorism” and humanitarian obligations to accord basic procedural rights to all unlawful migrants arriving by sea so as to properly determine who may have a *bona fide* claim to refugee status.

It is against this background that the border protection legislation that was passed in September 2001 may be better understood.<sup>17</sup> Under the current domestic legal regime outlined in the Migration Act, the ADF is empowered to intercept all vessels suspected of containing unlawful migrants entering the contiguous maritime zone and may remove such vessels either to a nominated third country processing center or simply to a “place” seaward of the contiguous zone. This latter method of removal necessarily gives rise to potential objections under the Law of the Sea Convention with respect to the capacity to detain, and indeed tow, foreign-flagged vessels across international waters. There are a number of answers that might be offered to such objections. First, while Australia has ratified the Law of the Sea Convention, there exists no mechanism of self-executing treaty implementation within Australia such as exists within the United States. Accordingly, while some aspects of the Law of the Sea Convention have been incorporated into Australian domestic law, it is certainly not a comprehensive incorporation and there is no inconsistency with the amended Migration Act legislative powers to remove such vessels. This does not, of course, answer potential questions of state responsibility that might arise from interfering with freedom of navigation rights of the flag State of the vessel, yet notwithstanding ADF actions there has yet to be any kind of claim raised by any nation State that has alleged breach of such obligations. Second, and in partial answer to the first issue, the practice to date has been to tow only those vessels with Indonesian nationality under the terms of a “letter of notice” provided to Indonesia advising of such intent to return Indonesian flagged vessels carrying unlawful migrants. The return of such vessels to the 12nm edge of the

Indonesian coast under Operation Relex was observed by Indonesian authorities without protest and Australian international lawyers have characterized this forbearance as “constructive acquiescence.”

The issue of unlawful immigration and border control mechanisms has necessarily been brought into sharper relief in the context of the war against terrorism. Notwithstanding the navigational regime contemplated in the Law of the Sea Convention pertaining to the application of immigration laws in the contiguous zone and territorial sea only, the general jurisdictional rules of international law concerning both territorial and prescriptive jurisdiction relating to national security controls does admit to an extended reach of application beyond these maritime zones. Under these principles it is entirely arguable to admit to the extra territorial application of migration controls that might be exercised within international waters where this is deemed to be a necessary incident of preserving national security interests. Indeed, the skein of authority emanating from a US Court of Appeals and the US Supreme Court, respectively, in the *Nippon Paper*<sup>18</sup> and *Hartford Fire*<sup>19</sup> cases would seem to lend support for such reach, at least in circumstances where the intent of foreign actors is to unlawfully interfere with domestic activities and their conduct in fact produced or is likely to produce a substantial effect. More trenchantly, the adoption of United Nations Security Council Resolution 1373<sup>20</sup> on September 28, 2001 would seem to provide ample Chapter VII authority to override objections of navigational interference reflected in the Law of the Sea Convention. Resolution 1373 deals with international terrorism in the context of the post-9/11 environment. Article 2(g) thereof calls upon States, acting under Chapter VII authority, to “prevent the movement of terrorists or terrorist groups by effective border controls.” Pursuant to Articles 25 and 103 of the Charter, which demand compliance with such decisions and provide for the overriding of inconsistent provisions contained in any international agreement, such a stipulation could readily displace navigational rights of vessels carrying unlawful migrants in circumstances where there is a suspicion of terrorist connection. The requisite level of suspicion of terrorist connection required to authorize action need not necessarily be high. The academic Derek Jinks has persuasively argued that in the context of international terrorism the rules of state responsibility have been applied by virtue of both Resolution 1373 and international consensus to significantly lower the threshold of attribution between private actors and the State in circumstances where the State merely harbors or supports such actors.<sup>21</sup> Such a development further dilutes the original tests promulgated by the International Court of Justice (IC) in the *Nicaragua* case<sup>22</sup> and the International Criminal Court for the Former Yugoslavia in the *Tadic* appeal<sup>23</sup> regarding attribution criteria. While such an approach may be critiqued for being both under and over inclusive,<sup>24</sup> it nonetheless

grounded offensive military action in Afghanistan in 2002 and thus opens the door for consideration of lesser forms of control mechanisms. If such action is acceptable in the context of offensive military operations then surely it permits a State to tighten maritime border controls beyond the traditional limits of the contiguous zone and thus authorize preventative action within international waters where this is deemed necessary to preserve both national and international security. That such a proposition relies upon the authority of Resolution 1373, as it does, is hardly revolutionary. As far back as 1949 in the ICJ's *Corfu Channel* decision, the highly respected Judge Alvarez pointedly acknowledged the capacity of the Security Council to vary maritime navigational rights where this was necessary to preserve international peace and security and fully accepted the consequential diminution of sovereign rights that such actions might entail.<sup>25</sup> Indeed, as evidenced by the *Certain Expenses*<sup>26</sup> and *Namibia*<sup>27</sup> decisions of the ICJ, the challenge of international lawyers today seems not so much as deciding what the Security Council can do, but rather determining the limits of what it may not do.<sup>28</sup>

The clash between national security measures as applied in the context of border control actions and humanitarian aspirations of those seeking asylum and human rights obligations of the coastal State does raise uncomfortable conundrums. In the current environment of the war on terrorism, States such as Australia are choosing to accord national security and the orderly processing and screening of asylum seekers within countries of origin (rather than on the shores of Australia) a higher priority. While such a choice might be criticized on both legal and policy grounds,<sup>29</sup> it is not altogether unique within the domestic jurisprudence of a number of countries who have faced similar issues. The US Supreme Court in *Sale v. Haitian Centers Council*,<sup>30</sup> for example, in an 8-1 majority decision determined that high seas interdiction of Haitian asylum seekers did not attract obligations under the Refugee Convention<sup>31</sup> as the Court construed neither the Convention nor supporting US domestic law as applying beyond territorial boundaries of the United States.<sup>32</sup> Similarly, the UK Court of Appeal in the recent 2002 decision of *A v. Secretary of State for the Home Department*<sup>33</sup> determined that measures adopted by the UK Government following 9/11 to detain and expel non-nationals derogated from a host of international human rights guarantees (detention policies and rights to a fair trial) but were nonetheless acceptable as derogations which could be justified in times of public emergency. What is intriguing in that instance was that the UK Government's detention of non-nationals was directed more at the threat such non-nationals posed to the United States than the United Kingdom, but nonetheless such actions were unanimously upheld by the Court.

*Multilateral Cooperation*

While invocation of national security measures to inform approaches to maritime border control suggest a theme of arrogant unilateralism, this is not necessarily the case. The experience of maritime law enforcement by Australia within the region has been one of exceptionally constructive co-operation. This has been particularly pronounced with Australia's near neighbors such as Papua New Guinea and Indonesia and more generally with countries situated in the South West Pacific under the Nuie Treaty,<sup>34</sup> but has also extended more broadly to countries situated within the Indian Ocean which was amply demonstrated by the *South Tomi* incident of early 2001.<sup>35</sup>

In that instance, a Togolese registered vessel had engaged in illegal fishing activity at Heard and Macdonald Islands and was pursued from the EEZ of those islands by an Australian Fisheries Authority vessel in a two-week hot pursuit that extended along the entire southern length of the Western Indian Ocean to the coast of South Africa. During the course of the pursuit offers of warship assistance were received from French authorities who occupied the French possession of Kerguelen Island and, similarly, South African authorities who were exceptionally helpful when assistance was requested. In the event, an Australian military boarding team was dispatched to South Africa and transited through that country for deployment upon a South African warship that met *South Tomi* as it rounded the Cape of Good Hope. With hastily prepared complementary rules of engagement and mutually agreed understandings of the legal issues involved, Australian military members (who were also authorized fisheries officers under the relevant legislation) successfully apprehended *South Tomi* from the flotilla of South African warships that had steamed out into international waters to intercept the vessel. An Australian steaming party was placed onboard *South Tomi* and the vessel returned back to Western Australia where the ship and catch were forfeited and the master prosecuted. From a Law of the Sea Convention perspective, the incident raised a number of interesting legal issues which included, in particular, the capacity of one nation to hand over hot pursuit to another nation while still maintaining law enforcement jurisdiction upon apprehension. In that regard, the Convention merely makes reference to "government ships" without mentioning the nationality of such ships as an integral criteria for hot pursuit. Similarly, the question of whether the skirting of *South Tomi* through the territorial sea of Kerguelen Island would have rendered the hot pursuit otiose even when the coastal State, in this case France, did not object to the continued pursuit. In any event, this latter issue was not in issue, for while *South Tomi* seemed intent on entering the French territorial sea at Kerguelen Island it eventually diverted its track and did not do so.

The international legal issues thrown up by the *South Tomi* incident were never tested within international legal or diplomatic fora as Togo made no representations on behalf of the vessel upon its arrest or subsequent prosecution. The issues nonetheless demonstrated the unilateral nature of many of the rights contained within the Law of the Sea Convention. It seemed a very odd outcome that notwithstanding the co-operation of so many nations in seeking to apprehend this vessel, that the terms of the Convention had, in theory at least, the capacity to defeat this intent.

### *Conclusion*

The tightening of its maritime border control laws by the Australian Government has generated considerable academic criticism by those who validly rue the subordination of humanitarian priorities. Such measures have nonetheless been supportable under a sheath of domestic and international legal authority and, moreover, have proven to be extremely effective in stemming the tide of seaborne unlawful migrants. Australian embassies in countries of origin apply the very same tests for refugee status in those countries as would apply to the hapless asylum seeker washing up on Australian shores.

The events of 9/11 and the associated war on terrorism continue to resonate in approaches to maritime security issues and have permitted the ascendancy of national and international security measures which have the potential to override long standing navigational rights. The key in confronting international terrorism and ensuring adequate maritime border security is striving for multilateral cooperation rather than resolute reliance upon unilateral rights. The experiences of the ADF/RAN in undertaking law enforcement measures within our region in concert with countries such as South Africa, France and Papua New Guinea have amply demonstrated the magnificent ability to “force multiply” military means so as to secure common ends. Such co-operation is of course key to ensuring effective maritime border security and more broadly to ensuring a durable victory in this war we are fighting against the scourge of international terrorism.

### *Notes*

1. See *infra* note 9 and accompanying text.
2. Border Protection (Validation and Enforcement Powers) Act 2001, available at [http://www.australianpolitics.com/parliament/legislation/01-08-29\\_border-protection-bill.shtml](http://www.australianpolitics.com/parliament/legislation/01-08-29_border-protection-bill.shtml).
3. The terrorist bombing occurred in Kuta, Indonesia on the Island of Bali on October 12, 2002. Among the 202 people killed in the attack were 88 Australian nationals. A description of the events of that tragic event is available at <http://www.answers.com/topic/2002-bali-bombing>.

4. Act of June 18, 1878, § 15 (codified in 18 U.S.Code § 1385 (1994)).
5. Gibbs J. in *Li Chia Hsing v Rankin* (1978), 141 COMMONWEALTH LAW REPORTS 182, 195.
6. See generally Nathan Canestaro, *Homeland Defense: Another Nail in the Coffin for Posse Comitatus*, 12 WASHINGTON UNIVERSITY JOURNAL OF LAW & POLICY 99 (2003).
7. The Uruguayan long-liner fishing vessel *Viarsa I* was sighted on August 7, 2003 fishing in the Australian Exclusive Economic Zone. A 6300 kilometer pursuit followed, which ended with the *Viarsa I*'s capture on August 28. See *Illegal Boat Set to Dock*, THE ADVERTISER (Adelaide, Australia), Sept. 30, 2003, at 24. An earlier second extended pursuit involved the *South Tomi*, a South African-registered, Spanish-owned trawler. On March 29, 2001 the *South Tomi* was observed by an Australian Fisheries Management Authority vessel to be engaged in unlawful fishing in the Australian Exclusive Economic Zone near Heard and McDonald Islands. Ignoring an order to proceed to Fremantle, a 4100 kilometer pursuit ensued, with the *South Tomi* finally being captured on April 12. See *8000 KM Sea Chase – Pirate Trawler Caught After Hot Pursuit*, THE DAILY TELEGRAPH (Sydney, Australia), Apr. 14, 2001, at 11; *Fish Pirates Chased Across Ocean SAS Troops Pounce Out of Africa*, COURIER MAIL (Queensland, Australia), Apr. 14, 2001, at 3. For a complete discussion of both events, see Erik Jaap Molenaar, *Multilateral Hot Pursuit and Illegal Fishing in the Southern Ocean: The Pursuits of the Viarsa I and the South Tomi*, 19 INTERNATIONAL JOURNAL OF MARINE & COASTAL LAW 19 (2004).
8. See generally *Blitz On Illegal Fishing Boats Catches Nine Indonesian Vessel*, Vol. 6, Issue No. 22, WEEKLY DIAR.COM E-NEWSLETTER, available at <http://www.diar.com/data/news04.htm#Anchor-May-59504>.
9. For a description of the *MV Tampa* incident and of Operation Relex, see Parliament of Australia: Select Committee Inquiry on a Certain Maritime Incident, Ch. 2, Operation Relex, available at [http://www.aph.gov.au/senate/committee/mar.time\\_incident\\_ctte/report.htm](http://www.aph.gov.au/senate/committee/mar.time_incident_ctte/report.htm).
10. See Operation Relex, in Wikipedia, available at [http://.wikipedia.org/wiki/Operation\\_Relex](http://.wikipedia.org/wiki/Operation_Relex).
11. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).
12. *Victorian Council for Civil Liberties Inc. v. Minister for Immigration & Multicultural Affairs* (2001) 110 FCR 452.
13. *Ruddock v. Vardarlis* (2001) 110 FCR 491.
14. See Penelope Mathew, *Current Development: Australian Refugee Protection in the Wake of the Tampa*, 96 AMERICAN JOURNAL OF INTERNATIONAL LAW 661, 662 (2002).
15. Convention Relating to the Status of Refugees, July 25, 1951, 189 U.N.T.S. 150.
16. See generally Penelope Mathew, *International Association of Refugee Law Judges Conference: Address – Legal Issues Concerning Interception*, 17 GEORGETOWN IMMIGRATION LAW JOURNAL 221 (2003).
17. The border protection legislation of September 2001 is a package of three separate acts pertaining to border protection issues that were enacted by the Australian Parliament in the wake of the terrorist attacks of 9/11. That package includes the Migration Legislation (Excision from Migration Zone) Act 2001, the Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001, and the Border Protection (Validation and Enforcement Powers) Act 2001. See also *supra* note 2.
18. *United States v. Nippon Paper Industries Co., Ltd.*, 109 F.3d 1 (1st Cir. 1997), *cert. denied* 522 U.S. 1044.
19. *Hartford Fire Insurance Co. v. California*, 509 U.S. 764 (1993).
20. SC Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001), available at <http://daccessdds.un.org/doc/UNDOC/GEN/N01/557/43/PDF/N0155743.pdf?OpenElement>.

21. Derek Jinks, *State Responsibility for Sponsorship of Terrorist and Insurgent Groups: State Responsibility for the Acts of Private Armed Groups*, 4 CHICAGO JOURNAL OF INTERNATIONAL LAW 83 (2003).
22. Military and Paramilitary Activities (Nicar v. US), 1986 ICJ 14 (June 27).
23. Prosecutor v. Tadic, Case No. IT-94-1-A (ICTY 1999), available at <http://www.un.org/icty/tadic/appeal/judgement/tad-aj990715e.pdf>.
24. Jinks, *supra* note 19, at 92-4.
25. Corfu Channel (Merits) (U.K. v. Alb.), 1949 I.C.J. 4, 41 (Dec. 15).
26. Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, 1962 I.C.J. 157 (July 20).
27. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16 (June 21).
28. Jose E. Alvarez, *Judging the Security Council*, 90 AMERICAN JOURNAL OF INTERNATIONAL LAW 1 (1996).
29. Mathew, *supra* note 14.
30. Sale v. Haitian Centers Council, Inc., 509 U.S. 155 (1993).
31. Convention Relating to the Status of Refugees, *supra* note 13.
32. See Mathew, *supra* note 14, at 667-8, where the author criticizes the reasoning adopted by the majority in that instance.
33. [2002] EWCA Civ 1502 Case No: C/2002/1710 of Oct. 25, 2002.
34. Niue Treaty on Cooperation in Fisheries Surveillance and Law Enforcement in the South Pacific Region, July 9, 1992, 32 INTERNATIONAL LEGAL MATERIALS 136 (1993), available at <http://fletcher.tufts.edu/multi/texts/niue.txt>.
35. *Supra* note 7.

# III

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## European and German Security Policy and International Terrorism

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**Torsten Stein\***

**G**erman security policy cannot be separated from that of the European Union, especially when it comes to border controls as one of its principal elements. Since the 1970s, the European Union (then the European Economic Community (EEC)) has been engaged in harmonizing the Member States' security policy, which has, in the light of the ongoing European integration, become one of its primary goals, especially with regard to the enlargement of the European Union, which took place on May 1, 2004. The importance of both European and transatlantic cooperation in this field cannot therefore be overemphasized, particularly since the events of September 11, 2001, which have confronted all States with a new threat.<sup>1</sup>

The most prominent feature of the threat posed by international terrorism is the changed profile of its perpetrators: Al Qaida, and the persons and organizations associated with it, is not confined to nations, regarding either its members or its aims. The offenders are recruited from various countries and together constitute an internationally organized structure of terrorism, of which all Western societies can be victims, as witnessed last in Madrid. From a sociological point of view, this international terrorist structure differs from all known criminal groups. The

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spectrum reaches from illiterate religious fanatics to highly educated businessmen with international experience.<sup>2</sup> The focus of this article shall therefore be on the development of border controls and their effectiveness in the fight against international terrorism.

### ***Legal Regime for Security Policy and Border Controls in Europe and Germany***

The ongoing European integration has brought Europe's citizens not only economical, but also great personal freedom, a development which found its climax in the introduction of EU citizenship by the Maastricht Treaty on European Union.<sup>3</sup> But by granting those freedoms, a need for coordinating justice and home affairs became obvious. Starting with the Naples Agreement on the Cooperation of Customs Services in 1967,<sup>4</sup> informal governmental cooperation in the area of justice and home affairs has evolved. In this context, the TREVI Group,<sup>5</sup> mandated to combat terrorism, illegal immigration and organized crime, and composed of executives of the Member States' respective authorities, was created. The Single European Act of 1986,<sup>6</sup> which introduced the concept of the Single Market, brought about the need to create a balance between market freedoms and security interests, especially as far as controls of the EEC's external borders and the creation of a common European asylum and immigration policy were concerned.

### **The Schengen Regime**

Due to the difficult and tedious process of reconciling policies in the area of justice and home affairs, France, Germany and the Benelux countries concluded the 1985 Schengen Agreement<sup>7</sup> with a view to abolishing controls at the internal borders, harmonizing measures in the area of visas and asylum policy, and creating police and judicial cooperation. The 1990 Schengen Implementation Agreement (SIA)<sup>8</sup> codified the abolishment of internal border controls, laid down the procedure for controls at the external borders, and provided common rules for issuing short-term visas and for determining jurisdiction for asylum requests according to the Dublin Agreement.<sup>9</sup> The SIA came into force in 1995. The most interesting features of the SIA for the topic of this article are the introduction of cross-border pursuit and shadowing and of the "Schengen Information System" (SIS). The latter is a computerized network allowing the Member States' police authorities to exchange data on wanted persons as well as stolen goods, e.g., cars. The weak point of the SIS is that it is designed to serve only 18 Member States. Therefore, the European Community Council, at the urging of the Schengen Executive Council<sup>10</sup> (the primary organ created by the Schengen Agreements), directed that a second-generation Schengen Information System (SIS II) be developed that would take into

account new developments in information technology and update the system with new capacity criteria.<sup>11</sup> However, SIS II has not yet been implemented, due to technical difficulties. The foregoing agreements, as well as the legal instruments decreed by the Schengen organs, collectively constitute the Schengen Regime, which is now applicable in all EU Member States except the United Kingdom and Ireland.<sup>12</sup>

The Treaty of Amsterdam,<sup>13</sup> which first stipulated the creation of an area of freedom, security and justice as one of the EU's goals,<sup>14</sup> incorporated the Schengen Regime into the European Union.<sup>15</sup> The provisions of the Schengen Regime were transferred in 1999<sup>16</sup> to the respective legal bases of the Treaty Establishing the European Community (TEC)<sup>17</sup> and the Treaty on European Union (TEU).<sup>18</sup> A new Title IV on visa, asylum, immigration and other policies related to the free movement of persons was inserted into the TEC. Since then, the statutory basis for EC and EU measures in the areas of justice and home affairs that was before to be found in the Schengen Regime can now be found in the TEC and in the TEU.<sup>19</sup> Accordingly, the Schengen Regime forms part of the *acquis communautaire*, which the accession States must adopt. Exceptions apply only to the United Kingdom and Ireland as States that originally did not sign the Schengen Agreements, as well as Denmark, who opted out of some parts of the Maastricht Treaty establishing the European Union in 1992.

Since most of the measures adopted on the grounds of TEC/TEU provisions, except for regulations, need to be transformed into national law by the Member States, both EC/EU measures and national laws coexist, but also intertwine. Sparked by the innovations of the Amsterdam Treaty, the Council of the European Union decided, while meeting in Tampere, Finland in 1999, that the creation of an area of freedom, security and justice should be given the same importance as the realization of the Single Market. The area of security thus should comprise fighting cross-border crime, drug trafficking, illegal immigration and terrorism as the negative aspects resulting from the area of freedom. The European Commission was mandated to create a scorecard, which, at regular intervals, would show the progress in creating an area of freedom, security and justice.

### **Europol-Agreement**

Police cooperation between Member States was and is to date a significant aspect of an area of security. Therefore, the European Drugs Unit was set up as early as 1995 as part of the TEU's police and judicial cooperation,<sup>20</sup> enabling Member States to exchange and analyze information on criminal acts and assisting national police authorities in combating crime. However, the Drugs Unit was subsequently mandated with further competencies in the areas of drug trafficking, illegal dealing of radioactive and nuclear materials, illegal immigration, trafficking in human

beings, illegal moving of automobiles and money laundering. The exchange of information with the Drugs Unit was carried out via liaison officers in each Member State, who had to comply with the respective national laws protecting personal data; therefore personal data could not be stored directly with the Drugs Unit. In 1999, the European Drugs Unit was replaced by the European Police Office (Europol), which was established on the basis of the 1995 Europol Agreement.<sup>21</sup> Europol has essentially the same competencies as its predecessor, the Drugs Unit, but it maintains a computerized information system, which is fed with data directly from the Member States. Furthermore, personal data can be stored with Europol, on condition that it is only used to investigate serious crime falling into Europol's competencies. In addition, personal data fulfilling these conditions can be processed to third countries and their authorities, subject to an international agreement or in a situation affecting vital interests of a Member State or if imminent danger must be averted.<sup>22</sup> The agreement with the third country must include provisions on the type of data to be transmitted, on its recipient and on the purpose for which it is required. Also, the question of liability in the case of unauthorized or wrongful processing of data needs to be regulated. Should these requirements be met, the transfer of data is possible, but limited to law enforcement agencies. However, these agencies are obliged to delete the transferred data as soon as they are no longer required for the specific purpose intended.<sup>23</sup>

### **Eurojust**

Besides enhancing police cooperation, the Council of European Union, at its meeting in Tampere in 1999, decided to expand judicial cooperation in order to improve the fight against organized crime and agreed on the creation of an agency in which prosecutors, judges or police officers with comparable authority would join forces. To this end, Eurojust was established in 2002.<sup>24</sup> Article 3 of the Council Decision states that the purpose of Eurojust is to coordinate and facilitate investigations and law enforcement between the respective Member States' authorities. Article 4, in turn, provides that Eurojust's competence extends to the same forms of crime as that of Europol, but in addition Eurojust is mandated to deal with special forms of crime such as computer crime, fraud and corruption, money laundering as well as unlawful practices causing damage to the environment. Article 14 authorizes Eurojust to process personal data, but mandates maintenance of a minimum level of data protection as stipulated in the Council of Europe Agreement of January 28, 1981.<sup>25</sup> Furthermore, pursuant to Article 19 of the Council Decision, personal data must be deleted if it is wrong or incomplete. This also applies to personal data no longer required for the original purpose.

In order to ensure the effectiveness of police and judicial cooperation, Eurojust works closely with Europol and can exchange information to this end.<sup>26</sup> Moreover, Eurojust is empowered to conclude cooperation agreements, including provisions for the exchange of personal data, with third countries, competent institutions under the TEU/TEC, international organizations and law enforcement agencies of third countries, subject to approval by the Council.<sup>27</sup>

The coming years will determine if the judicial cooperation practiced through Eurojust will stand the test of time. In the long run, a truly effective information network between investigative and law enforcement agencies within the European Union can only be achieved by concluding a formal cooperation agreement between Eurojust and Europol, as envisaged in the Council Decision<sup>28</sup> and by giving those two agencies access to the SIS, as currently planned.<sup>29</sup>

### *Legal Instruments in the Fight against Terrorism*

The danger posed by terrorist attacks carried out with nuclear, biological and chemical weapons, as well as conventional weapons, calls for determined action by all Western States; international terrorism can only be fought by extensive and optimized international cooperation.

#### **European Level**

As early as 1995 the EU-US Action Plan<sup>30</sup> was established to foster cooperation in the fight against the global threats of organized crime, terrorism and drug trafficking. On a European level, the Council of the European Union, at its Vienna meeting in December 1998, adopted an Action Plan for implementing the Amsterdam Treaty provisions on building an area of freedom, security and justice.<sup>31</sup> The Action Plan underscored the fight against terrorism as one of the EU's aims. Special emphasis was also placed on the central role of Europol as an important instrument of enhanced cooperation between the Member States. However, the measures foreseen in the EU Action Plan, as well as the existing measures intended to realize an area of security, e.g., provisions of the Schengen Regime and the Europol Agreement, did not prove to be effective; a fact that was tragically affirmed by the attacks of September 11, the planning of which took place in Germany and remained undetected. The new security threat called for advanced countermeasures on the part of both the European Union and the European Community, as well as at the national level in order to confer the necessary competencies upon the authorities responsible for protecting the population and fighting the latent danger.

Therefore, the Council of the European Union at its extraordinary meeting of September 21, 2001 agreed on an Action Plan specifically aimed at combating

terrorism, The Action Plan included enhanced police and judicial cooperation. These were to be facilitated by the introduction of the European Arrest Warrant (the creation of which had already been anticipated at the 1999 Tampere meeting), a uniform definition of terrorism, and the creation of a list of terrorist organizations, as well as the formation of joint investigation teams and of an anti-terrorism unit within Europol. In addition, it was decided that security measures for air transportation and quality controls for security at airports should be enhanced.

In fulfilling both UN Security Council Resolution 1373 of September 18, 2001 and the guidelines set out by the Action Plan of September 21, 2001, the Council adopted two Common Positions on combating terrorism and on the application of certain measures to this end.<sup>32</sup> According to an update of June 27, 2003, these Common Positions contain, in addition to a definition of “terrorist act,” a list of 52 persons and 34 groups that are subjected to enhanced police and judicial cooperative scrutiny and whose funds and assets are to be frozen. Based on the Common Positions, the Council adopted a decision on police and judicial cooperation in criminal matters under Title VI of the TEU,<sup>33</sup> which defines the scope of administrative assistance in preventing and combating terrorist attacks. Thus, every Member State has to establish a specialized authority within its police service having access to all information relating to terrorist offenses. These authorities are then required to forward the information to Europol and Eurojust.

For the purpose of EC-wide implementation of the Common Positions, the Council of the European Union issued a Regulation “on specific measures directed against certain persons and organizations in combating terrorism.”<sup>34</sup> The list attached to this Regulation names 26 persons and 23 organizations whose funds and other assets are to be frozen. The Regulation was subsequently extended,<sup>35</sup> pursuant to a Council of the European Union Common Position of May 27, 2002,<sup>36</sup> to specifically apply to persons and organizations connected to Osama bin Laden, the Al Qaida network and the Taliban. Since the Member States’ national laws and measures were partially in need of improvement, the Council issued a decision in November 2002<sup>37</sup> aimed at reassessing those laws in order to attain higher efficiency in combating terrorism.

One legal instrument expected to show great effect in fighting terrorism is the European Arrest Warrant,<sup>38</sup> which is designed to replace the political and administrative phases of the old extradition process with one single court procedure. It constitutes the first palpable realization of the principle of mutual recognition in criminal law matters, which was agreed upon by the European Council in Tampere in 1999.

As regards criminal law, a 2002 Council Framework Decision<sup>39</sup> on combating terrorism is of vital importance, since for the first time a move towards harmonizing the Member States’ criminal laws was made in the sense that minimum

standards for terrorist offenses and their elements, and for law enforcement, were defined. The need for such a decision becomes obvious when it is considered that as late as 2001, only six EU Member States had incorporated provisions on terrorist offenses into their criminal laws.<sup>40</sup> With this Framework Decision, the European Union has laid a foundation for a comprehensive system of combating terrorism, whereby the Member States' law enforcement agencies, assisted by Europol, Eurojust and the SIS, can improve the effectiveness of their investigations.<sup>41</sup> However, the Framework Decision has not been fully implemented into all Member States' national laws. As of March 2004, only eight Member States had implemented it, although Article 11 of the Framework Decision had set a deadline of December 21, 2002. This puts the events of March 11, 2004 in Madrid into an even more tragic light.

### **National Level**

Measures to combat the terrorist threat have also been taken on the national level, principally through the implementation of EU decisions. This article will focus on Germany as an example. The German Law on Combating Terrorism, which came into force on January 1, 2002, created a statutory basis for further measures and for enhanced cooperation between the various existing German security authorities.<sup>42</sup>

The Federal Office for the Protection of the Constitution (Bundesverfassungsschutz), as one of Germany's principal security agencies, was tasked to investigate cases involving organizations opposed to the idea of international understanding and peaceful coexistence of peoples. That agency now has the power to demand information on bank accounts and their holders from banks or other financial service providers. Thus, financial transactions to and from organizations with extremist or suspicious attitudes can be disclosed and further support for those organizations cut off. In addition, further competencies for disclosure of information by telecommunication and mail service providers as well as airlines were created, some of which were transferred to the Federal Intelligence Service (Bundesnachrichtendienst) and to the Naval Intelligence Service (Marineabschirmdienst).<sup>43</sup> At the same time, all the measures just mentioned are subject to a strict control regime by impartial bodies.<sup>44</sup>

Another agency endowed with new investigative and executive authority is the Federal Office of Criminal Investigation (Bundeskriminalamt). That agency can now directly intervene in cases of information technology (IT) sabotage, as one of the potential fields of future terrorist attacks, without further consultation with other agencies. If it has an initial suspicion of an offense, it can now initiate its own investigations and use its own resources for gathering information, especially in

the areas of terrorism and IT sabotage, while working together closely with other security agencies.

The Federal Border Police (Bundesgrenzschutz) has been granted power for training and deploying armed sky marshals.<sup>45</sup> Furthermore, in the interest of air security, the provisions of the air transportation law were altered to allow the reinforcing of controls and quality standards at and around airports, as well as the use of military aircraft to shoot down hijacked airplanes as a last resort. The latter provision permits for the first time the deployment of the Federal Army (Bundeswehr) within Germany in other than disaster operations. It was passed against strong opposition. The need for such a competence became all too obvious on January 5, 2003 when a deranged man commandeered a motorized glider, circled over Frankfurt/Main for several hours and threatened to crash the plane into the building of the European Central Bank. Fortunately, the plane did not have to be shot down by the summoned F-4 pursuit planes—no legal basis existed for such an action then<sup>46</sup>—, since the perpetrator gave up after three hours and safely landed the plane. The reinforced control standards at airports now include checking the reliability of airport employees. To this end, the air security authorities can obtain unlimited disclosure of information from the Federal Central Register (Bundeszentralregister).<sup>47</sup>

Similarly, the Law on the Review of Security Measures introduced strict control and security measures in order to prevent sabotage of other vital or militarily important installations. In the future it will be possible to explore the personal and economic background of employees in nuclear plants and other focal points of critical infrastructure. The Federal Office of Criminal Investigation therefore keeps in close contact with the respective operators of the relevant facilities in order to update the security assessment and optimize both protective measures and the flow of information.<sup>48</sup>

This new and intensified investigative work resulted in 182 criminal investigations of individuals with Islamic backgrounds between September 2001 and February 2004. Seventy of those were led by the Federal Office of Criminal Investigation and 112 by the regional police (Landespolizeien), the latter maintaining a close cooperation with the competent federal authorities. The Federal Office of Criminal Investigation alone investigated 25,600 hints and traces, taking advantage of the changed provisions in the Code of Criminal Procedure (Strafprozessordnung), which allow a simplified procedure and advanced competencies for intercepting correspondence, including telephone, cell phone, and e-mail contacts. However, the Federal Constitutional Court (Bundesverfassungsgericht)<sup>49</sup> declared some portions of the latter competencies unconstitutional.

In order to guarantee an adequate and constitutionally sound criminal conviction, the German Criminal Code (Strafgesetzbuch) had to be adapted to the new

circumstances, therefore new provisions were inserted into the code. Previously only membership in a terrorist group constituted an offense, so that the courts could not adequately react to terrorism in its new, international dimension. With insertion of the new provisions into the Criminal Code it is now possible to convict foreign offenders—especially members of Al Qaida.<sup>50</sup>

The investigations initiated between 2001 and 2004 led to several severe sentences and some criminal proceedings are still under way. The weaknesses of the new provisions and the difficulty of their latent infringement of the rule of law, which is highly protected in Germany, becomes especially apparent in the case of Mounir al Motassadeq (a member of the Hamburg group of Al Qaida terrorists who prepared and carried out the attacks of September 11), whose verdict was overruled and remanded due to insufficient evidence.<sup>51</sup> Cases like that of Motassadeq demonstrate that all States have to join in a closer cooperation (in this case it was alleged that the United States had evidence it did not make available to the German court) so that the efforts of the single nation State in building up pressure against terrorist organizations through criminal convictions and adequate court sentences will produce the intended effect.

Before repression of crimes committed, however, comes prevention of terrorist attacks. Preventive measures on the federal level in Germany were taken, *inter alia*, in the field of financing of terrorist groups. Identifying the financial sources funding terrorists and preventing financial transactions are critical aspects of combating terrorism. Also in this area, the complexity and diversity of transaction paths call for coordinated cooperation of security agencies and the financial sector, on both national and international levels. On the multinational level, the Financial Action Task Force (FATF),<sup>52</sup> of which 30 States besides Germany are members, has adopted a total of eight special recommendations on combating the financing of terrorism. In August 2002, Germany became the first State within Europe to fully implement the guidelines of the FATF, as well as the corresponding provisions of EU directives on money laundering, into its national law.<sup>53</sup> That legislation assigns special importance to the role of the Financial Intelligence Unit (FIU) within the Federal Office of Criminal Investigation.<sup>54</sup> The FIU functions as a central office for investigative leads, for matching of international measures and for informing other national or European authorities about methods of fighting money laundering or other means of support for Islamic organizations. Nonetheless, finding evidence of planned financial support of terrorist attacks remains a very difficult task despite new competencies enabling authorities to acquire information on account holders and transactions from financial institutions. Still, principal features of transaction methods were successfully identified and cut off. Given the complex and shrouded paths of monetary transactions, further isolation of international terrorism's

financial sources requires intensive international cooperation among States and exchange of information between their respective counterterrorism authorities.

### *Border Controls*

In addition to breaking up terrorist groups already existing within the European Union, preventing the entry of terrorists into the territory of EU Member States is another point of focus, and shall be the main one under scrutiny here. In this context, one needs to consider the fact that in a territory without internal customs and immigration borders, such as the greater part of the European Union due to the Schengen Regime, the State penetrated by a terrorist organization is not necessarily the State that is the target of attack.

The European Council is responsible for the adoption of uniform measures for control of the EU's external borders.<sup>55</sup> The Schengen Implementation Agreement (SIA) defines the external borders of the European Union as all land, sea and air borders of Member States that are not internal borders.<sup>56</sup> However, Member States are not precluded from concluding separate arrangements with third nations, as long as those agreements are in accordance with Community Law.<sup>57</sup>

Specific measures for the control of the EU's external borders are detailed in the SIA.<sup>58</sup> A Member State confronted with the entry of a third country national must comply with the SIA mandate that the security interests of all other Member States have to be taken into account pursuant to Community Law.<sup>59</sup> Therefore, third country nationals can be denied entry if they constitute a danger to the public order, national security or international relations of any Member State. To this end, the Member States have drawn up a common list of wanted persons, from which the names of individuals to be denied entry are transferred to the SIS and thereby made available to all Member States. In order to be put on this common list, persons have to fulfill the criteria set out in the SIA (prison sentence of at least one year, suspicion of having committed a serious crime, severe breach of entry and/or exit regulations),<sup>60</sup> and there has been compliance with national procedural rules.

All persons are subject to controls regarding their entry/exit, stay and work documents.<sup>61</sup> In every case, their identity must be verified.<sup>62</sup> Third country nationals are subject to a stricter control than EU citizens,<sup>63</sup> they generally have to submit to separate customs clearance procedures. In exceptional cases, i.e., for humanitarian reasons, if national interests or international commitments are concerned an individual Member State can grant entry to third country nationals irrespective of fulfillment of the requirements just mentioned. However, the entry in those cases is limited to the sovereign territory of the Member State concerned.<sup>64</sup>

External borders may only be crossed at border checkpoints and during their respective designated passing hours.<sup>65</sup>

In order to comply with the foregoing provisions, the Member States concerned must monitor the boundaries of the external border and deploy specially trained border patrols to this end.<sup>66</sup> The latter is quite a problem regarding the EU's new Eastern border, since border fortification and patrol are largely inadequate.

What is more, all available technical resources must be applied in identifying terrorists in order to achieve effective detection and defense against terrorism. In particular, the identity of visa applicants and other persons entering the territory of a Member State of the European Union must be effectively assessed, since reliable identification is the basis for all further measures. As far as passport and visa controls are concerned, responsibility is divided between the Council of the European Union and the Member States. The Council is responsible for establishing general rules governing short-term visas (up to three months).<sup>67</sup> Competence over long-term visas remains with the individual Member State. The Council has specified<sup>68</sup> those third countries whose nationals must be in possession of a visa in order to enter the European Union, as well as those countries that are exempt from visa obligations. In order to qualify for a visa waiver, third countries must fulfill certain criteria regarding illegal immigration, public order and security, especially danger of terrorist attacks. The EU's external relations do, of course, also play an important role in assessing whether a visa waiver will be granted. In certain cases, Member States can permit exemptions from visa obligations.<sup>69</sup>

The Council is also responsible for laying down procedural rules for the issuing of short term visas, particularly with regard to subject matter, jurisdiction of the issuing authority, and material requirements.<sup>70</sup> Jurisdiction for visa issuance lies with the diplomatic or consular representative of the Member State of destination.<sup>71</sup> Details can be found in the Common Consular Instruction (*Gemeinsame Konsularische Instruktion*) of the Common Handbook of the Schengen States.<sup>72</sup>

The Council also made provisions for the design of short-term visas.<sup>73</sup> The European Commission proposes the details of visa design. The security criteria for short-term visas include the appearance of an unforgeable visa and the information to be entered on it.<sup>74</sup>

In the area of seafaring, a Council of the European Union directive establishes registration formalities for ships entering and leaving ports of the Member States<sup>75</sup> (largely based upon an International Maritime Organization Agreement of 1965<sup>76</sup>), and on the issuance of visas at the border, including those for sailors in transit.<sup>77</sup> The latter prescribes reporting requirements of Member States' authorities responsible for visas in the case of signing in and signing off of ships lying in ports of the Schengen area. Additional qualifications for entry into the Schengen

area must be fulfilled between the competent authority and the shipping company/ shipping agent in order to obtain a visa at the border. These procedures guarantee the exchange of security-relevant information, in particular through the SIS, between the Member States.<sup>78</sup>

In the area of identification, special attention is accorded to biometrics. The registration of biometrical data (fingerprints, face, hand and iris screening) and their inclusion in passports or visas can allow for positive identification of notorious terrorists and violent enemies of Western societies, and therefore pave the way for appropriate countermeasures. Moreover, they constitute an effective means for allocating documents to their owner. On the EU level, the European Commission proposed introducing digitalized photographs into EU Member States' passports.

Germany envisages the use of biometrics in three important fields: border controls for entry, in visas and other residence permits, and in passports and national identification documents. The necessary amendments to the relevant laws (Pass- und Personalausweisgesetz) have already been enacted. Together with the use of biometrics, entry procedures can be extensively facilitated and accelerated by introducing an automated, computer-assisted border control process.<sup>79</sup> A corresponding pilot project began operation at Frankfurt airport at the beginning of 2004. However, the introduction of biometrical passports prescribed by the United States for maintaining the visa waiver program vis-à-vis EU citizens, is taking longer than expected. The initial deadline of October 26, 2004 was extended to October 26, 2005, and has now been extended for a second time. The current deadline is October 26, 2006. It is therefore undecided whether the former visa requirements for entry into the United States are going to be reintroduced.

Considering this development, the essential need for harmonizing the EU's external border controls on a high standard becomes all too obvious. It cannot be in the interest of the European Union to have terrorists circumvent the high-tech border controls of one Member State by entering a neighboring State not applying the same technical standards for border controls. What is more, the coordination among the States must include harmonizing the applied biometrical methods. Last but not least, biometrics is a relatively new technology subject to uncertainties and avoidable errors, which could be eliminated by joint efforts in exchanging information and experience between the States involved in the interest of an optimized outward protection. Germany, therefore, strives for greater cooperation in this area within the European Union, and with its G8 partners.<sup>80</sup>

Within the context of this cooperation, the forwarding of personal data on passengers embarked on transatlantic flights is a matter of current importance and needs to be mentioned here. As of February 5, 2003, and pursuant to the US Aviation Transportation and Security Act of 2001, the US Bureau of Customs and

Border Protection and the US Transportation Security Administration require airlines to provide access to so-called “PNR” (Passenger Name Record) data for international flights. Provision of this data by European Union airlines conflicts with European Union laws and regulations,<sup>81</sup> both because no specific authority therein allows for such transfer and because it has not been determined that the data will be “adequately protected” by the receiving authority as defined by European Community law.<sup>82</sup> What is more, US authorities, by accessing the personal data of EU citizens, encroach upon the sovereignty of EU Member States without being authorized to do so under public international law.

In order to both create a legal basis for the justified security interests of the United States and to ensure adequate data protection to which the EU citizens are entitled, the European Commission has proposed that an agreement be entered into between the European Community and the United States.<sup>83</sup> Such an agreement would meet the legal requirements of the European Community pertaining to data transfer and would justify the encroachment upon the Member States’ sovereignty. Furthermore, the Commission has determined that the proposed agreement would guarantee adequate protection of personal data as mandated by the applicable European Parliament Directive.<sup>84</sup> The Council signed this agreement at the end of May 2004 over the protests of the European Parliament. The European Parliament argues that the agreement violates the Treaty Establishing the European Community,<sup>85</sup> since it purports to amend the relevant Directive<sup>86</sup> which, as a legal instrument adopted according to the procedure set forth in Article 251 of that treaty, requires European Parliament approval for amendment. Accordingly, the European Parliament has decided to bring the matter before the European Court of Justice. A majority of members of the European Parliament deems the right of access to PNR-data granted to US authorities to be too broad, since the agreement makes no reference to the extent of data protection mandated by European Community law,<sup>87</sup> especially with regard to a potential transfer of the data to third countries.

Although the basic criticism of granting a right of transferring personal data to the US authorities as being too far reaching may be justified, one needs to take into account the fact that the European Commission has obtained guarantees from the US Bureau of Customs and Border Protection in the form of a self-commitment<sup>88</sup> for appropriate use of the data and that the current state of affairs—transfer of personal data without any legal basis—is simply unacceptable.

### *Intrastate Countermeasures in Case of a Terrorist Threat*

As soon as terrorists have been identified, either on the basis of European and international cooperation or as a result of the extended national competencies, further

procedures become the responsibility of the Member State concerned. Therefore, the authority to deny German visa and residence permits in a simplified procedure was enhanced by adapting the provisions of the 1990 Aliens Act (Ausländergesetz)<sup>89</sup> to accord with the Law against Terrorism (Terrorismusbekämpfungsgesetz).<sup>90</sup> Enemies of society and its democratic foundations who are ready to use or appeal for violence in pursuing their goals are now explicitly prohibited from obtaining a visa. In addition, the use of unforgeable features in national identification documents and residence permits has been enhanced by legislation.

Since the provisions of the Asylum Procedure Act (Asylverfahrensgesetz)<sup>91</sup> have been amended so as to include registering fingerprints, photographs, and, in the future, biometrical data of asylum seekers, it is now possible to save voice recordings of asylum seekers, thus providing information on their country of origin. Furthermore, these data can now be stored for up to ten years after irrevocability of the asylum decision and can be processed by the police and security authorities for identification purposes in a simplified procedure. The main aim in this area is to standardize and simplify the procedure, as well as to make it more automatic, while maintaining an adequate level of data protection.

Pursuant to the new Immigration Act, which was finally agreed on in June 2004, after the first version had been declared unconstitutional by the German Supreme Court (Bundesverfassungsgericht) on formal grounds, an admitted asylum seeker who is a member of a terrorist organization or an organization supporting terrorists can be deported in a simplified procedure. The new Immigration Act<sup>92</sup> entered into force on January 1, 2005, and contains stricter rules on arrest and extradition of foreign terrorists or extremists endangering Germany's internal security. If extradition is impossible due to the potential of torture or implementation of the death penalty by the country of destination, notification requirements and constraints on the freedom of movement can be applied in order to maintain control over the potential danger.

Apart from the measures already taken on the basis of the EU Action Plan, Germany continues to campaign for further initiatives to enhance transnational cooperation within the Council of the European Union, especially on improving information flows, identification systems and searches for wanted terrorists (profile search). In this context, it needs to be mentioned that the success in combating cross-border terrorist networks depends on concerted and determined action of the international community. The cooperation within international organizations and fora, such as the United Nations, G8,<sup>93</sup> NATO or OSCE (Organization for Security and Co-operation in Europe)<sup>94</sup> is therefore of paramount importance. The Council Recommendation on joining the G8 network of contact points with 24-hour service for combating high-tech crime<sup>95</sup> is just one example of this

cooperation. In addition, bilateral agreements and informal cooperation in identifying, arresting, prosecuting and sentencing terrorists continue to be necessary on the international level. A further aim of the German Law against Terrorism is to protect the population as well as possible and to minimize the vulnerability of key points of infrastructure. However, the competencies created need to be used continuously and with determination. Particularly in the areas of air security and infrastructure protection, measures taken to date have brought about an easing of tension. Close cooperation between the Department of the Interior, other security authorities and the operators of key infrastructure facilities, as well as airlines, warrant both continuous updating on the threats faced and the development of suitable strategies for countermeasures.

While terrorist act prevention is the main focus of the measures addressed in this article, optimizing crisis management after a terrorist attack requires at least as much attention. Civil protection plays a central role in this context. According to an Action Plan of the German Department of the Interior, key infrastructure facilities, i.e., all organizations and institutions of vital importance for the population—especially energy and water facilities, the breakdown of which can cause a long lasting shortage of supply, material disturbance of public security and other dramatic consequences for the population and the State's structures—are the center of attention in this context. In the event of extensive catastrophes, attacks or other crisis situations, federal and regional (Länder) civil protection resources need to be combined. For this purpose, the new federal Bureau for Civil Protection (Bundesamt für Bevölkerungsschutz und Katastrophenhilfe) was created as a further pillar of national security. The new bureau began its work in May of 2004. It can avail itself of the Joint Information Center of the German Federal State and the Regions (Gemeinsames Melde- und Lagezentrum des Bundes und der Länder, (GMLZ)), which began operations in the autumn of 2002 and which can coordinate crisis management (both information and countermeasures) in the scenarios mentioned above.<sup>96</sup>

For information and warning purposes, the GMLZ can utilize the German Emergency Information System (Deutsches Notfallvorsorge-Informationssystem), which provides the public with precautionary information about rescue, evacuation and supply via the Internet and telephone hotlines. In the case of an extraordinary emergency situation (e.g., an attack on a nuclear plant), a satellite based warning system, in place since October 2001, can, within seconds, issue public warnings to be broadcast on all public television and radio stations. The Department of the Interior is currently engaged in the development of other possible warning systems, such as alerting phones or clocks, and coordinating protection measures. Together with its European neighbors, Germany is developing defense concepts and

participates in joint exercises that form part of the program on the improvement of cooperation in preventing and fighting terrorist threats of a chemical, biological, radiological or nuclear nature (e.g., EURATOX 2002, a simulation exercise involving radiological and chemical fallout resulting from a terrorist attack).

More attention is increasingly being paid to computer network attack, the relatively new form of information technology terrorism. Since most of the vital facilities of infrastructure—from traffic lights to nuclear plants—are computerized, defense against attacks on these systems, the consequences of which can be catastrophic, must have utmost priority. In Germany, the Federal Bureau for Security in Information Technology (Bundesamt für Sicherheit in der Informationstechnik) examines the potential sensitivity of critical infrastructure and prepares those systems for defense against terrorist interference by creating framework plans or by directly cooperating with the systems' operators.

The last element of the Department of the Interior's Action Plan is fighting terrorism at its roots. Defense against Islamic terrorism is most effective at its financial and ideological source. Isolating terrorists from their ideological and economic support should be not the last, but the foremost goal of both national and international measures in fighting terrorism.

### *Conclusion*

The Coalition against Terror must cooperate closely in order to respond effectively to the new "asymmetric" threats our nations face today. But it needs also to advocate respect for and advancement of human rights in the countries that form the cultural base for international terrorism and to build up political pressure against oppressive regimes. By fostering democratic reforms and the development of the rule of law, as well as by handing over power to the oppressed peoples themselves, terrorist structures can more often than not be destroyed at the root, and true fanatics can be cut off from their sources. It is beyond doubt that international cooperation at its highest level in this area is of paramount importance. The European Union and its Member States take their international responsibilities seriously and are therefore involved in Operation Enduring Freedom in Africa and in the Gulf of Oman, are part of the Coalition against Terror in Afghanistan, and demonstrate great material and personnel commitment to the International Security Assistance Force for a sustainable pacification of Afghanistan.

The fact that the European Union is not the "United States of Europe," therefore having to share competencies and jurisdiction not with federated but sovereign States, creates some difficulties and sometimes delay in achieving the necessary measures. But there can be no doubt that the European Union and its

Member States will live up to their international responsibilities in the future and will remain a true and reliable partner of the Free World.

*Notes*

1. Oliver Lepsius, *Liberty, Security and Terrorism: The Legal Position in Germany*, 5 GERMAN LAW JOURNAL 436 (2004).
2. Otto Schily, German Secretary of the Interior, address at the opening of the 7th European Police Congress entitled "Fighting Terrorism and Protecting the Population" (Terrorismusbekämpfung und Bevölkerungsschutz), Bonn, Feb. 16, 2004.
3. Treaty on European Union, Maastricht, Feb. 7, 1992, Official Journal of the European Union (OJ 1992, C 191), Jul 29, 1992, full text *available at* <http://Europa.eu.int/en/record/int/title7.html>.
4. Naples Agreement on the Cooperation of Customs Services, Sep. 7, 1967.
5. See European Parliament Fact Sheet 4.11.3, Police and Customs Cooperation, which notes that:

Formal police cooperation between the Member States' representatives began in 1976 with the creation of working parties known as 'Trevi groups.' Its main subjects were terrorism and the organization and training problems of police departments. By 1989 there were four working parties, on terrorism, police cooperation, organized crime and the free movement of persons, headed by a group of senior civil servants responsible for preparing decisions for the Council of Ministers. This system prefigured the intergovernmental structure set up by the Schengen agreements and the Treaty of Maastricht.

Fact Sheet 4.11.3 is *available at* [http://www.europarl.eu.int/factsheet/4\\_11\\_3en.htm](http://www.europarl.eu.int/factsheet/4_11_3en.htm).

6. Single European Act, Sep. 9, 1985, Official Journal of the European Union (OJ 1987, L 169), Jun. 29, 1987, *available at* <http://europa.eu.int/abc/obj/treaties/en/entr14a.html>.
7. Agreement between the Governments of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at their Common Borders, June 14, 1985, Joint Ministerial Gazette, 1986, at 77.
8. Convention Applying the Schengen Agreement of 14 June 1985 Between 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, June 19, 1990, *available at* [http://www.privacy.org/pi/intl\\_orgs/schenen\\_agreement.txt](http://www.privacy.org/pi/intl_orgs/schenen_agreement.txt).
9. Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Communities, Jun. 15, 1990, Official Journal of the European Union (OJ 1997, C 254/1), Aug. 19, 1997.
10. Schengen Convention Executive Committee Decision (SCH/Com-ex (97)) 24, Official Journal of the European Communities (OJ 2000, L 239/442), Sep. 22, 2000.
11. Council of the European Union Regulation No. 2424/2001 On the Development of the Second Generation Schengen Information System (SIS II), Official Journal of the European Communities (OJ 2001, L 328/4), Dec. 13, 2001.
12. Italy joined the Schengen Agreements in 1990, Spain and Portugal in 1991, Greece in 1992, Austria in 1995, and Denmark, Finland and Sweden in 1996.
13. Treaty of Amsterdam Amending the Treaty of European Union, the Treaties Establishing the European Communities and Related Acts, Mar. 29, 1996, Official Journal of the European

- Union (OJ 1997, C 340), Nov. 10, 1997, *available at* <http://www.europarl.eu.int/topics/treaty/pdf/amst.en.pdf>.
14. Treaty on European Union, *supra* note 3, art. 2.
  15. See Treaty of Amsterdam, *supra* note 13, Protocol on the Incorporation of the Schengen-acquis into the EU framework.
  16. See Official Journal of the European Communities (OJ 1999, L 176), Oct. 10, 1999; amended (OJ 2000, L9/32), Jan. 13, 2000.
  17. Treaty Establishing the European Community, Mar. 25, 1957, full text of the treaty, as amended, *available at* <http://europa.eu.int/abc/obj/treaties/en/entoc05.htm>.
  18. *Supra* note 3.
  19. Arts. 61f and 29f, respectively.
  20. Council of the European Union Joint Action, Mar. 10, 1995, Official Journal of the European Union (OJ 1995, L 62), Mar. 20, 1995.
  21. Council of the European Union Act Drawing Up the Convention on the Establishment of a European Police Office, Jul. 26, 1995, Official Journal of the European Communities (OJ 1995, C 316), Nov. 27, 1995.
  22. Council of the European Union Act Adopting Rules Governing Transmission of Personal Data by Europol to Third States and Third Bodies, Mar. 12, 1999, Official Journal of the European Communities (OJ 1999, C 88), Mar. 30, 1999.
  23. Jan Ellerman, *EUROPOL auf dem Weg zu einem, europäische FBI?*, in ZEITSCHRIFT FÜR EUROPÄISCHE STUDIEN 561 (2002).
  24. Council of the European Union Decision Setting Up Eurojust With a View to Reinforcing the Fight Against Serious Crime, Feb. 28, 2002, Official Journal of the European Communities (OJ 2002, L 63), Mar. 6, 2002.
  25. Council of Europe Convention for the Protection of Individuals with Regard to Automated Processing of Personal Data, Jan. 28, 1981, European Treaty Series No. 108.
  26. Council of the European Union Decision, *supra* note 24, art. 26(1).
  27. *Id.*, art 27(3).
  28. *Id.*, art 26(1).
  29. Council of the European Union Regulation No. 871/2004 Concerning the Introduction of Some New Functions for the Schengen Information System Including in the Fight Against Terrorism, Apr. 29, 2004, Official Journal of the European Union (OJ 2004, L 162/29), Apr. 30, 2004.
  30. Joint EU-US Action Plan, Dec. 3, 1995, *available at* <http://www.eurunion.org/partners/actplan.htm>.
  31. 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, Dec. 3, 1998, Official Journal of the European Communities (OJ 1999, C 19), Jan. 23, 1999.
  32. Council of the European Union Common Position on Combating Terrorism, Dec. 27, 2001, Official Journal of the European Communities (OJ 2001, L 344/90, 2001/930/CFSP), Dec. 28, 2001, and Council of the European Union Common Position on the Application of Specific Measures to Combat Terrorism, Dec. 27, 2001, Official Journal of the European Communities (OJ 2001, L 344/93, 2001/931/CFSP), Dec. 28, 2001.
  33. Council of the European Union Decision 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, Dec. 19, 2002, Official Journal of the European Communities (OJ 2003, L 16), Jan. 22, 2003.

34. Council of the European Union Regulation No. 2580/2001 on Specific Restrictive Measures Directed Against Certain Persons and Entities With a View to Combating Terrorism, Dec. 27, 2001, Official Journal of the European Communities (OJ 2001, L 344/70), Dec. 28, 2001.
35. Council of the European Union Regulation No. 881/2002 Imposing Specific Restrictive Measures Directed Against Certain Persons and Entities Associated With Usama bin Laden, the Al-Qaida Network and the Taliban . . . , May 27, 2002, Official Journal of the European Communities (OJ 2002, L 139/9), May 29, 2002.
36. Council of the European Union Common Position Concerning Restrictive Measures Against Usama bin Laden, Members of the Al-Qaida Organisation and the Taliban . . . , May 27, 2002, Official Journal of the European Communities (OJ 2002, L 139/4), May 29, 2002.
37. Council of the European Union Decision Establishing a Mechanism for Evaluating the Legal Systems and their Implementation at National Level in the Fight Against Terrorism, Nov. 28, 2002, Official Journal of the European Communities (OJ 2002, L 349/1), Dec. 24, 2002.
38. Council of the European Union Framework Decision on the European Arrest Warrant and the Surrender Procedures Between Member States, Jun. 13, 2002, Official Journal of the European Communities (OJ 2002, L 190/1), Jul. 18, 2002.
39. Council of the European Union Framework Decision on Combating Terrorism, Jun. 13, 2002, Official Journal of the European Communities (OJ 2002, L 164/3), Jun. 22, 2002.
40. Germany, France, Spain, Italy, Portugal and the United Kingdom.
41. See Eugenia Dumitriu, *The E.U.'s Definition of Terrorism: The Council Framework Decision on Combating Terrorism*, 5 GERMAN LAW JOURNAL 585 (2004).
42. Law on Combating Terrorism (Terrorismusbekämpfungsgesetz), Jan. 9, 2002, Federal Law Gazette (BGBl. I 2002) 361–363.
43. *Id.* at 363, 364.
44. Lepsius, *supra* note 1.
45. *Supra* note 42, art. 6.
46. On June 18, 2004, the German Parliament adopted the Law on Adjustment of Air Security Tasks (Gesetz zur Neuregelung von Luftsicherheitsaufgaben – Luftsicherheitsgesetz), Federal Gazette (BGBl. I 2005) 78, which, in part, amended the Air Transportation law (Luftverkehrsgesetz), Federal Gazette (BGBl. I 1999) 550. In addition, in Article 14, paragraph 3 it provided authority to shoot down aircraft as a last resort. The Federal Constitutional Court (Bundesverfassungsgericht), however, annulled that provision on February 15, 2006 (Case No. 1 BvR 357/05, not yet published) for lack of constitutional competence and for violation of Article 2 (right to life) and Article 1 (human dignity) of the Constitution.
47. Air Transportation Law, as amended, *supra* note 46, art. 29d.
48. For a critical view on the adopted measures, see Verena Zöllner, *Liberty Dies by Inches: German Counter-Terrorism Measures and Human Rights*, 5 GERMAN LAW JOURNAL 469 (2004).
49. BVerfG first senate, judgement of Mar. 3, 2004, re.:1 BvR 2378/98, 1 BvR 1084/99, *reprinted in* NEUE JURISTISCHE WOCHENSCHRIFT 999–1022 (2004).
50. Lepsius, *supra* note 1.
51. Christoph Safferling, *Terror and Law—Is the German Legal System Able to Deal with Terrorism?—The Bundesgerichtshof (Federal Court of Justice) Decision in the Case Against El Motassadeq*, 5 GERMAN LAW JOURNAL 515 (2004).
52. Established in 1989, the Financial Action Task Force (FATF) is an intergovernmental body whose purpose is the development and promotion of policies, both at the national and international levels, to combat money laundering and terrorist financing. FATF information source is *available at* [http://www.fatf-gafi.org/pages/0,2987,en\\_32250379\\_32235720\\_1\\_1\\_1\\_1\\_1,00.html](http://www.fatf-gafi.org/pages/0,2987,en_32250379_32235720_1_1_1_1_1,00.html).

53. Law on Combating Money Laundering (Geldwaschegesetz), August 2002, BGBl.
54. *Id.*, para. 5.
55. Treaty Establishing the European Community, *supra* note 17, art. 62(a).
56. Schengen Implementation Agreement, *supra* note 8, art. 1.
57. Treaty Establishing the European Community, *supra* note 17, art. 62(b).
58. Schengen Implementation Agreement, *supra* note 8, arts. 3–8.
59. *Id.*, art. 6(2).
60. *Id.*, art. 96(2).
61. *Id.*, art. 6(a).
62. *Id.*, art. 69(2)(b).
63. *Id.*, art. 6(2)(c).
64. *Id.*, art. 5(2).
65. *Id.*, art. 3.
66. *Id.*, art. 6(3) and (4).
67. Treaty Establishing the European Community, *supra* note 17, art. 62(2)(ii).
68. Council of the European Union Regulation No. 539/2001 Listing Third Countries Whose Nationals Must be in Possession of Visas When Crossing External Borders and Those Whose Nationals are Exempt, Mar. 15, 2001, Official Journal of the European Communities (OJ 2001, L 81/1), Mar. 21, 2001.
69. *Id.*, art. 4.
70. Schengen Implementation Agreement, *supra* note 8, art. 12(2)(b)(ii).
71. *Id.*, art. 12(2) and (3).
72. Decision of the Schengen Executive Committee on the Compilation of a Manual of Documents to Which a Visa May be Affixed, Apr. 28, 1999 (SCH/Com-ex(99)14), Official Journal of the European Communities (OJ 2000, L 239/298), Aug. 22, 2000, as amended by Council of the European Union Regulation No. 539/2001, *supra* note 68, art. 7.
73. Council of the European Union Regulation No. 1683/95 Laying Down a Uniform Format for Visas, May 29, 1995, Official Journal of the European Union (OJ 1995, L 164), July 14, 1995; as amended by Council of the European Union Regulation No. 334/2002 Amending Regulation No. 1683/95 Laying Down a Uniform Format for Visas, Feb. 18, 2002, Official Journal of the European Communities (OJ 2002, L 53/7), Feb. 23, 2002; last amended by European Union Act Concerning the Conditions of Accession of the Czech Republic, et al, and the Adjustments to the Treaties on which the European Union is Founded, Official Journal of the European Communities (OJ 2003, L 236/33), Sep. 23, 2003, at 718–725.
74. Council of the European Union Regulation No. 1683/95, *supra* note 73.
75. European Parliament/Council of the European Union Directive No. 2002/6/EC On Reporting Formalities for Ships Arriving In and/or Departing From Ports of the Community, Feb. 18, 2002, Official Journal of the European Communities (OJ 2002, L 67/31), Sep. 3, 2002.
76. Convention on Facilitation of International Maritime Traffic, Apr. 9, 1965, 18 U.S.T. 411, T.I.A.S. 6251.
77. Council of the European Union Regulation No. 415/2003 On the Issue of Visas at the Border, Including the Issue of Such Visas to Seamen in Transit, Feb. 27, 2003, Official Journal of the European Union (OJ 2003, L 64/1), Mar. 7, 2003.
78. For more detailed information on port security, see Hans-Werner Rengeling, *Zur Sicherung der Seehäfen gegen terroristische Anschläge aufgrund neuer internationaler europäischer und deutscher Regelungen*, DEUTSCHES VERWALTUNGSBLATT 589 (2004).
79. Law on Combating Terrorism, *supra* note 42, arts. 7 and 8.

80. The G8 consists of Canada, France, Germany, Italy, Japan, Russia, the United Kingdom and the United States.
81. See European Parliament/Council of the European Union Directive No. 95/46 On the Protection of Individuals with regard to the Processing of Personal Data and on the Free Movement of Such Data, Oct. 24, 1995, Official Journal of the European Communities (OJ 1995, L 281/31), Nov. 23, 1995, and Council of the European Union Regulation No. 2299/89 On a Code of Conduct for Computerized Reservation Systems, July 24, 1989, Official Journal of European Communities (OJ 1989, L 220/1), July 29, 1989.
82. European Parliament/Council of the European Union Directive No. 95/46, *supra* note 81, art. 25(1) and (2).
83. European Commission Staff Working Paper, An EC-U.S. Agreement on Passenger Name Record (PNR), SEC(2004)81.
84. E.g., European Parliament/Council of the European Union Directive No. 95/46, *supra* note 81, art. 25 (1) and (2).
85. Treaty, *supra* note 17, particularly art. 300 (1) and (2).
86. E.g., European Parliament/Council of the European Union Directive No. 95/46, *supra* note 81.
87. Particularly Article 8 of the European Convention on Human Rights, Nov. 4, 1950, *available at* <http://www.hri.org/docs/ECHR50.htm>; Article 6 (2) of the Treaty on European Union, *supra* note 3; and Article 286 of the Treaty Establishing the European Community, *supra* note 17.
88. See Undertakings of the Department of Homeland Security Bureau of Customs and Border Protection (CBP), *available at* <http://www.statewatch.org/news/2004/feb/08eu-CAPPS%20II.htm>.
89. Aliens Act, July 9, 1990 (BGBl, 1354).
90. *Supra* note 42.
91. Asylum Procedure Act (Rev.), Bundesgesetzblatt (Federal Law Digest) BGBl. I, 1361), July 27, 2002, *available at* <http://www.1uscomp.org/gla/statutes/AsylVFG.htm>.
92. Immigration Act (Auswärtigesetz), Bundesgesetzblatt (Federal Law Digest)(BGBl), Jan. 1, 2005.
93. *Supra* note 80.
94. The OSCE currently has 55 participating States.
95. Council of the European Union Recommendation On Contact Points Maintaining a 24-Hour Service for Combating High-Tech Crime, June 25, 2001, Official Journal of the European Communities (OJ 2001, C 187/5), July 3, 2001.
96. See Secretary of the Interior address, *supra* note 2.



# **PART III**

## **THE PROLIFERATION SECURITY INITIATIVE IN THE MARITIME DOMAIN**



# IV

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## The Proliferation Security Initiative: Security vs. Freedom of Navigation?

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Wolff Heintschel von Heinegg\*

*Introduction: Object and Purpose of the Proliferation Security Initiative*

**T**he Proliferation Security Initiative (PSI) was announced by President Bush in Krakow, Poland, on May 31, 2003.<sup>1</sup> It is generally conceived of as a US reaction to the *So San* incident that occurred in December 2002 and that involved a Cambodian-registered vessel en route to Yemen suspected of illicitly transporting weapons of mass destruction (WMD) components that were ultimately destined for Iraq.<sup>2</sup> As a matter of fact, the intercepting Spanish frigates, upon boarding and searching, discovered SCUD missile parts on board the vessel. However, the *So San* was released after it had become clear that the missiles, though coming from North Korea, were destined for Yemen.

The announcement by President Bush triggered a series of meetings of the (originally eleven and now fifteen<sup>3</sup>) States participating in the initiative. During the Brisbane meeting they seemed to be prepared to follow a proactive course of action with the aim to effectively impede and stop shipments of WMD, delivery systems, and related materials.<sup>4</sup> However, a far more cautious approach was chosen during the Paris meeting in September 2003. There the participating States agreed upon the so-called “Interdiction Principles” which, in general terms, provide the political basis for unilateral or concerted activities aimed at the prevention of WMD proliferation.<sup>5</sup> It needs to be emphasized here that PSI is neither a treaty nor some

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## *The Proliferation Security Initiative: Security vs. Freedom of Navigation?*

form of an international body, least of all an international organization. It is to be seen as a concerted effort by the participating States to supplement, not to substitute, existing treaties and regimes dealing with the problem of WMD proliferation.<sup>6</sup>

PSI's ultimate goal is to effectively "interdict the transfer or transport of WMD, their delivery systems, and related materials to and from states and non-state actors of proliferation concern." The term "states and non-state actors of proliferation concern" refers to

[T]hose countries or entities that the PSI participants involved establish should be subject to interdiction activities because they are engaged in proliferation through: (1) efforts to develop or acquire chemical, biological, or nuclear weapons and associated delivery systems; or (2) transfers (either selling, receiving, or facilitating) of WMD, their delivery systems, or related materials.<sup>7</sup>

As regards "states of proliferation concern" it is more or less evident that this term refers to Iran and North Korea and to other States striving to acquire WMD and their delivery systems.<sup>8</sup> At first glance, the term "non-state actors of proliferation concern" seems to cover transnational terrorists and their organizational structures. However, in view of the fact that transnational terrorism is subject to a special international regime the correct understanding is that it relates to all private persons, like the notorious Pakistani Dr. Khan,<sup>9</sup> and entities involved in clandestine proliferation activities, regardless of a terrorist background. Therefore, PSI is not to be mistaken for an exclusively counter-terrorism activity. While the Initiative may trigger concerted actions of the participating States if there are reasonable grounds to suspect that, e.g., WMD transported on board a vessel are ultimately destined to a terrorist group, its scope is certainly not limited to such scenarios.

The means by which the participating States intend to reach the Initiative's goal comprise: exchange of information; if necessary, modification of the respective domestic law and of international law; and "specific action."

Of course, exchange of information is subject to the protection "of the confidential character of classified information." Still, the principal readiness of the participating States to rapidly exchange information should not be underestimated because the information concerned is usually classified and not too easily shared with other States even if they are close allies. Equally important, and far from being a matter of course, is the willingness of the participating States to modify their domestic law in order to enable them to fulfill their commitments under the Initiative. If the modification of domestic rules does not suffice because rules and

principles of international law prove either insufficient or an obstacle for the Initiative's objectives, the participating States have to be prepared to take the necessary steps on the international level. First efforts in that respect have been initiated by the United States and may eventually result in an amendment of the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation<sup>10</sup> at the end of 2005.<sup>11</sup>

The Initiative's core commitments, however, are laid down in Interdiction Principle 4 on "specific action," i.e., the participating States will:

Not transport or assist in the transport of WMD;

Board their own vessels in their respective internal waters and territorial sea areas as well as on the high seas, if there is reasonable ground for suspicion that they are engaged in proliferation activities;

Consider to provide consent to boarding of their vessels by the authorities of other participating States;

Take measures against foreign vessels in the sea areas covered by their territorial sovereignty and in their respective contiguous zone; and

Take measures against foreign aircraft in their respective national airspace.

At first glance, none of these commitments seems to imply insurmountable legal problems—the more so because the participating States have stressed that their interdiction activities will be "consistent with . . . relevant international law and frameworks, including the UN Security Council." Indeed, international lawyers seem to widely agree that in view of its rather limited scope PSI finds a sufficient basis in the existing law.<sup>12</sup> This is certainly correct insofar as interdiction measures are taken against vessels and aircraft belonging to one of the participating States. Vessels flying a State's flag and aircraft bearing a State's markings are subject to that State's sovereignty.<sup>13</sup> Accordingly, they may be visited and searched by that State's organs in sea areas and in airspace not covered by the territorial sovereignty of another State. The said position is also correct if the flag or home State has consented to interdiction measures by another State<sup>14</sup> or if the foreign vessel or aircraft is traveling in the internal waters or national airspace of a participating State.<sup>15</sup> However, some doubts remain with regard to interdiction measures taken against foreign vessels within the territorial sea because the rules of the law of the sea on enforcement measures by the coastal State are less clear than they seem to be. These questions will be addressed in the second part of this article. Moreover,

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the question arises whether States participating in PSI are excluded from interdicting foreign vessels and aircraft in high seas areas and in international airspace. It is true that, according to the wording of the Interdiction Principles agreed upon in Paris, there is no indication that they are prepared to interdict the transport of WMD and related material in those areas if on board a vessel or aircraft not belonging to one of them. Still, this does not necessarily mean that the participating States have for once and for all excluded that possibility. Therefore, the third part of this paper will deal with the legality of interdiction measures on the high seas and in international airspace. However, before dealing with these legal problems it is important to first establish the relationship of PSI and the international anti-proliferation regime. As will be shown in the first part, the Initiative is far from being a fundamentally novel approach by States sharing a common concern with regard to the threat posed by the proliferation of WMD and their delivery systems. Some of the voices raising (legal) concerns with regard to PSI seem to ignore the fact that a comparatively small group of States has a long history of close cooperation with the aim of preventing the proliferation of WMD and their delivery systems. PSI is but a small tessera in the mosaic that is the international anti-proliferation regime.

### *The International Anti-Proliferation Regime*

It is a fact all too often ignored that there already exists a rather sophisticated international regime aimed at the prevention of the proliferation of WMD. This regime covers not only nuclear weapons and nuclear material but also chemical and biological weapons, including their components, as well as delivery systems and the related technology. It consists of “hard law obligations” and of a number of supplementing agreements of a merely political character. Most of those formal and informal agreements pertain to specific weapons and materials. It should be mentioned, however, that there are three further instruments that are based on a comprehensive approach but that will not be dealt with here because they only indirectly contribute to counter-proliferation of WMD: the International Ship and Port Facility Code (ISPS Code),<sup>16</sup> the Container Security Initiative (CSI),<sup>17</sup> and the “Customs-Trade Partnership Against Terrorism” (C-TPAT) Program.<sup>18</sup>

### **Nuclear Weapons and Nuclear Material**

According to the 1968 Treaty on the Non-Proliferation of Nuclear Weapons (NPT),<sup>19</sup> nuclear-weapon States are prohibited from making available, either directly or indirectly, to non-nuclear-weapon States “nuclear weapons or other nuclear explosive devices” (Article I). Non-nuclear-weapon States, in turn, are under

an obligation not to “manufacture or to otherwise acquire such weapons or devices” (Article II). According to Article III, paragraph 1, a non-nuclear-weapon State is obliged to “accept safeguards, as set forth in an agreement to be negotiated and concluded with the International Atomic Energy Agency (IAEA) in accordance with the Statute of the International Atomic Energy Agency and the Agency’s safeguards system, for the exclusive purpose of verification of the fulfillment of its obligations assumed under” the NPT. The IAEA has safeguards agreements in force with more than 145 States around the world. Most of these are comprehensive safeguards agreements concluded pursuant to the NPT. Other types of agreements are known as item or facility safeguards agreements and voluntary offer agreements. Also in place is a Model Additional Protocol to safeguards agreements that grants the IAEA complementary verification authority.<sup>20</sup>

The NPT-IAEA system is supplemented by the Zangger Committee and by the Nuclear Suppliers Group (NSG), both informal groups of States that aim at strengthening the counter-proliferation efforts. The Zangger Committee<sup>21</sup> was formed in 1971 and consists of 35 States. Its main task is to harmonize the interpretation of nuclear export control policies by specifying the meaning of Article III, paragraph 2, of the NPT. Accordingly, the so-called “trigger list”<sup>22</sup> relates to source or special fissionable materials and to equipment or materials especially designed or prepared for the processing, use, or production of special fissionable materials. By interpreting and implementing Article III, paragraph 2, the “trigger list” helps to prevent the diversion of exported nuclear items from peaceful purposes to nuclear weapons or other nuclear explosive devices. Such material may only be exported by one of the participating States if three conditions are met: (1) non-explosive use assurance, (2) observance of the IAEA safeguards requirement, and (3) commitment to re-transfer. The Nuclear Suppliers Group<sup>23</sup> comprises 40 nuclear supplier countries. It seeks to contribute to the non-proliferation of nuclear weapons through the implementation of guidelines for nuclear exports. In view of NSG’s informal character the guidelines are not legally binding; they are, however, implemented by the participating governments that take the necessary decision at the national level according to their respective domestic law.

Finally, there are two draft conventions that, if ever accepted by a representative number of States, will certainly contribute to strengthening the international regime against the proliferation of nuclear weapons and of nuclear material: the Draft Convention for Suppression of Nuclear Terrorism (CNT)<sup>24</sup> and the Draft Fissile Material Cut-Off Treaty (FMCT).<sup>25</sup>

The Draft CNT would exclusively address acts by individuals. Therefore, its scope would not include the issue of the non-proliferation of nuclear weapons or nuclear threats posed by States or intergovernmental organizations. States parties

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would be obliged to cooperate in preventing or prosecuting acts of nuclear terrorism by, *inter alia*, adopting necessary legislative and technical measures to protect nuclear material, installations and devices, and to forestall unauthorized access to them by third parties. It would supplement the 1980 Convention on the Physical Protection of Nuclear Material.<sup>26</sup>

Fissile material, e.g., enriched uranium, is a key component in the development of nuclear warheads. After the General Assembly of the United Nations had passed a resolution on the prohibition of fissile material for nuclear weapons or other explosive devices<sup>27</sup> an *ad hoc* committee was established by the Conference on Disarmament in 1998, with a view to negotiating a treaty banning the production of fissile material for nuclear weapons. While it is unclear whether the work on the FMCT will produce results, the FMCT would cap the amount of fissile materials in nuclear weapons States and non-parties to the NPT. However, it would not apply to plutonium and Highly Enriched Uranium for non-explosive purposes and to non-fissile material (e.g., Tritium). It would not address existing stockpiles.

### **Chemical and Biological Weapons**

Chemical weapons and biological weapons are governed by the

1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare (GP 1925),<sup>28</sup>

1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (BTWC),<sup>29</sup> and

1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction (1993 CWC).<sup>30</sup>

The Australia Group (AG)<sup>31</sup> is an informal arrangement of 39 States and the European Commission which aims to allow exporting or transshipping countries to minimize the risk of assisting chemical and biological weapon (CBW) proliferation. Its task is to ensure, through licensing measures on the export of certain chemicals, biological agents, and dual-use chemical and biological manufacturing facilities and equipment, that exports of these items from their countries do not contribute to the spread of CBW.

### **Delivery Systems**

With regard to WMD delivery systems, there is no treaty or other legally binding instrument either prohibiting or restricting the transfer of such delivery systems or of related technologies. However, there are three informal arrangements aiming at the prevention of their proliferation.

The Missile Technology Control Regime (MTCR)<sup>32</sup> is an informal non-treaty association of 34 States that have agreed on the prevention of the proliferation of missiles, unmanned aerial vehicles (UAVs) and of related technologies. Similar to the Zangger Committee and the NSG, the MTCR is functioning on the basis of guidelines that are amended by an Equipment and Technology Annex. In addition, the Hague Code of Conduct against the Proliferation of Ballistic Missiles (HCOC) was adopted in November 2002.<sup>33</sup> The object and purpose of the HCOC is to curb the proliferation of WMD-capable ballistic missiles and to exercise maximum restraint in developing, testing, and deploying such missiles.<sup>34</sup>

### **Security Strategies of NATO, the United States and the European Union**

At the end of this overview of the international regime it needs to be emphasized that proliferation of WMD and their delivery systems has been identified as a major security threat in NATO's new Strategic Concept of April 1999,<sup>35</sup> in the US National Security Strategy of September 2002,<sup>36</sup> and in the European Security Strategy of December 12, 2003.<sup>37</sup> The US National Strategy to Combat Weapons of Mass Destruction of December 2003 provides that: "U.S. military and appropriate civilian agencies must possess the full range of operational capabilities to counter the threat and use of WMD by states and terrorists against the United States, our military forces, and friends and allies." The EU member States, according to the European Security Strategy, have recognized that "[a]ctive policies are needed to counter the new dynamic threats. We need to develop a strategic culture that fosters early, rapid, and when necessary, robust intervention."

Moreover, the European Union has adopted the EU Strategy Against Proliferation of Weapons of Mass Destruction which provides for a strengthened identification, control and interception of illegal trafficking in WMD. Hence, the European Union is prepared to adopt "common policies related to criminal sanctions for illegal export, brokering and smuggling of WMD-related material"; to consider "measures aimed at controlling the transit and transshipment of sensitive materials"; and to support "international initiatives aimed at the identification, control and interception of illegal shipments."<sup>38</sup>

The EU approach towards the proliferation issue may be less proactive than the US approach. Still, both EU strategies clearly indicate that the European Union will

not restrict itself to diplomatic means but that it is prepared to also make use of armed force whenever this may prove necessary.

**PSI as a further Cornerstone of the International Counter-Proliferation Regime**

It has been shown that PSI is a common effort of a group of States that fits well into the already existing counter-proliferation regime.<sup>39</sup> Subject to the final determination of its legality under international law, PSI is without doubt to be considered an additional step towards an effective prevention of the proliferation of WMD and their delivery systems. Its informal character enhances the participating States' ability to flexibly react to proliferation activities by States and individuals of concern and thus contributes to an effective implementation of their national and international security strategies.

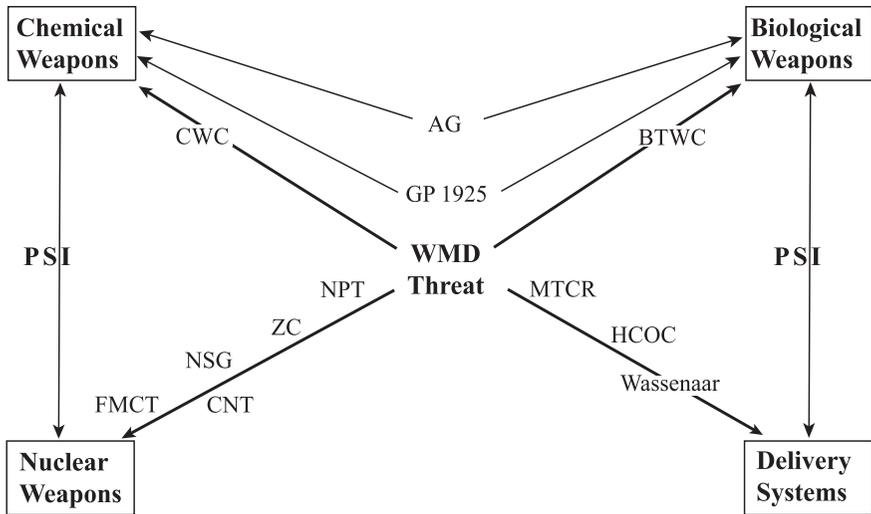


Figure 1: PSI as Part of the International Counter-Proliferation Regime

***Interdicting the Transport of WMD in the Territorial Sea***

The success of PSI is, of course, dependent on the firm political will of the participating States. However, some of them, e.g., Russia and Germany, have continuously stressed that their active participation in the Initiative presupposes the legality of the measures taken under international law. As long as interdiction measures are taken in the respective territories, national airspaces, and internal waters they are in conformity with international law.<sup>40</sup> The same holds true if ships and

aircraft are intercepted in international sea areas and in international airspace either by, or with the consent of, their respective flag or home State.<sup>41</sup>

However, when it comes to intercepting foreign vessels within the territorial sea, the question arises whether the law of the sea provides a sufficient legal basis. It needs to be emphasized that interference with foreign shipping, even if it occurs in the territorial sea of the intercepting State, will always have to be measured against the freedom of navigation, especially against the well-established right of innocent passage. Since all States participating in PSI are heavily dependent upon free sea lanes and unimpeded maritime commerce, they will certainly not too easily infringe upon those freedoms and rights. The precedent they set may be copied by other States and could contribute to a new form of “creeping jurisdiction” that may ultimately prove counterproductive. It is, therefore, vital for PSI that interdiction measures are in compliance with the regime of the territorial sea as set forth in the 1982 United Nations Convention on the Law of the Sea<sup>42</sup> (1982 LOS Convention) and in the corresponding customary law.<sup>43</sup>

Without prejudice to the inherent right of self-defense, the right of coastal States to interfere with foreign vessels in their territorial sea is regulated in Articles 25 and 27 of the 1982 LOS Convention.<sup>44</sup> According to the latter provision, the coastal State may exercise its criminal jurisdiction on board a foreign ship, i.e., it may arrest persons, conduct investigations, and temporarily detain the vessel, if crimes have been committed on board during passage that impact upon the coastal State. In view of the fact that coastal States are entitled to prevent infringement of, *inter alia*, their customs, fiscal, immigration and sanitary laws and regulations (Article 21, paragraph 1), enforcement measures taken against vessels suspect of transporting WMD, WMD components or delivery systems, do not seem to pose any problems. If the States participating in PSI enact legislation prohibiting the transport of such material they would be in a position to enforce these regulations against suspect vessels. It may, however, not be left out of consideration that the mere breach of the domestic (criminal) law of the coastal State will justify the exercise of its criminal jurisdiction only in cases where the crime has been committed on board a ship passing through the territorial sea after leaving the coastal State’s internal waters (Article 27, paragraph 2). If the vessel concerned has not left a port of the coastal State the exercise of criminal jurisdiction, according to Article 27, paragraph 1, is limited to one of the following cases:

- (a) if the consequences of the crime extend to the coastal State;
- (b) if the crime is of a kind to disturb the peace of the country or the good order of the territorial sea;

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- (c) if the assistance of the local authorities has been requested by the master of the ship or by a diplomatic agent or consular officer of the flag State; or
- (d) if such measures are necessary for the suppression of illicit traffic in narcotic drugs or psychotropic substances.

In the context of PSI, the coastal State will therefore be obliged to prove that the prohibited transport of WMD and related material meets the conditions of either subparagraph (a) or (b). An analogy to subparagraph (d) is not justified in view of the restricted scope of that exception. In view of the fact that the coastal State's enforcement jurisdiction in the territorial sea is in principle complete,<sup>45</sup> and in view of the dangerous character of such cargoes, the coastal State will in most cases be in a position to provide sufficient evidence that the said conditions are met. Still, it should not be left out of consideration that there is no general and complete prohibition of the transport of such material. Therefore, the coastal State that wishes to interdict the transport of WMD through its territorial sea should give prior notification of its domestic legal rules prohibiting such transports.<sup>46</sup>

If the crime has been committed before entry into the territorial sea and if the ship, proceeding from a foreign port, is only passing through the territorial sea without entering internal waters, the coastal State may not take any steps on board the ship.<sup>47</sup> However, this rule will in most cases not be an obstacle for interdiction measures because the transport of WMD or of delivery systems constitutes a permanent crime, i.e., the perpetration continues during passage.

Finally, the question remains whether the coastal State would be entitled to take enforcement measures against foreign vessels by referring to a "non-innocent" passage if there is no domestic law or regulation prohibiting the transport of the items in question. According to Article 25, paragraph 1, of the 1982 LOS Convention, the coastal State "may take the necessary steps in its territorial sea to prevent passage which is not innocent." Article 19 of the Convention provides that passage is not innocent if it is "prejudicial to the peace, good order or security of the coastal State" (paragraph 1) or if the vessel is engaged in one of the activities listed in Article 19, paragraph 2. Transporting missiles or WMD is not mentioned in paragraph 2 which, e.g., the United States considers "an exhaustive list of activities that would render passage not innocent."<sup>48</sup> Accordingly, some authors have serious doubts as to whether interdiction measures may be based upon the assumption of the non-innocent character of the transport of WMD.<sup>49</sup> However, this position is not very convincing. According to UN Security Council Resolution 1540<sup>50</sup> "proliferation of nuclear, chemical and biological weapons, as well as their means of delivery, constitutes a threat to international peace and security." Daniel Joyner argues,

therefore, that it “should be relatively unproblematic . . . for coastal states to justify overcoming seagoing vessels’ right of innocent passage through their territorial waters when there is a reasonable basis for suspicion that they are involved in proliferation.”<sup>51</sup> Although the coastal State’s reaction, according to Article 25, paragraph 1, will be limited to “preventing” such innocent passage, this does not mean that the suspect vessel may only be ordered to immediately leave the territorial sea. Such a restriction merely applies in cases of warships not complying with the coastal State’s laws and regulations because warships, even if within a foreign territorial sea, enjoy sovereign immunity.<sup>52</sup> With regard to merchant vessels that do not enjoy sovereign immunity, the coastal State will therefore be entitled to take all necessary steps, including the arrest of the vessel and seizure of its cargo.<sup>53</sup>

### *Interference with Foreign Vessels and Aircraft in High Seas Areas*

As seen, the interdiction measures agreed upon in the Paris Interdiction Principles<sup>54</sup> are consistent with existing international law.<sup>55</sup> The participating States do not yet envisage interdiction activities in high seas areas or in international airspace unless their own vessels and aircraft are concerned or unless the flag or home State has consented in a boarding or interception by another participating State. As a matter of fact, such consent was the legal basis for the interception the *BBC China* in September 2003.<sup>56</sup> Consent, including presumed consent, will also be the decisive legal argument for the interception, boarding, search, diversion, and arrest of Liberian- and Panamanian-flagged vessels according to bilateral agreements concluded by the United States with the two States.<sup>57</sup> The same holds true for an amendment of the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA Convention)<sup>58</sup> that is expected to be agreed upon in the end of 2005.

It needs to be emphasized here that no considerable legal problems are involved if there are reasonable grounds for suspicion that a vessel encountered on the high seas (or a civil aircraft in international airspace) is engaged in the transport of WMD and their delivery systems and that the cargo is destined to transnational terrorists. There is today widespread agreement that in case of a terrorist background interception, boarding, search, or arrest of vessels and aircraft finds its legal basis either in the (inherent) right of self-defense or in the international law of countermeasures (in combination with United Nations Security Council Resolution 1373 (2001)<sup>59</sup>).

However, it remains to be seen whether the PSI States would be entitled to also interdict the transport of WMD on the high seas or in international airspace if

there is neither a terrorist background nor a (presumed) consent by the flag or home State.

### **Law of the Sea**

Merchant vessels on the high seas are subject to the sovereignty of their respective flag State.<sup>60</sup> The same holds true with regard to civil aircraft in international airspace.<sup>61</sup> Therefore, third States are not entitled to interfere with such vessels and aircraft unless such interference is justified by the consent of the flag or home State or by a special agreement.<sup>62</sup> There is, as yet, no express treaty prohibition of the transport of WMD and their delivery systems.<sup>63</sup> Moreover, such activities may not be equated with piracy.<sup>64</sup> Therefore, the only provision of the 1982 LOS Convention serving as a basis for interdicting such transports in high seas areas is Article 110, paragraph 1 (d) and (e). Hence, as was the case in the *So San* incident,<sup>65</sup> the vessel must be without nationality or, though flying a foreign flag or refusing to show its flag, it must, in reality, be of the same nationality as the intercepting warship. It remains to be seen whether the proposed amendments of the SUA Convention<sup>66</sup> will also result in a modification of the LOS Convention or contribute to the emergence of a new rule of customary international law. At present, however, the international law of the sea does not provide a legal basis beyond the scope of Article 110 of the 1982 LOS Convention.

### **Self-Defense**

As in cases with a terrorist background, the right of self-defense will serve as a legal basis if the conditions triggering that right are met. Hence, if the transport of WMD is sufficiently linked to a given threat of an armed attack its interdiction will be justified, because there will be a “necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment of deliberation.”<sup>67</sup> This will be the case if a merchant vessel is sailing in the immediate vicinity of the outer limit of a State’s territorial sea and if there are reasonable grounds for suspicion that there is a nuclear weapon on board. Under the right of self-defense the coastal State will certainly be entitled to take all necessary measures, including the capture of the vessel, in order to effectively counter the threat.<sup>68</sup> The same holds true if the suspect vessel is destined to a third State whose government has shown an aggressive attitude and has given sufficient evidence that it would make use (or would consent in the use) of WMD as soon as it disposes of such weapons. Accordingly, the Cuban Quarantine could have been justified as a necessary measure of preemptive/interceptive<sup>69</sup>—not preventive—self-defense.<sup>70</sup> It may well be that in some near or distant future the customary right of self-defense will also apply to less immediately threatening circumstances. The US National Security Strategy may then be

characterized as the first precedent contributing to a progressive development of international law. For the time being, however, coercive measures of a purely preventive character are not in compliance with the right of self-defense. The mere shipment of WMD and their delivery systems will in most cases not meet the three-fold test of immediacy, necessity and proportionality.<sup>71</sup> Hence, except for extraordinary circumstances, an extension of PSI to interdictions of foreign vessels and aircraft in the high sea and in international airspace cannot be based upon the right of self-defense.<sup>72</sup> It needs to be emphasized that any extensive interpretation, claim or application of the right of self-defense to situations traditionally not covered by that right may serve as a welcome precedent for other States. Even if they display a certain conduct that the PSI States are unwilling to tolerate, the latter will be in a most unpleasant and difficult situation because they will certainly be reminded of their prior conduct. Moreover, all States, including the PSI States, should be aware of the tremendous achievements of the past three years. Prior to September 11, 2001 most international lawyers and governments would have agreed that the right of self-defense does not apply to attacks by a group of private persons. Today nobody would doubt that this is the case. A further extension of the right of self-defense to situations not meeting the test of imminence would not only be premature but, ultimately, counterproductive.

### **Counter-Measures Short of Self-Defense**

However, the above findings do not rule out the possibility of a further legal basis justifying the interdiction of WMD transports on the high seas and in international airspace that is all too often left out of consideration: counter-measures short of self-defense.

Admittedly, in its Resolution 1540 the UN Security Council has not authorized the boarding or capture of vessels and aircraft suspected of transporting WMD and their delivery systems.<sup>73</sup> Had the Security Council provided such an authorization—either in general terms or with regard to vessels and aircraft of a given nationality—the resolution would be a perfect legal basis.<sup>74</sup> However, the continuous plea for an express authorization by the Security Council whenever security issues are at stake is unrealistic. It is based upon an erroneous perception of the UN system of collective security. Of course, a functioning institutionalization of the use of force, including measures short of self-defense, may be an ideal worth working for. However, at present the system is far from perfect. It would amount to wishful thinking to believe that, e.g., the People's Republic of China will ever vote in favor of a Security Council resolution aimed at the proliferation activities by North Korea and authorizing the interdiction of North Korean ships and aircraft suspected of being engaged in such transports. Moreover, the present system of international

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law is far from excluding unilateral or multilateral action outside the UN system of collective security.

Be that as it may, with Resolution 1540 there now exists a legally binding document that unambiguously specifies the obligations of all States with regard to the prevention of the proliferation of WMD by non-State actors. Contrary to the views expressed by some politicians<sup>75</sup> and international lawyers<sup>76</sup> the Security Council is not limited in making use of its powers under Chapter VII of the UN Charter in situations in which a specific State threatens the peace. In other words, the Security Council may, in view of its primary responsibility for peace and international security, act as a quasi-legislator if the only means to counter a threat to the peace is a general and abstract resolution. The international community has not protested against either Resolution 1373 or Resolution 1540, thus acquiescing in the performance of such powers.

It may be recalled that, in Resolution 1540, the Security Council, acting under Chapter VII, has identified a series of obligations with regard to the prevention of WMD proliferation by non-State actors<sup>77</sup>:

1. [A]ll States shall refrain from providing any form of support to non-State actors that attempt to develop, acquire, manufacture, possess, transport, transfer or use nuclear, chemical or biological weapons and their means of delivery;
2. . . . all States, in accordance with their national procedures, shall adopt and enforce appropriate effective laws which prohibit any non-State actor to manufacture, acquire, possess, develop, transport, transfer or use nuclear, chemical or biological weapons and their means of delivery, in particular for terrorist purposes, as well as attempts to engage in any of the foregoing activities, participate in them as an accomplice, assist or finance them;
3. . . . all States shall take and enforce effective measures to establish domestic controls to prevent the proliferation of nuclear, chemical, or biological weapons and their means of delivery, including by establishing appropriate controls over related materials and to this end shall:
  - (a) Develop and maintain appropriate effective measures to account for and secure such items in production, use, storage or transport;
  - (b) Develop and maintain appropriate effective physical protection measures;

- (c) Develop and maintain appropriate effective border controls and law enforcement efforts to detect, deter, prevent and combat, including through international cooperation when necessary, the illicit trafficking and brokering in such items in accordance with their national legal authorities and legislation and consistent with international law;
- (d) Establish, develop, review and maintain appropriate effective national export and trans-shipment controls over such items, including appropriate laws and regulations to control export, transit, trans-shipment and re-export and controls on providing funds and services related to such export and trans-shipment such as financing, and transporting that would contribute to proliferation, as well as establishing end-user controls; and establishing and enforcing appropriate criminal or civil penalties for violations of such export control laws and regulations . . . .

Accordingly, every State that either allows or otherwise—actively or passively—assists in the transport of WMD and their delivery systems by non-State actors will violate its international obligations under Resolution 1540. A justification based on an assertion that the State in question does not possess the necessary means to comply with its duties is immaterial because Resolution 1540, in paragraph 7, specifically:

*Recognizes* that some States may require assistance in implementing the provisions of this resolution within their territories and invites States in a position to do so to offer assistance as appropriate in response to specific requests to the States lacking the legal and regulatory infrastructure, implementation experience and/or resources for fulfilling the above provisions.

Therefore, a State that knowingly allows the transport of WMD and of their delivery systems or that does not intervene by preventing such transports on board vessels flying its flag or on board aircraft bearing its markings commits an internationally wrongful act. According to the well-established principles of the law of State responsibility,<sup>78</sup> as codified in the 2002 rules prepared by the International Law Commission (ILC),<sup>79</sup> the State injured by a violation of international law is entitled to take the necessary countermeasures in order to either induce the wrongdoer to comply with its obligations or to reestablish the legal *status quo ante* instead of the delinquent State.<sup>80</sup> Since all forms of WMD proliferation activities by non-State actors are to be considered a threat to peace and international security

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and since the vast majority of States, including the People's Republic of China, agrees that such activities pose a considerable danger, the category of "injured State" is not limited to potential target States. Consequently, countermeasures and reprisals involving visit, search and capture may be taken against vessels and aircraft for the mere reason that they are flying the delinquent State's flag or that they are bearing that State's markings (genuine link). However, in view of the importance of the freedom of navigation and overflight such measures must be necessary and strictly proportionate. That will only be the case if there are reasonable grounds for suspicion that the vessels or aircraft concerned are indeed engaged in illicit activities of WMD transportation, i.e., that they are acting without the legal authority of any State.<sup>81</sup>

### *Conclusions*

There are some who are skeptical about the Proliferation Security Initiative, which they consider a too proactive and, thus, dangerous undertaking.<sup>82</sup> However, they also agree that proliferation of WMD and their delivery systems constitutes a concrete threat to international security. Still, they are not prepared to admit that the Initiative has been built on a sound legal basis. PSI, as it now stands, is in perfect conformity with both the international law of the sea and, though in exceptional cases only, the right of self-defense. Its legal basis has further been strengthened by UNSC Resolution 1540, thus enabling the participating States to extend their interdiction activities to the high seas and to international airspace. *A fortiori*, they may interdict transports of WMD and their delivery systems in areas covered by their respective territorial sovereignty, i.e. in their national airspace and in their territorial sea areas. Such interdictions—wherever conducted—presuppose that there are reasonable grounds for suspicion that the vessel or aircraft is engaged in proliferation activities not legally authorized by any State. The freedom of navigation is a principle far too important and vital for the national economies and for national and multilateral security interests to be interfered with easily.

Of course, the silver bullet is a treaty based approach. As seen, the United States has succeeded in concluding bilateral agreements with the two most important flag of convenience States—Liberia and Panama.<sup>83</sup> It is to be expected that further bilateral agreements will follow, thus enabling the US Coast Guard to effectively interdict the transport of WMD and of WMD-related cargoes by non-State actors. If the IMO member States succeed in amending the 1988 SUA Convention there will be a multilateral treaty serving as a further legal basis. However, the States of the highest proliferation concern, e.g., North Korea and Iran, will hardly be prepared to conclude or accede to such treaties. For an indefinite period of time,

interdictions involving those States and their shipping and aviation will have to be based upon the rules and principles identified in this article. In view of their highly delicate character they should, however, be conducted in a most cautious and restricted manner.

### *Notes*

1. US DEPARTMENT OF STATE, PROLIFERATION SECURITY INITIATIVE, Sept. 15, 2003, *available at* <http://www.state.gov/r/pa/ei/rls/24134.htm>. *See also* Contemporary Practice of the United States, *Proliferation Security Initiative for Searching Potential WMD Vessels*, 98 AMERICAN JOURNAL OF INTERNATIONAL LAW 355 (2004).
2. For a discussion of the facts surrounding the *So San* incident, see *Threats and Responses: Arms Smuggling; Scud Missiles Found on Ship of North Korea*, NEW YORK TIMES, Dec. 11, 2002, at A1; P. Kerr, *U.S. Stops Then Releases Shipment of N. Korean Missiles*, [http://www.armscontrol.org/act/2003\\_01-02/yemen\\_janfeb03.asp](http://www.armscontrol.org/act/2003_01-02/yemen_janfeb03.asp) (last visited Feb. 8, 2005).
3. The original eleven PSI participating States are: Australia, France, Germany, Italy, Japan, the Netherlands, Poland, Portugal, Spain, the United Kingdom, and the United States. Canada, Norway, Russia, and Singapore now also belong to the core group. Denmark and Turkey participated only in some of the meetings. 60 additional States have reportedly agreed to cooperate on an ad hoc basis.
4. At the Brisbane meeting (July 2003) the participants agreed on (a) a global initiative with global reach, (b) direct, practical measures to impede the trafficking in WMD, missiles and related items, (c) interdicting shipments of these items at sea, in the air or on land, and (d) robust and creative steps to prevent trafficking in such items. *See* Special Press Summary: Proliferation Security Initiative Meeting, *available at* <http://www.vic-info.org/RegionsTop.nsf/0/f5d0af10159ebd530a256d65000a5571?OpenDocument> (last visited Feb. 8, 2005).
5. US DEPARTMENT OF STATE, PROLIFERATION SECURITY INITIATIVE: STATEMENT OF INTERDICTION PRINCIPLES, <http://www.state.gov/t/np/rls/fs/23764.htm> (last visited Feb. 6, 2005) [hereinafter *Interdiction Principles*].
6. This has been repeatedly emphasized by former Undersecretary of State, John Bolton. *See* The New Proliferation Security Initiative—an Interview with John Bolton, <http://www.armscontrol.org/aca/midmonth/November/Bolton.asp> (last visited Feb. 6, 2005).
7. *Interdiction Principles*, *supra* note 5, Principle 1.
8. For an assessment of the North Korean weapons program, see John Chipmann, International Institute for Strategic Studies (IISS) Director, *available at* <http://www.iiss.org/showdocument.php?docID=324>. On February 11, 2005 North Korea announced that it possesses nuclear weapons. For an overview of the Iranian nuclear program, see <http://www.iaea.org/NewsCenter/Focus/laeaIran/index.shtml> (last visited Feb. 12, 2005). Libya was a “State of proliferation concern” until Muammar el-Qaddafi abandoned the WMD program in late 2003.
9. Dr. Abdul Qadeer Khan is known as the father of Pakistan’s nuclear weapons program. However, he also was involved in an extensive international network for the proliferation of nuclear technology and know-how. The network sold centrifuges to enrich uranium, uranium hexafluoride, and technological know-how to Iran, Libya and North Korea.
10. Mar. 10, 1988, 1678 U.N.T.S. 221, *reprinted in* 27 INTERNATIONAL LEGAL MATERIALS 668 (1988).
11. *See infra* p. 65 and note 58.

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12. Robert M. Chesney, *The Proliferation Security Initiative and Weapons of Mass Destruction Interdiction on the High Sea*, 13 NATIONAL STRATEGY FORUM REVIEW 5 (Fall 2003), *reprinted in* 25 NATIONAL SECURITY LAW REPORT 5, 5–8 (Oct. 2003); Erin Harbaugh, *The Proliferation Security Initiative: Counterproliferation at the Cross Roads*, III STRATEGIC INSIGHTS, Issue 7 (July 2004), *available at* <http://www.ccc.nps.navy.mil/si/2004/jul/harbaughJul04.asp> (last visited Feb. 8, 2005); Daniel H. Joyner, *The PSI and International Law*, 10 THE MONITOR 7 (Spring 2004), *available at* <http://www.uga.edu/cits/documents/pdf/monitor-sp-2004.pdf>; Michael Byers, *Policing the High Seas: The Proliferation Security Initiative*, 98 AMERICAN JOURNAL OF INTERNATIONAL LAW 526–545 (2004); Christian Schaller, *Die Unterbindung des Seetransports von Massenvernichtungswaffen*, SWP-STUDIE (May 2004). Doubts as to the Initiative’s legality are raised by Benjamin Friedman, *The Proliferation Security Initiative: The Legal Challenge*, Bipartisan Security Group, Global Security Institute (September 2003), *available at* <http://www.nautilus.org/DPRKBrifingBook/terrorism/PSI-brief.html#top>.
13. Schaller, *supra* note 12, at 9. The flag State principle was characterized as “the most venerable and universal rule of maritime law” by the US Supreme Court in *Lauritzen v. Larsen*, 345 U.S. 571 (1953). *See also* S.S. Lotus Case (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7).
14. *See, inter alia*, Byers, *supra* note 12, at 529; Chesney, *supra* note 12, at 6. It should be noted, however, that there is no general agreement whether the consent of the flag State is necessary or whether the master’s consent would suffice.
15. Joyner, *supra* note 12, at 8.
16. The International Maritime Organization’s (IMO) Diplomatic Conference of December 2002 adopted the ISPS Code by amendments to Chapters V and XI of the International Convention for the Safety of Life at Sea, Nov. 1, 1974, 32 U.S.T. 47, T.I.A.S. 9700. The full text of the ISPS Code, formally entitled the International Code for the Security of Ships and of Port Facilities, is available at <http://www.turkloydu.org/EN/SEA/ISPS-Code-en.pdf>.
17. CSI was announced by the US Commissioner of Customs and Border Protection in January 2002 as a means to extend the US zone of security outward so US borders are the last line of defense, not the first. Through CSI, US customs authorities may examine suspect containers in the port of origin of participating States. At present, CSI has been implemented in 34 international ports. For a discussion of CSI and a current listing of participating ports, see Homeland Security, Container Security Initiative (CSI), *available at* <http://www.globalsecurity.org/security/systems/carg-inspect.htm>. *See also* John F. Frittelli, *Maritime Security: Overview of Issues* 5 (2003), Congressional Research Service Report RS21079, *available at* <http://fas.org/sgp/crs/RS21079.pdf> (last visited Feb. 8, 2005).
18. C-TPAT allows for better cooperation between US customs authorities and private enterprises. *See* US GENERAL ACCOUNTING OFFICE, GAO-03-770, CONTAINER SECURITY EXPANSION OF KEY CUSTOMS WILL REQUIRE GREATER ATTENTION TO CRITICAL SUCCESS FACTORS (2003), *available at* <http://www.gao.gov/new.items/d03770.pdf> (last visited Feb. 8, 2005). *See also* J. Ashley Roach, *Container and Port Security: A Bilateral Perspective*, 18 THE INTERNATIONAL JOURNAL OF MARINE AND COASTAL LAW 341 (2003).
19. July 1, 1968, 21 U.S.T. 483; 729 U.N.T.S. 161; T.I.A.S. 6839 (entered into force Mar. 5, 1970).
20. The texts of the safeguards agreements and additional protocol are available at <http://www.iaea.org/Publications/Documents/Infcircs/Others/inf153.shtml> (last visited Feb. 10, 2005).
21. For an overview of the Zangger Committee, see <http://www.zanggercommittee.org>.
22. The term means that the export of listed items “triggers” IAEA safeguards as a condition for supply. The “trigger list” and the Zangger Committee’s understandings are published by the IAEA in its Information Circular 209 (INFCIRC/209) entitled “Communication Received from members regarding the Export of nuclear material and of Certain Categories of Equipment and

Other Materials”, available at <http://www.iaea.org/Publications/Documents/Infcir/Others/inf209.shtml>.

23. For an overview of the Nuclear Suppliers Group, see <http://www.nuclearsuppliersgroup.org>.

24. The text of the CNT is available at <http://www.fas.org/nuke/control/nt/docs/> (last visited Feb. 8, 2005).

25. For an overview and assessment of the FMCT, see <http://www.fas.org/nuke/control/fmct/> (last visited Feb. 8, 2005).

26. Mar. 3, 1980, T.I.A.S. 11080 (entered into force Feb. 8, 1987).

27. G.A.Res. A/RES/48/75, Dec. 16, 1993, available at <http://www.un.org/documents/ga/res/48/a48r075htm>.

28. June 17, 1925, 26 U.S.T. 571, T.I.A.S. No. 8061; *reprinted in* DOCUMENTS ON THE LAWS OF WAR 158 (Adam Roberts & Richard Guelff eds., 3d ed. 2000).

29. Apr. 10, 1972, 1015 U.N.T.S. 164; T.I.A.S. No. 8062, *reprinted in* THE LAWS OF ARMED CONFLICTS 137 (Dietrich Schindler & Jiri Toman eds., 3d. ed. 1988) (entered into force on Mar. 26, 1975).

30. Jan. 13, 1993, 1975 U.N.T.S. 469, *reprinted in* 32 INTERNATIONAL LEGAL MATERIALS 800 (1993). For an overview of the work of the Organisation for the Prohibition of Chemical Weapons, see <http://www.opcw.nl/>.

31. An overview of the AG and a listing of its members is available at <http://www.australiagroup.net/en/intro.htm>.

32. A discussion of the MTCR and a current listing of its members are available at <http://www.mtcr.info>.

33. The text of the HCOC is available at <http://projects.sipri.se/expcon/hcocfinal.htm> or [http://www.minbuza.nl/default.asp?CMS\\_ITEM=MBZ460871](http://www.minbuza.nl/default.asp?CMS_ITEM=MBZ460871) (last visited Feb. 8, 2005). See also US DEPARTMENT OF STATE, FACT SHEET, INTERNATIONAL CODE OF CONDUCT AGAINST BALLISTIC MISSILE PROLIFERATION (2004), available at <http://www.state.gov/t/np/rls/fs/27799.htm> (last visited Feb. 9, 2005).

34. Christer Ahlström, *Non-Proliferation of Ballistic Missiles: The 2002 Code of Conduct*, STOCKHOLM INTERNATIONAL AND PEACE INSTITUTE YEARBOOK 749 (2003).

35. The Strategic Concept is the product of NATO Alliance’s Strategic Concept, which was approved by the Heads of State and Government participating in the meeting of the North Atlantic Council in Washington, D.C., on April 23 and 24, 1999. Paragraph 22 provides:

The proliferation of NBC weapons and their means of delivery remains a matter of serious concern. In spite of welcome progress in strengthening international non-proliferation regimes, major challenges with respect to proliferation remain. The Alliance recognises that proliferation can occur despite efforts to prevent it and can pose a direct military threat to the Allies’ populations, territory, and forces. Some states, including on NATO’s periphery and in other regions, sell or acquire or try to acquire NBC weapons and delivery means. Commodities and technology that could be used to build these weapons of mass destruction and their delivery means are becoming more common, while detection and prevention of illicit trade in these materials and know-how continues to be difficult. Non-state actors have shown the potential to create and use some of these weapons.

36. According to the National Security Strategy of the United States, the comprehensive approach to combat WMD includes “proactive counterproliferation efforts,” “strengthened nonproliferation efforts to prevent rogue states and terrorists from acquiring the materials, technologies, and expertise necessary for weapons of mass destruction,” and “effective consequence management to respond to the effects of WMD use, whether by terrorists or hostile

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states.” OFFICE OF THE PRESIDENT OF THE UNITED STATES, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES 14 (2002).

37. The text of the European Security Strategy is available at <http://ue.eu.int/uedocs/cmsUpload/78367.pdf> (last visited Feb. 8, 2005). The EU Strategy reads, in pertinent part, as follows: “Proliferation of Weapons of Mass Destruction is potentially the greatest threat to our security. . . . The most frightening scenario is one in which terrorist groups acquire weapons of mass destruction. In this event, a small group would be able to inflict damage on a scale previously possible only for States and armies.”

38. The text of the Strategy Against Proliferation is available at [http://www.sipri.org/contents/expcon/eu\\_wmdsstrategy.pdf](http://www.sipri.org/contents/expcon/eu_wmdsstrategy.pdf).

39. Seema Gahlaut, *The PSI Will Parallel the Multilateral Export Control Regimes*, 10 THE MONITOR 12 (Spring 2004).

40. See *supra* notes 12 and 13.

41. See Joyner, *supra* note 14.

42. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 833 U.N.T.S. 396, *reprinted in* 21 INTERNATIONAL LEGAL MATERIALS 1261 (entered into force Nov. 16, 1994) [hereinafter 1982 LOS Convention]. See also the Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, UN Doc. A/RES/48/263 of Aug. 17, 1994, available at [http://www.un.org/Depts/los/convention\\_agreements/texts/unclos/closindxAgree.htm](http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindxAgree.htm) (entered into force July 28, 1996).

43. The rules of the 1982 LOS Convention on the territorial sea and on innocent passage are generally considered to be customary in character. Hence they are binding on all States. For an appraisal of the customary character, see especially the Joint Statement by the United States of America and the Union of Soviet Socialist Republics, Jackson Hole, Wyoming, Sep. 23, 1989, *reprinted in* 28 INTERNATIONAL LEGAL MATERIALS 1444 (1989) [hereinafter US-USSR Joint Statement].

44. In the context of PSI, Article 28 of the 1982 LOS Convention on civil jurisdiction is, if at all, of only minor relevance.

45. ROBIN R. CHURCHILL & ALAN V. LOWE, THE LAW OF THE SEA 98 (3d ed. 1999); Schaller, *supra* note 12, at 11.

46. This will regularly be achieved by making use of a Notice to Mariners and by a Notice to Aviators. The obligation to notify is based on the assumption that interference with foreign shipping will, *a priori*, constitute an infringement upon the flag State principle and the right of innocent passage. For a general duty to warn third States’ shipping of dangers within the territorial sea, see *Corfu Channel (UK v. Albania)*, Merits, 1949 I.C.J. 4, 22 (Apr. 9).

47. 1982 LOS Convention, *supra* note 42, art. 27 (5). Note, however, that this restriction does not apply to cases provided for in Part XII of the Convention pertaining to the protection of the marine environment or with respect to violations of laws and regulations adopted in accordance with Part V (the EEZ).

48. See Joint US-USSR Statement, *supra* note 42, ¶ 3.

49. Friedman, *supra* note 12, at 3.

50. UN Doc. S/RES/1540 (2004) of Apr. 28, 2004.

51. See Joyner, *supra* note 12, at 8.

52. 1982 LOS Convention, *supra* note 42, art. 30. Sovereign immunity of warships is specifically recognized in Article 236. See also *The Schooner Exchange v. McFadden & Others*, 11 U.S. 116 (1812).

53. CHURCHILL & LOWE, *supra* note 45, at 98; Joyner, *supra* note 12, at 8; Schaller, *supra* note 12, at 12.

54. *Supra* note 5.
55. The same view is taken by Byers, *supra* note 12, at 529; Joyner, *supra* note 12, at 8; and Schaller, *supra* note 12, at 19.
56. For the facts surrounding the interception and boarding of the *BBC China*, see Mark Esper & Charles Allen, *The PSI: Taking Action Against WMD Proliferation*, 10 THE MONITOR 4, 6 (Spring 2004).
57. Agreement between the Government of the United States of America and the Government of the Republic of Liberia Concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials by Sea, Feb. 11, 2004, *available at* <http://www.state.gov/t/np/trty/32403.htm>. Amendment to the Supplementary Arrangement between the Government of the United States of America and the Government of Panama to the Arrangement between the Government of the United States of America and the Government of Panama for Support and Assistance from the United States Coast Guard for National Maritime Service of the Ministry of Government and Justice, May 12, 2004, *available at* <http://www.state.gov/t/np/trty/32858.htm>.
58. 1678 U.N.T.S. 221, *reprinted in* 27 INTERNATIONAL LEGAL MATERIALS 668 (1988). The proposed amendment will include a criminalization of the transport of WMD and their components and rules on (a presumed) consent by the flag State to interception measures if there are reasonable grounds of suspicion that the vessel is engaged in such activities.
59. Rudger Wolfrum, *Fighting Terrorism at Sea: Options and Limitations under International Law*, in NEGOTIATING FOR PEACE. LIBER AMICORUM TONO EITEL 649–668 (Jochen A. Frowein et al. eds., 2003); Wolff Heintschel von Heinegg, *Current Legal Issues in Maritime Operations: Maritime Interception Operations in the Global War on Terrorism, Exclusion Zones, Hospital Ships and Maritime Neutrality*, 34 ISRAEL YEARBOOK ON HUMAN RIGHTS 151 (2004).
60. See the references *supra* note 12.
61. Bin Cheng, *Air Law*, in I ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 66, 69 (Rudolf Bernhardt ed., 1992).
62. *E.g.*, according to the bilateral agreements between the United States on the one side and Liberia and Panama on the other side (*supra* note 57).
63. Subject to an amendment to the 1988 SUA Convention at the end of 2005.
64. Transport of WMD even if performed for private ends will not meet the conditions laid down in Article 101 of the LOS Convention. Moreover, there is no indication—either in State practice or in the literature—of an emerging consensus to that effect.
65. See the references *supra* note 2.
66. *Supra* note 58.
67. Robert Y. Jennings, *The Caroline and McLeod Cases*, 32 AMERICAN JOURNAL OF INTERNATIONAL LAW 82, 91 (1938). For an appraisal of the *Caroline* formula, see YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 169 (3d ed. 2001).
68. For such a scenario, see Byers, *supra* note 12, at 532.
69. For the concept of interceptive self-defense, see DINSTEIN, *supra* note 67, at 219.
70. Carl Q. Christol & Charles R. Davis, *Maritime Quarantine: The Naval Interdiction of Offensive Weapons and Associated Matériel to Cuba, 1962*, 57 AMERICAN JOURNAL OF INTERNATIONAL LAW 525 (1963).
71. For these legal limits of the right of self-defense, see DINSTEIN, *supra* note 67, at 207.
72. Friedman, *supra* note 12, at 5; Byers, *supra* note 12, at 532, 540; Schaller, *supra* note 12, at 20; Joyner, *supra* note 12, at 7; Harbaugh, *supra* note 12, at 5; Chesney, *supra* note 12 at 7.
73. U.N.S.C. Res. 1540 (Apr. 28, 2004).
74. Byers, *supra* note 12, at 531; Schaller, *supra* note 12, at 17.

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75. E.g., in September 2004 the chairperson of the Swiss Department of Foreign Affairs, Micheline Calmy-Rey, criticized the Security Council for gradually usurping the role of a “world legislator” in referring to UNSC Resolution 1373.

76. E.g., Klaus Dicke, *Weltgesetzgeber Sicherheitsrat (Kommentar)*, in 49 VEREINTE NATIONEN 163, 168 (2001).

77. In a footnote to the Resolution, the term “non-State actor” is defined as an “individual or entity, not acting under the lawful authority of any State in conducting activities which come within the scope of this resolution.”

78. For an assessment of the customary character of the rules and principles of State responsibility it suffices here to refer to IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 419 (6th ed. 2003); Karl Zemanek, *Responsibility of States: General Principles*, in IV *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 219, 221 (Rudolf Bernhardt ed., 2000).

79. G.A. Res. A/RES/56/83, Jan. 28, 2002, Annex: Responsibility of States for internationally wrongful acts.

80. Article 49 of the ILC rules reads as follows:

1. An injured State may only take countermeasures against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations under part two.
2. Countermeasures are limited to the non-performance for the time being of international obligations of the State taking the measures towards the responsible State.
3. Countermeasures shall, as far as possible, be taken in such a way as to permit the resumption of performance of the obligations in question.

Note, however, that the restriction in paragraph 1 is not part of customary international law because States have continuously claimed a right to resort to counter-measures in order to reestablish the legal *status quo ante* in cases in which the obliged State has been either unwilling or unable to comply with its international obligations.

81. For a similar argument in the context of counter-terrorism, see Heintschel von Heinegg, *supra* note 59.

82. E.g., Friedman, *supra* note 12, *passim*; Harbaugh, *supra* note 12, *passim*.

83. See *supra* note 59.

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## Limits on the Use of Force in Maritime Operations in Support of WMD Counter-Proliferation Initiatives

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Craig H. Allen\*

*We could have other missile crises in the future—different kinds, no doubt, and under different circumstances. But if we are to be successful then, if we are going to preserve our own national security, we will need friends, we will need supporters, we will need countries that believe and respect us and will follow our leadership.*

Robert F. Kennedy, *Thirteen Days: A Memoir of the Cuban Missile Crisis*<sup>1</sup>

### *Introduction*

**O**n May 31, 2003, President Bush invited a number of like-minded States to join in a Proliferation Security Initiative (PSI) to counter the proliferation of weapons of mass destruction (WMD) and prevent them from falling into the hands of rogue regimes and terrorist organizations.<sup>2</sup> In the following year, the United States, together with eight NATO allies<sup>3</sup> and Australia, Japan, and Singapore, participated in a series of PSI planning sessions, experts' meetings, exercises and operations to develop and refine the initiative. On September 4, 2003, the PSI participating States adopted a Statement of Interdiction Principles (reproduced in

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Appendix I), in which they agreed to “take specific actions in support of interdiction efforts regarding cargoes of WMD, their delivery systems, or related materials.”<sup>4</sup> The “specific actions” are to include vessel boardings at sea and in port. All such boardings are to be conducted in compliance with applicable international and national laws.<sup>5</sup> Soon after the PSI was released, three open registry nations, Panama, Liberia and the Marshall Islands, which collectively represent more than half of the world’s shipping capacity by tonnage, entered into bilateral agreements with the United States that will allow the United States to conduct PSI boardings of vessels flagged in those States while in international waters.<sup>6</sup> Cyprus, Croatia and Belize soon entered into similar agreements. By the time of the first anniversary meeting of the PSI States in Krakow, Poland on May 31 2004, sixty-two States had signaled their support for the PSI and the Russian Federation had joined the original group of core participants.<sup>7</sup> The 9/11 Commission embraced the PSI and recommended that it be extended.<sup>8</sup> In addition, the United Nations Security Council legitimated the core principles of the PSI by unanimously passing Resolution 1540 (reproduced in Appendix II), calling on all States to criminalize possession of WMD by, or the transfer or transport of WMD to, non-State actors.<sup>9</sup> The resolution stopped short of conferring on non-flag-States any new interdiction authority over vessels engaged in transporting WMD and delivery systems on the high seas.<sup>10</sup> A proposal to add WMD interdiction authority to the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA)<sup>11</sup> is presently under consideration.<sup>12</sup>

As the PSI matures, maritime boardings under the Statement of Interdiction Principles may present a number of practical and legal issues. The first, an important but non-legal issue, is the safety of the boarding teams, who will be exposed not only to the risks associated with boarding potentially noncompliant vessels at sea (rather than in the comparative safety of a port), but might now also face the risk of exposure to radiological, biological or chemical materials and explosive devices. The second issue, which is related to the first, concerns the adequacy of boarding platforms, equipment and trained personnel to conduct the necessary detection, surveillance, screening, boarding, searching and seizure of vessels, cargoes and crews, while also carrying out the multitudinous other missions already imposed on the armed forces.<sup>13</sup> The third issue that could be presented in some cases concerns the scope of a State’s authority to board and search foreign vessels in its ports and coastal waters, or to permit other States to conduct boardings in their coastal waters, and the authority of States other than the flag State to intercept, interrogate, board and seize vessels on the high seas, with or without consent of the flag State or master of the vessel or the authority of a UN Security Council resolution. The fourth area requiring examination will arise in cases where illicit WMD

or missile delivery materials are discovered during a boarding, and concerns the handling and disposition of those materials and the possible actions to be taken against the vessel and the owner and crew found to be involved in transporting WMD. The final issue—and the subject of this paper—concerns the legal limits on the use of force in carrying out WMD interception operations. Analysis of some of these questions has taken on added urgency in light of the fact that some US critics of the 1982 UN Convention on the Law of the Sea<sup>14</sup> have urged the US Senate not to consent to accession to the treaty, in part because in the critics' opinion the terms of the treaty would undermine the PSI.<sup>15</sup>

Depending on the vessel's location, flag and type, the threat level presented, and the goals of the mission, maritime detection, interception and enforcement operations in support of the PSI may involve a variety of Department of Defense (DoD) and/or Department of Homeland Security (DHS) platforms and personnel. At-sea measures to intercept vessels suspected of transporting WMD by DoD or DHS could potentially be carried out under one or more of the following frameworks: (1) boardings conducted pursuant to consent by the vessel's flag State, the coastal State or vessel master; (2) maritime interception operations (MIO) to enforce embargoes imposed under the operative terms of a resolution by the UN Security Council or similar authority;<sup>16</sup> (3) "expanded" maritime interception operations (E-MIO);<sup>17</sup> (4) maritime law enforcement operations (MLE);<sup>18</sup> (5) the peacetime right of approach and visit;<sup>19</sup> (6) the customary law of countermeasures (self-help);<sup>20</sup> (7) the right of individual or collective self-defense; or (8) the belligerent's right of visit and search for contraband under the law of neutrality.

Vessel interceptions and boardings by naval vessels are generally carried out by visit, board, search and seizure (VBSS) teams drawn from the US Maritime Forces.<sup>21</sup> Boarding teams from US Navy platforms may include Navy, Marine Corps and Coast Guard personnel. Coast Guard interception and boarding teams may also operate from Coast Guard boats or cutters or from allied naval vessels. In most cases, Coast Guard law enforcement detachments (LEDETs) on naval vessels serve under the operational or tactical control of the cognizant Coast Guard command authority when conducting boardings.<sup>22</sup> In cases not calling for law enforcement measures, however, the LEDET may operate under DoD control, under the Coast Guard's statutory authority to provide assistance to other agencies.<sup>23</sup>

Experience has shown that interceptions and boardings by Navy and Coast Guard units occasionally require the use of force to overcome noncompliance or in self-defense. A number of standing and situation-specific documents promulgated by competent authorities establish doctrine and provide guidance applicable in situations involving the use of force during interception and boarding operations by DoD and Coast Guard units.<sup>24</sup> At the same time, international law

and US municipal law impose limits on the use of force. Which laws and doctrines apply will depend on the particular situation, though some principles apply in virtually all situations. This article examines the legal limits on the use of force in maritime interception and law enforcement operations. It first provides the reader with an introduction to the nature of maritime interception and boarding operations, before turning to an examination of the international and US authorities regarding the use of force at sea. It then applies those authorities to situations that might arise in the course of WMD maritime interception operations.

### *Nature of Maritime Interception and Boarding Operations*

WMD maritime interception operations by the United States can be traced back at least as far as the 1962 quarantine proclaimed by President Kennedy and enforced by the US Navy to halt the shipment of Soviet offensive missiles to Cuba.<sup>25</sup> Navy doctrine notes that the term “quarantine” was later dropped from the planning terminology in favor of maritime interception operations.<sup>26</sup> Contemporary maritime interception operations by the Navy are characterized by: (1) the source of their legal authority (usually a UN Security Council resolution); (2) the principle of proportionality between means and ends; (3) the principle of impartiality;<sup>27</sup> and (4) a commitment to effectiveness.<sup>28</sup> Only the National Command Authorities (“NCA”) (the President or Secretary of Defense) can authorize US forces to conduct MIO.<sup>29</sup> Once the NCA approves US participation, the Chairman of the Joint Chiefs of Staff designates the combatant commander for the relevant geographic area to carry out the MIO.<sup>30</sup> The authorization will address the level of force that may be used to carry out the MIO, the cargo or ships within the MIO prohibition, the geographic limits of the operation and the disposition of any cargo or ships found to be in violation of the governing resolution. Planning such operations is inevitably influenced by political constraints and resource limits.

Typically, the interception of a vessel suspected of transporting WMD or delivery systems will be based on an intelligence finding which is later developed through surveillance and reconnaissance, before moving to the “stop-and-search” phase of MIO.<sup>31</sup> For example, a vessel observed loading suspicious cargo in a port might later be tracked by satellite, aircraft, radar, surface ship, submarine, or seabed sensors. When the vessel is encountered by an intercepting vessel or aircraft, it will be visually inspected for evidence of identity and flag. Visual surveillance might be followed by a radio inquiry, to determine or confirm its name, registry, homeport, last port, next port, cargo and passengers.<sup>32</sup> The information obtained can then be checked against available information and intelligence databases. The vessel’s registry might also be confirmed with the flag State (if cooperative), and its

claimed next port of call might be contacted to determine whether the vessel has filed an advance notice of arrival and a copy of its cargo manifest. If suspicions remain, the vessel may be ordered to heave to and stand by for a boarding.

A VBSS team<sup>33</sup> consisting of Navy and perhaps Marine Corps and Coast Guard LEDET personnel may be sent over by small boat or helicopter. If the MIO on scene commander concludes the boarding will be opposed or non-compliant,<sup>34</sup> the VBSS team may be augmented by special operations forces.<sup>35</sup> SEAL and Marine Corps Maritime Special Purpose Force (MSPF) members assigned to helicopter assault force teams are trained to fast-rope from helicopters to the deck of the ship (vertical take-downs), engage and neutralize any hostile forces aboard, and gain control of the vessel.<sup>36</sup> Throughout the boarding, supporting helicopters hover overhead, with snipers stationed to provide cover to the boarding team. Alternatively, special operations personnel may “breach” the suspect vessel by small boat.<sup>37</sup>

When the suspect ship is under control, a chemical, biological and radiological (CBR) team and/or explosive ordnance disposal (EOD) team might be placed aboard to sweep the vessel before the VBSS boarding begins. Once the VBSS team is aboard, all personnel on the boarded vessel are accounted for by the VBSS security team, and the sweep team conducts an initial safety inspection (ISI) to confirm the boarding can be conducted safely.<sup>38</sup> The VBSS team members then examine the vessel’s registry and cargo documents. Under some circumstances, the boarding may extend to a search of all man-sized spaces, and an inspection of the cargo. In rare cases, the vessel may be diverted to a port or other sheltered location for a more detailed examination.<sup>39</sup> Diversion may be necessary to search a vessel transporting containerized cargo since at-sea container inspections are at best difficult.<sup>40</sup> If the boarding team has grounds for inspecting such cargo, the better alternative is often to divert the vessel to a port. Diversion may also be ordered if contraband is discovered. If evidence of a crime is discovered in the course of a visit, boarding or search personnel with law enforcement authority (the Coast Guard LEDET or foreign law enforcement agents) may be called on to arrest the offenders and seize the vessel and cargo.

### ***Authority for and Limits on the Use of Force in Maritime Interceptions and Boardings***

Any given approach and boarding operation on a vessel to intercept WMD or delivery systems could combine elements of the maritime interception and maritime law enforcement doctrines. Depending on the response by the master and crew of the suspect vessel, such operations can also raise questions regarding the source of

the applicable rules on any use of force by the Navy, Marine Corps and Coast Guard members of the team.<sup>41</sup> The authority to conduct an interception and boarding<sup>42</sup> must be distinguished from the authority for using force in such operations. The authority to use force in an interception, boarding, search and seizure may derive from (1) a State's right under customary international law and the State's municipal law to use force as necessary to carry out law enforcement actions; (2) a UN Security Council resolution providing such authority;<sup>43</sup> (3) the State's inherent right of self-defense recognized in Article 51 of the UN Charter;<sup>44</sup> or (4) the unit's or individual's right of self-defense. Depending on the circumstances, the exercise of force may be governed by international law, the laws of the boarding State (the constitution, statutes and regulations) and any doctrine and guidance promulgated by the service or services carrying out the operation. The common denominator running through all those authorities is the mandate that any action taken must be necessary to achieve a legitimate end and is reasonable under the circumstances. As Chief Justice John Marshall opined in a *Hovering Act* case two centuries ago, other States will oppose measures that are unreasonable, but if a State's enforcement measures are "reasonable and necessary to secure their laws from violation, they will be submitted to."<sup>45</sup>

### **US Doctrines on Use of Armed and Police Force**

In addition to limits on the use of force under international law and the Constitution and statutes of the United States (discussed below), members of the DoD and DHS must comply with applicable directives regarding the use of force issued by their command authorities.<sup>46</sup> At the outset, a distinction must be made between rules of engagement (ROE) and rules and policies on the use of force.<sup>47</sup> As more fully explained below, ROE are generally established by appropriate national and subordinate command authorities to guide the armed forces in the use of force in carrying out the national and homeland defense missions. The rules on the use of force (RUF) for DoD elements and the Coast Guard Use of Force Policy (CGUFP) are established by competent authorities to provide guidance on the use of force in carrying out law enforcement and other civil support missions in support of homeland security that do not call for the traditional use of armed force. It is also important to recognize that not every use of force by a member of the armed forces constitutes an application of "armed force" under the UN Charter and the law of armed conflict.<sup>48</sup> The focus of this article is on "police" force directed against private vessels or individuals who may be involved in transporting WMD, not "armed" force against the territorial integrity or political independence of a State.<sup>49</sup> The article takes the position that it is the mission, not the uniform worn by the

actor, that determines how the force should be classified and which doctrine controls that use of force.

### *Rules of Engagement (ROE)*

Rules of engagement are “directives that a government may establish to delineate the circumstances and limitations under which its own naval, ground and air forces will initiate and/or continue *combat* engagement with enemy forces.”<sup>50</sup> Adequate ROE appropriate to the situation are vital to mission success and protection of United States and allied assets. Even so, readiness, training and implementation deficiencies can prove devastating, as was learned in the 1983 terrorist bombing of the Marine barracks in Beirut, Lebanon,<sup>51</sup> and re-learned following the al Qaeda attack on *USS Cole* in 2000.<sup>52</sup> Members of the armed forces are well aware that any failure to obey controlling ROE is punishable as an orders violation under the Uniform Code of Military Justice (UCMJ).<sup>53</sup> Additionally, a service member who violates the applicable ROE may lose affirmative defenses to assault or homicide charges under the UCMJ.<sup>54</sup> However, the fact that official conduct may have violated an internal agency directive does not mean the conduct was unreasonable under the Fourth Amendment or a violation of international law.<sup>55</sup>

Although much of the ROE doctrine and guidance is classified, a few general comments can be made. The ROE applicable to a given situation is typically drawn from national and subordinate command authorities, and may include rules promulgated by joint or combined command authorities. The three commonly cited bases for ROE are national policy objectives, operational requirements and the relevant law. The ROE include the Standing Rules of Engagement (SROE), which includes both self-defense and mission accomplishment rules, and any supplemental rules of engagement for specific operations, missions or projects.<sup>56</sup> The SROE apply to military operations outside the territorial jurisdiction of the United States, even during peacetime.<sup>57</sup> The ROE also govern actions to be taken by US forces during military homeland defense (HD) operations in the territorial jurisdiction of the United States.<sup>58</sup> ROE do not apply to members of the armed forces when conducting military assistance to civil authorities missions, including missions in support of civil law enforcement agencies (discussed below).<sup>59</sup> Under some circumstances the SROE are also applicable to Coast Guard units.<sup>60</sup>

Naval units participating in multinational operations might find themselves operating under limitations imposed by the UN Security Council,<sup>61</sup> the NATO Rules of Engagement<sup>62</sup> or some other form of combined ROE.<sup>63</sup> Like other ROE, the rules for naval units participating in multinational operations will include mission accomplishment and self-defense ROE.<sup>64</sup> The need for common ROE doctrine in

such operations has long been recognized;<sup>65</sup> however, the challenges of developing ROE for multinational forces can be daunting.<sup>66</sup>

ROE must conform to the relevant international and national law.<sup>67</sup> “International law” includes applicable international human rights laws in peacetime and international humanitarian law during an armed conflict. It should be noted that for strategic, operational and policy reasons the applicable ROE may well be, and frequently are, more restrictive than international or national law would require. In most cases, compliance with the ROE should constitute compliance with the applicable law. An exception to that rule of thumb might arise in operations governed by ROE prepared at a multinational level. Such combined ROE must of course comply with all relevant international law; however, the national laws of any given participant might be more restrictive. Potentially, a service member’s action might be found to have been in compliance with the combined ROE, but not with the member’s more restrictive national laws. Such disparities are best avoided through careful ROE drafting and implementation training.<sup>68</sup>

The SROE make it clear that they do not limit a commander’s inherent authority and obligation<sup>69</sup> to use all necessary means available and to take appropriate action in self-defense of the commander’s unit and other US forces in the vicinity.<sup>70</sup> Self-defense is limited by the principles of necessity and proportionality.<sup>71</sup> The current ROE provisions on self-defense direct that:

When the use of force in self-defense is necessary, the nature, duration, and scope of the engagement should not exceed that which is required to decisively counter the hostile act or demonstrated hostile intent and to ensure the continued protection of US forces or other protected personnel or property.<sup>72</sup>

Program-specific doctrine may supplement or amplify the rules set out in the SROE.<sup>73</sup> For example, to address the need for naval security personnel to determine whether approaching vessels possess a hostile intent in the post-*Cole* environment, the Secretary of Defense and Chief of Naval Operations have promulgated directives authorizing the use of warning shots against such threats.<sup>74</sup>

#### *DoD Rules for the Use of Force (RUF)*

In addition to its principal national security mission, the Department of Defense has long provided support to civilian law enforcement agencies and to civil authorities.<sup>75</sup> However, in part because the Posse Comitatus Act of 1879 (PCA) prohibits, with some exceptions, the direct use of the armed forces (other than the Coast Guard) to enforce US laws,<sup>76</sup> the use of force by members of the armed forces within the territory of the United States is restricted.

Under the Joint Doctrine for Homeland Security (under development at the time this was written), DoD identifies two homeland security (HS) mission areas: homeland defense (HD), with air, land and maritime components, and civil support (CS).<sup>77</sup> CS includes military assistance to civil authorities (MACA), which is further broken down into military assistance for civil disturbances (MACDIS), military support to civil authorities (MSCA) and military support to civil law enforcement agencies (MSCLEA).

The SROE recognize that not all situations involving the use of force are armed conflicts under international law.<sup>78</sup> DoD has now promulgated Rules for the Use of Force (RUF) that address selected DoD mission areas not calling for the traditional use of armed force. RUF refer to directives issued to guide US forces on the use of force during CS operations in the territorial jurisdiction of the United States in support of the HS mission area. The use of force by US military forces deployed on CS missions within the territorial jurisdiction of the United States is not governed by ROE. DoD forces deployed on CS missions are instead bound to adhere to the RUF.<sup>79</sup> RUF directives applicable in MACA operations may take the form of mission execute orders, deployment orders, memoranda of agreement, or plans.<sup>80</sup> Those RUF may be established by the deployment order or memorandum of agreement, or by the Chairman of the Joint Chiefs of Staff instruction on the “Rules on the Use of Force by DoD Personnel Providing Support to Law Enforcement Agencies Conducting Counterdrug Operations in the United States.”<sup>81</sup> RUF are restrictive, detailed and sensitive to political concerns, in recognition of the fact that the CS mission area is characterized by restraints on weapons, tactics and levels of force. RUF are subject to change during operations. As a result, DoD policy directs military commanders to consult with their judge advocates to draft written RUF guidance and design and implement an appropriate RUF training program, to ensure military forces under their command understand the RUF procedures.<sup>82</sup>

#### *USCG Use of Force Policy (CGUFP)*

Congress has long recognized that effective maritime enforcement of laws and treaties requires that the Coast Guard be authorized to use force when necessary to carry out its enforcement of laws and treaties mission. Two federal statutes expressly address the use of force by the Coast Guard. The first, 14 U.S.C. § 637, which was amended in 2004, addresses the use of force to stop a vessel “liable to seizure or examination” by the Coast Guard.<sup>83</sup> The second, 14 U.S.C. § 89, establishes the general law enforcement authority of Coast Guard boarding officers and authorizes such officers to “use all necessary force to compel compliance.” In exercising the authority conferred by either statute, Coast Guard personnel and, in some

situations, supporting DoD platforms and personnel, must comply with the Coast Guard's Use of Force Policy (CGUFP).

The CGUFP is set out in the agency's Maritime Law Enforcement Manual, which is designated "for official use only."<sup>84</sup> The CGUFP must be adhered to by all of the following while conducting Coast Guard missions, exercising the right of individual self-defense, and in situations where the SROE do not apply: (1) all Coast Guard personnel (military, civilian and contract security), (2) all Coast Guard vessels and Coast Guard aircraft specifically authorized by the Commandant of the Coast Guard to use force, (3) all non-Coast Guard personnel onboard a Coast Guard unit, (4) all non-Coast Guard units or personnel operating under Coast Guard tactical control (TACON) or operational control (OPCON).<sup>85</sup> Coast Guard personnel follow the CGUFP even when the Coast Guard is not the lead federal agency.<sup>86</sup> Coast Guard personnel do not, under any circumstances, apply foreign use of force policies.<sup>87</sup> US Navy units operating under Coast Guard OPCON or TACON conducting law enforcement support operations follow the CGUFP for employing warning shots and disabling fire. Under those circumstances, the provisions of 14 U.S.C. § 637 (discussed below) extend to the naval unit.<sup>88</sup> Navy units follow the SROE and/or mission specific ROE or RUF for all other purposes.<sup>89</sup>

The CGUFP includes provisions for the use of force against noncompliant vessels and against individuals. The provisions applicable to the use of force against individuals take the form of a "use of force continuum" that distinguishes between non-deadly force and deadly force. Deadly force is defined as any force that is likely to cause death or serious physical injury.<sup>90</sup> Only that force reasonably necessary under the circumstances may be used. Force shall not be used where assigned duties can be discharged without the use of force. However, there is no duty to retreat to avoid law enforcement situations justifying the use of force, including deadly force. Like the SROE, the CGUFP emphasizes that covered personnel always have the inherent right to use all available means necessary to defend themselves or another from physical harm.<sup>91</sup>

The CGUFP provisions applicable to the use of force against noncompliant vessels<sup>92</sup> address both the conditions for, and modalities of, using force to stop a vessel in a law enforcement situation. The provisions do not apply to vessel-on-vessel use of force in self-defense.<sup>93</sup> In applying the CGUFP it is important to recognize that US practice differs in some respects from the practices of other nations. Some States categorically reject the use of force to stop noncompliant vessels for minor offenses or for offenses not involving public safety, such as fisheries violations. Other States apply the twin principles of necessity and proportionality in determining whether the use of force is appropriate to overcome a vessel's non-compliance. It is also important to recognize that in the United States any use of

force, other than in self-defense, generally requires case-specific approval by the operational or tactical commander, who might well decline to approve the use of force even in situations where it would be permitted under the CGUFP.

Under the CGUFP and 14 U.S.C. § 637, warning shots are considered a “signal” to a vessel to stop, not a use of force.<sup>94</sup> Warning shots are only used after other signaling methods have been tried without success. Warning shots are not used against aircraft or under circumstances where their use might endanger any person or property. Generally, warning shots are not used unless the enforcement units have the capability to deliver disabling fire if the warning shots are ignored. Disabling fire is the firing of ordnance at a vessel with the intent to disable it, with minimum injury to personnel or damage to the vessel. Under the CGUFP, disabling fire is to be discontinued when the vessel stops, is disabled, enters the territorial sea of another State, or the situation changes in a manner that introduces substantial risk to those aboard the noncompliant vessel.<sup>95</sup>

14 U.S.C. § 637 (reproduced, with 2004 amendments, in Appendix III) expressly authorizes disabling fire under limited circumstances and provides for an indemnity of vessel commanding officers called on to use disabling fire.<sup>96</sup> Disabling fire may be used against vessels subject to “examination” or “seizure.” During the so-called “Rum War” of the Prohibition era, the Coast Guard used warning shots and disabling fire on numerous occasions to interdict vessels attempting to smuggle alcohol into the United States.<sup>97</sup> The need for forcible interdiction measures arose again in the late 1970s, as Coast Guard and Navy units ranging in size from 82-foot patrol boats to 530-foot cruisers responded to a surge in maritime drug smuggling operations.<sup>98</sup> Air and surface assets trained and equipped for assignment to the Coast Guard’s Operation New Frontier<sup>99</sup> employ relatively novel means of stopping noncompliant vessels. The operation, which employs cutter-deployable, specially equipped high-speed over-the-horizon (OTH) boats and Coast Guard Helicopter Interdiction Tactical Squadron (HITRON) MH-68A (“Sting Ray”) helicopters, establishes a coordinated method to chase down and, if necessary, forcibly disable “go-fast” vessels engaged in unlawful activity.

### **US Constitutional and Statutory Limits on the Use of Force**

Enforcement actions within the United States, including its territorial sea, or those involving US vessels beyond the territorial sea, or involving US nationals on foreign vessels beyond the territorial sea, are constrained by the US Constitution.<sup>100</sup> When the Constitution applies, it is clear that Congress cannot by statute (e.g., 14 U.S.C. § 637 or 14 U.S.C. § 89) authorize what the Constitution forbids.<sup>101</sup> Nevertheless, the US Supreme Court has recognized that application of the constitutional standards to maritime searches and seizures authorized by Congress

might vary from applications to similar actions carried out under the differing conditions prevailing on land.<sup>102</sup> The Fourth Amendment to the Constitution provides that the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated and that no warrant authorizing such a search or seizure shall be issued in the absence of probable cause.<sup>103</sup> The Fifth Amendment further provides that the government may not deprive any person of their life, liberty or property without due process of law.<sup>104</sup> Both amendments potentially play a role in maritime interdiction and enforcement actions.<sup>105</sup> Constitutional violations may lead to suppression of evidence, dismissal of charges and even suits for damages against the officers responsible for the violations. To ensure compliance with the constitutional limits, the Supreme Court has repeatedly emphasized the duty of law enforcement agencies to provide their officers with use of force training.<sup>106</sup>

The Fourth Amendment seizure provision may be triggered by the seizure of a person, a vessel or property or papers on the vessel. Plainly, the Fourth Amendment applies to the actual arrest of a person by a law enforcement officer. An arrest must be based on probable cause and it must be conducted in a reasonable manner. “Excessive” force is by definition unreasonable. Allegations of excessive force during a detention or arrest typically arise in suits for damages against an enforcement officer,<sup>107</sup> or the officer’s employing agency. On occasion, a defendant charged with assaulting a law enforcement officer will assert in defense an argument that excessive force by the enforcement officer justified self-defense measures in response.<sup>108</sup> Where a defendant was subjected to “torture, brutality, and similar outrageous conduct” rising to the level that violates due process the court might even dismiss the charges against the defendant.<sup>109</sup>

Actions by law enforcement officers that fall short of an actual arrest may nevertheless rise to the level of a “seizure” implicating the Fourth Amendment.<sup>110</sup> For example, the Supreme Court has held that an “investigatory stop,” although not an arrest, is a seizure subject to the Fourth Amendment’s reasonableness requirement. However, such stops may be justified by a “reasonable suspicion” falling short of the probable cause that would be needed for an arrest.<sup>111</sup> An officer conducting a so-called “*Terry* stop” may forcibly detain the individual if necessary.<sup>112</sup> The Supreme Court has made it clear, however, that any use of force by the government to effect a seizure must be reasonable under the Fourth Amendment.<sup>113</sup> As a result, the reasonableness test is the standard by which a claim of excessive force in any seizure (including mere investigatory stops) will be measured.<sup>114</sup> In defining the contours of the reasonableness test the Supreme Court recognized: “police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary

in a particular situation.”<sup>115</sup> Accordingly, the Court held, the reasonableness of the officer’s belief as to the appropriate level of force should be judged by that on-scene perspective.<sup>116</sup> The Court has articulated a three-part balancing test that turns on the severity of the crime at issue, whether the suspect posed an immediate threat to others and whether the suspect was actively resisting arrest or attempting to evade arrest by flight.<sup>117</sup> If an officer reasonably, but mistakenly, believes that a suspect is likely to fight back, the officer is justified in using more force than might in fact be needed.<sup>118</sup>

The Supreme Court has held that the reasonableness requirement for searches under the Fourth Amendment does not apply to actions by US law enforcement personnel acting outside US territory, when the action is taken against a non-national of the United States.<sup>119</sup> Moreover, the reasonableness of foreign searches involving US nationals or vessels is judged by reference to the law of the place where it was conducted.<sup>120</sup> Some writers argue that the Fourth Amendment might still apply extraterritorially to a case alleging excessive force in the seizure of a non-national.<sup>121</sup> Extraterritorial conduct by law enforcement officers amounting to “deliberate and unnecessary lawlessness” has on one occasion led the court to dismiss the charges against the defendant.<sup>122</sup> Alternatively (or additionally), such conduct may be analyzed under the applicable international human rights laws discussed below and the principles of State responsibility.

### **International Law Limits on the Use of Force**

Earlier, this article highlighted the distinction between the two common usages of the term “force.” It was suggested that when the UN Charter speaks of “force” in Articles 2(4) and 41,<sup>123</sup> it is referring to military force (aggressive and defensive; individual and collective) by one State or its proxies against another State. The term is also used, in a very different context, to refer to the means used by authorized government vessels and their agents to compel individuals to comply with enforcement actions.<sup>124</sup> Such “police force” is not directed against a State and does not constitute “armed force,” nor does it violate the LOS Convention provisions reserving the seas for “peaceful purposes”<sup>125</sup> and requiring States to refrain from the use of force in any manner inconsistent with the UN Charter.<sup>126</sup> Nonetheless, it is possible that some acts conducted in the course of a law enforcement action against a vessel might be construed as an act of aggression;<sup>127</sup> perhaps even a *casus belli* in former times.<sup>128</sup> It is also important to bear in mind that international law imposes stricter limits on the use of force against aircraft than against vessels. Use of force against civil aircraft while in flight would likely violate the Montreal Convention protocol and federal law.<sup>129</sup>

The exercise of law enforcement authority outside the territorial limits of the State is limited under international law.<sup>130</sup> Under international law, the use of force in actions not amounting to armed conflict may be authorized or limited by treaty,<sup>131</sup> such as a bilateral boarding agreement<sup>132</sup> or the 2005 Protocol to the SUA Convention,<sup>133</sup> customary international law and general principles of law. For the most part, international law is directly implicated only in incidents involving conduct directed against the nationals, vessels or aircraft of another State.<sup>134</sup> International human rights law, including the International Covenant on Civil and Political Rights (ICCPR),<sup>135</sup> may apply even to conduct by a State directed at one of its own nationals.<sup>136</sup> Article 7 of the ICCPR, in language closely paralleling the Eighth Amendment of the US Constitution, prohibits torture and cruel, inhuman or degrading treatment or punishment. Article 9, echoing the Fifth Amendment, provides that no one shall be subjected to “arbitrary” arrest or detention, nor may the State deprive them of their liberty except on such grounds and in accordance with such procedures as are established by law.

When an interception and boarding is carried out under authority of a multilateral or bilateral agreement, the agreement itself may authorize or limit any use of force. Such is the case with the PSI boarding agreements entered into by the United States.<sup>137</sup> Similarly, the draft SUA Protocol includes an express provision on the use of force during any action authorized within its framework.<sup>138</sup> Any use of force other than in self-defense is therefore restricted to measures authorized by the treaty, as modified by any later case-specific verbal agreements.<sup>139</sup> The interplay of conventional and customary law on the use of force in maritime law enforcement operations is demonstrated by three leading cases. The first case, concerning the *I'm Alone*, arose under a bilateral boarding treaty, but also briefly examines the use of force under customary law.

#### *The I'm Alone (1929)*

The starting point for examining the international law limits on the use of force against a foreign vessel by maritime law enforcement authorities is the arbitration commission decision in the dispute arising out of the sinking of the auxiliary-powered schooner *I'm Alone* on March 22, 1929.<sup>140</sup> The dispute arose after the Coast Guard cutter *USCGC Wolcott* intercepted the British flag (Canadian registered) vessel *I'm Alone* on March 20, 1929, anchored between 8 and 15 miles off the coast of Louisiana (the distance offshore was disputed by the parties). A 1924 treaty between the United States and Great Britain authorized the United States to board British flag vessels suspected of liquor smuggling while in close proximity to the US coast.<sup>141</sup> Both governments agreed that the *I'm Alone* was “unquestionably” a notorious smuggling vessel, which transported liquor from Belize and the Bahamas

for delivery to contact boats off the US coast, while staying just outside the US territorial sea.<sup>142</sup> The contact boats then ran the liquor ashore, in violation of the National Prohibition Act. When the cutter *Wolcott* approached, the master of *I'm Alone*, asserting the US Coast Guard had no jurisdiction over his vessel, weighed anchor and began to flee southwest toward Mexico. The *Wolcott* fired across the vessel's bow and into the rigging, but the *I'm Alone* continued to flee. Over the next two days, the *Wolcott* followed the vessel in hot pursuit, eventually enlisting the assistance of two other Coast Guard cutters, the *Dexter* and the *Hamilton*. On March 22, 1929, after the chase had taken the vessels more than 200 miles from the US coast, the cutter *Dexter* closed in on the *I'm Alone* and once again ordered the vessel to heave to for boarding. After the master refused, the *Dexter* fired across the vessel's bow then into the sails and rigging. The *Dexter* then ceased fire and once again ordered the vessel to stop or it would be sunk. According to the Coast Guard, the master of the *I'm Alone* then brandished a pistol and told the *Dexter* that he would forcibly resist any attempt to board his vessel. The *Dexter* then resumed fire, this time into the hull of the *I'm Alone*, sinking the vessel about thirty minutes later. The master and crew of the *I'm Alone* jumped into the water as the vessel sank. The Coast Guard recovered all but one of the crewmen. That crewman, a French national, drowned before he could be recovered.

The arbitration panel appointed by the United States and Canada concluded that, assuming the United States had jurisdiction over the *I'm Alone* under the 1924 treaty; the Coast Guard was justified in using "necessary and reasonable force for the purpose of effecting the objects of boarding, searching, seizing and bringing into port the suspected vessel; and if sinking should occur incidentally, as a result of the exercise of necessary and reasonable force for such purpose, the pursuing vessel might be entirely blameless."<sup>143</sup> The commissioners went on to conclude that the cutter's act of intentionally sinking the *I'm Alone* was not justified under either the 1924 treaty or any other principle of international law.<sup>144</sup> Three observations are in order. First, the commission resolved the case under what they understood to be the prevailing international law standard. Second, the "reasonable and necessary force" standard articulated by the commissioners applied to all phases of the interception, from boarding through seizure.<sup>145</sup> Finally, the commission did not attempt to flesh out its "reasonable and necessary" standard, other than to draw distinction between a sinking that was incidental and one that was intentional, nor did it explain whether the nature of the suspected offense (suspicion of liquor smuggling) was a factor to be considered in weighing the necessity or proportionality of the force used. It was sufficient for the commissioners to determine that the Coast Guard's decision to intentionally sink the *I'm Alone* under the circumstances exceeded that standard.

*The Red Crusader (1961)*

Another commonly cited use of force case arose out of a 1961 enforcement action against the British fishing vessel *Red Crusader* by the Danish frigate *Niels Ebbesen*.<sup>146</sup> On May 21, 1961, the trawler *Red Crusader* and several other fishing vessels were sighted near the Danish Faeroe Islands. The parties disputed the *Red Crusader*'s exact position and whether it was engaged in fishing. Upon sighting the *Red Crusader*, the *Niels Ebbesen* signaled it to stop by signal searchlight and siren. When those signals went unheeded, the Dane fired a blank 40 mm warning shot across the *Red Crusader*'s bow. The *Red Crusader* then stopped, and the *Niels Ebbesen* sent over a boarding party. The master of *Red Crusader* was notified that his vessel was under arrest and that he was to follow *Niels Ebbesen* into port. A two-man custody crew was placed aboard *Red Crusader*. After initially complying with the Danish frigate's instructions, the master of the *Red Crusader* changed his mind, locked up the custody crew and attempted to flee with its embarrassed hostages. When the *Red Crusader*'s attempted flight became apparent to the commanding officer of the *Niels Ebbesen*, the frigate fired two 127 mm warning shots (one astern and one to starboard), accompanied almost immediately by a sound signal (Morse Code "K") to stop. Two minutes later, it fired warning shots ahead of and to port of the *Red Crusader*, again closely followed by a whistle signal to stop. Fifteen minutes later, while *Red Crusader* continued to flee, the *Niels Ebbesen* fired solid (non-explosive) shots at the vessel's scanner, mast, masthead light, hull and stem, while interspersing further warnings by loudhailer to stop. The vessel was damaged, but not sunk, and no one was injured. Britain protested the Danish action. The Commission of Enquiry later appointed by the two governments to investigate the matter determined that:

In opening fire at 03.22 hours up to 03.53 hours, the Commanding Officer of the *Niels Ebbesen* exceeded legitimate use of armed force on two counts: (a) firing without warning of solid gun-shot; (b) creating danger to human life on board the *Red Crusader* without proved necessity, by the effective firing at the *Red Crusader* after 03.40.

The escape of the *Red Crusader* in flagrant violation of the order received and obeyed, the seclusion on board the trawler of an officer and rating of *Niels Ebbesen*, and Skipper Wood's refusal to stop may explain some resentment on the part of Captain Sølling. Those circumstances, however, cannot justify such violent action.

The Commission is of the opinion that other means should have been attempted, which, if duly persisted in, might have finally persuaded Skipper Wood to stop and revert to the normal procedure which he himself had previously followed.<sup>147</sup>

The commission did not specify what “other,” non-deadly means would have been appropriate in this fisheries enforcement action. Nor did it categorically rule out the use of force that might create a danger to human life in cases of “proved necessity.”<sup>148</sup>

Interestingly, the commission was also called upon to examine the propriety of the conduct of the British naval vessel *HMS Troubridge*, which intervened in the confrontation. The Danish government initially protested that *Troubridge* had interfered with legitimate law enforcement measures by Denmark when *Troubridge* interposed herself between the other two vessels. Although Denmark withdrew parts of the question from the commission, the commission nevertheless offered its opinion that *Troubridge* “made every effort to avoid any recourse to violence between *Niels Ebbesen* and *Red Crusader*.”<sup>149</sup> The commission went on to opine that “[s]uch an attitude and conduct were impeccable.”<sup>150</sup> The two governments later agreed to mutually waive all claims and charges arising out of the incident.<sup>151</sup>

#### *The M/V Saiga (1997)*

The most recent decision to examine the international law limits on the use of force in a maritime law enforcement boarding was issued in 1999 by the International Tribunal for the Law of the Sea (ITLOS) in the “*M/V Saiga*” (*No. 2*) *Case*.<sup>152</sup> The suit—the first case brought before the new ITLOS—was initiated by the flag State, Saint Vincent and the Grenadines (“St. Vincent”), against the coastal State, the Republic of Guinea. The dispute arose out the forcible arrest by Guinea of the St. Vincent flag vessel *Saiga*. *Saiga* was a coastal tanker that refueled fishing vessels at sea. On the day before the incident *Saiga* had delivered gas oil to three fishing vessels in waters 22 miles offshore from Guinea. *Saiga* then moved to a position just outside the Guinean exclusive economic zone to await the arrival of several more vessels. At about 0800 on October 28, 1997, *Saiga* was, in the words of the Tribunal, “attacked” by Guinean patrol boat *P35* for an alleged violation of customs laws. Armed officers from *P35* then boarded the *Saiga*, seized the vessel and arrested the master and crew, firing their weapons at various times in the process. *Saiga* was taken to Conakry where the master was detained and the crewmembers’ travel documents were confiscated. Two crewmen who were injured by gunfire during the boarding were later allowed to travel to Dakar for medical treatment.

The Tribunal’s first ruling in the matter concerned St. Vincent’s application for prompt release of the *Saiga* and its crew upon the posting of reasonable security.<sup>153</sup> The second decision concerned the merits and addressed a number of issues, including the use of force by the Guinean enforcement vessel. St. Vincent argued that Guinea’s use of force in stopping and boarding the vessel was excessive and unreasonable.<sup>154</sup> St. Vincent pointed out that the *Saiga* was an unarmed tanker that was

almost fully laden with gas oil. The vessel was riding low in the water (and therefore easily boarded) and was capable of a speed of no more than ten knots. The crew offered no resistance. St. Vincent also called the Tribunal's attention to the fact that *P35* fired live ammunition, using solid shots from large-caliber automatic weapons. In response, Guinea asserted that the *P35* crew's actions were neither unreasonable nor unnecessary because the *Saiga* refused all visual, auditory and radio signals to stop. In its ruling, the Tribunal explained that:

Although the Convention does not contain express provisions on the use of force in the arrest of ships, international law, which is applicable by virtue of article 293 of the [LOS] Convention, requires that the use of force must be avoided as far as possible and, where force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances. Considerations of humanity must apply in the law of the sea, just as they do in other areas of international law.<sup>155</sup>

The Tribunal concluded that the Guinean patrol vessel fired live ammunition at the *Saiga* without first issuing any of the signals and warnings required by international law and practice. Once aboard the *Saiga*, Guinean enforcement personnel fired their weapons indiscriminately, despite the fact that the crew of the *Saiga* offered no resistance and did not threaten the boarding team. In the process, two of the *Saiga* crewmembers were seriously injured and vital equipment in the vessel's radio room and engine room was damaged. The tribunal ordered the government of Guinea to make reparations to the vessel's flag State. It relied in part on the *I'm Alone* and *Red Crusader* cases as the basis for its ruling and held that Guinea's use of force before and after the boarding was excessive and endangered human life.<sup>156</sup>

In ruling against Guinea, the Tribunal also cited the enforcement provisions in the 1995 Straddling Fish Stocks Agreement,<sup>157</sup> which was not in effect at the time of the decision, and in any event would not have been controlling in this dispute. Article 21 of the Straddling Fish Stocks Agreement provides a mechanism for States other than the flag State to exercise fisheries enforcement authority over foreign vessels on the high seas. Article 22 calls on parties conducting enforcement measures under Article 21 to ensure that their duly authorized fisheries inspectors "avoid the use of force except when and to the degree necessary to ensure the safety of the inspectors and where the inspectors are obstructed in the execution of their duties."<sup>158</sup> The Tribunal concluded that Article 22 "reaffirmed" the "basic principle concerning the use of force in the arrest of a ship at sea."<sup>159</sup> Because the above quoted Article 22 provision was later incorporated into the bilateral WMD boarding agreements with Liberia and the Marshall Islands (discussed below), the Tribunal's construction of Article 22 could prove relevant in construing the WMD boarding agreements.

*UN Guidance Documents*

Dire warnings on the continued use of deadly force in maritime interdiction and enforcement actions demonstrate a need for further development and clarification on the international limits on such actions.<sup>160</sup> It is clear that customary law prohibits firing into a vessel without warning. Additionally, using gunfire to intentionally sink a fleeing vessel suspected of smuggling illegal liquor, at least without first attempting to disable it, violates the established rule that force must be necessary and reasonable. Such gunfire would almost certainly pose a threat to the lives of those aboard.<sup>161</sup> But the full contours of the legal limits on the use of police force at sea remain unclear.<sup>162</sup> In contrast to US law, international law has so far failed to recognize explicitly that the level of force that is reasonable and appropriate under the circumstances will vary according to the nature of the violation and the impact alternative enforcement approaches will have on the legal regime's effectiveness.<sup>163</sup> Force levels appropriate in interdicting a vessel engaged in narcotics trafficking might well be inappropriate to one suspected of violating fisheries laws in a coastal State's EEZ.<sup>164</sup> And the community interest in interdicting a WMD shipment under circumstances that threaten international peace and security could justify force levels that would be deemed excessive in response to a minor pollution incident. To be accurate, any contemporary statement of customary law must also account for a significant amount of State practice that is not easily reconciled with the broad statements made by the ITLOS in the *M/V Saiga* case. Finally, maritime use of force norms should be reexamined periodically in light of the progressive development in the law of State responsibility.

In their text on the *Law of the Sea*, Professors Churchill and Lowe take the position that international law, as articulated by the arbitral tribunal in the *P'm Alone* Case, permits States to use only the "minimum force" necessary to compel compliance.<sup>165</sup> That position is generally consistent with the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials adopted by the United Nations<sup>166</sup> for enforcement operations ashore. Drawing on Article 3 of the UN Code of Conduct for Law Enforcement Officials,<sup>167</sup> the *Basic Principles* state that "law enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty." It generally argues against the use of firearms and asserts:

Governments and law enforcement agencies should develop a range of means as broad as possible and equip law enforcement officials with various types of weapons and ammunition that would allow for a differentiated use of force and firearms. These would include the development of non-lethal incapacitating weapons for use in appropriate situations, with a view to increasingly restraining the application of means capable of causing death or injury to persons. For the same purpose, it should also be

possible for law enforcement officials to be equipped with self-defensive equipment such as shields, helmets, bullet-proof vests and bullet-proof means of transportation, in order to decrease the need to use weapons of any kind.<sup>168</sup>

The commentary accompanying the *Code of Conduct* “emphasizes that the use of force by law enforcement officials should be exceptional.” Although the *Basic Principles* are not binding in themselves, an argument can be made that when the UN Security Council authorizes enforcement measures under Article 41, with the proviso that such measures shall be carried out “in conformity with international standards,” the applicable standards might be construed to include the *Basic Principles* and *Code of Conduct* documents if the measures taken are in the nature of law enforcement actions.

### *Use of Force in Maritime PSI Interception Operations*

The law applicable to the use of force in maritime operations to intercept WMD and their delivery systems will vary according to the legal basis for the action. The limits on the use of force to interdict the shipment of an operational WMD under circumstances amounting to an imminent act of “armed aggression” within the meaning of Article 51 of the UN Charter, or the belligerent’s right of blockade or visit and search under the laws of armed conflict and neutrality, will differ from those for enforcing a UN Security Council embargo, exercising a peacetime right of visit, conducting maritime law enforcement operations with respect to a vessel within the enforcing State’s jurisdiction, or while acting with the consent of the flag State, coastal State or vessel master. The use of force without legal justification or in a manner that is unreasonable may lead to State responsibility under international law or liability under the State’s municipal laws.<sup>169</sup> And, of course, any attempt in peacetime to assert jurisdiction or control over a warship or government-owned vessel used only on government non-commercial service would constitute a serious breach of international law.<sup>170</sup>

The starting point in any examination of the use of force by US Maritime Forces during MIO and E-MIO operations is the applicable ROE.<sup>171</sup> However, because most ROE doctrine is classified, this analysis will focus on the relevant international and US laws and to some extent the Navy MIO Doctrine and CGUFP, both of which are unclassified. The authority to use force other than in self-defense is derivative. Force may only be legitimately employed under circumstances where the interdicting vessel (or aircraft) has the lawful authority to compel a vessel to submit to its jurisdiction or control. If the vessel or aircraft has jurisdiction to enforce applicable laws or a right to exercise some measure of control over a vessel, as

in an exercise of the right of approach and visit, the vessel or aircraft also has the right to use reasonable force if necessary to compel compliance. For example, a warship justified in exercising a right of visit (an “examination” under 14 U.S.C. § 637) has the correlative right to use the necessary and reasonable force to compel compliance.<sup>172</sup>

If the WMD interception operation is carried out pursuant to a resolution of the Security Council, the measures available for enforcement derive from the resolution itself and any other applicable basis for asserting jurisdiction and control, along with the relevant mission accomplishment ROE. It is not uncommon, however, for Security Council resolutions to omit specific provisions on the use of force to enforce them. In construing and implementing the enforcement provisions of a Security Council resolution, it may be helpful to refer to the provisions of the Vienna Convention on the Law of Treaties (VCLT) for guidance, even though they are not directly applicable to Security Council resolutions.<sup>173</sup> Article 31 of the VCLT instructs that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in light of its object and purpose. The ordinary meaning of the terms used in a Chapter VII resolution by the Security Council may in some cases be determined by recourse to earlier resolutions by the Council,<sup>174</sup> analogous treaties, and any statements by States regarding their understanding of those terms. It should also be borne in mind that the primary object and purpose of any resolution issued under Chapter VII is to maintain or restore international peace and security.<sup>175</sup> Accordingly, any interpretation of the resolution should serve those ends. All members of the UN have an obligation to “accept and carry out” the decisions of the Council, in accordance with the Charter, giving such resolutions universal force.<sup>176</sup> Article 32 of the VCLT permits recourse to “supplementary” means of interpretation and the circumstances of the treaty’s conclusion to confirm the meaning determined by applying Article 31 or to determine the meaning if application of Article 31 leaves the meaning ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable. In some cases, an Article 32 approach to interpreting resolutions might justify resort to the record of any debate within the Security Council regarding the content and meaning of the resolution. In cases where the Council indicated in the resolution that it remains seized of the matter, recourse may always be made to the Council for clarification or supplementary guidance.

In consensual boardings the use of force other than in self-defense must generally be authorized by the consenting State. Operations conducted under authority of a bilateral boarding agreement with either the flag State or a coastal State in whose waters the vessel is located must comply with any limitations imposed by the

agreement.<sup>177</sup> The boarding agreements with Liberia and the Marshall Islands include the following provisions on the use of force:

Article 9  
Use of Force

1. All uses of force pursuant to this Agreement shall be in strict accordance with the applicable laws and policies of the Party conducting the boarding and applicable international law.
2. Each Party shall avoid the use of force except when and to the degree necessary to ensure the safety of Security Force Officials and vessels or where Security Force Officials are obstructed in the execution of their duties.
3. Only that force reasonably necessary under the circumstances may be used.
4. Boarding and search teams and Security Force vessels have the inherent right to use all available means to apply that force reasonably necessary to defend themselves or others from physical harm.
5. Whenever any vessel subject to boarding under this Agreement does not stop on being ordered to do so, the Security Force vessel should give an auditory or visual signal to the suspect vessel to stop, using internationally recognized signals. If the suspect vessel does not stop upon being signaled, Security Force vessels may take other appropriate actions to stop the suspect vessel.<sup>178</sup>

As noted earlier, paragraph 2 of this article mirrors the use of force provision in the Straddling Fish Stocks Agreement, which the International Tribunal for the Law of the Sea concluded “reaffirmed” the “basic principle on the use of force in the arrest of a ship at sea.”<sup>179</sup> However, one important feature distinguishes boardings under the WMD boarding agreements with Liberia and the Marshall Island from those conducted under the Straddling Fish Stocks Agreement. The WMD boarding agreements expressly provide that the “authorization to board, search and detain includes the authority to use force in accordance with Article 9 of this Agreement.”<sup>180</sup> No such authority is included in the Straddling Fish Stocks Agreement. Article 9 of the Liberia and Marshall Islands agreements applies by its own terms only to operations carried out under authority of the agreement. Article 9 does not control in boardings carried out under an alternative basis of authority, such as a right of approach and visit, or boardings conducted while the vessel is located in waters over which a coastal State has jurisdiction.<sup>181</sup>

The WMD boarding agreement with Panama takes the form of an amendment to an existing arrangement providing for cooperation in counter-narcotics detection and interdiction. The Panama agreement differs in several respects from the Liberia and Marshall Islands agreements. Like parallel provisions in the agreements

with Liberia and the Marshall Islands, Article X of the agreement with Panama provides that the “authorization to board, search and detain includes the authority to use force.”<sup>182</sup> However, Article XVII of the Panama agreement, which defines the limits on the use of force, differs in several respects. Article XVII draws on language common to bilateral counter-narcotics cooperative agreements (rather than the Straddling Fish Stocks Agreement), and adopts the prevailing international and national law standard:

#### Article XVII

1. All uses of force by a Party pursuant to this Supplementary Arrangement shall be in strict accordance with applicable laws and policies of that Party and shall in all cases be the minimum reasonably necessary under the circumstances, except that neither Party shall use force against civil aircraft in flight.
2. Nothing in this Supplementary Arrangement shall impair the exercise of the inherent right of self-defense by law enforcement or other officials of the Parties.<sup>183</sup>

Article XVII does not include the paragraph common to Article 22 of the Straddling Fish Stocks Agreement and Article 9 of the Liberia and Marshall Islands WMD boarding agreements. It is also noteworthy that the agreements the United States concluded with Liberia and the Marshall Islands expressly include authority for boardings to be conducted by the US Navy, while the Panama WMD boarding agreement contemplates that, except in emergencies, boardings will be carried out only by “law enforcement” officials.<sup>184</sup>

#### **Non-Forcible Measures to Stop and Board**

**SQ3: “You should stop or heave to; I am going to board you.”<sup>185</sup>**

As mentioned earlier, when a PSI interception and boarding is undertaken under authority of a Security Council resolution, questions regarding the use of force must begin with the authorizing resolution (see discussion above). The resolution will serve as the foundation for the National Command Authorities’ MIO authorization and the vessels’ operational tasking directives and ROE. Those documents should provide clear directions on the use of warning shots and disabling fire, and perhaps vertical take-down procedures if such a capability exists.<sup>186</sup> All such guidance must conform to the relevant principles of international and national law.

It is well established that under international law force may be used only when necessary. The necessity for using force can only be established by demonstrating that lesser means were attempted and failed to produce the needed compliance, or that those lesser means would have been impossible or futile under the circumstances. The sequence of measures short of actual force must begin with an

identification of the enforcing vessel and its intentions.<sup>187</sup> In the *M/V Saiga Case*, the International Tribunal for the Law of the Sea identified at least two steps an enforcing vessel must take before using force against a noncompliant vessel.<sup>188</sup> First, the vessel must be given an auditory or visual signal to stop using internationally recognized signals.<sup>189</sup> If the signal is not heeded, the enforcing vessel is justified in firing one or more warning shots across the bow of the vessel in a manner likely to attract attention. Only if the signals and warning shots go unheeded is the enforcing vessel justified, as a last resort and after further warning the noncompliant vessel, in using disabling fire.<sup>190</sup> Given the history of tribunals imposing on the enforcing State the burden of proving any use of force was necessary and reasonable, warnings given before firing warning shots or disabling fire should be recorded by videotape and audiotape when practicable. Prudent commanding officers will also require their crew to document the legal bases for taking interdiction or enforcement action against the suspect vessel before using force against the vessel.

When it applies, 14 U.S.C. § 637 requires the enforcing vessel to display its prescribed ensign, pennant or other identifying insignia.<sup>191</sup> The suspect vessel is signaled by visual, auditory and electronic means. Traditional “visual” means include flag hoist and Morse Code flashing light signals taken from the International Code of Signals, such as the SQ3 signal quoted above.<sup>192</sup> Auditory signals may be given by loudhailer or megaphone and supplemented by siren or whistle signals to attract the attention of those on board the suspect vessel. If necessary, the enforcing vessel’s intent may also be demonstrated by uncovering, readying and manning the ship’s weapons (without training them on the suspect vessel). Throughout the encounter, the enforcing vessel transmits radiotelephone calls to the suspect vessel over frequencies all vessels are required to monitor. The calls, which are commonly transmitted in English and any other language commonly used by vessels in the area or using internationally recognized signals for the International Code, informs the suspect vessel of the enforcing vessel’s intent to board.

If the signals and radio calls are ignored or the suspect vessel otherwise refuses to stop to permit boarding, the enforcing vessel may pursue one or more options in a progressive sequence. The Coast Guard MLEM prescribes a four-step approach for stopping noncompliant vessels. The sequence begins with “command presence,” progresses to “low-level” and then “higher-level” tactics, and finishes, if necessary, with “disabling fire.”<sup>193</sup> The Navy MIO Doctrine adopts a similar approach. It prescribes—subject to the applicable ROE and tasking orders—an ordered sequence of levels of force to be used against noncompliant vessels that escalates, if necessary, from “nonviolent” signals and maneuvers, to “deterrence” measures (warning shots), to a “show of force” (including disabling fire), and finally to “full force.”<sup>194</sup>

A variety of low-level force tactics designed to compel a fleeing vessel to stop have been tried over the years, including low level passes by aircraft; physically blocking or even “shouldering” the fleeing vessel; directing fire hose streams into the fleeing vessel’s exhaust stack to flood the engine; deploying nets, lines and other devices designed to entangle the vessel’s propellers; and severing the vessel’s fuel line. Low-level tactics are seldom successful in persuading a determined noncompliant suspect, particularly on merchant vessels of the size likely to be transporting WMD. Moreover, some of the tactics might even expose the pursuing vessel or a nearby support vessel to added risks. For example, if the fleeing vessel circles or doubles back, any nets and lines deployed in the water earlier to entangle the fleeing vessel might endanger the pursuing vessel as it turns to continue the pursuit.

If low-level tactics fail to induce the suspect vessel to comply, they may be followed by warning shots. Until recently, the federal statute governing the Coast Guard’s use of force against noncompliant vessels expressly required that warning shots always be fired before the enforcing vessel employed disabling fire. Any failure to first fire warning shots might have stripped the commanding officer of the indemnity provided by the statute. However, a 2004 amendment to 14 U.S.C. § 637 introduced an exception to the requirement. The amended statute no longer requires that warning shots be given before disabling fire if the person in command of the enforcing vessel “determines that the firing of a warning signal would unreasonably endanger persons or property in the vicinity of the vessel to be stopped.”<sup>195</sup> It is important not to read too much into the 2004 amendment. To meet the standards set by international law for the use of force in maritime enforcement actions, the use of disabling fire without prior warning shots would still have to be preceded by an effective means of warning the fleeing vessel that force will be used against the vessel if it fails to comply with the enforcing vessel’s orders.<sup>196</sup>

The United States has long taken the position that a warning shot is a signal. Warning shots are not directed against the vessel or any person on board and do not constitute a use of force. Although international law is largely silent on the manner for firing warning shots, the CGUFP provides detailed guidance for Coast Guard platforms (and DoD platforms under Coast Guard TACON or OPGON). The CGUFP specifies the need for prior authorization from the operational or tactical commander, the visual, auditory and electronic warnings to be given to the vessel before firing the warning shot, the position and posture of the crew on the enforcing vessel, the choice of weapon and ammunition and the direction of fire relative to the suspect vessel.<sup>197</sup> Like the CGUFP, the Navy MIO Doctrine provides specific direction on pre-fire warnings, the choice of weapon and ammunition and the weapon targeting method.<sup>198</sup> The general directions set out in the MIO

Doctrine must be applied consistently with the mission accomplishment ROE and operational tasking directives.

The use of warning shots to stop a vessel for boarding constitutes a “seizure” of the vessel in the constitutional sense and must therefore comply with the Fourth Amendment standard of reasonableness. The Court of Appeals for the Second Circuit applied the reasonableness standard to a case involving the Coast Guard’s use of warning shots against a Panamanian drug trafficking vessel on the high seas. The *USCGC Tamaroa* intercepted the 210-foot Panamanian mothership *Roondiép* fifty miles off Cape Cod and, with the consent of Panamanian authorities, ordered the vessel to heave to for boarding.<sup>199</sup> The *Roondiép* refused, and after twice warning the vessel by radio, *Tamaroa* fired warning shots across the vessel’s bow using a .50 caliber machine-gun. The *Roondiép* eventually stopped and in the boarding that followed the team discovered a large quantity of marijuana in the hold. The defendants appealed their convictions on grounds that the boarding and seizure violated the Fourth Amendment. After first rejecting the Government’s argument that Panama’s consent provided an independent constitutional basis for the boarding, the Court of Appeals concluded that the interception was a reasonable investigatory stop and therefore did not violate the Fourth Amendment.<sup>200</sup> The Court then turned to the warning shots:

The firing of warning shots to stop the *Roondiép* was not unreasonable, since reasonable force may be used if needed. The *Roondiép* had for some twenty minutes refused to stop upon request. The Coast Guard’ firing of warning shots into the water in front of the ship appears to have been the least drastic way to force the ship to stop, and the shots were directly attributable to the *Roondiép*’s refusal to submit to an authorized request to stop.<sup>201</sup>

It is not clear whether the court considered the warning shots a use of force, rather than just one of several acts to consider in determining whether the Coast Guard’s seizure was reasonable under the circumstances. However, the court went on to hold that “the firing of warning shots appears to have been no more intrusive than the circumstances required to get the *Roondiép* to stop.”<sup>202</sup> Accordingly, the Coast Guard’s actions were held to be reasonable.

### **Use of Force to Stop and Board**

**SQ1: “You should stop or heave to; otherwise I shall open fire on you.”**<sup>203</sup>  
The effectiveness of maritime legal regimes has long been a matter of concern.<sup>204</sup> Even the most carefully crafted regime will fail to produce the desired public order if compliance is poor. Compliance is best achieved by a coordinated system of enforcement that detects, interdicts and punishes violators, thereby deterring future

violations. Any regime that allowed a violator to escape interdiction and punishment by simply registering the vessel with a closed or uncooperative flag State that refuses all requests to board is unlikely to be effective against a determined adversary. As one experienced commentator observed, MIO patrols would be ineffective if the patrol vessels lack the right to use force if necessary to stop ships.<sup>205</sup> The late Professor Myres McDougal observed:

The authority to prescribe law, to make law, if it is to have any meaning must carry with it the authority to apply the law, decide what it is in particular instances, and to enforce it . . . Mr. Burke and I have collected the authorities on this for every type of area. It is our conclusion that you can be reasonably sure that states are authorized by international law to employ force when it is necessary to apply any law which they are authorized to make for the protection of their various exclusive interests. A comparable competence is established for the protection of the inclusive interests. . . . The principal point . . . is that, by and large, the maintenance of order upon the oceans is a function of the application of force by the ships of nation-states.<sup>206</sup>

It has been shown that the legitimacy of using force to stop a vessel subject to the enforcing State's jurisdiction or control is well established under international practice, treaty law and US law.<sup>207</sup> Although some condemn the use of force in fisheries and pollution enforcement actions as unreasonable and anachronistic, the need to preserve the authority to use force to compel compliance with the WMD non-proliferation regime is not so easily dismissed. Accordingly, at the international level a balance must be struck between the common interest in preserving freedom of navigation and limiting the use of force against vessels and their crews on the one hand, and the need to address the threat to international peace and security posed by the proliferation of WMD and delivery systems into the hands of rogue regimes and renegade non-State actors. As Professor Shearer recognized when he put the *Im Alone* decision in perspective in an earlier Blue Book series article:

[T]he proportionality principle requires the enforcing State to weigh the gravity of the offense against the value of human life. Rum-running . . . did not strike the [*Im Alone*] commissioners as sufficient to warrant such drastic action. They did not have to consider other cases. It is suggested that fisheries, revenue, immigration and other regulatory offenses would fall into the same category. So might pollution offenses. This is not only because sending a vessel with dangerous cargoes or wastes on board to the bottom might only compound the danger, but because of the Convention scheme . . . under which the flag State can be required to take enforcement action against the delinquent vessel escaping immediate arrest. Other cases might justify the use of more vigorous, and perhaps ultimately deadly, force, such as piratical vessels, vessels carrying arms to dissidents in the enforcing State, or craft carrying large quantities of dangerous

drugs. These cases might be argued to have the character of self-defense or self-preservation more than of enforcement of regulatory laws.<sup>208</sup>

At the same time, any decision to use force at this early stage—to get aboard a suspicious vessel—must take into account that in most such cases the enforcing vessel will not yet have probable cause to believe the vessel is engaged in illegal activities or activities that give rise to a right of self-defense or self-help.

It has also been shown that use of force in MLE boardings may raise constitutional and statutory questions under US law. As with the firing of warning shots, the use of disabling fire by the Coast Guard to seize a vessel at sea must comply with the Fourth Amendment reasonableness standard. As the US Supreme Court explained in *Graham v. Connor*, a case involving the use of force against an individual, not a vessel, the court will consider the severity of the crime at issue, whether the suspect poses an immediate threat to others, and whether the suspect is actively resisting arrest or attempting to evade arrest by flight.<sup>209</sup> The reasonableness standard, along with the governing international law standards, was applied to an incident involving the use of disabling fire in a joint Navy-Coast Guard counter-narcotics boarding off the Bahamas. In the interdiction, the *USS Kidd (DDG-993)*, operating with a deployed Coast Guard LEDET, fired warning shots then .50 caliber machine-gun disabling fire to stop a stateless vessel on the high seas (the incident was the first use of disabling fire by a Navy ship in a counter-narcotics operation). Once aboard, the boarding team discovered over 57,000 pounds of marijuana on the vessel.<sup>210</sup> On an appeal by the defendants of their conviction on drug trafficking charges, the court concluded that “the boarding and the seizure were not in conflict with United States statutes, international treaties or conventions, or the Constitution.”<sup>211</sup> Nothing in the court’s decision suggests that the use of disabling fire to stop a fleeing vessel under those circumstances violates the Fourth Amendment.

When the on scene commander or commanding officer has determined that a suspect vessel will present either an opposed boarding or a noncompliant boarding the full range of use of force options described above may come into play.<sup>212</sup> Those options may include the Coast Guard’s “higher level” tactics<sup>213</sup> and disabling fire. “Disabling fire” refers to use of weapons to disable the ship without risk to the crew. The use of disabling fire by Navy and Coast Guard vessels conducting MLE operations is constrained by a variety of sources, including 14 U.S.C. § 637, as amended in 2004, the CGUFP set out in the MLEM, any applicable bilateral boarding agreement and tasking directives by OPLAN or TACON. If disabling fire is used, the enforcing vessel’s method and choice of ammunition are limited by both service doctrine and international law. In the *M/V Saiga Case*, for

example, the International Tribunal for the Law of the Sea held that in its use of disabling fire the enforcement vessel should make every effort to ensure that life is not endangered.<sup>214</sup> Service doctrines typically require that the enforcing vessel attempt to disable the noncompliant vessel with smaller caliber weapons. Such a sequence was followed by the Coast Guard cutter *USCGC Boutwell* in 1988 when it encountered the converted Panamanian supply ship *Encounter Bay* 600 miles off the coast of Washington. *Boutwell* first fired sixty .50 caliber machine-gun rounds into the drug trafficking vessel without any immediate effect. The *Encounter Bay* crew decided to comply with the boarding demand when *Boutwell* threatened to switch to the vessel's deck gun.<sup>215</sup>

Despite the general acceptance accorded to the use of disabling fire against vessels trafficking in drugs, as a practical matter few commanding officers or command authorities are likely to be anxious to shoot at vessels suspected of transporting nuclear, biological or chemical weapons or precursors. Moreover, they will recognize that the typical merchant ship is often able to survive even prolonged disabling fire by the weapons and ammunition allowed by the use of force doctrines. For example, in a 1990 interception of the 250-foot Panamanian freighter *M/V Hermann* suspected of transporting drugs, the Coast Guard cutter *USCGC Chincoteague*, with the consent of the flag State, fired over 130 rounds from the vessel's 20 mm gun and 600 rounds from an M-60 machine-gun into the vessel's engine spaces and rudder post.<sup>216</sup> Despite the two-hour assault by *Chincoteague*, they were unable to disable the vessel before it entered the territorial sea of Mexico, at which point the *Chincoteague* was legally bound to discontinue the pursuit.

An effective alternative means of overcoming the suspect vessel's noncompliance or even opposition—often without endangering the crew or potentially dangerous cargo on the suspect vessel—is available if the enforcing vessel has the capability of deploying a helicopter-borne special operations force boarding team.<sup>217</sup> A vertical take-down may obviate the need for disabling fire against a noncompliant vessel and may therefore best meet the “reasonable and necessary force” test.

The efficacy of the vertical take-down alternative was demonstrated in the 2002 interdiction of the *M/V So San* by Spanish naval forces acting under the leadership of Spain's former Prime Minister Aznar. In response to United States and British intelligence, the Spanish frigate *Navarra*, operating in support of Operation Enduring Freedom and seeking to prevent the escape of al Qaeda and Taliban forces from Afghanistan, intercepted the *So San* in the Indian Ocean approximately 600 miles from the Horn of Africa.<sup>218</sup> No ship named *So San* appeared in any of the vessel registries. The vessel was flying no flag at the time of approach and displayed no

indication of its State of registry or homeport. In fact, a North Korean flag on its funnel had been painted over, as were the Korean characters for *So San*. The master of the vessel provided only cursory answers to radio questions from the *Navarra*. He indicated that his vessel was registered in Cambodia and was carrying a cargo of cement to Yemen. The government of Cambodia could only confirm that the ship matched the description of a vessel registered in Cambodia under a different name.<sup>219</sup> Concluding that the failure to fly a flag or display a name, together with the unverifiable claim of Cambodian registry, constituted reasonable grounds for suspecting that the ship was without a nationality (i.e., stateless), the Spanish frigate chose to exercise the internationally recognized right of a warship to “visit” a vessel on the high seas.<sup>220</sup> The right of visit entitles a warship to send over a boat or aircraft to verify the ship’s right to fly its flag.<sup>221</sup> The *So San* captain refused to slow down or to allow *Navarra* to board. *Navarra* then fired warning shots in an attempt to stop the *So San*, but the warnings were ignored. In fact, the *So San* increased its speed, making it impossible to board the ship by small boat. After a six-hour stand-off, *Navarra* prepared a special operations team of Spanish Marines to conduct a non-compliant boarding. To facilitate a vertical takedown, snipers on the *Navarra* first shot away the guy wires on the *So San*’s main mast that would have endangered the team when they fast-roped from the helicopter to the deck of the ship. Their path cleared, the Spanish team was able to get aboard and secure the vessel for the right of visit boarding. Most legal experts agree that the circumstances justified a right of visit boarding.<sup>222</sup> And none of those who concluded the boarding was legitimate questioned the Spanish decision to shoot out the vessel’s obstructing cables. Had the Spanish lacked a vertical take-down capability, and therefore been forced to choose between resorting to disabling fire or forgoing the boarding, it is not clear whether the command authorities would have authorized disabling fire.

### **Use of Force to Divert, Arrest and/or Seize**

It bears repeating that each progressive step in an interdiction from approach to seizure must be grounded in lawful authority. The authority to order a vessel to divert must be distinguished from a detention or formal seizure of the vessel.<sup>223</sup> Similarly, the mustering or temporary detention of persons aboard a vessel to facilitate a boarding must be distinguished from the arrest of persons whom a law enforcement officer has probable cause to believe committed a crime within the enforcing State’s jurisdiction. The amount of force that may be “reasonable” for one form of seizure might be seen as unreasonable if used in another context.

Even a cursory inspection of the international and national legal regimes applicable to WMD, their precursors and delivery systems will reveal they are riddled with gaps (the UN Security Council recognized as much when it passed Resolution

1540). As a result, a boarding team could find that the presence or transport of WMD components or delivery systems turned up by their laborious search do not violate any laws enforceable by the boarding State.<sup>224</sup> For example, once aboard the *M/V So San*, the Spanish boarding team uncovered fifteen SCUD missiles<sup>225</sup> and conventional (high explosive) warheads, along with parts to make eight more missiles and 23 barrels of chemicals (nitric acid) buried beneath tons of bagged cement. The missiles, which were sold by the government of North Korea to Yemen, were not listed in the vessel's cargo manifest. Yet the legal analysts ultimately concluded that no applicable international law prohibited the sale or shipment of SCUD missiles from North Korea to Yemen.<sup>226</sup> Accordingly, there was no legal basis for seizing the missiles, or taking further actions against the vessel or crew. The *So San* was released, to deliver its cargo to Yemen.

In circumstances where neither the vessel nor any of its crew has violated WMD possession or transportation laws enforceable directly by the boarding State, the boarding State may nevertheless find that one or more individuals aboard the vessel are suspected of having committed an offense that falls within the extradite or prosecute provision of an applicable international treaty. Such clauses are common in multinational terrorism conventions. Boarding teams and their commanders must recognize that their power (and duty) to detain such persons is limited. The treaty obligation to prosecute or extradite is generally triggered only when a person suspected of committing an offense under the treaty is within the "territory" of a contracting party.<sup>227</sup> Such a provision would not justify apprehension of a person on a foreign vessel for extradition to a third State.<sup>228</sup> On the other hand, the flag State may be under such an obligation if it is a party to a treaty requiring extradition.<sup>229</sup> Such cases—like those involving asylum requests—call for careful handling by the enforcing vessel's chain of command within the context of established interagency consultation procedures.

Assuming the authority to divert, detain arrest or seize exists, the question arises regarding what force may be used to carry out those actions. Vessels employed in MIO or E-MIO operations must consult their mission accomplishment ROE and operational tasking directives. The reader will also recall that the *I'm Alone* commissioners articulated an international law "necessary and reasonable force" standard that applies to all steps in the encounter, including the boarding, search and seizure and bringing the vessel into port.<sup>230</sup> For Coast Guard boarding officers engaged in maritime law enforcement operations, 14 U.S.C. § 89 authorizes such officers to use all force necessary to compel compliance. That statutory authority must be applied within the limitations imposed by the constitutional provisions discussed above and the CGUFP. The CGUFP imposes limitations on the use of deadly force that are similar to, but more restrictive than, those in the Model Penal

Code. Section 3.07 of the MPC begins by addressing the use of any force (deadly or non-deadly) in making an arrest. It provides that force is justifiable if the arresting officer believes its use is immediately necessary to effect the arrest. The MPC then imposes limits on the use of deadly force, providing that deadly force is not justifiable unless: (1) the arrest is for a felony; (2) the arresting officer believes that the force employed creates no substantial risk of injury to innocent persons; and (3) the arresting officer believes that the crime for which the arrest is made involved conduct including the use or threatened use of deadly force *or* the officer believes there is a substantial risk that the person to be arrested will cause death or serious bodily injury if his apprehension is delayed.<sup>231</sup>

The CGUFP is more restrictive than the MPC and better comports with the 1985 *Tennessee v. Garner* test described above.<sup>232</sup> While the MPC is cast in the disjunctive, requiring only that the felony for which the arrest is being made involve the threat or use of deadly force *or* that there be a substantial risk that the person being arrested will cause death or serious bodily injury if apprehension is delayed, the CGUFP only authorizes the use of deadly force to effect an arrest if there is probable cause to believe that “the suspect has committed a felony involving the use or threatened use of deadly force” *and* the “suspect is armed, or otherwise poses an imminent threat of death or serious physical injury to any person.”<sup>233</sup> A separate provision of the CGUFP authorizes the use of force, including deadly force, when necessary to protect hazardous materials or deadly weapons from theft, sabotage or unauthorized control.<sup>234</sup> In addition, the boarding team has the inherent right to use force when necessary in self-defense.

### **Use of Force in Self-Defense**

Throughout the approach and boarding it is important to distinguish the use of force to carry out the boarding, search and seizure from the use of force in self-defense. Regardless of the stage of the approach and boarding, the intercepting forces may be faced with actions requiring the use of force in self-defense. The ROE identify four levels of self-defense: individual self-defense (which includes defense of others), unit self-defense, national self-defense, and collective self-defense.<sup>235</sup> Individual self-defense is the act of defending oneself or another person by using force. Unit self-defense is the act of defending a particular unit of US forces, or other US forces in the vicinity, against a hostile act or demonstrated hostile intent. Responses to a ramming or attempted ramming of a Coast Guard or DoD vessel, or vessel under Coast Guard TACON, would be governed by the SROE on unit self-defense.<sup>236</sup> National self-defense is the act of defending the United States and, in some circumstances, US citizens and their property, and/or US commercial assets. Collective self-defense refers to the act of defending designated non-US forces or

designated foreign nationals and their property from a hostile act or demonstrated hostile intent.

The SROE and CGUFP recognize the inherent right of an individual and a unit to act in self-defense, subject to the twin constraints of necessity and proportionality.<sup>237</sup> The definitions of necessity and proportionality in the self-defense context differ from parallel provisions in mission accomplishment ROE. “Necessity” for the use of force in self-defense exists when a hostile act occurs or when a force or terrorist exhibits hostile intent.<sup>238</sup> “Proportionality” in the self-defense context refers to measures that are reasonable in intensity, duration and magnitude to the perceived or demonstrated threat, based on all the facts known to the commander at the time.<sup>239</sup> The SROE make it clear that “all necessary means available” may be used in self-defense.<sup>240</sup> Although the meaning of that phrase is classified, it can be said that when the hostile force no longer represents an imminent threat, the right to self-defense ends. Mission accomplishment ROE written to supplement the SROE do not limit the commander’s inherent authority and obligation to act in self-defense.<sup>241</sup> Intentionally sinking the *I’m Alone* (discussed above) was held to be excessive as an enforcement measure for a non-violent crime (smuggling alcohol). For those familiar with the ruthless determination of some modern traffickers in narcotics and illegal arms it is easy to imagine a circumstance in which it might be necessary to intentionally sink a trafficking vessel in self-defense.

The authority to exercise national or collective self-defense is generally more restrictive.<sup>242</sup> The doctrine of unit self-defense is well established. In the *Marianna Flora*, the Supreme Court recognized that a warship has no duty to flee or wait until she is crippled before defending herself with force. Writing for the Court, Justice Story held that the warship commander’s duty under such circumstances is plain: it is to “oppose force to force, to attack and to subdue the vessel.”<sup>243</sup> Justice Story went on to explain that the commander:

had the flag of his vessel to maintain, and the rights of his cruiser to vindicate. To have hesitated in what was his duty to his government called for on such an occasion, would have been to betray (what no honourable officer could be supposed to indulge) an indifference to its dignity and sovereignty.<sup>244</sup>

The Court then upheld the boarding and seizure of the approached vessel, not for piracy but for the very act of firing on a US warship without legal justification.<sup>245</sup> The Court of Appeals for the Ninth Circuit recently extended that principle, holding that a threat to open fire on the Coast Guard if its agents attempted to board provided independent grounds for seizing the vessel.<sup>246</sup>

The “no-duty-to-retreat” rule has been incorporated into Coast Guard doctrine, though it also acknowledges that under some circumstances temporary withdrawal might prove to be the wiser alternative, to provide time for the arrival of additional assets or personnel or to reduce tensions.<sup>247</sup> Similarly, under the SROE guidelines on “de-escalating the situation,” when time and circumstances permit, a hostile force should be warned and given an opportunity to withdraw or cease any threatening activities.<sup>248</sup>

### *Conclusion*

UN Security Council Resolutions 1373 and 1540 provide stark warning of the grave threat to international security posed by global terrorism and the proliferation of WMD and their delivery systems. For some, the resolutions also demonstrate that the presumption in the 1945 UN Charter that nation-States will hold a monopoly on the large-scale use of force must be reevaluated. It is too soon to predict whether those resolutions will eventually serve as the basis for new crimes of universal jurisdiction or progressive development of the right of approach and visit under the law of the sea. In the meantime, while the Security Council monitors progress on the implementation of its terrorism and counter-proliferation resolutions, nations participating in the PSI and those cooperating with them will move forward with a pragmatic and adaptive program to counter the growing threat posed by the conjunction of global terrorism and WMD proliferation. Given the physical nature of most WMD and delivery systems of concern and the likely routes they will follow from their sources to intended users, the PSI must include a maritime interception component if it is to succeed. To be effective, maritime interception must include provisions for using reasonable force when necessary to overcome non-compliance. As both a legal and practical matter, the enforcing vessel cannot simply continue a pursuit indefinitely.<sup>249</sup> Even an enforcing vessel with unlimited fuel and patience—and no other pressing mission—must terminate its pursuit if the pursued vessel enters the territorial sea of a third State, unless that State consents to an enforcement action in its waters or such action is authorized by an applicable resolution of the UN Security Council.<sup>250</sup>

International law and the national laws of the States participating in PSI maritime operations impose limits on the use of force. Through the Statement of Interdiction Principles, the PSI participants have pledged to conform their operations to international and national law. The exact contours of that law have yet to be fully defined. For example, customary law has yet to expressly acknowledge that as the threat to international or national security increases higher levels of force in enforcement measures may be justified. Cases involving the use of force in fisheries

enforcement are inapposite where the danger of ineffective enforcement is not merely over-fishing, but rather permitting nuclear, biological or chemical weapons to come into the possession of a rogue regime or terrorist group. Even if the law were fully developed, it would not lessen the need for use of force policies and case-by-case decision-making grounded in informed risk assessment and management principles. The risk of using disabling fire against a vessel carrying WMD or component materials, and the low probability of success, cast serious doubt on whether such measures are likely to be employed. Accordingly, innovative methods, such as vertical take-downs or breaches of non-compliant vessels by small boat, may become an increasingly common feature of maritime interception operations. Both options expose the boarding team members to greater risk from the nature of the operation and potential opposition by the boarded vessel; however, the risk to global security posed by a course of passive inaction is likely to be even greater.

A given PSI interception may implicate national defense, homeland security and/or law enforcement mission responsibilities. Accordingly, US maritime forces and their legal advisers must be prepared to apply what are often subtle distinctions among three distinct but sometimes overlapping systems of rules governing the use of force at sea. Policy makers and planners for PSI participating States must bear in mind that in framing a use of force approach for what will often be a combined operation they must strive to fashion an approach that recognizes that national attitudes on the use of force in maritime boardings may differ, even when they are grounded in universally applicable Security Council resolutions. The execution of those use of force policies will also shape and influence customary law on the use of force and on State responsibility in the years to come.

*Appendix I*  
*Interdiction Principles for the Proliferation Security Initiative*<sup>251</sup>

PSI participants are committed to the following interdiction principles to establish a more coordinated and effective basis through which to impede and stop shipments of WMD, delivery systems, and related materials flowing to and from states and non-state actors of proliferation concern, consistent with national legal authorities and relevant international law and frameworks, including the UN Security Council. They call on all states concerned with this threat to international peace and security to join in similarly committing to:

1. Undertake effective measures, either alone or in concert with other states, for interdicting the transfer or transport of WMD, their delivery systems, and related materials to and from states and non-state actors of proliferation concern. “States or non-state actors of proliferation concern” generally refers to those countries or entities that the PSI participants involved establish should be subject to interdiction activities because they are engaged in proliferation through: (1) efforts to develop or acquire chemical, biological, or nuclear weapons and associated delivery systems; or (2) transfers (either selling, receiving, or facilitating) of WMD, their delivery systems, or related materials.
2. Adopt streamlined procedures for rapid exchange of relevant information concerning suspected proliferation activity, protecting the confidential character of classified information provided by other states as part of this initiative, dedicate appropriate resources and efforts to interdiction operations and capabilities, and maximize coordination among participants in interdiction efforts.
3. Review and work to strengthen their relevant national legal authorities where necessary to accomplish these objectives, and work to strengthen when necessary relevant international law and frameworks in appropriate ways to support these commitments.
4. Take specific actions in support of interdiction efforts regarding cargoes of WMD, their delivery systems, or related materials, to the extent their national legal authorities permit and consistent with their obligations under international law and frameworks, to include:

- a. Not to transport or assist in the transport of any such cargoes to or from states or non-state actors of proliferation concern, and not to allow any persons subject to their jurisdiction to do so.
- b. At their own initiative, or at the request and good cause shown by another state, to take action to board and search any vessel flying their flag in their internal waters or territorial seas, or areas beyond the territorial seas of any other state, that is reasonably suspected of transporting such cargoes to or from states or non-state actors of proliferation concern, and to seize such cargoes that are identified.
- c. To seriously consider providing consent under the appropriate circumstances to the boarding and searching of its own flag vessels by other states, and to the seizure of such WMD-related cargoes in such vessels that may be identified by such states.
- d. To take appropriate actions to (1) stop and/or search in their internal waters, territorial seas, or contiguous zones (when declared) vessels that are reasonably suspected of carrying such cargoes to or from states or non-state actors of proliferation concern and to seize such cargoes that are identified; and (2) to enforce conditions on vessels entering or leaving their ports, internal waters or territorial seas that are reasonably suspected of carrying such cargoes, such as requiring that such vessels be subject to boarding, search, and seizure of such cargoes prior to entry.
- e. At their own initiative or upon the request and good cause shown by another state, to (a) require aircraft that are reasonably suspected of carrying such cargoes to or from states or non-state actors of proliferation concern and that are transiting their airspace to land for inspection and seize any such cargoes that are identified; and/or (b) deny aircraft reasonably suspected of carrying such cargoes transit rights through their airspace in advance of such flights.
- f. If their ports, airfields, or other facilities are used as transshipment points for shipment of such cargoes to or from states or non-state actors of proliferation concern, to inspect vessels, aircraft, or other modes of transport reasonably suspected of carrying such cargoes, and to seize such cargoes that are identified.

*Appendix II*

*United Nations Security Council Resolution 1540 (2004)* <sup>252</sup>

Security Council  
4956th Meeting (PM)\*

*The Security Council,*

*Affirming* that proliferation of nuclear, chemical and biological weapons, as well as their means of delivery,\*\* constitutes a threat to international peace and security,

*Reaffirming*, in this context, the Statement of its President adopted at the Council's meeting at the level of Heads of State and Government on 31 January 1992 (S/23500), including the need for all Member States to fulfil their obligations in relation to arms control and disarmament and to prevent proliferation in all its aspects of all weapons of mass destruction,<sup>4</sup>

*Recalling also* that the Statement underlined the need for all Member States to resolve peacefully in accordance with the Charter any problems in that context threatening or disrupting the maintenance of regional and global stability,

*Affirming* its resolve to take appropriate and effective actions against any threat to international peace and security caused by the proliferation of nuclear, chemical and biological weapons and their means of delivery, in conformity with its primary responsibilities, as provided for in the United Nations Charter,

*Affirming* its support for the multilateral treaties whose aim is to eliminate or prevent the proliferation of nuclear, chemical or biological weapons and the importance for all States parties to these treaties to implement them fully in order to promote international stability,

*Welcoming* efforts in this context by multilateral arrangements which contribute to non-proliferation,

*Affirming* that prevention of proliferation of nuclear, chemical and biological weapons should not hamper international cooperation in materials, equipment and technology for peaceful purposes while goals of peaceful utilization should not be used as a cover for proliferation,

*Gravely concerned* by the threat of terrorism and the risk that non-State actors\*\* such as those identified in the United Nations list established and maintained by the Committee established under Security Council resolution 1267 and those to whom resolution 1373 applies, may acquire, develop, traffic in or use nuclear, chemical and biological weapons and their means of delivery,

*Gravely concerned* by the threat of illicit trafficking in nuclear, chemical, or biological weapons and their means of delivery, and related materials,\*\* which adds a new dimension to the issue of proliferation of such weapons and also poses a threat to international peace and security,

*Recognizing* the need to enhance coordination of efforts on national, subregional, regional and international levels in order to strengthen a global response to this serious challenge and threat to international security,

*Recognizing* that most States have undertaken binding legal obligations under treaties to which they are parties, or have made other commitments aimed at preventing the proliferation of nuclear, chemical or biological weapons, and have taken effective measures to account for, secure and physically protect sensitive materials, such as those required by the Convention on the Physical Protection of Nuclear Materials and those recommended by the IAEA Code of Conduct on the Safety and Security of Radioactive Sources,

*Recognizing further* the urgent need for all States to take additional effective measures to prevent the proliferation of nuclear, chemical or biological weapons and their means of delivery,

*Encouraging* all Member States to implement fully the disarmament treaties and agreements to which they are party,

*Reaffirming* the need to combat by all means, in accordance with the Charter of the United Nations, threats to international peace and security caused by terrorist acts, *Determined* to facilitate henceforth an effective response to global threats in the area of non-proliferation,

*Acting* under Chapter VII of the Charter of the United Nations,

1. *Decides that* all States shall refrain from providing any form of support to non-State actors that attempt to develop, acquire, manufacture, possess, transport,

## *Limits on the Use of Force*

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transfer or use nuclear, chemical or biological weapons and their means of delivery;

2. *Decides also* that all States, in accordance with their national procedures, shall adopt and enforce appropriate effective laws which prohibit any non-State actor to manufacture, acquire, possess, develop, transport, transfer or use nuclear, chemical or biological weapons and their means of delivery, in particular for terrorist purposes, as well as attempts to engage in any of the foregoing activities, participate in them as an accomplice, assist or finance them;

3. *Decides also* that all States shall take and enforce effective measures to establish domestic controls to prevent the proliferation of nuclear, chemical, or biological weapons and their means of delivery, including by establishing appropriate controls over related materials and to this end shall:

(a) Develop and maintain appropriate effective measures to account for and secure such items in production, use, storage or transport;

(b) Develop and maintain appropriate effective physical protection measures;

(c) Develop and maintain appropriate effective border controls and law enforcement efforts to detect, deter, prevent and combat, including through international cooperation when necessary, the illicit trafficking and brokering in such items in accordance with their national legal authorities and legislation and consistent with international law;

(d) Establish, develop, review and maintain appropriate effective national export and trans-shipment controls over such items, including appropriate laws and regulations to control export, transit, trans-shipment and re-export and controls on providing funds and services related to such export and trans-shipment such as financing, and transporting that would contribute to proliferation, as well as establishing end-user controls; and establishing and enforcing appropriate criminal or civil penalties for violations of such export control laws and regulations;

4. *Decides* to establish, in accordance with rule 28 of its provisional rules of procedure, for a period of no longer than two years, a Committee of the Security Council, consisting of all members of the Council, which will, calling as appropriate on other expertise, report to the Security Council for its examination,

on the implementation of this resolution, and to this end calls upon States to present a first report no later than six months from the adoption of this resolution to the Committee on steps they have taken or intend to take to implement this resolution;

5. *Decides* that none of the obligations set forth in this resolution shall be interpreted so as to conflict with or alter the rights and obligations of State Parties to the Nuclear Non-Proliferation Treaty, the Chemical Weapons Convention and the Biological and Toxin Weapons Convention or alter the responsibilities of the International Atomic Energy Agency or the Organization for the Prohibition of Chemical Weapons;

6. *Recognizes* the utility in implementing this resolution of effective national control lists and calls upon all Member States, when necessary, to pursue at the earliest opportunity the development of such lists;

7. *Recognizes* that some States may require assistance in implementing the provisions of this resolution within their territories and invites States in a position to do so to offer assistance as appropriate in response to specific requests to the States lacking the legal and regulatory infrastructure, implementation experience and/or resources for fulfilling the above provisions;

8. *Calls upon* all States:

(a) To promote the universal adoption and full implementation, and, where necessary, strengthening of multilateral treaties to which they are parties, whose aim is to prevent the proliferation of nuclear, biological or chemical weapons;

(b) To adopt national rules and regulations, where it has not yet been done, to ensure compliance with their commitments under the key multilateral non-proliferation treaties;

(c) To renew and fulfil their commitment to multilateral cooperation, in particular within the framework of the International Atomic Energy Agency, the Organization for the Prohibition of Chemical Weapons and the Biological and Toxin Weapons Convention, as important means of pursuing and achieving their common objectives in the area of non-proliferation and of promoting international cooperation for peaceful purposes;

## *Limits on the Use of Force*

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- (d) To develop appropriate ways to work with and inform industry and the public regarding their obligations under such laws;
9. *Calls upon* all States to promote dialogue and cooperation on non-proliferation so as to address the threat posed by proliferation of nuclear, chemical, or biological weapons, and their means of delivery;
10. Further to counter that threat, *calls upon* all States, in accordance with their national legal authorities and legislation and consistent with international law, to take cooperative action to prevent illicit trafficking in nuclear, chemical or biological weapons, their means of delivery, and related materials;
11. *Expresses* its intention to monitor closely the implementation of this resolution and, at the appropriate level, to take further decisions which may be required to this end;
12. *Decides* to remain seized of the matter.

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\* The 4955<sup>th</sup> Meeting was closed.

\*\* Definitions for the purpose of this resolution only:

*Means of delivery*: missiles, rockets and other unmanned systems capable of delivering nuclear, chemical, or biological weapons, that are specially designed for such use.

*Non-State actor*: individual or entity, not acting under the lawful authority of any State in conducting activities which come within the scope of this resolution.

*Related materials*: materials, equipment and technology covered by relevant multi-lateral treaties and arrangements, or included on national control lists, which could be used for the design, development, production or use of nuclear, chemical and biological weapons and their means of delivery.

Appendix III

14 U.S.C. § 637

*Stopping vessels; immunity indemnity for firing at or into vessel*

(a) (1) Whenever any vessel liable to seizure or examination does not stop on being ordered to do so or on being pursued by an authorized vessel or authorized aircraft which has displayed the ensign, pennant, or other identifying insignia prescribed for an authorized vessel or authorized aircraft, the person in command or in charge of the authorized vessel or authorized aircraft may, ~~after a gun has been fired by the authorized vessel or authorized aircraft as a warning signal~~ fire at or into the vessel which does not stop.

(2) Before firing at or into a vessel as authorized in paragraph (1), the person in command or in charge of the authorized vessel or authorized aircraft shall fire a gun as a warning signal, except that the prior firing of a gun as a warning signal is not required if that person determines that the firing of a warning signal would unreasonably endanger persons or property in the vicinity of the vessel to be stopped.

(b) The person in command of an authorized vessel or authorized aircraft and all persons acting under that person's direction shall be indemnified from any penalties or actions for damages for firing at or into a vessel pursuant to subsection (a). If any person is killed or wounded by the firing, and the person in command of the authorized vessel or authorized aircraft or any person acting pursuant to their orders is prosecuted or arrested therefor, they shall be forthwith admitted to bail.

(c) A vessel or aircraft is an authorized vessel or authorized aircraft for purposes of this section if—

(1) it is a Coast Guard vessel or aircraft; or

(2) it is a surface naval vessel or military aircraft on which one or more members of the Coast Guard are assigned pursuant to section 379 of title 10; ~~or~~.

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\* As amended in 2004 by PUB. L. No. 108–293, § 205 (2004). Underlined sections were added in 2004. ~~Strikeouts~~ indicate sections deleted in 2004.

## *Limits on the Use of Force*

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(3) ~~subject to subsection (d), it is a naval aircraft that has one or more members of the Coast Guard on board and is operating from a surface naval vessel described in paragraph (2):~~

~~(d) (1) The inclusion of naval aircraft as an authorized aircraft for purposes of this section shall be effective only after the end of the 30-day period beginning on the date the report required by paragraph (2) is submitted through September 30, 2001:~~

~~(2) Not later than August 1, 2000, the Secretary of Defense shall submit to the Committee on Armed Services of the House of Representatives and the Committee on Armed Services of the Senate a report containing~~

~~(A) an analysis of the benefits and risks associated with using naval aircraft to perform the law enforcement activities authorized by subsection (a);~~

~~(B) an estimate of the extent to which the Secretary expects to implement the authority provided by this section; and~~

~~(C) an analysis of the effectiveness and applicability to the Department of Defense of the Coast Guard program known as the "New Frontiers" program:~~

(d) Report- The Commandant of the Coast Guard shall transmit a report annually to the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Transportation and Infrastructure of the House of Representatives describing the location, vessels or aircraft, circumstances, and consequences of each incident in the 12-month period covered by the report in which the person in command or in charge of an authorized vessel or an authorized aircraft (as those terms are used in section 637 of title 14, United States Code) fired at or into a vessel without prior use of the warning signal as authorized by that section.

### *Notes*

1. ROBERT F. KENNEDY, THIRTEEN DAYS: A MEMOIR OF THE CUBAN MISSILE CRISIS 123 (1969).
2. See 2004 Report of the Secretary-General, Oceans and the Law of the Sea, at 40–41, para. 162, U.N. Doc. A/59/62 (2004).
3. NATO members participating in the PSI since its inception include France, Germany, Italy, the Netherlands, Poland, Portugal, Spain and the United Kingdom. Canada and Norway joined several months later.

4. Interdiction Principles for the Proliferation Security Initiative, Sept. 4, 2003, para. 1, *available at* <http://www.state.gov/tnp/rls/fs/23764.htm>.
5. *Id.* para. 4.
6. See Agreement Between the Government of the United States of America and the Government of the Republic of Liberia Concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials By Sea, Feb. 11, 2004 [hereinafter United States-Liberia Bilateral WMD Boarding Agreement], *at* <http://www.state.gov/tnp/trty/32403.htm>; Amendment to the Supplementary Arrangement between the Government of the United States of America and the Government of the Republic of Panama to the Arrangement Between the Government of the United States of America and the Government of the Republic of Panama for Support and Assistance from the United States Coast Guard for the National Maritime Service of the Ministry of Government and Justice, May 12, 2004 [hereinafter United States-Panama Bilateral WMD Boarding Agreement], *at* <http://www.state.gov/tnp/trty/32858.htm>; Agreement Between the Government of the United States of America and the Government of the Republic of the Marshall Islands Concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials by Sea, Aug. 13, 2004, [hereinafter United States-Marshall Islands Bilateral WMD Boarding Agreement], *at* <http://www.state.gov/tnp/trty/35237.htm>.
7. Wojciech Moskwa, *Bush Seeks to Broaden Fight Against Spread of WMD*, REUTERS, June 1, 2004, *available at* <http://www.reuters.com/newsArticle.jhtml?type=politicsNews&storyID=5309821&src=rss/ElectionCoverage&section=news>.
8. FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 381 (2004). The commission concluded the “PSI can be more effective if it uses intelligence and planning resources of the NATO alliance. Moreover, PSI membership should be open to non-NATO countries. Russia and China should be encouraged to participate.” The PSI was always open to non-NATO States. And well before the commission entered its final report, Russia had already joined the PSI and China appeared to have no interest in joining.
9. U.N. Security Council Res. 1540, U.N. Doc. No. S/RES/1540 (2004). In Resolution 1373, the Council had earlier called on all States to, *inter alia*, act to eliminate the supply of weapons to terrorists. U.N. Security Council Res. 1373, para. 2(a), U.N. Doc. No. S/RES/1373 (2001).
10. Reportedly China agreed to support the resolution only after a provision that would have permitted interdiction at sea was removed. Warren Hodge, *Ban on Weapons of Doom is Extended to Qaeda-Style Groups*, NEW YORK TIMES, Apr. 29, 2004.
11. Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, Mar. 10, 1988, 1678 U.N.T.S. 221, S. TREATY DOC. NO. 101-1 (1989), *reprinted in* 27 INTERNATIONAL LEGAL MATERIALS 672 (1988).
12. Calvin M. Lederer, Developments Involving the Convention on the Suppression of Unlawful Acts Affecting Maritime Navigation, 2004 YEARBOOK OF THE COMITÉ MARITIME INTERNATIONAL 45, 50. See also Counter-Proliferation: Practising to Provoke, THE ECONOMIST, Sept. 20, 2003, at 41.
13. The commanding officer of a US Navy cruiser described the typical MIO tempo of operations in the Persian Gulf this way: “During MIO, a single Navy ship can expect to run boat ops 15 to 18 hours a day, provide three to four six-man security teams, two 12-man (VBSS) teams, and in general ride herd on an average of 10 to 15 merchant ships daily.” Chris Nichols, *SWO Life: Operation Enduring Freedom and Philippine Sea (CG-58)*, SHIPMATE, Mar. 2002, *available at* [http://www.usna.com/News\\_Pubs/Publications/Shipmate/2002/03/SWO.htm](http://www.usna.com/News_Pubs/Publications/Shipmate/2002/03/SWO.htm).
14. United Nations Convention on the Law of the Sea, Dec. 10, 1982, U.N. Doc. A/CONF.62/122 (1982), 1833 U.N.T.S. 3; S. TREATY DOC. 103-39 (1994), *reprinted in* 21 INTERNATIONAL

LEGAL MATERIALS 1261 (1982) [hereinafter LOS Convention]. The United States is not yet a party.

15. For testimony rebutting those claims, see Senate Foreign Relations Committee, Report on the United Nations Convention on the Law of the Sea, S. EXEC. REP. NO. 108-10, at 49, 64, 97, 103 & 111–12 (Mar. 11, 2004).

16. The term “maritime interception operations” has taken on a variety of meanings over time. It was originally used in a narrow sense to refer only to naval operations taken to enforce the UN Security Council resolutions imposing embargoes. The Navy now defines MIO as the “legitimate action of denying suspect vessels access to specific ports for import or export of prohibited goods to or from a specified nation or nations, for purposes of peacekeeping or to enforce imposed sanctions.” See US Navy, Maritime Interception Operations, ¶ 1.5.12, NTTP 3-07.11/CGP 3-07.11 (2003) [hereinafter Navy MIO Doctrine]. The Navy MIO doctrine does not apply to naval blockades in time of war. *Id.* ¶ 1.3. In fact, Navy doctrine acknowledges there are “crucial differences between MIOs and belligerent acts of interdiction such as blockade and visit and search during international armed conflict.” See US Navy, Naval Doctrine for Military Operations Other-Than-War, ¶ 3.2.2.1, NWP 3-07 (1998) [hereinafter Navy MOOTW Doctrine].

17. “Expanded MIO,” when authorized by the Secretary of Defense, are designed to intercept targeted personnel or material that pose an imminent threat to the United States. E-MIO may involve multinational forces and may be implemented even when sanctions have not been imposed. See Navy MIO Doctrine, *supra* note 16, ¶ 1.5.6.

18. The Coast Guard defines “law enforcement” as “all Coast Guard functions or actions carried out pursuant to the legal authorities described in” the Maritime Law Enforcement Manual. See US Coast Guard, Maritime Law Enforcement Manual, ¶ 4.A.2, COMDTINST M16247.1C (2003) [hereinafter Coast Guard MLEM].

19. See LOS Convention, *supra* note 14, art. 110.

20. “Countermeasures” are directed at another State to coerce the State to comply with international law. Historically, they included both non-forcible and forcible counter-measures. Forcible countermeasures are now limited by the United Nations Charter. See RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 904(2) (1987) [hereinafter RESTATEMENT]; *Corfu Channel (U.K. v. Alb.)* 1949 I.C.J. 4, 35 (Apr. 9) (rejecting the U.K. argument that it had a right to intervene and clear mines in the Albanian territorial sea to facilitate innocent passage of U.K. warships). See also Professor Heintschel von Heinegg’s article, *The Proliferation Security Initiative: Security vs. Freedom of Navigation*, which is Chapter IV in this volume, at 56. As Professor McDougal pointed out in an earlier Blue Book volume, the use of force in law enforcement activities does not constitute forcible self-help. See Myres S. McDougal, *Authority to Use Force on the High Seas*, in READINGS IN INTERNATIONAL LAW FROM THE NAVAL WAR COLLEGE REVIEW 1947–1977, at 551, 557–58 (Richard B. Lillich & John Norton Moore eds., 1980) (Vol. 61, US Naval War College International Law Studies).

21. The term “US Maritime Forces” includes the Navy, Marine Corps and Coast Guard. See Navy MOOTW Doctrine, *supra* note 16, at 1-1.

22. See 10 U.S.C.A. § 379 (West 2005).

23. The fact that a given boarding is conducted under the MIO/VBSS framework does not indicate the nature or scope of the boarding or the legal authority on which it relies. Similarly, the fact that a Coast Guard LEDET accompanies a Navy VBSS team does not necessarily indicate the boarding falls within the maritime law enforcement rubric. See Navy MIO Doctrine, *supra* note 16, ¶ 2.2.4. The Memorandum of Understanding Between the Department of Defense and Department of Transportation [now Homeland Security] on the Use of USCG Capabilities and

Resources in Support of National Military Strategy (Oct. 3, 1995) defines five categories of the Coast Guard that may be made available to support the National Military Strategy, including, *inter alia*, maritime interception operations, peacetime military engagement and coastal sea control.

24. The actions may also trigger an operational report (OPREP) or situation report (SITREP) message reporting requirement. *See* Chairman of the Joint Chiefs of Staff Manual 3150.05 (series); Chairman of the Joint Chiefs of Staff Manual 3150.3 (series); Office of the Chief of Naval Operations Instruction 3100.6 (series).

25. Proclamation No. 3504, 27 FEDERAL REGISTER 10,401 (Oct. 23, 1962). The Proclamation authorized the use of force only in cases of failure or refusal to comply, after reasonable efforts had been made to communicate directly with the vessels, or in cases of self-defense, and then only to the extent necessary.

26. *See* Navy MOOTW Doctrine, *supra* note 16, at 3-2 n.4. NATO prefers the phrase Maritime Interdiction Operations (MIOPs). In the United States “interdiction” is defined as activities designed to “divert, disrupt, delay or destroy” the adversary’s potential to inflict harm before it can be used effectively against friendly forces. *See* Joint Chiefs of Staff, Joint Pub 3-03, Joint Interdiction Operations (1997).

27. The principle of impartiality is also manifested in the 1982 LOS Convention’s articles banning discrimination. *See, e.g.*, LOS Convention, *supra* note 14, arts. 24(1)(b), 25, 26, 42(2), 52(2) & 227.

28. Navy MIO Doctrine, *supra* note 16, at 3-3. The principle of impartiality does not require that all vessels be stopped. Effectiveness is measured by the extent to which MIO furthers compliance with the sanctions.

29. *Id.* at 3-4.

30. *Id.*

31. Intelligence, surveillance and reconnaissance are part of the larger integrated JC4ISR approach, which also includes joint command, control, communications and computing. *See* Joint Chiefs of Staff, Joint Publication 3-32, Command and Control of Joint Military Operations, at App. A (Second Draft, 25 June 2003), *available at* [http://www.dtic.mil/doctrine/jel/ddrraafft\\_pubs/3\\_22sd.pdf](http://www.dtic.mil/doctrine/jel/ddrraafft_pubs/3_22sd.pdf).

32. Enforcement vessels will no doubt recognize the security risks posed by requiring vessels to transmit sensitive information by radio transmissions that are easily intercepted by other vessels or shore stations.

33. VBSS team members attend individual and team training to learn boarding procedures, vessel control tactics, levels of force, take-down procedures and search techniques. Team members are trained in non-lethal and lethal use of force techniques. *See generally* Navy MIO Doctrine, *supra* note 16, ¶ 4.3.1 & App. H.

34. The Navy distinguishes between “opposed” boardings and “noncompliant” boardings, the former of which present a higher risk. *See id.* ¶ 1.5. Special operations forces are always used in opposed boardings, and may be used in noncompliant boardings. Ship’s force VBSS teams are not authorized to conduct opposed boardings, *id.* ¶ 6.1, or noncompliant boardings on vessels with high freeboard. *Id.* ¶ 6.6.

35. Special operations forces may be drawn from a SEAL or MSPF team. The MSPF element within Marine expeditionary units (special operations capable) provides the direct action capability and carries out the VBSS mission in support of maritime interception operations. *See* Navy MOOTW Doctrine, *supra* note 16, ¶ 3.2.2.5. On naval vessels without an embarked MEU, similar support may be available from a Marine security force battalion or one of its fleet antiterrorism security teams (FAST).

36. The effectiveness of this approach was demonstrated by a team of Navy SEALs and Marines that conducted a vertical take-down in the widely-studied interdiction of the Iraqi cargo ship *Ibn Khaldun* in the northern Arabian Sea in 1990. See Lois E. Fielding, *Maritime Interception: Centerpiece of Economic Sanctions in the New World Order*, 53 LOUISIANA LAW REVIEW 1191, 1192 (1993); see also Robert E. Marabito, *Maritime Interdiction: Evolution of a Strategy*, 22 OCEAN DEVELOPMENT AND INTERNATIONAL LAW 301 (1991).
37. Navy MIO Doctrine, *supra* note 16, ¶ 6.6.2. “Breaching” refers to boarding by small boat without the cooperation of the boarded vessel, and may require overcoming passive measures to obstruct the boarding. It is considered “extremely dangerous.” *Id.*
38. *Id.* ¶ 5.6.2.2.
39. Diversions have been directly addressed in the context of the belligerents’ right of visit and search. See SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA 32, ¶ 121 (Louise Doswald-Beck, ed. 1995). At the time the Manual was written, some concluded that a right to compel diversion had not yet ripened into a rule of customary law. See Louise Doswald-Beck, *Current Developments: The San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, 89 AMERICAN JOURNAL OF INTERNATIONAL LAW 192, 202 (1995).
40. Navy VBSS and Coast Guard LEDET teams have implemented a number of innovations to overcome the difficulties of at-sea container inspections, including the use of sophisticated climbing equipment and techniques. See Navy MIO Doctrine, *supra* note 16, Annex D, ¶ D.5.
41. The choice of rules can be even more complex if the operation includes military or law enforcement personnel from other nations. See Navy MIO Doctrine, *supra* note 16, ¶¶ 2.4 & 2.5.
42. The legal authorities on which WMD interception operations may be founded are beyond the scope of this article.
43. See Alfred H.A. Soons, *Enforcing the Economic Embargo at Sea*, in UNITED NATIONS SANCTIONS AND INTERNATIONAL LAW 307–24 (Vera Gowlland-Debbas et al. eds., 2001).
44. Charter of the United Nations, June 26, 1945, 59 Stat. 1031, T.S. No. 993. See also Dieter Fleck, *Rules of Engagement for Maritime Forces and the Limitation of the Use of Force Under the UN Charter*, 31 GERMAN YEARBOOK OF INTERNATIONAL LAW 165 (1988). For an analysis of the self-defense arguments, see Michael Byers, *Comment, Policing the High Seas: The Proliferation Security Initiative*, 98 AMERICAN JOURNAL OF INTERNATIONAL LAW 526–45 (2004). The French commentators Dupuy and Vignes and their Iranian contributor Djamchid Momtaz argue against a right of self-defense on the high seas. RENÉ-JEAN DUPUY & DANIEL VIGNES, A HANDBOOK ON THE NEW LAW OF THE SEA 412–14 (1991).
45. *Church v. Hubbard*, 6 U.S. (2 Cranch) 187, 235 (1804).
46. See, e.g., US Navy Regulations (1990), arts. 0915 (use of force against another State) & 0914 (violations of international law and treaties).
47. It is sometimes said, even in introductory use of force training sessions, that there is little or no meaningful difference between the SROE, the RUF and the CGUFP. Staff judge advocates and law specialists must be alert to correct such simplistic assertions and their tendency to blur vital distinctions between the doctrines. The more difficult challenge will be to justify the need for multiple doctrines and the potential to inject confusion into one of the commander’s most important planning and operational decisions.
48. The distinction is implicit in the UN Security Council’s Resolution 221 imposing an embargo on the former Rhodesia. Although not explicitly stated, the resolution was issued under Article 41 of the UN Charter, which is limited to measures not including the use of armed force. Nevertheless, the Council authorized the enforcing State to use force to compel compliance with the embargo. See U.N. Security Council Resolution 221, para. 5, U.N. Doc. S/RES/221 (1966)

(authorizing the United Kingdom to “prevent, by the use of force if necessary” the arrival of tankers in (Portuguese controlled) Beira). By Resolution 217 issued the year before, the Council had imposed an “embargo on oil and petroleum products” to Rhodesia. See U.N. Doc. S/RES/217 (1965), para. 8.

49. See PHILIP C. JESSUP, A MODERN LAW OF NATIONS 162 (1952). Judge Jessup took the position that a use of armed force violates Article 2(4) of the Charter only if it is directed against the territorial integrity or political independence of a State.

50. See Joint Chiefs of Staff, Joint Publication 1-02, Department of Defense Dictionary of Military and Associated Terms, (Apr. 12, 2001, as amended through June 9, 2004) (emphasis added) [hereinafter DoD Dictionary].

51. Despite the fact that the US embassy in Beirut had been bombed just six months earlier, the United States had not taken any additional precautions at the Beirut barracks, nor, reportedly, had the on scene commander requested an ROE review or revision. The incident raised serious questions about why, in such a high-risk environment, the sentries’ weapons were not loaded.

52. BRUCE BERKOWITZ, THE NEW FACE OF WAR: HOW WAR WILL BE FOUGHT IN THE 21ST CENTURY 117 (2003) (reporting that the safety of the *Cole* “depended totally on a handful of twenty-year-old sailors armed with unloaded M-16s, squinting into the noonday sun and trying to figure out why two guys in a skiff were waving at them as they approached”).

53. Perhaps the best known case concerned General John LaVelle, USAF, commander of the Seventh Air Force in Viet Nam in 1971, who was relieved of command and demoted for charges relating to violations of applicable ROE and reporting requirements. See BERKOWITZ, *id.* at 151. More recently, an Illinois Air National Guard pilot received non-judicial punishment under Article 15 of the Uniform Code of Military Justice for, *inter alia*, violating the rules of engagement during Operation Enduring Freedom in Afghanistan. The flag officer who imposed the punishment found that the pilot “blatantly ignored the applicable rules of engagement and special instructions.” See *U.S. Pilot Found Guilty in ‘Friendly Fire’ Incident*, CNN.COM NEWS, July 6, 2004, at <http://www.cnn.com/2004/LAW/07/06/pilot.friendly.fire/>.

54. Self-defense is an affirmative defense under the Uniform Code of Justice. Rule for Courts-Martial (R.C.M.) 916(e), Manual for Courts Martial (2002). A similar rule applies in cases brought before the International Criminal Court (ICC). To prevail on a defense of self-defense before the ICC, the conduct must have been a “reasonable” response to an imminent and unlawful use of force. Rome Statute of the International Criminal Court, July 17, 1998, art. 31(1)(c), U.N. Doc. A/CONF.183/9, *reprinted in* 37 INTERNATIONAL LEGAL MATERIALS 999 (1998) (the United States is not a party). The Rome Statute also limits the defense of obedience to orders. Responsibility for crimes falling within the Rome Statute is excluded only if the person acting under a legal obligation to obey orders (1) did not know the order was unlawful, and (2) the order was not manifestly unlawful. *Id.* art. 33.

55. See *United States v. Hensel*, 699 F.2d 18, 28, 29 (1st Cir.), *cert. denied*, 461 U.S. 958 (1983).

56. See Chairman, Joint Chiefs of Staff, Standing Rules of Engagement for U.S. Forces, CJCS Inst. 3121.01 (series). The SROE replaced what were known as the “Peacetime Rules of Engagement.” Most of the 2000 version (CJCS Inst. 3121.01A) is classified, with the exception of Enclosure A, which sets out the SROE for self-defense [hereinafter CJCS 3121.01A]. Typically, ROE for joint operations are included in Appendix 8 (Rules of Engagement) to Annex C (Operations) of the applicable operation plan or operation order.

57. See CJCSI 3121.01A, *supra* note 56, Encl. A, ¶ 1(a) (SROE are applicable during “all military operations, contingencies, terrorist attacks, or prolonged conflicts outside the territorial jurisdiction of the United States”). An exception is made for US forces under the operational control of a multinational force. *Id.* ¶ 1(c).

58. Joint Chiefs of Staff, Joint Publication 3-26, Joint Doctrine for Homeland Security, at III-13, (Mar. 26, 2004 draft) [hereinafter Joint Doctrine for Homeland Security].
59. *Id.* at IV-17. See also William J. Fenrick, *Legal Limits on the Use of Force by Canadian Warships Engaged in Law Enforcement*, 18 CANADIAN YEARBOOK OF INTERNATIONAL LAW 113–45 (1980).
60. See Coast Guard MLEM, *supra* note 18, ¶ 4.E.1, which provides that Coast Guard units shall adhere to the SROE under the following conditions: (1) when the unit (wherever located and even if conducting a Coast Guard mission at the time) determines that it must take action in defense of itself or other US forces in the vicinity; (2) when the unit is under the tactical control of the DoD (for any purpose) when operating outside US territory (seaward of the 12 NM territorial sea); or (3) when engaged in national self-defense, as authorized by an authority designated in the SROE. The SROE authority to exercise “national self-defense” in the absence of express authorization does not currently extend to the Coast Guard. *Id.* at 4-3.
61. See Navy MIO Doctrine, *supra* note 16, ¶ 2.6.1. Naval doctrine acknowledges that the sanctioning body’s resolution prescribes the level of force authorized in conducting MIO. However, “the wording is often ambiguous.” *Id.* Accordingly, MIO units must also rely on national interpretations of the resolution and the ROE.
62. North Atlantic Treaty Organization, NATO Rules of Engagement, MC362 (1999).
63. US forces operating under the OPCON or TACON of a multinational force commander follow the mission accomplishment ROE of the multinational force if authorized by the National Command Authorities; however, they always retain the right to use necessary and proportional force for unit and individual self-defense in response to a hostile act or demonstrated hostile intent, just as they do when under Coast Guard OPCON or TACON. See CJCS Inst. 3121.01A, *supra* note 56, Encl. A, ¶¶ 1.c & 1.f.
64. See Navy MIO Doctrine, *supra* note 16, ¶¶ 2.4 & 2.5.
65. Richard Zeigler, *Ubi Sumus? Quo Vadimus? Charting the Course of Maritime Interception Operations*, 43 NAVAL LAW REVIEW 1 (1996).
66. Mike Spence, *Lessons for Combined Rules of Engagement*, U.S. NAVAL INSTITUTE PROCEEDINGS, Oct. 2000, at 56–60 (observing that dealing with ROE is difficult enough when only one nation’s armed forces are engaged; however, problems multiply rapidly when consistent ROE must be developed for multinational forces).
67. It is the policy of the United States that the armed forces of the United States will comply with the “law of war” during all armed conflicts, however, such conflicts may be characterized. The “law of war” encompasses all international law for the conduct of hostilities that is binding on the United States or its individual citizens. See Secretary of Defense, DOD Directive 5100.77, DoD Law of War Program, Dec. 9, 1998; Chairman, Joint Chiefs of Staff, Implementation of the DOD Law of War Program, CJCS Instruction 5810.01B, Mar. 25, 2002.
68. See Navy MOOTW Doctrine, *supra* note 16, at 3-2.
69. For the obligation, see Article 0914 of the US Navy Regulations (1990):
- On occasions when injury to the United States or to citizens thereof is committed or threatened in violation of the principles of international law or in violation of rights existing under a treaty or other international agreement, the senior officer present . . . shall take such action as is demanded by the gravity of the situation. In time of peace, action involving the use of force shall be taken only in consonance with the provisions of [Article 0915].

Article 0915 limits the use of force against another State to cases of self-defense against hostile acts or hostile intent directed against the unit and, when appropriate, in defense of US citizens, their property and US commercial assets in the vicinity.

70. CJCSI 3121.01A, *supra* note 56, Encl. A, at A-3. “Hostile act” and demonstrated “hostile intent” are defined at A-5. See generally Richard J. Grunawalt, *The JCS Standing Rules of Engagement: A Judge Advocate’s Primer*, 42 AIR FORCE LAW REVIEW 245 (1997). See also Mike Palmer, *Unwrapping the ROE Axle*, U.S. NAVAL INSTITUTE PROCEEDINGS, May 2004, at 58 (highlighting the inherent and independent force of self-defense ROE from mission accomplishment ROE).
71. CJCSI 3121.01A, *supra* note 56, Encl. A, at ¶ 5.f.
72. *Id.* Encl. A, at ¶ 8(2).
73. See, e.g., Navy MIO Doctrine, *supra* note 16, Annex D, ¶ D.3.1 (“boarding team threat standing rules of engagement” for MIO boardings).
74. See Secretary of Defense Directive of 16 May 2003; Chief of Naval Operations message 311903Z July 2003. DoD considers warning shots a signal to an approaching vessel to stop; they do not constitute a use of force.
75. See Joint Doctrine for Homeland Security, *supra* note 58, at GL-13.
76. 18 U.S.C.A. § 1385 (West 2005). See also Annotation, *Construction and Application of Posse Comitatus Act* (18 U.S.C.A. § 1385), and *Similar Predecessor Provisions, Restricting Use of United States Army and Air Force to Executive Laws*, 141 AMERICAN LAW REPORTS, FEDERAL 271 (2003). Although the PCA directly addresses only the Army (and later the Air Force), Congress directed the Secretary of Defense to promulgate regulations prohibiting the Navy and Marine Corps from directly participating in civilian law enforcement activities. 10 U.S.C.A. §§ 371–382 (West 2005).
77. Joint Doctrine for Homeland Security, *supra* note 58, at I-13 to I-15. Navy civil support missions include measures to combat terrorism, counter-narcotics operations, national security special events, critical infrastructure and key asset protection, support for natural and manmade disasters response operations and for chemical, biological, radiological, nuclear and high yield explosive (CBRNE) consequence management.
78. CJCSI 3121.01A, *supra* note 56, Encl. A, ¶ 1(i). The Naval Doctrine for Military Operations Other-Than-War distinguishes MOOTW involving the use/threat of force (combat) from MOOTW not involving the use/threat of force (noncombat). See Navy MOOTW Doctrine, *supra* note 16, at 1-2. Such operations often overlap with what are now referred to as Security and Stability Operations (SASO). MIO and counter-proliferation measures are categorized as MOOTW. *Id.* at 1-3 & ¶ 3.2.2.
79. *Id.* at IV-17 to IV-18.
80. Joint Doctrine for Homeland Security, *supra* note 56, at GL-14.
81. *Id.* at IV-18. The applicable instruction is CJCSI 3121.02A, May 31, 2000. The instruction does not apply to US military units or personnel while under OPCON or TACON of the Coast Guard in support of counter-narcotics operations. Such units instead follow the SROE or CGUFP. See CJCSI 3121.02A, *supra* note 56, ¶¶ 3.c & 3.e.
82. Joint Doctrine for Homeland Security, *supra* note 56, at IV-18.
83. The amended version is reproduced (in redline format) in Appendix III of this article.
84. Coast Guard MLEM, *supra* note 18, at 1-6. Portions of the MLEM are not releasable to foreign governments. *Id.* Chapter 4 is titled “Use of Force Policy and the Standing Rules of Engagement.” Additional guidance is contained in the U.S. Coast Guard, Maritime Counter Drug and Alien Migrant Interdiction Operations (AMIO), COMDINST M16247.4/NWP 3-07.4 (2000).
85. “Operational control” is the authority to direct all aspects of military operations and training necessary to accomplish the mission. “Tactical control” is mission-specific or task-specific. It is defined as the command authority over assigned or attached units made available for tasking that is limited to the detailed direction and control of movement or maneuvers

within the operational area necessary to accomplish the missions or tasks assigned. Operational control includes tactical control. See DoD Dictionary, *supra* note 50.

86. Coast Guard MLEM, *supra* note 18, ¶ 3.C.1.a.1.

87. *Id.* ¶ 4.B.1.a.

88. 14 U.S.C.A. § 637(c) (West 2005). By the terms of the statute, it applies to naval surface vessels (or aircraft) on which one or more members of the Coast Guard are assigned pursuant to 10 U.S.C. § 379.

89. Coast Guard MLEM, *supra* note 18, at ¶ E.2.

90. *Id.* ¶ 4.B.3.b. See also MODEL PENAL CODE § 3.11(2) (1985) [hereinafter MPC]. The Model Penal Code serves as a template for defining the elements of crimes and defenses for many jurisdictions and sets out several defenses to what would otherwise be crimes involving the use of force. The Code is not legally binding.

91. Coast Guard MLEM, *supra* note 18, at 4-4.

92. The CGUFP does not distinguish between “opposed” boardings and “noncompliant” boardings. See Coast Guard MLEM, *supra* note 18, ¶ 4.A.3.

93. See *id.* ¶ 4.B.3.b.5.

94. The CGUFP prohibits warning shots other than against noncompliant vessels. *Id.* ¶ 4.B.2.d.

95. *Id.* at 4-14. Note that disabling fire is permitted even when there is a risk of “minimum” injury, but it will be discontinued if there is a “substantial” risk of injury. As phrased, the “substantiality” qualification apparently refers to the probability of risk, not its magnitude.

96. Note that the statute provides for an *indemnity*, not *immunity*. The indemnity also extends to those acting under that commanding officer’s direction for any penalties or actions for damages arising out of the action. 14 U.S.C.A. § 637(b) (West 2005).

97. See, e.g., *The I’m Alone Arbitration* (Can. v. U.S.), 3 UNITED NATIONS REPORTS OF INTERNATIONAL ARBITRAL AWARDS 1609 (1933) (use of disabling fire); *Ford v. United States*, 272 U.S. 593 (1924) (warning shots); *United States v. 63 Kegs of Malt*, 27 F.2d 741 (2d Cir. 1928) (warning shots); *The Vincennes*, 20 F.2d 164 (E.D.S.C. 1927) (warning shots and disabling fire).

98. See CHARLES M. FUSS, *SEA OF GRASS: THE MARITIME DRUG WAR 1970–1990*, at 69, 70, 116, 159, 193 & 248 (1996). On October 10, 1980, the *USCGC Point Francis* became the first US vessel to use disabling fire against a drug smuggling vessel.

99. See U.S. Coast Guard, *Operation New Frontier Procedures Manual*, COMDTINST M3120.2 (2003) (public access is restricted because the manual is designated for official use only).

100. See RESTATEMENT, *supra* note 20, § 721, comment c & note 2.

101. In *United States v. Hensel*, 699 F.2d 18 (1st Cir. 1983), the court construed 14 U.S.C. § 89 and its legislative history and concluded that Congress did not intend that the statute would authorize the Coast Guard to conduct searches that would violate international law. *Id.* at 27.

102. See *United States v. Villamonte-Marquez*, 462 U.S. 579 (1983) (holding that Fourth Amendment was not violated when customs officers boarded a US vessel, pursuant to their authority under 19 U.S.C. § 1581(a) to go on board any vessel at any place in the United States and examine the vessel’s documents without any suspicion of wrongdoing); see also *United States v. Flores-Montano*, 542 U.S. 149 (2004) (holding that Fourth Amendment does not require Customs officer to have “reasonable suspicion” to conduct a non-destructive search of a vehicle’s fuel tank when vehicle crossed US border).

103. U.S. CONST. amend. IV.

104. U.S. CONST. amend. V.

105. The Constitutional safeguards apply to interceptions and boardings even when the boarding does not have a law enforcement purpose.

106. See, e.g., *Canton v. Harris*, 489 U.S. 378 (1989); *Collins v. Harker Heights*, 503 U.S. 115 (1992).
107. See, e.g., *Saucier v. Katz*, 533 U.S. 194 (2001) (holding that officer had qualified immunity to suit for alleged excessive force); *Gonzalez v. Reno*, 325 F.3d 1228 (11th Cir. 2003).
108. For example, a defendant charged with violating 18 U.S.C. § 111 (forcibly assaulting, resisting or impeding certain federal officers designated in 18 U.S.C. § 1114) might assert in defense that the defendant's use of force against the officer was justified by the officer's use of excessive force against the defendant. A person is not justified in resisting arrest by force on the ground that the arrest is unlawful. See MPC, *supra* note 90, § 3.04(2)(a)(i).
109. See, e.g., *United States ex rel. Lujan v. Gengler*, 510 F.2d 62 (2d Cir.), *cert. denied*, 421 U.S. 1001 (1975). The Supreme Court has ruled that the illegality of a defendant's detention cannot deprive the government of the opportunity to prove his guilt. *United States v. Crews*, 445 U.S. 453, 474 (1980).
110. See *Terry v. Ohio*, 392 U.S. 1 (1968). *But see* *United States v. Draper*, 536 U.S. 194 (2002) (holding that, under the circumstances presented, the presence of three police officers on a bus that was stopped did not constitute a seizure of the persons on the bus).
111. Whenever a law enforcement officer has acted in a way that denies a person the freedom to walk away, a Fourth Amendment "seizure" has occurred. *Terry*, 392 U.S. at 16. The reasonableness of the officer's suspicion is determined by a "totality of the circumstances" test. *United States v. Arvizu*, 534 U.S. 266 (2002). The Fifth Circuit has held that the "reasonable grounds" standard applicable to a right of approach boarding (under Article 110 of the 1982 LOS Convention) satisfies the "reasonableness" test under the Fourth Amendment. See *United States v. Williams*, 617 F.2d 1063, 1083 (5th Cir. 1980) (applying Article 22 of the former 1958 Convention on the High Seas).
112. *United States v. Gomez*, 633 F.2d 999, 1006 (2d Cir. 1980).
113. *Tennessee v. Garner*, 471 U.S. 1, 7–12 (1985) (holding that the use of deadly force to stop a fleeing suspect is only reasonable if the officer has probable cause to believe that the suspect poses a significant threat of death or physical injury to the officer or others). See also MPC, *supra* note 90, § 3.07(b).
114. *Graham v. Connor*, 490 U.S. 386, 388 (1989).
115. *Id.* at 397.
116. *Id.* at 396.
117. *Id.*
118. *Saucier v. Katz*, 533 U.S. 194, 205 (2001).
119. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 274–75 (1990); see also *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (confirming it is "well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders"). Some treaties of friendship, commerce and navigation (FCN) extend "national treatment" to nationals of the other State. Such treaties have been held to be self-executing. *Asakura v. City of Seattle*, 265 U.S. 332, 341 (1924) (holding that the FCN treaty between the United States and Japan "operates of itself without the aid of any legislation").
120. *United States v. Peterson*, 812 F.2d 486, 491 (9th Cir. 1987) (holding that a foreign search is reasonable if it conforms to the requirements of foreign law). *But see* *United States v. Bin Laden*, 132 F. Supp.2d 168, 186–87 (S.D.N.Y. 2001) (holding that Fifth Amendment protections relating to self-incrimination apply to the use, in a US court, of a statement obtained in a foreign custodial interrogation by US government agents because the Fifth Amendment "violation" occurs when the statement is used at trial, not when it was obtained).
121. See RESTATEMENT, *supra* note 20, § 722, comment m & note 16. In *Rasul v. Bush*, 542 U.S. 466 (2004), the Court held that the Guantanamo Bay Navy Base in Cuba, over which the United States exercises "complete jurisdiction and control" under the lease, falls within the territorial

jurisdiction of the United States for purposes of applying the habeas corpus statute, 28 U.S.C. § 2241. Accordingly, a federal court with venue may determine whether the detainees are being held in custody in violation of the Constitution or the laws or treaties of the United States. The Supreme Court's holding so far does not extend to detentions at other overseas locations that are not under the "plenary and exclusive jurisdiction" of the United States.

122. *United States v. Toscanino*, 500 F.2d 267, 274–75 (2d Cir. 1974). In *Ker v. Illinois*, 119 U.S. 436 (1886), however, the Court held that a defendant who was forcibly abducted in Peru for trial in the U.S. was not entitled to have the charges dismissed on grounds that his right to due process was violated. See also *Frisbie v. Collins*, 342 U.S. 519 (1952); RESTATEMENT, *supra* note 20, § 433.

123. Acting under Article 41 of the Charter, the Council cannot authorize "armed force." Armed force may only be authorized under Article 42. For some, that raises the question whether police force can be used to enforce council resolutions adopted under Article 41; however, the Security Council appears to have answered the question in the affirmative in its embargo resolutions against the former Rhodesia. See *Soons*, *supra* note 43, at 321.

124. See Louis Sohn, *Peacetime Use of Force on the High Seas*, in THE LAW OF NAVAL OPERATIONS 38 (Horace B. Robertson, Jr. ed., 1991) (Vol. 64, US Naval War College International Law Studies).

125. LOS Convention, *supra* note 14, art. 88.

126. *Id.* art. 301.

127. In 1974 the United Nations General Assembly attempted to define "aggression" by resolution. According to the Assembly's resolution, aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as defined by the resolution. U.N. General Assembly, Resolution 3314 (XXIX) of Dec. 14, 1974, G.A.O.R. 29th Sess., Supp. No. 31 (A/9631), at 142 [hereinafter Aggression Resolution]. For a discussion of the US position on defining "aggression" under the Rome Statute of the International Criminal Court, see UNITED STATES DEPARTMENT OF STATE, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 2000, at 286–91 (2001).

128. Britain's seizure of US merchant vessels was a principal cause of the War of 1812. Similarly, President Wilson sought a declaration of war after German submarines sank US merchant vessels at a time when the United States had declared its neutrality in World War I. Today, however, any response must be consistent with Articles 2(4) and 51 of the UN Charter, as construed by the International Court of Justice in the *Military and Paramilitary Activities in and against Nicaragua* decision and the *Oil Platforms* case. *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27) (merits), reprinted in 25 INTERNATIONAL LEGAL MATERIALS 1023 (1986); *Oil Platforms (Iran v. U.S.)*, 2003 I.C.J. \_\_\_\_ (Nov. 6) (merits), available at <http://www.icj-cij.org/icjwww/idocket/iop/iopframe.htm>. See also William H. Taft IV, *Self-Defense and the Oil Platforms Decision*, 29 YALE JOURNAL OF INTERNATIONAL LAW 295 (2004) (criticizing the court for its excursion into *obiter dictum* and criticizing the court's treatment of the armed attack and self-defense issues). Under the General Assembly definition, an "attack by the armed forces of a State on the land, sea or air forces, or marine or air fleets of another State" constitutes aggression. Aggression Resolution, *supra* note 127, art. 3(d). The definition appears to be limited to attacks on warships and naval auxiliaries. However, in its dispute with Canada over Canada's seizure of the *F/V Estai* on the high seas in 1995, Spain argued that Canada's use of warning shots to stop the vessel constituted a use of force in violation of Article 2(4) of the Charter. *Fisheries Jurisdiction (Sp. v. Can.)*, 1998 I.C.J. 432, 465 (Dec. 4) (declining jurisdiction). See also D. P. O'CONNELL, II, THE INTERNATIONAL LAW OF THE SEA 804 (Ivan A. Shearer ed., 1984). However, nothing in the decision by the International Court of Justice in that case or by the International Tribunal on the Law of the Sea in the *M/V Saiga* case discussed below suggests that either tribunal considered the use of military weapons in stopping and boarding a

vessel to be an “armed attack” or an act of unlawful “aggression” in violation of Article 2(4) of the UN Charter or a violation of Article 301 of the LOS Convention.

129. See Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 564, T.I.A.S. No. 7570 (“Montreal Convention”); Protocol Relating to an Amendment to the Convention on International Civil Aviation, Montreal, May 10, 1984, reprinted in 23 INTERNATIONAL LEGAL MATERIALS 705 (1984). The United States is not a party to the 1984 protocol, presumably out of concern over its provisions for compulsory ICJ jurisdiction. Article 3 *bis* of the protocol requires States to refrain from using weapons against civil aircraft in flight. See also Aircraft Sabotage Act of 1984, codified in part at 18 U.S.C. § 32 (criminalizing attacks on civil aircraft). Congress later made provisions for immunity in cases involving US assistance to foreign enforcement officials. See 22 U.S.C.A. § 2291-4. See also Phillip A. Johnson, *Shooting Down Drug Traffickers*, in LIBER AMICORUM PROFESSOR JACK GRUNAWALT 79 (Michael N. Schmitt ed., 1998) (Vol. 72, US Naval War College International Law Studies).

130. See, e.g., LOS Convention, *supra* note 14, art. 73 (limiting enforcement measures available to coastal States in the EEZ). See also Continental Shelf (Tunis. v. Libya), 1982 I.C.J. 18, 230 (Feb. 24) (Oda, J. dissenting) (predicting that disputes arising out of Article 73 enforcement activities will likely be excluded from the LOS Convention’s compulsory dispute settlement provisions by virtue of Article 298 of the convention).

131. See Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, Dec. 4, 1995, U.N. Doc. A/CONF.164/37 (1995), S. TREATY DOC. NO. 104-24 (1996), reprinted in 34 INTERNATIONAL LEGAL MATERIALS 1542 (1995) [hereinafter the Straddling Fish Stocks Agreement]. Article 22 of the agreement limits the use of force in fisheries enforcement actions.

132. See, e.g., United States-Liberia Bilateral WMD Boarding Agreement, *supra* note 6, art. 4(5) & art. 9.

133. Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, art. 8, para. 2 (adding Article 8*bis* to the SUA Convention), adopted Oct. 17, 2005, IMO Doc. LEG/CONF.15/DC/1 [hereinafter 2005 Protocol to the SUA Convention]. The new 2005 Protocol article provides that:

When carrying out the authorized actions under this article, the use of force shall be avoided except when necessary to ensure the safety of its officials and persons on board, or where the officials are obstructed in the execution of the authorized actions. Any use of force pursuant to this article shall not exceed the minimum degree of force which is necessary and reasonable in the circumstances.

134. See *United States v. Postal*, 589 F.2d 862, 870 (5th Cir.) (“the boarding of a vessel on the high seas by its flag state is not an international event. The consequences are solely a domestic matter. The boarding of a foreign vessel is, of course, a matter of international concern that might call for more restraint on the part of the boarding state.”), *cert. denied*, 442 U.S. 832 (1979).

135. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; see also Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85. The United States ratified the ICCPR in 1992 subject to five reservations, four understandings and four declarations. See S. REP. 102-123 (1992); 138 CONG. REC. 8070 (1992).

136. See ICCPR, *supra* note 135, art. 2(1) (requiring States-parties to protect the defined rights of all individuals “within its territory and subject to its jurisdiction”); see also RESTATEMENT, *supra*

note 20, § 701. Application might turn on reservations and exceptions entered and the extent to which the convention is deemed to be self-executing.

137. See, e.g., United States-Liberia WMD Boarding Agreement, *supra* note 6, art. 4(5) & art. 9.

138. 2005 Protocol to the SUA Convention, *supra* note 133, art. 8*bis*, para. 7.

139. It is beyond the scope of this article whether an individual would have standing in a US court to object to enforcement actions by the United States that went beyond or were in contravention of an applicable bilateral boarding agreement with the flag State.

140. The diplomatic correspondence, claims and briefs exchanged between the two governments are reprinted in DEPARTMENT OF STATE, ARBITRATION SERIES NO. 2 (vol. 1–7), *I'm Alone Case* (1931–1935) [hereinafter *I'm Alone Case*]. The interim decision is also reported in the “*I'm Alone*” Arbitration (Can. v. U.S.).

141. Convention for the Prevention of Smuggling of Intoxicating Liquors (United States–Great Britain), Jan. 23, 1924, reprinted in *I'm Alone Case*, *supra* note 140, vol. I, annex B. Article II of the Convention provided the US jurisdiction to board British vessels beyond US waters when within a distance from the coast the target vessel could traverse in one hour. Article IV provided for arbitration of disputes.

142. Under customary law, by acting as a “mothership” supplying contraband to contact boats in violation of US laws, the *I'm Alone* might be said to be “constructively present” in US waters. The constructive presence doctrine is implicit in Article 111 of the 1982 LOS Convention and Article 23 of the 1958 Convention on the High Seas, both of which in describing the right of hot pursuit recognize that pursuit may be commenced if the pursued vessel “or one of its boats” is in the pursuing State’s territorial sea or internal waters. See also MYRES S. MCDUGAL & WILLIAM T. BURKE, PUBLIC ORDER OF THE OCEANS 909–11 (1962, rev. 1987). Under the narrow view of the doctrine, a vessel is only constructively present when it works with its own boats to violate coastal State law. Under the broader view, the contact boats used to shuttle the illicit cargo to shore need not be from the mothership. See ROBIN R. CHURCHILL & A. VAUGHAN LOWE, THE LAW OF THE SEA 215–16 (3d ed. 1999).

143. Joint Interim Report of the Commissioners, the *I'm Alone Case* (1933), *supra* note 140, vol. 6, at 5.

144. *Id.* Initially, the Commission concluded only that the intentional sinking was not justified by any provision of the 1924 treaty. Later, in their final report, they added that the sinking was not justified “by any principle of international law.” Ultimately, compensation was denied to the owners on the ground that they were US nationals, but the arbitrators ordered the United States to apologize and pay \$25,000 in compensation to the United Kingdom for its insult to the UK flag. Joint Final Report of the Commissioners, the *I'm Alone Case* (1935), *supra* note 140, vol. 7, at 3–4.

145. Part V of the LOS Convention, which governs enforcement of marine resource laws in the EEZ, similarly limits “enforcement measures” available to the coastal State to those “necessary”; but it appears to take a broad view of necessity. Article 73 provides that the coastal State is authorized to “take such measures, including boarding, inspection and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted in conformity with this Convention.” LOS Convention, *supra* note 14, art. 73 (emphasis added). This is functionally equivalent to the standard in 14 U.S.C. § 89 (“All necessary force to compel compliance”). Spain took a narrower view of Article 73 in its dispute with Canada over the 1995 seizure of the *F/V Estai*. Spain’s counsel suggested in oral argument that because Article 73 does not expressly authorize the use of force, any use of force would violate international law. Fisheries Jurisdiction (Sp. v. Can.) (Oral argument for Spain by Counsel Sanchez on June 9, 1998), at <http://www.icj-cij.org/icjwww/idocket/iec/iecframe.htm>.

146. The Red Crusader Case (U.K. v. Den.), Comm'n of Enquiry, Mar. 23, 1962, 35 INTERNATIONAL LAW REPORTS 485 (1962). The two governments agreed to establish a commission of enquiry to determine the vessel's location at the time of interception.
147. *Id.* at 499 (emphasis added).
148. The use of the phrase "proved necessity" suggests that the burden of proof was on Denmark.
149. This conclusion may mean nothing more than that if the fleeing vessel's flag State intervenes and persuades the vessel to stop, the use of force is no longer necessary. Had the British intervention permitted *Red Crusader* to escape, it is not clear the British intervention would have been excused.
150. *Id.* at 500.
151. *Id.*
152. The M/V "Saiga" (No. 2) Case (St. Vincent and the Grenadines v. Guinea) (Int'l Trib. Law of the Sea 1999) (merits), 120 INTERNATIONAL LAW REPORTS 143, reprinted in 38 INTERNATIONAL LEGAL MATERIALS 1323 (1999) [hereinafter *The M/V Saiga*].
153. Prompt release actions may be brought under Article 292 of the LOS Convention to obtain the release of a vessel and crew upon payment of reasonable security.
154. The M/V Saiga, *supra* note 152, ¶ 153.
155. *Id.* ¶ 155.
156. *Id.* ¶ 153.
157. Straddling Fish Stocks Agreement, *supra* note 131, art. 22.
158. *Id.* art. 22(1)(f). Before extending the Article 22 limits outside the fisheries enforcement context it might be useful to consider that some fisheries enforcement regimes do not even permit boarding officers to be armed while conducting boardings. See, e.g., Northwest Atlantic Fisheries Organization (NAFO), Conservation and Enforcement Measures, art. 24(8), NAFO FC Doc. 04/1 Serial No. N4936, available at <http://www.nafo.ca/activities/FRAMES/AcFrFish.html>. Unarmed boardings would be unrealistic for vessels that might be engaged in trafficking in narcotics, weapons or humans, and any use of force policy must recognize the differing risk levels presented in the various contexts.
159. The M/V Saiga, *supra* note 152, ¶ 156.
160. See Tim Zimmermann, *If World War III Comes, Blame Fish*, U.S. NEWS & WORLD REPORT, Oct. 21, 1996, at 59–60. The article reports that "fish are the reason that Russians are shooting at Japanese, Tunisians are shooting at Italians, and a lot of people are shooting at Spaniards." It goes on to report that three Thai fishermen were shot dead by Vietnamese maritime authorities, two Spaniards were injured by gunfire from a Portuguese patrol boat, Iceland authorized the use of force to exclude Danish fishermen from its waters, and a Malaysian naval vessel fired on a Thai fishing boat, killing the master and his 14-year-old son. The United Kingdom dispatched naval frigates to protect British fishing boats during the several "cod wars" with Iceland from 1958 to 1976. See also O'CONNELL, *supra* note 128, at 1071-72 n.67 (collecting cases and protests involving the use of force against US vessels and those of other States).
161. The use of force to intentionally sink a vessel with persons aboard would constitute "deadly force" (force that is likely to cause death or serious physical injury). The standards for the use of deadly force are much more stringent than those applicable to stopping a noncompliant vessel.
162. Recent decisions by the International Court of Justice highlight the importance of clarifying the burden and quantum of proof in such cases. See *Oil Platforms*, *supra* note 128 (Higgins, J., Separate Opinion, ¶¶ 30–39), reprinted in 42 INTERNATIONAL LEGAL MATERIALS 1334 (2003). In the *S.S. Lotus* case, the tribunal ruled that France, as the State challenging Turkey's exercise of jurisdiction, had the burden of proving that Turkey's action violated an applicable rule of international law. *S.S. Lotus* (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 9 (Sept. 7).

163. The LOS Convention prescribes an effectiveness standard for enforcement. See, e.g., LOS Convention, *supra* note 14, art. 94(1) (establishing flag State's duty to "effectively" exercise its jurisdiction and control).
164. For example, in 1964, the United States protested an incident that occurred 16 miles off the Soviet coast in which a Soviet vessel fired on the unarmed American merchant vessel *Sister Katingo*, apparently because the American vessel failed to clear customs before departing the Soviet port. The United States also protested a 1969 incident in which a Peruvian gunboat fired on an unarmed US tuna boat located 40 miles off the Peruvian coast, breaking the tuna boat's mast and radio antenna. The United States argued there was no justification under international law for firing on an unarmed fishing vessel. See O'CONNELL, *supra* note 128, at 1071-72 n.67.
165. CHURCHILL & LOWE, *supra* note 142, at 461; see also O'CONNELL, *supra* note 128, at 1071-74 (also relying on the *Im Alone* case).
166. Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, U.N. Doc. E/CN.15/1996/16/Add.2 [hereinafter Basic Principles]. The Basic Principles declare themselves to be non-derogable, even in times of public emergency. *Id.* para. 8. Although the Basic Principles developed by the UN Economic and Social Council are not legally binding, the European Court of Human Rights treats them as if they were. See, e.g., *Öcalan v Turkey* [2003] Eur. Ct. H.R. 46221/99, ¶ 196.
167. UN Code of Conduct for Law Enforcement Officials, adopted by the UN General Assembly Resolution 34/169, Dec. 17, 1997, U.N. Doc. A/RES/34/169 (1997) [hereinafter Code of Conduct].
168. Basic Principles, *supra* note 166, para. 2. The European Court of Human Rights held that the Government of Turkey bore responsibility for failing to equip its security forces with non-lethal force equipment when they responded to a large internal civil disturbance, leaving the forces no alternative to the use of deadly force. *Güleç v. Turkey*, [1998] Eur. Ct. H.R. 21593/93, ¶¶ 71, 73, 83.
169. As noted above, under Articles 297 and 298 of the LOS Convention certain disputes concerning law enforcement or military activities may be exempt from the Convention's compulsory dispute settlement procedures. See LOS Convention, *supra* note 14, arts. 297 & 298. Private suits for damages may be subject to the defenses of sovereign immunity or the act of State doctrine. See, e.g., *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989) (dismissing suit by tanker owner for damage to vessel by Argentine naval gunfire). The act of State doctrine applies only to the State's acts within its territory, not to those occurring on the high seas.
170. See LOS Convention, *supra* note 14, arts. 95 & 96.
171. Navy MIO Doctrine, *supra* note 16, ¶¶ 2.4 & 2.5.
172. See, e.g., HENRY WHEATON, *ELEMENTS OF INTERNATIONAL LAW* 180 n.89 (Richard H. Dana ed, 8th ed. 1866) (George G. Wilson rev. ed. 1936) (the "right to stop a foreign vessel and visit her must carry the right to use the requisite force, if the exercise of the right is resisted. If not, it is not a right in any sense worth disputing").
173. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, *reprinted in* 8 *INTERNATIONAL LEGAL MATERIALS* 679 (1969). The United States is not a party.
174. For example, a WMD shipment to a suspected terrorist organization being transported by sea in the Persian Gulf area might implicate one or more resolutions on WMD proliferation, global terrorism and State-specific embargoes.
175. See U.N. Charter, *supra* note 44, arts. 24(1), 39 & 1(1).
176. *Id.* art. 25. The means by which a decision of the Council is to be "carried out" are not defined; however, they must be "in accordance with" the Charter, including the purposes and principles articulated in Articles 1 and 2.

177. Such boarding agreements are *lex specialis* and therefore control in any disputes between the parties. However, such agreements must be compatible with the LOS Convention. See LOS Convention, *supra* note 14, art. 293(1).
178. See United States-Liberia Bilateral WMD Boarding Agreement, *supra* note 6, art. 9; United States-Marshall Islands Bilateral WMD Boarding Agreement, *supra* note 6, art. 9.
179. The “M/V Saiga,” *supra* note 152, ¶ 156.
180. See United States-Liberia Bilateral WMD Boarding Agreement, *supra* note 6, art. 4(5).
181. The boarding agreement expressly preserves the right of the parties to exercise the right of approach and visit under international law. See *id.*, art. 4(4).
182. Supplementary Arrangement Between the Government of the United States of America and the Government of the Republic of Panama to the Arrangement Between the Government of the United States of America and the Government of the Republic of Panama for Support and Assistance from the United States Coast Guard for the National Maritime Service of the Ministry of Government and Justice, Feb. 5, 2002, art. X, 2002 U.S.T. Lexis 51, available at <http://www.state.gov/t/np/trty/32859.htm>. Any use of force must comply with Article XVII of the agreement.
183. *Id.* art. XVII.
184. See *id.* art. 1(6)(a). The Panama Agreement permits WMD boardings by “auxiliary personnel” only when law enforcement personnel are not available. See United States-Panama Bilateral WMD Boarding Agreement, *supra* note 6, art. 1, para. 4 (revising Article XV of the existing agreement).
185. U.S. National Imagery & Mapping Agency, International Code of Signals for Visual, Sound, and Radio Communications, NIMA Publ’n 102 (1969, rev. 2003), at 83 [hereinafter NIMA Publication 102].
186. Navy MIO Doctrine, *supra* note 16, ¶ 2.4. In general, mission accomplishment ROE in MOOTW are more restrictive than in war. See Joint Doctrine for MOOTW, *supra* note 16, ¶ I-1.
187. The identification need not include the enforcing vessel’s name. The vessel’s (or aircraft’s) nationality and status as a warship is sufficient.
188. The “M/V Saiga,” *supra* note 152, ¶ 156.
189. Article 9 of the WMD boarding agreements between the United States, Liberia and the Marshall Islands incorporates a requirement for visual and auditory signals.
190. The Tribunal ultimately concluded, on conflicting assertions, that Guinea had failed to warn the *Saiga* before opening fire. The “M/V Saiga,” *supra* note 152, ¶ 157. If warnings were given, *P35* did not document the warnings by audiotape or videotape. The Tribunal did not identify which of the States had the burden of proof on the question whether warnings were given.
191. There is no requirement to identify the vessel by name. US Coast Guard cutters and boats often display the rotating blue light associated with law enforcement vehicles. The light is expressly authorized only in Inland Waters. See 33 C.F.R. § 88.11 (2005).
192. The International Code of Signals consists of alphanumerically coded signals that may be transmitted between vessels by radio, signal flags, semaphore or flashing light. The meaning of each signal is set forth in a readily available publication printed in several languages. See NIMA Publication 102, *supra* note 185.
193. Coast Guard MLEM, *supra* note 18, ¶ 4.3 & Table 4-1.
194. Navy MIO Doctrine, *supra* note 16, ¶ 6.6. Any decision to use “full force,” which might include sinking the vessel, must be evaluated not only under the applicable mission accomplishment ROE but also governing international law standards, such as those set by the *I’m Alone* case.
195. 14 U.S.C.A. § 637(a)(2) (West 2005).

196. In *Lewin v. United States*, the court of appeals rejected the defendant's claim that because the Coast Guard had failed to fire warning shots before firing into his vessel, unintentionally killing another crewman, the defendant was justified in resisting the boarding with "force." Although the court concluded that the former statutory requirement to fire warning shots should be "rigidly administered" "for the good of the service," it also concluded that it was "perfectly clear that the defendant knew his boat was being chased." *Lewin v. United States*, 62 F.2d 619, 620 (1st Cir. 1933).
197. See Coast Guard MLEM, *supra* note 18, ¶ 4.D & Table 4-1.
198. Navy MIO Doctrine, *supra* note 16, ¶ 6.6.1.2.
199. *United States v. Streifel*, 665 F.2d 414, 424 (2d Cir. 1981).
200. *Id.* at 419.
201. *Id.* at 424. The court quoted its earlier decision in *United States v. Gomez*:  
A law enforcement officer who has duly announced his authority and who has attempted to stop and question a suspect is not required "to simply shrug his shoulders," ... and abandon his investigation... [T]he officer has the right to detain the suspect against his will... Indeed, the officer "is entitled to make a forcible stop."  
633 F.2d 999, 1006 (2d Cir. 1980) (emphasis added), *cert. denied*, 450 U.S. 994 (1981).
202. *Streifel*, 665 F.2d at 424.
203. NIMA Publication 102, *supra* note 185, at 83.
204. The port State control regime is a response to the ineffectiveness of a regime that relies solely on flag State jurisdiction and control.
205. Adam B. Seigel, *Enforcing Sanctions: A Growth Industry*, 46 NAVAL WAR COLLEGE REVIEW 130, 132 (1993).
206. McDougal, *supra* note 20, at 557–58. Professor McDougal distinguished the use of force in law enforcement measures against private actors from forcible self-help and self-defense measures against States for violations of international law. He goes on to report "I'm ashamed to confess that at one time I lent my support to the suggestion that article 2(4) and the related articles did preclude the use of self-help less than self-defense. On reflection, I think that was a very grave mistake." *Id.* at 559. Colombos devoted a chapter to "forcible measures short of war used in time of peace." C. JOHN COLOMBOS, INTERNATIONAL LAW OF THE SEA ch. X (6th ed. 1967).
207. See, e.g., 14 U.S.C.A. § 637 (West 2005).
208. Ivan A. Shearer, *The Development of International Law with Respect to the Law Enforcement Role of Navies and Coast Guards in Peacetime*, in THE LAW OF ARMED CONFLICT: INTO THE NEXT MILLENNIUM 429, 441 (Michael N. Schmitt & Leslie C. Green eds., 1998) (Vol. 71, US Naval War College International Law Studies).
209. *Graham v. Connor*, 490 U.S. 386, 396 (1989); see also *United States v. Hensel*, 699 F.2d 18 (1st Cir.) (use of force by Canadian enforcement vessels to board vessel smuggling marijuana), *cert. denied*, 461 U.S. 958 (1983). The stricter test set out in *Tennessee v. Garner* will control if the disabling fire would constitute "deadly force." See *supra* note 113.
210. See *Fuss*, *supra* note 98, at 116.
211. *United States v. Del Prado-Montero*, 740 F.2d 113, 116 (1st Cir.), *cert. denied*, 469 U.S. 1021 (1984). The court also rejected a defense argument that the Navy's participation violated the Posse Comitatus Act, 18 U.S.C. § 1385, citing the former regulation authorizing Navy support for Coast Guard counter-narcotics operations in 32 C.F.R. § 213.10(c) [repealed]. See 740 F.2d at 116.
212. The United States has adopted an escalating use of force approach that progresses from warning shots to disabling fire. Other States do not necessarily follow that order. For example, when a marijuana smuggling vessel failed to heed their warning shots, a Canadian enforcement

vessel fired two 12-gauge shotgun blasts into the vessel's pilothouse, where three or four of the crewmembers were located. No one was injured and the operator then stopped the boat. See *United States v. Hensel*, 699 F.2d 18, 22 (1st Cir.), *cert. denied*, 461 U.S. 958 (1983).

213. The CGUFP includes limited provisions for non-lethal “higher-level” force tactics to overcome a vessel operator’s refusal to comply with a boarding demand. The tactics seek to obviate resort to the more dangerous disabling fire alternative. The two non-lethal force means presently authorized include string-ball projectiles and rubber fin-stabilized munitions. Each is fired at the operator of the vessel from a 12-gauge shotgun, with the intent of disabling the operator long enough to allow the boarding party to get aboard. See Coast Guard MLEM, *supra* note 18, ¶ 4.D.3.c. & Table 4-1. Neither of the techniques is likely to be effective against the size of vessel likely to be engaged in transporting WMD or missile delivery systems.

214. See The “M/V Saiga,” *supra* note 152, ¶ 157.

215. See *72 Tons of Marijuana Seized*, NEW YORK TIMES, July 7, 1988. See also *United States v. Cadena*, 585 F.2d 1252 (5th Cir. 1978) (Coast Guard’s use of machine-gun and deck gun fire to stop foreign-flag marijuana smuggling vessel 200 miles off Florida coast).

216. See U.S. DEPARTMENT OF STATE, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1989–1990, at 452–56 (2003). Before resorting to disabling fire, the cutter signaled the fleeing vessel, sprayed water across the vessel’s bow and down its stack and fired warning shots across its bow.

217. The doctrine for use of helicopters by special operations forces is classified and will not be discussed here. See Navy MIO Doctrine, *supra* note 16, ¶ 7.3.2.1.

218. The facts are taken primarily from U.S. DEPARTMENT OF STATE, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 2002, at 1052–57 (2003).

219. Although Cambodia could not verify the vessel’s registration, it granted conditional consent to the boarding if the vessel was in fact registered in Cambodia.

220. See LOS Convention, *supra* note 14, art. 110. See also Convention on the High Seas, Apr. 29, 1958, art. 22, 13 U.S.T. 2312, 450 U.N.T.S.

221. In exercising a right of visit boarding, the enforcing vessel is no longer limited to sending boarding teams over by small boat. In contrast to Article 22 of the 1958 Convention on the High Seas, which spoke only of sending a boarding team by boat, Article 110 of the 1982 LOS Convention expressly extends the right of visit to military aircraft and any other duly authorized ships or aircraft clearly marked and identifiable as being on government service. See LOS Convention, *supra* note 14, art. 110.

222. See, e.g., Frederic L. Kargis, *Boarding of North Korean Vessel on the High Sea*, AMERICAN SOCIETY OF INTERNATIONAL LAW INSIGHTS, Dec. 12, 2002, at <http://www.asil.org/insights/insigh94.htm>; Kevin Drew, *Law Allows Search, But Does Not Address Seizure of Cargo*, CNN.COM NEWS, Dec. 11, 2002 (quoting Professor John Norton Moore).

223. See, e.g., *United States v. Juda*, 46 F.3d 961, 969 (9th Cir.) (holding that the Coast Guard was entitled to proceed to verify the ship’s right to fly its flag by examining its documents and, if necessary, by an examination on board the ship; where the master refused and threatened to shoot at the Coast Guard boat “the Coast Guard was authorized to seize” the vessel), *cert. denied*, 514 U.S. 1090 (1995); *United States v. Kahn*, 35 F.3d, 426, 430 (9th Cir. 1994) (holding that the Coast Guard may legally detain a vessel while awaiting consent of the flag State to exercise jurisdiction over the vessel).

224. If evidence of criminal activity is discovered, the officials from the State conducting the boarding generally have two options: prosecute the individuals for violating the laws of the boarding State, or—in some circumstances—detain the individuals until they can be delivered to officials of another State with jurisdiction over the offense. As Chief Justice Marshall declared in 1825, “the Courts of no country execute the penal laws of another.” *The Antelope*, 23 U.S. (10 Wheat.) 66, 123 (1825).

225. The missiles reportedly had a designed range of roughly 300 kilometers. The Missile Technology Control Regime (MTCR) defines Category I missiles (the most regulated class) as those capable of delivering at least a 500 kilogram payload to a range of at least 300 kilometers. See Missile Technology Control Regime, Equipment, Software and Technology Annex, Apr. 7, 2004, p. 10, at <http://www.mtcr.info/english/Annex2004.doc>.
226. *Legal Maze over Scud Seizure*, BBC NEWS WORLD ED., Dec. 11, 2002, at [http://news.bbc.co.uk/2/hi/middle\\_east/2565905.stm](http://news.bbc.co.uk/2/hi/middle_east/2565905.stm).
227. See, e.g., International Convention for the Suppression of Terrorist Bombings, Dec. 15, 1997, art. 6(4), U.N. Doc. A/RES/52/164, S. TREATY DOC. 106-6 (1999). The International Law Commission has long taken the position that a coastal State may not take custody of a person on board a foreign vessel in innocent passage through its territorial sea for purposes of extraditing that person to a third State. International Law Commission, *Report to the General Assembly*, 1956 YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, vol. II, at 275.
228. See generally M. CHERIF BASSIOUNI & EDWARD M. WISE, *AUT DEDERE AUT JUDICARE: THE DUTY TO EXTRADITE OR PROSECUTE IN INTERNATIONAL LAW* (1995).
229. For a discussion of extradition issues under the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, see DIGEST OF U.S. PRACTICE IN INTERNATIONAL LAW 1989–1990, *supra* note 216, at 111–14.
230. See *supra* note 145 and accompanying text.
231. MPC, *supra* note 90, § 3.07.
232. See *supra* note 113 and accompanying text.
233. Coast Guard MLEM, *supra* note 18, ¶ 4.B.3.b.2. The MLEM also limits the use of deadly force to situations in which the suspect has failed to obey an order to halt, where such orders are feasible and their use would not increase the danger to the officer or others. *Id.*
234. *Id.* ¶ 4.B.3.b.4.
235. See CJCSI 3121.01A, *supra* note 56, Encl. A, ¶ 5; see also Coast Guard MLEM, *supra* note 18, ¶ 4.A.5.
236. Coast Guard MLEM, *supra* note 18, ¶ J.3. See also U.S. Coast Guard, Maritime Counter Drug and Alien Migrant Interdiction Operations, ¶ 7.15, COMDTINST M16247.4/NWP 3-07.4 (2000).
237. See CJCSI 3121.01A, *supra* note 56, Encl. A, ¶ 5.a; see also Coast Guard MLEM, *supra* note 18, ¶¶ 4.A.5, 4.B.2 & App. J.3.
238. See CJCSI 3121.01A, *supra* note 56, at A-4 to A-5. The meaning of military necessity under the law of armed conflict is beyond the scope of this article. See generally ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK OF THE LAW OF NAVAL OPERATIONS 292 n.6 (A.R. Thomas & James C. Duncan, eds., 1999) (Vol. 73, US Naval War College International Law Studies) [hereinafter ANNOTATED Supplement].
239. See CJCSI 3121.01A, *supra* note 56, at A-4 to A-6. The meaning of proportionality under the law of armed conflict is beyond the scope of this article. See ANNOTATED SUPPLEMENT, *supra* note 238, at 294 n.7.
240. See CJCSI 3121.01A, *supra* note 56, at A-2, A-3 & A-6.
241. *Id.* Encl. A, ¶ 5(a).
242. See *id.* Encl. A, ¶ 7. See also Coast Guard MLEM, *supra* note 18, ¶ 4.A.5 (note).
243. *The Marianna Flora*, 4 U.S. (11 Wheat.) 1, 46 (1826).
244. *Id.*
245. *Id.* at 50.
246. See *United States v. Juda*, 46 F.3d 961, 969 (9th Cir.), *cert. denied*, 514 U.S. 1090 (1995). See also *Lewin v. United States*, 62 F.2d 619 (1st Cir. 1933).

247. Coast Guard MLEM, *supra* note 18, ¶ 4.B.2.a. The Model Penal Code provision on self-defense confirms this. See MPC, *supra* note 90, § 3.04(2)(b)(ii)(B).
248. See CJCSI 3121.01A, *supra* note 56, Encl. A, ¶ 8.a(1).
249. Australian fisheries enforcement vessels patrolling the Southern Ocean may be the exception. Australia has repeatedly demonstrated its commitment to effective enforcement of marine resource conservation laws through some of the longest “hot pursuits” of scofflaw vessels in history. See Erik Jaap Molenaar, *Multilateral Hot Pursuit and Illegal Fishing in the Southern Ocean: The Pursuits of the Viarsa 1 and the South Tomi*, 19 International Journal of Marine and Coastal Law 19 (2004) (reporting Australia’s 21-day, 3,900 mile pursuit of *F/V Viarsa I* and 14-day, 3,300 mile pursuit of *F/V South Tomi*).
250. See RESTATEMENT, *supra* note 20, §§ 432–433; *United States v. Conroy*, 589 F.2d 1258, 1267–68 (5th Cir. 1979) (upholding Coast Guard enforcement action in Haitian territorial sea with Haiti’s consent).
251. Sept. 4, 2003, available at <http://www.state.gov/t/np/rls/fs/23764.htm>.
252. U.N. Security Council Res. 1540, *supra* note 9.



# VI

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## The Proliferation Security Initiative in the Maritime Domain

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Stuart Kaye\*

### *Introduction*

**T**he Proliferation Security Initiative (PSI) is one of a number of measures taken by the international community in response to the heightened concern over terrorism since the attacks on the United States on September 11, 2001. The PSI is essentially part of a preventative strategy to deny weapons of mass destruction (WMD) to terrorist organizations by ensuring such weapons cannot be moved freely across the world's oceans. This article will seek to consider the implications for the law of the sea, particularly the operation of the 1982 United Nations Convention on the Law of the Sea,<sup>1</sup> generated by the PSI, and the possible implications of its vigorous pursuit.

### *Content of the PSI*

The PSI was announced in Krakow, Poland on May 13, 2003 by President George W. Bush.<sup>2</sup> It initially was a cooperative venture between eleven States,<sup>3</sup> but has gradually widened its support base to include a number of additional States, including Russia.<sup>4</sup> In addition to this direct support, the PSI received tacit approval from States attending an international conference directed at international

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security arrangements. This was demonstrated at the first anniversary meeting in Krakow on May 31 and June 1, 2004, which was attended by over sixty States.<sup>5</sup>

The thrust of the PSI is to prevent the proliferation of WMD by sea, land and air, although within the scope of this article, only the maritime aspect of the Initiative will be considered. The PSI is not a treaty, but rather a statement of intention on the part of participating States, and, of itself, it does not create formally binding international law obligations. Participating States have agreed to abide by a set of interdiction principles, set out in a formal Statement. The interdiction principles indicate States will undertake effective measures to combat the proliferation of WMD, delivery systems or related materials;<sup>6</sup> cooperate on information exchange and coordination of activities to combat such proliferation;<sup>7</sup> and review domestic and, if necessary, international law to strengthen these efforts.<sup>8</sup>

In terms of specific circumstances when interdiction will take place, the PSI provides a number of instances, and these are worth extracting:

Take specific actions in support of interdiction efforts regarding cargoes of WMD, their delivery systems, or related materials, to the extent their national legal authorities permit and consistent with their obligations under international law and frameworks, to include:

- a. Not to transport or assist in the transport of any such cargoes to or from States or non-State actors of proliferation concern, and not to allow any persons subject to their jurisdiction to do so.
- b. At their own initiative, or at the request of and good cause shown by another State, to take action to board and search any vessel flying their flag in their internal waters or territorial seas or areas beyond the territorial seas of any other State that is reasonably suspected of transporting such cargoes to or from States or non-State actors of proliferation concerns, and to seize such cargoes that are identified.
- c. To seriously consider providing consent under the appropriate circumstances to the boarding and searching of its own flag vessels by other States and to the seizure of such WMD-related cargoes in such vessels that may be identified by such States.
- d. To take appropriate actions to (1) stop and/or search in their internal waters, territorial seas, or contiguous zones (when declared) vessels that are reasonably suspected of carrying such cargoes to or from States or non-State actors of proliferation concern and to seize such cargoes that are identified;

and (2) to enforce conditions on vessels entering or leaving their ports, internal waters or territorial seas that are reasonably suspected of carrying such cargoes, such as requiring that such vessels be subject to boarding, search, and seizure of such cargoes prior to entry.

e. At their own initiative or upon the request and good cause shown by another State, to (1) require aircraft that are reasonably suspected of carrying such cargoes to or from States or non-State actors of proliferation concern and that are transiting their airspace to land for inspection and seize any such cargoes that are identified; and/or (2) deny aircraft reasonably suspected of carrying such cargoes transit rights through their airspace in advance of such flights.

f. If their ports, airfields, or other facilities are used as transshipment points for shipment of such cargoes to or from States or non-State actors of proliferation concern, to inspect vessels, aircraft, or other modes of transport reasonably suspected of carrying such cargoes, and to seize such cargoes that are identified.<sup>9</sup>

These principles fall into a number of specific categories, in relation to shipping. Firstly, PSI States agree to undertake measures to prevent shipments of WMD, and to cooperate with other participants to achieve this end. Ships suspected of carrying WMD destined for non-State actors may be stopped and searched in three circumstances: where the ship flies the flag of a participating State in the PSI, either by the flag State itself, or in cooperation with other PSI States; where the ship is alongside in a port of a PSI participating State; and, where the ship is present in the internal waters, territorial sea or contiguous zone of a participating State. As is evident in e. and f. above, similar provisions exist for aircraft, although only at airfields of a PSI State, or the national airspace of a PSI State.

These categories were effectively widened in 2004, with bilateral agreements between the United States on the one hand, and Liberia and Panama on the other, with a view to permitting US vessels to stop and search suspect vessels flagged in the latter two countries.<sup>10</sup> Liberia and Panama will not function as PSI States, but, in certain circumstances, they have agreed to allow the United States to inspect their flag vessels.<sup>11</sup> Subsequently, similar agreements have been concluded with a number of other States, including Belize, Croatia, the Marshall Islands, and Cyprus.<sup>12</sup>

The PSI has also been the subject of consideration by the United Nations Security Council. On April 28, 2004, the Security Council unanimously adopted Resolution 1540 on the prevention of the proliferation of weapons of mass destruction

to non-State actors. The Resolution provided that States could take all measures consistent with international law to prevent the proliferation of weapons of mass destruction, and that States were under an obligation to ensure that such weapons did not fall into the control of non-State actors. Significantly, there is no reference to interdiction of vessels,<sup>13</sup> so the Resolution falls short of the range of measures contemplated within the PSI; however it is clear the Resolution would render the shipping of weapons in the circumstances contemplated to be addressed by the PSI unlawful.

### *Legal Justifications for Interdiction under the PSI*

The PSI draws its legal support from a number of bases, some of which are straightforward and some that are more contentious. For this reason, it is necessary to consider each in turn. These will be done without reference to the positions of the PSI States per se, as they have largely simply asserted that the PSI itself is consistent with international law.<sup>14</sup>

#### **Flag State Jurisdiction**

One of the oldest and most settled matters within the law of the sea is the notion that a flag State retains jurisdiction over a vessel flying its flag.<sup>15</sup> This provides the basis for the identification of jurisdiction and legal authority over ships in waters beyond national jurisdiction. This principle is acknowledged in the Law of the Sea Convention, and is reinforced by the requirement that where a ship owner seeks to change the registration of their ship, this can only take place in port.<sup>16</sup> This ensures that at sea, the flag State of a ship remains singular and constant, giving certainty in identification of the applicable law and authority aboard.

The use of flag State jurisdiction under the PSI is entirely valid, as flag States clearly have the power to regulate affairs aboard vessels flying their flag,<sup>17</sup> and therefore can direct masters of such vessels to comply with lawful directions. Accordingly, a flag State could direct a vessel flying its flag to heave to and be boarded by another PSI State's nationals, submit to search and make for a designated port in a PSI State.<sup>18</sup> With the authorization of the flag State, all the participating nations in the operation could be assured of the legality of their actions.

#### **Port State Interdiction**

The second approach to interdiction under the PSI is found through the medium of port State jurisdiction. A coastal State's ports are part of its internal waters, or at least can be made so under the Law of the Sea Convention.<sup>19</sup> Since the restrictions on assertion of the coastal State's jurisdiction over vessels exercising a right of

innocent passage in the territorial sea do not apply to internal waters, the coastal State has a virtually unfettered jurisdiction to apply its law to ships visiting its ports, or to deny entry to its ports to foreign vessels if it chooses.

Historically, there have been some restrictions upon the port State from applying its laws to vessels that are alongside in its internal waters. With the exception of sovereign immunity, which will be considered separately, these restrictions derive largely from customary international law. For example, traditionally, vessels calling at a port as a result of distress are not subjected to the law of the coastal State.<sup>20</sup> Similarly, States generally do not apply their labor laws to vessels calling at their ports, or interfere with matters that are generally regarded as internal to the operation of the vessel.<sup>21</sup>

It is unlikely that any of these restrictions existing in international custom would withstand the right of a coastal State to take steps to deal with a risk to its own security, or that of its allies, in its own port. Whether knowingly or not, in circumstances in which the visiting vessel poses a threat to the security of the coastal State, it would seem absurd that the State would not be able to address that threat within its own territory. Flag States have generally shown no objection to efforts by port States to take measures against vessels to curb the international drug trade, and the consequences in the context of the PSI for a failure to prevent a shipment reaching its destination are even higher.

On this basis, Port State efforts to implement the PSI would, with the caveat of respect for sovereign immune vessels, seem to be on very solid ground, and there would seem to be no difficulty in its implementation to vessels alongside in a PSI State.<sup>22</sup>

### **Territorial Sea and Archipelagic Waters Interdiction**

One matter of significant concern surrounding the PSI relates to freedom of navigation. The Law of the Sea Convention provides substantial guarantees with respect to freedom of navigation, and the operation of the PSI to restrict the freedom of certain vessels to allow search and possible seizure of cargo presents a significant challenge. To place this challenge in context, it is useful to summarize the development and content of current arrangements in the law of the sea with respect to freedom of navigation.

Freedom of navigation has its origins in Hugo Grotius' response to the Spanish and Portuguese claims of control over the oceans and territories outside of Europe by virtue of the Papal Bull<sup>23</sup> and Treaty of Tordesillas.<sup>24</sup> These documents purported not only to give control over territory outside of Europe, but also provided for exclusive seaborne trading rights in the South Atlantic and Indian Oceans.<sup>25</sup> In reaction to this assertion, Grotius produced his seminal work, *Mare Liberum*,

asserting that the oceans were incapable of appropriation by States, and that the ships of any State could journey anywhere on the world's oceans.<sup>26</sup>

In the modern law of the sea, freedom of navigation was equally perceived as important, and this status is reflected in the now superseded 1958 Geneva Conventions on the law of the sea. Article 14 of the Convention on the Territorial Sea and Contiguous Zone guaranteed a right of innocent passage to vessels, which was non-suspendable for waters in international straits, and Article 23 indicated explicitly that such rights were available to warships.<sup>27</sup> Freedom of navigation on the high seas was guaranteed in Article 2 of the Convention on the High Seas,<sup>28</sup> with Article 3 of the Continental Shelf Convention ensuring that the status of waters above a State's continental shelf remained as high seas, therefore enjoying freedom of navigation.<sup>29</sup> These efforts had been prefaced by the International Court of Justice in 1949 in the *Corfu Channel Case*, which confirmed the right of innocent passage, available even to warships, passing through "straits used for international navigation."<sup>30</sup> The Court was also prepared to state that foreign vessels, including warships, during peacetime had a right of innocent passage through all international straits.

The current 1982 Convention on the Law of the Sea maintains the approaches found in the *Corfu Channel Case* and the 1958 Geneva law of the sea conventions. It deals with navigation in two distinct contexts. First, it examines freedom of navigation in the territorial sea and archipelagic waters. Three passage regimes are established in these waters: innocent passage, transit passage and archipelagic sea lanes passage. It then considers freedom of navigation in areas beyond national sovereignty in Article 87.<sup>31</sup>

The regime of innocent passage deals with navigation by ships only in the territorial sea of a coastal or archipelagic State and archipelagic waters of an archipelagic State, and as noted above, it retains the same approach as that used in the Territorial Sea Convention and the *Corfu Channel Case*. Article 17 of the Law of the Sea Convention grants ships the right of innocent passage through the territorial sea, while the remaining articles in Subsection 3(A) of the Convention indicate how the right is circumscribed. Essentially, vessels are required to transit in a continuous and expeditious fashion, on the surface of the ocean. Such passage cannot be impeded, except on a non-discriminatory and temporary basis for essential security purposes.<sup>32</sup>

The coastal State has ability to regulate certain matters with respect to a vessel exercising a right of innocent passage. These are listed in Article 21(1) of the Law of the Sea Convention:

The coastal State may adopt laws and regulations, in conformity with the provisions of this Convention and other rules of international law, relating to innocent passage through the territorial sea, in respect of all or any of the following:

- (a) the safety of navigation and the regulation of maritime traffic;
- (b) the protection of navigational aids and facilities and other facilities or installations;
- (c) the protection of cables and pipelines;
- (d) the conservation of the living resources of the sea;
- (e) the prevention of infringement of the fisheries laws and regulations of the coastal State;
- (f) the preservation of the environment of the coastal State and the prevention, reduction and control of pollution thereof;
- (g) marine scientific research and hydrographic surveys;
- (h) the prevention of infringement of the customs, fiscal, immigration or sanitary laws and regulations of the coastal State.

Upon their face, these controls do not provide a basis for a coastal State to assert jurisdiction over a passing vessel in its territorial sea for the purposes of the PSI. The matters Article 21 permits regulation of are clearly restricted to matters pertaining to the safe navigation of the ship, the protection of the surrounding marine environment, and the maintenance of customs, fiscal, sanitation (health) and immigration controls of the coastal State. Unless there was a clear intention to illegally import WMD into the coastal State, which could be accomplished when the vessel came alongside in any case, there is no authority drawn from Article 21 to assist coastal States to implement the PSI.

Other articles within the Law of the Sea Convention may be of more utility. Article 19 requires that a ship's passage cannot be prejudicial to the peace, good order or security of the coastal State. A range of activities that fall outside this requirement are explicitly listed, including "any other activity not having a direct bearing on passage."<sup>33</sup> Clearly the delivery of WMD to terrorists may well be highly prejudicial to the peace, good order and security of a coastal State, and an argument

could be made that such a passage is therefore not innocent, and the restrictions on coastal State authority over the passing vessel are removed.

On the other hand, there may be goods on board of which the master and crew know little or nothing, and their only relationship with terrorists comes from an anonymous and unremarkable bill of lading. In these circumstances, it may seem unduly harsh to argue the vessel's right of innocent passage is open to question. However, the awareness of the crew does not render the vessel's cargo safe, nor make it any less of a security threat. The possible lack of knowledge of the crew should be a factor in their interaction with the boarding party, but should not be the determining factor in the ability of a coastal State to intercept the vessel.

The ability of a coastal State to close territorial waters for essential security purposes on a temporary basis will not assist the PSI. Such closures are to be non-discriminatory in their application, and clearly this is not possible with the PSI. The PSI's objective is to interdict suspect vessels, not to institute what resembles a blockade and compel the inspection of every passing ship. Further, Article 25(3) is intended to clear areas of the sea temporarily, not to authorize an inspection regime.<sup>34</sup>

Coastal State criminal jurisdiction, which would usually encompass preparations to undertake terrorist activities, can also be exercised under Article 27 of the Law of the Sea Convention for vessels passing through the territorial sea. This can occur in four circumstances:

- (a) if the consequences of the crime extend to the coastal State;
- (b) if the crime is of a kind to disturb the peace of the country or the good order of the territorial sea;
- (c) if the assistance of the local authorities has been requested by the master of the ship or by a diplomatic agent or consular officer of the flag State; or
- (d) if such measures are necessary for the suppression of illicit traffic in narcotic drugs or psychotropic substances.<sup>35</sup>

Of these categories, only (a) and (b) will be of direct relevance to the PSI, since if the master or flag State seeks assistance as in (c), there is no issue of legality. For (a) and (b), it may be conspiracy to commit a terrorist act and preparatory steps towards such an act, the consequences of which might extend to the coastal State, or disturb its peace or good order that are the criminal matters. However, the materials may be intended for a third State, which nullifies Article 27, which is specific to the coastal State.

For transit passage and archipelagic sea lanes passage, the same concerns apply, save that such passage cannot be interrupted for any reason, not even the essential security concerns of the coastal State. This would make the stopping of a vessel in an international strait or archipelagic sea lane of greater significance. Further, the categories of applicable coastal State law to such vessels, as described in Article 42, are more limited than those for innocent passage. However, Article 39 does require vessels to refrain from any violation of the principles of the United Nations Charter, as in Article 19, so the above discussion there would similarly be applicable.<sup>36</sup>

### **Interception in the Contiguous Zone**

The PSI also includes interdiction within the contiguous zone of a participating coastal State. This raises additional issues with respect of freedom of navigation. While vessels in the territorial sea are obliged to observe the regime of innocent passage or be subject to the wider law of the coastal State, the contiguous zone is unfettered by such concerns.

Beyond the territorial sea, the Law of the Sea Convention also confirms there is freedom of navigation for all vessels. Article 87 provides:

1. The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. It comprises, *inter alia*, both for coastal and land-locked States:
  - (a) freedom of navigation;
  - (b) freedom of overflight;
  - (c) freedom to lay submarine cables and pipelines, subject to Part VI;
  - (d) freedom to construct artificial islands and other installations permitted under international law, subject to Part VI;
  - (e) freedom of fishing, subject to the conditions laid down in section 2;
  - (f) freedom of scientific research, subject to Parts VI and XIII.
2. These freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities in the Area.

The impact of this provision finds its way into the regime of the EEZ by virtue of Article 58, which expressly incorporates rights of freedom of navigation and over-flight. While a coastal State has additional jurisdictional reach in the contiguous zone, it is part of the EEZ and the navigational freedoms which exist on the high seas and the EEZ apply there as well.

In terms of jurisdiction, under Article 33(1) of the Law of the Sea Convention the contiguous zone grants a coastal State power over four types of activity:

In a zone contiguous to its territorial sea, described as the contiguous zone, the coastal State may exercise the control necessary to:

- (a) prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea;
- (b) punish infringement of the above laws and regulations committed within its territory or territorial sea.

Were WMD destined to be imported into the coastal State for use in a terrorist attack, it would seem to fall clearly within the rubric of prevention of infringement of customs and possibly immigration laws and regulations<sup>37</sup> under Article 33. The coastal State could therefore argue a right to stop, search, and seize was necessary to uphold its customs laws, and prevent the delivery of highly dangerous and undesirable materials to its territory.

A more difficult situation arises where the WMD are destined for another State. It would not be open to a coastal State to assert its customs laws were to be infringed by a passing vessel carrying WMD, as the vessel's master might never have had any intention to enter the territorial sea of the coastal State. It would seem an unreasonable expansion of Article 33 to have it include not mere prevention of infringement of customs of the coastal State, but of other States as well. This is particularly the case given the freedom of navigation guaranteed for vessels in the contiguous zone, as a foreign flag vessel will have breached no law of the coastal State, and should be entitled to transit through the zone without interference.

### **Self-Defense and the Use of Force**

Utilizing the PSI, based on application of the doctrine of self-defense and the use of force in international law raises a number of issues. Among these issues are whether the transfer of WMD might amount to a preparatory act to the use of force that might permit intervention by the PSI States, and whether the interdiction of suspected WMD vessels amounts to a use of force in the sense it is used in the

United Nations Charter. In order to explore these effectively, it is necessary to consider the doctrine of self-defense in international law, and the use of force.

Contemporary international law is predicated on the notion that the use of the force should be extremely limited, in an effort to promote international peace and security. One of the most significant changes to the international law surrounding armed conflict over the past 150 years has been the effective abolition of the right of States to use force against others in pursuance of their territorial or diplomatic aims. This restriction is explicitly restated in the United Nations Charter in Article 2(4): “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.” This ban is only modified by the authorization to use force when approved by the Security Council under Chapter VII of the United Nations Charter in order to preserve international peace and security, or, with notification to the Security Council, in the exercise of a right of individual or collective self-defense under Article 51 of the Charter.<sup>38</sup>

One issue for the PSI is whether interdictions of vessels constitute an unauthorized use of force. In stopping and searching a vessel, there may be the necessity to use force, in circumstances where the vessel refuses to heave to and its crew resists the boarding. If the flag State is not a PSI State, and has not given its consent to the boarding, it is likely that some degree of force will have to be used to take control of and search the suspect vessel.

However, it is important to note that the prohibition on the use of force contained in Article 2(4) of the Charter is not a blanket restriction on the use of force, but rather is a prohibition of the use of force “against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.” Clearly the PSI does not infringe the territorial integrity of a State, unless the ship was considered part of its territory, which in this context would seem inappropriate. Even if a State can exercise prescriptive and enforcement jurisdiction over its vessels on the high seas, it cannot exercise its enforcement jurisdiction within the territorial sea of another State. The ship can hardly be said to be integral to the territory of its flag State, if the State cannot undertake efforts to enforce its law in certain locations. Similarly, the political independence of a State is unlikely to be threatened by unusual instances of vessels being stopped and boarded in the territorial sea of another State.

The key issue is whether such a boarding would be inconsistent with the Purposes of the United Nations. Certainly the United Nations is dedicated to the maintenance of international peace and security, and this is not inconsistent with the stated aims of the PSI. This is underscored by the fact that the Security Council

has considered the PSI and has adopted Resolution 1540, which supports some aspects of its operation. What is needed is a careful and considered approach to the issue of boardings pursuant to the PSI to ensure there is never any question that they are being undertaken in a fashion that would run afoul of the principles of the United Nations.

If force can be used, there is also a requirement it be in proportion to the interference with the sovereignty of the State concerned.<sup>39</sup> This concept finds support in the *Caroline* Principles,<sup>40</sup> and also has been used by the International Court of Justice: “[T]here is a specific rule whereby self-defense would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law.”<sup>41</sup>

In the case of the PSI, it is submitted the level of force used is relatively slight. A ship after it has been boarded and searched, can be permitted to continue on its way,<sup>42</sup> and if wrongfully detained, be the subject of a compensation claim by the flag State against the detaining State. In proportion to the potential harm of an attack which WMD would cause, the interference with the flag State is minimal.

### **Anticipatory Self-Defense**

The controversial doctrine of anticipatory self-defense is also potentially of application. The doctrine is based on the notion that the use of WMD leads to such destructive consequences for the State liable to imminent attack, that it ought to be able to utilize conventional weapons to remove the threat. Waiting until an actual attack may effectively be too late, as the State attacked might be largely destroyed or have millions of its citizens killed. In response, a small-scale conventional attack to remove the threat, it can be argued, is a reasonable compromise.

The response to this notion is that it is predicated on the imminent attack of one State on another, an event that may never occur. The possession of weaponry and a climate of international tension do not necessarily demonstrate an intention to launch a hostile and devastating attack in the near future.<sup>43</sup> Further, the use of anticipatory self-defense would not seem to advance international peace and security, as it uses the suspicion of an imminent attack, rather than the reality of such an attack, as the justification for the use of force. There does not appear to be any support for the concept directly within the United Nations Charter.<sup>44</sup>

Anticipatory self-defense is supported by relatively few States in international law, and there are few instances of State practice relying upon it, at least since the end of World War II.<sup>45</sup> One of the more direct examples of it came on June 7, 1981, with the Israeli attack upon the Iraqi nuclear facility at Osiraq, outside of Baghdad. Israel had argued that the facility would have given Iraq the ability to manufacture nuclear weapons in the near future, and it was the most likely target for the use of

such weapons.<sup>46</sup> Most of the international community rejected Israel's position, including a large number of the PSI States,<sup>47</sup> and there has been no change in this viewpoint evident in the international community since 1988. Concerns that the doctrine was too fluid with difficulties of what might be judged as imminent,<sup>48</sup> harmful to world peace in potentially authorizing unprovoked attacks on States suspected of having WMD they might wish to use, and capable of misapplication by States seeking an excuse to attack their neighbors are cited for the lack of any rise in support for anticipatory self-defense.<sup>49</sup> While academic opinion on the issue is divided, there is a not insubstantial volume of scholarship against the validity of the doctrine.<sup>50</sup>

In theory, the doctrine of anticipatory self-defense could be adapted to the interdiction of vessels. A PSI State could argue that the shipping of WMD to a terrorist organization would lead to attack by that terrorist organization on the PSI State or its allies, and therefore stopping and boarding suspect vessels and removing WMD would be incidental to aiding in the defense of that State from an imminent attack, albeit at some undefined point of time in the future, and not necessarily on the State itself.

It is submitted that such an argument would not be acceptable to the bulk of the international community, including most of the PSI States. The uncertainty as to the date and location of a terrorist attack would make it difficult to meet the requirement of the imminent nature of the threat. The international repugnance surrounding the doctrine of anticipatory self-defense would be sufficient to ensure that none of the PSI States would seek to use it to justify their PSI activities, if any other ground was available.

### **Necessity**

One approach to the PSI that could be used to justify interdiction of vessels is the doctrine of necessity. Necessity has been the subject of consideration by international legal scholars for some decades, and is neatly dealt with in the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts. Article 25 of the Draft Articles provides that an otherwise unlawful act of a State can be justified if it meets two criteria: (a) the act was the only means of safeguarding an essential interest of the State against a grave and imminent peril; and (b) the act does not seriously impair an essential interest of the State towards which the obligation existed.<sup>51</sup> This principle has more than just the imprimatur of the International Law Commission to support its status within public international law. The identical predecessor of Article 25, Article 33 of the Draft Articles on State Responsibility,<sup>52</sup> was cited with approval by the International Court of

Justice in the *Gabcíkovo-Nagymaros Project* case,<sup>53</sup> and was itself cited with approval by the International Tribunal for the Law of the Sea in *M/V Saiga (No. 2)*.<sup>54</sup>

When applied to the PSI, necessity can provide a justification for actions that might otherwise be unlawful at international law. While it is clear that much of the PSI in relation to interdiction is valid, such as the interception of vessels flying the flag of a PSI State, or where there is a treaty between the flag State and the PSI States, such as between Liberia, Panama and the United States, some aspects of its operation may be problematic. The interception of a vessel, flagged in a third State, government operated and on a non-commercial charter, while exercising a right of innocent passage, is one example where the legality of the stop and search of a suspect vessel presents difficulties.

In such a situation, a PSI State could note that the only way to prevent the transit of WMD to a non-State actor would be to stop a vessel en route at sea in its waters, meeting the first of the criteria in Article 25. Certainly the possession of WMD by hostile terrorists would amount to a “grave and imminent peril” to the State. On the second criterion, provided the vessel was released and allowed to continue, albeit without its deadly cargo, the essential interests of the flag State would not be seriously impaired.

The PSI States have not shown much enthusiasm for utilizing necessity as a means to legitimize possible operations under the Initiative. This may be the case for a number of reasons. First, the Draft Articles remain contentious, and there might be a reluctance by some PSI States to show direct support for part of a document about which they have serious reservations. Second, to rely upon the concept of necessity would be a tacit admission that some contemplated actions under the PSI are unlawful. As the Initiative is designed to combat unlawful behavior, and is seeking to gain as much support from the international community as possible, it may not be politic for the PSI States to indicate that the PSI might in certain circumstances encompass unlawful action. This would be particularly the case for the United States, Britain and Australia, where the lawfulness of the intervention in Iraq by the “Coalition of the Willing” has become a major political issue, and the governments of those three States might be unwilling to highlight the lawfulness or otherwise of future measures in the global “war on terror.”

A present unwillingness to utilize arguments based on necessity would not necessarily preclude their use in the future to justify an interception. In the face of the aftermath of action against a third State vessel, where WMD had been found, the PSI States would seemingly have a strong argument that even if other justifications for interdiction had failed, necessity would cure the legitimacy of their action. Whether necessity would operate to provide such protection in the event WMD were not found is not so simple, as without WMD in the mix, it is difficult to

construct what the “grave and imminent peril” to the interest of the coastal State might be.

### **Security Council Resolution 1540**

Another possible justification for the PSI might be derived from Security Council Resolution 1540. As already noted in the context of self-defense, one of the legitimate ways for a State to utilize force against another is through the adoption of a resolution by the Security Council, authorizing the use of force. The Council may make such a resolution pursuant to Chapter VII of the United Nations Charter, if it feels the application of force would assist in combating a threat to international peace and security.<sup>55</sup>

However, while the Security Council could pass a resolution seeking to search and detain vessels suspected of carrying WMD bound for non-State actors, as such vessels would clearly constitute a threat to international peace and security, it has not done so to the present point in time. Resolution 1540 extols States not to permit the transit of WMD to non-State actors, but it does not create any positive duty upon States to undertake interdiction of such vessels. Indeed, the resolution only goes so far as to authorize actions which are “consistent with international law.”<sup>56</sup> The PSI States may contend that the Initiative is of itself lawful, and therefore is consistent with Resolution 1540, which appears to be the case, but it does not provide for an explicit authorization of interdiction that would otherwise be unlawful.

One additional point in relation to Security Council Resolution 1540 can be made. Were an unlawful interdiction to take place, and WMD discovered to be on board, even if the interdiction was unlawful, the presence of WMD would mean the flag State was in material breach of a Security Council resolution. While not advocating the adoption of two international wrongs making a right into the lexicon, one imagines that the issue of the interdiction would be regarded as secondary at the political level, in comparison to the tremendous risk to international peace and security posed by the shipment itself.

### ***Interaction of the PSI with the Law of the Sea Convention***

#### **Sovereign Immunity**

One great challenge to the operation of the PSI comes from the operation of the doctrine of sovereign immunity. The doctrine is one of great age and significance within the law of the sea, requiring that warships and government vessels on non-commercial service be considered inviolate at international law. A warship is exempt from the operation of law of a port State or coastal State, unless its commander voluntarily permits the application of such law. If the warship breaches the

law of a coastal State, no sanction can be imposed directly on it, nor can it be stopped or boarded. The only measure permitted is an order directing the immediate departure of the vessel from the territorial waters of the coastal State. Any harm it may have caused can only be the subject of international claim.

The rules with respect to sovereign immunity of vessels have their origins back in history well prior to the 20th century. An attempt at codification of the old rules took place in the 1920s, and led to the adoption of the International Convention for the Unification of Certain Rules concerning the Immunity of State-owned Ships.<sup>57</sup> Article 3(1) of that Convention provides that warships, State-owned vessels on non-commercial service, hospital ships, fleet auxiliaries, and other vessels are to receive immunity in respect of claims brought against them. Such protection is confirmed in the Law of the Sea Convention, which provides explicit protection for such vessels on the high seas in Articles 95 and 96, and in the context of the territorial sea in Part II, section 3(C). These provisions make it clear that only flag States have jurisdiction over sovereign immune vessels, and that in the event of the vessel breaching an applicable law of the coastal State, there is flag State responsibility for such breaches, but the only action permissible against the vessel itself is to require it to leave immediately.<sup>58</sup>

Interference with a sovereign immune vessel, without the consent of the flag State, would amount to a clear breach of international law. For PSI States, this has the potential to be a serious problem. While it is unlikely that a State would ship WMD to non-State actors on a warship, there is a possibility of a State-owned vessel, on non-commercial service being used in such a fashion, particularly in the case of a communist State where most vessels will be State-owned. While the English courts have been prepared to look behind the activity a vessel is engaged in to determine its status,<sup>59</sup> a third State actively engaged in supplying WMD to terrorists is likely to claim sovereign immune status.<sup>60</sup>

It is submitted that the potential use of sovereign immune vessels to ship WMD to non-State actors represent the greatest challenge posed by the PSI to the law of the sea. Such vessels cannot, under international law, be interfered with by port States or coastal States without the consent of the flag State or the master. The PSI States will have a difficult decision to make in considering whether to act against such a vessel and thereby potentially undermine the status of their own naval vessels elsewhere in the world.

### **Freedom of Navigation**

Of distinct concern is the impact of the PSI on security notifications. A number of States have asserted that prior to entry into their territorial waters, foreign flagged vessels are obliged to give notice of their passage.<sup>61</sup> Most restrict this to foreign

warships, but some, notably North Korea, require it in the case of any foreign vessel. The reason most frequently cited for such action is that it is incidental to the security of the coastal State, and a transiting foreign warship passing close to the littoral State without prior warning represents a security threat. There is no authority in the Law of the Sea Convention to support such an interpretation.

For the maritime powers, this could set an awkward precedent. The PSI would be encouraging them to stop and search vessels that posed a security risk because of the possible presence of WMD on board. A similar description, from the point of view of China or North Korea could describe a US, British or French warship in their territorial waters. The warship might be carrying WMD, in the form of nuclear weapons, and may also be seen as a threat to the coastal State's security. In comparison to stopping and searching the vessel, the requirement of a warning seems relatively modest, and in time, this may provide support to the security warning advocates. Such a result would not be a desirable one to the maritime powers, most of whom are PSI States.

In its present form, with the lack of a binding treaty, and the reiteration that it is consistent with international law, the PSI does not erode the position of the maritime powers with respect to security notification. Unless and until an actual interception, without some other ground based on flag or port State control, takes place and the maritime powers assert the legality of their actions, those States seeking security notification will remain without concrete action upon which to base their objections.

### **Military Exercises**

The issue of military activities, including surveillance, in the exclusive economic zone (EEZ) of another State is one not directly dealt with in the Law of the Sea Convention.<sup>62</sup> While the Convention makes it plain that military exercises and weapons testing in the territorial sea of a coastal State would be contrary to the regime of innocent passage, there is no equivalent restriction articulated with respect to other maritime zones. However, neither is there any specific authorization with respect to such activities, which are not included within the Article 87 of the Law of the Sea Convention list of freedoms.

The lack of direct reference to military activities is not fatal to the case for the conduct of such exercises in the EEZ of another State. The rights listed in Article 87(1) are by no means an exhaustive list, and are merely specifically enunciated examples. This is explicit in the use of the phrase "*inter alia*." Further, the freedoms of the high seas are described as being subject to the conditions set down in the Convention and "other rules of international law." The use of this language makes it

clear that the Law of the Sea Convention is not intended to be the only source of law in relation to the use of the high seas or EEZ.

If the case for freedom to undertake military exercises in another State's EEZ can be made, it is clearly subject to some qualification. For this the crux of the issue will essentially turn on the meaning of the phrase "with due regard." This qualification is applied to high seas freedoms generally in Article 87(2), and it would seem logical that one must have due regard to the rights of others while navigating through the EEZ.<sup>63</sup>

One issue that could be relevant in assessing the legitimacy of interdiction under the PSI in the contiguous zone relates to whether passage by a suspect vessel might constitute a threat to international peace and security, and therefore be illegitimate and capable of being intercepted. The Law of the Sea Convention provides limited assistance through Article 88 which provides: "The high seas shall be reserved for peaceful purposes."

A wide reading of this provision would, in theory, see great limitation of the uses of warships on the high seas, and the potential circumscription on all military activities, particularly when read with the Preamble, which invokes the Convention's role in the furtherance of peace and security in the world,<sup>64</sup> suggesting only peaceful uses of the sea are permissible. By extension this could be drawn into the EEZ, as Article 58 adopts the high seas freedoms in the Convention, and explicitly includes Article 88 in this list.<sup>65</sup> Similarly, the provisions with respect to marine scientific research under Part XIII of the Convention indicate that marine scientific research can only be undertaken for peaceful purposes.<sup>66</sup> A case could be made that military activity from the high seas or another State's EEZ were incompatible with the Law of the Sea Convention.

Such an interpretation has not been favored by many States or publicists.<sup>67</sup> The San Remo Manual on Armed Conflicts at Sea, which sought to update and consolidate the law of armed conflict at sea, makes it clear that armed conflict at sea can take place on the high seas, and, in certain circumstances, in the EEZ of a neutral State.<sup>68</sup> The Manual provides that belligerents must have due regard to the uses to which another State may wish to put its EEZ and avoid damage to the coastal State.

If the motivation for interception is international security, then an argument may be placed in the hands of those States that claim military exercises cannot legitimately take place in their EEZs. Such States have typically observed that foreign military activity prevents them from utilizing their EEZ and is a threat to the security of the sovereign rights they possess in the EEZ. If security concerns can override navigational rights under the PSI, these States may have a stronger case to argue that security and due regard are inconsistent, and that permission should be sought to exercise in the EEZ. This is particularly the case in so-called "security

zones” that may be attached to the contiguous zones of some States. These have been the subject of protest by the United States and other maritime States.<sup>69</sup>

### *Conclusion*

The PSI represents a practical solution to the threats posed by the changed security environment since the 9/11 attacks. By virtue of the speed and manner of its introduction, it is yet to be structured into formally binding obligations within international law. Were it to be implemented, to the full extent indicated in its interdiction principles, it could be justified, albeit not without difficulty under international law. However, the implications of that justification would create challenges which the law of the sea would struggle to accommodate, and might create precedents which would undermine key principles the maritime powers would not wish to see damaged.

### *Notes*

1. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 833 U.N.T.S. 396 [hereinafter Law of the Sea Convention].

2. President Bush stated:

When weapons of mass destruction or their components are in transit, we must have the means and the authority to seize them. So today I announce a new effort to fight proliferation called the Proliferation Security Initiative. The United States and a number of our close allies, including Poland, have begun working on new agreements to search planes and ships carrying suspect cargo and to seize illegal weapons or missile technologies. Over time, we will extend this partnership as broadly as possible to keep the world’s most destructive weapons away from our shores and out of the hands of our common enemies.

*Available at* <http://www.whitepages.gov/news/releases/2003/05/20030531-3.html>.

3. Australia, France, Germany, Italy, Japan, the Netherlands, Poland, Portugal, Spain, the United Kingdom and the United States.

4. As of the date of this writing, the additional States are Canada, Denmark, Norway, Russia, Singapore and Turkey.

5. See paragraph 2, Chairman’s Statement, First Anniversary Proliferation Security Initiative Meeting, Krakow, Poland, May 31 – June 1, 2004, *available at* [http://www.dfat.gov.au/security/statements/1st\\_psi\\_chairmans\\_statement\\_040601.html](http://www.dfat.gov.au/security/statements/1st_psi_chairmans_statement_040601.html).

6. Paragraph 1 of the Statement of Interdiction Principles calls on all concerned States to:

Undertake effective measures, either alone or in concert with other states, for interdicting the transfer or transport of WMD, their delivery systems, and related materials to and from states and non-state actors of proliferation concern. “States or non-state actors of proliferation concern” generally refers to those countries or entities that the PSI participants involved establish should be subject to interdiction activities because they are engaged in proliferation through:

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- (a) efforts to develop or acquire chemical, biological, or nuclear weapons and associated delivery systems; or
- (b) transfers (either selling, receiving, or facilitating) of WMD, their delivery systems, or related materials.

*Available at* [http://www.dfat.gov.au/globalissues/psi/psi\\_statement.html](http://www.dfat.gov.au/globalissues/psi/psi_statement.html).

7. Paragraph 2 of the Interdiction Principles calls on all concerned States to: “Adopt streamlined procedures for rapid exchange of relevant information concerning suspected proliferation activity, protecting the confidential character of classified information provided by other states as part of this initiative, dedicate appropriate resources and efforts to interdiction operations and capabilities, and maximize coordination among participants in interdiction efforts.” *Id.*

8. Paragraph 3 of the Interdiction Principles calls on all concerned States to: “Review and work to strengthen their relevant national legal authorities where necessary to accomplish these objectives, and work to strengthen when necessary relevant international laws and frameworks in appropriate ways to support these commitments.” *Id.*

9. *Available at* [http://www.dfat.gov.au/globalissues/psi/psi\\_statement.html](http://www.dfat.gov.au/globalissues/psi/psi_statement.html).

10. Agreement between the Government of the United States of America and the Government of the Republic of Liberia Concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, their Delivery Systems, and Related Materials by Sea, Feb. 11, 2004, *available at* <http://www.state.gov/t/np/trty/32403.htm>. Amendment to the Supplementary Arrangement between the Government of the United States of America and the Government of the Republic of Panama to the Arrangement between the Government of the United States and the Government of Panama for Support and Assistance from the United States Coast Guard for the National Maritime Service of the Ministry of Government and Justice, May 12, 2004, *available at* <http://www.state.gov/t/np/trty/32858.htm>.

11. Liberia will also have the right to inspect United States flag vessels, but it is unlikely this right will be exercised.

12. Agreement Between the Government of the United States of America and the Government of Belize Concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials By Sea, Aug. 4, 2005, *available at* <http://www.state.gov/t/np/trty/50809.htm>; Agreement Between the Government of the United States of America and the Government of the Republic of Cyprus Concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials By Sea, July 25, 2005, *available at* <http://www.state.gov/t/np/trty/50274.htm>; Agreement Between the Government of the United States of America and the Government of the Republic of Croatia Concerning Cooperation to Suppress The Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials, June 1, 2005, *available at* <http://www.state.gov/t/np/trty/47086.htm>; Agreement Between the Government of the United States of America and the Government of the Republic of the Marshall Islands Concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials by Sea, Aug. 13, 2004, *available at* <http://www.state.gov/t/np/trty/35237.htm>.

13. This omission was at the request of China.

14. The PSI arrangements explicitly state the Initiative is to be consistent with international law. *See* [http://www.dfat.gov.au/globalissues/psi/psi\\_statement.html](http://www.dfat.gov.au/globalissues/psi/psi_statement.html).

15. *See, e.g.,* Muscat Dhows Case (1905) 9 UNRIAA 83, *reprinted in* 2 AMERICAN JOURNAL OF INTERNATIONAL LAW 921 (1908); S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7). *See also* IVAN A. SHEARER, STARKE’S INTERNATIONAL LAW (11th ed.1994); ROBIN R. CHURCHILL AND A. VAUGHN LOWE, THE LAW OF THE SEA 205–209 (2d ed. 1988).

16. See Law of the Sea Convention, *supra* note 1, arts. 91 and 92.
17. *Id.*, art. 94.
18. A shipowner could also direct a vessel that it heave to, be boarded and to proceed to a designated port, providing the flag state did not object, as was the case with the *BBC China*. For the facts surrounding the interception and boarding of the *BBC China*, see Mark Esper & Charles Allen, *The PSI: Taking Action Against WMD Proliferation*, 10 THE MONITOR 4, 6 (Spring 2004). See also discussion at Michael Byers, *Policing the High Seas: The Proliferation Security Initiative*, 98 AMERICAN JOURNAL OF INTERNATIONAL LAW 526, 529 (2004).
19. If a port were not already within the internal waters of a State, by virtue of being in a closed bay or river, the Law of the Sea Convention allows areas associated with ports to be enclosed by territorial sea baselines. Article 11 provides that harbor works and other areas “forming an integral part of the harbor system” may be enclosed, while Article 12 explicitly permits the enclosure of roadsteads.
20. See *The Creole*, Moore’s International Arbitration 4375; *but cf.* *The Rebecca*, United States-Mexican Claims Commission [1929–1930] No.82.
21. See *Patterson v. The Eudora*, 190 U.S. 169 (1903).
22. Van Dyke notes that seizures of suspect materials from ports have already taken place in States associated with the PSI. Taiwan seized dual-use chemicals from a North Korean vessel in Kaohsiung, and Japanese authorities have searched North Korean vessels when in Japanese ports. Jon M. Van Dyke, *Balancing Navigational Freedom with Environmental and Security Concerns*, COLORADO JOURNAL OF INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 19, 26 (2003).
23. Bull *Inter Caetera* of Pope Alexander VI, May 4, 1493, available at <http://bullsburning.itgo.com/essays/Caetera.htm#theBull>.
24. Treaty of Tordesillas, June 7, 1494, reproduced at <http://www.yale.edu/lawweb/avalon/modeur/mod001.htm>.
25. C. JOHN COLOMBOS, THE INTERNATIONAL LAW OF THE SEA 48–49 (6th ed. 1967); RENÉ-JEAN DUPUY & DANIEL VIGNES, A HANDBOOK OF THE NEW LAW OF THE SEA 64–65 (1991).
26. HUGO GROTIUS, MARE LIBERUM: THE FREEDOM OF THE SEAS OR THE RIGHT WHICH BELONGS TO THE DUTCH TO TAKE PART IN THE EAST INDIAN TRADE (Ralph Van Damen Magoffin trans., 1916) (1609).
27. Convention on the Territorial Sea and Contiguous Zone, Apr. 29, 1958, 516 U.N.T.S. 205.
28. Convention on the High Seas, Apr. 29, 1958, 450 U.N.T.S. 82.
29. Convention on the Continental Shelf, Apr. 29, 1958, 499 U.N.T.S. 311.
30. *Corfu Channel (UK v. Albania)*, Merits, 1949 I.C.J. 4, 28 (Apr. 9).
31. See *infra* pp. 157–59.
32. Law of the Sea Convention, *supra* note 1, art. 25(3).
33. Article 19(2) of the Law of Sea Convention also provides, *inter alia*:  
Passage of a foreign ship shall be considered to be prejudicial to the peace, good order or security of the coastal State if in the territorial sea it engages in any of the following activities:  
(a) any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations.
34. See generally 2 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY 232–233 (Myron H. Nordquist ed., 1993) [hereinafter Commentary].
35. Law of the Sea Convention, *supra* note 1, art. 27(1).

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36. Articles 39 and 42 of the Law of the Sea Convention apply to transit passage. For archipelagic sea lanes passage, Article 54 provides: "Articles 39, 40, 42 and 44 apply *mutatis mutandis* to archipelagic sea lanes passage."
37. Immigration laws might pertain to a situation where terrorists accompanied the WMD aboard the ship.
38. Article 51 of the Charter provides:  
Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.
39. See ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS 402 305 (A. Ralph Thomas and James C. Duncan eds., 1999) (Vol. 73, US Naval War College International Law Studies). See also SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA 76–77 (Louise Doswald-Beck ed., 1995) 76–77; Thomas Graham Jr., *Is International Law Relevant to Arms Control?: National Self-Defense, International Law, and Weapons of Mass Destruction*, 4 CHICAGO JOURNAL OF INTERNATIONAL LAW 1, 6–9 (2003).
40. See the discussion in Robert Y. Jennings, *The Caroline and McLeod Cases*, 32 AMERICAN JOURNAL OF INTERNATIONAL LAW 82 (1938).
41. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Merits, 1986 I.C.J. 14, 94, (June 27); Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 245 (July 8).
42. This occurred with the detaining and subsequent release of a North Korean vessel carrying missiles bound for Yemen. After it was clear no treaty violation was taking place, and Yemen was procuring the weapons for its own defense, the vessel was allowed to continue by the detaining Spanish warships. See Van Dyke, *supra* note 22, at 25–27.
43. A number of eminent publicists have given qualified support to the concept of anticipatory self-defense in the context particularly of the imminent use of nuclear weapons against a State. See Christopher Greenwood, *International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaida, and Iraq*, 4 SAN DIEGO INTERNATIONAL LAW JOURNAL 7, 14–15 (2003). See also THOMAS M. FRANCK, RECOURSE TO FORCE 102–107 (2002) and 1 OPPENHEIM'S INTERNATIONAL LAW 421 (Robert Jennings & Arthur Watts eds., 1994) who have argued that there is a right of anticipatory self-defense against an imminent armed attack. See also ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 242 (1994).
44. Michael Glennon has argued the Charter is ill equipped to deal with the issue of fighting terrorists, in part because it does not deal with anticipatory self-defense. Michael J. Glennon, *Military Action Against Terrorists under International Law: The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter*, 25 HARVARD JOURNAL OF LAW AND PUBLIC POLICY 539, 552–553 (2002).
45. Michael J. Kelly, *Time Warp to 1945 – Resurrection of the Reprisal and Anticipatory Self-Defense Doctrines in International Law*, 13 JOURNAL OF TRANSNATIONAL LAW AND POLICY 1, 31 (2003).
46. See the statements by the Israeli Ambassador to the United Nations extracted in *id.* at 30.

47. See Security Council Resolution 487 of June 19, 1981. This resolution condemned the Israeli attack, and was adopted by the Council unanimously.
48. See Greenwood, *supra* note 43, at 15–16.
49. See John Quigley, *A Weak Defense of Anticipatory Self-Defense*, 10 TEMPLE INTERNATIONAL AND COMPARATIVE LAW JOURNAL 255, 257 (1996). See also Byard Q. Clemmons & Gary D. Brown, *Rethinking International Self-Defense: The United Nations' Emerging Role* 45 NAVAL LAW REVIEW 217, 229 (1998).
50. See IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 257–276 (1963); LOUIS HENKIN, HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY 141–144 (1979); CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 112 (2000).
51. Draft Articles on Responsibility of States for internationally wrongful acts, in Report of the International Law Commission on the Work of Its Fifty-third Session, UN GAOR, 56th Sess., Supp. No. 10, UN Doc. A/56/10 (2001), available at [http://www.un.org/law/ilc/texts/State\\_responsibility/responsibility\\_articles\(e\).pdf](http://www.un.org/law/ilc/texts/State_responsibility/responsibility_articles(e).pdf).
52. 2 YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 58, UN Doc. A/CN.4/SER.A/1996/Add.1 (Part 2).
53. Gabčíkovo–Nagymaros Project (Hung. v. Slov.), Judgment, 1997 I.C.J. 7, 40–41 (Sept. 25).
54. M/V “Saiga” (No. 2) (St. Vincent & the Grenadines v. Guinea) (International Tribunal for the Law of Sea, July 1, 1999), at paragraph 133, available at [http://www.itlos.org/start2\\_en.html](http://www.itlos.org/start2_en.html).
55. See *supra* p. 147 and note 33.
56. Operative paragraph 10 provides: “Further to counter that threat, calls upon all States, in accordance with their national legal authorities and legislation and consistent with international law, to take cooperative action to prevent illicit trafficking in nuclear, chemical or biological weapons, their means of delivery, and related materials.”
57. International Convention for the Unification of Certain Rules Concerning the Immunity of State-owned Ships, Apr. 10, 1926, 176 L.N.T.S. 199 [hereinafter 1926 Brussels Convention]; Protocol additional to the International Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels, May 24, 1937, 176 L.N.T.S. 215.
58. Law of the Sea Convention, *supra* note 1, art. 30.
59. The Philippine Admiral v Wallem Shipping (Hong Kong) Ltd [1977] AC 373.
60. Article 5 of the 1926 Brussels Convention, *supra* note 57, establishes a system whereby States can issue a certificate indicating the non-commercial status of the ship or cargo.
61. China, for example, has enacted legislation (Article 13 of the Law of the Territorial Sea and the Contiguous Zone of February 25, 1992) that asserts its authority to exercise jurisdiction over security within the contiguous zone, and to seek prior notification of entry therein. This is rejected by the United States as inconsistent with Article 33 of the Law of the Sea Convention, which has no reference to a security jurisdiction in respect of the contiguous zone. The 1992 US protest is cited in ANNOTATED SUPPLEMENT, *supra* note 39, at 108.
62. See e.g., George V. Galdorisi & Alan G. Kaufman, *Military Activities in the Exclusive Economic Zone: Preventing Uncertainty and Defusing Conflict*, 32 CALIFORNIA WESTERN JOURNAL OF INTERNATIONAL LAW 253 (2002).
63. See Francisco Francioni, *Peacetime Use of Force, Military Activities, and the New Law of the Sea*, (1985) 18 CORNELL INTERNATIONAL LAW JOURNAL 203, 215 (1985). See also COMMENTARY, *supra* note 34, at 553–565.
64. The Preamble states in part:  
Prompted by the desire to settle, in a spirit of mutual understanding and co-operation, all issues relating to the law of the sea and aware of the historic significance of this

Convention as an important contribution to the maintenance of peace, justice and progress for all peoples of the world  
and

Believing that the codification and progressive development of the law of the sea achieved in this Convention will contribute to the strengthening of peace, security, cooperation and friendly relations among all nations in conformity with the principles of justice and equal rights and will promote the economic and social advancement of all peoples of the world, in accordance with the Purposes and Principles of the United Nations as set forth in the Charter.

65. Galorisi & Kaufman, *supra* note 62, at 275–278.

66. Article 240, Law of the Sea Convention provides: “In the conduct of marine scientific research the following principles shall apply: (a) marine scientific research shall be conducted exclusively for peaceful purposes.”

67. On this point, see DAVID J. ATTARD, *THE EXCLUSIVE ECONOMIC ZONE IN INTERNATIONAL LAW* 75 (1987); FRANCISCO ORREGO VICUNA, *THE EXCLUSIVE ECONOMIC ZONE: REGIME AND NATURE UNDER INTERNATIONAL LAW* 110–113 (1989); Galdorisi & Kaufmann, *supra* note 62, at 274–276.

68. SAN REMO MANUAL, *supra* note 39, at 8.

69. For example, Pakistan has added security to the list of jurisdictional matters under its contiguous zone. See *Territorial Waters & Maritime Zones Act, 1976*, available at [www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/PAK\\_1976\\_Act.pdf](http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/PAK_1976_Act.pdf). The United States made a formal protest to Pakistan in 1996 in respect of this claim. China asserted jurisdiction in the contiguous zone over security matters in 1992 in the *Law of the Territorial Sea and the Contiguous Zone* of 25 February 1992, which was protested by the United States in 1992. Iran asserted a similar security zone by Note Verbale No.152 transmitted to the United Nations. The United States protested this claim in 1994. See *Maritime Claims Reference Manual*, Department of Defense 2005.1-M, available at <http://www.dtic.mil/whs/directives/corres/html/20051m.htm>. With respect to China, see *supra* note 61.

# **PART IV**

**CURRENT ISSUES IN OCCUPATION LAW**



# VII

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## Is There a “New” Law of Intervention and Occupation?

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Leslie C. Green\*

**A**t least since the seventeenth century international law has accepted as a fundamental principle that all States are equal, none enjoying sovereignty over any other. This principle has found expression in Vattel’s famous aphorism:

Since men are by nature equal, and their individual rights and obligations the same, as coming equally from nature, Nations, which are composed of men and may be regarded as so many free persons living together in a state of nature, are by nature equal and hold from nature the same obligations and the same rights. Strength or weakness in this case, count for nothing. A dwarf is as much a man as a giant is; a small Republic is no less a sovereign State than the most powerful Kingdom.<sup>1</sup>

As a consequence it has come to be accepted that a State is free to treat its nationals as it pleases without interference from others, a principle which finds expression in the domestic jurisdiction clause of the Charter of the United Nations:

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures

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under Chapter VII [relating to acts of aggression and threats to or breaches of the peace].<sup>2</sup>

Nevertheless, both doctrinal writings and States, especially the more powerful, have asserted a right of intervention and even occupation in “exceptional” circumstances.

International law recognizes two forms of occupation of the whole or part of the territory of one State by the forces or governmental representatives of another. *Occupatio pacifica* is the basis of acquiring title to territory.<sup>3</sup> For the purpose of this paper, the term is used for the situation that takes place when the occupied entity has agreed to the occupation or it has been imposed without the use of force by an occupier or as a result of a multilateral treaty, although the threat to resort to force may be the deciding factor that induces the occupied entity to agree to the occupation. *Occupatio bellica* ensues during or at the end of an armed conflict and, generally speaking, is contrary to the wishes of the State occupied or is acquiesced in since there is no other option available to that State.

Examples of occupation pursuant to agreement may be seen in the treaties relating to the independence of the successor principalities of the Ottoman Empire—Bulgaria, Montenegro, Roumania and Serbia—initiated by the 1878 Treaty of Berlin. In the case of Bulgaria, a provisional administration was established which:

[S]hall be under the direction of an Imperial Russian Commissary until the completion of the Organic Law. An Imperial Turkish Commissary, as well as the Consuls delegated *ad hoc* by the other Powers, signatory of the present Treaty, shall be called to assist him so as to control the working of the provisional *regime*. In case of disagreement amongst the Consular Delegates, the vote of the majority shall be accepted, and in case of a divergence between the majority and the Imperial Russian Commissary or the Imperial Turkish Commissary, the Representatives of the Signatory Powers at Constantinople, assembled in Conference, shall give their decision.<sup>4</sup>

Article VII, in turn, provides that:

The provisional *regime* shall not be prolonged beyond a period of nine months from the exchange of the ratifications of the present Treaty. When the Organic Law is completed the election of the Prince of Bulgaria shall be proceeded with immediately. As soon as the Prince shall have been installed, the new organization shall be put into force, and the Principality shall enter into the full enjoyment of the autonomy.

To some extent this procedure seems to foretell the type of arrangement that followed the operations against Afghanistan and Iraq at the beginning of this

century.<sup>5</sup> The succession clauses in the Treaty of Berlin guaranteed protection to religious and other minorities in each of the States concerned, but they did not provide for any form of direct sanction in the event of non-observance. In this, they differed from the view expressed by some of the “fathers” of international law, who envisaged the possibility of intervention by force, even resulting in occupation allegedly on humanitarian grounds in favor of an oppressed people. Thus, Grotius was of the opinion that:

The fact must also be recognized that kings, and those who possess rights equal to those of kings, have the right of demanding punishments not only on account of injuries against themselves or their subjects, but also on account of injuries which do not directly affect them but excessively violate the law of nature or of nations in regard to any persons whatsoever. . . . Truly, it is more honourable to avenge the wrongs of others rather than one’s own, in the degree that in the case of one’s own wrongs it is more to be feared that through a sense of personal suffering one may exceed the proper limit or at least prejudice his mind. . . . [K]ings, in addition to the particular care of their own state, are also burdened with a general responsibility for human society. . . . The final and most wide-reaching cause for undertaking wars on behalf of others is the mutual tie of kinship among men, which of itself affords sufficient ground for rendering assistance. . . . If, further, it should be granted that even in extreme need subjects cannot justifiably take up arms [against their sovereign] . . . , nevertheless it will not follow that others may not take up arms on their behalf.<sup>6</sup>

Not all the “fathers” of international law would agree with Grotius in his view concerning the right of a State to punish another for committing crimes against natural law. Among these was Vattel who asked:

Did not Grotius perceive that . . . his view opens the door to all the passions of zealots and fanatics, and gives to ambitious men pretexts without numbers?<sup>7</sup> . . . [However, i]f there should be found a restless and unprincipled Nation, ever ready to do harm to others, to thwart their purposes, and to stir up civil strife among their citizens, there is no doubt that all the others would have the right to unite together to subdue such a Nation, to discipline it, and even to disable it from doing further harm. . . . [But n]o foreign State may inquire into the manner in which a sovereign rules, nor set itself up as judge of his conduct. . . . If he . . . treats his subjects with severity it is for the Nation to take action; no foreign State is called on to amend his conduct and to force him to follow a wiser and juster course. . . . But if a prince, by violating the fundamental laws, gives his subjects a lawful cause for resisting him; if, by his insupportable tyranny, he brings on a national revolt against him, any foreign power may rightfully give assistance to an oppressed people who ask for its aid. . . . To give help to a brave people who are defending their liberties against an oppressor by force of arms is only the part of justice and generosity. . . . But this principle should not be made use of so as to authorize criminal designs against the peace of Nations. . . . As for those monsters who

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under the name of sovereigns, act as a scourge and plague of the human race, they are nothing more than wild beasts, of whom every man may purge the earth.<sup>8</sup>

This last comment calls to mind President Bush’s reference to certain States as constituting an “axis of evil.”<sup>9</sup>

Pufendorf would not go as far as Grotius in granting a third State the right to intervene on behalf of foreign nationals, he nevertheless granted that right if the subjects themselves had good cause to revolt,<sup>10</sup> and, while he was critical of those:

[W]ho say, that, when the king has degenerated into a tyrant, he can be stripped of his command and punished by the people . . . [but] no one should believe, however, that we grant a boundless licence to princes, and deliver over to them their subjects, from whom we have taken away every faculty of fighting back, like cattle to their pleasure, we are altogether of the opinion that, if, indeed, even an absolute prince should assume a mind utterly hostile towards his subjects, and openly seek their destruction without the appearance of justice, his subjects can rightly employ against him also the means customarily used against an enemy for the sake of defending their own safety. . . . [A]ssuredly, absolute princes can be punished neither for not running the state to suit the people, nor for private misdeeds. . . . But after they have assumed the person of enemies [by their actions against their people], the evils which, perchance are inflicted upon them by the right of war do not have the character of a punishment properly so called. . . .<sup>11</sup> [T]he safest principle to go on is, that we cannot lawfully undertake the defence of another’s subjects, for any other reason than they themselves can rightfully advance, for taking up arms to protect themselves against the barbarous savagery of their superiors. . . .<sup>12</sup> [F]inally, when there is no other reason, common descent alone may be a sufficient ground for our going to the defence of one who is unjustly oppressed, and implores our aid, if we can conveniently do so.<sup>13</sup>

To a great extent the military operations undertaken by the United States and the United Kingdom against Iraq in 2003 were based on this type of reasoning, although the plea for intervention came not from oppressed inhabitants, but from political exiles. However, the subsequent occupation received general support, at least in the early days.

By the nineteenth century respect for sovereignty was so highly regarded that writers generally were only willing to concede a right of intervention and possible occupation in the most exceptional of circumstances. Phillimore pointed out that:

Intervention by one Christian State on behalf of Religion has . . . been practised and cannot be said, in the abstract, to be a violation of International Law. But what kind of Intervention? By remonstrance, by stipulation, by a condition in a Treaty concluding a war waged on other grounds. It may, perhaps, be justly contended that the principle might be pushed further; and that in the event of *persecution* of large bodies of men, on account of their religious belief, an armed intervention on their behalf might be as

warrantable in International Law, as an armed intervention to prevent the shedding of blood and protracted internal hostilities. . . . [N]o writer of authority upon International Law sanctions such an intervention, except upon the case of a positive *persecution* inflicted avowedly upon the ground of religious belief.<sup>14</sup>

Hall too was equally restrictive of the right:

International law professes to be concerned only with the relations of states to each other. Tyrannical conduct of a government towards its subjects, massacres and brutality in a civil war, or religious persecution are acts which have nothing to do directly or indirectly with such relations. On what ground then can international law take cognizance of them? Apparently on one only, if it be competent to take cognizance of them at all. It may be supposed to declare that acts of the kind mentioned are so inconsistent with the character of a moral being as to constitute a public *scandal*, which *the body of states, or one or more states as representative of it, are competent to suppress*. . . . [I]ntervention for the purpose of checking gross tyranny or of helping the efforts of a people to free itself is very commonly regarded without disfavour. Again, religious persecution, short of a cruelty which would rank as tyranny, has ceased to be recognised as an independent ground of intervention, but is still used as between Europe and the East as an accessory motive, which seems to be thought by many persons as sufficiently praiseworthy to excuse the commission of acts in other respects grossly immoral. . . . [S]entiment has been allowed to influence the more deliberately formed opinion of jurists . . . [who] have imparted an aspect of legality to a species of intervention, which makes a deep inroad into one of the cardinal doctrines of international law [that of sovereign independence] . . . and which by the readiness to which it lends itself to the uses of selfish ambition becomes as dangerous in practice as plausible in appearance. It is unfortunate that publicists have not laid down broadly and unanimously that no intervention is legal, except for the purpose of self-preservation, unless a breach of the law as between states has taken place, or *unless the whole body of civilised states has concurred in authorising it*. Intervention, whether armed or diplomatic, undertaken either for the reason or upon the pretext of cruelty, or oppression, or the horrors of a civil war, or whatever the reason put forward, supported in reality by the justification which such facts offer to the popular mind, would have had to *justify themselves, when not authorised by the whole body of civilised states unless accustomed to act together for common purposes, as measures which, being confessedly illegal in themselves, could only be excused in rare and extreme cases in consideration of the unquestionably extraordinary character of the facts causing them, and of the evident purity and motives of the intervening state*.<sup>15</sup>

Westlake, almost foretelling modern views based on respect for human rights and popular indignation, commented that:

Intervention in the internal affairs of another state is justifiable . . . when a country has fallen into such a condition of anarchy or misrule as unavoidably to disturb the peace,

external or internal of its neighbours,<sup>16</sup> whatever the conduct or policy of its government may be in that respect. . . . In considering anarchy and misrule as a ground for intervention the view must not be confined to the physical consequences which they may have beyond the limits of the territory in which they rage. These are often serious enough. . . . The moral effect on the neighbouring population is to be taken into account. Where these include considerable numbers allied by religion, language or race to the population suffering from misrule, to restrain the former from giving support to the latter in violation of the legal rights of the misruled state may be a task beyond the power of their government, or requiring it to resort to modes of restraint irksome to its subjects, and not necessary for good order if they were not excited by the spectacle of miseries which they must feel acutely. It is idle to argue in such a case that the duty of the neighbouring peoples is to look on quietly. Laws are made for men and not for creatures of the imagination, and they must not create or tolerate for them situations which are beyond the endurance, which we will not say of average human nature, since laws may fairly expect to raise the standard by their operation, but of the best human nature at the time and place they can hope to meet with.<sup>17</sup>

Today it is increasingly the case that popular feeling at large, and not merely in neighboring States, may be so outraged that a demand for intervention either by the United Nations or some other international organization is made, as has been the case in, for example, the Sudan with regard to the treatment of Darfur.<sup>18</sup>

It has not only been writers who, before the outbreak of World War I and the establishment of the League of Nations, were prepared to condemn the actions of particular States and even to advocate intervention or occupation. In his 1904 annual message, for example, President Theodore Roosevelt stated:

[T]here are occasional crimes committed on so vast a scale and of such peculiar horror as to make us doubt whether it is not *our manifest duty* to endeavour at least to show our disapproval of the deed and our sympathy with those who have suffered by it. The cases must be extreme in which such a course is justifiable . . . [and] *in extreme cases action may be justifiable and proper*. What form the action shall take must depend upon the circumstances of the case; that is, upon the degree of the atrocity and upon our power to remedy it. *The cases in which we would interfere by force of arms . . . are necessarily very few*. Yet it is not to be expected that a people like ours . . . which shows by its consistent practice its belief in the principles of civil and religious liberty and of orderly freedom . . . it is inevitable that such a nation should desire eagerly to give expression to its horror on an occasion like that of the massacre of the Jews in Kishenev,<sup>19</sup> or when it witnesses such systematic and long-extended cruelty and oppression of which the Armenians<sup>20</sup> have been the victims, and which have won for them the indignant pity of the civilised world.<sup>21</sup>

The commitment of the United States to the principle of humanitarianism has led the American writer Stowell, perhaps the most authoritative writer on intervention, to comment:

Humanitarian intervention may be defined as the *justifiable use of force* for the purpose of protecting the inhabitants of another state from treatment so arbitrary and persistently abusive as to exceed the limits within which the sovereign is presumed to act with reason and justice. . . . [However, t]he right of the sovereign state to act without interference within its own territory, even though it be no more than a presumption, is of such importance to the well-being of international society, that the states in their wisdom, as evidenced in their practice, have been jealous of admitting the pleas of humanity as a justification for action against a sister state; and we find that intervention on this ground has been rather rigidly limited to specific cases, and conditioned in each of them upon the existence of a certain state of facts. It is true that the appreciation of the facts and the *determination as to the existence of the justifying situation* still remains to a certain degree a matter *entrusted to the conscientious discretion of the intervening state*; nevertheless, the general and *salutary attitude of suspicion with which every intervention upon the ground of humanity is regarded serves as a rough check upon its abuse*. The counterpoise which serves as the sanction to prevent aggression and subsequent conquest under the guise of humanitarian intervention is perhaps to be found in the general readiness of states to act in defense of the balance of power and in order to preserve the society of independent states.<sup>22</sup>

In the light of these comments the reader might be justified in assuming that a right of intervention leading to possible occupation is, in certain circumstances, recognized in customary international law. However, whether this is the case or not, such action is, as Stowell asserted, a matter of discretion, and by 1938, despite the evidence of atrocities in Nazi Germany, reaction was largely “platonic”<sup>23</sup> leading Professor H. A. Smith of London University to complain:

[I]n practice we no longer insist that States shall conform to any common standards of justice, religious toleration and internal government. Whatever atrocities may be committed in foreign countries, we now say that they are no concern of ours. Conduct which in the nineteenth century would have placed a government outside the pale of civilised society is now deemed to be no obstacle to diplomatic friendship. This means, in fact, that we have now abandoned the old distinction between civilised and uncivilised states.<sup>24</sup>

In so far as *occupatio pacifica* as a result of treaty is concerned, reference might be made to Article III of the 1903 Agreement between the United States and Cuba for the lease to the former of an area of Guantanamo “for the time required for the purpose of coaling and naval stations” and “during the period of occupation by the United States . . . the United States shall exercise complete jurisdiction and control over and within said areas. . . .”<sup>25</sup> In a 1933 decision the Cuban Supreme Court held that “the territory of that Naval Station is for all legal effects regarded as foreign.”<sup>26</sup>

Nevertheless, problems arose when the United States armed forces sent numbers of individuals captured in Afghanistan for detention at the Guantanamo naval base, labeling them, since there was no “war” declared, even though supporters of the Taliban as distinct from members of al-Qaeda, carried their arms on behalf of a de facto governing authority, as “enemy combatants” rather than “prisoners of war.” The United States, maintained that as such, regardless of the terms of the Geneva Convention relating to the treatment of prisoners of war,<sup>27</sup> they could be detained indefinitely, denied access to counsel, and permitted no means of challenging their confinement or clarifying their status or alleging mistaken identity.<sup>28</sup> However, this situation was challenged at the end of 2003 by a detainee by way of *habeas corpus* proceedings, and in *Gherebi v. George W. Bush and Donald H. Rumsfeld* the government claim was rejected by the majority of the Court of Appeals for the Ninth Circuit:

[W]e simply cannot accept the government’s position that the Executive Branch possesses the unchecked authority to imprison indefinitely any persons, foreign citizens included, on territory under the sole jurisdiction and control of the United States, without permitting such prisoners recourse of any kind to any judicial forum, or even access to counsel regardless of the length or manner of their confinement. . . . In our view, the government’s position is inconsistent with fundamental tenets of American jurisprudence and raises most serious concerns under international law.<sup>29</sup>

The Court cited, by way of explanation, Article 5 of the Prisoners of War Convention, 1949,<sup>30</sup> as well as Article 9 of the International Covenant on Civil and Political Rights to which the United States<sup>31</sup> is a party: “Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that a court may decide without delay on the lawfulness of his detention. . . .”

The United States argued to the court that while it exercised “complete jurisdiction and control” over Guantanamo naval base, it continued to recognize the “continuance and ultimate sovereignty in Cuba,” distinguishing the rights pertaining to “territorial jurisdiction” from those pertaining to “sovereignty”<sup>32</sup> leading the court to point out that the “United States has exercised ‘complete jurisdiction and control’ over the Base for more than a century now, with the right to acquire . . . any land or other property therein by purchase or by exercise of eminent domain with full compensation to owners thereof.”<sup>33</sup>

The court further noted that the United States has “also treated Guantanamo Bay as if it were subject to American sovereignty: we have acted as if we intend to retain the Base permanently, and have exercised the exclusive right to use it as we wish, regardless of any restrictions contained in the lease or continuing Treaty.”<sup>34</sup> The court determined that:

[B]y virtue of the United States' exercise of territorial jurisdiction over Guantanamo, habeas jurisdiction lies in the present case. . . . [W]e conclude that, at least for habeas purposes, Guantanamo is part of the sovereign territory of the United States. Both the language of the Lease and continuing Treaty and the practical reality of U.S. authority and control over the Base support that answer. . . . [T]he United States exercises total dominion and sovereignty, while Cuba retains simply a contingent reversionary interest that will become effective only if and when the United States decides to relinquish its exclusive jurisdiction and control, i.e. sovereign domain over the territory. . . . [T]he United States possesses and exercises all the attributes of sovereignty, while Cuba retains only a residual or reversionary interest, contingent on a possible future United States' decision to surrender its complete jurisdiction and control. . . . [W]e conclude that Lease and continuing Treaty must be construed as providing that Cuba possesses no substantive sovereignty over Guantanamo during the period of the U.S. reign. All such sovereignty during that indefinite and potentially permanent period is vested in the United States. . . . Sovereignty may be gained by a demonstration of intent to exercise sovereign control on the part of a country that is in possession of the territory in question and has the power to enforce its will.<sup>35</sup>

These statements by the court are fully in accord with the traditional view under customary international law of the effect of occupation and there is nothing new or innovative about them. And the State which exercises sovereignty is entitled to all the rights accompanying sovereignty, as well as being burdened with all the obligations.<sup>36</sup>

As a further instance of *occupatio pacifica* by way of agreement the situation created by the arrangements made in 1960 at the time of the grant of independence to Cyprus, whereby Britain retained full sovereignty over two areas of the island as military bases may be cited.<sup>37</sup>

It may happen that part of a State's territory is occupied by a victor in accordance with a peace treaty after a war. In such a case, the borderline between *occupatio pacifica* and *occupatio bellica* may be somewhat blurred. However, when such an occupation takes place, the wartime rights and obligations of the occupant are not normally relevant. Under the 1919 Treaty of Versailles for example, Article 426 provides:

As a guarantee for the execution of the present Treaty by Germany, the German territory situated west of the Rhine [the Rhineland and the Ruhr], together with the bridgeheads, will be occupied by Allied and Associated troops for a period of fifteen years from the coming into force of the present Treaty.<sup>38</sup>

Provision was also made, depending on compliance by Germany with the terms of the Treaty, for the gradual withdrawal of the occupying forces.<sup>39</sup>

A somewhat different policy was adopted after World War II because of the unconditional surrender of both Germany<sup>40</sup> and Japan.<sup>41</sup> In so far as Germany was concerned, the victorious Allies—France, the Union of Soviet Socialist Republics, the United Kingdom and the United States—divided the country into four separate zones governed by military officers, with Berlin divided into four sectors each allocated to one of the four powers. To all intents and purposes Germany, as a State, had ceased to exist by virtue of *debellatio*<sup>42</sup> and the zones, both separately and severally, were under the full sovereignty and administration of the occupying powers, which only formally ended with the establishment and recognition of the Federal and People’s Republics, respectively. In so far as Japan was concerned, the situation was somewhat different. There was no suggestion that the State had ceased to exist and the Emperor remained as titular Head of State, although the actual government was in the hands of General Douglas MacArthur as Supreme Commander for the Allied Powers. He ruled with virtually absolute power. Although ostensibly acting on behalf of the Allied Powers, MacArthur remained subject to the authority of the President of the United States. This situation prevailed until the adoption of the Peace Treaty with Japan in 1951.<sup>43</sup> Article 6(a) of the Treaty provides, in part, that all “occupation forces of the Allied Powers shall be withdrawn from Japan as soon as possible after the coming into force of the present Treaty, and in any case not later than 90 days thereafter. . . .”

Although by Article 1 of the Peace Treaty “the Allied Powers recognize the full sovereignty of the Japanese people over Japan and its territorial waters,” the Constitution of Japan,<sup>44</sup> drawn up in 1947 under the auspices of MacArthur’s occupation, remained in force. Article 9 of the Constitution provided:

Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as a means of settling international disputes.

In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognized.

The occupation of Japan was similar to that of the occupation of the Rhineland in that both followed the unconditional surrender of the defeated State and the assumption of absolute power by the victors. There was no suggestion that the occupier was in any way limited by the rights granted to an occupier in accordance with the law of war.

Reference might also be made to the position of Austria following World War II. Austria had been annexed by Germany in 1938 and was regarded as part of

Germany.<sup>45</sup> Recognition of the annexation was withdrawn by virtue of the Moscow Declaration.<sup>46</sup> Nevertheless, Austria was not treated in the same fashion as other States unlawfully occupied by Germany. In 1946, an agreement was concluded between the four major Allied Powers (United States, United Kingdom, Soviet Union and France) and Austria<sup>47</sup> that established a four-power Commission with competence for the whole of Austria, but with each of these powers a virtual sovereign occupant in its own zone. By Article 1 of that accord, the Austrian Government and all subordinate Austrian authorities were bound to carry out all instructions received from the Allied Commission, so much so that “the Austrian authority . . . is no more than an executive arm of the occupying Power.”<sup>48</sup> Although the *anschluss* had ceased to be recognized, in 1955 a peace treaty was agreed to with Austria,<sup>49</sup> Article 20 of which stipulated that the 1946 Agreement was terminated and that the Agreement on Zones of Occupation was to terminate on the withdrawal of all Allied forces by the end of that year.

*Occupatio bellica* involves occupation during the actual conduct of hostilities or, after these have ceased prior to any arrangement being made for the future of the territory in question. In such cases, reference must be made to the laws and customs of war. Already in ancient India:

Customs, laws and family usages which obtain in a country should be preserved when the country has been acquired. . . . Having conquered his foe, let him not abolish or disregard the laws of that country. . . . A king should never do such injury to his foe as would rankle in the latter’s heart.<sup>50</sup>

More important from our point of view, particularly since it became the model for much of Europe, is the Lieber Code<sup>51</sup> prepared by Professor Lieber of Columbia University and propounded by President Lincoln during the American Civil War. Here, we find a number of regulations affecting the rights of enemy civilians of which we need cite just a few:

Art. 23. Private citizens are no longer murdered, enslaved, or carried off to distant parts, and the inoffensive individual is as little disturbed in his private relations as the commander of the hostile troops can afford to grant in the overruling demands of a vigorous war.

Art. 25. In modern regular wars of the Europeans, and their descendants in other portions of the globe, protection of the inoffensive citizen of the hostile country is the rule; privation and disturbance of private relations are the exception.

Art. 33. It is no longer considered lawful – on the contrary, it is held to be a serious breach of the law of war – to force the subjects of the enemy into the service of the

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victorious government, except the latter should proclaim, after a fair and complete conquest of the hostile country or district, that it is resolved to keep the country, district, or place permanently as its own and make it a portion of its own country.

Art. 35. Classical works of art, libraries, scientific collections, or precious instruments, such as astronomical telescopes, must be secured against all avoidable injury, even when they are contained in fortified places whilst besieged or bombarded.<sup>52</sup>

Art. 36. If such works of art, libraries, collections, or instruments belonging to a hostile nation or government, can be removed without injury, the ruler of the conquering state or nation may order them to be seized and removed for the benefit of the said nation. The ultimate ownership is to be settled by the ensuing treaty of peace. In no case shall they be sold or be given away by the armies of the United States, nor shall they ever be privately appropriated, or wantonly destroyed or injured.

Art. 37. The United States acknowledge and protect, in hostile countries occupied by them, religion and morality; strictly private property; the persons of the inhabitants, especially those of women: and the sacredness of domestic relations. Offenses to the contrary shall be rigorously punished. . . .

Art. 39. The salaries of civil officers of the hostile government who remain in the invaded territory, and continue the work of their offices, and can continue it according to the circumstances arising out of the war – such as judges, administrative or public officers, officers of city or communal governments – are paid from the public revenue of the invaded territory, until the military government has reason wholly or partially to discontinue it. . . .

Art. 44. All wanton violence committed against persons in the invaded country, all destruction of property not commanded by the authorized officer, all robbery, all pillage or sacking, even after taking place by main force, all rape, wounding, maiming, or killing of such inhabitants, are prohibited under the penalty of death, or such other severe punishment as may seem adequate for the gravity of the offense. . . .

Art. 47. Crimes punishable by all penal codes, such as arson, murder, maiming, assaults, highway robbery, theft, burglary, fraud, forgery, and rape, if committed by an American soldier in a hostile country against its inhabitants, are not only punishable as at home, but in all cases in which death is not inflicted, the severe punishment shall be preferred. . . .

There is no need here to examine the Brussels Declaration of 1874<sup>53</sup> or the Oxford Manual of 1880<sup>54</sup> since the former was never ratified, while the latter was drawn up by members of the Institute of International Law and had no official standing. Moreover, their contents were fully taken into consideration at the Hague

Conference of 1899, which produced Hague Convention II<sup>55</sup> with respect to the Laws and Customs of War on Land, which was itself replaced at the 1907 Conference by Convention IV.<sup>56</sup> It is the latter Convention which governed the law on occupation until its application was extended in 1949 by the Fourth Geneva Convention,<sup>57</sup> as possibly supplemented by the various principles now accepted as part of the international law concerning the protection of human rights, in particular the 1948 Universal Declaration of Human Rights<sup>58</sup> and the 1966 International Covenant on Civil and Political Rights.<sup>59</sup> Since the Geneva Conventions apply “to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them,”<sup>60</sup> it may be said as a general statement that:

[T]he law of belligerent occupation is applicable whenever one State occupies, in the course of an armed conflict, territory which was previously under the control of a hostile party to that conflict, irrespective of whether the displaced power was the lawful sovereign of that territory.<sup>61</sup>

But, this is only true of conflicting States which are parties to the Conventions, although the principles embodied in 1907 have been held to be part of customary law<sup>62</sup> and would, therefore, be applicable in any armed conflict. Moreover, the Martens Clause, set forth in the Preamble of Hague Convention IV of 1907, provides, in pertinent part, that:

[I]n cases not included in the Regulations [annexed to the Convention] . . . , the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.

In its advisory opinion on nuclear weapons, the International Court of Justice made clear that the Martens Clause is relevant even today, and “the fundamental rules [laid down in the Hague and Geneva Conventions] are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law.”<sup>63</sup>

Since it is now established that the principles embodied in the Hague Regulations and the Geneva Conventions, at least to the extent that they are in accordance with accepted customary law, are of general application binding on all, it is necessary to draw attention to some of the basic principles relating to occupation. The underlying principle in Hague Convention IV is to be found in Article 43:

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The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in that country.

The effect of this provision may be seen from the statement by the United States Military Tribunal in the *Hostages Case*:

The status of an occupant of the territory having been achieved, international law places the responsibility upon the commanding general of preserving order, punishing crime and protecting lives and property within the occupied territory. His power of accomplishing these ends is as great as his responsibility. But he is definitely limited by recognized rules of international law.<sup>64</sup>

This does not mean, of course, that the occupying power must maintain in force legal provisions that run counter to morality or basic principles underlying its own way of life, so that the Powers occupying Germany after its unconditional surrender were fully entitled to abrogate such German legislation as the Nazi “racial” laws, or, as has happened more recently, the cancellation of discriminatory legislation directed at women.

Other relevant provisions of Hague Convention IV include Article 45 (“It is forbidden to compel the inhabitants of occupied territory to swear allegiance to the hostile Power”), Article 46 (“Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected . . .”), Article 50 (“No general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which they cannot be regarded as jointly and severally responsible”), and Article 55 (“The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct”).

The law with regard to *occupatio bellica* was greatly expanded with the adoption of the 1949 Geneva Convention IV. This did not replace the provisions of the 1907 Convention, expressly stating that it is “supplementary” thereto.<sup>65</sup> This Convention is primarily directed to protecting the rights of civilians in occupied territory, limiting the rights of the occupant in so far as such civilians are concerned. Article 4 provides that “Persons protected by the convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of . . . a[n] occupation, in the hands of a[n] Occupying Power of which they are not nationals.” It has been said of this Convention that:

The emphasis is . . . upon the preservation of minimum humanitarian standards, through the prohibition of reprisals and collective punishments against the civilian population of the occupied territory, hostage-taking, torture, inhuman and degrading treatment, deportation, slave labour, wholesale seizure of property, and compulsion to perform work of military value. Both the Hague Regulations and the Fourth Geneva Convention also forbid the exploitation of the economy of the occupied territory for the benefit of the occupant's own economy. In exercising its power to determine such matters as exchange rates, the amount of money in circulation in the occupied territory, and the terms and conditions of trade, the occupying power must seek to provide for the good economic government of the occupied territory and not merely feather its own nest.<sup>66</sup>

As important as these humanitarian provisions are, perhaps even more significant is the provision in Article 1 that the Convention is to apply "in all circumstances," while by Article 2, which is common to all four of the 1949 Geneva Conventions, Convention IV is to apply:

[T]o all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them. [It] shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party even if the occupation meets with no armed resistance.

The provisions in Geneva Convention IV are applicable from the opening of the conflict or of the occupation and:

[I]n the case of occupied territory [its] applications . . . shall cease one year after the general close of military operations; however, the Occupying Power shall be bound, for the duration of the occupation, to the extent that such Power exercises the functions of government in such territory by the provisions of [certain specified Articles relating to the status and treatment of civilians]. Protected persons whose release, repatriation or re-establishment may take place after such dates shall meanwhile continue to benefit by the present Convention.<sup>67</sup>

By Article 27, the rights guaranteed by Convention IV are to be enjoyed by all "without any adverse distinction based . . . on race, religion or political opinion," and women are to be protected against "any attack on their honour." To ensure that protected persons enjoy their rights under the Convention, Article 29 provides that the "Party to the conflict in whose hands protected persons may be, is responsible for the treatment accorded to them by its agents, irrespective of any individual responsibility which may be incurred . . ." Article 31, in turn, states that "no physical or moral coercion shall be exercised against protected persons, particularly to

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obtain information from them or from third parties.” Moreover, Article 32 provides that it is prohibited to take:

[A]ny measure of such a character as to cause the physical suffering or extermination of protected persons in [the] hands [of any High Contracting Party]. This prohibition applies not only to murder, torture, corporal punishment, mutilation and medical or scientific experiments not necessitated by the medical treatment of a protected person, but also to any other measures of brutality, whether applied by civilian or military agents.

It is important to note that, in accordance with Article 8, protected persons may not agree to give up their rights under the Convention either “in part or entirety.” Similarly, Article 47 declares that:

[P]rotected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by the annexation by the latter of the whole or part of the occupied territory.

This raises nice questions regarding, for example, the Israeli actions with regard to territories under the control of the Palestine Administration Authority; although Israel contends that since it has never ratified the Fourth Convention it is not bound thereby. Moreover, it has argued that since the territories in question were never under the authority of any recognized sovereign they are merely “administered,” rather than “occupied”—whatever that distinction might be. However, Prime Minister Sharon has acknowledged, in connection with his undertaking to withdraw from parts of the territory in question, that they are in fact “occupied.” In this connection it might be of interest to draw attention to the following comment in the British Manual of the Law of Armed Conflict: “Whether the administration imposed by the occupying power is called a military government or civil government is not important. The legality of its acts will be determined in accordance with the law of armed conflict.”<sup>68</sup> The United States Army manual, *The Law of Land Warfare*, is to the same effect:

It is immaterial whether the government over an enemy’s territory consists in a military or civil or mixed administration. Its character is the same and the source of its authority is the same. It is a government imposed by force, and the legality of its acts is determined by the law of war.<sup>69</sup>

In the light of these statements, it would appear that the inclusion in the administration of civilian nationals of the occupied territory would not alter the situation. It might be questioned, therefore, whether the administrations that, under the supervision of occupying authorities, have been established in the Kosovo region of Yugoslavia, Afghanistan and Iraq are truly in line with the requirements of the Convention, for they purport to govern regardless of the provisions of the Convention or the customary law concerning occupation. In each of these instances, regardless of the installation of “local” administrations, the occupation, even though government might be conducted through local surrogates however described, has continued and appears likely to do so for some time, despite the holding of local elections. A comment by Professor Greenwood is relevant:

Although it is obviously difficult to apply the law of belligerent occupation in a prolonged occupation, that law is not thereby rendered inapplicable. Prolonged occupation raises many questions to which the Hague Regulations and the Fourth Geneva Convention provide no express answers. In particular, there is a need for change on a far greater scale during a prolonged occupation simply because of the way in which circumstances change over time. Nevertheless, there is no indication that international law permits an occupying power to disregard provisions of the Regulations or the Convention merely because it has been in occupation for a long period, not least because there is no body of law which might plausibly take their place and no indication that the international community is willing to trust the occupant with *carte blanche*. Any changes, it is suggested, must take place within the framework of the Hague Regulations and the Fourth Geneva Convention, the principles of which are flexible enough to accommodate at least some of the needs of a prolonged occupation. . . . The longer the occupation lasts, the greater the degree of change which is likely to be required but changes should still be made only in accordance with the broad principles [to be found in the Regulations and Convention].<sup>70</sup>

It must be borne in mind, when considering the Israeli situation, which was Professor Greenwood’s particular concern when making this comment, that Israel has refused to ratify Geneva IV and is only bound by those provisions of the Convention which give expression to customary law.

In so far as the Israeli situation is concerned, while the tendency has been until recently to describe the contested Palestinian lands—the West Bank region, also described as Judea and Samaria—held by Israel as “administered territories”<sup>71</sup> to which the Fourth Convention does not apply, Israeli courts, when called upon to consider the legality of actions by military authorities in those territories, have not always taken such a narrow approach, pointing out as early as 1968 that the Military Commander’s legislative powers derive from the actual occupation and not the Convention, but the judge stated:

[T]he State of Israel observes the provisions of the convention in practice. And since it is guided by the convention, inasmuch as the latter embodies humanitarian principles of civilized nations, I shall assume that I must have recourse to the convention as being of binding force. . . . Any Order made by the Commander is presumed to be valid, and its validity can only be impugned if the Order is on the face of it so unreasonable and exceptional and contrary to the most basic principles of natural justice and international morality accepted by civilized nations, that it stands to be rejected and the Military Court [set up under security Provisions Order issued by the Military Commander of the Region] by virtue of its inherent authority must disregard it as being enacted out of malice and arbitrariness rather than the achievement of any lawful purpose. . . .<sup>72</sup>

The “Military Court” referred to in this opinion was established under security Provisions Order issued by the Military Commander of the Region. Establishment of such military courts is consistent with Geneva Convention IV.<sup>73</sup>

As to the 1907 Hague Regulations, the Israeli judicial position is very clear. As was pointed out by the Supreme Court in 1982:

The rights of a resident in the area under military government vis-à-vis the military commander – rights subject to judicial review in a court of law of the occupying state – stem from the rules governing belligerent occupation in customary international law and contractual international law, insofar as they have been assimilated into the internal law of the occupying state by a valid internal act of legislation. In respect of Israel’s belligerent occupation, and in the absence of legislation which internalizes the principle [sic] norms of the laws of war relating to belligerent occupation, (the rules in force) are those included in the Hague Regulations. . . . Even though the Hague Regulations serve as an authority in this respect, the accepted attitude – which has also been accepted by this Court – is that the Hague Regulations are declarative in nature and reflect customary international law, applicable in Israel without an act of Israeli legislation.<sup>74</sup>

The Fourth Geneva Convention, not having been ratified by Israel, has never been the subject of Israeli legislation. However, as has just been noted, the courts will apply those parts of the Convention which it considers to be purely humanitarian in character and part of international customary law. It is for this reason that Israel applies the Hague Regulations appended to Convention IV of 1907, even though it contends there is no war since there is no State enemy, merely groups of “terrorists,” like the Popular Front for the Liberation of Palestine, who are not entitled to be treated as prisoners of war and are, therefore, not protected by the Third Geneva Convention.<sup>75</sup>

Among the activities of the Israel military administration claimed to be contrary to both the Hague Regulations and Geneva Convention IV is the destruction of the

homes of civilians who are related to an alleged terrorist. In the 1985 case of *Degalis v. Military Commander of the Judea and Samaria Region*, Judge Ben-Dror pointed out that the goal of the 1945 Defence (Emergency) Regulations permitting such demolition:

[W]as a deterrent effect, and this effect should apply not only to the terrorist alone, but also to the family living with him. A demolition of a terrorist's house cannot be considered a 'collective punishment' because the house about to be demolished is connected to the terrorist, and not to people unconnected with the matter. In cases such as this the High Court usually instructs the respondent [the Military Commander] to consider other deterrent measures, such as merely sealing off the terrorists' houses. However, the final decision on the nature of the measure to be adopted lies within the respondent's competence according to Regulation 119, and due to the gravity of the acts performed by the petitioners' relatives, the sanction of demolition of their houses seems quite a reasonable one.<sup>76</sup>

The conclusion to be drawn from these Israeli judicial decisions is that it matters little whether the occupying power regards the territory under administration as "enemy" or "terrorist" or by some other nomenclature. For Israel, at least, the law to be applied is made up of the occupation provisions of the Hague Regulations, together with those provisions of the Fourth Geneva Convention which are humanitarian in their purpose and as such are to be observed regardless of legislation ratifying the Convention.

The difference between the Israeli occupation and those that have occurred later lies in the fact that the former is the result of conflict following Israel's creation and has been conducted between Israel and forces that, for the main part, do not owe allegiance to any other State. The later occupations have all involved States, all of which are members of the United Nations, and have followed an intervention not of the normal conflict type, but have been based on some other ground, often in disregard of the terms of the Charter of the United Nations. It is necessary, therefore, to pay some attention to the basis for the intervention and the consequent occupation.

Before doing so, however, reference must be made to some apparent occupations under the auspices of the United Nations which have nothing inherently to do with the law of armed conflict, and, consequently, not with the law concerning occupation. There have been a number of incidents in which the members of the United Nations, particularly of the Security Council, have become concerned at the manner in which conflicting racial or tribal groups within a country, frequently one that has only recently achieved its independence, have indulged in outrageous behavior, or in which it has been feared the local hostilities might eventually

involve some third power. In such circumstances the United Nations has authorized the raising of a “peacekeeping” force which has been stationed in the affected territory with a view to bringing an end to hostilities by acting as an interposition force between rival groups.<sup>77</sup> This has happened, for example, in Cyprus, Korea, Israel, Somalia, Rwanda,<sup>78</sup> Kampuchea, and East Timor, to name but a few. However, these forces do not operate as occupiers, and the law, whether it is that of the Hague or of Geneva, has no relevance. That these forces are there as a matter of local tolerance may be seen from the manner in which the UN force in Gaza was withdrawn at the request of Egypt, the host country, in 1967.<sup>79</sup>

The intervention by peacekeepers in Haiti tends to stand in a position of its own, for in this case it has been alleged that the United States, which provided the bulk of the peacekeeping force, virtually forced Aristide, the democratically elected president of the country, to depart and arranged for his removal (Aristide asserts that the United States forcibly removed him), which, if true, is clearly an action interfering with local government contrary to customary international law. The United States denied doing so. While there was some indication that this action may have been popular at the time, by October 2004 agitation was taking place calling for his return.

Before considering the legal status of such interventions it must be pointed out that by Article 2, paragraph 4, of the Charter all Members “shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.” Further, as was indicated at the very beginning of this article, paragraph 7 of the same Article provides:

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this Principle shall not prejudice the application of enforcement measures under Chapter VII.

Chapter VII is concerned with “Action with respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression.” *Prima facie*, this would suggest that, unless ill treatment of nationals by one State constituted a direct threat to the well-being of another, no State or the United Nations itself would have a right to intervene on behalf of those persecuted. The situation might be altered by virtue of the existence of treaty obligations concerning human rights undertaken by the persecutor, although it must be borne in mind that none of the presently existing treaties in this field confers a right of direct intervention on any other party to such treaties.

In accordance with the law of treaties, unless the treaty specifically creates such a right, by both customary and conventional law, breach of a treaty does not give private citizens any right recognized and enforceable by international law,<sup>80</sup> and the various treaties concerned with human rights have not created such a right *expressis verbis*. The only other recourse to a national would depend upon the State party to the treaty and alleged to be in breach of it having created such a right under its national law. The only right accruing to other parties to the treaty would be by way of damages, provided it could prove that its own interests had in fact been adversely affected by the conduct objected to.

The first case that calls for consideration arose out of the dissolution of the Socialist Federal People's Republic of Yugoslavia and the conflicts which began in 1991. These conflicts were both international, as for example, between Croatia and Serbia, and non-international, as for instance, between Bosnia and Bosnian Serbs seeking to join Serbia. In accordance with customary international law, an established government is entitled to take such action as it deems necessary to suppress a revolt, free from any active intervention by any other State, and it would appear from Article 2, paragraph 7 of the Charter, free from intervention by the United Nations. In addition, in this particular instance it is important to note that all of the parties concerned in the Yugoslav fighting accepted the provisions of Protocol II of 1977.<sup>81</sup>

By Article 3 of the Protocol, non-intervention by third States, whatever the circumstances, is condemned emphatically:

1. Nothing in the Protocol [including Part II concerning Humane Treatment] shall be invoked for the purpose of affecting the sovereignty of a State or the responsibility of the government, by all legitimate [it does not say "reasonable"] means, to maintain or re-establish law and order in the State or to defend the national unity and territorial integrity of the State.

2. Nothing in the Protocol shall be invoked as a justification for intervening, directly or indirectly, in the armed conflict or in the internal or external affairs of the High Contracting Party in the territory of which the conflict occurs.

Of course, States, for example the United States, which had not become a party to the Protocol, would not be bound by this provision. It would, however, be bound by the well-established principle of non-intervention under customary law and reaffirmed in the Charter.

Apart from the conflicts between Bosnia, Croatia and Serbia, a major conflict took place in the Serb remnant, particularly as between the Serb authorities and the Albanian population that constituted a majority in Kosovo. The attempt by the

Serbs to reassert their authority resulted in atrocities on both sides, with widespread allegations that the authorities were carrying out extensive policies of “ethnic cleansing” involving expulsions, killings and mass rapes of the Albanians. Some would argue that “ethnic cleansing” was a sanitized term for genocide. Article II of the Genocide Convention of 1948 defines genocide as meaning:

[A]cts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.<sup>82</sup>

It can hardly be denied that slaughtering the men, and forcing women and children to flee their homes and take to the hills in winter without adequate food or clothing, would fall within this definition. While the Convention elevated genocide to a crime, it made little provision for its punishment, nor did it give any party a right to intervene to terminate acts of genocide being committed by some other party. *In any case, by failing to describe what was going on by the treaty term would suggest that no such right could be asserted.*

Nevertheless, when Serbia rejected a proposal that a force of North Atlantic Treaty Organization (NATO) personnel be admitted and that a plebiscite under NATO supervision be held on Kosovo’s future after three years of interim government, and followed this rejection with increased pressure upon the Kosovar Albanian population, NATO indicated that military action against the Serbs was inevitable and in July 1999 NATO began a bombing campaign. This is not the place to discuss the NATO intervention<sup>83</sup> either in accordance with the United Nations Charter or the North Atlantic Treaty<sup>84</sup> itself. Suffice it to say that Article 5 of the Treaty defines the geographic area of its competence, which does not include the former State of Yugoslavia, and requires an armed attack against a signatory for the obligations of the Treaty to come into effect. It is difficult to appreciate how a non-international conflict in Yugoslavia, not a member of NATO, in any way threatened the security of any NATO member. NATO, however, maintained that its intervention was not in any way politically directed with the aim of breaking up what remained of the former Yugoslavia or to recognize an independent Kosovo, but was purely humanitarian, directed at terminating the ethnic cleansing and other

atrocities committed by the Serbs against the Muslim Albanian population, and to enable the latter to return home in safety and enjoying the same rights as all other Serbian citizens in the area. Here we have an approach that is reminiscent of provisions to be found in the 1878 Treaty of Berlin. Article XXXV thereof provides:

In Serbia the difference of religious creed and confession shall not be alleged against any person as a ground for exclusion or incapacity in matters relating to the enjoyment of civil and political rights, admission to public employments, functions, and honours, or the exercise of the various professions and industries, in any locality whatever. The freedom and outward exercise of all forms of worship shall be assured to all persons belonging to Serbia, as well as to foreigners. And no hindrance shall be offered either to the hierarchical organization of the different communions, or to their relations with their spiritual heads.

While it is true that there is no established right of intervention, whether leading to occupation or not, in customary international law, one cannot ignore the fact that international law is a developing process. The Preamble to the United Nations Charter affirms “faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small.” This has led to the adoption of a variety of instruments reaffirming the existence of and support for human rights. With few States presuming to oppose these assertions, there is a tendency to assert that there is now, if not a *jus cogens*, at least a developing customary law in this field binding upon and enforceable by all. Given this trend, it may be contended that the NATO intervention is legally justifiable. What may be more difficult to support is the continued presence of NATO forces and a UN administrator in the territory now that “peace” has officially been restored, and purportedly free elections have been held in Serbia. However, the form of those elections and the persons permitted to run for office have all been vetted and approved by the non-local internationally imposed administrator. While there is no official occupation in existence and no suggestion that the area is under the umbrella of the Fourth Geneva Convention, the members of the “occupying” forces are immune from the local jurisdiction, and there appears to be little effort made by the sending State authorities to try their personnel in accordance with their own national law for offenses committed against local inhabitants.<sup>85</sup>

It remains to discuss the situation in both Afghanistan and Iraq, particularly as the United States has taken the lead in dealing with both these countries and continues to do so, and remains somewhat indifferent to the view of other States offering support in seeking to restore order.

On September 11, 2001, three hijacked American aircraft were used as destructive weapons against the World Trade Center in New York and the Pentagon in

Washington, D.C., while a fourth plane was likely prevented by its passengers from crashing into the White House itself. The immediate reaction of the United States Government was to declare a “war against terrorism,” without any indication as to the State against which this war was to be waged. There was strong evidence to indicate that the attacks had been organized by al-Qaeda, a group of Islamic fundamentalists led by Osama bin Laden, a renegade Saudi citizen, who had been responsible for a number of prior attacks against United States and other western interests. There was also evidence to indicate that bin Laden was in Afghanistan where he maintained or financed a number of terrorist training camps. Afghanistan was at that time administered by an Islamic fundamentalist administration (the Taliban) that constituted the country’s *de facto* government, although it was not internationally recognized. The Taliban authorities were called upon to arrest bin Laden and surrender him to the United States for trial. When they refused to do so, the country was attacked by US forces, supported by the United Kingdom and others.

There was no declaration of war and, despite the fact that Taliban fighters were representative of their “government” and as such distinguishable from al-Qaeda, the United States refused to recognize them as legitimate combatants entitled to treatment when captured as prisoners of war. Instead they were described as “enemy combatants,” a classification not known to the law of armed conflict, which regards all captured enemy personnel belonging to an organized force as prisoners of war. If not clearly recognizable as entitled to be described as such, they are entitled to be treated as if they were prisoners of war until such time as their status has been clarified by a tribunal.<sup>86</sup> It is true that the supporters of the Taliban administration were not easily identifiable as members of a regular force, but they were certainly no less identifiable than those constituting the Northern Alliance, which purported to be the remnant of the government overthrown by the Taliban. Moreover, in view of the camouflage worn by many members of modern armed forces—as well as by many, particularly younger, civilians—it may well be difficult to identify these too, especially those members who participate in undercover missions wearing civilian or other dress, as distinct from national uniform, whether in place of or additional to their regular uniform.<sup>87</sup> Having displaced the Taliban, the United States treated as an ally the Northern Alliance as representatives of the government displaced by the Taliban, and subsequently selected personnel from among its members, together with some tribal leaders, to form a council to elect a government under the leadership of an individual acceptable to the United States. In the meantime the latter was able to persuade some third States to assist in the administration and rebuilding of Afghanistan, and, as in Kosovo, some of the military supervisory activities have been undertaken by NATO—although there has

been no attempt to explain how such an activity so far from the North Atlantic area falls within NATO's competence. At no time has it been suggested that there is an occupation or that there is any room for any of the Geneva Conventions to be applied.

Moreover, a new development in the practice of occupation has been introduced in Afghanistan. A number of armed western security personnel, often ex-servicemen, who may well be described as mercenaries and therefore illegal combatants,<sup>88</sup> have been recruited to assist the occupying authority and the Afghan administration in protecting commercial interests, usually western in character. Such personnel have no interest in or concern for restrictions imposed by the Hague or Geneva Conventions and their activities go largely unchecked by either the allied or Afghan authorities.<sup>89</sup>

Despite the existence of an acceptable Afghan administration and the participation of other States, the United States has removed captured personnel from Afghanistan to Guantanamo Bay in Cuba, where it has a naval base leased in virtual perpetuity from the Cuban government.<sup>90</sup> Among the captives are members of the Taliban, who, it may be suggested, were legitimately engaged in combat on behalf of their government against the United States "invader," and who might be regarded, *prima facie*, as entitled to Third Convention protection, instead of being denied, until recently,<sup>91</sup> any form of independent legal protection. Also among the Taliban captives are non-Afghan Muslims who volunteered to defend a Muslim administration against rebels or foreign forces seeking to overthrow that administration. It may be suggested that they were entitled to the same treatment as the French Foreign Legion, the LaFayette Squadron or any American who joined the allied forces in either World War before the United States itself became a belligerent. Even when these captives have held the nationality of one of the American allies, as have a number from Britain or Pakistan, the United States has declined to treat them as in any way protected by the law of armed conflict nor, with rare exceptions, has it been prepared to hand them over to their own government for treatment in accordance with their national law. Moreover, it would seem that where some detainees are concerned no details as to name or even place of detention are known.<sup>92</sup>

In practice, despite the existence of a nominally independent government, Afghanistan is under effective US occupation since it would appear that the "government" acts only with the consent of the United States, even though the latter contends that any actions taken by them against local "terrorists" (a term which is being used somewhat indiscriminately both in Afghanistan and Iraq even against those who might be more correctly described as "insurgents") are only undertaken at the request or with the consent of the Afghan administration. Both the United

States and the Afghan authorities deny that an occupation exists, and the United States has indicated that it will withdraw if requested after the Afghan election which is due to take place shortly. Until then, it is the United States that is seeking to ensure that conditions exist for such an election to be held.

At least in so far as Afghanistan is concerned, it is possible to argue that the protection offered by the Taliban to the al-Qaeda terrorist movement with the latter's threats and actions against third States was enough to regard the Taliban as an ally of Osama bin Laden's supporters and, as such, sufficient as a coconspirator to warrant action against it. Additionally, the Taliban governmental authority was extremely restrictive and in virtual denial of all human rights, particularly where women were concerned, although this argument was not originally of any major significance.

In the case of Iraq, no similar contentions could be put forward. Instead reference was made to the United Nations resolutions terminating hostilities at the end of the conflict with Iraq consequent upon its invasion of Kuwait. By Resolution 687,<sup>93</sup> which was adopted in 1991, Iraq was required to get rid of all its chemical and biological weapons as well as its weapons of mass destruction and to submit to international inspection to ensure compliance with these requirements. After 9/11, the United States contended that Iraq was not fulfilling its obligations and was not cooperating with the United Nations inspectors. When the Security Council failed to take the further action desired by the United States, the latter, supported by the United Kingdom, launched a military offensive against Iraq, while adding to its complaint the assertion that Saddam Hussein, president of Iraq, was a partisan of al-Qaeda and even claimed that Iraq was party to the September attacks on the United States, a claim for which there appears to have been no substantive evidence whatever. The United Kingdom added the complaint that Iraq was in breach of every international obligation concerning human rights and that the administration should be overthrown even on this ground alone.

As in the case of Afghanistan, there was no support from the United Nations nor was there any declaration of war.<sup>94</sup> The actual combat operations were not of great duration, the Iraqi armed forces soon surrendered, and President Bush proclaimed that the operation was successfully terminated. In that case, in accordance with the Third Geneva Convention,<sup>95</sup> all prisoners of war other than those held for potential trial as war criminals must be released, an obligation only partly complied with. Further, the United States declared that Saddam Hussein and many of his leading military, political and scientific advisers had committed war crimes during the first Gulf War following the Iraqi invasion of Kuwait, as well as crimes against humanity, particularly against dissident Iraqi nationals. There was again no suggestion that these latter were to be treated in accordance with the Geneva Conventions,

although Saddam at least was permitted to see International Committee of the Red Cross representatives. Moreover, the United States arranged for Saddam and some of the others to be handed over to the new Iraqi administration for trial, thus raising the possibility of trials by vengeance, even though it was asserted that proper precautions would be taken to ensure that they receive a fair trial.

With the overthrow of the government, the United States, without acknowledging that it was an occupant subject to the restrictions imposed by the Hague or Geneva Conventions, became the governing authority in Iraq, appointing a United States citizen as supreme governor, although he was later replaced by an American-sponsored Iraqi interim administration, with the United States making clear which local politicians it would not tolerate. The United States signed an agreement with this administration undertaking to withdraw from Iraq should the Iraqi government request it to do so. In the meantime, the United States remained the supreme authority for security purposes and agreed not to undertake offensive operations against “terrorists,” even though some of those so described might more properly be considered as insurgents. It must be kept in mind that the overthrow of Saddam Hussein and his government and the disbandment by the occupant of the Iraqi armed forces did not mean that all support for the legitimate Iraqi government had terminated, particularly as many of these forces found themselves without prospects of employment. Many of them did in fact continue operations of a warlike character against both the “invading” military forces and representatives of the Iraqi administration. Subsequently the United States began allowing members of the former Iraqi forces, after proper vetting, to rejoin the newly-created Iraqi armed or police forces.

When it became clear that Iraq had no weapons of mass destruction and had destroyed under United Nations supervision its chemical and biological weapons, a fact later confirmed by the head of the United States Iraq Survey Group in his Final Report,<sup>96</sup> the United States and its allies changed the balance of their arguments concerning the invasion and subsequent occupation. It now seemed that the most important aim of their operations was to bring democracy to Iraq, sometimes claiming that this would prove an example for other Middle East States, the governments of many of which were dictatorial in character. This claim that the spread of democratic governments everywhere the United States and its allies considered it to be desirable—even absent United Nations approval if this could not be obtained—is reminiscent of policies pursued by the Concert of Europe in the nineteenth century.

In both Afghanistan and Iraq, the United States, backed by its allies, has supported its nominee in the local administration in organizing an election under American protection. The presumption appears to be that with an election, even

though local conditions might not make it feasible to be held throughout the occupied area, a new era will be created with a popular government taking over, one that will fully respect human rights, will not constitute a threat to any neighbor and will not seek to acquire weapons of mass destruction or others now considered contrary to international law.

This view that the introduction of the trappings of democracy to a society that has never known it and the history of which is riven with local lustings for power, hatreds and jealousies is the answer to all problems and the way to a future peaceful existence for all is similar to the situation that existed particularly in former British colonies in Africa during the disassembling of empire. At that time the attitude seems to have been,

[Y]ou are now independent. We are giving you a building that looks like a London railway terminus which is your legislature. In addition, we are providing you with a ceremonial chair which is the ‘Speaker’s Chair’, although the man who sits in it does not speak. There will be a person dressed somewhat like Little Lord Fauntleroy known as the Speaker, who will sit in the Speaker’s Chair from which he is not allowed to speak. Then we will present you with an ornamental mace as a symbol of the Speaker’s authority, but which must not be used as you were accustomed historically to use a mace. Finally, we will give you a presentation copy of Erskine May’s *Parliamentary Procedure* and you will hold an election. After this, the world will know that you are a democracy.

Unfortunately, the years since those “heady” days have shown how artificial these hopes were. There is no reason to assume that the situation in either Afghanistan or Iraq will be any different.

While there may be good grounds for arguing that the operations against the former Yugoslavia and in Kosovo, together with the invasions of both Afghanistan and Iraq are contrary to the Charter of the United Nations and the obligations of the members, and are thus illegal, it should be noted that there has been no attempt in that organization to condemn any of them, not that there could have been any decision by the Security Council to this effect in view of the vetoes that would have been exercised by the United States and the United Kingdom.<sup>97</sup> It must, however, be noted that the governments responsible for the invasions have sought to justify their interventions on the basis of the need to protect and assert human rights. In this endeavor, they argue, they have done nothing contrary to the principles relating to humanitarian intervention discussed earlier in this paper, particularly when the international community as such has failed to take action collectively. In their case, this contention is strengthened by the generally accepted view that respect for human rights is now part of the international *jus cogens* that must be respected and protected by all.

In these instances, however, since the enforcing powers maintained that they were present only for the good of the country affected and the welfare of the world, they, or at least the United States, tended to argue that their opponents were not entitled to the protection of the law. For the main part, however, military personnel captured in Iraq have, while in detention, been treated in accordance with the regulations concerning prisoners of war, subject to the exceptions respecting some members of both the United States and United Kingdom forces responsible for holding and interrogating Iraqi military and civilian detainees.<sup>98</sup> Given the circumstances in which the invasions took place, the existence of interim governments in both Afghanistan and Iraq and the tendency to describe all opponents as terrorists, it is perhaps not surprising that the occupying authorities have not been too concerned about the application of the Hague or Geneva Conventions. It would appear, therefore, that by and large there has been no “new” law of occupation, but an application of behavior conditioned by the circumstances of the case.

For the future, perhaps, and to avoid the controversies that these operations have given rise to, the writer may be permitted to refer to a proposal he first put forward in 1994:

When a government is unwilling or unable to protect, or persistently infringes the human rights of large segments of its population, or the government structure has so disintegrated that law and order have virtually ceased to exist, it may then well be time for the United Nations to take over the administration until such time as normal conditions have been restored. . . . However, it would perhaps be more desirable that this be done not on an *ad hoc* basis – nor by a group of States assuming such authority unto itself – but on the basis of a permanent United Nations body made up of trained personnel from a variety of countries and regions. . . . The members of such administrative or governing commission should not be drawn from nationals of the great powers among whom, despite the end of the cold war, political rivalries and manoeuvring is still likely to take place.<sup>99</sup>

At the same time, it would be necessary to establish rules, probably by way of a convention somewhat similar to Geneva Convention IV, indicating the manner in which persons in the country taken over are to be treated.

Such a proposal would be met by opposition from the great powers since it is suggested they be left out of the administration to be established, while they might well be called upon to assist in its financing and in the training of personnel over whose activities they would have no control. In addition, opposition would almost certainly be forthcoming from some of the smaller newly independent and developing countries which are jealous of their sovereignty and are aware that they are more likely to be the “victims” of such a procedure than any other State. However,

if such a policy were adopted, there might be less doubt as to the legal basis for the intervention and consequent occupation, and a more substantial foundation for contending that it is in accordance with the rule of law.

*Notes*

1. EMMERICH DE VATTEL, 3 THE LAW OF NATIONS 7 (Charles G. Fenwick ed., Carnegie Institute of Washington 1916) (1758).
2. U.N. Charter art. 2, para 7.
3. See, e.g., *Island of Palmas (U.S. v. Neth.)*, 1928, 2 R.I.A.A. 829, 839; see also *Western Sahara (Advisory Opinion)* 1975 I.C.J. Reports 12, 39 (Oct. 16) and M.F. LINDLEY, *THE ACQUISITION AND GOVERNMENT OF BACKWARD TERRITORY IN INTERNATIONAL LAW* (1926).
4. 1878 Treaty of Berlin (Great Britain, Austria-Hungary, France, Germany, Italy, Russia and Turkey), art. VI, July 13, 1878, 153 Consol. T. S. 172; reprinted in *MAJOR PEACE TREATIES OF MODERN HISTORY, 1648–1967*, at 975 (Fred L. Israel ed., 1967).
5. See *infra* pp. 190–94.
6. HUGO GROTIUS, *II DE JURE BELLI AC PACIS* 504–5, 508, 582, 584 (Francis W. Kelsey trans., Clarendon Press 1964) (1625).
7. See, e.g., IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 338–42 (1963); see also Imre Szabo, *Fundamental Questions Concerning the Theory and History of Citizens Rights*, in *SOCIALIST CONCEPT OF HUMAN RIGHTS* 267 (Jozsef Halasz ed., 1966).
8. VATTEL, *supra* note 1, at 116, 130–2.
9. See, e.g., President Delivers State of the Union Address, Jan 29, 2002, available at <http://www.whitehouse.gov/news/releases/2002/01/20020129-11.html>.
10. SAMUEL VON PUFENDORF, *DE JURE NATURAE ET GENTIUM* (C.H. & William A. Oldfather trans., Clarendon Press 1934) (1688).
11. SAMUEL VON PUFENDORF, *ELEMENTORUM JURISPRUDENTIAE UNIVERSALIS* 292–5 (William A. Oldfather trans., Clarendon Press 1931) (1672).
12. VON PUFENDORF, *supra* note 10, at 1307.
13. SAMUEL VON PUFENDORF, *DE OFFICIO HOMINIS ET CIVIS* 140 (Frank G. Moore trans., Oxford University Press 1927) (1682).
14. SIR ROBERT PHILLIMORE, 1 *INTERNATIONAL LAW* 622–3 (1879) [italics in original].
15. WILLIAM E. HALL, *TREATISE ON INTERNATIONAL LAW* 302–4 (A. Pearce Higgins ed., 4th ed. 1924) (1895) [emphasis added].
16. This was largely the ground on which India invaded East Pakistan during the Bangladeshi struggle for independence in 1971.
17. JOHN WESTLAKE, 1 *INTERNATIONAL LAW* 305–07 (1904).
18. John Ibbitson, *Standing on Guard for Darfur*, *GLOBE AND MAIL* (Toronto), Sept. 3, 2004, at A4.
19. See CYRUS ADLER & AARON M. MARGALITH, *WITH FIRMNESS IN THE RIGHT: AMERICAN DIPLOMATIC ACTION AFFECTING JEWS 1840–1945*, at 261 *et seq.* (1946).
20. JOHN BASSETT MOORE, 5 *DIGEST OF INTERNATIONAL LAW* 833 (1906).
21. JOHN BASSETT MOORE, 6 *DIGEST OF INTERNATIONAL LAW* 32 (1906) [emphasis added].
22. ELLERY C. STOWELL, *INTERNATIONAL LAW* 349, 352 (1931) [emphasis added].
23. ARNOLD J. TOYNBEE, *SURVEY OF INTERNATIONAL AFFAIRS* 1931, at 371 (1934).
24. H. A. Smith, *Where the League of Nations Failed*, *THE LISTENER*, Jan. 26, 1938, at 183.

25. Agreement for the Lease to the United States of Lands in Cuba for Coaling and Naval Stations, Feb. 23, 1903, T.S. 418, 6 Bevans 1113 [hereinafter Agreement for the Lease].
26. *In re Guzmán and Latamble*, ANNUAL DIGEST AND REPORTS OF PUBLIC INTERNATIONAL LAW CASES, 1933–34, Case No. 43 (Cuba 1933).
27. Convention Relative to the Treatment of Prisoners of War, art. 5, Aug. 12, 1949, 75 U.N.T.S. 135, *reprinted in* DOCUMENTS ON THE LAWS OF WAR 244 (Adam Roberts & Richard Guelff eds., 3d ed. 2000) [hereinafter Geneva Convention III], provides that:

Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4 [defining those who are prisoners of war], such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.
28. *See, e.g.*, Neil A. Lewis, *U.S. Erecting a Solid Prison at Guantanamo for Long Term*, NEW YORK TIMES, Oct. 23, 2004, at A20.
29. *Gherebi v. Bush*, 352 F.3d 1278 (9th Cir. 2003), *reprinted in* 43 INTERNATIONAL LEGAL MATERIALS 381 (2004).
30. *Id.* at 1283 n.7.
31. Done Dec. 16, 1966, 999 U.N.T.S. 171.
32. *Gherebi*, *supra* note 29, at 1286.
33. *Id.* at 1287.
34. *Id.* The 1903 Agreement for the Lease of Guantanamo Bay was extended in 1934 by agreement between the United States and Cuba. It states that the lease “shall continue in effect” “until the two contracting parties agree to the modification or abrogation of” the lease, provided that the United States does not abandon the naval station. Treaty Defining Relations with Cuba, U.S.-Cuba, art. III, May 29, 1934, 48 Stat. 1682, 1683.
35. *Gherebi*, 352 F.3d at 1289–1290. In its decision, the court cited *States v. Rice* 17 U.S. (4 Wheat) 246, at 254 (“hostile occupation gives ‘firm possession’ and the “fullest rights of sovereignty” to the occupying power, while suspending the sovereign authority of the land whose territory is being occupied.”)
36. *See, e.g.*, award by Judge Huber in Island of Palmas Case (Neth. v. U.S.), Hague Court Reports 2d (Scott) 83 (Perm. Ct. Arb. 1928), 2 U.N. Rep. Intl. Arb. Awards 829, 831.
37. HMSO Command Paper 1093 (1960).
38. Treaty of Versailles, June 28, 1919, 225 Consol. T. S. 188, *reprinted in* II MAJOR PEACE TREATIES OF MODERN HISTORY, *supra* note 4, at 1265.
39. *Id.*, art. 429.
40. Declaration regarding the Defeat of Germany and the Assumption of Supreme Authority of the Occupying Powers, June 5, 1945, HMSO Command Paper 6658 (1953); *see also* WOLFGANG FRIEDMANN, THE ALLIED MILITARY GOVERNMENT OF GERMANY (1947).
41. *See* Instrument of Surrender, 1945; Moscow Declaration, December 1945; and Presidential document on United States Post-Surrender Policy for Japan, all *reprinted in* US State Department, Occupation of Japan: Policy and Progress 62, 69–73, 73–81 (1946); *see also* Leslie C. Green, *Law and Administration in Present-day Japan*, 1 CURRENT LEGAL PROBLEMS 188 (1948).
42. *See* LUDOVICO N. BENTIVOGLIO, LA ‘DEBELLATIO’ NEL DIRITTO INTERNAZIONALE (1948).
43. San Francisco Peace Treaty, Sep. 8, 1951, *reprinted in* IV MAJOR PEACE TREATIES OF MODERN HISTORY, *supra* note 4, at 2641; *see also* Leslie C. Green, *Making Peace with Japan*, 6 YEARBOOK OF WORLD AFFAIRS 1 (1952).
44. *See* Occupation of Japan, *supra* note 41, at 117; AMOS J. PEASLEE, 2 CONSTITUTIONS OF NATIONS 518 (1966).

## *Is There a “New” Law of Intervention and Occupation?*

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45. See 1 OPPENHEIM'S INTERNATIONAL LAW 192 n.37 (9th ed. 1996); see also *In re Mangold's Patent*, (1950) 68 R.P.C. 1.
46. Moscow Conference, Joint Four-Nation Declaration, Oct. 1943, 161 British and Foreign State Papers 288 (1954), available at <http://www.ibiblio.org/pha/policy/1943/431000a.html>.
47. Agreement on the Machinery of Control in Austria, Vienna, June 28, 1946, 138 U.N.T.S. 85.
48. Requisition of Private Property (Austria) Case, ANNUAL DIGEST AND REPORTS OF PUBLIC INTERNATIONAL LAW CASES, 1949, Case No. 188 (Austria).
49. Treaty for the Re-establishment of an Independent and Democratic Austria, May 15, 1955, 217 U.N.T.S. 223, reprinted in IV MAJOR PEACE TREATIES OF MODERN HISTORY, *supra* note 4, at 2709.
50. See W. S. Armour, *Custom of Warfare in Ancient India*, 8 TRANSACTIONS OF THE GROTIUS SOCIETY 71, 81 (1922).
51. Instructions for the Government of Armies of the United States in the Field, General Order No. 100, Apr. 24, 1863, reprinted in THE LAWS OF ARMED CONFLICTS 3 (Dietrich Schindler & Jiri Toman eds., 4th ed. 2004); see also Richard R. Baxter, *The First Modern Codification of the Law of War*, 3 INTERNATIONAL REVIEW OF THE RED CROSS, No. 25, at 171 (1963).
52. After the fall of Baghdad and its occupation by United States forces, there was much criticism at the “failure” of those forces adequately to protect Iraqi works of art, museum pieces, and the like.
53. Reprinted in THE LAWS OF ARMED CONFLICTS, *supra* note 51, at 21.
54. *Id.* at 29.
55. Convention (II) With Respect to the Laws and Customs of War on Land, July 29, 1899, 22 Stat. 1803, 1 Bevans 247, reprinted in *id.* at 63.
56. Convention (IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631, reprinted in *id.* at 55.
57. Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287, reprinted in *id.* at 575.
58. G.A. Res. 217A (III), Dec. 10, 1948, available at <http://www.un.org/Overview/rights.html>.
59. G.A. Res. 2200 A (XXI), Dec. 16, 1966, 999 U.N.T.S. 171, available at <http://www.clea.org.uk/treaties/Iccpr.html>.
60. See Common Article 2 of each of the four Geneva Conventions of 1949, reprinted in DOCUMENTS ON THE LAWS OF WAR, *supra* note 27, at 197, 222, 244 and 301, respectively.
61. Christopher Greenwood, *The Administration of Occupied Territory in International Law*, in INTERNATIONAL LAW AND THE ADMINISTRATION OF OCCUPIED TERRITORY 243 (Emma Playfair ed., 1992).
62. The *Nuremberg Judgment* 1946, HMSO, Command 6964 (1946), at 65 states that:

The rules of land warfare expressed in the Convention undoubtedly represented an advance over existing international law as it existed at the time of their adoption. But the Convention expressly stated that it was an attempt ‘to revise the general laws and customs of war’, which it thus recognised to be then existing, but by 1939 these rules laid down in the Convention were recognised by all civilised nations, and were regarded as being declaratory of the laws and customs of war. . . .
63. Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226, 257 (July 8).
64. *In re List* (1948) 11 Trials of War Criminal 1230, 1244–5.
65. *Supra* note 57, art. 154.
66. Greenwood, *supra* note 61, at 250.
67. *Supra* note 57, art. 6.

68. United Kingdom Ministry of Defense, *The Manual of the Law of Armed Conflict*, Sec. 11.19 (2004).
69. Department of the Army, *The Law of Land Warfare*, FM 27-10, July 1956, ¶ 368.
70. Greenwood, *supra* note 61, at 263; *see also* the opinion of Judge Barak in *A Cooperative Society Lawfully Registered in the Judea and Samaria Region v. Commander of the IDF Forces in the Judea and Samaria Region*, 37 (4) Piskei Din (Reports of Supreme Court, Israel) 1982, *reprinted in* 14 ISRAEL YEARBOOK OF HUMAN RIGHTS 301, 307, 313 (1984):

The concrete content that we shall give to Art. 43 of the Hague Regulations in regard to the occupant's duty to ensure life and order will not be that of public life and order in the nineteenth century, but that of a modern civilized State at the end of the twentieth century. . . . The transportation needs of the local population continue to increase and it is impossible to freeze the condition of the roads in the Region. Therefore the Military Administration was authorized to elaborate a roads project to respond to the present and future needs of the population. Indeed, the roads will remain after the termination of the military administration, but this fact does not matter. There is nothing in the roads project that might blur the distinction between a military administration and an ordinary government. . . .
71. *See, e.g.*, J. Singer, *The Establishment of a Civil Administration in the Areas Administered by Israel*, 12 ISRAEL YEARBOOK ON HUMAN RIGHTS 259 (1982); *see also* Mustafa Yusef v. Manager of the Judea and Samaria Central Prison, 17 ISRAEL YEARBOOK ON HUMAN RIGHTS 309 (1984).
72. *The Military Prosecutor v. Zuhadi Saleh Hussein Zohar*, 1968, *reprinted in* 1 ISRAEL YEARBOOK ON HUMAN RIGHTS 421 (1971).
73. *Supra* note 57, art. 66.
74. *A Cooperative Society Lawfully Registered in the Judea and Samaria Region v. Commander of the IDF Forces in the Judea and Samaria Region*, 1982, *cited in* Mazen Qupty, *The Application of International Law in the Occupied Territories as Reflected in the Judgments of the High Court of Justice in Israel*, in *INTERNATIONAL LAW AND THE ADMINISTRATION OF OCCUPIED TERRITORY*, *supra* note 61, at 90.
75. *Supra* note 28. *See also* *The Military Prosecutor v. Omar Mahmud Kassem et al.*, 1969, *reprinted in* 1 ISRAEL YEARBOOK ON HUMAN RIGHTS 456 (1971).
76. *Reprinted in* 17 ISRAEL YEARBOOK ON HUMAN RIGHTS 315 (1987).
77. *See, e.g.*, ROSALYN HIGGINS, *I UNITED NATIONS PEACEKEEPING 1946–1967*, at 271–3 (1969); MICHAEL J. KELLY, *PEACE OPERATIONS: TACKLING THE MILITARY, LEGAL AND POLICY CHALLENGES* (1997).
78. *See, e.g.*, ROMEO DALLAIRE, *SHAKE HANDS WITH THE DEVIL* (2003).
79. HIGGINS, *supra* note 77, at 295 *et seq.*
80. *Civilian War Claimants Association v. The King* [1932] A.C. 14. (House of Lords).
81. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609, *reprinted in* THE LAWS OF ARMED CONFLICTS, *supra* note 51, at 775 [hereinafter Protocol II].
82. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 27, at 180.
83. For a discussion of the NATO intervention, *see, e.g.*, LEGAL AND ETHICAL LESSONS OF NATO'S KOSOVO CAMPAIGN (Andru Wall ed., 2002) (Vol. 78, US Naval War College International Law Studies).
84. The North Atlantic Treaty, Washington, Apr. 4, 1949, 34 U.N.T.S. 243.
85. *See* A. LeBor, *NATO and UN 'Fund Prostitution in Kosovo'*, TIMES (London), May 7, 2004, at A19.

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86. See *Public Prosecutor v. Koi* [1968] A.C. 829 (P.C. 1967), and *Osman bin Haji Mohamed Ali v. Public Prosecutor* [1969] 1 A.C. 430 (P.C. 1968).
87. See W. Hays Parks, *Special Forces' Wear of Non-Standard Uniforms*, 4 CHICAGO JOURNAL OF INTERNATIONAL LAW 493 (2003).
88. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 47, June 8, 1977, 1125 U.N.T.S. 3, reprinted in DOCUMENTS ON THE LAWS OF WAR, *supra* note 27, at 422. See also International Convention Against the Recruitment, Use, Financing and Training of Mercenaries, G.A. Res. 44/34, U.N. GAOR, 72nd plen. mtg., art. 1, U.N. Doc. A/RES/44/34 (Dec. 4, 1989), reprinted in 29 INTERNATIONAL LEGAL MATERIALS 89.
89. See Hamida Ghafour, *Afghans Learning the Price of Security*, GLOBE AND MAIL (Toronto), Oct. 8, 2004, at A14.
90. See *supra* text accompanying notes 25–35.
91. *Gherebi v. Bush* 352 F.3d 1278 (9th Cir. 2003); reprinted in 43 INTERNATIONAL LEGAL MATERIALS 381 (2004).
92. See, e.g., D. McGory, *Ghost Prisoners Haunt Terrorism Hunt*, TIMES (London), Sept. 11, 2004, at 19 (“President Bush says he does not know how many ‘ghost prisoners’ there are, but that interrogating them in secret has proved crucial in the war on terrorism”).
93. S.C. Res. 687, Apr. 8, 1991, reprinted in 30 INTERNATIONAL LEGAL MATERIALS 846.
94. Similarly, in the case of Iraq, on August 24, 2005, the English Court of Chancery held in *Sadiqua Ahmed Amin v. Brown* that it “was satisfied that the Government’s position was that there was not, and had not been a state of war between the United Kingdom and the Republic of Iraq.”
95. See Convention Relative to the Treatment of Prisoners of War, Geneva, Aug. 12, 1949, art. 118, 75 U.N.T.S. 135, reprinted in DOCUMENTS ON THE LAWS OF WAR, *supra* note 27, at 243, which provides that “Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.” See also Article 119 which provides, in part, that “Prisoners of war against whom criminal proceedings for an indictable offence are pending may be detained until the end of such proceedings. . . .”
96. See Iraq Survey Group Final Report, Sept. 30, 2004, available at <http://www.globalsecurity.org/wmd/library/report/2004/isg-final-report/>.
97. U.N. CHARTER, art. 27, para. 3.
98. See Report of the International Committee of the Red Cross on the Treatment by the Coalition Forces of Prisoners of War and Other Protected Persons by the Geneva Conventions in Iraq During Arrest, Internment and Interrogation, Feb. 2004, available at <http://cryptome.org/icrc-report.htm#EXECUTIVE%20SUMMARY>; Article 15-6 Investigation of the 800th Military Police Brigade, Mar. 9, 2004, available at [http://www.npr.org/iraq/2004/prison\\_abuse\\_report.pdf](http://www.npr.org/iraq/2004/prison_abuse_report.pdf). The latter is the report by Major General Antonio M. Taguba on the alleged abuse of prisoners at the Abu Ghraib prison in Baghdad. See also KAREN J. GREENBERG & JOSHUA L. DRATEL, THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 405 (2005).
99. Leslie C. Green, Proceedings, 23rd Annual Conference of the Canadian Council on International Law, 6, 26 (1994) and Proceedings, 26th Annual Conference of the Canadian Council on International Law 31, 37 (1997). See also *supra* text accompanying notes 15 and 17, respectively, for comments of Hall and Westlake.

# VIII

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## Current Issues in Occupation Law: 2003 Civilian Deaths in Baghdad

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Fred Abrahams\*

**T**his article documents and analyzes civilian deaths caused by US forces in Baghdad from the end of major combat operations in May 2003 until October of that year. It is based on field research conducted in Iraq in September and October 2003 for Human Rights Watch. During that time, the author interviewed the witnesses to civilian deaths, family members of the deceased, victims who were non-lethal casualties, Iraqi police, lawyers and human rights activists, US soldiers, US Army judge advocates stationed in Iraq, and members of the United States-led Coalition Provisional Authority (CPA), responsible at the time for governing Iraq.

The research revealed many cases of upstanding and legally respectful work by the US military in Iraq's capital. Many soldiers and commanders were aware of their obligations as an occupying power under international humanitarian law and took appropriate measures to fulfill those obligations. At the same time, there were disturbing cases during the period under review in which soldiers used force in an excessive or indiscriminate manner, sometimes resulting in the death of Iraqi civilians. Many of these cases went uninvestigated, contributing to an atmosphere of impunity.

Clearly Iraq was and remains a hostile environment for US troops, with daily attacks by Iraqis or others opposed to the United States and coalition forces. But such

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an environment does not absolve the military from its obligations under international law to use force in a restrained, proportionate and discriminate manner, and only when strictly required. Soldiers and commanders found to have used or tolerated the use of excessive or indiscriminate force must face appropriate administrative or criminal action.

Conditions in Iraq have changed a lot since the second half of 2003, particularly with the growth of the insurgency and the transfer of power to the Iraqi government and security forces. But the concerns about civilian casualties remain, both in Iraq and as a lesson for military occupations.

### *Numbers*

United States military and coalition forces in Iraq keep meticulous records of soldiers killed in duty, providing daily accounts to the press,<sup>1</sup> but they do not keep statistics on civilian deaths. In response to a Human Rights Watch request for information about civilian casualties, the coalition's press office sent this reply:

It is tragic that civilians have died as a result of our operations and we are fully aware that every time a civilian is caught in the line of coalition fire, we potentially lose allies among the Iraqi population. In terms of statistics, we have no definitive estimates of civilian casualties for the overall campaign. It would be irresponsible to give firm estimates given the wide range of variables. For example, we have had cases where during a conflict, we believed civilians had been wounded and perhaps killed, but by the time our forces have a chance to fully assess the outcomes of the contact, the wounded or dead civilians have been removed from the scene. Factors such as this make it impossible for us to maintain an accurate account.<sup>2</sup>

While the coalition claims an accurate account of civilian deaths is impossible to obtain, Human Rights Watch collected data from a variety of sources for a database of post-war civilian casualties in Baghdad. Given its vast resources, the US military should be able to do the same, and not doing so suggests that civilian deaths are not of paramount concern.

Based on the data collected, US soldiers in Baghdad killed ninety-four civilians between May 1 and September 30, 2003, in legally questionable circumstances that merit an investigation. Human Rights Watch researchers did not verify each of these individual allegations but, taken as a whole, they reveal a pattern of alleged unlawful deaths that should prompt concern and investigations.

More concretely, based on interviews with witnesses and family members, Human Rights Watch confirmed the deaths of twenty Iraqi civilians in Baghdad in legally questionable circumstances between May 1 and September 30, 2003. Eighteen

of these deaths are documented in the Human Rights Watch report, *Hearts and Minds: Post-war Civilian Deaths in Baghdad Caused by U.S. Forces (Hearts and Minds)*,<sup>3</sup> published in October 2003. In addition, Human Rights Watch collected data on civilian deaths by US forces from the Iraqi police, human rights organizations, Western media and US military statements on the topic. In total, Human Rights Watch estimated the US military in Baghdad killed ninety-four civilians in questionable circumstances in the period May to September 2003.<sup>4</sup>

While this article does not present all the individual cases of civilian deaths documented in *Hearts and Minds*, it is worth looking at the pattern they reveal; namely, a disturbing trend by US forces of over-aggressive tactics, indiscriminate shooting in residential areas and a quick reliance on lethal force. In some cases, US forces faced a legitimate threat, which gave them the right to respond with force. But that response was sometimes disproportionate to the threat or inadequately targeted, thereby harming civilians or putting them at risk.

### *Categories of Excessive Force*

In Baghdad, civilian deaths can be categorized in three basic incident groups. First were deaths that occurred during US military raids on homes in search of arms or members of armed groups. The US military said in the fall of 2003 that it was implementing less aggressive tactics, and was increasingly taking Iraqi police on raids. But Baghdad residents in late 2003 still complained of aggressive and reckless behavior, physical abuse, and theft by US troops. When US soldiers encountered armed resistance from families who thought they were acting in self-defense against thieves, they sometimes resorted to overwhelming force, killing family members, neighbors or passers-by.

Second were civilian deaths caused by US soldiers who responded disproportionately and indiscriminately after they had come under attack at checkpoints or on the road. Human Rights Watch documented cases where, after an improvised explosive device detonated near a US convoy, soldiers fired high caliber weapons in multiple directions, injuring and killing civilians who were nearby. While the threat in those cases was often real, the indiscriminate response put civilians at risk.

Third were killings at checkpoints when Iraqi civilians failed to stop. At the time the research was conducted in the fall of 2003, US checkpoints constantly shifted throughout Baghdad. They were sometimes not well marked, although sign visibility was improving. A dearth of Arabic interpreters and poor understanding of Iraqi hand gestures added to the confusion, with results that were sometimes fatal for civilians. Soldiers sometimes shouted conflicting instructions in English with their guns raised: "Stay in the car!" or "Get out of the car!"

In all of these scenarios, US soldiers were sometimes arrogant and abusive. They were seen putting their feet on detained Iraqis' heads—a highly insulting offense. Male soldiers sometimes touched or even searched female Iraqis, also a culturally unacceptable act, although female soldiers or searchers were increasingly deployed.

Of course, not all soldiers behaved in this way. Human Rights Watch met many US military personnel who dealt respectfully with Iraqis and were working hard to train police, guard facilities and pursue criminals in difficult conditions. Some of these soldiers expressed frustration at the lack of sensitivity shown by their colleagues. "It takes a while to get the Rambo stuff out," one officer said.

### *A Case Study: The Checkpoint in al-Slaikh*

On the evening of August 7, 2003, soldiers from the Alpha Company, 2nd Battalion, 3rd Field Artillery Regiment of the 1st Armored Division conducted a weapons search in the Tunis district of Baghdad's al-Slaikh neighborhood. According to residents, troops blocked the main street at two points with armored vehicles as soldiers went through homes and shops. One checkpoint was established on the corner of Bilal Habashi Street and Street 5.

Around 9:15 p.m., a transformer blew on one of the electrical poles nearby. The electricity in the immediate area was out, although it is not clear whether this was because of the blown transformer or whether the lights had been out before the explosion. Two cars drove down Bilal Habashi Street, apparently unaware of the checkpoint. The first car with three young men approached the checkpoint at a high speed, music blaring. Soldiers yelled at the driver to stop and fired warning shots, a witness said, but when the car passed the checkpoint, the soldiers opened fire. Two men survived but the driver, Saif Ra`ad `Ali Sa`id al-`Azawi, was killed. Behind him, a car with six members of the al-Kawwaz family was fired upon without warning before it reached the checkpoint. The father and three children were killed.<sup>5</sup>

#### *Car One: The Killing of Saif Ra`ad `Ali Sa`id al-`Azawi, 20*

As US soldiers were searching homes and shops in the neighborhood—around 9:00 p.m.—Saif Ra`ad `Ali Sa`id al-`Azawi, age 20, asked his father for permission to borrow his blue Opel station wagon. A student at the industrial high school, Saif was excited by successful exam grades he had just received.<sup>6</sup> His father agreed so Saif picked up two friends, `Abbas Shihab Ahmad al-Amary and `Ali Hussain al-Juburi, and drove off to visit a third friend named Ahmad.

According to `Abbas al-Amary, the three young men were driving home around 9:30 with the music playing loud. “The district had electricity but before we arrived at the top of the side street which takes us home there was a dark area,” he said.<sup>7</sup>

A resident of the neighborhood who lives and works near the corner of Bilal Habashi Street and Street 5 had a better view from the front of his tire repair shop. Ahmad Abd al-Samad Fatuhi said that Saif’s car was moving fast and the music was loud. The soldiers warned him to stop, he said, but he did not slow down. He told Human Rights Watch:

At that time, the electricity in the district was cut off and the interior light of Saif’s car was turned on, which prevented him from seeing outside clearly. He was accompanied by two other passengers, it seems that they were his friends. The Americans gave Saif a warning to stop the car by one of the African-American soldiers who yelled “Stop! Stop!” but Saif did not stop the car because I think he was afraid of hijackers. As I mentioned earlier, the area was dark and without electricity. After that, one of the American soldiers started to shoot warning shots at the ground, but Saif did not stop the car and he penetrated the American checkpoint. The result of this action was an immediate shooting at Saif’s car, which led to Saif’s death and to the injury of his two friends.<sup>8</sup>

This account was confirmed by another resident, Muhammad Sa`d `Adil al-Bayati, interviewed separately. He said:

I saw Saif’s car driving very fast. He was accompanied by two other people in the car. The person in the backseat had his head out the sun roof, the inside lights were on and the stereo was playing loudly. I shouted at him loudly: “Saif stop! There is a checkpoint there! There is an American checkpoint ahead!” but he did not hear me because he was driving very fast. I shouted at him, “the Americans will shoot you—there is an American checkpoint!” but he did not stop.<sup>9</sup>

The passenger, `Abbas al-Amary, said that none of the men in the car had seen any signs to indicate a checkpoint or any soldiers asking them to stop. Before they understood they were at a checkpoint, he said, they had come under fire from US troops:

Suddenly Saif’s car was fired on and another car which was behind us [see al-Kawwaz family below]. . . . I could not see where the shooting was coming from. I was sitting in the back seat of the car because when the shooting started I lowered my head. The shooting was full-automatic and the source of the gunfire was more than two machine guns. It continued for several minutes. After it stopped, I raised my head, I saw Saif’s face because he was on the side, and his face was opposite me. As I said, I was in the

middle of the back seat. I started shouting and so did our friend [ʿAli] but Saif did not reply. We realized he had passed away.<sup>10</sup>

On the side of the street, Muhammad Saʿd ʿAdil al-Bayati was also hit by a bullet in the right leg, suggesting that the shooting was not targeted exclusively on Saif’s car. He was hiding behind a parked car, he said, but was shot when he tried to crawl home.<sup>11</sup>

According to both the passenger al-Amary and the witness Fatuhi, US soldiers approached Saif’s car and pulled the two surviving men out. The car was burning and Saif’s body was inside, but no one tried to put the fire out or to take the body from the wreck. Al-Amary explained what happened next:

They came to the car and opened the front and the back doors of the right side, pointing guns to our heads. They took us out of the car and told us through an interpreter to shut up. ʿAli and I begged the interpreter to take Saif from the car but the interpreter said “Shut up, it’s nothing to do with you.” After they removed us from the car, they made us lay down on our stomachs on the ground. After five minutes, they took us to another place ten to fifteen meters away from the car where the American vehicles were parked. While they took me there I saw the front of Saif’s car burning—the engine was burning. Again I asked the interpreter to take Saif from the car, but the interpreter did not reply. They left Saif in the car while we were lying on the ground.<sup>12</sup>

ʿAbbas al-Amary and his friend ʿAli al-Juburi were eventually put in a truck. A wounded man and young girl from the other car joined them, and all four were taken to a US military base. The man and girl, both from the al-Kawwaz family, were taken to another room, and ʿAbbas and ʿAli soon learned that they had died.

While all this was happening, Saif’s father had no idea his son had been killed. Around 9:30 p.m., when he returned home from evening prayers, he went looking for Saif. Neighbors told him that US troops had killed several people in cars and that one of the cars was burning. He told Human Rights Watch:

I was horrified and rushed to see. I found the car there with no American troops. The car was completely burnt—nothing could identify it except a small iron box, which contains the car’s spare parts. I knew the car was ours and Saif’s corpse was charcoal. They killed an honest, peaceful young man who wanted to live in peace.<sup>13</sup>

ʿAli al-Jaburi and ʿAbbas al-Amary were held and interrogated for two days at the base, ʿAbbas said. They received medical treatment for their light wounds. In total, they were held for more than one month, first at a center near the Shaab Stadium, then at the airport, and finally at a juvenile facility in al-Salihiyya before

being released by a judge at the al-A`dhamiyya court. According to `Abbas al-Amari, the judge said they were free to go because no charges had been filed.

*Car Two: The Killing of `Adil `Abd al-Karim al-Kawwaz, 42, Haidar `Adil `Abd al-Karim al-Kawwaz, 19, `Ula `Adil `Abd al-Karim al-Kawwaz, 17, and Mirvat `Adil `Abd al-Karim al-Kawwaz, 8*

Around 9:20 p.m. on the same evening, August 7, `Adil `Abd al-Karim al-Kawwaz began the short drive home from his in-laws' house. His pregnant wife, Anwar Kadhim Jawad, was in the front seat and their four children sat in the back. By 9:30, `Adil and three of his children were dead.

Anwar Jawad told Human Rights Watch what happened:

The Americans were stopping cars. There were no signs. We came close to them and the Americans began to shoot. Their cars had no lights on. There were two tanks. Our car had its lights on. We were 100 meters away. I heard nothing first—we were astonished by the shots. My husband was shouting but they were shooting. . . . I saw the bullets flying. It was the first time I had seen someone get shot and I saw my husband get hit on the left.<sup>14</sup>

According to Ahmad Fatuhi, the neighborhood resident who witnessed the shooting, US soldiers opened fire on the car without warning. “The car’s front lights were dimmed,” he said. “The Americans opened fire on that car without any warning or signal to stop the car, and they killed four members of one family.”<sup>15</sup>

Haidar `Adil al-Kawwaz, age 19, and `Ula `Adil al-Kawwaz, age 17, were killed instantly. Their father `Adil `Abd al-Karim al-Kawwaz, age 42, and his daughter Mirvat `Adil al-Kawwaz, age 8, were badly wounded but still alive. US soldiers took them from the car and brought them to a military base in a truck, together with the two survivors from the first car, `Abbas al-Amari and `Ali al-Juburi. Both `Adil and Mirvat died, either there or perhaps at a hospital where they were taken that night.

A Human Rights Watch researcher inspected the al-Kawwaz family car on September 26, 2003, a 1984 white Volkswagen Passat. The car had twenty-eight bullet holes on the front and left side, including four in the front windshield.

Anwar Jawad, who gave birth to a baby boy named Hassan one week after the incident, was summoned to visit the US military on September 24. Two officers, who she thought were named Colonel William Rabena and Colonel Peter Mansoor, offered her \$11,000.<sup>16</sup> A document she signed said she received the money “as an expression of sympathy.”<sup>17</sup> The family is requesting formal compensation as well.

US military authorities conducted an investigation to determine whether soldiers from the Alpha Company, 2nd Battalion, 3rd Field Artillery Regiment of the 1st Armored Division had acted inappropriately by shooting at the two cars.

According to the military coalition's public affairs office, as well as US Army judge advocates assigned to Combined Joint Task Force 7, then the organisation running the US military's efforts in Iraq, the shootings were considered a "regrettable incident," but it was determined that the soldiers had "acted in accordance with the rules of engagement."<sup>18</sup> It is unclear how this was determined in the case of the al-Kawwaz car, which was fired upon without warning.

### *Training and Transition from Combat*

In late 2003, a fundamental problem in Baghdad was that combat troops were asked to perform law enforcement and policing tasks for which they were not adequately trained or attitudinally prepared. Of the cases documented in *Hearts and Minds*, for instance, eight Baghdad incidents resulting in sixteen civilian deaths involved either the 82nd Airborne Division or the 1st Armored Division. Many of the soldiers from these divisions had fought their way into Iraq, and were then asked to switch quickly from warriors to police who controlled crowds, pursued thieves and rooted out insurgents. According to soldiers and commanders, there was inadequate training and equipment for these Stability and Support Operations (SASO) and an inadequate supply of Arabic interpreters.

The problem was explained in detail by an unnamed US infantry commander in an After Action Report filed April 24, 2003, since declassified. "After less than 48 hours after the first battlefield engagement," the commander said:

Members of this company team were tasked to conduct checkpoint operations southwest of al-Najaf. With no training, soldiers were expected to search vehicles, interact with civilians with no CA [Civil Affairs] or PSYOPS [Psychological Operations] support, detain EPW's [Enemy Prisoners of War], and confiscate weapons. Less than 48 hours after this, the unit was again heavily engaged in combat operations. The radical and swift change from combat operations to SASO and back to combat operations over and over again causes many points of friction for the soldiers and their leaders.<sup>19</sup>

With the exception of a class given to the platoon leaders, there were no formal classes or training conducted by Civil Affairs personnel prior to the operation. Soldiers received no training on checkpoint operations or interacting with civilians.

The commander also noted that the unit's limited supply of construction and barrier materials for checkpoints was exhausted by the time they had reached Baghdad. Soldiers had to use "destroyed cars, flower pots, bicycle racks, and whatever else was available for force protection."<sup>20</sup> Interpreters, he wrote:

[W]ere not available to the company team at any point during the operation. These interpreters are critical to the team's ability to interact with civilians, discern their problems, and broadcast friendly unit intentions. Often times the unit had crowds and upset civilians to deal with and absolutely no way to verbally communicate with them.<sup>21</sup>

The report emphasized the “fundamental shift in attitude” demanded of the troops as they shifted from combat to law enforcement tasks:

The soldiers have been asked to go from killing the enemy to protecting and interacting, and back to killing again. The constant shift in mental posture greatly complicates things for the average soldier. The soldiers are blurred and confused about the rules of engagement, which continues to raise questions, and issues about force protection while at checkpoints and conducting patrols. How does the soldier know exactly what the rule of engagement is? Soldiers who have just conducted combat against dark skinned personnel wearing civilian clothes have difficulty trusting dark skinned personnel wearing civilian clothes.

Other officers reflected the above concerns. In an interview published on a US Army-related website, a second lieutenant from the 82nd Airborne Division described the complications of Iraq's post-war scene:

Pulling the trigger against groups of fedayeen was easy compared to this post-war environment where we are still taking casualties daily. Understanding why one village waves and blows kisses at you while the next one down the road sets up ambushes and IEDs is not as easy as friendly/enemy, don't kill/kill. We are ambassadors with our thumbs on the selector lever and always scanning for a set-up. It's so hard to help and interact with a people when you trust no one. Getting your soldiers to understand the need to be hot/cold, on/off, at war/at peace with only milliseconds between the two is very challenging.<sup>22</sup>

An article from the August 10, 2003, newsletter of the 1st Armored Division based in Iraq described how platoon leaders were adapting urban operations because the tasks in Iraq—patrols, raids and checkpoints—were different from the combat exercises for which they had trained. “[I]n Iraq, civilians are not merely an occasional presence, as urban terrain training often depicts civilians,” the author wrote, “instead, interactions with civilians often comprise the entire mission.”<sup>23</sup>

“Our mentality as soldiers is combat,” said Lieutenant Lucas Hale, who was trying to modify urban combat techniques (Military Operations in Urban Terrain, or MOUT) in the field. “We don't deal with civilians well as a whole. But in Iraq, you have to understand that 99 percent of the people [we encounter] are simple people who just want to get on with their lives.”<sup>24</sup>

US judge advocates and CPA legal officials who spoke with Human Rights Watch in the fall of 2003 were sympathetic to these concerns, and they agreed that not all combat troops had received adequate training for post-war tasks. Special instructors were brought in to assist the 1st Armored Division, they said. "They must come to terms with this kind of environment," Australian Colonel Mike Kelly said, "Policing requires a different skill set."<sup>25</sup>

According to the judge advocates, the US Marines performed better in the peacekeeping role because they were "quicker to adapt." And Military Police were better trained for crowd control, checkpoints and other peacekeeping tasks. In general, they said, the biggest problems were in Baghdad due to the intense urban environment and the high level of armed resistance. Clearly this was before the later fighting in Falluja and Najaf and the insurgency's development in central and western Iraq.

### *Accountability*

Coalition forces in Iraq are not subject to Iraqi law. According to Coalition Provisional Authority Regulation Number 17, coalition personnel are "immune from local criminal, civil and administrative jurisdiction and from any form of arrest or detention other than by persons acting on behalf of their parent states."<sup>26</sup>

Given the absence of Iraqi legal structures to hold coalition forces accountable, it is incumbent on the occupying powers of the participating countries to investigate all allegations of abuse, and to punish those found to have violated domestic military codes, international humanitarian law, or human rights standards. Both the laws of war and non-derogable human rights standards require the investigation of suspicious or apparently unlawful killings, even during times of armed conflict.

In 2003, the United States military did not fulfill that obligation. The lack of timely and thorough investigations into questionable incidents created an atmosphere of impunity, in which soldiers felt they could pull the trigger without coming under review.

Specifically, as of October 1, when Human Rights Watch completed its research, there were no known criminal investigations into cases of alleged use of excessive or disproportionate force by US soldiers in Iraq. The US military said it had completed five administrative investigations above the division level, all of them under the authority of the Deputy Commanding General in Iraq, but the findings of these investigations raised serious concerns. In four of the five investigations, soldiers were found to have operated within the rules of engagement. In the fifth case, a helicopter pilot and his commander faced disciplinary action for trying to tear down

a Shi'a banner in Sadr City in Baghdad, an incident that provoked a violent clash with demonstrators on August 13.

Human Rights Watch conducted its own investigation into two of the five cases, and found evidence to suggest that soldiers had used excessive force, including shooting a person who had his hands in the air and beating a detainee. There are also many questionable civilian deaths for which no investigation had taken place. The most notable example is the killing of up to twenty people by the 82nd Airborne Division in Falluja on April 28 and 30, documented in a June 2003 Human Rights Watch report, *Violent Response: the U.S. Army in al-Falluja*.<sup>27</sup>

Iraqis rarely knew the unit of soldiers responsible for inflicting casualties. Through its own research or media reports, however, Human Rights Watch identified at least the military division, if not the specific unit, in eight incidents involving sixteen civilian deaths. Of these, the 82nd Airborne Division was involved in four incidents in which seven civilians were killed and the 1st Armored Division was involved in four incidents in which nine civilians were killed. Four civilians were killed in an operation by Task Force 20, a combined CIA-Army special forces team established to capture Iraq's former rulers, but it is not clear if they were responsible for the shooting.

The following is a list of civilian casualties in Baghdad in the year 2003 for which the specific US military unit is known:

#### **82nd Airborne Division**

- Mardan Muhammad Hassan and Farah Fadhil al-Janabi on September 1 in Mahmudiyya killed by soldiers from the 3rd Battalion, 505th Parachute Infantry Regiment.<sup>28</sup>
- Iraqi guards Ra`ad Fahd Shallal, Sa`id Majid Sa`dun and `Abbas `Uday `Abbas `Aday killed on July 10 in the al-Bayya` neighborhood.<sup>29</sup>
- Muhammad Subhi Hassan al-Qubaisi killed on June 26 in the Hay al-Jihad neighborhood.<sup>30</sup>
- `Uday Ahmad Mustafa killed on July 10 behind the Baya'a Police Station/al-Dora Patrol Station.<sup>31</sup>

#### **1st Armored Division**

- `Ali Muhsin, killed on August 11 by the 1st Battalion, 36th Infantry.<sup>32</sup>
- Lt. `Ala' `Ali Salih and Sgt. Muhammad Hilal Nahi, killed on August 9 on the Abu Ghraib road by soldiers from the 1st Battalion, 41st Infantry of the 3rd Brigade.<sup>33</sup>
- Izhar Mahmud Ridha killed on August 1 in the al-Mansur neighborhood by soldiers from the 3rd Brigade.<sup>34</sup>

- Soldiers from Alpha Company, 2nd Battalion, 3rd Field Artillery Regiment<sup>35</sup> shot and killed Saif Ra`ad `Ali Sa`id al-`Azawi when he failed to stop at a checkpoint. In a second car, soldiers killed `Adil `Abd al-Karim `Abd al-Karim al-Kawwaz and three of his children, Haidar, `Ula and Mirvat.<sup>36</sup>

### *Recommendations*

Since late 2003, the US military has taken some steps to reduce civilian deaths in Iraq. Checkpoints became more clearly marked and combat troops received additional training for police tasks. Iraqi police and military were more frequently escorting US soldiers on raids, or conducting those raids themselves, and over the past year the Iraqi security forces have assumed the burden of policing tasks. Accountability has apparently improved after the abuse scandal at Abu Ghraib.

But more initiatives are required. One basic step is to continue improving the language and cultural training to teach soldiers hand gestures used and understood by Iraqis and essential Arabic words and phrases, which would minimize confusion at checkpoints or during raids.

The US military's rules of engagement are not made public due to security concerns, but Iraqi civilians have a right to know the guidelines for safe behavior. The coalition should mark all checkpoints clearly, for instance, and inform Iraqis through a public service campaign of how to approach checkpoints and how to behave during raids.

US soldiers and other coalition forces should also be better trained to defuse tense non-combat situations without resorting to lethal force. Lethal force should be used only when necessary to meet an imminent threat to life and only in proportion to the actual danger presented in conformity with international standards.

To properly perform post-conflict policing, US soldiers need adequate supplies of non-lethal crowd control devices like tear gas and rubber bullets. Efforts to enhance communication with local communities should be intensified, starting with adequate provision of interpreters.

When civilian deaths do occur, they should be documented and investigated. Military authorities should keep records, observe and analyze trends related to specific units and commanders, as well as tactics, in order to minimize civilian casualties.

Of central importance are prompt investigations of and punishment for all inappropriate or illegal use of force, as required under international law. In 2003 US soldiers operated with a large degree of impunity in Iraq. Knowledge that they will be held accountable will be a helpful restraint on the excessive, indiscriminate, or reckless use of lethal force.

Notes

1. Between May 1 and September 30, 2003, 88 US soldiers were killed in hostile deaths and more than 800 wounded. During that time, there were also 94 non-hostile deaths and 197 non-hostile injuries among US troops. See, e.g., Robert H. Reid, *One U.S. Soldier Killed in Iraq Bombing*, ASSOCIATED PRESS, Oct. 1, 2003, and Alex Berenson, *Roadside Bombs Kill 3 Soldiers and a Translator in Iraq*, NEW YORK TIMES, Oct. 7, 2003, at A18.
2. E-mail sent to Human Rights Watch from coalition press office on September 29, 2003.
3. HEARTS AND MINDS: POST-WAR CIVILIAN DEATHS IN BAGHDAD CAUSED BY U.S. FORCES, Oct. 2003, available at <http://www.hrw.org/reports/2003/iraq1003/>.
4. Human Rights Watch used six sources to obtain data: 1) Direct interviews with witnesses or the family of victims accounted for twenty-one deaths; 2) Records from Iraqi police in Baghdad account for fifty-four civilian deaths; 3) A local human rights group, The Human Rights Organization in Iraq, reported thirty-three cases of civilian casualties in Baghdad; 4) Western news media reported fifteen civilian deaths, but Human Rights Watch included only those deaths reported with a victim's name; 5) Other non-governmental organizations reported six civilian deaths; 6) US military press releases reported three civilians killed in two incidents, and the US Combined Joint Task Force 7 Judge Advocate General's office confirmed a fourth. Twenty-three deaths were reported by two or more sources, leaving a total of ninety-four.
5. Some media reported that on the same night US forces killed another man, `Ali Hikmat Salman, on a road nearby and, in an interview with Human Rights Watch, Salman's family supported this claim. Human Rights Watch interview with `Ali Salman's mother, Samira Sabri, Baghdad, Oct. 5, 2003. Based on interviews in the neighborhood, however, Human Rights Watch believes that `Ali Salman probably died on the highway in a traffic accident unrelated to US troops. See also Scheherezade Faramarzi, *Jittery U.S. Soldiers Firing in the Dark Kill Six Iraqis Trying to Get Home Before Curfew*, ASSOCIATED PRESS, Aug. 10, 2003, available at <http://www.signonsandiego.com/news/world/iraq/20030810-1225-iraq-adeadlynight.html>.
6. Human Rights Watch interview with Ra'ad `Ali Saied al-Azawi, Baghdad, Sept. 26, 2003.
7. Human Rights Watch interview with `Abbas Shihab Ahmad al-Amary, Baghdad, Sept. 26, 2003.
8. Human Rights Watch interviews with Ahmad Abdel Samad Fatuhi, Baghdad, Sept. 29 and Oct. 5, 2003.
9. Human Rights Watch interview with Muhammad Sa'd `Adil al-Bayati, Baghdad, Oct. 5, 2003.
10. Interview with `Abbas Shihab Ahmad al-Amary, *supra* note 7.
11. Interview with Muhammad Sa'd `Adil al-Bayati, *supra* note 9.
12. *Id.*
13. Interview with Ra'ad `Ali Saied al-Omran al-Azawi, *supra* note 6.
14. Human Rights Watch interview with Anwar Khdim Jawad, Baghdad, Sept. 26, 2003.
15. Interviews with Ahmad Abdel Samad Fatuhi, *supra* note 8.
16. Colonel Peter Mansoor was commander of the 1st Armored Division's 1st Brigade and Lieutenant Colonel William S. Rabena was commander of the 2nd Battalion, 3rd Field Artillery.
17. The receipt, viewed by Human Rights Watch, calls the money a "Solatia payment from CERP" and is from Captain Robert Brewer and ordered by Captain Casey D. Coyle.
18. Human Rights Watch interview with Colonel Marc Warren, Colonel Mike Kelly, and Major P. J. Perrone, Baghdad, Sept. 23, 2003.
19. Operation Iraqi Freedom After Action Review Comments, Apr. 24, 2003, available at <http://www.strategypage.com/dls/articles/20030912.asp>.

20. *Id.*
21. *Id.*
22. Interview with Second Lieutenant Andy Blickhahn 325th Airborne Infantry Regiment, 82nd Airborne Division, *available at* [www.companyteam.army.mil](http://www.companyteam.army.mil), as of October 2003.
23. Lisa Burgess, *1AD Units Modify MOUT Training to Suit the Situation*, THE OLD IRONSIDES REPORT, Vol. I, Issue 20, Aug. 10, 2003.
24. *Id.*
25. Interview with Colonel Marc Warren, Colonel Mike Kelly and Major P.J. Perrone, *supra* note 18.
26. Coalition Provisional Authority Order Number 17, Status of the Coalition, Foreign Liaison Missions, Their Personnel and Contractors, June 27, 2003. All CPA regulations are available at [www.cpa-iraq.org](http://www.cpa-iraq.org), however, Order Number 17 was revised on June 27, 2004. Under Section 2, paragraph 3 of the revised regulation, "All MNF, CPA and Foreign Liaison Mission Personnel, and International Consultants shall be subject to the exclusive jurisdiction of their Sending States. They shall be immune from any form of arrest or detention other than by persons acting on behalf of their Sending States. . . ." Although the language has been revised, the effect is the same—coalition forces are not subject to Iraqi law.
27. VIOLENT RESPONSE: THE U.S. ARMY IN AL-FALLUJA, June 2003, *available at* <http://www.hrw.org/reports/2003/iraqfalluja/>.
28. HEARTS AND MINDS, *supra* note 4, at 26–9.
29. *Id.* at 29–31.
30. *Id.* at 33–4.
31. *Id.* at 23–6.
32. John Tierney, *How and Why did Iraqi Die? 2 Tales of Anger and Denial*, NEW YORK TIMES, Aug. 27, 2003, at A1.
33. HEARTS AND MINDS, *supra* note 4, at 31–3.
34. Gary Marx, *As Iraqis Die, Hate for U.S. Spreads*, CHICAGO TRIBUNE, Aug. 17, 2003, at 1.
35. Commander of the 2nd Battalion, 3rd Field Artillery is Lieutenant Colonel William S. Rabena.
36. *See* text accompanying notes 6–18. *See also* HEARTS AND MINDS, *supra* note 4, at 18–23.

# IX

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## Treatment and Interrogation of Detained Persons

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David E. Graham\*

**M**edia reports of abuse of enemy prisoners of war (EPW) and Security Detainees in Iraq, as well as other reports questioning certain interrogation techniques employed to gain intelligence from those in the custody of the United States have raised concerns regarding the adequacy of the guidance dealing with such matters provided to U.S. Army personnel. This article addresses the current U.S. Army regulatory and doctrinal guidance relevant to the treatment and interrogation of EPW and Security Detainees.

Before turning to this subject, however, I would like to briefly focus on an event that occurred at The Judge Advocate General's Legal Center and School (LCS), in Charlottesville, Virginia. In the summer of 2004, the LCS hosted its annual Non-Commissioned Officer Conference, at which Army paralegals from around the world gathered to discuss ongoing issues. One of the highlights of this conference is always the presentation of an annual award to an outstanding junior paralegal. The award winner, this year, had the looks of a recruitment poster—early 30s, a college graduate, jump qualified. In fact, he was a Jump Master. As he accepted his award, he expressed thanks to his colleagues, of course, and saluted all of the good legal work that they had accomplished—and then he related this story. While he was in

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Iraq, he had served as a Convoy Commander. In fact, he had served in this capacity well over 50 times. On one such occasion, the convoy became stalled in traffic and, as the vehicles were sitting at a dead halt, a grenade was dropped from an overpass. At that moment, every weapon in the convoy swung in that direction. What followed next, he said, made him exceptionally proud to be an American soldier serving in Iraq. For, even though every weapon had been pointed at the overpass, not a single shot was fired. Why not? Because, he said, a target could not be identified. The personnel in that convoy had complied with the Rules of Engagement. Not a single round was fired. And, I would submit that such behavior is the norm—not the exception.

Do accidents occur? Are crimes committed? Are investigations conducted? Are crimes prosecuted and defended equally aggressively? In each instance, the answer is yes. Yet, if one focuses only on the negative, such as the abhorrent conduct at Abu Ghraib, one loses sight of the fact that the overwhelming majority of U.S. personnel serving in Iraq consistently do the right thing—simply because it is the right thing. Mistakes are made, crimes are committed, investigations may take an apparently overly extended period of time to complete. But, again, I would submit that the actions taken by those servicemen in that convoy, on that particular day in Iraq, as related by that junior enlisted soldier, represent the norm—not the exception.

Turning now to the subject at hand: the current Army regulatory and doctrinal guidance dealing with the treatment and interrogation of EPW and Security Detainees is found in several Army publications. In terms of their application to the situation in Iraq, each publication begins with a premise with which essentially every public international lawyer would agree. Almost all individuals present in Iraq are subject to either the Third or Fourth Geneva Convention.<sup>1</sup> Thus, with respect to EPW taken captive in Iraq, the process is a relatively simple one. If the individual was a member of the Iraqi armed forces, he was entitled to Prisoner of War status. As such, he was to be afforded the numerous rights and privileges accorded by the Third Convention. In terms of the interrogation of EPW, this, again, is a very straightforward matter. Article 17 provides:

Every prisoner of war, when questioned on the subject, is bound to give only his surname, first names and rank, date of birth, and army, regimental, personal or serial number, or failing this, equivalent information.

....

No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of

war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind.

Clearly, coercing EPW into divulging information is forbidden.

Although the Third Convention is clear and unequivocal in its requirements for the humane treatment of EPW and the prohibition of coercive interrogations, some have contended that the law is somewhat less certain with respect to Security Detainees. I disagree. The first issue that must be addressed in this regard is the manner in which an individual might become a Security Detainee in Iraq. That is, how does an individual lose his status as a “protected person” under Article 4 of the Fourth Convention<sup>2</sup>—a status that carries with it a broad range of protections and safeguards? The answer is found in the fact that Article 5 of the Fourth Convention enables the Occupying Power to arrest and detain individuals who pose a security threat.<sup>3</sup> Article 78, in turn, enables the Occupying Power to detain or to incarcerate those arrested under the authority of Article 5. These individuals, then, are no longer protected persons; they are, in fact, Security Detainees.

Again, there have been those who have argued that once an individual loses his status as a protected person, he essentially loses those protections accorded him under the Fourth Convention. This, of course, is simply not true. Even with respect to the interrogation of Security Detainees, Article 5 clearly indicates that such individuals must be treated humanely.

The U.S. Army provides both regulatory and doctrinal guidance regarding the treatment and interrogation of EPW and Security Detainees. This guidance has been criticized by some as being unclear or that, given their “nuanced” nature, the relevant regulatory provisions are subject to varying interpretations. Contrary to such assertions, however, it is my view that there is simply no lack of clarity, no lack of precision with respect to the relevant regulatory requirements. Army Regulation 190-8, *Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees*,<sup>4</sup> addresses the treatment of both EPW and Security Detainees. Paragraph 1-5(a)(1) provides:

All persons captured, detained, interned or otherwise held in U.S. Armed Forces custody during the course of a conflict will be given humanitarian care and treatment. The inhumane treatment of EPW, civilian internees, and retained personnel is prohibited and is not justified by the stress of combat or by deep provocation.

Paragraph 1-5(b) further notes:

All prisoners will receive humane treatment without regard to race, nationality, religion, political opinion, sex or other criteria. The following acts are prohibited:

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murder, torture, corporal punishment, mutilation, the taking of hostages, sensory deprivation, collective punishment, execution without trial by proper authority, and all cruel and degrading punishment.

Additional guidance on the issue of the treatment of EPW and Security Detainees is found in Army Field Manual 3-19.40, *Military Police Internment/Resettlement Operations*.<sup>5</sup> Specifically, paragraphs 5-1 and 5-2 state that physical torture or moral coercion must not be used in connection with civilian internees and Security Detainees. They must be protected against violence, insult, public curiosity, bodily injury, reprisal, and sexual attack.

The photos of abused prisoners at Abu Ghraib generated much of the initial attention focused on the treatment and interrogation of those individuals held by the United States, and the issue of interrogation, in particular, has continued to be a matter of intense media scrutiny. Army Field Manual 34-52, *Intelligence Interrogation*,<sup>6</sup> deals with both EPW and Security Detainees. This FM provides that “EPWs, captured insurgents, civilian internees, other captured, detained or retained persons, foreign deserters, or other persons . . . are protected by the Geneva Conventions.”<sup>7</sup> It further states that “the [Geneva Conventions] and U.S. policy expressly prohibit acts of violence or intimidation, including physical or mental torture, threats, insults or exposure to inhumane treatment as a means of or aid to interrogations. Such illegal acts are not authorized and will not be condoned by the U.S. Army.”<sup>8</sup> Very importantly, it also goes on to say that violations of these prohibitions are criminal acts, punishable under the Uniform Code of Military Justice.<sup>9</sup>

The *Intelligence Interrogation* manual specifically addresses prohibited interrogation techniques. It provides that “physical or mental torture or coercion revolve around eliminating the source’s free will, and are expressly prohibited by the [Geneva Conventions].”<sup>10</sup> Torture is defined as “the infliction of intense pain to body or mind to extract a confession or information, or for sadistic pleasure.”<sup>11</sup> Examples of physical torture cited in the FM include: electric shock; infliction of pain through chemicals or bondage; forcing an individual to stand, sit or kneel in abnormal positions for prolonged periods of time; food deprivation; and any form of beating. Cited examples of mental torture include mock executions, abnormal sleep deprivation, and chemically induced psychosis. “Coercion” is defined as:

actions designed to unlawfully induce another to compel an act against one’s will . . . to include: threatening or implying physical or mental torture to the subject or to his family or others; intentionally denying medical assistance or care in exchange for information or cooperation; and, finally, threatening or implying that rights guaranteed by the [Geneva Conventions] will not be provided unless cooperation is forthcoming.<sup>12</sup>

Questions have been raised as to whether the *Intelligence Interrogation* manual accurately reflects both the domestic and international law obligations of the United States. I can assure you that it does. Twelve years ago, the International and Operational Law Division of the Office of The Judge Advocate General of the Army conducted an intense legal review of FM 34-52 and produced a 12-page, single-spaced, legal opinion detailing the manner in which US legal obligations were to be set forth in this publication.

Once again, I would submit that the regulatory and doctrinal guidance relevant to the treatment and interrogation of EPW and, very importantly, Security Detainees, is quite clear, and it should be well understood as to those actions that can—and cannot—be taken. Equally clear is the fact that, if an interrogator engages in proscribed activities, he or she is subject to prosecution under the Uniform Code of Military Justice. This is precisely what U.S. Army military intelligence personnel are taught. The *Intelligence Collection* manual, published in 1992, provides carefully considered, thoughtful, and lawful guidance, guidance that has never been modified.

Some have suggested that, given the nature of the “Global War on Terrorism,” detainee interrogation techniques that obviously go well beyond those sanctioned in current Army doctrine should be permitted. I would object to the use of such interrogation methods for a number of reasons. First, once you cross that interrogation Rubicon dictated by both international and domestic law, you immediately subject individual service members to potential civil and criminal litigation. I am unconvinced that any form of a “necessity defense” argument would protect these individuals from prosecution under either the Uniform Code of Military Justice or in an international forum. Second, instructing military intelligence personnel to now engage in questionable interrogation techniques would contravene 30 to 40 years of previous training. Third, as the *Intelligence Collection* manual observes, “Revelation of use of torture will bring discredit upon the US and its armed forces, while undermining domestic and international support for the war effort.” Finally, there is the matter of reciprocity. Once the United States condones actions that go beyond those always considered to reflect accepted international norms, these practices will almost automatically become, in my view, the benchmark for interrogation methods deemed suitable for use by both State and non-State actors. For all of these reasons, it is critically important that the United States continue to adhere to the humanitarian treatment standards set forth in the Geneva Conventions and other relevant international agreements.

*Notes*

1. Geneva Convention III Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 UST 3316, 75 U.N.T.S. 135 and Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 UST 3516, 75 U.N.T.S. 287, *reprinted in* DOCUMENTS ON THE LAWS OF WAR (Adam Roberts & Richard Guelff eds., 3d ed. 2000) at 244 and 301, respectively.
2. The relevant portion of Article 4 provides, “Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.”
3. Specifically,

Where, in the territory of a Party to the conflict, the latter is satisfied that an individual protected person is definitely suspected of or engaged in activities hostile to the security of the State, such individual person shall not be entitled to claim such rights and privileges under the present Convention as would, if exercised in the favour of such individual person, be prejudicial to the security of such State.
4. Headquarters, Department of the Army, AR 190-8, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees (Oct. 1, 1997), *available at* [http://www.usapa.army.mil/pdffiles/r190\\_8.pdf](http://www.usapa.army.mil/pdffiles/r190_8.pdf). This is a multi-service regulation that also is also applicable to the Air Force, Marine Corps and Navy.
5. Headquarters, Department of the Army, FM 3-19.40, Military Police Internment/Resettlement Operations (Aug 1, 2001), *available at* <https://134.11.61.26/CD5/Publications/DA/FM/FM%203-19.40%2020010801.pdf>.
6. Headquarters, Department of the Army, FM 34-52, Intelligence Collection (Sept. 28, 1992), *available at* <https://134.11.61.26/CD7/Publications/DA/FM/FM%2034-52%2019920928.pdf>.
7. *Id.* at 1.7.
8. *Id.* at 1–8.
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*

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## Liberation and Occupation: A Commander's Perspective

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Fabio Mini\*

One of the main challenges for the commander of a military operation outside his national territory is to deal with the international laws that should apply to the operation and the constraints his own nation may impose upon him. Such limits stem from political aims, diplomatic convenience, economic interest, international image, media opportunity, budget priorities, force structure and the national law jurisdiction applicable to the area of operations. For the commander of a multinational force the challenges are even greater because he is subject to additional constraints coming from the international organization he is working for, the international organizations he is working with and the national caveats each contingent of his force brings with them. The legal constraints influence his autonomy and command action during the conflict, but, most importantly, they affect post-war operations when he becomes the target of scrutiny—and often criticism. While the military code of conduct and the customs of war are embedded in military education and can help guide the commander's action, the legal constraints affecting war or peace support operations are sometimes ambiguous. The latter must be known and studied, with the support of legal advisors, but, unfortunately, they are largely neglected in military education and during the specific pre-deployment

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training. In many countries, the military education systems include them only in the formal program, but then they are skipped because there is something “more important” to do or they are left in the hands of boring lawyers that simply list the litany of what you cannot do.

In particular, in many Western war colleges or military academies no one teaches how to handle a post-war situation. Strategy and tactics refer only to combat situations. Management deals only with our own military organization and units. A little bit of management is devoted to civil-military cooperation (CIMIC), but because of the emphasis given to peace support operations rather than to post-war management, CIMIC is perceived more as a candy bar distribution initiative than a military methodology to control the post-war situation. Military control over civil institutions is a blasphemy for democratic armies and nowadays every nation and army pretends to be democratic. I am old enough to remember the warning posters of the occupying powers after World War II: “Tomorrow the distribution of food will be suspended” and “Public gathering is prohibited. Offenders will be arrested,” signed Captain Charlie or Kurt or Martini. Nowadays captains are not even given the authority to ask questions and the generals who ask questions are not entitled to any answers. I also belong to the generation that planned for military control over civilian administrations in case of internal insurgency. I remember the plans to replace civil authorities, to exercise censorship, limit individual liberties and so on. Those times are gone and, we all hope, for good.

Our democratic system is strong and the military does not have to plan for the assumption of power. However, while war is still very much present and alive, we in the West have avoided and, at the same time, subverted the idea of war. During the last ten years we have avoided the reality of war. We invented operations “other than war”—humanitarian intervention, international police operations, peace support operations, with their aggregate of peacekeeping, peace enforcing, peace making, and so on. We invented hundreds of expressions in order to avoid the word “war” or to soften its meaning. In the United States and other parts of the world, e.g., China, there was the opposite phenomenon. The same word was largely abused and everything became a “war,” including market competition, family quarrels and social endeavors. The result was again an illusion because when war resumed in its traditional form as confrontation and violence, often asymmetric and non-linear, many people did not recognize it. War on terror in many countries is still considered to be the equivalent of the war on inflation, or the war on corruption, or the war on drugs.

The “Global War on Terror” and its many forms suggest a vision of Star Wars, with the Empire striking back and Luke Skywalker saving the Galaxy or similar

fantasies, instead of inspiring the idea of a worldwide disaster. This substantial elusion has also disrupted our awareness about wartime responsibility; the consequence has been the separation of military operations from pre- and post-conflict management. Contrary to what was taught to junior officers at military schools fifty years ago, the armies of the democratic West today are told to limit themselves to combat operations. They are taught to deal with “army-like” threats and leave “internal” security problems to the civil authorities responsible for law enforcement. I have seen national caveats forbidding the employment of soldiers to quell public unrest. Subsequently, when they were caught in the middle of civil disorder, the soldiers did not know how to respond. There are many NATO nations that do not agree with the use of their soldiers in anti-crime, anti-extremism or even anti-terrorism roles. We all have seen our officers and professional soldiers witnessing, without taking action, the looting of national museums, public and private property, or ethnic minority assets; saying that they are not policemen.

The separation between military and civil powers is necessary, but not before the security situation is stabilized and real democratic and effective institutions, a functioning judicial system and reliable law enforcement resources are in place. Whoever rushes in to declare the end of military operations (or even the end of the war) and transfers the responsibilities for public order to immature local authorities or to inefficient international organizations or to puppet governments is not responding to security and reconstruction requirements, but only to nearsighted and narrow-minded political interests. Such a rush is conducive to instability, creates civil-military disconnects and increases risks for the forces in the area of operations. The fact of the matter is that modern military operations do not end with the cessation of combat. Victory is no longer defined just by successful military operations, if it ever was. The aims of modern operations are purely political and this is true down to the platoon level and lower. Therefore, until the political aims are achieved, victory cannot be declared.

Furthermore, the occupation of a foreign territory is not the end of an operation but the beginning of another phase of the same effort. Modern wars and operations are not undertaken to acquire territory or sovereignty. In particular, the annexation of a territory is no longer the aim of the modern Western democracies which tend, instead, to respect the integrity and the sovereignty of foreign countries no matter how mean their political regime and their social behavior might be.<sup>1</sup> Modern operations are undertaken more to further ideals and interests than for territorial acquisitions, even if that territory has valuable resources or can become a profitable marketplace. Therefore, the military have specific responsibilities that cannot be ignored by simply declaring the end of combat. This is especially the case in the absence of a safe and secure environment to support such

a declaration or if the same “victorious” forces are continuously suffering attacks. We cannot say that we have won the battle in the field against the opposition forces while the civil authorities have lost the battle to create a basis for democratization, peace, reconstruction, development and social enhancement. We all have lost our common war.

Unfortunately this artificial and hasty separation between supposedly military and civilian responsibilities is a critical factor in the failure of modern operations or, at least, leads to lengthy and inconclusive operations, delays, and a waste of money, time, effort and human lives. It leads the military to concentrate on military objectives with little concern for post-war problems related to possible side effects and so-called “collateral damage.” In the meantime it gives the civilian authorities an alibi for their failure in reconstruction. They can put the blame on the military and use extensive war damage, the lack of internal stability and even popular unrest stemming from economic difficulties as an excuse. From the military standpoint, and under the influence of this civil-military “separation,” the operations tend to be planned and executed to:

- Achieve absolute military supremacy even when it is not necessary. Today there are no symmetric threats that can challenge the US and Western military supremacy. There is not a lack of military power to cope, but an excess of power to manage. Terror is achieving some results only because it is not a military threat and because it is completely asymmetric. In addition, terror directly affects a political class and an international leadership largely unfit and untrained to cope with this problem.

- Make no distinction between combatants and noncombatants.<sup>2</sup> If war is mistakenly considered a “police operation” or a “humanitarian effort” there is no enemy but only a “criminal.” However, dealing with a criminal is different from dealing with a “just enemy.” Here begins the main contradiction of our times. While avoiding the idea of war and eluding its reality, the military forces still have training, ethics and procedures related to war—a classic, traditional, symmetric, old fashion, destructive war. Our armies are completely different from police forces. And rightly so. But many situations that militaries have to face are not that different from international law enforcement. In order to cope with this ambiguity, many military units attempt to change their ethics and code of conduct. Unfortunately, when the ethics of war change, the applicable rule of law changes as well and often with undesirable consequences. The majority of our soldiers know how to deal with the enemy, a traditional combatant, but do not know how to deal with criminals. So we tend to abuse the terms “criminal” or “terrorist” in order to enhance the aggressive behavior and determination of our

soldiers, but at the same time this lowers our ethical threshold. If the definition of enemy is unclear, “criminal” can become a potential enemy, even if legally belonging to the category of noncombatant.

- Destroy all infrastructure (factories, roads, power plants, bridges, communications, government facilities) with little concern for safeguarding essential infrastructure needed by the country to recover quickly. Some infrastructure is safeguarded but only if useful to the subsequent military occupation. This generally creates the impression that the “real aims of the war” are other than humanitarian undertaken in the pursuit of international justice.

- Selectively overthrow rogue regimes and dictators. There are many dictators and rogue regimes that do not “benefit” from our military attention. Instead, some of them benefit from our protection, while the current “bad guys” have, at times, conveniently been our best allies—all of them. This also gives an erroneous perception of the aims of war.

- Carry on preventive operations in the sense that they come first but do not prevent crises, losses or damages. In our Western terminology, “prevention” has assumed the meaning of crisis and war avoidance. A war to prevent another similar or worse war is not perceived as true prevention. It is an “anticipation” of an event whose necessity is not yet defined or proven—a scenario. Our societies, following a legalistic approach, do not accept war as a preventive measure and the use of force can be gradually applied only if balanced against a threat that is visible, immanent and imminent. Scenarios are not threats and worst-case scenarios cannot lead international policy as a matter of routine. In our legalistic approach, intelligence is not evidence. This set of perceptions further limits possible solutions and adds suspicion about the legality of the military use of force.

- Carry on operations in the complete absence of an achievable political and economical “end state.” Here “achievable” refers to a result planned as an outcome of a pre-determined period of time and clearly allocated resources (including those for security). While democratization, liberty, rule of law, and reconciliation are good ideas and ideals, in areas where peoples have lived through hardship and economic or ideological slavery for centuries, they are not political end states “achievable” through a defined and predetermined foreign military intervention. That is why many military operations appear endless and useless.

- Show force and pursue humiliation both of the antagonist and the allies. If the enemy is a “criminal,” the ethics of combat suffer and humiliation becomes a tool to exercise superiority. When humiliation becomes a tool, it is difficult to confine it to the enemy. It is also easily applied to allies and friendly forces. Refusing an offer of help because “this operation is too sensitive” or “too

technological,” or “bound to secrecy” is perceived as a humiliation by many allies. Not sharing essential intelligence, abuse of the “blue eyes only” criteria and sharing uneven responsibilities can become a humiliation in the event of difficult missions and indefinite risk.

On the other hand, the transitional civil administrations (either under international or national and local control) that are so eager to intervene after the military operations, tend to:

- Apply the same set of measures to all situations and to every kind of local society. The drawers of the international planners seem to contain only one “road map” or one list of “benchmarks” or a single “eight-point plan,” and these are used indifferently for East Timor, Kosovo, Palestine or Iraq. Hundreds of international experts are paid huge sums of money for their consultancy and then the output is the same plan over and over, often repeating the same mistakes and making some new ones because differences of social, cultural and economic environment are not taken into account.

- Establish a Western-style democracy regardless of its compatibility with the existing culture and development needs. Western-style democracy, which is based on the ideals of liberty and freedom of expression of the will of the people, is the product of two bloody and lengthy conflicts: the American and the French revolutions. In both cases, it took hundreds of years to attain the full benefits of democracy, and now this model, which is far from perfect and which requires the continuous checks and balances provided by the different branches of government and the ultimate control of periodic elections, is imposed on populations that neither understand the system nor really want it. Additionally, the main corollary of modern democracy, “the market democracy,” has, in many cases, a devastating effect on immature, archaic or former socialist societies.

- Dissolve existing social institutions (welfare, health care, wages, local councils, family systems, etc.) with no acceptable or efficient alternatives. Often the existing network of institutions and set of customs is the only organizational glue surviving after the war. The people know where the hospitals are and what to do to get there. They know what belongs to whom and why. They know what is legal and illegal according to their own old set of rules. The rapid change of social structures and age old points of reference gives the impression, and sometimes the reality, of anarchy.

- *Divide et impera* (divide and rule). This principal is often applied when there are ethnic or religious differences within a society. Additionally, these differences are exploited when they exist among other States in the region. The result is that where the crisis stemmed from religious or social hatred, coexistence between

diverse ethnic or religious groups becomes impossible. In the meantime the basic social infrastructures are unified under the control of foreign powers and they soon prove ineffective.

- Change standards (legal system, standards of living, social relations) and disband existing organizations (army, police, judicial).
- Impose an ambiguous rule of law often based on alien law methodology and culture. For example, the Balkans used to have a mixed system of socialist and Roman law. The new international administration introduced many English common law–based regulations that were often perceived as unfair and frequently incomprehensible to local judges, lawyers and the people.
- Concentrate on aid and emergency assistance but not on sustainable development.

### *Lessons Learned*

All the operations so far conducted by the international community, if seen as integrated efforts including pre-war, war and post-war phases, have demonstrated that they can fail, not because of military blunders or lack of power, but because of:

**Dimensional Disconnect.** The preparation and conduct of the war is global while the post-war management is local; or vice versa (unilateral war and multilateral post-war management). All operations since the 1991 Gulf War have required a global engagement. All nations have been asked to unite in the effort of war and subsequently for peace support operations. However, immediately after the fighting, all solutions of the crises have looked for divisions—the Dayton syndrome. The new imperatives have been divide, separate, cantonize, decentralize. In so doing, regional security actors have been neglected or seen as part of the problem but not part of the solution. In Afghanistan and Iraq, the trend of war was the opposite, but the multilateral post-war effort still does not include the regional forces and their responsibilities.

**Elusion and Illusion.** In this post–Cold War era, we have developed the belief that the use of military arms is humanitarian; we do not wage war, we ensure peace. We are good and we produce a “success story” every day. This irenic approach eludes the concept of war and produces many illusions that are present in the behavior of many military organizations and administrators. Their claims of successes are so evanescent and groundless that trusting them becomes a real risk.

**Oversimplifications.** Politics seems to have lost the sense of complexity it has always had and that made its management a real art. Instead of understanding complexity and elaborating new approaches to the problems, our political system has resorted to simplifications and often oversimplification. For example:

- Democracy means elections—the sooner the better. Huge and powerful international organizations are devoted to this mantra and rush entire populations that have never had a democratic system into elections. But who are the candidates? How are the rights and fair representation of minorities protected? During the crises, whoever gets in power normally has the support of guns or the protection of foreign forces. In both cases the “free” elections risk legalizing the change of power and strengthening the power of unknown entities or individuals.

- Freedom means free markets. Free market means free competition; but what about local economies that cannot compete? Local resources will never have the chance to grow independently. In many instances, local and international mafias will benefit from a market where everything has to be imported and where there are weak governments or collusive forces facilitating the evasion of taxes and controls.

- Free economy means a unified currency. The first step international monetary authorities take is to establish a convertible currency. But converting what? Coming from where? Acquired through what? What about money laundering?

- The managers of after-war periods tend to assume that the basics of the society hit by a crisis have not changed during the war. This is not only an oversimplification; nothing is less true. War changes almost everything, but in particular it changes the people. Before, during and after the war entire generations are lost because of the killed and missing in action, the wounded, the massacres and reprisals on civilians. Generations of “could be” fathers and mothers are lost. But during these periods, generations are also lost deprived of educational opportunities during the war. This compounds the inadequacy of the education they received from the previous regimes, and the ideological, racial, ethnic biases of their upbringing, biases reinforced by the vicious cycle of violence.

- We in the West tend to face the problems only when violence erupts. But in almost all instances it is already too late. We started dealing with East Timor in 1999, but the crisis started in 1975. The most dramatic genocide in the world (in terms of the percentage of the existing population) was perpetrated during that period and nobody seemed to care. Everybody knew that Marshall Tito's death in 1980 would start the dissolution process of Yugoslavia, but from 1980 to 1992 no

one seemed to care. NATO brought war to Yugoslavia during the Kosovo crisis in 1999, but the problem had started ten years before, in 1989, when Milosevic raised his nationalistic stance against the province. In those ten years, the Serbs took away the autonomy Kosovo had enjoyed since 1948, and the Albanian ethnic groups were forced out of the government and denied an adequate education; finally resorting to open violence. A Catholic priest in Kosovo once said to me: “it takes a lifetime to shape a man and 24 hours with a gun in the hands to spoil his life. All these kids that tasted the power of violence will never be the same.” And those children that lived in constant contact with war relics, unexploded ordnance, landmines and under the protection of foreign military forces will never be the same. Generations that are supposed to reshape the future of the country are simply non-existent or wholly unprepared for the task. An international observer noted in Western Africa, “The sons are less educated and more violent than the fathers.” This is an equally unfortunate truism in the Balkans, Afghanistan, East Timor, Somalia, Rwanda, Palestine, Iraq, and elsewhere visited by the violence of war. These are historical defeats for our society because the “fathers” were raised through colonialism, communism, extremism and fundamentalism—all manifestations of the “evil” from which we liberated them. The international community tends to replace every loss with temporary foreign manpower and in so doing they perpetuate the delay in recovering the lost generations. Finally, within these societies, there are also lost expectations, lost hopes, and lost ideals, and these losses aggravate the recovery plan.

- Reconstruction by the few. In all of the after-crisis periods a handful of international companies are given the task of reconstruction. Normally these companies belong to the same nations that “donate” the resources for reconstruction. The money basically returns to those who gave it. The local manpower is scarcely involved and since such companies are technologically advanced, their costs tend to be much higher than the average local standards. In periods of emergency, through so-called international community and then replacing the governmental structures that existed before the crisis is not ready to exercise control over the foreign money and over the reconstruction plans. Therefore the opportunities for speculation, profiteers, black market, crime, tax evasion and so on are great.

- Another maniacal effort immediately undertaken is “privatization.” Former State-owned enterprises, cooperatives, farms, and industries are disbanded and thousands of workers laid off. The international administrators do not want to appear undemocratic and they immediately tend to shape the local economy according to free market models that it took centuries to develop. Almost

everywhere, this abrupt effort does not fit a situation where property rights are unclear, ethnic or religious divisions make it difficult to be fair, and where societal needs require labor occupation and not unemployment.

- Last but not least, intervenors intervene without defining the desired “final status” of the crisis area. It is a sign of hypocrisy and inefficiency to give hopes and fuel expectations that would be difficult to keep. It is also difficult to think that one model of society could work for every corner of the world. Furthermore, the delay of the realization of the final status in the absence of a strong, efficient, impartial and transparent administration supports the creation of failed States, quasi-States, rogue States and mafia States. The final status must be defined and agreed upon before the international intervention with clarity and courage. That status must be compatible with international standards but first and foremost must be compatible with the local and regional reality. No single hot spot can be dealt with in isolation from its environment.

**Fire and Forget.** This tendency is not new, but has regained conceptual support during the last decade. The military instruments are the only readily available and organized tools to turn to in emergency situations. The political imperative to “do something” (which is also a sign of political weakness) finds it easy to resort to military action first. Unfortunately, the lack of comprehensive planning of the pre-war, war and post-war phases and of any kind of holistic approach makes it also easy to identify the emergency circumstances, respond to the crisis areas and then forget them, leaving the military behind. Peacekeeping missions start in the spotlight of public support and emotion but very soon are neglected and forgotten.

**Civil-military Relationship.** Another lesson drawn from recent operations is that the relationship between the military forces and the non-military administration is always problematic, but it becomes a disaster when the international community or the sending States allow:

- Multiple chains of command.
- Different reporting lines (national, international, private).
- Different priorities, concepts of secrecy, concepts of reliability (vis-à-vis the locals).
- Different approaches: emergency vs. sustainable development, bureaucracy vs. results, local vs. regional, politics vs. administration, success story vs. true story.
- Uneven access to the political leadership and feedback. International organizations and corporations have much easier access to the “political masters”

than do the military commanders. Normally layers of political, diplomatic, economic, religious and other advisors screen the access of the military to the decision makers who, often unable to get the military assessment as it has been stated by the commanders, tend to take the wrong decisions or prefer the always “good news” stories those advisors want to present.

- Security not to be integrated in the development and reconstruction strategy. In the minds of many civil administrators and politicians, security is often confined to “armed protection.” The international civil administrations do not like to see the military around or inside their briefing rooms. Peacekeeping is mistakenly seen as a pacifistic and idealistic effort and many international civilian peacekeepers (administrators) come from personal backgrounds of conscientious objection, anti-military activism, and other “noble” endeavors. Many, of course, know that without the military it would be impossible to cope with emergency situations, but many others think it would be better to leave the military home or, if military forces are absolutely necessary, to send them away as soon as possible once the initial emergency is in hand. Almost all these administrators do not include the military aspects of security in the plans they make—roads and bridges are rebuilt without considering defensive or military requirements; industrial complexes and plants are rebuilt and managed regardless of their vulnerability to internal and external sabotage; mines and minerals or other natural resources are left in the hands of engineers and managers totally unaware of security issues. Furthermore, the reconstruction plans do not consider the indirect effect a military presence has on local development and the indirect and direct protection of minorities and their patrimonial sites. This security factor is either taken for granted or completely missed. There is always a great push towards a so-called “de-militarization” or effort to diminish the presence of the military without having restored an effective security system. A reduction in the foreign military force is always a great confidence building measure, but it must undertaken only when accompanied by a real improvement in the security environment, and, most of all, the diminution of visible aspects of security must be balanced by invisible, but not less effective, measures of security (intelligence, deterrence, reassurance, reserve forces, civil-military cooperation, information campaign, psychological operations and military-to-military cooperation). Finally, the great value that the military-to-military relationships have in the regional context is very seldom considered. The occupying military forces are denied opportunities for regional or wider contacts with the military forces of the area on the assumption that a relationship with neighboring foreign forces could invade the realm of foreign policy. In this way a basic and effective tool of cooperation is often neglected.

The latest international operations have also demonstrated that nobody can act alone. No matter how powerful and strong a nation, the participation of allies and friends is always advisable and necessary. Coalitions of the willing are not enough if they exclude traditional partners or potential critics. Critics must be always involved and their views solicited and considered. Furthermore, the single-sided approach (the military wage war, civilians manage pre-war and post-war) creates further disconnects and a vacuum of power that is immediately filled by thugs, criminals and extremists. Without an integrated approach to pre-war, war and post-war operations, the transition periods, no matter how smooth or short, embed the seeds of failure for the entire operation. It is during these periods that the major contrasts between military operations and civil administration are most apparent and that both the military and civilian sides are most vulnerable. During the transitions the huge amount of money that international "solidarity" has poured into the crisis area cannot be controlled and these monies create enormous possibilities for criminal organizations and other profiteers. It is also during these transition periods that oversight of the local political system is reduced. Often a struggle for internal power delays political development.

**The "Liberation Syndrome."** It is often stated that modern military operations and wars are not waged just to defeat an enemy but to free a country or a population. Of course this is a true statement and it is the only appropriate motivation that a modern civilization can have to justify war against someone that does not pose a direct threat to the sovereignty of our countries nor possess the military capability or power in whatever form to threaten our basic security. But the aim of "liberation" cannot be misused or abused. Liberation is not a status granted by intervening foreign forces or freely claimed by insurgents, but it is acquired through a self-determination process guided by internationally recognized legal institutions. Self-determination is a fundamental principle of international law. The United Nations system is built on the concept of self-determination as expressed in the UN Charter. The inalienable right of self-determination stands as the very first article in the two treaties, the International Covenant of Civil and Political Rights<sup>3</sup> and the International Covenant on Economic, Social and Cultural Rights,<sup>4</sup> both adopted in 1976, which, together with the Universal Declaration of Human Rights,<sup>5</sup> comprise the International Bill of Rights. The right to self-determination may be claimed and asserted only by the legitimate representative of a people or nation. The realization of the right to self-determination, through the attainment of sovereignty and legal personality, is governed under international law according to the following recognized factual criteria of Statehood: "The State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a

defined territory; (c) government; and (d) capacity to enter into relations with other States.”<sup>6</sup> In addition to these factual criteria, recognition is an important factor in the granting of legal statehood. The General Assembly, responsible for admitting members to the United Nations, is the most authoritative forum for State recognition, although bilateral recognition by other States is also an important factor. However, the right to self-determination is not the same as an absolute right of secession from an established State. The territorial integrity and sovereign equality of States are also basic principles of international law recognized in the UN Charter and subsequent treaties. In the 1970 Declaration of Principles of International Law, the General Assembly affirms that every State must aid in the realization of the “self-determination of peoples” in accordance with the provisions of the Charter, but also that “nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair . . . the territorial integrity or political unity of a sovereign State.”<sup>7</sup> Similarly, the 1961 Declaration on the Granting of Independence to Colonial Countries and Peoples affirms both the right of all peoples to self-determination and the principles of territorial integrity and inviolability of State borders.<sup>8</sup>

In the last decade, “liberation,” more than an expression of self-determination of the poor and oppressed, has become a “syndrome” of the powerful. It has also created dangerous ambiguity in the role of belligerent parties and occupying powers. The misperception induced by the “politically incorrect” word “occupation” is greater than the reality, while the “good” word “liberation” fuels many misunderstandings. These include:

- Liberators are not occupants; they cannot behave like occupying forces
- Immediate liberation. In the minds of the liberated peoples they are free as soon as the liberating forces assume the control of the territory and come in contact with them. If small local irregular units happen to have contributed to the fighting, they become the heroes of the nation and the “freedom fighters.” They demand immediate actions in removing the previous authority, freeing political prisoners or internees, arresting former officials, disbanding former State administrative agencies and State security organizations, including intelligence, law and order and administration. They expect the international community to allow freedom and rights not previously enjoyed. They expect that power will be transferred to them without any interference or delay.
- Another perception is that of those who were persecuted by the previous regime want the power too. They are martyrs. They want the leading positions and they want revenge.

- Then there is the perception of the liberating forces. In this modern age there are no longer wars for territorial control or annexation. Nobody wants to modify the existing borders. Therefore, unlike the occupying forces of the 19th century, the so-called liberation forces do not want to control the territory; they simply want to accomplish whatever objective was set and then go home as soon as possible. They want to transfer the power to whoever could free them from any continuing responsibility. The liberators do not feel additional responsibility towards the “liberated” and are not psychologically prepared to use force against them; even if the failure to do so would allow the thugs to come into power or if disbanding the previous administration would mean chaos for decades.

All this is very far from what the reality of the situation requires and far from what is anticipated by international humanitarian law (IHL). Liberation is a synonym of self-determination as far as the people or the nation that strive to attain independence are concerned and it is a form of external “aid” to such an endeavor when foreign forces intervene. However, no matter the purpose of the conflict, the status of occupation paradoxically provides a greater legal basis than any other justification for military presence and best ensures the protection and basic rights of the civilian population. Let us turn to the case of Iraq and see what occupation should imply.

The following analysis contains extracts taken from a paper prepared as part of the International Humanitarian Law Research Initiative.<sup>9</sup> While somewhat lengthy, it provides an excellent discussion of the principles of IHL in the context of the military occupation of Iraq.

The Fourth Geneva Convention [1949] and the Hague Regulations [annexed to 1907 Hague Convention IV 1907] regulate the situation of belligerent occupation. They set forth a series of duties and obligations for the parties involved from Coalition forces to relief agencies and the Iraqi population itself. Their purpose is to ensure minimal protection of the civilian population and favor the stabilization of the security and living conditions in the territory under the control of invading forces.

....

#### **What is an occupation?**

The IHL follows a very practical approach in defining military occupation. It refers to factual control over a territory or a population. It does not require any form of declaration or intent of the invading forces. The motives for the presence of foreign military forces on the territory, be they liberation, self-defence, or enforcing pre-emptive doctrine, are irrelevant. . . .

### **What is the law of occupation?**

From the point of view of IHL, civilians in occupied territories deserve and need particularly detailed rules of protection. . . . The civilians have no obligation of loyalty towards the occupying power, regardless of the motives of the invading forces. The only obligations they have relate to their civilian status, i.e., not to participate in hostilities. . . . [Because of that obligation, IHL prohibits civilians from violently resisting occupation of their territory and from attempting to liberate that territory by violent means.] [Conversely,] the occupying power is subject to a series of obligations pertaining to the administration of the territories it occupies and the population it controls as a substitute and caretaker for the national authorities.

### **When does occupation begin?**

The criteria for the application of the law of occupation are relatively straightforward. The law of occupation applies whenever, during an armed conflict, a territory and its population come under control of the enemy of the State authorities previously controlling that territory. (See Art. 42 of the Hague Regulations and Art. 2(1) and Art. 4 of Fourth Geneva Convention.) The overriding concern of the IHL rules is to regulate the relationship between the civilian population and the invading forces as soon as the two are in contact, independently of the duration or motives of the military operations. In this context, even a military platoon occupying a village for a period of a few hours, has obligations to take care of the population (emergency health care, food and water supplies, etc.), not as a matter of charity but as a duty under the rules of IHL. The longer this occupation lasts, the more detailed the obligations become. In the case of Iraq, the fall of the regime certainly creates long-term obligations pertaining to all spheres of public services, from the maintenance of law and order, the administration of justice, the supply of food, water, and health services, and the administration of the Iraqi resources for the benefit of its people.

### **When does occupation end?**

Occupation ends whenever one of the conditions of occupation is no longer met.

1. The international armed conflict has ended.

An agreement has been signed between the parties at conflict bringing to an end the armed conflict. In general, such agreement will involve the withdrawal of the occupying forces. There may be situations, however, where the former occupier will maintain a military presence in the country, with the agreement of the legitimate government under a security arrangement (e.g. US military presence in Japan and Germany). The legality of such agreement and the legitimacy of the national authorities signing it are subject to international recognition, whereby members of the international community reestablish diplomatic and political relations with the

national government. In this context, it is in the interest of all the parties involved to maintain a clear regime of occupation until the conditions for stability and peace are created allowing the re-establishment of a legitimate national government. A post-occupation military presence can only be construed in the context of a viable, stable and peaceful situation.

2. Foreign military forces have withdrawn from enemy territory or are no longer exerting control over the population of that territory.

In case of an ongoing conflict, the withdrawal of the forces also brings an end of the applicability of the law of occupation. It implies however that the enemy power has regained control over its population and territory. The mere withdrawal of troops from certain conquered places does not end or suspend the application of IHL rules if it leaves a vacuum of authority. The control of the territory and the legal duties involved remain in effect until the front lines have stabilized. Evidently, in the course of a military campaign where front lines can move back and forth many times and responsibility over the territory and population is unclear, the implementation of such rules can become impractical. However, in the case of the collapse of enemy forces, as in Iraq, the law of occupation applies to territories and populations entering into contact with invading forces, and remains applicable regardless of further tactical deployment of troops. In other words, there is no vacuum of authority or responsibility once troops have moved into a given territory. Obligations for the maintenance of law and order as well as all other obligations pertaining to occupying powers are applicable to the Coalition forces as soon as they drive Iraqi forces out of civilian areas.

In both cases:

- The hand-over of administrative functions to civil servants does not relieve the Occupying Power of its obligation;
- The set-up of government structures by opposition groups with the continuing military presence of Coalition forces does not fulfil the conditions for the end of the occupation. If changes to the Constitution are required, it can only be amended under its own provisions and procedures or, in exceptional cases, under applicable international law and procedures. Agreements concluded by the U.S. or the U.K. with local authorities of the occupied territory or changes introduced by Coalition Forces to Iraqi institutions or to the government of Iraq cannot deprive protected persons from the protection offered by IHL (see Article 47 of Fourth Geneva Convention).
- In all cases, the law of occupation applies until one year after the general close of military operations, and even beyond that date basic rules continue to apply, if the occupying power exercises the functions of government in the territory. (See Article 6(3) of the Fourth Geneva Convention.) In addition, Protocol I contemplates the

extension of the full application of occupation law until the termination of occupation. (See Article 3(b) of Protocol I.).

### **What are the obligations of the Coalition forces in Iraq?**

- In principle, life in the occupied territory must be allowed to continue as normally as possible. The obligations of the occupying power can be summed up as permitting life in the occupied territory to continue without being affected by its presence. As authority has passed into the hands of the occupant, it becomes responsible for public order, safety and welfare in the occupied territory. IHL is strong in protecting the status quo ante, while weak in responding to new needs of the population of the occupied territory. The longer the occupation lasts, the more shortcomings of the regime established by IHL therefore appear. Only international institutions such as the U.N. or new local authorities established in conformity with the right of the Iraqi people to self-determination can establish a new political system in Iraq.

The legal implications of this approach are the following:

#### Regarding internal security, the maintenance of law and order and public welfare

- The occupying power's only protected interest is the security of the occupying armed forces; it may take necessary measures to protect that security, but it is also responsible to take all measures in its power to restore and ensure, as far as possible, public order and safety (see Article 43 of the Hague Regulations). In this context, while the U.S. is not responsible for every looting occurring in the territory it controls, it must exercise due diligence to avoid such looting. The claim that its forces are not sufficient in number or not appropriately trained is not a sufficient excuse;
- Similarly, the U.S. and the U.K. are responsible for ensuring public health and sanitation (see Article 56 of the Fourth Geneva Convention) and the provision of food and medical supplies (see Article 55 of the Fourth Geneva Convention).

#### Regarding the administration of justice

- Except concerning the protection of the occupying power's security, local laws remain in force (see Article 43 of the Hague Regulations and Article 64 of Fourth Geneva Convention) and local courts remain competent (see Article 66 of the Fourth Geneva Convention);
- Civilians may only be detained in anticipation of a trial or for imperative security reasons, which must be individually determined, allowing for a right of appeal (see Article 78 of the Fourth Geneva Convention). Such civil internees benefit from a very detailed protective regime under the Fourth Geneva Convention (see Arts. 79–135 of Convention IV);

- If civilians commit hostile acts, they may be punished under legislation introduced by the occupying power, but do not lose their civilian status. They may however lose their communication rights (see article 5(2) of Convention IV). Unless they directly participate in hostilities, they benefit from the protection of civilians against effects of hostilities (see article 51(3) of Protocol I.)
- In no case may a civilian be deported outside the occupied territory (see Article 49 (1) of Fourth Geneva Convention).

Regarding property and resources

- Except when rendered absolutely necessary by military operations, private property may not be destroyed (see Article 53 of the Fourth Geneva Convention) and it may only be confiscated under local legislation (see Article 46 of the Hague Regulations).
- The government previously controlling the territory can obviously no longer administer public property (other than that of the municipalities (see Article 56 of the Hague Regulations). Such property may therefore be administered by the occupying power, but only under the rules of usufruct (see Article 55 of the Hague Regulations). If Iraqi oil wells were government owned, the U.S. may administer them and sell the oil. According to some opinions, it may use the proceeds not only for the benefits of the local population, but also, similar to levies, to cover the cost of the occupation (but not of the whole war) (see Article 49 of the Hague Regulations).

As can be seen, the aim of liberation does not affect the status of occupation nor alter the relevant obligations. “Fire and forget” is not the kind of responsibility the IHL assigns to occupying powers. “Fight, pay and leave” is not what the civilian population can ask for. The criteria set by the law of occupation exactly fit the situation of Iraq.

*Case Studies*

**Afghanistan.** In the case of Afghanistan, the “liberation” by the Coalition was neither requested nor wanted by the Taliban regime that constituted the government of that country. The so-called “Northern Alliance” was not a resistance force but the remnant of a group of warlords opposing the unifying power of the Taliban. The Taliban regime, which itself pretended to “free” the country from the previous regime and the mujahideen under the banner of self-determination, was not recognized by the United Nations. In fact, after the Coalition’s “liberation” the same warlord system of the mujahideen regime that preceded the Taliban has taken over local power, while the central government is able to perform a sort of loose control only over Kabul, and that thanks to the presence of US and NATO forces. During

the mujahideen regime there were around 28 warlords and now there are at least 32 war/drug lords.

**Iraq.** In the case of Iraq, there will be no liberation until the Iraqi people have effective, stable and legal (internally and internationally recognized) State institutions. Unfortunately, they have been prevented from liberating themselves from Saddam's regime. The assumed and promised popular revolution and participation in the "liberation" did not take place. It was a gross misperception and a mistake of evaluation on the part of many experts, worldwide renowned Islam scholars, intelligence agencies and naïf politicians. On the other hand, there was no attempt to organize the participation of the local population in the coalition operation was not organized, not foreseen and not even symbolically pursued. Perhaps the most widely remembered symbol of the end of the Saddam regime was the pulling down of the large statue in central Baghdad. But this was done by a US Marine, and the small crowd of Iraqis around it was chanting more for the sake of TV cameras than for joy. Most Iraqis had longed to liberate themselves from the Saddam regime, but were not given the opportunity to organize their own fight, not even at a symbolic level. Although coalition leaders brought with them Iraqis that were believed to be potential leaders, these had no political credibility; they were viewed as puppets of the Western forces that had imposed hardship on the Iraqis for too long. Because there was no participation by the Iraqi population, the people had no opportunity to rid themselves of regime propaganda and the atavist fear of the regime. They did not have the chance to understand the new situation and finally react.

Paradoxically, like any other peoples that did not have the opportunity to free themselves from their own dictators, the Iraqis are now freeing themselves from the "liberators"—the Coalition. Liberation and freedom must be earned through self-sacrifice and cannot simply be given to them for free by someone else. The status of "liberator" is not one recognized by international law and liberation by "liberators" is not a guarantee of democracy or humanity. The Jewish internees of the Nazi lagers gained their freedom through their own martyrdom; they were already free in the face of God and in the face of the international community when the Americans and the Soviets opened the gates of Auschwitz, Buchenwald, Dachau, etc. Nevertheless, they saw their liberators as angels regardless of whether those military forces belonged to a Western democracy or a Stalinist regime. The majority of Iraqis view the Coalition forces as liberators, but they know that this recognition does not give the Coalition any specific right over them, their resources, or their sovereignty.

The majority of Iraqis recognized the Coalition as an occupying power responsible for restoring and ensuring public order and safety, because they knew they

were incapable without that assistance of overcoming the resistance forces or even the criminal gangs that plagued their country. They were willing to postpone the establishment of their own freedom because of their lack of capability to maintain security. But if the occupying forces prove unable to ensure security or want to give up their own responsibility as occupying forces in order to appear “liberators,” i.e., the good guys, they have no useful role to play and should leave. The people themselves have the right to free their own country. Therefore, from the legal point of view, a temporary consensual military occupation is better than an indefinite stay in the ambiguous status of liberators. Furthermore, as soon as the “occupiers” give up their legitimate status and want to become just “liberators,” ignoring their responsibility to ensure security and freedom of movement, they can be seen as unlawful occupants, making the struggle for liberty, or self-determination, against them lawful and justified. That’s why in the periods of immediate post-conflict, or even during the phase of active combat against rebels or insurgents, the status of occupants is better than any other funambulism, at least until security is guaranteed and civil institutions are able to control the internal situation. Until that moment, the coalition forces should retain the status of occupying forces and comply with their relevant responsibilities under international law. Liberation and occupation is not a matter of self-labeling, but of international obligation.

In the case of a coalition composed of belligerent and non-belligerent nations, the responsibility of ensuring respect for the norms of international humanitarian law as occupying forces resides with the individual nations even though the operational or administrative leadership has been assumed by or delegated to a leading nation. Although some national forces may not accept the rationale for the war, the status of occupation is independent from their acceptance or non-acceptance of that rationale. Their *de facto* control over part of a territory even by a small unit render the national forces responsible for the fulfillment of occupying obligations. In Iraq, it is likely that the so-called supporting nations (Italy, Poland, etc), when assuming the responsibility of a sector, implicitly assume the obligation of occupying forces even though that status is specifically recognized by the relevant UN resolutions only with respect to the United States and the United Kingdom. On June 28, 2004, the control of Iraq was formally handed over to Iraqi authorities. However, coalition forces have not changed or given up their *de facto* control of Iraqi territory. It is highly questionable whether the nominal control residing in the hands of the local authorities is sufficient to end the “occupation regime,” but certainly it is not sufficient to amend the obligations that the coalition has towards the civilian population.

It is clear that in their formal new status of “invited” forces, the national forces in Iraq cannot have fewer obligations than they did when their status was that of

occupying forces. Furthermore, Iraqi forces have no power to control the security situation, lack intelligence and surveillance resources, and do not possess even the capability to adequately support the Coalition. In fact, the Coalition still has full control of the security instruments and their apparent status of “supporting” the local authorities is a fiction. As a matter of fact, the so-called “passage of sovereignty” (in reality, according to international law, Iraq never lost its sovereignty) to the Iraqis has added the Iraqis themselves and their immature, unprepared, ineffective security forces to the list of enemies of the criminals and the rebels. The early disengagement of Coalition forces from the obligations of occupation law, their desire to regain the fallacious status of “liberators,” and their formal transfer of responsibility of security to the provisional local institutions has ended the regime of occupation and also the right of resistance that such law recognizes to the Iraqi armed groups.<sup>10</sup> But it has also relieved the civilian population from their duty to not engage in violent resistance to the occupation. The formal end of the occupation has paradoxically increased the risk of legalizing mass rebellion and fueling a civil war; the rebels can now clearly identify the Iraqi security forces either as collaborators of the unlawful occupants or as internal enemies.

**Kosovo.** In Kosovo, legally speaking, the war against the sovereign State of Serbia and Montenegro was waged by a regional security organization (NATO) in order to protect a minority legally and lawfully integrated into a sovereign State, but not to transfer to such ethnic group the sovereignty over the parts of Serbia, Albania and the Former Yugoslav Republic of Macedonia (FYROM) where they live. “Liberation” in this case and in this phase has the value of humanitarian protection and relief. That is why UN Security Council Resolution 1244<sup>11</sup> authorizing the NATO-led mission in Kosovo and the UN administration did not foresee any loss of sovereignty by Serbia and Montenegro.

The international administration of Kosovo that followed Operation Allied Force was often discussed both before and after the war with regard to its applicability to Iraq. Many experts and UN officials wanted to export the “Kosovo model” to Iraq. In fact several international officials and national military officials were transferred from Kosovo to Iraq in the early days of the invasion. I can testify from personal experience that among those international officials there were some good persons who had performed effectively, but there were others that had failed miserably during their tour in Kosovo. The suggestion of the “Kosovo model” for Iraq was a serious concern to all those who had lived through that painful, ongoing peacekeeping process. Kosovo has nothing to do with Iraq and the poor performance of the most prominent international organizations there did not justify any attempt to make a “model” out of it. The Kosovo model becomes even more

irrelevant when being exported to a completely different situation, culture, mentality and set of practical problems. The United Nations may have had little choice because other models were not available and the donor countries and the international organizations had somehow accepted the bureaucracy established in Kosovo. Because the different circumstances in Iraq were not understood, this decision was not very promising. Iraq required a new and clearly determined approach; the failure to provide that approach does not bode well for the future.

The United Nations imprimatur has great political value and good diplomatic value. Worldwide operations or initiatives cannot be effectively undertaken without the consent and the support of the United Nations. That said, in Kosovo, as in other missions it has undertaken, the United Nations proved completely ineffective and even dangerous when administering a country or a territory. Kosovo is a small spot in the Balkans; officially a province of Serbia. It has a territory of 10,000 square kilometers and a population of 2.1 million. United Nations Interim Administration Mission in Kosovo (UNMIK)<sup>12</sup> is, in effect, the governing institution in Kosovo and is responsible for running this province on behalf of the United Nations. A Special Representative of the UN Secretary-General (SRSG) is the highest international authority in that province. NATO, which brought war to Serbia-Montenegro because of the Kosovo humanitarian crisis, maintains Kosovo Force (KFOR), an international security force composed of NATO and non-NATO military contingents, in the province. The KFOR commander (COMKFOR) is the second ranking international official in Kosovo, but is not subordinate to the SRSG.

Personnel of the United Nations High Commissioner for Refugees (UNHCR) are still, as of the time this article is written, working in Kosovo. Their main humanitarian work is finished and they are reducing their staff and handing over some responsibilities to the civil administration, but they still provide assistance to the local minorities.

UNMIK is divided into four sections, which it calls “pillars,” as follows:

- Pillar I, under UN management, is responsible for police and justice affairs.
- Pillar II (civil administration), also under UN management, is responsible for all aspects of organization of normal life; e.g., finance and payment, education, transportation, health, judicial affairs, UNMIK police, post and telecommunication, public utilities and many more.
- Pillar III, an institution run by the Organization for Security and Cooperation in Europe (OSCE), is in charge of media development, democratization, police training, and elections/registration.
- Pillar IV, run by the European Union, is responsible for reconstruction, trade and industry and public utilities.

The SRSB is responsible to the Secretary-General, but must report to a Contact Group of eight nations. In theater, a special supervisory mandate is given to the QUINT Nations (the missions in Pristina, Kosovo of the Federal Republic of Germany, France, Italy, the United States and the United Kingdom). In 2002, when I took over as COMKFOR, UNMIK had 16,000 personnel assigned to it and KFOR 32,000. In the period which followed, UNMIK was to slightly reduce its size, while I received the task to reduce KFOR to 17,000 personnel by the end of 2003. Other interlocutors included the staffs of the international non-governmental organizations (400 non-Kosovars and 3000 Kosovars) and the police force composed of 5000 international police officers and 5000 indigenous personnel.

From the international humanitarian law point of view, the NATO-led forces in Kosovo should not have the status of occupation forces. Serbia signed an agreement allowing the foreign military presence on its own territory. However, under the requirement to use whatever means “to establish a secure environment”<sup>13</sup> KFOR could have acted as a “de facto” occupant rather than a force “allowed” to be deployed there for a long time. This was prevented by the hurry the UN and NATO political authorities were in to declare the situation safe and secure. It is also peculiar that NATO and Serbia did not sign a status of forces agreement regarding KFOR. Instead, the immunity granted to the forces is regulated by the Framework for Provisional Self-Government in Kosovo issued by UNMIK itself.

When I assumed command of the Kosovo Force in October 2002 (three years after the war), I had the good fortune to be aware of most of my legal limitations because I had served as Chief of Staff of Joint Forces Command Southern Europe that had, during the previous two years, been responsible for all operations in the Balkans. I was also fortunate in that exactly ten years earlier I led a mechanized brigade in the very first phase of an operation against organized crime in Sicily. At that time, in the aftermath of the assassination of two magistrates, the local government institutions were unable to cope with the distrust of the population and were not effective in countering organized crime. The Italian Army undertook this operation with special police powers and deployed in Sicily for nine years before returning full control of the region to civilian law enforcement. When I assumed command of KFOR, I thought I understood all of the difficulties related to the relationship with civil administration and law enforcement. I was also convinced that NATO forces had “liberated” the Albanian population and that both the Albanians and the Serbs were under control. During the previous three years there were no incidents or deliberate attacks against KFOR and the official reporting always depicted some improvement.

On taking command, I was also immediately challenged by some unusual legal aspects of my mandate. The first meeting scheduled after bidding farewell to my

predecessor was with the Russian Representative at NATO who traveled from Brussels to Pristina for the sole purpose of complaining about the exclusion of a Russian liaison officer at some regular meetings with the Serbian Security Forces. The second meeting was with my Chief of Staff and the legal advisors to examine an official complaint presented by Amnesty International in reference to the alleged mistreatment of two Islamic diplomats by KFOR troops. The two diplomats had been arrested with clear evidence of conducting illegal activities while allegedly working for an Islamic NGO. I settled the dispute with the Russians in five minutes, but Amnesty International is not satisfied with the answer NATO provided with regard to the two diplomats and that issue remains open.

I soon discovered that the national caveats (the guidance provided by the participating countries with regard to their contingents), previously seen as “political gadgets” the diplomats like to play with, were directly affecting the mission of the contingents and limiting their rules of engagement. Some of them were also posing additional and unnecessary risks to our soldiers. For example, minimum use of force was allowed only in case of direct attack or hostile intent. The meaning of direct attack is clearly recognizable, but not so hostile intent. Generally speaking, the national caveats were clear, understandable and justifiable. More problematic was the interpretation of existing local law, the national law every soldier must respect, and international law.

Any concerns that I had with potential legal matters and dealing with the differing national caveats were insignificant when compared to the overwhelming practical problems associated with carrying out KFOR's responsibilities.

In exercising its responsibility for ensuring a safe and secure environment in Kosovo, KFOR had passed security tasks related to the protection of sensitive and patrimonial sites, border control, and freedom of movement, to local police forces. What I discovered after the first couple of weeks was that the situation was far from being safe and stable. The endless “successes” that contributed to the rosy picture were exaggerations, when they were not plain lies. In most cases, when real successes were reported, the following failures did not find their way into the reports. Security was sufficient only regarding KFOR self-protection. The ethnic hatred precipitating the war was still there and had worsened the situation of the minority, the Serbian population of Kosovo. The Albanian majority was conducting a steady “Albanization” of the province through blackmail, intimidation, assassination, and attacks on Serbian citizens and property.

In addition, the reconstruction program was behind schedule with no prospects of improvement. The final political status of Kosovo was not even being discussed. The relationship with Belgrade was a disaster, with daily clashes and insults between the SRS and a Deputy Prime Minister of Serbia. The transition of power to

the provisional government was not implemented. The local Assembly was rioting and the ministers wanted only more cars, cell phones and bodyguards. Notwithstanding three rounds of democratic elections, there was not a functioning government. Politically motivated assassinations were a norm. Some extremists had organized riots, demonstrations and the export of violence to southern Serbia and northern FYROM.

Many of these security and governance issues stemmed from Kosovo's non-functioning economy. Unemployment impacted 80% of the population, crime infested every field of activity, the decentralization of powers to the municipalities had not even started, energy infrastructure was under constant sabotage, the judicial system was compromising with the thugs, the UN administration was thinking more about political games than "administration," extremists had taken over the control of legal parties and civil protection institutions, schoolteachers were on strike, and the miners were claiming their jobs. Kosovo was importing every item and not one single social system had been re-established. Energy production was below the average requirements for domestic electricity use. No industries, mines, or farms had been reactivated. The money poured into the province had already tripled the initial estimate for the full reconstruction. The results of this huge investment (US \$9 billion, without counting the military expenses) brought some good news for housing and roads, but the rest was a disaster. Nobody knew where \$8 billion of the \$9 billion had gone.

War criminals were free to walk the streets and the International Criminal Tribunal for the Former Yugoslavia (ICTY), established by the Security Council to prosecute those who had committed war crimes during the ethnic conflicts of the 1990s, was afraid to indict the Albanians that committed crimes against humanity. The international police, composed of police officers coming from 80 countries, was largely ineffective and under continuous threat. Some of them were completely unaware of the local legal system, or of any kind of legal system for that matter. Corruption was widespread. The local police were not only ineffective but also involved in crime through clan and family links. Many of these officers were so-called "former freedom fighters" who believed this entitled them to claim certain privileges, but did not impose upon them obligations to carry out their law enforcement responsibilities.

The entire system was biased by a diffuse blackmail: "Do not upset the Albanian population. We liberated them." Kosovo not only was going nowhere; even worse, there was a real risk that it would become a mafia State. The dangers were, in fact, greater than they had been two years earlier. It was not more military and law enforcement forces that were needed, but a better and tougher use of a few forces against extremism, terrorism, crime, corruption and inefficiency. The huge

intelligence asset that existed in Kosovo was oriented towards the wrong threats. These resources were focused on a supposed military threat from the Serbian Army and completely overlooked and neglected the destabilizing power of the Albanian former freedom fighters in the region and in Kosovo. It was clear that the only threat to the safe and secure environment that KFOR was tasked to create and maintain came from within Kosovo and not from outside.

It was also clear that dramatic change was required. Within a few months, we started to arrest war criminals of any ethnicity indicted by the ICTY. Detention powers were used in a very discrete way and cooperation was improved with a weak judicial system that was relying on international and local judges. We started downsizing and changing methods of operations, allowing more cooperation with and support to the police, more participation in anti-crime operations, and increased utilization of the Over the Horizon NATO-led reserve forces. We built a comprehensive intelligence database and created a Joint Intelligence Operation Center, which incorporated all possible sources and all the intelligence agencies present in Kosovo. Within two months we were able to identify more than 5000 criminal links within the government, the political parties, the social institutions and within the organization supposedly in charge of civil protection. Nevertheless, it took our Joint Forces Commander (JFC) and the Strategic Commander six months to “socialize” a new assessment of the situation with NATO political authorities.

When the SRSG and I finally had the opportunity to present our views to the North Atlantic Council the facts on the ground had already proven the accuracy of our assessment. KFOR had arrested the first Albanians indicted by the ICTY while two members of the Kosovo Protection Corps, the civilian emergency service agency established by a 1999 UNMIK regulation, had just blown themselves up in a terrorist attack against a railway bridge. Attacks against the police stations had intensified, while we were able to disrupt a spring offensive in southern Serbia and FYROM through the arrest and detention of prominent extremists and criminals. Through cooperation with the judicial system, we were also able to put the detainees under judicial control.

Unfortunately, as of the time this article is written, all these efforts now seem useless. The fight in Kosovo is not over yet and inter-ethnic clashes erupted again in March 2004. Recently, the SRSG, a former prime minister of Finland, a gentleman and a highly respected politician, resigned. His frustration with the lack of results and goodwill on the part of all concerned led to this harsh decision.

The bottom line in Kosovo is that the seeds of a persistent, frustrating situation were planted:

1. In the pre-war period when trust was placed in and help given to the wrong persons and priority was given to the military campaign without integrating war and post-war requirements;
2. In the war period when the so-called freedom fighters were allowed to assume power with guns and perpetrate a sort of ethnic cleansing against the minorities; and
3. In the post-war period when the power of extremists was consolidated through illegal activities and “democratic elections.” Furthermore, the UN administration was inefficient and plethoric; the international security forces were too indulgent towards the extremists, allowing them to become de-stabilizers and even criminal clans; and some nations and international organizations, still linked to the pre-war mentality of the extremists as victims, continued to assist them after the war by providing assistance and funding.

### *Conclusions*

Because of a misperceived sense of “democratic” division of responsibility, military forces tend to be used as legitimate interpreters of the power of invasion, occupation and liberation only during combat operations. As soon as the fighting ends, or is artificially declared over, civilian authorities, with no understanding of the situation, assume decision-making responsibility. By the time local civilian rule is established and functioning, permanent damage has been done: pre-war structures have been destroyed by the war or no longer function, and the new structures are biased by compromise and corruption.

During planning in advance of an operation, it must be determined and made clear who will direct the civil administration during the war and in its immediate aftermath, to include the kind of social, economic and security system that will be put in place, how the regional framework will be affected and what to do in order to prevent destabilization.

In the last ten years we have tested the system to separate war from pre-war and post-war. We have identified the actors responsible for each phase as separate entities. And we have proven that the system does not work! Pre-war is the realm of politics and diplomacy, but the military could be used much more than as a tool of diplomacy (coercive diplomacy). The military consequences must be dealt with in this period by defining the potential risk for our forces and also the destabilizing effects of war on society.

War is the realm of the military, but political leadership has an important stake in its execution. Particularly, political leaders must respect the priority of military operations and ensure that each provides a political value that contributes to the

resolution of the crisis. What has to be avoided is the use of operations as a substitute for political action or to maintain ambiguity. Politicians cannot ask for short, surgical operations and then keep them going for years. They cannot camouflage war-like operations behind other names. Pre-war and war must be connected and have a unified political-military-diplomatic control center. The time for reaction during crises is becoming shorter and shorter not because threats are emerging overnight, but because the international community is very slow in acquiring the right intelligence, getting an honest and independent assessment, and then deciding what to do without indulging in bureaucratic politics. With fewer and fewer States maintaining standing armies, the preparation of the military instrument is becoming more difficult. In the meantime, military strategy and concepts are growing faster: the major risk of the pre-emptive war doctrine is that it requires military operations even before diplomacy is ready or has clear ideas on what to do afterwards. Early operations (pre-emptive) are at their extreme when anticipating the war before the enemy is recognised or before the friendly forces are ready or before the objectives are set. During the war, any political request to end military operations, or to pretend they have ended, before a reasonable level of security is achieved has to be, if possible, contested.

During the last ten years the post-war phase has been the most dangerous and unfruitful. Decision makers, both State and international, have applied the management model of *divide et imperato* to Bosnia and Afghanistan, and it is currently under discussion for application in Kosovo and Iraq. The international community has applied this Roman Empire rule in the most unhistorical way: it has been applied indifferently to enemies within occupied territories, and, most importantly, it has been applied to us and to our allies. The Romans used to divide everything that was too big and strong to handle as a whole, but they made sure they were able to control the separate pieces. For each situation, they had a tool to control it: force, money, favors, or corruption. Every tool was legitimate. Instead of using a variety of mechanisms, today the international community focuses on dividing entities without understanding it is losing any possibility of control. We have also divided ourselves by not only breaking alliances in order to form coalitions, but by dividing the leadership and the tools to exercise power.

We have established a substantial separation between civilians and the military, between the United Nations and national structures, between governmental and non-governmental entities, between NATO and the United Nations, between OSCE and the European Union, and so on. This separation has given birth to a myriad of chains of command, reporting channels, priorities and differing assessments. The results are that in all situations, from Somalia to Bosnia-Herzegovina, to Kosovo, to East Timor, Afghanistan and Iraq, international forces are not

controlling the situation. In fact, in the last ten years we have missed the main point: the three phases of pre-war, war and post-war are not separate. Any attempt to keep them separate is artificial and the gaps between them favor the destructive forces, allowing them to infiltrate and destabilization to prevail.

Another missed point is that conflicts are never limited to the hot spots. The reasons for crises are often very far from the time and space of the hotspot. We cannot hope to control a crisis just by pouring troops and missiles on the hotspot. We need to consider the regional balance and the international environment. We also have to consider the kind of side effects that can be expected in the medium/long term, and we must be prepared to cope with them. Nowadays, these side effects are rarely of a nature that the military can control. They are related to the economy, political balance, strategic resource management, social fields and, lastly, security.

The three phases of pre-war, war and post-war are connected by security. In each phase there is a subtlety, a slightly different aspect of security, which remains the prerequisite. In the pre-war period, security is mainly a stability problem. There is something that threatens it. During combat operations, security is mainly a primacy problem in order to gain control over destabilizing forces, including the people for whom we fight. After the war, security is mainly a self-protection and rule of law problem. Military forces have a prime role to play in every phase, but they cannot act in isolation or be separated from politics, diplomacy, administration and reconstruction. Some type of war cabinet must assume control over the crisis in the very early stages and provide oversight and direction, while respecting the unity of command. This war cabinet must also provide guidance on what to do before, during and after actual combat operations. No vacuum of power can be permitted, no transition can take place if the security requirements are not achieved, and no transfer of power can be executed if the political and administrative bodies are not ready to take responsibility. My suggestion is very simple, maybe even simplistic. War cannot be rushed into before all solutions are explored and attempts to peacefully solve the crisis are made. Politicians and diplomats must refrain from rushing into war “hoping” that it will solve the problem or just because “something has to be done.”

In the pre-war phase, military forces have the vital role of preparing for war, while emphasizing to the politicians and diplomats that waging war is not a preferred option. Military leaders have a duty to highlight all possible options and their consequences, including the side effects on the economy, social system, regional and global assets. Military forces have a duty to prepare for short, intense operations that do not annihilate, and for a long, painful, uncertain and costly period of insecurity. They have to focus on strengthening their powers of deterrence, dissuasion, and “reassurance” more than their capability to destroy. Reassurance

has a focal point in the military because it has to be credible and flexible, but it comprises both economic aid and confidence building measures. The military have to be prepared to participate in the temporary territorial administration of foreign countries, under different cultural situations.

When operations begin, the military should use a reasonable excess of power to secure major objectives and defeat the enemy forces. They have to “manage” the excess of power and safeguard basic critical infrastructure needed for post-war operations and reconstruction. After major operations have been completed, they must be in control of those providing security and must guarantee the necessary framework for rehabilitation. They must not hand over control to so-called local police until security is re-established and stability ensured, until a judicial system is effectively functioning, until freedom of movement is re-established and generalized violence is extinguished. In this phase, the military have to resist the desire to declare their mission completed and depart, the wish of the politicians to claim victory and leave, the desire of the profiteers to transfer power to the civilian agencies or to the local clans, and the wish of the local population to have the military forces on the ground as a nice, money spending, non-interfering, gentle “close your eyes and open your wallet” organization. The military also has the duty to build regional security and therefore they have to engage all regional and international actors in projects that build regional or wider security. Security in this phase is not only self-protection or the fight against extremists. Security and stability also entail economic recovery, reconciliation, return of refugees, prosecution of war crimes, maintenance of law and order, an effective judicial system, employment, resources management, nation building and regional confidence. Security is also bringing maturity and social development to the system: you are not free and safe if you are hungry or humiliated.

Does accomplishing these things necessitate a long occupation under military rule? A difficult and extended period of responsibility for law and order and justice? A significant share of responsibility over a long and painful period of reconstruction? In some circumstances, perhaps. Until international law evolves and becomes more relevant to current circumstances, occupation law must be considered not as an instrument of invasion or prevarication, but as the only tool available to clearly assume responsibility for and obligations towards the civilian population. It is not the best tool we can ask for, but it is a rule of law that will not mean an endless sequence of uncertainty, lack of control, civil-military separation, instability, and deaths. It will not allow compromising with the thugs, becoming guilty by association, and pouring indefinite, infinite and unaccountable resources into a black hole and, consequently, supporting new failed States, rogue States, non-States, quasi-States and mafia-States instead of new democratic entities. It will

prevent spreading violence, destabilization, drugs and terror all over the world. It will mean a real unified engagement for a real liberation.

*Notes*

1. This is based on the principle of the “inadmissibility of the acquisition of territory by war.” International law views occupation as a temporary status during which the occupier is obligated first to end the occupation as quickly as possible and second to safeguard the rights of the occupied population during the temporary period in which the occupation is maintained. Any move by the occupier to infringe on the rights of the occupied or change the status of the occupied land through, for example, annexation, confiscation of resources, population transfer, or destruction of civilian property, is illegal under the Geneva Conventions. *See, e.g.*, Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287, *reprinted in* DOCUMENTS ON THE LAWS OF WAR 301 (Adam Roberts & Richard Guelff eds., 3d ed. 2000).
2. The legal status of combatants for the right to self-determination was defined by the General Assembly in 1973 according to the following principles: first, such struggles are legitimate and in full accord with the principles of international law; second, attempts to suppress struggles against colonial and racist regimes are incompatible with the UN Charter. Universal Declaration of Human Rights, GA Res. 217A, at 71, U.N. Doc. A/810 (1948); Declaration on the Granting of Independence to Colonial Countries and Peoples, GA Res. 1514, U.N. GAOR, 15th Sess., Supp. No. 16, at 66, U.N. Doc. A/4684 (1961). Such attempts themselves constitute a threat to peace and security.
3. Adopted Dec. 19, 1966, 999 U.N.T.S. 171, *reprinted in* 6 INTERNATIONAL LEGAL MATERIALS 368.
4. Adopted Dec. 16, 1966, 993 U.N.T.S. 3.
5. *Supra* note 2.
6. Montevideo Convention on Rights and Duties of States, art. 1, Dec. 26, 1933, 165 L.N.T.S. 19, 49 Stat. 3097, T.S. No. 881.
7. Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, art. 2, GA Res. 2625, 25 U.N. GAOR, Supp. (No. 28) 121, U.N. Doc. A/8028 (1971).
8. Universal Declaration of Human Rights, *supra* note 2.
9. The IHL Research Initiative is a project of the Program on Humanitarian Law and Conflict Research, an international research and policy program based at the Harvard School of Public Health. The discussion set forth above is taken from Military Occupation of Iraq: I. Applicability of IHL and the Maintenance of Law and Order, Apr. 14, 2003, *available at* <http://www.ihlresearch.org/iraq/pdfs/briefing3423.pdf>.
10. Occupied people have the right to resist the occupation itself, as well as the specific illegal practices of the occupier. However, it is beyond dispute that attacks on unarmed civilians—whether by an occupying army or an armed resistance group—always constitute a violation of fundamental human rights and can never be justified under international law.
11. SC Res. 1244 (June 10, 1999), *available at* <http://daccessdds.un.org/doc/UNDOC/GEN/N99/172/89/PDF/N9917289.pdf?OpenElement>.
12. Established by the Secretary-General under the authority provided by SC Res. 1244, *id.*
13. *Id.*, para 9(d).



# PART V

## MILITARY COMMISSIONS



# XI

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## Military Commissions: Old Laws for New Wars

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William K. Lietzau\*

### *Introduction*

**T**he President's exercise of his constitutional authority to direct the Secretary of Defense to detain enemy combatants and to convene military tribunals to prosecute war crimes and other crimes triable by military commission<sup>1</sup> is both a lawful and practical response to the ascendance of terrorism. Though unpredicted by many,<sup>2</sup> and initially challenged as anachronistic, the exercise of jurisdiction by military commissions comports both with domestic and international law and can serve to advance the values that long have animated US national security strategy.

The apocalyptic effects of al Qaeda's attacks of September 11, 2001—the deaths of thousands of innocent civilians and the immutable gash in the skyline of our most populous city<sup>3</sup>—were pale harbingers of the significant changes to be wrought across the international and domestic landscapes when the United States initiated the Global War on Terrorism in response. That war, in turn, has introduced legal challenges that perhaps represent the quintessential example of the enduring impact of the attacks and the US response thereto. That the President should instigate a metamorphosis of old law to address the unique challenges of this new war was not surprising. History teaches that changes in the law are often

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\* Lieutenant Colonel, United States Marine Corps. The remarks contained herein are personal reflections and do not necessarily represent the position of the US Marine Corps or the Department of Defense.

significant consequences of war. So too, this war on terrorism has challenged and continues to challenge the limits of the constitutive tenets that have defined our international and domestic orders throughout the last half of the 20th century. A failure to participate thoughtfully and deliberately in fashioning the legal norms that are being developed—norms that will guide the global community for the next century—would constitute a missed opportunity of substantial moment.

US post-9/11 counterterrorist activities, particularly in the legal realm, have been the subject of much criticism. The decision to use military commissions to try alleged terrorists is a notable example. US efforts to cultivate those changes in extant law necessary to prosecute the war on terror frequently have appeared uncoordinated and ill-composed in immediate application. But this awkwardness is most accurately attributed to the fact that the progression in law required to deal with terrorism highlights both the confluence of what might previously have been viewed as disparate legal regimes—law enforcement and war—and the lacunae that reveal themselves in our attempts to merge the boundaries of these separate disciplines.

### *Paradigm Shift*

To comprehend fully the issues raised by the decision to use military commissions, one must first recognize the significant strategic and operational shift associated with the 9/11 response. Historically, the strategy of the United States in responding to terrorism was grounded solely in law enforcement.<sup>4</sup> It was widely recognized and accepted that the magnitude of the 9/11 attacks, coupled with their penetration of the American homeland, rose beyond mere criminal conduct, amounting instead to an act of war.<sup>5</sup> The almost exclusive law enforcement responses to past terrorist attacks would not suffice; the use of military force had become not only a legitimate option, but also a necessity. The US Congress recognized the changed nature of the terrorist threat when, on September 14th, it enacted a joint resolution authorizing the President to use “all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, and harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States.”<sup>6</sup>

The military response to the events of September 11th marked the most significant use of military force in response to terrorist acts to date—what had for years been viewed and addressed as a criminal act now had started a war. This view was not limited to domestic observers. The use of military force in Afghanistan in response to 9/11 was well received both internationally and domestically.<sup>7</sup> On September 12th,

the Security Council passed a resolution expressly recognizing the right of the United States to respond in self-defense.<sup>8</sup> Days later, the North Atlantic Treaty Organization (NATO) took the unprecedented step of passing a resolution citing Article 5 of the NATO Charter.<sup>9</sup> Separate resolutions of the ANZUS and Rio Pact nations similarly condemned the 9/11 attacks as attacks on their respective collective memberships.<sup>10</sup>

Though the need to respond to terrorism via the armed conflict model was manifest—primarily as a preventive measure—it was undoubtedly attended by punitive aspects traditionally associated with law enforcement concepts. Similarly, in crafting the associated new legal paradigm, the United States incorporated elements of both law enforcement and warmaking. This was no mere academic choice, but one required by the circumstances at hand. Oliver Wendell Holmes’s observation is appropriately recollected, “the life of the law has not been logic, but experience.”<sup>11</sup> We were and remain clearly at war, but the stated objective of that war was and is, at least in part, to bring wrongdoers to justice.<sup>12</sup>

In theory, an act subordinate to and lawfully consistent with the decision to engage in armed conflict should enjoy support commensurate with that attending the core decision itself.<sup>13</sup> But that has not been the case.<sup>14</sup> The armed conflict model for addressing terrorism, most prominently embodied in Operation Enduring Freedom,<sup>15</sup> was accompanied by a number of subordinate actions that did not enjoy such a sanguine reaction within the international community. Issues related to the detention of alleged terrorists at Guantanamo Naval Base, Cuba,<sup>16</sup> and the proposed plan for prosecuting alleged terrorists before military tribunals<sup>17</sup> are most conspicuous among those that have been the object of international condemnation. Yet, these decisions are a natural outgrowth of the paradigm shift from one of law enforcement to one of war. Legally and logically, military tribunals are a natural extension of the President’s authority as Commander-in-Chief of the armed forces; they are not a function of the United States’ judicial authority as is so often claimed.<sup>18</sup> Domestic and international criticisms of the President’s decisions have been cloaked in sweeping allegations of illegality. The apprehension animating those claims, however, is most frequently a misperception of an abuse of judicial authority or misidentification of policy concerns generated by the imperfect merger of the two relevant bodies of law.<sup>19</sup>

### *Executive versus Judicial Authority*

The first misperception is the most widespread and also the most easily defeated. Much of this criticism is simply the natural consequence of continuing to address discrete acts related to the war on terrorism as if they fell squarely and solely within

the law enforcement arena. A response to terrorism framed solely in the law enforcement paradigm—particularly when the detention and trial of accused individuals is involved—invokes a body of law requiring significant procedural due process and according a suspect or accused a plethora of substantive rights. In addition, the concept of trials by military commission invokes a feature of domestic law that itself has been scrutinized substantially: procedures and rights attending the criminal trials of accused persons in civilian courts have been the subject of extensive legislation, have been implemented in detail by the executive branch of our government, and continue to be the object of considerable judicial scrutiny during the process.

Critical aspects of a wartime terrorist trial militate against using procedures and rules of evidence akin to those employed in times of peace in civilian jurisdictions. Criminal justice systems are not attuned to—nor could they be readily adjusted to accommodate—unique aspects of the law of war such as the indefinite incarceration of enemy combatants for the duration of hostilities. Processing an alleged terrorist through the civilian court system would likely implicate speedy trial and pre-trial detention review norms that could be completely unworkable during armed conflict. An alleged terrorist detained for trial in the United States, for example, would have the right to appear before a federal judge within forty-eight hours of apprehension. At that juncture the judge would receive evidence to determine whether there existed probable cause that the crime had been committed, that the accused had committed it, and that pre-trial detention was necessary.<sup>20</sup> But a nation at war cannot be expected to pull military commanders from the battlefield to present the necessary evidence for such a judicial determination.

War crimes investigators would likely be hamstrung by a civilian court's strict rules of evidence. Such rules could prove counterproductive from both prosecution and defense perspectives. For example, it is far less likely that law enforcement investigators will be able to secure evidence amounting to more than hearsay (inadmissible in most US courts) or to document the chain of custody associated with the warrantless seizure of evidence from a remote Afghan cave by a military unit under fire. In civilian courts, these rules are often thought to operate to the detriment of the government, but in a war crimes trial held outside the accused detainee's country of residence, a rule favoring the admission of relevant evidence without regard to hearsay or established chain of custody might greatly assist the accused as well.

Another difficulty created by deferring to an extant peacetime criminal justice system is that the circumstances and evidence associated with a war crimes trial or trial for acts of transnational terrorism *during an ongoing conflict* are likely to require the production and disclosure of intelligence collection methods and

sensitive intelligence products to a degree rarely, if ever, encountered during civilian trials. The presentation of classified information in sensitive federal criminal prosecutions, while not routine, is possible under the Classified Information Procedures Act of 1980. Those trials are not normally conducted during an armed conflict, however, when the sensitivity of relevant intelligence information is at its peak. It is reasonable to presume that the presentation of classified information under seal and the requirement that defense attorneys submit to security clearance background checks would affect each and every terrorism case, substantially increasing the scope and volume of procedural safeguards required, escalating dramatically the cost of mounting such prosecutions, and contributing to extensive delay.<sup>21</sup>

There also exist a number of civil rights and prophylactic judicial rules that have no practical currency in a wartime prosecution regime. For example, a *Miranda*-like rights advisement is unlikely to be part of the operational doctrine of US ground troops when they take enemy combatants prisoner;<sup>22</sup> and an exclusionary rule in such instance would do nothing to further the rule of law or civil liberties of cave-dwelling terrorists. Similarly, statements made by alleged terrorists during initial interrogations are unlikely to have been preceded by a rights advisement. Certainly we cannot intend for intelligence debriefers to question only those detainees who have waived the right to silence and to consult a lawyer. And if there is no extant right to a lawyer during the debrief, there is no value in an exclusionary rule to guarantee compliance. These and like issues invoke legitimate concerns that have been addressed incrementally over years of practice in civilian courts.

Conversely, most actions associated with the conduct of war are governed by far less developed legal frameworks—domestically, the President’s executive authority in the war-making arena and internationally, the law of armed conflict. It is in those arenas to which the law of war does not speak that hiatuses in the nascent legal paradigm associated with the Global War on Terrorism naturally reveal themselves. That these matters have been subject to heavy regulation in the law enforcement field exacerbates perceptions that the law of armed conflict is inapplicable or insufficient. Critical sensibilities are understandably influenced by familiarity with the criminal justice system. Those sensibilities yield negative visceral reactions to war-related actions that are readily, but inappropriately, analogized to law enforcement.<sup>23</sup>

The problem is compounded further by the existence of parallels between the areas in which war-related decisions may appear to correlate to actions normally associated with the criminal justice system and criticisms of those very aspects of the criminal justice system from another camp. Some argue that substantial deficiencies mar our criminal law enforcement system—deficiencies associated with

an overly charitable extension to criminal defendants of due process and other substantive rights.<sup>24</sup> The relatively flexible and unregulated norms associated with the law of war may then be seized upon as affording a welcome opportunity to avoid the overdeveloped procedures of federal criminal practice. The shadow of the OJ Simpson trial and its sensationalized treatment in the press cast a pall over any thought of a significant terrorist trial. This backdrop, coupled with the understandable need to protect classified intelligence in the national security trial of an alleged terrorist, may cause some to fear a Republican-led governmental overreaction to the prospect of a media-focused trial. They may also fear use of the intelligence protection rationale as a subterfuge to hold secret proceedings that will conceal a related erosion of civil liberties or trial-related human rights.<sup>25</sup> This persistent undercurrent lends a patina of credibility to some who would question the motives of those that elect to proceed within the law of war framework.

All things considered, past experience may prompt the conclusion that there exists no rubric under which terrorists can be held accountable for their crimes. What some see as criminal justice deficiencies and others view as appropriate procedural protections may in fact yield only systemic ineffectiveness when applied to the problem of international terrorism. The standard “extradite or prosecute” model simply has not worked, and to the extent it can be made to work in individual cases, one may question our ability to prosecute any sizeable number of alleged terrorists in the context of an expensive and over-laden US federal court system.<sup>26</sup>

Despite the contumely of some pundits, military commissions are not the novel concoction of clever Bush Administration attorneys. Since before the birth of the United States, “warriors have used such tribunals to determine the guilt or innocence of their fellow warriors for violations of the law of war.”<sup>27</sup> The Supreme Court has consistently upheld as constitutional the trials of belligerents by military commission.<sup>28</sup> In establishing military commissions, the President has sought to navigate adeptly the confluence of law enforcement and the law of armed conflict, and at the same time to fill gaps in our legal landscape in a principled way that furthers the interests of the rule of law.

In addition to being well-grounded legally, the military commission decision is logically sound as well. President Bush’s use of the military instrument involved a prolonged, deliberate, “boots on the ground” operation with the objective of killing or capturing terrorists and destroying their networks. To then shift to a law-enforcement paradigm after capture might appease certain human rights activists in the short-term, but it would create a perverse dynamic on the battlefield that could undermine the most fundamental tenets of the law of war. By further extending the use of the military instrument in authorizing the use of commissions to try enemy combatants, President Bush eliminated that potentially absurd dilemma

for the US soldier on the battlefield—whether to capture or kill an enemy who clearly will continue to pose a threat to the United States, and who, in this case, maintains no affiliation with a parent organization that, in more conventional circumstances, could direct surrender.<sup>29</sup>

### *Enforcing the Law of War: Military Commissions versus Courts-martial*

Almost 50 years ago, Israeli Ambassador to the United States Abba Eban described international law as the law “the wicked do not obey and the righteous do not enforce.”<sup>30</sup> For years, the international law of armed conflict has lacked an enforcement mechanism.<sup>31</sup> The President’s Military Order of November 2001 created a framework for military commissions and set in motion a process to fill this void in the enforcement of the laws and customs of war.<sup>32</sup> Conversely, cynics view the Order and the commissions it establishes as an attempt to circumvent normal criminal procedures—a kangaroo court that eschews burdensome due process requirements, providing a mechanism to bring alleged terrorists to justice in a fashion that favors efficiency over human rights and civil liberties.<sup>33</sup> These concerns are partly a consequence of the changed circumstances associated with terrorism. More simply, however, they reflect that the President’s chosen path regarding the prosecution of alleged terrorists—by military tribunal—has not been traveled in decades and improvements to that path, although identified as necessary years ago, have not yet been implemented.

After defining persons subject to the President’s Military Order (terrorists and those who aid and abet them if designated as such by the President),<sup>34</sup> the Order clarifies that such persons will be held by the Department of Defense and, if tried, tried by military commission as opposed to some other forum.<sup>35</sup> Lawyers, human rights groups, and foreign capitals criticized the Order for derogating so substantively and substantially from relevant due process guarantees—regardless of the war/law enforcement paradigm shift.<sup>36</sup> Critics were somewhat quieted by the Secretary of Defense’s implementing order issued four months later,<sup>37</sup> but subsequent steps in the direction of trial, such as the publication of additional implementing instructions restoked the anti-commission fires.<sup>38</sup> In the almost three years subsequent to promulgation of the Order, only eleven individuals have been designated as subject to its jurisdiction; two of these were subsequently transferred to the United Kingdom, their country of citizenship, and released. Although truncated preliminary hearings have been held in several cases, no trial has yet proceeded to the presentation of evidence on the merits.<sup>39</sup>

Delays and difficulties notwithstanding, however, we simply cannot avoid the mandate to conduct trials. Every United States president who has faced terrorism has

spoken of bringing its perpetrators to justice.<sup>40</sup> Moreover, international crime is clearly a growth industry, and its law enforcement complement has not kept pace.

It is useful to note that historically, military commissions have been viewed as a means of injecting a civilized, judicial component into an otherwise uncivilized chaotic world where killing is authorized and the fog of war often obscures the moorings of civilization. This military authority<sup>41</sup> has been used previously in three different roles: 1) to try individuals who violate the laws of war; 2) to administer justice in an occupied territory; and 3) to serve as a general court in an area where martial law has been declared and the civil courts are closed.<sup>42</sup> With respect to the Global War on Terrorism, we are primarily dealing with the first category of conflict-related offenses, but the likelihood that commissions may be needed in the future under other circumstances may play into the analysis of whether their establishment is a worthwhile endeavor.<sup>43</sup>

From a domestic perspective, the authority to convene military commissions derives from the President's Article II Commander-in-Chief powers.<sup>44</sup> As Justice Douglas noted, the executive's power "is vastly greater than that of any troop commander. He not only has full power to repel and defeat the enemy; he has the power to occupy the conquered country and to punish those enemies who violated the law of war."<sup>45</sup> Congress has also explicitly acknowledged the President's preexisting authority in this regard. A pertinent provision of the Uniform Code of Military Justice (UCMJ) provides, "The provisions of this chapter . . . do not deprive military commissions . . . of concurrent jurisdiction with respect to offenders or offenses that by statute or the law of war may be tried by military commissions. . . ."<sup>46</sup> A subsequent provision of the UCMJ authorizes the President to adopt regulations for military commissions.<sup>47</sup> Further, in subsequent related legislation, Congress appears to have taken great pains to ensure continued recognition of the President's authority with respect to military commissions.<sup>48</sup> A common cry among uniformed judge advocates, many of whom have spent years defending the military justice system from claims that it is inferior to civilian courts in protecting the rights of the accused,<sup>49</sup> is that military commissions are no longer necessary because courts-martial now have jurisdiction over the same set of offenses triable by military commission.<sup>50</sup> Therefore, the argument goes, we now should use the UCMJ as a guide because it contemplated, or should have, wartime exigencies. At the outset, we should recognize that the extension of jurisdiction over law of war violations in the latest rendition of the UCMJ is not as revolutionary as some might think. In enacting the current version of the UCMJ, first introduced in 1950,<sup>51</sup> Congress made a conscious decision to *continue* including the identical language found in a 1928 version of a Manual for Courts-Martial,<sup>52</sup> which clarified that the Articles of War did not "deprive military commissions . . . or other military

tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions . . . or other military tribunals.”<sup>53</sup> The 1950 Manual for Courts-Martial also extended that jurisdiction to general courts-martial—but only to the extent that military commissions already possessed such jurisdiction as a matter of custom.<sup>54</sup> Since adoption of the UCMJ, no war crime has ever been successfully tried by court-martial.<sup>55</sup> In fact, during the well-documented trial of Lieutenant William Calley on charges of premeditated murder related to the My Lai massacre, an appellate court noted in a footnote that there had been some consideration given to trying another alleged perpetrator for war crimes, “by military commission. . . .”<sup>56</sup>

Lack of historical use aside, the real weakness in the argument for the use of courts-martial to try terrorists—or war crimes in a more general sense—is that the UCMJ’s evolution over the years has weakened its utility in this regard. Since the end of the Second World War, the UCMJ has been continuously modified, not to account for expanded jurisdiction involving violations of the law of war, but in response to perceived due process deficiencies in the forum—the possibility of trials inadequately sensitive to defendant rights that prevailed during World War II and the years immediately thereafter. The response has been to make courts-martial look very much like federal district courts.<sup>57</sup>

What has never been addressed in the court-martial system is the ability to try war criminals for violations of the law and customs of war. While elements of crimes have been the subject of extensive drafting and judicial interpretation for all of the offenses specified in the UCMJ, the Manual for Courts-Martial has made no attempt whatsoever to define violations of the laws of war. Similarly, court-martial procedures fail to contemplate the trial of any defendant who is not a service member; the UCMJ establishes no appellate process for a convicted war criminal and the Manual for Courts-Martial makes no attempt to modify procedures for the non-service member accused. Public perception to the contrary, courts-martial are unlikely to be a panacea for the problems associated with trying terrorists.

### *Substantive Due Process*

In March of 2002, the Secretary of Defense issued basic rules for the conduct of military commission trials. These rules were the subject of subsequent elaboration in a series of “Military Commission Instructions.”<sup>58</sup> In keeping with the President’s Military Order, these rules mandated a “full and fair trial”<sup>59</sup> purportedly designed to strike an appropriate balance—a balance that, on the one hand, recognizes the exigencies associated with warfare, and, on the other hand, demonstrates faithful adherence to the principles of fairness and due process that animate our domestic

criminal jurisprudence.<sup>60</sup> What the rules did not do is replicate the level of detail or procedural due process found in other more developed criminal justice systems. For this, the rules have been vociferously criticized.<sup>61</sup>

Anticipating the need for greater evidentiary flexibility, the military commission rules promulgated by the Department of Defense leave many procedural and evidentiary determinations in the hands of the triers of fact.<sup>62</sup> This same policy animates the International Criminal Court's rules of procedure and those of the International Criminal Tribunals for the Former Yugoslavia and Rwanda.<sup>63</sup> Though similar in nature to the concept of military commissions, they operate under different conditions (e.g., post-hostility), and are hampered by the unique idiosyncrasies of their respective international processes. Because the tribunals used to prosecute 9/11 terrorists will play such an important role in defining available legal structures for the future, it is imperative that we identify and attach essential due process elements to the tribunal's conduct, but do so in a way that accounts for their unique mission.

Military commissions afford defendants several important protections that adhere faithfully to immutable principles of fairness and due process that animate our domestic criminal jurisprudence—protections such as the presumption of innocence, the ability to confront witnesses, and a standard of proof beyond a reasonable doubt.<sup>64</sup> They also explicitly make available to the government tools such as closed trials, intelligence shielding protective measures, and relaxed rules of procedure and evidence—tools that recognize the national security-related difficulties associated with war-time prosecutions, e.g., that evidence seized on the battlefield is unlikely to carry with it a chain of custody or a judicially approved warrant necessary to satisfy the reticulated requirements of judicial trials; that flexibility is required to bring criminals to justice while concurrently accommodating the prosecution of a war; and that war is attended by concomitant operational security concerns and the imperative to protect intelligence information, methods and sources.<sup>65</sup> The rules affect an appropriate balance with a view to providing justice in the context of a war against terrorism. Whether the balance may be off is open for debate—but it is a balance that, at present, no other forum has attempted to strike.

### *Compliance with the Law of War*<sup>66</sup>

Another common criticism of military commissions is that, admitting the applicability of the law of war and the propriety of using military commissions in general, the incarceration and intended trial of enemy combatants simply violates the law of war. Here we must look at the law of war itself, and the applicability of various

provisions. In most cases, specific accusations of noncompliance are based on an inappropriate application of particular tenets.

Given the eminence of the Geneva Conventions,<sup>67</sup> one might think that simply abiding by their terms—regardless of applicability as a technical matter—is most consistent with a commitment to the rule of law. Indeed, US military policy expressed in a Chairman of the Joint Chiefs of Staff Instruction mandates “compl[iance] with the law of war during all armed conflicts, however such conflicts are characterized.”<sup>68</sup> The language regarding conflict characterization refers to the traditional parsing of international and internal armed conflicts. While most of the provisions of the Geneva Conventions are applicable to only international armed conflicts, military policy is to apply those provisions even if the conflict is “not of an international character.” One could reason, then, that the characterization of the war on terrorism should not impact US policy as it pertains to the handling of captured enemy combatants or any other matter. The problem is that complying with a body of law and applying its provisions are two very different endeavors. While a legal regime might be applicable, a particular provision may not apply.

By way of analogy, one might elect to comply with safe driving standards regardless of whether the jurisdiction in which one drives effectively applies or enforces those standards. Self-imposed compliance does not mandate continuing to drive 45 miles per hour when the speed limit goes up to 65—even though the lower limit is arguably safer; applicable standards may change. Viscerally, failing to accord prisoner of war status to enemy combatants is, to some, a decision not to drive safely. To others, it is a simple recognition of changed circumstances. Many customary provisions of the law of armed conflict are appropriately rendered applicable as a matter of policy;<sup>69</sup> others, however, are dependent on circumstance.

Note that this relationship to circumstance could be a matter of either permission or prescription/proscription. Absent a required minimum, the authorization to drive 65 miles per hour does not preclude one’s decision to drive slower. If the particular safety norm at issue involved, for example, on which side of the road one was to drive, the changed circumstance would *require* adjustment or head-on collisions would inevitably result. The pertinent provisions of Geneva Convention (III), which pertains to prisoners of war, detail specific requisite circumstances for applicability—demonstrating that the rights and regulations associated with prisoner of war status were not intended to be reflexively applied in all circumstances. Like the speed limit, however, they are clearly permissive in nature with respect to denial of prisoner of war status.

Nevertheless, the concern that the Global War on Terrorism has identified a significantly sized group that appears to fall largely outside the particularized

protections of various Geneva Conventions and Protocols<sup>70</sup> may indeed be a legitimate concern militating in favor of developing new international norms. A discussion is appropriate, but that discussion should be based on the common understanding that seizing on the legal regime associated with law enforcement as the basis for criticizing the treatment of captured enemy combatants is a misguided application of law by analogy.<sup>71</sup> In addition, useful dialogue can occur only subsequent to recognition of the legitimate, but differing perspectives on the current state of the law of armed conflict. We benefit from the insights of Paul Grossreider, the former Director General of the International Committee of the Red Cross (ICRC), who in the days following September 11th asserted, “with the September 11 terrorist attacks, the nature of war is changing. . . . With al Qaeda, we face an emerging new type of belligerent, . . . transnational networks. To cope with this change, [the international law of armed conflict] must adapt itself for fear of being marginalized.”<sup>72</sup>

Nowhere does Geneva Convention (III) preclude, or even discourage, trials by military commission. Indeed, Article 84 reflects a preference for “military courts” as that term was broadly understood in 1949.<sup>73</sup> As opposed to mandating a particular procedure or forum, Geneva Convention (III) requires certain minimum standards of fairness in the forum choice elected. For example, the prosecution of prisoners of war must include “essential guarantees of independence and impartiality as [are] generally recognized.”<sup>74</sup> The Conventions identify as a grave breach “willfully depriving a protected person of the rights of a fair and regular trial prescribed in the applicable convention.”<sup>75</sup> It is unimaginable that any judicial system established by the United States would not meet these minimum requirements. So long as any particular military commission meets those broad fairness requirements, it would appear that even prisoners of war might be tried in such a forum.<sup>76</sup>

A more specifically applicable standard has been established since the 1949 Conventions, however, that provides greater detail regarding minimum trial standards. Article 75 of Additional Protocol I defines that article’s applicability as being to, “persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol. . . .”<sup>77</sup> It then provides, among other things, a moderately extensive list of trial rights that represent a minimum standard for the due administration of justice.<sup>78</sup>

Although the United States is not party to Additional Protocol I, many have opined that we should accept certain of its provisions, including Article 75, as reflective of customary international law.<sup>79</sup> The United States’ military commission rules appear to comply with all requirements of Article 75. Perhaps the only colorable claim that military commissions, as contemplated, are noncompliant with the general normative due process standards enumerated in the Geneva

Conventions is found in the “independence” requirement set forth in Article 84 of the Third Convention.<sup>80</sup> The standard for independence is that which is “generally recognized.”<sup>81</sup> Some may interpret the “independent” requirement as precluding a military commission’s utilization of a trier of fact or lawyer who is subordinate to the military chain of command.<sup>82</sup> Such a reading, however, would be inconsistent with State practice since the 1949 Conventions were negotiated. Military tribunals have always involved military triers of fact, and there is no evidence in the Geneva negotiating records suggesting that anything to the contrary was intended.<sup>83</sup> Certainly, any such proposition should be forcefully rejected.

The bottom line when assessing the substantive due process accorded accused terrorists to be tried by military commission is that there is no reason to anticipate any derogation from fundamental fairness guarantees normally accorded to criminal defendants. The President’s Military Order and the Secretary of Defense’s rules require commissions to provide a “full and fair” trial. Even if there were no other protections provided by the rules or applicable instructions, military officers constituting a military commission should be expected to follow orders in providing a full and fair trial. The absence of particular rules, thus permitting pundits to identify potential abuses that *could* occur is hardly fodder for a substantial criticism, though it is likely a natural consequence of the slow and deliberate means by which trials have proceeded. At this juncture, criticism of military commission procedures amounts to nothing more than an attack on worst case hypotheticals.

### *Nondiscrimination Principle*

Another principle of humanitarian law of potentially even greater impact on future terrorist trials is that which appears to require nondiscrimination in judicial proceedings applied to prisoners of war and members of the armed forces of the detaining power.<sup>84</sup> To date, the United States has made no statement regarding its interpretation of the principle’s relevance to the trials of alleged terrorists. The most extreme textual articulation related to this norm is found in Article 102 of Geneva Convention (III), which states:

A prisoner of war can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power, and if, furthermore, the provisions of the present Chapter have been observed.<sup>85</sup>

While arguably not directly relevant to trials currently contemplated (if only because the defendants are not entitled to the protections associated with prisoner of

war status),<sup>86</sup> other potential military commission trials—such as those deriving from the conflict in Iraq—may involve persons who do meet Geneva Convention (III) criteria for prisoner of war status.<sup>87</sup> Moreover, the norms are worth noting because they envisage circumstances similar to those found in the law of war paradigm for trials. And as a matter of policy, the United States has agreed to apply the principles of the Geneva Conventions to the extent practicable.<sup>88</sup>

Some would read the language of Article 102 as precluding the use of military tribunals were they not also employed to try US troops. Given that no US citizen may be subject to the President's Military Order or to trial by military commission, the principle of nondiscrimination would appear to bar the use of military commissions to try prisoners of war.<sup>89</sup>

The language of Article 102 is ambiguous in several important respects, however. Probing these ambiguities renders premature and overly simplistic the unquestioning acceptance that Article 102 bars absolutely the use of military commissions—even with respect to the trial of prisoners of war protected by Geneva Convention (III). In particular, it is unclear whether Article 102 applies only to post-capture offenses, or whether it may apply to pre-capture offenses as well.<sup>90</sup> Second, the language fails to clarify the meaning of either “same courts” or “same procedure.”<sup>91</sup>

The language of Article 102 was carried over from Article 63 of the 1929 Geneva Convention.<sup>92</sup> In the famous post-World War II war crimes trial, *In re Yamashita*, that language was interpreted by the US Supreme Court to apply only to post-capture offenses committed by an individual who already was a prisoner of war.<sup>93</sup> While drafters of the 1949 Conventions clearly intended to provide procedural protections for those accused of pre-capture offenses, it is not clear that Article 102 was the intended vehicle for those protections. Nothing in the minor verbiage adjustments of the 1949 Convention appears to affect this original intended applicability (and terrorism-related trials are likely to involve only pre-capture offenses). Yet, Geneva Convention (III) not only retained the 1929 language that ultimately became Article 102, it added a new provision—Article 85—with no parallel in the 1929 Convention.<sup>94</sup> Some view the combination of Articles 102 and 85 as eviscerating the *Yamashita* limitation and requiring that the courts and the procedure utilized be the same for prisoners of war as for the armed forces of the detaining power—even with regard to pre-capture offenses.<sup>95</sup> Reasoning that the detaining power's procedures should apply when the detaining power's substantive law is in play appeals to both logic and fairness. But the claim that future war crimes trials must exactly mirror courts-martial should not be viewed as dispositive of the current state of the law, particularly given that the text of the 1949 Conventions reflects a

variety of competing interests.<sup>96</sup> And a closer review of Article 85 reveals a more focused orientation toward post-conviction treatment than to trial rights *per se*.<sup>97</sup>

Additionally, a narrower read of Article 102 as requiring nondiscrimination only in the prosecution of post-capture offenses is consistent with the underlying theory of prisoner of war “assimilation” in the armed force of the detaining power; that is, once captured, a prisoner of war must obey the rules and regulations that apply to the armed forces of the detaining power.<sup>98</sup> Such assimilation has no application when the issue is pre-capture, that is, pre-assimilation crimes.<sup>99</sup>

Setting aside for a moment the colorable argument that Article 102 does not apply to pre-capture offenses such as those for which terrorists would be prosecuted, the question persists as to the meaning of “same courts” and “same procedure.” “Same” may be read to mean: what is jurisdictionally available, what has been used historically, what would likely be used in the future, or some other criteria. Indeed, no US court has considered the meaning of this term in this context. Although the “same courts” language may have a straightforward meaning and application when applied to a detaining power that prosecutes its service members in only one forum, it is not so straightforward in the case of the United States. Given that the United States may prosecute members of the armed forces in any number of fora, including Article III courts, courts-martial, and military commissions, there are different aspects of “sameness” that may apply.

Article 102 may be read to require only that prisoners of war must be sentenced by any of the same courts that may have jurisdiction over a US service member.<sup>100</sup> Because jurisdiction can be determined without regard to subjective intent, the greatest degree of clarity and precision inhabits this interpretation. Another reading of Article 102 is that it requires prisoners of war to be sentenced by the same courts that have historically sentenced US service members. This approach would look beyond bare jurisdiction to determine what courts and procedures have been “typically” used and require that prisoners of war be subject to trial by the same courts and under the same procedures as past trials of US service members. This analysis illuminates another potential problem, however. While recent history would militate in favor of the court-martial forum for standard military or civilian offenses, such would not be the case for violations of the international law of armed conflict. In fact, law of war violations by service members have only been prosecuted, as such, by military commission.<sup>101</sup>

Finally, another possible reading is that the cases to which prisoner of war prosecutions should be compared are those hypothetical cases that could arise from the same area or same conflict. Thus, to the extent that the executive evidences intent to prosecute its service members in a particular manner in a particular conflict, prisoners of war from that same conflict should be subject to those same courts and

same procedures. The current widespread exercise of court-martial jurisdiction in contradistinction to historic uses of military commissions for war crimes warrants some consideration of this possibility.<sup>102</sup>

The above discussion of the last two possibilities posed begs the question of what crime would apply for purposes of conducting the analysis.<sup>103</sup> Certainly the type of offense must play some role. If US soldiers most frequently find themselves in traffic court to deal with moving violations, does that mean that traffic court is an appropriate forum for war crimes committed by prisoners of war? If we limit our review in this regard only to violations of the law of war, we are left either with the conclusion that violations of the law of war must be tried by military commissions or a determination that future war crimes will be tried by courts-martial.<sup>104</sup> The idea that any “same courts” and “same procedure” procedure analysis must assume that the crime charged is the same as well is also consistent with the other relevant provisions in Geneva Convention (III).<sup>105</sup> Assuming this to be the case, note that Article III courts, courts-martial, and military commissions, each have certain jurisdictional authority to prosecute war crimes.

Article III courts probably have the narrowest range of authority with respect to law of war violations,<sup>106</sup> although recent developments with respect to the “material support to terrorism” charge may give them equal or better coverage over substantive conduct of terrorism.<sup>107</sup> Only specified war crimes are chargeable under the War Crimes Act, including crimes identified as “grave breaches” under the Geneva Convention.<sup>108</sup> Subject matter jurisdiction extends to aliens (including prisoners of war) only if the victim of the war crime is a member of the US armed forces or a national of the United States.<sup>109</sup> The Act also authorizes prosecution of US service members irrespective of the status of the victim.<sup>110</sup>

Were prisoners of war to be prosecuted in Article III courts, a pure jurisdictional understanding of “sameness” would support an argument that the requirements of Article 102 had been met. That is, because US service members may be tried for enumerated violations of the laws of war in Article III courts, prisoners of war also may be. Historically, though, US service members have not been tried in Article III courts for violations of the laws of war or even for crimes that could have been charged as such.

As previously mentioned, prisoners of war are subject to trial by courts-martial for violations of the UCMJ committed after establishing prisoner of war status.<sup>111</sup> Additionally, 10 U.S.C. § 818 appears to establish jurisdiction over a broader group of persons triable under the law of war.<sup>112</sup> This could include jurisdiction over prisoners of war during the period of time preceding their attainment of prisoner of war status.<sup>113</sup> The claim that Article 102’s nondiscrimination requirement had been satisfied then could be grounded in jurisdiction or perhaps historical use.

Historical use, however, would cut in different directions. On the one hand, although courts-martial have jurisdiction to try violators of the laws of war, they have not been employed for that purpose since the UCMJ was enacted. On the other hand, the United States has sent US service members to courts-martial for crimes that could have been charged as war crimes.<sup>114</sup>

Nevertheless, there are other complications attending the court-martial route worth noting. Because courts-martial have been designed with an emphasis on prosecution of US service members, certain adjustments to the procedures would have to be effected to permit the process to function properly in the trial of a prisoner of war. From a practical perspective, procedures such as rules for membership on panels<sup>115</sup> and the conduct of pretrial confinement reviews<sup>116</sup> would require modification to fit the unique circumstances attending prisoners of war. Moreover, one might argue that given the *Calley* precedent of charging what could be a war crime as an enumerated offense under the UCMJ, one could not claim that prosecution of a prisoner of war was proceeding under the “same procedures.” For example, for the same factual offense, a US service member would be charged with murder (subject to the elements of that charge as well as the sentence limitations) while a prisoner of war would be charged with a law of war violation (with no enumerated elements or sentence limitations). Thus, although the court-martial may at first seem a comfortable fit with the requirements of Article 102, a closer look reveals a more complicated and potentially problematic relationship.<sup>117</sup>

Finally, assessing military commissions from an Article 102 perspective, we find they easily fit a jurisdictional method of analysis. Past precedent makes clear that military commissions may be used to try US citizens.<sup>118</sup> As one court held, “citizens and non-citizens alike—whether or not members of the military, or under its direction and control, may be subject to the jurisdiction of a military commission for violations of the law of war.”<sup>119</sup> Thus, trial of prisoners of war by military commission would be by one of the same courts that has jurisdiction over a US service member for a similar crime. From a historical use perspective, military commissions have been convened against US service members,<sup>120</sup> indeed, even against “camp-followers and other civilians employed by the government in connection with the army.”<sup>121</sup> On the other hand, no military commissions have been convened since the period immediately following World War II.

One adjustment to the current state of affairs could improve the perception that the trial of prisoners of war by military commission comports with the nondiscrimination principle; that would be to modify the President’s Military Order establishing commissions so as not to exclude US citizens from its jurisdiction. Of course, an even stronger argument that the military commission forum complies

with the requirement of nondiscrimination could be made if US service members actually were brought before such tribunals.<sup>122</sup>

In fact, were it not for the wartime setting, it would appear that neither courts-martial nor military commissions would have sufficient jurisdiction to address appropriate offenses.<sup>123</sup> It is only when terrorist conduct amounts to an act of war that military commission or expanded court-martial jurisdiction engages.<sup>124</sup> Thus, the concept of military commissions languished in desuetude during the last 50 years. This, in turn, explains why the parameters of the governing substantive law were not addressed during the same period. As has always been the case, development of the law of war comes after changes to war itself.

### *Conclusion*

So what is the best way to bring terrorists to justice? Certainly that question existed prior to September 11, 2001, but the collapse of New York's tallest buildings imposed on us, as Americans, and as citizens of the world, a mandate to find an answer. Today, almost three years later, we have moved toward an answer, but there remains much work yet to be done. Our challenge is to answer that question deliberately. As the United States proceeds with military commission trials of alleged terrorists, history will be written. As in the aftermath of World War II and Nuremberg, we are in the process of establishing a future world order. September 11, 2001 stands out conspicuously as a historic inflection point, but the long-term impact of that day ultimately may prove to be the new legal paradigms established in its wake.

The manner and tempo at which legal transformation takes place is important to preserving and improving international cooperation. Many US allies evinced discontent early in observing the shift from addressing terrorism solely as a law enforcement matter. The best United States response will be in making a point of consciously influencing appropriate and useful changes to the law of war. The law needs to adapt and adjust, and we are in the best position both to identify that need and to lead the way in satisfying it. It has always been both "our national interest" and "in our national interest" to establish the rule of law domestically and internationally. And the United States today has an unprecedented opportunity to establish an international order based on the rule of law. The war on terrorism should be pursued to victory, but it should also be pursued in such a way as to develop the law most effectively.

It is too easy to simply criticize something that represents change—and that is the case with most criticism of military commissions. Over the past several years, the United States Government has faced the challenge of attempting to apply the

existing laws of war to the Global War on Terrorism. That application may not please everyone, but neither does it deserve the condemnation associated with claims of denigrating the rule of law. As in the aftermath of past conflicts, international law has moved forward by effectively establishing a pattern of State practice that eventually may be adopted as customary law or codified by convention. That process is at work today.

If there is one legitimate criticism of the US decision to initiate military commissions, it is the failure to explain adequately its legal reasoning to reluctant allies. A key component to any planned evolution of existing law through a consistent State practice is the public articulation of the norm, values, and principles guiding that practice. State practice is almost meaningless if a deontologically acceptable explanation does not accompany its execution.<sup>125</sup> Our State practice, without explanation, amounts to nothing more than fuel for criticism based on inconsistency or ignorance. In this regard, enough cannot be said about the importance of clearly engaging and communicating with the international community. To shape the law intentionally, we must communicate why certain decisions are consistent with the rule of law as we see it, and, if change is needed, our intent—both to effectuate the change itself, and to maximize our standing to do so.

Alone, neither the law governing domestic criminal enforcement nor that governing war is well situated to address the ascendance of terrorism. The work of the future is to adjust or perhaps merge these paradigms in a way that contemplates the future. Military commissions are as good a potential component to such a future legal regime as any. They represent both a well-founded precedent from the past, and a forward-looking change for the future. The task before us is not to reject precedent, but rather to build on the foundation of existing law—national security law, criminal law, and the law of armed conflict—as we seek to apply their relevant tenets, justly, to the challenges of the war on terrorism. We can expect that such change will be accompanied by a bit of anguish and perhaps a few missteps, but we must not be dissuaded by the fact that change never comes easily.

The law of war has been written primarily in the aftermath of crisis—crafted to address the concerns of past conflicts—with the hope of providing relevant guidance for those of the future. That hope having seen its limitations as applied to our current conflict, the law of war must be retooled to address the changed circumstances of the war on terrorism. A commander with whom I once had the privilege of serving was fond of saying, “if you want a new idea, go read an old book—it’s all been done before.” In military commissions, as reshaped to fit a unique and unforeseen adversary, we have something that is both old and new. In this same vein, we do well to recall the paradoxical words of Alexander Bickel who, praising the heroes among common law judges, characterized them as those who “imagined

the past and remembered the future.”<sup>126</sup> The United States, in using military commissions to try terrorists, is shaping the law imparted by the past, all the while seeking to make it relevant, not just for today, but for tomorrow.

### Notes

1. On November 13, 2001, the President of the United States issued a Military Order providing that “[a]ny individual subject to this order shall, when tried, be tried by military commission.” Military Order of Nov. 16, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Federal Register 57,833 (Nov. 16, 2001) [hereinafter President’s Military Order]. The initiation of military tribunals aptly illustrates the unforeseen legal challenges of the post-9/11 world. See, e.g., Elisabeth Bumiller & David Johnston, *A Nation Challenged: Immigration; Bush Sets Option of Military Trials in Terrorist Cases*, NEW YORK TIMES, Nov. 14, 2001, at A1; Anne Gearan, *Terrorists Could Face Military Trial*, AP ONLINE, Nov. 14, 2001, available at 2001 WL 30244845.
2. This action was unexpected by most. William K. Lietzau, Address at the Harvard Program on Humanitarian Policy and Conflict Research Conference on *International Humanitarian Law and Current Conflicts: New Dilemmas and Challenges for Humanitarian Organizations* (Nov. 1, 2001) (answering a question regarding the possible use of military commissions by stating that while possible in a theoretical sense, military commissions were a thing of the past). Several authors were more prescient in recognizing the viability of military commissions to try terrorists. See, e.g., Spencer J. Crona & Neal A. Richardson, *Justice For War Criminals of Invisible Armies: A New Legal and Military Approach to Terrorism*, 21 OKLAHOMA CITY UNIVERSITY LAW REVIEW 349 (1996) (advocating the adoption of the military tribunal to try accused terrorists); Daniel M. Filler, *Values We Can Afford—Protecting Constitutional Rights in an Age of Terrorism: A Response to Crona and Richardson, id.*, at 409 (arguing that accused terrorists should be tried in civilian courts).
3. See, e.g., *Terrorists Hijack 4 Airliners, Destroy World Trade Center, Hit Pentagon; Hundreds Dead*, WASHINGTON POST, Sept. 12, 2001, at A1; Eric Lipton, *Struggle to Tally All 9/11 Dead by Anniversary*, NEW YORK TIMES, Sept. 1, 2002, at 1 (reporting that the final World Trade Center death toll will drop no lower than about 2,750, not including the 10 hijackers. Counting the 233 killed in Washington and Pennsylvania, it will remain the second-bloodiest day in United States history, behind the battle of Antietam in the Civil War). The dead include citizens of more than 90 countries. A City of New York Office of the Comptroller estimated the overall economic loss to New York City resulting from the 9/11 attacks as totaling between 82.8–94.8 billion dollars. See <http://www.comptroller.nyc.gov/bureaus/bud/reports/impact-9-11-year-later.pdf>.
4. *U.S. Issues Warning on Terrorist Attacks; State Department’s Concern Partly Based on Seizure of Explosives, Arrests in Spain*, LOS ANGELES TIMES, Dec. 15, 1989, at P2 (259 people aboard the plane and 11 on the ground were killed in the 1988 bombing of Pan American Flight 103). The first Bush Administration treated the problem of apprehending suspects as one of diplomacy and extradition, clearly a law enforcement matter. See Nejla Sammakia, *Libya Starts Parliamentary Process That Could Give Gadhafi Way Out*, ASSOCIATED PRESS, May 8, 1992, available at 1992 WL 5296910 (reporting that the United Nations had instituted sanctions on Libya that would continue until two Libyan suspects in the Pan Am bombing were turned over to either the United States or the United Kingdom). In the 1993 World Trade Center bombing, six people were killed and over 1,000 injured. Law enforcement officials conducted an extensive investigation, resulting ultimately in the apprehension, extradition, trial, and conviction in US

District Court of most of the suspects of the bombing, including Sheik Omar Abdel Rahman. Again, we observe what was unquestionably a law enforcement response. See *United States v. Rahman*, 837 F. Supp. 64 (S.D.N.Y. 1993) (stating that the United States charged Omar Ahmad Ali Abdel Rahman with crimes associated with the 1993 bombing of the World Trade Center). See also *Death Toll From Bomb Rises to 6; Searchers Sifting the Wreckage at World Trade Center Uncover the Body of a Missing Man*, ORLANDO SENTINEL, Mar. 16, 1993; Larry Neumeister, *Verdict: Sheik, All Co-defendants Guilty in Terror Trial*, ASSOCIATED PRESS, Oct. 2, 1995, available at 1995 WL 4408662. The 1998 embassy bombings in Nairobi, Kenya, and Dar es Salaam, Tanzania, claimed the lives of 12 Americans and over 200 Kenyans and Tanzanians. The United States conducted a one-strike military response, and indictments were issued against 15 individuals, four of whom were apprehended by foreign governments, extradited to the United States, and tried and convicted in US District Court. See Remarks by President William Clinton at Ceremony Honoring the Men and Women who Lost Their Lives in the Bombings of the Embassies in Kenya and Tanzania, Andrews Air Force Base, Maryland, The White House, Office of the Press Secretary (Aug. 13, 1998) (“The 12 Americans and the 245 Kenyans and Tanzanians were taken from us in a violent moment by those who traffic in terror and rejoice in the agony of their victims. We pledge here today that neither time, nor distance can bend or break our resolve to bring to justice those who have committed these unspeakable acts of cowardice and horror. We will not rest. We will never retreat from this mission.”). See John Diamond, *Strikes Only Partly Successful, Reports Suggest*, AP ONLINE, Aug. 21, 1998, available at 1998 WL 6711944. See U.S. Department of State, Office of the Spokesman, *Fact Sheet, Steps Taken to Serve Justice in the Bombings of U.S. Embassies in Kenya and Tanzania* (Aug. 4, 1999), available at [http://www.state.gov/www/regions/africa/fs\\_anniv\\_steps.html](http://www.state.gov/www/regions/africa/fs_anniv_steps.html). See also *United States v. Bin Laden*, 92 F. Supp. 2d 225 (S.D.N.Y. 2000) (stating that the United States charged Usama Bin Laden and others with crimes stemming from the bombing of the US embassies in Nairobi, Kenya, and Dar es Salaam, Tanzania); See also Greg B. Smith, *Osama’s Tech-Thug Pal Bombings Planner in Jail, Report Says*, NEW YORK DAILY NEWS, Mar. 18, 2002, at 9. International initiatives to address the terrorist threat also have reflected a predisposition to law enforcement. The United States responded to the Khobar Towers attack both by launching a law enforcement investigation and by commencing an international initiative that ultimately resulted in the negotiation and entry into force of the Terrorist Bombing Convention. International Convention for the Suppression of Terrorist Bombings, Jan. 12, 1998, 37 INTERNATIONAL LEGAL MATERIALS 249. We attempted to shore up weaknesses in the law enforcement model through treaties establishing a regime of *aut dedere aut punire* (extradite or prosecute) for terrorism offenses; *id.*, art. 8 (providing that States, in whose territory a person is present who has committed or is alleged to have committed an offense under the Convention, agree to investigate his involvement in the offense, and, if appropriate, take such person into custody for the purpose of prosecution or extradition. If a Party does not extradite the person, it is obliged, without exception whatsoever, to prosecute him.). Another example of this general emphasis is the Terrorist Financing Convention. International Convention for the Suppression of the Financing of Terrorism art. 10(1), Jan. 10, 2000, 39 INTERNATIONAL LEGAL MATERIALS 270 [hereinafter Terrorist Financing Convention].

5. See Dick Polman, “War” is Now More than a Metaphor; *Deadly Terror Attacks—and the Promised U.S. Response—Make a Long Overused Word Mean Just What It Says*, PHILADELPHIA INQUIRER, Sept. 13, 2001, at A5; Katherine M. Skiba, *Terror Hits Were “Acts of War,”* MILWAUKEE JOURNAL SENTINEL, Sept. 13, 2001, at 1A.

6. Joint Senate Resolution to Authorize the Use of United States Armed Forces Against Those Responsible for the Recent Attacks Launched Against the United States, Pub. L. No. 107-40, 115 Stat. 224 (2001).

7. The international community readily embraced the right of the United States to respond with armed force. See, e.g., David Clark, *Terror in America: Mr. Blair Must Be Prepared to Stand Up to President Bush*, INDEPENDENT (LONDON), Sept. 14, 2001, at 4 (noting that “[c]lear evidence that Usama Bin Laden orchestrated [the 9/11] atrocities will necessitate military action to eliminate the threat he and his organisation pose”); *Bush Tells US to be Patient*, AUSTRALIAN FINANCIAL REVIEW, Sept. 17, 2001, at 1 (noting that President Bush “has broad commitments of international support for his response to the attacks” of 9/11 and that the “President of Pakistan, General Pervez Musharraf, agreed to help in whatever might be required”).
8. See S.C. Res. 1368, U.N. SCOR, 4370th mtg., 40 INTERNATIONAL LEGAL MATERIALS 1277 (2001) [hereinafter 9/11 Resolution] (recognizing the “the inherent right of individual or collective self-defense in accordance with the Charter”).
9. See *North Atlantic Treaty Organisation (NATO): Statement by NATO Secretary General, Lord Robertson*, 40 INTERNATIONAL LEGAL MATERIALS 1268 (2001) (resolution quoting Article 5 of the NATO Charter and emphasizing that the attack on the United States “shall be considered an attack on all” NATO members).
10. See Australian Prime Minister Media Release, Application of ANZUS Treaty to Terrorist Attacks on the United States (“The Government has decided, in consultation with the United States, that Article IV of the ANZUS Treaty applies to the terrorist attacks on the United States.”), available at [http://www.pm.gov.au/news/01\\_news.html](http://www.pm.gov.au/news/01_news.html). Article IV provides, in pertinent part, that: “Each Party recognizes that an armed attack in the Pacific Area on any of the Parties would be dangerous to its own peace and safety and declares that it would act to meet the common danger in accordance with its constitutional processes.” Security Treaty between Australia, New Zealand and the United States of America (ANZUS), Sept. 1, 1951, 3 U.S.T. 3420; T.I.A.S. 2493; 131 U.N.T.S. 83. The Rio Treaty (Inter-American Treaty of Reciprocal Assistance), Dec. 3, 1948, T.I.A.S. 1838; 21 U.N.T.S. 77 [hereinafter Rio Pact], has been ratified by twenty-three States in the Western Hemisphere, including Argentina, the Bahamas, Bolivia, Brazil, Chile, Colombia, Cuba, Costa Rica, the Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Trinidad and Tobago, the United States, Uruguay, and Venezuela. After the September 11th terrorist attacks, a special session of the General Assembly of the Organization of American States (OAS) being held in Lima, Peru on that very day “condemned in the strongest terms the terrorist acts . . . and reiterated the need to strengthen hemispheric cooperation to combat this scourge that has thrown the world and the hemispheric community into mourning.” Ten days later, the OAS, acting pursuant to the Rio Pact, labeled the attacks on the World Trade Center and the Pentagon as “attacks against all the American States.” See Terrorist Threat to the Americas, RC.24/RES.1/01, OAS Doc. OEA/Ser.F/II.24/RC.24/RES.1/01 rev. 1 corr. 1, at operative para. 1 (Sept. 21, 2001) (24th Meeting of Consultation of Ministers of Foreign Affairs).
11. *Lecture 1—Early Forms of Liability*, in OLIVER WENDELL HOLMES, THE COMMON LAW (1881).
12. See President George W. Bush, State of the Union Address (Jan. 29, 2002), available at <http://www.whitehouse.gov/news/releases/2002/01/20020129-11.html> (“We will . . . bring terrorists to justice.”).
13. See Richard Morin & Claudia Deane, *Most Americans Back U.S. Tactics: Poll Finds Little Worry Over Rights*, WASHINGTON POST, Nov. 29, 2001, at A1.
14. As a general rule, the community of nations has not as completely accepted the paradigm shift from law enforcement to war. This could be partly explained by the fact that it is the United States that most conspicuously associates armed conflict with use of the military instrument. Other governments use the military for some instances of domestic law enforcement, while the

United States has traditionally rejected the same. *See, e.g.*, The Posse Comitatus Act, 18 U.S.C. § 1385 (2004) (“Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned. . . .”). Some academics have also suggested that it is appropriate to use the military instrument in an act of war as a matter of self-defense without triggering the laws of war. Thus, while most would agree that the Global War on Terrorism does not amount to a traditional armed conflict, some would argue that it does not amount to an armed conflict at all. This view should be rejected as amounting to a situation where there is almost no accepted legal regulation of the extraterritorial use of force.

15. The military response to the September 11, 2001 terrorist attacks on the United States was assigned the name Operation Enduring Freedom. The initial military objectives of Operation Enduring Freedom, as articulated by President Bush, included the destruction of terrorist training camps and infrastructure within Afghanistan, the capture of al Qaeda leaders, and the cessation of terrorist activities in Afghanistan. Long-term goals included the end of terrorism, the deterrence of State sponsorship of terrorism, and the reintegration of Afghanistan into the international community. *See* President George W. Bush, Address to a Joint Session of Congress (Sep. 20, 2001) and Address to the Nation (Oct. 7, 2001), available at <http://www.globalsecurity.org/military/ops/enduring-freedom.htm>.

16. *See* Roy Gutman, Christopher Dickey & Sami Yousafzai, *Guantanamo Justice?*, NEWSWEEK, July 8, 2002, at 34.

17. *See, e.g.*, Christopher Schroeder, *Military Commissions and the War on Terrorism*, 29 AMERICAN BAR ASSOCIATION LITIGATION 28, 32 (2002).

18. US CONST. art. II, § 2. *See also* Joan Biskupic & Richard Willing, *Military Tribunals: Swift Judgments in Dire Times*, USA TODAY, Nov. 15, 2001, at 1A.

19. STEPHEN M. DUNCAN, A WAR OF A DIFFERENT KIND: MILITARY FORCE AND AMERICA’S SEARCH FOR HOMELAND SECURITY 170–172 (2004); *see generally* Note: *Responding To Terrorism, Crime, Punishment, and War*, 115 HARVARD LAW REVIEW 1217, 1235–37 (2002) [hereinafter *Terrorism, Crime, Punishment, and War*].

20. *County of Riverside v. McLaughlin*, 500 U.S. 44, 58–59 (1991).

21. *See* Classified Information Procedures Act of 1980 (18 U.S.C. App. III).

22. *See* *Miranda v. Arizona*, 384 U.S. 436, 467–72 (1966) (noting that the right to remain silent is “fundamental to our system of constitutional rule,” while the “right to have counsel present at the interrogation is [an] indispensable [right].”). *But see* 148 Congressional Record S733 (daily ed. Feb. 13, 2002) (statement of Sen. Arlen Specter of Pennsylvania upon his introduction of a bill to establish procedures for military commissions, arguing that *Miranda* rights are appropriately employed with regard to trials by military commission).

23. *See, e.g.*, Senator Edward M. Kennedy Statement on the Pending Nomination of William Haynes (May 11, 2004) available at <http://kenedy.senate.gov/~kenedy/statements/04/03/2004311703.html>.

24. *See, e.g.*, *Terrorism, Crime, Punishment, and War*, *supra* note 19.

25. Joanne Mariner, O.J. and Osama, *the Fear of a Highly Publicized Bin Laden Trial, and the Problem with Military Commissions*, FINDLAW LEGAL COMMENTARY, Nov. 26, 2001, available at <http://writ.news.findlaw.com/mariner/20011126.html>.

26. *See* Ryan H. Berry, *Modern Use of Military Tribunals: A Legal “Can” and a Political “Should”?*, 28 OHIO NORTHERN UNIVERSITY LAW REVIEW 789, 808 (2002) (noting that “the case of *United States v. Rahman* took nine months, involved seventy-one defense witnesses and resulted in a massive opinion. In its opinion, the US Court of Appeals for the Second Circuit

even praised the trial judge for his “outstanding achievement in the face of challenges far beyond those normally endured by a trial judge.” All this was to bring nine men, tried at once, to justice. While it is laudable that the United States domestic system was able to handle this case, imagine the effect on the judicial system if over three hundred similar prisoners were brought to trial in the domestic courts. Placing these cases in one court, such as the Federal District Court for Alexandria, Virginia, would create a massive backlog for that court. Spreading the cases throughout the country would create a legal nightmare of differing decisions on identical issues across the circuits, leading to different treatment of similar cases. The Supreme Court would eventually have to resolve these potential controversies. . .”).

27. See Michael O. Lacey, *Military Commissions: A Historical Perspective*, ARMY LAWYER, Mar. 2002, at 49. Military commissions were utilized during the Civil War, the Second World War, and, in between, the Indian Wars, the Spanish American War, and the First World War, all employed the “commission concept to punish violations of the law of war.” See also PETER MAGUIRE, *LAW AND WAR: AN AMERICAN STORY* (2000).

28. See, e.g., *Ex Parte Quirin*, 317 U.S. 1 (1942); *In re Yamashita*, 327 U.S. 1 (1946). Only in the Civil War’s *Ex parte Milligan* decision did the Court limit the jurisdiction of such tribunals, holding that US citizens could not be tried by military commission in a state not invaded and not engaged in rebellion, in which the Federal courts were “open, and in the proper and unobstructed exercise of their judicial functions.” *Ex parte Milligan*, 71 U.S. 2, 121, 221 (1866). See also, WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE, CIVIL LIBERTIES IN WARTIME* (1998) (providing a detailed history of the facts underlying the *Milligan* decision).

29. This dilemma is not unworkable, but it highlights the unintended consequences of the presumed preference for more developed judicial systems. By way of example discussed in greater detail below, Colombian soldiers are regularly involved in fighting an insurgency conducted by the Revolutionary Armed Forces of Colombia (known by its Spanish acronym, FARC) and other narco-terrorists. See Dan Burton & Barton Gillman, *Miscues in the Drug War*, WASHINGTON TIMES, Apr. 11, 1999, at B4. The military frequently kills these terrorists during armed conflict (and vice versa). If terrorists are captured, however, in compliance with the law, they must be submitted almost immediately to the normal domestic court system, which, in turn, can be influenced by the very terrorist groups the military is fighting. See *FARC Leaders Charged*, LATIN AMERICAN NEWS LTD., May, 15, 2001, at 228. A conversation with a Colombian military officer elicited this disturbing comment, “In a firefight, we try to kill as many of [the narco-terrorists] as possible before they can surrender. The ones we capture go before the courts and may end up back in the jungle—killing our relatives.” Confidential interview with Colombian military officer, Spring 2004 (notes on file with author).

30. Person to Person (CBS television broadcast, Sept. 20, 1957), *quoted in* GERHARD VON GLAHN, *LAW AMONG NATIONS* 4 (1981).

31. The Security Council attempted in recent years to fill part of this void ad hoc—but the International Criminal Tribunals for the former Yugoslavia and Rwanda never were intended to replace the sovereign exercise of national jurisdiction to bring wrongdoers to justice. The International Criminal Tribunal for the Former Yugoslavia, headquartered at The Hague, was created by the Statute for the International Criminal Tribunal for the former Yugoslavia, S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (1993) [hereinafter Statute of the ICTY]; The International Criminal Tribunal for Rwanda, headquartered at Arusha, Tanzania, was created by Statute for the International Criminal Tribunal for Rwanda, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453rd mtg., Annex, U.N. Doc. S/RES/955 (1994) [hereinafter Statute of the ICTR]. The International Criminal Court (ICC), which the United States does not view as an appropriate permanent international forum for addressing violations of the laws of

war, has been praised as inaugurating an end to the “era of impunity.” Statute of the International Criminal Court, U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, U.N. Doc. A/Conf.183/9 (1998) [hereinafter ICC Statute]. The ICC came into existence on July 1, 2002. It is the first permanent court ever established to investigate and try individuals for the most serious violations of international humanitarian law, including war crimes, crimes against humanity, and genocide. See Barbara Crossette, *Long-Range Justice Raises Fears for Sovereignty*, NEW YORK TIMES, July 1, 2001, §1 at 8 (quoting William Pace, convener of the Coalition for an International Criminal Court). But even its proponents agree that the benefit of the ICC lies primarily in encouraging the exercise of national jurisdiction. United Nations, General Assembly, 56th Session, Statement by the International Committee of the Red Cross, New York, Establishment of the International Criminal Court (Nov. 12, 2001), available at <http://www.icrc.org/web/eng/siteeng0.nsf/iwplList>. 32. See President’s Military Order, *supra* note 1, at Sec. 4(c)(2).

33. *But see* David Greenberg, *Uncivil Courts: America’s Military Tribunals Through the Ages*, SLATE, Dec. 5, 2001, <http://www.slate.com/?id=2059375&device=> (arguing military tribunals are not normally kangaroo courts).

34. See President’s Military Order, *supra* note 1, at Sec. 2, ¶ (a):

The term “individual subject to this order” shall mean any individual who is not a United States citizen with respect to whom I determined from time to time in writing that:

- (1) there is reason to believe that such individual, at the relevant times,
  - (i) is or was a member of the organization known as al Qaeda;
  - (ii) has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefore, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or
  - (iii) has knowingly harbored one or more individuals described in subparagraphs (i) or (ii) of subsection 2(a)(1) of this order; and
- (2) it is in the interest of the United States that such individual be subject to this order.

35. *Id.*, at Sec. 3, Detention Authority of the Secretary of Defense; and Sec. 4, Authority of the Secretary of Defense Regarding Trials of Individuals Subject to this Order.

36. See, e.g., Joan Biskupic & Richard Willing, *Military Tribunals: Swift Judgments in Dire Times*, USA TODAY, Nov. 15, 2001, at 1A; Gearan, *supra* note 1; Bumiller & Johnston, *supra* note 1. See generally Lawyers Committee for Human Rights, *A Year of Loss: Reexamining Civil Liberties Since September 11*, Sept. 5, 2002, at 32 (Claiming that the order creates a parallel criminal justice system in which defendants would have only those rights that the President or Secretary of Defense decide they would have, reciting a litany of specific concerns associated with the process accorded an accused tried by military commission, and asserting that some of the cherished principles on which the country is founded have been eroded or disregarded.).

37. Department of Defense, Military Commission Order No. 1, Procedures for Trials by Military Commission of Certain Non-Citizens in the War Against Terrorism (Mar. 21, 2002) [hereinafter MCO No. 1].

38. Department of Defense, Military Commission Instruction No. 1, Military Commission Instructions (Apr. 30, 2003); Department of Defense, Military Commission Instruction No. 2, Crimes and Elements for Trials by Military Commission (Apr. 30, 2003) [hereinafter MCI No. 2]; Department of Defense, Military Commission Instruction No. 3, Responsibilities of the Chief Prosecutor, Prosecutors, and Assistant Prosecutors (Apr. 15, 2004); Department of Defense,

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Military Commission Instruction No. 4, Responsibilities of the Chief Defense Counsel, Detailed Defense Counsel, and Civilian Defense Counsel (Apr. 15, 2004); Department of Defense, Military Commission Instruction No. 5, Qualification of Civilian Defense Counsel (Apr. 30, 2003); Department of Defense, Military Commission Instruction No. 6, Reporting Relationships for Military Commission Personnel (Apr. 15, 2004); Department of Defense, Military Commission Instruction No. 7, Sentencing (Apr. 30, 2003); Department of Defense, Military Commission Instruction No. 8, Administrative Procedures (Apr. 20, 2003); Department of Defense, Military Commission Instruction No. 9, Review of Military Commission Proceedings (Dec. 26, 2003).

39. See Department of Defense Military Commissions, Presidential Decisions, *available at* [http://www.defenselink.mil/news/presidential\\_decisions.html](http://www.defenselink.mil/news/presidential_decisions.html) (“The President determined that there is reason to believe that each of these enemy combatants was a member of al Qaeda or was otherwise involved in terrorism directed against the United States.”).

40. See President William Clinton, Remarks About the Saudi Arabia Explosion (June 25, 1996), *available at* <http://www.cnn.com/WORLD/9606/25/clinton.remarks/index.html> (“The United States will be firm with terrorists. We will not make concessions. . . . If we find states supplying money, weapons, training, identification, documents, travel, or safe haven for terrorists, we will respond. Our aim is to demonstrate to these countries that supporting terrorism is not cost-free. We will bring terrorists to justice. We will . . . identify, track, apprehend, prosecute, and punish terrorists. Terrorism is crime, and terrorists must be treated as criminals.”). See Department of Defense, Compendium, Terrorist Group Profiles, Nov. 1988, at 1 (Four days before Christmas, 1988, Pan American Flight 103 from London to New York exploded over Lockerbie, Scotland. All 259 passengers and 11 people on the ground were killed. In discussing his horror at the bombing, President Reagan stated “Now that we know definitely that it was a bomb, we’re going to make every effort we can to find out who was guilty of this savage and tragic thing and bring them to justice.” See <http://www.pbs.org/wgbh/pages/frontline/shows/target/etc/script.html>. See generally LOU CANNON, PRESIDENT REAGAN: THE ROLE OF A LIFETIME 654 (1991) (quoting President Reagan’s remarks on signing an anti-terrorism bill on August 27, 1986). President Reagan also promulgated National Security Decision Directive 207, National Program for Combating Terrorism (Jan. 1986) (outlining the basic tenets of US policy for responding to international terrorism, whether conducted inside or outside US territory), *available at* <http://www.fas.org/irp/offdocs/nsdd/nsdd-207.htm>.

41. See US Department of Justice, Office of Legal Counsel, Memorandum for Alberto R. Gonzales, Counsel to the President, Legality of the Use of Military Commissions to Try Terrorists (November 6, 2001) (concluding that under 10 U.S.C. § 821 and pursuant to his inherent powers as Commander in Chief, the President may establish military commissions to try and punish terrorists apprehended as part of the investigation into, or the military and intelligence operations in response to, the September 11 attacks [hereinafter Legal Counsel Memo for Gonzales].).

42. See WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS (2d ed. 1920).

43. Had an effective military tribunal system been extant in the Spring of 2003, the second historic role of military commissions—as an occupation court—might have been a relevant topic for discussion as well. Consider, for example, the potential utility of establishing military commissions to assist in maintaining security in occupied Iraq. Such commissions could have included Iraqi panel members and more efficiently established a judicial process for certain categories of offenses. Many agree that, had commissions been established in other contexts in more recent history, far greater consideration would have been accorded their use in Iraq.

Perhaps more importantly, we should recognize that Winthrop's articulation of historical precedent (*id.*) is merely a reflection of how the judicial arm of the military instrument developed in the 18th and 19th centuries. We should anticipate its evolution in the future as well. The use of commissions against individual members of transnational terrorist organizations might stand on its own as an independent example of the use of military commissions in the future.

44. See *supra* note 41.

45. *Hirota v. MacArthur*, 338 U.S. 197 (1948) (Douglas, J., concurring).

46. See Uniform Code of Military Justice, 10 U.S.C. §§ 801–946 [hereinafter UCMJ], at 10 U.S.C. § 821. General Enoch H. Crowder, Judge Advocate General of the Army, appeared before Congress in 1916 as a sponsor for the adoption of the Articles of War and made it clear that the concept of military commission jurisdiction enacted in the Articles of War was meant to be preserved. He stated, “As long as the articles . . . provided that [persons subject to military law] might be tried by court-martial, I was afraid that, having made special provision for their trial by court-martial, it might be held that the provision operated to exclude trials by military commission and other war courts; so this new article was introduced.” See *In re Yamashita*, 327 U.S. 1, 20 n.7 (1946); see also *Madsen v. Kinsella*, 343 U.S. 341 (1952) (“[Article 15] just saves to these war courts the jurisdiction they now have and makes it a concurrent jurisdiction with courts-martial, so that the military commander in the field in time of war will be at liberty to employ either form of court that happens to be convenient” (quoting General Crowder’s testimony at S. Rep. No. 130, 64th Cong., 1st Sess. 40)).

47. 10 U.S.C. § 836.

48. See, e.g., 18 U.S.C. §326 (providing that the Military Extraterritorial Jurisdiction Act of 2000 would not effect jurisdiction of military commissions); 10 U.S.C. § 828 (providing for employment of interpreters at military commissions); 10 U.S.C. § 3037 (noting that a judge advocate of the Army must prepare records of proceedings in military commissions); and 18 U.S.C. § 3172 (noting that the Speedy Trial Act does not apply to trials by military commissions).

49. See, e.g., Jan E. Aldykiewicz, *Authority to Court-Martial Non-U.S. Military personnel for Serious Violations of International Humanitarian Law Committed During Internal Armed Conflicts*, 167 MILITARY LAW REVIEW 74, 145–48 (2001).

50. UCMJ art. 18 (“general courts-martial also have jurisdiction to try any person who by the law of war is subject to trial by military tribunal and may adjudge any punishment permitted by the law of war.” 10 U.S.C. § 818); UCMJ art. 21 (“The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals.” 10 U.S.C. § 821.). See Mark S. Martins, *National Forums for Punishing Offenses Against International Law: Might U.S. Soldiers Have Their Day in the Same Court?*, 36 VIRGINIA JOURNAL OF INTERNATIONAL LAW 659, 673–75 (1996) (noting that a “United States court-martial trying an alleged war criminal would provide further safeguards. All of the protections accorded in the Hague Tribunal [ICTY] would be accorded. In addition, the accused would be protected by elaborate rules of evidence, such as those generally excluding hearsay. Were he convicted, the presentencing procedures would give him the benefit of relaxed rules of evidence to present matters in extenuation and mitigation, while continuing to impose strict rules on the prosecution. Were a sentence imposed on him, he also would receive several levels of direct appeal.”).

51. The Uniform Code of Military Justice, was originally promulgated on May 5, 1950 as Pub.L. 81-506, 64 Stat. 107-49. The law took effect on May 31, 1951 and was codified at 10 U.S.C. §§ 801–946.

52. Manual for Courts-Martial, effective Apr. 1, 1928, at 213–16 (1936).
53. 10 U.S.C. § 821.
54. 10 U.S.C. § 818 (“General courts-martial also have jurisdiction to try any person who by law of war is subject to trial by military tribunal and may adjudge any punishment permitted by the law of war.”).
55. See Department of the Army, International and Operational Law Department, The Judge Advocate General’s School, Operational Law Handbook 518 (2000) (It is DoD policy that a member of the armed forces who commits an offense that qualifies as a “war crime” will be charged with a specific article of the UCMJ.).
56. U.S. v. Calley, 46 C.M.R. 1131, 1137 (C.M.A. 1973).
57. 10 U.S.C. § 800, *et seq.* Manual for Courts-Martial, United States, Military Rules of Evidence 1102 (2002) [hereinafter MCM]. In fact, courts-martial now so mirror federal criminal proceedings that eighteen months after their effective date in the federal system, changes to the Federal Rules of Evidence are automatically applicable to courts-martial unless action to the contrary is taken by the President.
58. See *supra* note 38.
59. See MCO No. 1, *supra* note 37.
60. *Id.* at § 6.B(1) (stating that the commission must give “a full and fair trial”); *Id.* at § 5.B (stipulating that the defendant “shall be presumed innocent until proven guilty”).
61. See, e.g., Mariner, *supra* note 25. Unlike the civilian courts with their underpinnings of legislative activity and judicial review, the law of war has no similar mechanism for developing a baseline procedural framework for military commissions. Perhaps the best law of war analog exists vis-à-vis the common law characteristics of our domestic criminal law system—incremental changes in the law are rooted in a priori reasoning and guided by past practice. The common law of war, however, is truly a function of the practice of nation States. Fortunately, State practice with respect to many elements of the law of war has been limited; unfortunately, it is perhaps most limited with respect to the prosecution of violations of the law of armed conflict.
62. See MCO No. 1, *supra* note 37, at § 6.D(2)(d) (“The Presiding officer may authorize any methods appropriate for the protection of witnesses and evidence.”).
63. See ICC Statute, *supra* note 31; Statutes of the ICTY and ICTR, *id.*; (all establishing a “probative value”-based evidentiary admission policy).
64. See Polman, *supra* note 5; Skiba, *supra* note 5.
65. For example, they permit protective measures, including closed trial sessions, to accommodate the operational imperative of shielding intelligence information, methods, and sources.
66. The focus of this section is on only those areas most significantly impacted by the war on terror. This section does not purport to provide an exhaustive collection of pertinent law of war standards regarding the trial process.
67. See, e.g., Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, July 27, 1929, 47 Stat. 2074, 118 L.N.T.S. 303, *reprinted in* THE LAWS OF ARMED CONFLICTS 409 (Dietrich Schindler & Jiri Toman eds., 4th ed. 2004) [hereinafter 1929 Geneva Convention]. See also Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention (I)]; Geneva Convention (II) for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.S.T.S. 85 [hereinafter Geneva Convention (II)]; Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention (III)]; Geneva Convention (IV) Relative to the

Treatment of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention (IV)]; all *reprinted in* DOCUMENTS ON THE LAWS OF WAR (Adam Roberts & Richard Guelff eds., 3d ed. 2000) at 197, 222, 244 and 301, respectively.

68. Department of Defense, Chairman of the Joint Chiefs of Staff Instruction 5820.02B, Implementation of the DoD Law of War Program (Mar. 25, 2002).

69. For example, Article 36 of Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Jun. 8, 1977, 1125 U.N.T.S. 3, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 67, at 422 [hereinafter Additional Protocol I], requires that the acquisition process include a legal review of all new weapons to determine whether they comply with pertinent provisions of international law. Note that the United States is not party to Additional Protocol I, but see Michael J. Matheson, *Remarks in Session One: The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AMERICAN UNIVERSITY JOURNAL OF INTERNATIONAL LAW & POLICY 419, 428 (1987) (declaring that it is US policy to consider parts of Additional Protocol I customary international law). The Defense Acquisition Program in turn requires a legal review of all intended weapon acquisitions—regardless of whether the treaty is applicable regarding a conflict with the likely adversary against whom the weapon might be used. Department of Defense, Directive 5000.1, The Defense Acquisition System (May 23, 2003), para E1.1.15.

70. See Geneva Conventions (I), (II), (III) and (IV), *supra* note 67; Additional Protocol I, *supra* note 69; and Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Conflict (Protocol II), June 8, 1977, 1125 U.N.T.S. 609, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 67, at 483. This is not to say that the law of armed conflict is silent regarding the persons in question. It is well accepted that belligerents can be detained without charge until the end of hostilities. See *Ex Parte Quirin*, 317 U.S. 1, 31, 37 (1942); *Colepaugh v. Looney*, 235 F. 2d 429, 432 (10th Cir. 1956); *In re Territo*, 156 F. 2d 142, 145 (9th Cir. 1946). But Geneva Convention (III) only regulates the detention of those entitled to participate in hostilities. Moreover, additional questions not specifically addressed by relevant treaties arise in the context of the Global War on Terrorism, such as when the conflict that pertains to a particular unprivileged belligerent ends or what status a detainee has when apprehended in a location away from a traditional battlefield.

71. See *A Nation Challenged; Agency Differs with U.S. Over P.O.Ws*, NEW YORK TIMES, Feb. 9, 2002, at A9; Seth Stern & Peter Grier, *Untangling the Legalities in a Name*, CHRISTIAN SCIENCE MONITOR, Jan. 30, 2002, at 3.

72. Interview with Paul Grossreider, Director, International Committee of the Red Cross (ICRC), *Le Temps*, Jan. 29, 2002 (“Le droit humanitaire doit s’adapter sous peine d’être marginalize” translated as “Humanitarian law must adapt or risk marginalization.”). The ICRC has since distanced itself from the Grossreider comment, clamoring for the trial or repatriation of the Guantanamo Bay detainees. See generally Report of the 28th International Conference of the Red Cross and Red Crescent, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, Dec. 2–6, 2003 (emphasizing throughout that international humanitarian law is specifically designed to take account of both State security and individual rights).

73. Geneva Convention (III), *supra* note 67, art. 84 (stating, in part, “A prisoner of war shall be tried only by a military court, unless the existing laws of the Detaining Power expressly permit the civil courts to try a member of the armed forces of the Detaining Power in respect of the particular offence alleged to have been committed by the prisoner of war.”).

74. *Id.*, art. 84 (“In no circumstances whatever shall a prisoner of war be tried by a court of any kind which does not offer the essential guarantees of independence and impartiality as generally recognized, and, in particular, the procedure of which does not afford the accused the rights and means of defence provided for in Article 105.”).

75. *Id.*, art. 130; Geneva Convention (IV), *supra* note 67, art. 147.

76. Some Geneva Convention requirements are not reflected in the Military Commission Instructions promulgated for al Qaeda. For example, pursuant to Geneva Convention (III), *supra* note 67, art. 105, a prisoner of war is entitled, among other things, “to assistance by one of his prisoner comrades.” These less substantively important provisions could be easily accommodated with additional implementing instructions were it to be decided that all the technical provisions of Geneva Convention (III), Article 102 were appropriate for application to unlawful combatants.

77. Additional Protocol I, *supra* note 69, art. 75.

78. *Id.* Article 75 reads, in pertinent, part:

3. Any person arrested, detained or interned for actions related to the armed conflict shall be informed promptly, in a language he understands, of the reasons why these measures have been taken. Except in cases of arrest or detention for penal offences, such persons shall be released with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist.

4. No sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure, which include the following:

- (a) The procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him and shall afford the accused before and during his trial all necessary rights and means of defence;
- (b) No one shall be convicted of an offence except on the basis of individual penal responsibility;
- (c) No one shall be accused or convicted of a criminal offence on account of any act or omission which did not constitute a criminal offence under the national or international law to which he was subject at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed; if, after the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby;
- (d) Anyone charged with an offence is presumed innocent until proved guilty according to law;
- (e) Anyone charged with an offence shall have the right to be tried in his presence;
- (f) No one shall be compelled to testify against himself or to confess guilt;
- (g) Anyone charged with an offence shall have the right to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
- (h) No one shall be prosecuted or punished by the same Party for an offence in respect of which a final judgment acquitting or convicting that person has been previously pronounced under the same law and judicial procedure;

- (i) Anyone prosecuted for an offence shall have the right to have the judgment pronounced publicly; and
    - (i) A convicted person shall be advised on conviction of his judicial and other remedies and of the time-limits within which they may be exercised.
  6. Persons who are arrested, detained or interned for reasons related to the armed conflict shall enjoy the protection provided by this Article until their final release, repatriation or re-establishment, even after the end of the armed conflict.
  7. In order to avoid any doubt concerning the prosecution and trial of persons accused of war crimes or crimes against humanity, the following principles shall apply:
    - (a) Persons who are accused of such crimes should be submitted for the purpose of prosecution and trial in accordance with the applicable rules of international law; and
    - (b) Any such persons who do not benefit from more favourable treatment under the Conventions or this Protocol shall be accorded the treatment provided by this Article, whether or not the crimes of which they are accused constitute grave breaches of the Conventions or of this Protocol.
  8. No provision of this Article may be construed as limiting or infringing any other more favourable provision granting greater protection, under any applicable rules of international law, to persons covered by paragraph 1.
79. See Matheson, *supra* note 69. In the only recognized authoritative statement on the subject by a US Government official, Mr. Matheson, then US Department of State Deputy Legal Advisor, expounded at a law of armed conflict conference on those provisions of Additional Protocol I the United States deemed to constitute customary international law. He included Article 75's provisions among them.
80. Geneva Convention (III), *supra* note 67, art. 84.
81. *Id.*
82. Cf. Melvin Heard, Robert P. Monahan, William Ryan & E. Page Wilkins, *Military Commissions: A Legal and Appropriate Means of Trying Suspected Terrorists?* 49 NAVAL LAW REVIEW 71 (2002) (criticizing the "most significant weakness" in MCO No. 1—the lack of an independent appellate court).
83. See MCM, *supra* note 57, Rules for Courts-Martial 504, 505 (prescribing a military panel as the trier of fact). Moreover, if Geneva is interpreted as requiring that the trier of fact function be segregated in a different branch of government, several hundred years of military courts-martial practice would have to be invalidated as well. To an American audience, "ludicrous" may be an appropriate modifier for the above postulate that a military jury is not sufficiently "independent" to comport with modern standards. It would be equally ludicrous to suggest that the United States Senate, in ratifying the Geneva Conventions, was acceding to an international law standard that would afford alleged war criminals theoretically superior trial rights than those accorded US soldiers. We should be aware, however, that others may see things differently. Indeed, the European Court of Human Rights has done just that. In *Findlay v. United Kingdom*, 24 E.H.R.R. 221 (1997), that court found insufficient independence in British courts-martial to comply with parallel human rights provisions found in the European Convention on Human Rights. *Findlay* at para. 59. The European Court of Human Rights, which has authority over the United Kingdom, nullified a British court-martial and established a rule that required an entire revamping of the United Kingdom's military justice system. See Simon P. Rowlinson, *The British System of Military Justice*, 52 AIR FORCE LAW REVIEW 17 (2002). In articulating the rule of law we deem both correct under currently accepted norms and appropriate for a future that involves an

ongoing war on terrorism, we must be cognizant of European and other sensibilities in this area and ensure we are not unwittingly setting undesirable precedent.

84. See Geneva Convention (III), *supra* note 67, arts. 84, 85, 102.

85. *Id.*, art. 102.

86. See Legal Counsel Memo for Gonzales, *supra* note 41.

87. See Geneva Convention (III), *supra* note 67, art. 4.

88. The White House, Office of the Press Secretary, Fact Sheet, Status of Detainees at Guantanamo (Feb. 7, 2002) [hereinafter White House Fact Sheet—Status of Detainees], available at <http://www.whitehouse.gov/news/releases/2002/02/20020207-13.html>.

89. President's Military Order, *supra* note 1, at Sec. 2. One of the negotiators of the 1949 Conventions has argued that only courts-martial are now legally available for war crimes trials. See, e.g., Raymond T. Yingling & Robert W. Ginane, *The Geneva Conventions of 1949*, 46 AMERICAN JOURNAL OF INTERNATIONAL LAW 393 (July 1952). It is not clear what consequences this reading of Article 102 might impose on the United States, but at the very least, the President's Military Order language prohibiting trial of US citizens becomes problematic, if not as a legal issue, then certainly as one of international public relations.

90. See Geneva Convention (III), *supra* note 67, art. 99 (beginning the chapter in which article 102 is contained with language implying that the chapter will discuss offenses relegated under the detaining power's law—i.e., post-capture offenses).

91. *Id.*, art. 102.

92. Geneva Convention, *supra* note 67.

93. *In re Yamashita*, 327 U.S. 1 (1946).

94. Geneva Convention (III), *supra* note 67, art. 85 (providing that “[p]risoners of war prosecuted under the laws of the Detaining Power for acts committed prior to capture shall retain, even if convicted, the benefits of the present Convention.”).

95. See Yingling & Ginane, *supra* note 89 (concluding, in an article published shortly after the negotiation of the 1949 Conventions, that the courts and the procedure utilized must be the same for prisoners of war as for the armed forces of the detaining power—even with regard to pre-capture offenses). A more recent paper authored by Ed Cummings, Deputy Legal Advisor to the US Department of State, reached this same conclusion.

96. Geneva Convention (III) essentially retained the 1929 language that ultimately became Article 102, but the new additive provision, Article 85, had no parallel in the 1929 work.

97. Geneva Convention (III), *supra* note 67, art. 85. An expansive reading of Article 85 would make superfluous another provision of the Convention—Article 84—also first added in 1949 (suggesting that if a choice of courts is available; military courts must be used unless civilian courts have jurisdiction.) If the “same” courts must be used for pre-capture crimes, however, then there is no choice of courts as described in Article 84, and the language is meaningless.

98. *Id.*, arts. 99–100.

99. *Id.*

100. The terms of Article 84 suggest just such a reading of Article 85. Article 84 turns on jurisdiction; it requires trial by a military court, “unless the existing laws of the Detaining Power expressly permit the civil courts to try a member of the armed forces of the Detaining Power in respect to the particular offense alleged to have been committed by the prisoner of war.”

101. In the course of the *Calley* case, there was some discussion among prosecutors about whether Calley should be charged under provisions of 10 U.S.C. § 821 with the commission of war crimes in addition to the UCMJ charges for the substantive offenses underlying such war crimes. Prudential concerns resulted in the charging only of non-law of war charges. *U.S. v. Calley*, 46 C.M.R. 1131 (1973).

102. This interpretation is rife with inherent subjectivity. A random sampling of the meaning of Article 102 among uniformed judge advocates would probably yield a belief that the provision requires trial by court-martial—simply because that is the forum with which most have the greatest familiarity.

103. That is, if a certain subset of criminal offenses is applicable for consideration, then a court-martial would undoubtedly be the most prevalent forum, both historically and with respect to future probability.

104. That courts-martial charges have been brought against those accused in the prisoner abuse scandal of Abu Ghraib provides continued support for this proposition. *See, e.g.*, Sergeant Javal S. Davis—Charged under the UCMJ with conspiracy to maltreat detainees; dereliction of duty for willfully failing to protect detainees from abuse, cruelty, and maltreatment; maltreatment of detainees; assaulting detainees; and making a statement designed to deceive an investigator; and Corporal Charles Graner—Charged under the UCMJ with conspiracy to maltreat detainees; dereliction of duty for willfully failing to protect detainees from abuse, cruelty, and maltreatment; maltreatment of detainees; assaulting detainees; committing indecent acts; adultery with Private First Class England; and obstruction of justice. Charge sheets available at <http://news.findlaw.com/hdocs/docs/iraq/>. *See also* Edmund Sanders & Richard Serrano, *Contrite GI Pleads Guilty to Abuse*, LOS ANGELES TIMES, May 20, 2004 (“Choking back tears and expressing remorse, US Army Spc. Jeremy C. Sivits pleaded guilty Wednesday in Baghdad, Iraq, to abusing detainees at the Abu Ghraib detention center and was demoted, sentenced to a year in military prison, and expelled from the Army. The sentence makes him the first US soldier court-martialed in an evolving scandal that authorities say could reach beyond the seven soldiers implicated so far.”). *See also* *Hearing Scheduled for Pfc. Lynndie England on Prisoner Abuse Charges, Lawyer Says*, THE ASSOCIATED PRESS, May 28, 2004 (noting that “Army Pfc. England, who appeared in Abu Ghraib prison photographs pointing at Iraqi prisoners’ genitals and holding a leash attached to a detainee, will face a military court hearing known as an “Article 32,” scheduled for June 21–25, at Fort Bragg, North Carolina. The Article 32 is a proceeding where military prosecutors present evidence and a judge decides whether to go forward with a court-martial. It is similar to a civilian grand jury. England is one of seven soldiers facing military charges in the Abu Ghraib prison scandal. England is charged with assaulting Iraqi detainees, conspiring with Spec. Charles Graner Jr. to mistreat the prisoners and committing an indecent act by forcing prisoners to masturbate.”), available at <http://ap.tbo.com/ap/breaking/MGBOZ4HGSUD.html>.

105. *See, e.g.*, Geneva Convention (III), *supra* note 67, art. 84 (authorizing trial by civil courts when such courts have jurisdiction over “the particular offense alleged to have been committed”). *See also* Yingling & Ginane, *supra* note 89 (arguing that Geneva limited the Supreme Court’s decision in *Yamashita* approving differing treatment of POWs vis-à-vis US service members “for a like offense”).

106. The War Crimes Act of 1996, 18 U.S.C. § 2441 (war crimes); 18 U.S.C. § 371 (conspiracy).

107. The Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. No. 104-132, 702(a), 110 Stat. 1214, 1291–94 (codified at 18 U.S.C. § 2332b)(defining the charge of “material support to terrorism”).

108. The War Crimes Act, *supra* note 106, at § 2441(c).

109. *Id.* at § 2441(b).

110. *Id.*

111. *See* 10 U.S.C. § 802 (prescribing that “prisoners of war in custody of armed forces” are subject to the UCMJ).

112. *See* MCM, *supra* note 57.

113. *Id.*

114. *See, e.g.*, U.S. v. Calley, 46 C.M.R. 1131 (1973).

115. MCM, *supra* note 57, part III (2002).

116. *Id.*

117. Treating prisoners of war “the same” at a court-martial raises problematic jurisdictional issues as well. For example, the UCMJ limits its jurisdiction over US armed forces to crimes committed after the member is under military control, and thus has no jurisdiction over pre-enlistment or pre-commission crimes. Because Article 102 requires that prisoners of war be treated the same way US armed forces are treated, one might argue that a court-martial has no jurisdiction over pre-capture crimes.

118. *Ex Parte Quirin*, 317 U.S. 1 (1942).

119. *Mudd v. Caldera*, 134 F. Supp. 2d 138 (D.D.C. 2001) (citing *Ex Parte Quirin*). Only one case has limited the reach of military commission jurisdiction over US citizens. See *Ex Parte Milligan*, 71 U.S. 2 (1866). In *Milligan*, the Court determined that a US citizen who was not a belligerent—and who resided in a state without active hostilities and where the civil courts were open and operating—could not be tried by military commission. *Id.* These considerations would not serve to limit the jurisdiction of military commissions over military members, however. *Id.* at 118 (citing accused’s lack of military status as a factor in finding that military commission lacked jurisdiction).

120. See WINTHROP, *supra* note 42.

121. *Id.* (noting that, *inter alia*, officers’ servants, government detectives, medical cadets, and lieutenants in the revenue service were tried by military commission in the Civil War).

122. This would, however, not only create obvious political concerns, it would also raise constitutional issues. For example, in response to a defense argument that the Fifth and Sixth Amendments required trial by jury, the *Quirin* Court held that the “offenders were outside the constitutional guarantee of trial by jury, not because they were aliens but only because they had violated the law of war.” *Quirin*, *supra* note 118, at 44. Read broadly, the decision may be interpreted as placing all military commission proceedings outside of the realm of Constitutional guarantees. *Id.* at 45 (“We conclude that the Fifth and Sixth Amendments did not restrict whatever authority was conferred by the Constitution to try offenses against the law of war by military commission. . .”). But there is some risk that a reviewing court may read *Quirin* more narrowly and find that some constitutional provisions do apply at military commissions convened to try US citizens. In the case of a US citizen for example, if the 6th Amendment Confrontation Clause was found to apply, commission hearsay rules might be restricted to reflect that right. This would raise the concern, of course, that the trials of prisoners of war would no longer be using the “same procedures” as trials of US service members (most of whom are citizens).

123. Except perhaps in the unique case when a service member was prosecuted for terrorist-related activities using either an enumerated violation of the UCMJ or an assimilated crime charged as a violation of Article 134 of the UCMJ.

124. See MCI No. 2, *supra* note 38 (requiring that the contextual element for each offense, when read in light of definitions, mandates a war nexus).

125. See Remarks by Alberto Gonzales, Counsel to the President, American Bar Association Standing Committee on Law and National Security, Washington, D.C., Feb. 24, 2004, available at <http://usinfo.state.gov/dhr/Archive/2004/Mar/17-834301.html>.

126. Bickel was quoting Sir Lewis Bernstein Namier in an address originally delivered in the 1969 Oliver Wendell Holmes Lecture series at Harvard Law School, reprinted in ALEXANDER BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 13 (1970).

# XII

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## Military Commissions: Constitutional, Jurisdictional, and Due Process Requirements

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Jordan J. Paust\*

*Presidential Power to Create a Military Commission and  
Jurisdictional Competence*

**T**he President's power as Commander-in-Chief to set up a military commission and the jurisdictional competence of a military commission apply only during an actual war within a war zone or a war-related occupied territory.<sup>1</sup> As Colonel William Winthrop recognized in his classic study of military law: "A military commission . . . can legally assume jurisdiction only of offences committed within the field of command of the convening commander," and regarding military occupation, "cannot take cognizance of an offence committed without such territory . . . . The place must be the theater of war or a place where military government or martial law may be legally exercised; otherwise a military commission . . . will have no jurisdiction . . . ."<sup>2</sup> The military commission set up within the United States during World War II and recognized in *Ex parte Quirin*<sup>3</sup> had been created during war for prosecution of enemy belligerents for violations of the laws of war that occurred within the United States and within the convening authority's field of command—which in that case was within the Eastern Defense Command of the United States Army.<sup>4</sup>

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### **Limitations with Respect to Place**

What is unavoidably problematic with respect to military commission jurisdiction at Guantanamo, Cuba is the fact that the US military base at Guantanamo is neither in a theater of actual war nor in a war-related occupied territory,<sup>5</sup> and, thus, a military commission at Guantanamo will not be properly constituted and will be without lawful jurisdiction. Moreover, alleged violations of the laws of war during war in Afghanistan or Iraq clearly did not occur in Cuba. Another problem with respect to prosecution of certain persons in a military commission at Guantanamo involves an absolute prohibition under the laws of war. Any person who is not a prisoner of war and who is captured in occupied territory in Afghanistan or Iraq must not be transferred out of occupied territory. Article 49 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War<sup>6</sup> expressly mandates that “[i]ndividual or mass forcible transfers . . . of protected persons from occupied territory . . . are prohibited, regardless of their motive.”<sup>7</sup> Further, “unlawful deportation or transfer” is not merely a war crime; it is also a “grave breach” of the Geneva Convention.<sup>8</sup> To correct such violations of the laws of war, persons who are not prisoners of war and who were captured in occupied territory and eventually found at Guantanamo or other areas under US control outside of occupied territory should be returned to the territory where they were captured.

### **Limitations with Respect to Time**

The President’s power and a military commission’s jurisdiction are limited in terms of time to a circumstance of actual war until peace is finalized.<sup>9</sup> As Major General Henry Halleck wrote early during the last century, military commissions “are established by the President, by virtue of his war power as commander-in-chief, and have jurisdiction of cases arising under the laws of war,” adding: “[they] are war courts and can exist only in time of war.”<sup>10</sup> Similarly, in 1865 Attorney General Speed formally advised the President:

A military tribunal exists under and according to the Constitution in time of war. Congress may prescribe how all such tribunals are to be constituted, what shall be their jurisdiction, and mode of procedure. Should Congress fail to create such tribunals, then, under the Constitution, they must be constituted according to the laws and usages of civilized warfare. They may take cognizance of such offences as the laws of war permit . . . . In time of peace neither Congress nor the military can create any military tribunals, except such as are made in pursuance of that clause of the Constitution which gives to Congress the power “to make rules for the government of the land and naval forces.”<sup>11</sup>

From the Attorney General's opinion, one can recognize that relevant presidential power is tied to a war circumstance and law of war competencies such as the competence of a war-related occupying power to set up a military commission to try violations of the laws of war in accordance with the laws of war.

### **Crimes Triable Before Military Commissions**

Since their authority is tied to war powers, military commissions generally have jurisdiction only over war crimes, which are violations of the laws of war. In fact, some writers have stated that military commissions have jurisdiction only over war crimes.<sup>12</sup> In 10 U.S.C. Sections 818 and 821, Congress has only expressly conferred military commission jurisdiction for prosecution of "offenders or offenses that by statute or by the law of war may be tried by military commissions." Such a congressional grant of competence, without additional grants of jurisdiction over offenders or offenses by statute, limits the offenders and offenses that are triable to those that the law of war permits to be tried in a military commission. The Supreme Court has also recognized that when Congress enacted the 1916 Articles of War, which contained similar language, Congress "gave sanction" to uses of a "military commission contemplated by the common law of war."<sup>13</sup> Section 4(A) of the President's 2001 Military Order<sup>14</sup> states that accused shall be tried for "offenses triable by military commission."<sup>15</sup> Thus, one question is whether the law of war allows a military commission to address crimes other than war crimes.

In practice, some military commissions have addressed other crimes under international law that occurred during war (such as crimes against humanity occurring during World War II) when, but only when, the military commissions were convened in war-related occupied territory.<sup>16</sup> A war-related occupying power actually has a greater competence under the international law of war to maintain law and order in the occupied territory and to prosecute various crimes.<sup>17</sup> Since international law is a constitutionally based part of the law of the United States and law that the President is bound faithfully to execute here or abroad in time of peace or war,<sup>18</sup> the President actually has an enhanced power to execute laws of war that confer powers on a war-related occupying power to prosecute such crimes.<sup>19</sup> Congress has also conferred such a competence in 10 U.S.C. Section 821, since the law of war with respect to war-related occupation permits the trial of such offenders and offenses. Thus, when the United States is exercising a war-related occupying power, a military commission in such territory could prosecute crimes other than war crimes because of a special competence conferred by the law of war concerning war-related occupation. Where the United States is not such an occupying power, it is apparent that military commission jurisdiction can be permissible in a theater of war but will be limited to prosecution of war crimes.

Again, military commissions at Guantanamo are not within a theater of war or war-related occupied territory and have no such jurisdiction.<sup>20</sup> Even if they were constituted in an actual theater of war such as Afghanistan or Iraq, questions have been raised whether the current list of crimes set forth in Military Commission Instruction No. 2<sup>21</sup> is partly improper because it attempts to list crimes that are not prosecutable as war crimes as such despite a statement that the “crimes and elements derive from the law of armed conflict, . . . the law of war” and “constitute violations of the law of armed conflict or offenses that, consistent with that body of law, are triable by military commission.”<sup>22</sup> For example, Human Rights First has stated that the list includes crimes that are not war crimes and that offenses prosecutable by military commission must occur during an armed conflict to which the laws of war apply.<sup>23</sup> The list does include some crimes that are not war crimes per se; but conduct relevant to some of the crimes, such as “hijacking or hazarding a vessel or aircraft”<sup>24</sup> and “terrorism,”<sup>25</sup> could constitute a war crime during actual war in a given circumstance and the Instruction requires that “[t]he conduct took place in the context of and was associated with armed conflict.”<sup>26</sup> In fact, terrorism is not new to the laws of war and some forms of “terrorism” are war crimes.<sup>27</sup> Some crimes on the list can be war crimes if they are committed against persons or property protected from attack or destruction by the laws of war. These could involve murder or destruction of property<sup>28</sup> if in a given context the murder or destruction were war crimes.<sup>29</sup> Yet, some of the crimes listed are merely crimes against the state as such or “pure political offenses”<sup>30</sup> and are not war crimes. These include: “aiding the enemy, spying,<sup>31</sup> perjury or false testimony, and obstruction of justice related to military commissions.”<sup>32</sup> The Human Rights First Report also correctly notes that definitions of “armed conflict” are too broad with respect to the laws of war and that an attempted jurisdictional reach through such a definition and concepts such as “associated with” an armed conflict are potentially improper.<sup>33</sup>

### **Other Constitutional Limitations**

#### *General Conferral of Competence by Congress*

Some have argued that Congress must authorize the creation of military commissions and that Congress has not done so with respect to military commissions addressed in the 2001 Military Order of the President. However, as noted Congress has generally conferred military commission jurisdiction with respect to prosecution of war crimes in 10 U.S.C. Sections 818 and 821; and it has done so in the same general language that existed in the 1916 congressional Articles of War<sup>34</sup> addressed by the US Supreme Court in *Ex parte Quirin* and *In re Yamashita* which not only

allows such jurisdiction to obtain when a military commission is otherwise properly constituted and is being used in a manner “contemplated by the common law of war,”<sup>35</sup> but also incorporates the laws of war by reference as offenses against the laws of the United States whether they are committed by United States or foreign nationals here or abroad.<sup>36</sup> The President expressly mentioned such a conferral of jurisdictional competence in his 2001 Military Order.<sup>37</sup> I do not agree that Congress must do so again in more specific legislation, although it is the case that Congress has not approved the type of military commissions or procedures set forth in the 2001 Military Order<sup>38</sup> or in subsequent Department of Defense (DoD) military commission rules of procedure or instructions.

#### *A Violation of the Separation of Powers*

Nonetheless, a serious violation of the separation of powers exists with respect to the attempt by the President in his 2001 Military Order to preclude any judicial review of US military commission decisions<sup>39</sup> concerning offenses against the laws of war and other international crimes over which there is concurrent jurisdictional competence in federal district courts.<sup>40</sup> Additionally, under Article I, Section 8, clause 9 of the United States Constitution, Congress merely has power “[t]o constitute Tribunals inferior to the supreme Court” and, thus, tribunals subject to ultimate control by the Supreme Court.<sup>41</sup> For this reason, the congressional authorization for creation of military commissions in 10 U.S.C. Section 821 is necessarily subject to the constitutional restraint contained in Article I, Section 8, clause 9 and the President’s attempt to preclude any form of judicial review is constitutionally improper whether or not a military commission has support in a general congressional authorization.<sup>42</sup>

#### ***Problems Concerning Present DoD Rules of Procedure for Military Commissions***

Since 9/11, we have witnessed the deliberate creation of rules of procedure for US military commissions that would violate human rights and Geneva law guarantees<sup>43</sup> and can create war crime civil and criminal responsibility for those directly participating in their creation and application if the military commission rules are not changed and are utilized.<sup>44</sup> We have seen a refusal to even disclose the names of persons detained and false Executive claims are made before our courts and media that human beings have no human rights or Geneva law protections, no right of access to an attorney or to their consulate, and no right of access to a court of law to address the propriety of their detention without trial.<sup>45</sup> Despite commendable efforts by professional military lawyers to stretch the DoD rules of

procedure where they can in order to follow the mandate of the President's Military Order requiring that all accused have "a full and fair trial,"<sup>46</sup> present DoD rules for military commissions would assure denial of the customary and treaty-based human rights to trial before a regularly constituted, competent, independent, and impartial court;<sup>47</sup> to counsel of one's choice and to effective representation;<sup>48</sup> to fair procedure and fair rules of evidence, including the right to confrontation and examination of all witnesses against an accused (an important due process guarantee that can be violated, for example, by use of unsworn written statements, declassified summaries of evidence, testimony from prior trials or proceedings, certain forms of hearsay, other testimony from witnesses who do not appear before the military commission, and reports);<sup>49</sup> to review by a competent, independent, and impartial court of law;<sup>50</sup> and to various other human rights, including freedom from discrimination on the basis of national origin (since only aliens will be subject to prosecution before the military commissions), rights to equality of treatment and equal protection, and "denial of justice" to aliens.<sup>51</sup> Relevant customary human rights to due process are also incorporated through common Article 3 of the Geneva Conventions as minimum due process guarantees for all persons in any armed conflict, regardless of their status as combatants or noncombatants<sup>52</sup> and whether or not the due process requirements are mirrored elsewhere in the Conventions.

Clearly, the DoD rules should be changed. Moreover, they should be construed consistently with the President's requirement of a "full and fair trial" wherever possible, since in case of a potential clash between lawful portions of the President's Military Order and subsequent DoD rules of procedure or military commission instructions the lawful portions of the Military Order must prevail.<sup>53</sup> Additionally, since the Executive is bound by international law,<sup>54</sup> the Military Order and subsequent DoD rules and instructions should be construed consistently with international legal requirements wherever possible.<sup>55</sup> In cases where the Military Order or DoD rules or instructions are unavoidably violative of international law, international law must prevail as supreme law of the United States.<sup>56</sup>

### *Conclusion*

Military commissions are "war courts" and their jurisdiction is limited in terms of context and time to a circumstance of actual war and in terms of place to a theater of war or a war-related occupied territory. Guantanamo Bay, Cuba is not in a theater of war or war-related occupied territory and, thus, a military commission situated there would not have lawful jurisdiction. Some of the crimes that might be charged are also not within the competence of a military commission. A serious

violation of the separation of powers exists because the military commissions at Guantanamo Bay do not comply with Article I, Section 8, clause 9 of the US Constitution, which requires that tribunals be constituted “inferior to the supreme Court” and, thus, subject to its ultimate control.

Some of the present DoD rules of procedure and instructions for military commissions do not comply with international law, which is the constitutionally based supreme law of the United States, and they should be changed. Some DoD rules and instructions have a potential to create violations of international law and to violate the President’s requirement of a “full and fair trial.” They should be interpreted consistently with international law or changed if compliance is not possible.

Serious short- and long-term consequences can ensue for the United States, other countries, United States and other military personnel, and other US nationals if violations of human rights and rights under the Geneva Conventions occur. Violations are unnecessary. They would degrade this country, its values, and its influence. They can fulfill terrorist ambitions<sup>57</sup> and pose serious long-term threats. As military officers, we took an oath to preserve and protect the Constitution and we are bound to comply with the laws of the United States, not to violate or degrade them here or abroad even at the order of a President.<sup>58</sup>

### Notes

1. See, e.g., *The Grapeshot*, 76 U.S. (9 Wall.) 129, 132–33 (1869) (jurisdiction exists “wherever the insurgent power was overthrown”); WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 836 (2d ed. 1920); Jordan J. Paust, *Antiterrorism Military Commissions: Courting Illegality*, 23 *MICHIGAN JOURNAL OF INTERNATIONAL LAW* 1, 5 & n.14, 25 n.70, 26–27 (2001); see also *Madsen v. Kinsella*, 343 U.S. 341, 348 (1952) (a military commission is proper in a war-related occupied enemy territory “in time of war”); *Duncan v. Kahanamoku*, 327 U.S. 304, 324 (1946) (“occupied enemy territory”); *id.* at 326 (Murphy, J., concurring) (“[o]nly when a foreign invasion or civil war actually closes the courts”); *Coleman v. Tennessee*, 97 U.S. 509, 515 (“when . . . in the enemy’s country”), 517 (when occupation of enemy territory occurs) (1878).
2. WINTHROP, *supra* note 1, at 836.
3. 317 U.S. 1 (1942).
4. See 317 U.S. at 22 n.1. Petitioners had also been charged with war-time espionage, but the Supreme Court merely approved military commission jurisdiction to try violations of the laws of war.
5. See, e.g., Paust, *supra* note 1, at 25 n.70. See also *Rasul v. Bush*, 542 U.S. 466, 487 (2004) (Kennedy, J., concurring) (it is territory “far removed from any hostilities”).
6. Done Aug. 12, 1949, 75 U.N.T.S. 287, 6 U.S.T. 2516, T.I.A.S. No. 3365, *reprinted in* *DOCUMENTS ON THE LAWS OF WAR* 301 (Richard Guelff & Adam Roberts eds., 3d ed. 2000) [hereinafter GC or Geneva Civilian Convention]. The Convention applies to the wars in Afghanistan and Iraq even though the United States cannot be at “war” with al Qaeda as such there or elsewhere and members of al Qaeda can be covered under certain provisions of the Convention if captured during war in Afghanistan or Iraq. See, e.g., Paust, *supra* note 1, at 5-8

n.16; Jordan J. Paust, *War and Enemy Status After 9/11: Attacks on the Laws of War*, 28 YALE JOURNAL OF INTERNATIONAL LAW 325, 325–28 (2003).

7. GC, *supra* note 6, art. 49; *see also id.*, art. 76 (“persons accused of offences shall be detained in the occupied country”); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, art. 85(4)(a), 1125 U.N.T.S. 3, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 6, at 422, 471 [hereinafter Geneva Protocol I]; IV COMMENTARY, GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 278–80, 363 (Jean S. Pictet ed., 1958) [hereinafter IV COMMENTARY]; Paust, *supra* note 1, at 24 n.68. Even if persons are nationals of a “neutral” State and their State of nationality has normal diplomatic relations with the detaining State, they are protected persons if they are in occupied territory or other territory that is not the territory of the detaining State, since the exclusion in paragraph 2 in Article 4 only applies to persons detained in the detaining State. *See, e.g.*, GC, *supra* note 6, art. 4; IV COMMENTARY, *supra*, at 48 (“in occupied territory they are protected persons and the Convention is applicable to them”); U.S. Department of the Army, Pam. 27-161-2, 2 INTERNATIONAL LAW 132 (1962) (“If they are in occupied territory, they remain entitled to protection.”); UK Ministry of Defence, THE MANUAL OF THE LAW OF ARMED CONFLICT 274 (2004) (“Neutral nationals in occupied territory are entitled to treatment as protected persons under Geneva Convention IV whether or not there are normal diplomatic relations between the neutral States concerned and the occupying power.”) [hereinafter UK MANUAL].

Additionally, rights and duties under the 1949 Geneva Conventions must be applied “in all circumstances.” *See, e.g.*, GC, *supra* note 6, arts. 1, 3, 27. Importantly, any detainee who is not a prisoner of war has certain protections under the Geneva Civilian Convention and common Article 3, which now applies also in an international armed conflict (*i.e.*, there are no gaps in Geneva law that leave a person without any protections). *See, e.g.*, GC, *supra* note 6, arts. 3, 5, 13, 16, 27–33; IV COMMENTARY, *supra* at 18, 58, 595; U.S. Department of the Army Field Manual 27-10, THE LAW OF LAND WARFARE 31, ¶ 73, 98, ¶ 247(b) (1956) [hereinafter FM 27-10]; UK MANUAL, *supra*, at 5, 145, 148, 150, 216, 255; Derek Jinks, *Protective Parity and the Law of War*, 79 NOTRE DAME LAW REVIEW 1493, 1504, 1508–11 (2004); Paust, *supra* note 1, at 6–8 n.15; William H. Taft, IV, *The Law of Armed Conflict After 9/11: Some Salient Features*, 28 YALE JOURNAL OF INTERNATIONAL LAW 319, 321–22 (2003). Further, the 1949 Geneva Conventions contain express and implied rights and can be self-executing. *See, e.g.*, Jordan J. Paust, *Judicial Power To Determine the Status and Rights of Persons Detained Without Trial*, 44 HARVARD INTERNATIONAL LAW JOURNAL 503, 515–17 (2003). Additionally, they are “executed” by congressional legislation in, for example, 10 U.S.C. §§ 818, 821. *See, e.g.*, *infra* note 36; *see also* Paust, *supra* at 517 (re: ATCA and habeas statutes). Moreover, the President has an unavoidable constitutional duty to faithfully execute the law. *See, e.g.*, U.S. CONSTITUTION, art. II, § 3; *infra* notes 11, 18.

That the United States has been an occupying power in Afghanistan and Iraq is well-known. *See, e.g.*, United Nations Security Council Resolution 1438, U.N. SCOR, 58th Sess., 4761st mtg. pmb., U.N. Doc. S/RES/1483 (2003) (addressing UK and US recognitions); Jordan J. Paust, *The US as Occupying Power Over Portions of Iraq and Special Responsibilities Under the Laws of War* (May 2003), at [http://www.nimj.org/documents/occupation\(1\).doc](http://www.nimj.org/documents/occupation(1).doc); Paust, *supra* note 1, at 24 n.67.

8. GC, *supra* note 6, art. 147; IV COMMENTARY, *supra* note 7, at 280, 599. *See also* Geneva Protocol I, *supra* note 7, art. 85(4)(a); Rome Statute of the International Criminal Court, art. 8(2)(a)(vii) and (b)(viii), U.N. Doc. A/CONF.183/9 (1998), *reprinted in* 37 INTERNATIONAL LEGAL MATERIALS 999 (1998).

9. See, e.g., *Madsen v. Kinsella*, 343 U.S. 341, 346–48 (1952) (recognizing that military commission power is “related to war” and recognizing them as “war courts” that the President “may, in time of war, establish”); *In re Yamashita*, 327 U.S. 1, 11–13 (1946) (such power exists after cessation of hostilities “at least until peace has been officially recognized by treaty or proclamation of the political branch of the Government.”), 20 n.7 (a military commission is a “war court”) (1946); *Ex parte Quirin*, 317 U.S. 1, 28 (1942); *The Grapeshot*, 76 U.S. (9 Wall.) 129, 132–33 (1869) (permitting jurisdiction “so long as the war continued” and “during war”); *Cross v. Harrison*, 57 U.S. (16 How.) 164, 190 (1853) (permitting jurisdiction until a “treaty of peace”); 24 Opinions of the Attorney General 570, 571 (1903); 11 Opinions of the Attorney General 297, 298 (1865); JORDAN J. PAUST, M. CHERIF BASSIOUNI, ET AL., *INTERNATIONAL CRIMINAL LAW* 309–10 (2d ed. 2000); WINTHROP, *supra* note 1, at 86 (jurisdiction of military commissions “is determined by the existence and continuance of war”), 831 (jurisdiction is tied to the war powers, “exclusively war-court”), 837 (“An offence . . . must have been committed within the period of the war or of the exercise of military government . . . . [J]urisdiction . . . cannot be maintained after the date of a peace . . . .”); DIGEST OF OPINIONS OF THE JUDGE ADVOCATE GENERAL 1067 (1912); Henry W. Halleck, *Military Tribunals and Their Jurisdiction*, 5 AMERICAN JOURNAL OF INTERNATIONAL LAW 958, 965–66 (1911), reprinted in *MILITARY LAW REVIEW BICENTENNIAL ISSUE* 15, 21 (1975); Michael A. Newton, *Continuum Crimes: Military Jurisdiction Over Foreign Nationals Who Commit International Crimes*, 153 *MILITARY LAW REVIEW* 1, 15 (1996); Paust, *supra* note 1, at 5 & n.14, 9, 25 n.70; Committee on Military Affairs and Justice of the Association of the Bar of the City of New York, *Inter Arma Silent Leges: In Times of Armed Conflict, Should the Laws be Silent? – A Report on the President’s Military Order of November 13, 2001* at 25–26 n.68, 28 (Dec. 2001); SENATE REPORT. No. 64-130, at 40 (1916) (it is a “war court”).

10. Halleck, *supra* note 9, at 965–66. General Halleck was a general during the Civil War and a prominent international legal scholar who participated in the creation of the 1863 Lieber Code on the laws of war.

11. 11 Opinions of the Attorney General, *supra* note 9, at 297, 298 (1865). Clearly, Congress can regulate the jurisdiction and procedure of military commissions, but must do so consistently with international law and the requirements of international law “are of binding force upon the departments and citizens of the Government, though not defined by any law of Congress” and neither Congress nor the Executive can “abrogate them or authorize their infraction.” See, e.g., *id.* at 298–300; *Madsen v. Kinsella*, 343 U.S. 341, 348–49 (1952); see also *Dooley v. United States*, 182 U.S. 222, 231 (1901) (Executive military powers are “regulated and limited . . . directly from the laws of war”), quoting 2 HENRY W. HALLECK, *INTERNATIONAL LAW* 444 (1st ed. 1861); *infra* note 18.

12. See, e.g., Human Rights First, *Trials Under Military Order: A Guide to the Final Rules for Military Commissions* 2, 8 (rev. ed. June 2004) [hereinafter Human Rights First Report], available at [http://www.humanrightsfirst.org/us\\_law/PDF/detainees/trials\\_under\\_order0604.pdf](http://www.humanrightsfirst.org/us_law/PDF/detainees/trials_under_order0604.pdf); Alberto R. Gonzales, *Martial Justice, Full and Fair*, *NEW YORK TIMES*, Nov. 30, 2001, at A27 (“The [2001 presidential] order only covers foreign enemy war criminals . . . [they] must be chargeable with offenses against the international laws of war”). See also *Madsen v. Kinsella*, *supra* note 11, at 348–49; *Johnson v. Eisentrager*, 339 U.S. 763, 786 (1950) (“the military commission is a lawful tribunal to adjudge enemy offenses against the laws of war.”); *Duncan v. Kahanamoku*, 327 U.S. 304, 313–14, 322–23 (1946); 11 Opinions of the Attorney General, *supra* note 9, at 298 (“They may take cognizance of such offenses as the laws of war permit”); WINTHROP, *supra* note 1, at 831, 836–37; Halleck, *supra* note 9, at 965–66 (they “have jurisdiction of cases arising under the laws of war”); Newton, *supra* note 9, at 15, 19–21 (stating

- that jurisdiction apparently exists only over violations of the laws of war); *O'Callahan v. Parker*, 395 U.S. 258, 267 (“court-martial jurisdiction cannot be extended to reach any person not a member of the Armed Forces . . . no matter how intimate the connection between their offense and the concerns of military discipline . . . . [C]ourts-martial have no jurisdiction over nonsoldiers, whatever their offense”), 302 (“we deal with peacetime offenses, not with authority stemming from the war power. Civil courts were open. The offenses were committed within our territorial limits, not in the occupied zone of a foreign country.”) (1969); *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 13–14 & n.4 (1955) (ex-service persons are not subject to prosecution in military courts-martial re: murder, yet the case did not involve congressional power to punish offenses against the laws of war). A resolution of the American Bar Association in 2002 recommended that the military commissions prosecute only war crimes. See Jeff Blumenthal, *ABA Votes to Favor Curbs on Bush's Military Tribunals*, THE LEGAL INTELLIGENCER, Feb. 5, 2002, at 24, available at <http://pirate.shu.edu/~jenninju/CivilProcedure/911/ABAOpposesMilitaryTribunalsLawComFeb5.htm> [hereinafter ABA Resolution].
13. *In re Yamashita*, *supra* note 9, at 19; see also *id.* at 20 n.7 (a military commission is a “war court”).
  14. Military Order of Nov. 13, 2001, 66 Federal Register 57,833 (Nov. 16, 2001), available at <http://www.fas.org/irp/offdocs/eo/mo-111301.htm>.
  15. *Id.* § 4(A).
  16. See, e.g., PAUST, BASSIOUNI, ET AL., *supra* note 9, at 288–93. The Supreme Court has stated that “jurisdiction of military tribunals is a very limited and extraordinary jurisdiction derived from the cryptic language of Art. I, § 8,” concerning offenses against the law of nations. *Reid v. Covert*, 354 U.S. 1, 21 (1957).
  17. See, e.g., GC, *supra* note 6, arts. 64, 66–68, 71–75, 147; Hague Convention No. IV Respecting the Laws and Customs of War on Land, Annex, Oct. 18, 1907, art. 43, League of Nations Treaty Series vol. XIV (1929), No. 2138, T.S. No. 539, 36 Stat. 2277, reprinted in DOCUMENTS ON THE LAW OF WAR, *supra* note 6, at 69, 80.
  18. See, e.g., U.S. CONSTITUTION, art. II, § 3; JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 7–9, 169–92, 488, 493–94 (2d ed. 2003), and the many cases and opinions and views of the Founders and Framers cited; Paust, *supra* note 7, at 517–22; Jordan J. Paust, *Executive Plans and Authorizations to Violate International Law Concerning Treatment and Interrogation of Detainees*, 43 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 811, 856–861 (2005); *supra* note 11; see also U.S. CONSTITUTION, arts. III, § 2, VI, cl. 2.
  19. Concerning the enhancement of Executive power by international law, see, e.g., PAUST, *supra* note 18, at 9, 16, 44–47 n.55, 79, 82, 180, 185, 457, 468–69, 480–81.
  20. See Part I A *supra*.
  21. Military Commission Instruction No. 2, Crimes and Elements for Trials by Military Commission (rev. ed. Apr. 30, 2003), available at <http://www.defenselink.mil/news/May2003/d20030430milcominstno2.pdf> [hereinafter Instruction No. 2].
  22. See *id.* at 1–2, § 3(A).
  23. See Human Rights First Report, *supra* note 12, at 2, 8–9, 13.
  24. In a given case, a hijacking can involve hostage-taking covered under the Geneva Civilian Convention. See GC, *supra* note 6, arts. 3(1)(b), 34. Some might involve cruel or inhumane treatment, and so forth.
  25. See Instruction No. 2, *supra* note 21, at 13–14, § 6(B)(1)–(2). The definitional elements of “terrorism” are, however, too broad since they do not require an intent to produce “terror” or intense fear or anxiety but merely an intent to “intimidate or coerce.” See *id.* § 6(B)(a)(4). Minimum standards of fairness and common sense dictionary definitions require that terrorism

involve an intent to produce “terror” in or to “terrorize” a given human target. Interrogation techniques approved by Secretary Rumsfeld and others would be “terrorism” under such a definition when they violate laws of war such as those in the Geneva Civilian Convention, *supra* note 6, arts. 3, 5, 27, 31–33, 147.

26. See Instruction No. 2, *supra* note 21, at 13–14, § 6(B)(1)(a)(3) and (2)(a)(4).

27. See, e.g., GC, *supra* note 6, art. 33; Geneva Protocol I, *supra* note 7, art. 51; PAUST, BASSIOUNI, ET AL., *supra* note 9, at 32 (1919 list of war crimes adopted by the Responsibilities Commission of the Paris Peace Conference), 998; Jordan J. Paust, *Terrorism and the International Law of War*, 64 MILITARY LAW REVIEW 1 (1974).

28. See Instruction No. 2, *supra* note 21, at 13–14, § 6(B)(3)–(4).

29. “Murder,” for example, involves the unlawful killing of a human being, which partly begs the question because some persons, in some contexts, can be lawfully killed during a war. As an example, once any person is “taking no active part in the hostilities” “violence to life . . . , in particular murder” of such a person would be both murder and a war crime covered by common Article 3(1)(a) of the Geneva Conventions. See also GC, *supra* note 6, arts. 32, 147. It would not matter whether the perpetrator was “military or civilian.” FM 27-10, *supra* note 7, at 178, ¶ 499. Yet, is the unlawful killing of one soldier by a fellow soldier that constitutes “murder” under domestic law a war crime merely because it happens in a theater of war? Similarly, is “murder” by a noncombatant or unlawful belligerent necessarily a war crime if committed in a theater of war? Professor Yoram Dinstein has written that an unprivileged belligerent who kills on the battlefield lacks combat immunity and, therefore, becomes subject to domestic prosecution for any applicable domestic crimes over which there is jurisdiction, but that the law of war “merely takes off a mantle of immunity from the defendant, who is therefore accessible to penal charges for any offense committed against the domestic legal system.” YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 31 (2004). See also *Ex parte Quirin*, 317 U.S. 1, 28–31, 35–37, 44 (1942) (prosecution of combatants who engaged in combatant operations of sabotage out of uniform in violation of the laws of war); MYRES S. MCDUGAL & FLORENTINO P. FELICIANO, *LAW AND MINIMUM WORLD PUBLIC ORDER* 712 (1961); Paust, *supra* note 6, at 331–32 (regarding combatant immunity).

30. Concerning the concept of “pure political offenses,” see, e.g., PAUST, BASSIOUNI, ET AL., *supra* note 9, at 332–33, 367–69.

31. Spying as such is not a war crime. See, e.g., *id.* at 854; FM 27-10, *supra* note 7, at 33, ¶¶ 77, 78(c).

32. See Instruction No. 2, *supra* note 21, at 14–16, § 6(B)(5)–(8). See also *Smith v. Shaw*, 12 Johns. 257, 265 (N.Y. Sup. Ct. 1815) (civilian who allegedly was an enemy spy exciting mutiny and insurrection during war cannot be detained by the US military for trial in a military tribunal); *In re Stacy*, 10 Johns. 328, 332 (N.Y. Sup. Ct. 1813) (habeas writ issued in wartime against a military commander holding a civilian charged with treason in aid of the enemy, since US military did not have jurisdiction despite the alleged threat to national security).

33. Human Rights First Report, *supra* note 12, at 9–12, addressing Instruction No. 2, *supra* note 21, at 3, § 5(B)–(C). In this regard, it should be noted that although the United States is at war in Afghanistan and Iraq, one cannot be at war with al Qaeda as such. Thus, armed attacks by al Qaeda outside of an actual war, such as those that occurred outside the context of the civil war in Afghanistan between the Northern Alliance and the Taliban or that occurred outside of Afghanistan and prior to the war in Afghanistan involving US armed forces that started in October 2001 might be criminal under some laws but cannot be war crimes. See, e.g., Paust, *supra* note 1, at 5–8 & n.16; Paust, *supra* note 6, at 325–28. However, the fact that a state of war or armed conflict cannot exist between the United States and al Qaeda as such does not preclude

- United States use of force in self-defense against such non-State actors (and the mere fact that the United States engages in such self-defense actions abroad does not create a state of armed conflict). See, e.g., Jordan J. Paust, *Use of Armed Force against Terrorists in Afghanistan, Iraq, and Beyond*, 35 CORNELL INTERNATIONAL LAW JOURNAL 533, 534–35, 538–39 (2002).
34. 39 Stat. 619, 653 (Aug. 29, 1916).
35. *In re Yamashita*, 327 U.S. 1, 19 (1946).
36. See, e.g., *Ex parte Quirin*, 317 U.S. 1, 28–30 (1942); *In re Yamashita*, *id.* at 7–8, 11; *United States v. Schultz*, 1 U.S.C.M.A. 512, 519, 4 C.M.R. 104, 111 (1952); Jordan J. Paust, *After My Lai: The Case for War Crime Jurisdiction Over Civilians in Federal District Courts*, 50 TEXAS LAW REVIEW 6, 10–12 (1971); reprinted in 4 THE VIETNAM WAR AND INTERNATIONAL LAW 447 (Richard Falk ed., 1976).
37. See *Military Order*, *supra* note 14, para. 1 (“By authority vested in me as president . . . by the Constitution and the laws of the United States of America, including . . . sections 821 and 836 of title 10 . . .”).
38. Congress certainly did not do so in its Joint Resolution to Authorize the Use of United States Forces Against those Responsible for the Recent Attacks Launched Against the United States, Sept. 18, 2001, Pub. L. No. 107-40, 115 Stat. 224, since there was no mention of military commissions and it was passed nearly two months prior to the President’s *Military Order*. See also *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (stating merely that Congress thereby impliedly authorized the “trial of enemy combatants” covered therein—not that any type of forum was authorized or, especially, that any type of military commission or procedure operative outside an actual theater of war or war-related occupied territory would be appropriate). For a well-argued view contrary to the view that Congress has generally approved military commission jurisdiction and that general approval should suffice, see, e.g., Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE LAW JOURNAL 1259 (2002).
39. See *Military Order*, *supra* note 14, § 7(B)(1)–(2). See also US Department of Defense, *Military Commission Order No. 1*, Mar. 21, 2002, §§ 6 H (4)–(6), 7 B, available at <http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf>. He cannot do so lawfully. See, e.g., Paust, *supra* note 1, at 10–11, 15; Paust, *supra* note 7, at 518–24; *infra* note 50.
40. Concerning judicial power and concurrent competence in federal district courts, see, e.g., U.S. Const., Art. III, § 2; 28 U.S.C. § 3231; Paust, *supra* note 36, at 17–28, and references cited.
41. See also James E. Pfander, *Federal Courts: Jurisdiction-Stripping and the Supreme Court’s Power to Supervise Inferior Tribunals*, 78 TEXAS LAW REVIEW 1433, 1454–56 (2000) (“Like other provisions of Article I that operate as restrictions on legislative power, the Inferior Tribunals Clause underscores the inability of Congress to fashion new courts to displace the constitutional supremacy of the one supreme court.”).
42. The Supreme Court has already recognized the propriety of habeas review concerning detention at Guantanamo. See *Rasul v. Bush*, 542 U.S. 466 (2004); see also Jordan J. Paust, *Antiterrorism Military Commissions: The Ad Hoc DOD Rules of Procedure*, 23 MICHIGAN JOURNAL OF INTERNATIONAL LAW 677, 690–94 (2002); Paust, *supra* note 7, at 517 & n.47, 519–20 n.67. It is not unlikely that the Court will insist that there be habeas review with respect to military commissions if not other forms of review. See also *infra* note 43.
43. See, e.g., Steven W. Becker, “*Mirror, Mirror on the Wall . . .*”: *Assessing the Aftermath of September 11th*, 37 VALPARAISO UNIVERSITY LAW REVIEW 563, 580–86 (2003); Paust, *supra* note 1, at 10–18; Paust, *supra* note 42, at 677–90; Joshua Rozenberg, *Law Chief Calls on US to Give Terror Suspects Fair Trial*, THE DAILY TELEGRAPH (London), Sept. 19, 2003, at 1 (United Kingdom’s Attorney General Goldsmith identifies some of the British complaints about lack of a

- jury, secret hearings, restrictions on counsel for the accused, and the lack of judicial review); Evan J. Wallach, *Afghanistan, Quirin, and Uchiyama: Does the Sauce Suit the Gander?*, THE ARMY LAWYER 18, 40, 43–45 (Nov. 2003); see also Michal R. Belknap, *A Putrid Pedigree: The Bush Administration's Military Tribunals in Historical Perspective*, 38 CALIFORNIA WESTERN LAW REVIEW 433 (2002); Lord Johan Steyn, *Guantanamo Bay: The Legal Black Hole*, Twenty-Seventh FA Mann Lecture, British Institute of International & Comparative Law (Nov. 25, 2003) at 11–12, 18, available at <http://www.nimj.org/documents/Guantanamo.pdf>; Jonathan Turley, *Tribunals and Tribulations: The Antithetical Elements of Military Governance in a Madisonian Democracy*, 70 GEORGE WASHINGTON LAW REVIEW 649 (2002); Lawyers Committee for Human Rights, *Assessing the New Normal: Liberty and Security for the Post–September 11 United States* 57–58, 60–61 (2003), available at <http://www.lchr.org/pubs/descriptions/Assessing/AssessingtheNewNormal.pdf>; *Blair Wants Britons' Legal Status Resolved*, HOUSTON CHRONICLE, Oct. 23, 2003, at A23 (Prime Minister Tony Blair reiterated concerns “about the form of trial that they [UK nationals] will have under a military commission.”).
44. See, e.g., Paust, *supra* note 42, at 694; Paust, *supra* note 1, at 4 n.12, 10 n.18, 28 n.81; Wallach, *supra* note 43, at 45–46.
45. See generally *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); Paust, *supra* note 7, at 503–04 (also addressing numerous cases recognizing judicial power to review Executive or military decisions, *id.* at 520–24). See also White House Counsel Alberto R. Gonzales, Memorandum for the President (Jan. 25, 2002), available at <http://www.msnbc.msn.com/id/4999148/site/newsweek>; John Yoo & Robert J. Delahunty of the Office of Legal Counsel, Department of Justice, Memorandum for William J. Haynes II, General Counsel, Department of Defense (Jan. 9, 2002), available at <http://www.msnbc.msn.com/id/5025040/site/newsweek>.
46. See Military Order, *supra* note 14, § 4(C)(2).
47. See, e.g., Paust, *supra* note 42, at 687–88; A. Christopher Bryant & Carl Tobias, *Quirin Revisited*, 2003 WISCONSIN LAW REVIEW 309, 360–61 (2003); Mark A. Drumbl, *Victimhood in Our Neighborhood: Terrorist Crime, Taliban Guilt, and the Asymmetries of the International Legal Order*, 81 NORTH CAROLINA LAW REVIEW 1, 10–12, 58–59 (2002); Harold Hongju Koh, *The Case Against Military Commissions*, 96 AMERICAN JOURNAL OF INTERNATIONAL LAW 337, 338–39 (2002); Detlev F. Vagts, *Which Courts Should Try Persons Accused of Terrorism?*, 14 EUROPEAN JOURNAL OF INTERNATIONAL LAW 313, 322 (2003); see also NORMAN ABRAMS, ANTI-TERRORISM AND CRIMINAL ENFORCEMENT 330–31 (2003); Justice Sandra Day O'Connor, *Vindicating the Rule of Law: The Role of the Judiciary*, 2 CHINESE JOURNAL OF INTERNATIONAL LAW 1, 3–4 (2003), quoting the Declaration of Rights of the Massachusetts Constitution, Article 29, which “framed by John Adams, boldly declares, ‘It is the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit,’” and adding: “Individual judicial independence is necessary if each case is to be resolved on its own merits, according to the facts and the law.”
48. See, e.g., Paust, *supra* note 42, at 690; Human Rights First Report, *supra* note 12, at 2–3, 17–18, 21–24; *supra* notes 43, 47.
49. See, e.g., Koh, *supra* note 47, at 339; Paust, *supra* note 42, at 678–79, 688–89; Human Rights First Report, *supra* note 12, at 3–4, 27–28, 30; Military Defense Attorneys and Counsel, DoD Office of Military Commissions, letter to the United States Senate Armed Forces and Judiciary Committees (June 1, 2004), available at [http://pegc.no-ip.info/omc\\_def\\_letter\\_20040601.html](http://pegc.no-ip.info/omc_def_letter_20040601.html); *supra* notes 43, 47.
50. See, e.g., Paust, *supra* note 42, at 678–79, 685–86; Human Rights First Report, *supra* note 12, at 4, 31–32; *supra* notes 43, 47. The Executive’s military “Review Panel” may not overturn a conviction, reverse or amend a decision, or order dismissal or release of the person (or order

anything else), since it “shall either (a) forward the case to the Secretary of Defense with a recommendation as to disposition, or (b) return the case to the Appointing Authority for further proceedings” if a majority of the panel decides that “a material error of law occurred.” Military Commission Order No. 1, *supra* note 39, § 6(H)(4). Further, only one member of the panel must be a lawyer, since only one member must “have experience as a judge,” and no member of the panel must have been a judge with expertise in the laws of war, international law more generally, or criminal law more generally. *See id.* § 6(H)(4). The final “decision” in such a “review” and “recommendation” system will be made by the Secretary of Defense or the President. *Id.* § 6(H)(2), (6). *See also* Reid v. Covert, 354 U.S. 1, 36 n.66 (1957), quoting Alexander Hamilton, THE FEDERALIST NO. 78 (“Liberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments . . .”).

51. *See, e.g.*, Paust, *supra* note 1, at 10–17; Paust, *supra* note 42, at 678–85 (including impermissible discrimination on the basis of national origin, denial of equal access to courts and to equality of treatment and equal protection of the law, “denials of justice” in violation of customary international law, and denial of the human right to fair, meaningful and effective judicial review of the propriety of detention).

52. *See, e.g.*, GC, *supra* note 6, art. 3(1)(d); Paust, *supra* note 7, at 511 n.27, 514 & n.32; Paust, *supra* note 42, at 678 n.9.

53. *See* Military Commission Order No. 1, *supra* note 39, §§ 7(B) and 8.

54. *See, e.g.*, *supra* notes 11, 18.

55. Even federal statutes must be interpreted and applied consistently with international law. *See, e.g.*, Cook v. United States, 288 U.S. 102, 120 (1933); The Charming Betsy, 6 U.S. (6 Cranch) 64, 117–18 (1804); Talbot v. Seeman, 5 U.S. (1 Cranch) 1, 43 (1801); 11 Opinions of the Attorney General, *supra* note 11, at 299–300; 9 Opinions of the Attorney General 356, 362–63 (1859) (“law . . . must be made and executed according to the law of nations”); PAUST, *supra* note 18, at 99, 120, 124–25 ns.2–3.

56. *See, e.g.*, *supra* notes 11, 18.

57. *See also* Adam Roberts, *Role of Law in the “War on Terror”: A Tragic Clash*, 97 PROCEEDINGS OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 18, 19–20 (2003); Steyn, *supra* note 41, at 3 (“unchecked abuse of power begets ever greater abuse of power”). Terrorists may seek to produce governmental overreaction that sends a message that the targeted government does not follow law, thus deflating its legitimacy and possibly enhancing terrorist recruiting, support, and influence or deflating for some the effects of the illegality of terrorist tactics. Claiming to be at “war” with certain non-State terrorists might also unwittingly enhance their status and serve other terrorist purposes.

58. *See* United States v. Lee, 106 U.S. 196, 219–21 (1882); *supra* notes 11, 18; *see also* Reid v. Covert, 354 U.S. 1, 5–6, 12, 35 n.62 (1957) (our government is one of delegated powers and one that is entirely a creature of the Constitution and has no power or authority to act here or abroad inconsistently with the Constitution); Paust, *supra* note 1, at 19–20. As the Supreme Court reminded in *United States v. Lee*:

No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it.

It is the only supreme power in our system of government, and every man who by accepting office participates in its functions is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives.

106 U.S. at 220.

# XIII

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## Military Commissions—Kangaroo Courts?

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Charles H. B. Garraway\*

**T**he decision to use Military Commissions to try persons held at Guantanamo has attracted massive worldwide opposition.<sup>1</sup> Unfortunately, much of it has been caught up in the increasing political vitriol that seems to be marking the whole question of the so-called “war on terror.” This is marring what should be a genuine legal debate. The advent of the International Criminal Court (ICC) with its emphasis on the doctrine of “complementarity”<sup>2</sup> should have encouraged States to discuss how best crimes arising out of armed conflict should be dealt with on a domestic level. Is it appropriate in the 21st century to use military justice in this way or should “democracy” require a civilian response? Instead the issue has become polarized so that people tend to be either “for” military commissions—and support them without criticism—or alternatively “against”—in which case nothing is good about them at all.

Part of the difficulty is the confusion over the term “war on terror.” Is it an “armed conflict” to which the laws of armed conflict apply? Is it a matter for law enforcement, in which case the laws of armed conflict may be irrelevant? Or is it a new form of conflict to which the law of armed conflict can only be applied by analogy? Traditionally terrorism has been dealt with in the law enforcement paradigm—and to a large extent still is.<sup>3</sup> In the view of most, Afghanistan was a traditional armed conflict with the Taliban being the de facto Government of that

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country. As such, the law of armed conflict applied to that conflict.<sup>4</sup> The difficult area is when attempts are made to expand that conflict into a worldwide campaign against “terrorism” in general and Al Qaeda in particular.

The attempt to extend the law of armed conflict into what has traditionally been a law enforcement area has been confusing and, frankly, badly handled. There has been a lack of clarity in the pronouncements on law by members of the US Administration that has made it very difficult to ascertain what the official position is. There has been a degree of “pick and mix” about the application of the law so that the impression is given that the United States is selecting those parts that suit its purpose and rejecting those as “unsuitable” that do not. However unfair this assessment may be, there is no doubt that this is how it is seen in many parts of the world including among traditional allies. The campaign against terror does raise some difficult legal issues which both domestic criminal lawyers and international lawyers have to come to terms with, but a unilateral reinterpretation of traditional paradigms is not necessarily the right way forward.

Further confusion is caused by the use of the loose term “unlawful combatant.” It implies that those who take part in hostilities become “combatants” and lose their status as civilians.<sup>5</sup> The argument is put forward that it is ridiculous to describe a civilian who has chosen to take up arms as anything other than a “combatant.” However, this is not necessarily as ridiculous as it may sound. It is accepted that only certain persons are allowed to take part in hostilities. They are termed under the law of armed conflict “combatants.”<sup>6</sup> Those who are not so entitled are termed “civilians” who have protected status.<sup>7</sup> If these “civilians” chose to take a direct part in hostilities, they do not change status, any more than a wounded soldier or prisoner of war changes status. They lose their protection.<sup>8</sup> Less confusing is the old fashioned—but, coming from Richard Baxter—well established term “unprivileged belligerent.”<sup>9</sup> Such people, in taking part in combat, remain “unprivileged.” That means that they have no combatant immunity and therefore even acts that to a combatant would be legitimate under the law of armed conflict are criminal in so far as the unprivileged belligerents are concerned. The combatant who tries to masquerade as a civilian remains a “combatant,” and while he may be committing perfidy, he does not become an “unlawful civilian.”

This background has helped to hide what may be the real issue here—a distaste in the modern world for the concept of military justice. The United States, United Kingdom and some other nations, mainly of the common law tradition, have well established military justice systems going back centuries. Based on civil procedures but modified to meet the peculiar requirements of service life, military justice as it is applied in those nations is often fairer than the ordinary domestic criminal systems that it replicates. For example, in the United Kingdom, there was never any

requirement for a judge in a domestic criminal trial to ensure that an accused fully understood the nature of his plea if he pleaded guilty. In military courts, a detailed procedure was followed to ensure that the accused did understand the consequences of his plea and it was not uncommon for guilty pleas to be refused and a not guilty plea entered. Ironically, many of these safeguards are being abandoned in the attempt to reflect more closely the civilian system.<sup>10</sup>

However, it has to be admitted, this is not the norm worldwide. Since 1945, military justice has got a bad name through the misuse of the system by repressive regimes both military and civilian. Could a military court in Stalin's Russia or in Argentina under the junta be trusted to administer justice? It is because of these abuses that military courts are looked at askance by so many. The UN Human Rights Committee has criticized military jurisdiction, particularly over civilians, stating that the use of military courts to try civilians "could present serious problems as far as the equitable, impartial and independent administration of justice is concerned. Quite often the reason for the establishment of such courts is to enable exceptional procedures to be applied which do not comply with normal standards of justice."<sup>11</sup> The European Court of Human Rights may soon be asked to examine just that issue in relation to UK courts-martial in the case of Alan Martin, a 17-year-old dependent who was tried for murder by a general court-martial in Germany in 1995.<sup>12</sup> The UK system has had to undergo radical overhaul in the last ten years because of human rights concerns, but in none of the cases that have gone to Strasbourg have the Court found an *actual* injustice.<sup>13</sup> The Court has made its rulings on the basis that justice must be *seen* to be done and thus reliance on the good faith of those who run the system is not sufficient. The Convening Officer—"Convening Authority" in US terminology—has been abolished, not because of any abuse of his powers but because of the perceived possibility of abuse. Military judges, who had survived in the Navy though the Army and Air Force had used civilian "judge advocates" since 1948, were abolished in 2003 for the same reason.<sup>14</sup> The world has swung full circle.

It was not always so. At the end of World War II, military justice was seen as the most appropriate means of dealing with cases in a wartime situation. Prisoners of war were made subject to the disciplinary laws of the forces of the Detaining Power<sup>15</sup> and civilian court proceedings were to be the exception rather than the rule.<sup>16</sup> The penal laws passed by an Occupying Power could be enforced by the "properly constituted, non-political military courts" of the Occupying Power.<sup>17</sup> It is interesting how military courts were then seen as essentially apolitical. In the case of war crimes, the majority of cases were tried by military courts set up by the Allied powers.<sup>18</sup> Although, at Nuremberg itself, the trials were conducted primarily, so far as the Western powers were concerned, by civilian lawyers and judges, many had

military experience and the military played a major role. Nuremberg was, however, the exception, not the rule.

On June 14, 1945, by Royal Warrant, Regulations for the Trial of War Criminals were established by the United Kingdom.<sup>19</sup> These established “Military Courts” for this purpose and a “war crime” was defined as “a violation of the laws and usages of war committed during any war in which His Majesty has been or may be engaged at any time since the 2nd September 1939.” Procedures were established and rules of evidence laid down. This Royal Warrant is still extant today though it is in grievous need of updating. The United Kingdom War Crimes Act of 1991,<sup>20</sup> designed to enable the Government to deal with the legacy of World War II war crimes arising out of the opening up of the records in Eastern Europe, was, strictly speaking, unnecessary except in so far as it granted jurisdiction to civil courts, as military courts already had jurisdiction under the Warrant.

Even today, in many European nations, “military courts” have the primary jurisdiction in war crimes cases. This is so, for example, in Switzerland.<sup>21</sup> However, this is not always a fair comparison as much “military justice” is now carried out by the civilian authorities, occasionally using special courts or lawyers who hold reservist posts.

There is nothing inherently wrong with military courts, commissions, tribunals—call them what you will—as a forum for dealing with cases of this nature. It is therefore necessary to examine the commissions in a more technical manner rather than attacking them as a matter of legal principle.

The Presidential Military Order of November 13, 2001<sup>22</sup> caused considerable alarm due to the starkness of its terms. For example, Section 1(f) stated “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.” The concern was not so much with “rules of evidence” as with “principles of law.” These concerns were compounded by the limitation of the Military Order to non-US citizens.<sup>23</sup> This is not the place to go into the controversy of prisoner of war status and the possible conflict with Article 82 of the Third Geneva Convention. However, it would appear from the text that in the case of US citizens, the impracticability referred to in Section 1(f) does not exist! Why the mere fact of nationality should affect the issue of practicability is not explained. While it may be argued that US citizens are entitled to their constitutional rights of which they cannot be deprived, this is not a matter of “practicability” but one of law.

Other provisions of the Order also gave cause for concern, including the wide provisions on evidence,<sup>24</sup> the lack of any judicial appellate structure<sup>25</sup> and the exclusion of the supervisory jurisdiction of the civil judiciary.<sup>26</sup> In fact, similar

provisions appear in the British Royal Warrant of 1945. The problem, however, lies primarily in the failure to appreciate that the language of 1945 may not any longer be appropriate in the 21st century, some 60 years later. The world has moved on, particularly in the field of human rights, a field in which the United States has played a major part. One only has to consider the role of Eleanor Roosevelt in the drafting of the Universal Declaration of Human Rights.<sup>27</sup> The temptation to go back to old precedents is enormous, but in this case, it undoubtedly caused unnecessary problems. Those assigned to translate the Presidential Order into other Orders and Instructions were then faced with marrying up old language with modern day commitments and starting from a position of antagonism by civil rights organizations that might, with more care, have been prevented. Many of the criticisms were easily foreseeable and could have been forestalled with a bit more thought.

The Military Commission Order No. 1 of March 21, 2002<sup>28</sup> and the subsequent Instructions<sup>29</sup> were greeted almost with a sense of relief in some circles! They appeared to row back to a considerable extent from the blunt language of the Presidential Order. In fact, they did not. They merely expressed that Order in slightly more acceptable language for the 21st century. After all, it was the Presidential Order that was the overall authority for the subsequent Orders and Instructions and they thus had to be consistent with it. Nevertheless, there was, and still remains, criticism of the structures proposed.

This will not be a detailed analysis of the Orders or Instructions, nor an analysis of them under US domestic law. That is better carried out by others. This article will, however, look at some of the key issues of contention and attempt to give an international perspective to them. This means that it will not examine the scope of jurisdiction including the crimes themselves and the elements of crimes, as this is primarily an issue governed by US law. It is ironic that many of the elements are based on those prepared for the ICC and, where there are changes, these are often specifically designed to meet the different nature of the law. This is a US domestic court—not an international one. This is particularly true in the decision to draft elements for the inchoate crimes.<sup>30</sup> This would have been far too difficult a task to carry out for the ICC given the differences between legal systems. Despite US encouragement, the Preparatory Commission decided not to go down that particular route. However, here, in a court operating under a single domestic legal system, US law, there is merit in drafting such elements. However, these elements should not necessarily be taken as a framework for other jurisdictions where different substantive law applies, particularly civil law jurisdictions where some of the common law terms are simply not known.<sup>31</sup>

While on elements, one particular innovation is noteworthy—the split in command responsibility between knowledge before the fact and knowledge after the

fact.<sup>32</sup> The former encompasses liability for the offenses committed, the latter for a separate offense of failing to act. This is a step in the right direction and provides a partial answer to the problems arising from the ICTY Appeals Chamber decision in *Hadzihasanovic*.<sup>33</sup>

Criticisms have centered on the evidential provisions, the role of the defense and the appellate structure. Each will be looked at in turn.

On evidence, the Presidential Order provided that the Commissions could admit

Such evidence as would, in the opinion of the presiding officer of the military commission (or instead, if any other member of the commission so requests at the time the presiding officer renders that opinion, the opinion of the commission rendered at that time by a majority of the commission) have probative value to a reasonable person.<sup>34</sup>

This has been substantially tempered firstly by the Military Commission Order No. 1 itself which required that the Presiding Officer be a lawyer (to be exact “a judge advocate of any United States armed force”),<sup>35</sup> as well as laying down slightly more detailed evidential admissibility criteria.<sup>36</sup> It is still unfortunate that the decision of the Presiding Officer can be overruled by lay members but this was so, even in the UK court-martial system, until comparatively recently. However, modern trends are to leave issues of admissibility of evidence in the hands of a judge, thus separating the role of judge and juror.

The criticism of the scope of permitted evidence would seem to be wide of the mark. In domestic jurisdictions, particularly those of a common law nature, there are extensive—and often illogical—rules on evidence admissibility.<sup>37</sup> Such rules are much more relaxed in civil law jurisdictions and this is apparent also in the rules governing international courts. Article 69(3) of the ICC Statute, for example, gives the Court “the authority to request the submission of all evidence that it considers necessary for the determination of the truth.”<sup>38</sup> This extremely broad provision is countered slightly by Article 69(4) which allows the Court to rule on admissibility “taking into account, *inter alia*, the probative value of the evidence” against any prejudicial affect. While the Rules of Procedure address methods of dealing with admissibility questions,<sup>39</sup> they do not detract from the breadth of the admissibility provisions in the Statute itself. Compared to that, the provisions for the Military Commissions are comparatively modest!

The second area of concern is the provision of defense counsel. Article 14(3) of the International Covenant on Civil and Political Rights refers to “counsel of his own choosing.”<sup>40</sup> It also refers to the right “to have legal assistance assigned to him,

in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.”<sup>41</sup> In so far as this latter requirement is concerned, it is met by the provisions in Military Commission Order No. 1, that “Detailed Defense Counsel” will be assigned “for each case.”<sup>42</sup> Such counsel are free of charge. Criticism is made of the fact that such counsel are all military judge advocates. However, this appears to be merely another facet of the distrust of military justice that pervades the world today (and in particular the human rights community). Military judge advocates assigned to be defense counsel are fiercely independent as they have already indicated.<sup>43</sup> However, they are at risk of coming under pressure from within the chain of command. It is because of the possibility of such influence that human rights courts have discouraged the use of military defense counsel. The concern is therefore one of presentation rather than substance. It does not matter how independent military defense counsel are, they will not be *seen* to be so by vast swathes of the community—and particularly in the Muslim world.

Of greater concern is the requirement to provide “counsel of his own choosing.” It is true that, subject to certain requirements, the accused can select a military judge advocate.<sup>44</sup> However, his choice outside that is limited. He may retain the services of a civilian attorney “at no expense to the United States Government” but that attorney must himself fulfill a number of requirements including being a US citizen and having been determined “to be eligible for access to information classified at the level SECRET or higher.”<sup>45</sup> In addition, Military Commission Instruction No. 5<sup>46</sup> required such counsel to sign an affidavit placing severe restrictions on his movements, his power to seek assistance, and even on his right to confidential communications with his client.<sup>47</sup> Such restrictions would be unacceptable to any British lawyer and the National Association of Criminal Defense Lawyers issued an ethics opinion “that it is unethical for a criminal defense lawyer to represent a person accused before these military commissions because the conditions imposed upon defense counsel before these commissions make it impossible for counsel to provide adequate or ethical representation.”<sup>48</sup> This resulted in some amelioration of these rather draconian provisions, in particular the requirement that counsel pay for their own security clearance and, though here the changes are ambiguous, on the monitoring of attorney-client communications. Nevertheless, the role of the “Civilian Defense Counsel” is very definitely subordinate to the military Detailed Defense Counsel. He can be excluded from closed sessions and prevented from obtaining any information on what went on during such sessions.<sup>49</sup> If, for whatever reason, it was decided to hold the complete trial in closed session, the role of the civilian defense counsel would effectively be denied completely.

The balance between security considerations and the requirements of fair trial are always difficult and it is clear that an attempt has been made to find a way through these two conflicting interests. However, it must be said that it is a compromise that, on paper, can satisfy nobody. Only time will tell if the efforts of the National Association of Criminal Defense Lawyers and the American Bar Association<sup>50</sup> bear fruit sufficiently so that the civilian defense counsel actually has a genuine role to play. While presiding officers, in accordance with their duty, will undoubtedly strive diligently to ensure that the balance between fairness and the needs of security is maintained, at present, the risk of abuse is too great and it would almost have been better to bite the bullet and dispense with the civilian defense counsel altogether. This would undoubtedly lead to an outcry from human rights activists but in some way would be more honest than introducing such an option hedged around with so many restrictions as to make it impracticable.

The third area of concern is the appellate structure. The Presidential Order required the “submission of the record of trial, including any conviction or sentence, for review and final decision by me or by the Secretary of Defense, if so designated by me for that purpose.”<sup>51</sup> The exclusion of the jurisdiction of the US civil courts further illustrated that the appellate process would not be through the judiciary but through the Executive. Again Military Commission Order No.1 sought to ameliorate this by the insertion in the process of a “Review Panel” at least one member of which “shall have experience as a judge.”<sup>52</sup> There have been further developments including the appointment of senior civil judges to the Review Panel (all being given two-star rank for the purpose!).<sup>53</sup> The “Review Panel” has been given enhanced powers which do seem to go far beyond the original terms of the Order.

The original provisions were again based on old precedents. The British Royal Warrant of 1945 provides for petitions to the Confirming Officer (the equivalent of the “Appointing Authority” under Military Commission Order No. 1) and reference to the Judge Advocate General “for advice and report.”<sup>54</sup> Beyond that, the relevant authorities were the Secretaries of State (in this case for War and Foreign Affairs) or various other designated officials, principally High Commissioners in occupied territory.<sup>55</sup> This reflected the procedures adopted under military justice generally. However, again times have moved on as has been reflected in some of the modifications introduced.

The International Covenant on Civil and Political Rights gives the right to “everyone convicted of a crime” to have his conviction and sentence “reviewed by a higher tribunal according to law.”<sup>56</sup> In 1951, the United Kingdom introduced the Courts Martial Appeals Court, from where appeal lay to the House of Lords<sup>57</sup> and there are similar appeal provisions applicable in the United States military justice system.<sup>58</sup> Here, there was initially a regression back to the position where appellate

structures are wholly within the discretion of the Executive. Even before 1951, in the United Kingdom, the military justice system was subject to control by the civilian courts through the medium of the prerogative orders, even if that power was rarely used. However, here, even that supervisory jurisdiction has been excluded.

It is worthy of note that in all the international tribunals established in recent years to deal with war crimes and similar offenses, a judicial appellate structure has been built into the system.<sup>59</sup> The days of the Executive having the final say in judicial matters, or even a single judicial body with no right of appeal, have gone. The United States would have been the first to protest if US citizens had faced similar executive-controlled processes in the former Soviet block—and rightly so. What is good for the goose is good for the gander and the argument of “Trust me—I’m the good guy” no longer washes.

To conclude, this article has looked at three particular areas of concern. There are others but these are the ones that have attracted the most opposition. It is unfortunate that the Executive chose originally to revert to precedents from the first half of the last century, appearing to ignore the developments in procedures over the last sixty years, many championed by the United States. The problems are real. If these proceedings are commenced in a manner that, rightly or wrongly, is seen as unfair, the effects could be incalculable. There is already a growing view, particularly in the Muslim world, that these Commissions are designed for convictions and that nobody can receive a fair trial before them. That is wrong. Military judge advocates of all armed services in the United States are proud of their profession and will do their best to ensure that justice is done. Military defense counsel and military judges will act “without fear or favor” and trials will be conducted to the highest standards of military justice. However, there is more to it than that. There is a political battle to be won and it is here ground is being lost. While great play was made on the original Order and its deficiencies, there has been little publicity outside the United States of the ameliorating changes that have been introduced.

The authorities have made great efforts to listen to criticism and to seek to meet those criticisms within the parameters laid down. It is a great tribute to all those involved that they have not “hunkered down” and sought to defend their own positions. However, the damage has been done by the failure to present the case properly. There has been an apparent lack of transparency in the process which has affected the way outsiders have looked at it.

Whether or not anybody accepts such a concept as a “war on terror,” all may unite in the view that there is a campaign to be fought and that it must be won, at least in part, in the hearts and minds of ordinary people. If convicting a few people of crimes by what are seen as dubious means simply antagonizes hundreds of others, driving them into the hands of extremist organizations, the end will be worse

than the beginning. The United States has been a beacon of liberty and democracy for most of its existence. It would be unfortunate if the light from that beacon was obscured by the apparent pursuit of short-term advantage at the expense of long-term security.

### *Notes*

1. See Human Rights Watch letter to President Bush of November 15, 2001, on the Human Rights Watch website under title “US: New Military Commissions Threaten Rights, Credibility,” available at <http://www.hrw.org/press/2001/11/miltribsltr1115.htm>. See also the report of a speech by the United Kingdom Attorney General, Lord Goldsmith, on June 25, 2004, reported under the title “UK Alarm over Guantanamo Trials,” available at <http://www.globalpolicy.org/intljustice/general/2004/0625alarm.htm>.
2. “Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions.” Preamble to the Rome Statute of the International Criminal Court, July 17, 1998, UN Doc. A/CONF. 183/98 (1998), available at <http://www.un.org/law/icc/statute/romefra.htm> [ICC Statute].
3. See, e.g., the European Commission action paper in response to the terrorist acts in Madrid, Memo 04/66, March 18, 2004, available at [www.statewatch.org/news/2004/mar/Comm-Action-Plan.pdf](http://www.statewatch.org/news/2004/mar/Comm-Action-Plan.pdf).
4. “Whether or not international humanitarian law, or the law of armed conflict, applied as from September 11, it clearly began to apply once the US started bombing Afghanistan.” John Cerone, *Status of Detainees in International Armed Conflict, and their Protection in the Course of Criminal Proceedings*, ASIL Insights, January 2002, available at <http://www.asil.org/insights/insigh81.htm>.
5. See Yoram Dinstein, *Unlawful Combatancy*, 32 ISRAEL YEAR BOOK ON HUMAN RIGHTS 247, 248 (2002).
6. “Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains . . . ) are combatants, that is to say, they have the right to participate directly in hostilities.” Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, art. 43(2), reprinted in DOCUMENTS ON THE LAWS OF WAR 444 (Adam Roberts & Richard Guelff eds., 3d. ed. 2000).
7. See *id.*, art. 50(1).
8. See *id.*, art. 51(3).
9. See Richard R. Baxter, *So-Called ‘Unprivileged Belligerency’: Spies, Guerrillas and Saboteurs*, 28 BRITISH YEAR BOOK OF INTERNATIONAL LAW 321, 345 (1951).
10. See Rule of Procedure 42, Rules of Procedure (Army) 1972 (S.I. 1972/316 as amended). These Rules were abrogated in the reforms introduced by the Armed Forces Discipline Act 1996 (c. 46) as a result of rulings made by the European Court of Human Rights.
11. UN Human Rights Committee, General Comment 13, Article 14 (Twenty-first session, 1984), at ¶ 4, available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/bb722416a295f264c12563ed0049dfbd?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/bb722416a295f264c12563ed0049dfbd?OpenDocument).
12. Martin’s appeal against conviction was rejected by the Judicial Committee of the House of Lords on December 16, 1997. The judgment is available at <http://www.publications.parliament.uk/pa/ld199798/ldjudgmt/jd971216/mart01.htm>.

13. See, for example, the comment of the Court in the case of *Findlay v United Kingdom*, ECHR Case No: 22107/93, decided February 25, 1997, at paragraph 84, upholding the view of the Commission that “no causal link had been established between the breach of the Convention complained of by the applicant and the alleged pecuniary damage, and . . . that it was not possible to speculate as to whether the proceedings would have led to a different outcome had they fulfilled” Convention requirements, *available at* <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Findlay%20%7C%20United%20%7C%20Kingdom&sessionId=557312&skin=hudoc-en>.
14. See *Grievs v United Kingdom*, ECHR Case No: 57067/00 decided December 16, 2003, *available at* <http://cmiskp.echr.coe.int/tkp197/portal.asp?sessionId=557429&skin=hudoc-en&action=request>.
15. Article 82 of the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 6, at 244, 277 [hereinafter Geneva Convention III] states that “A prisoner of war shall be subject to the laws, regulations and orders in force in the armed forces of the Detaining Power.”
16. Article 84 of Geneva Convention III states, “A prisoner of war shall be tried only by a military court, unless the existing laws of the Detaining Power expressly permit the civil courts to try a member of the armed forces of the Detaining Power in respect of the particular offence alleged to have been committed by the prisoner of war.” *Id.*
17. See Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 66, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 6, at 301, 323 [hereinafter Geneva Convention IV].
18. See CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 531–34 (2d. rev. ed., 1999).
19. See The Law of War on Land being Part III of the Manual of Military Law [hereinafter MML Part III], The War Office, 1958, at 347. An excellent account of the application of the Warrant can be found in Tony Rogers, *War Crimes Trials under the Royal Warrant: British Practice 1945–1949*, 39 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 780 (1990).
20. War Crimes Act 1991 (c. 13), *available at* [http://www.hmso.gov.uk/acts/acts1991/Ukpga\\_19910013\\_en\\_1.htm](http://www.hmso.gov.uk/acts/acts1991/Ukpga_19910013_en_1.htm).
21. See, for example, the case of G before the Military Tribunal of Division I, *cited in* HOW DOES LAW PROTECT IN WAR? 1255 (Marco Sassoli & Antoine Bouvier eds., 1999).
22. Military Order of November 13, 2001 on Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 FEDERAL REGISTER 57,833 (Nov. 16, 2001), *available at* <http://www.fas.org/irp/offdocs/eo/mo-111301.htm>.
23. *Id.*, sec. 2(a).
24. *Id.*, sec. 4(3).
25. *Id.*, sec. 4(8).
26. *Id.*, sec. 7(b).
27. “A key figure in the evolution of the Universal Declaration was Eleanor Roosevelt, the widow of President Franklin Roosevelt, who had died in 1945. She was selected to be the first US representative to the commission by her husband’s successor, President Harry Truman.” David Pitts, *The Noble Endeavor*, 3 USIA ELECTRONIC JOURNAL No. 3 (October 1998), *available at* <http://usinfo.state.gov/journals/itdhr/1098/ijde/noble.htm>.
28. Military Commission Order No. 1, Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism, Mar. 21, 2002, *available at* <http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf>.

29. A full list of Instructions and their texts are available on the Military Commissions website at <http://www.defenselink.mil/news/commissions.html>.
30. See Section 6(C) of Military Commission Instruction No. 2, on Crimes and Elements for Trials by Military Commission, *available at id.*
31. For example, the provisions relating to “conspiracy” in Section 6(C)(6) of Military Commission Instruction No. 2. *Id.*
32. See *id.* § 6(C)(3) and (4).
33. Prosecutor v Enver Hadzihasanovic, Mehmed Alagic and Amir Kubura. ICTY Case No. IT-01-47. Decision of the Appeal Tribunal on Interlocutory Appeal Challenging Jurisdiction in Relation to Command of 16 July 2003, *available at* <http://www.un.org/icty/hadzihas/appeal/decision-e/030716.htm>.
34. See Military Order of November 13, 2001, *supra* note 22, § 4(c)(3).
35. See Military Commission Order No. 1, *supra* note 28, § 4(A)(4).
36. *Id.*, § 6(D).
37. The rule against hearsay in English law has developed in a particularly convoluted manner over centuries. “There can be little doubt that the rule excluding hearsay is the most confusing of the rules of evidence, posing difficulties for courts, practitioners and witnesses alike.” See Extract from Consultation Paper No. 117 of The Law Commission for England and Wales on The Hearsay Rule in Civil Proceedings Part V – Provisional Conclusions, ¶ 5.1, *available at* [http://www.lawcomm.gov.je/appendix\\_a\\_bestvidence\\_rule\\_paper.htm](http://www.lawcomm.gov.je/appendix_a_bestvidence_rule_paper.htm).
38. ICC Statute, *supra* note 2.
39. See Chapter 4, ICC Rules of Procedure and Evidence, UN Doc. PCNICC/2000/1/Add.1 (2000), *available at* <http://www.un.org/law/icc/prepcomm/report/prepreportdocs.htm>.
40. The full wording is: “In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
- ....
- (b) To have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing;”
- ....
- See Article 14(3)(b), International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, *available at* [http://www.unhchr.ch/html/menu3/b/a\\_ccpr.htm](http://www.unhchr.ch/html/menu3/b/a_ccpr.htm).
41. *Id.*, art. 14(3)(d).
42. Military Commission Order No. 1, *supra* note 28, § 4(C)(2).
43. See, for example, the unclassified motions cited on the Department of Defense website. *Available at* [http://www.defenselink.mil/news/Aug2004/commissions\\_motions.html](http://www.defenselink.mil/news/Aug2004/commissions_motions.html).
44. See Military Commission Order No. 1, *supra* note 28, § 4(C)(3)(a).
45. *Id.*, § 4(C)(3)(b).
46. Military Commission Instruction No. 5, Apr. 30, 2003, *available at* <http://www.dod.mil/news/Feb2004/d20040220milcominstno5.pdf>.
47. *Id.* § 3(A)(2)(e) and Annex B.
48. See NACDL Ethics Advisory Committee Opinion 03-04 (Aug. 2003), *available at* [http://www.nacdl.org/public.nsf/2cdd02b415ea3a64852566d6000daa799/ethicsopinions/\\$FILE/Ethics\\_Op\\_03-04.pdf](http://www.nacdl.org/public.nsf/2cdd02b415ea3a64852566d6000daa799/ethicsopinions/$FILE/Ethics_Op_03-04.pdf).
49. See Military Commission Order No. 1, *supra* note 28, § 5(B)(3).
50. The American Bar Association created a Task Force on Treatment of Enemy Combatants which published a report in February 2003, *available at* <http://news.findlaw.com/hdocs/docs/aba/abatskforce103rpt.pdf>.

51. See Military Order of November 13, 2001, *supra* note 22, § (c)(8).
52. See Military Commission Order No. 1, *supra* note 28, § (H)(4).
53. See “Military Commission Review Panel Takes Oath of Office,” American Forces Press Service, Washington, September 22, 2004, *available at* [http://www.defenselink.mil/news/Sep2004/n09222004\\_2004092207.html](http://www.defenselink.mil/news/Sep2004/n09222004_2004092207.html).
54. See Regulation 10, Regulations for the Trial of War Criminals, MML Part III, at 349, *supra* note 19.
55. See Regulation 12, *id.* at 349–350.
56. See International Covenant on Civil and Political Rights, *supra* note 40, art. 14(5).
57. The current legislation is contained in the Courts Martial (Appeals) Act 1968.
58. The Uniform Code of Military Justice (UCMJ) was enacted on May 5, 1950. Article 67 of the UCMJ established the Court of Military Appeals as a three-judge civilian court. The Report of the House Armed Services Committee accompanying the legislation emphasized that the new Court would be “completely removed from all military influence of persuasion.” The legislation became effective on May 31, 1951. In 1968, Congress redesignated the Court as the United States Court of Military Appeals.
59. See, for example, the appellate provisions in relation to the Yugoslav and Rwanda Tribunals and the International Criminal Court. All available on the UN website *at* <http://www.un.org>.



# PART VI

THE RIGHT OF SELF-DEFENSE  
IN THE GLOBAL WAR ON TERRORISM



# XIV

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## Using Force Lawfully in the 21st Century

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### *Introduction*

War is not a law-free zone. There have always been rules governing when a State can legitimately use armed force. In one familiar ancient example, in the 12th century BC the Mycenaean Greeks most likely sacked the city of Troy because it was rich and vulnerable. As summer 2004 moviegoers saw, however, by 800 BC the poet Homer felt compelled to clean up the story with a justificatory act of Trojan perfidy—the kidnapping of a Spartan queen by a Trojan prince. Accordingly, a more respectable *casus belli*, rooted in revenge, love and passion, was provided in *The Iliad*<sup>1</sup> for what otherwise would have been blatant Greek aggression. Thus, even in the Age of Heroes, when armed combat was glorified and gods were believed to fight side-by-side with men, unalloyed aggression was viewed as morally questionable. The perceived need for some legal justification for unleashing the dogs of war has remained a constant ever since.

At the beginning of the 17th century, Hugo Grotius noted that, although “[t]he grounds of war are as numerous as those of suits at law . . . . Three justifiable causes for war are generally cited: defense, recovery of property, and punishment.”<sup>2</sup> There is little doubt that the *casus belli* regularly invoked by States over the subsequent 350 years fell into one or more of these categories. To be sure, given the broad nature of such concepts as “defense” or “punishment,” the potential for their abuse or bad faith application has been quite obvious. Only a hopelessly unimaginative

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statesman would have been unable to articulate some plausible sounding basis for his belligerent aims, whatever they might be.

Not surprisingly, while some leaders took full advantage of the considerable elasticity inherent in the traditional resort-to-force legal and ethical strictures, dubbed *jus ad bellum*, others have sought to leash the dogs of war by devising ever more rigid and proscriptive rules. Indeed, the efforts to ban armed conflict altogether (of which the 1928 Kellogg-Briand Pact<sup>3</sup> is perhaps the best-known example), or at least substantially constrain the use of violence, are as old as, or in some instances, even older, than war itself. The search for legal limitations has intensified in the 20th century, as the carnage of mechanized warfare and the horrendous casualties suffered during the two World Wars have substantially diminished combat's erstwhile heroic luster.

These regulatory efforts featured most prominently a no-first use concept, whereby force could be used only in response to an attack, rather than as an instrument of aggression. However, given the fact that waiting to absorb an attack by an enemy before responding can be a risky strategy, most statesmen and generals have sought to protect the option of using force first, albeit in anticipation of the enemy's attack. This anticipatory self-defense doctrine has been a hardy perennial in international law.<sup>4</sup>

### *Anticipatory Defense's Historical Record*

#### **Burning the *Caroline***

The 1837 *Caroline* incident,<sup>5</sup> involving the British destruction of an American ship in US territorial waters, buttressed the modern international law doctrine of "anticipatory self-defense." In accepting the British explanation that the *Caroline* was destroyed in "self-defense," anticipating that she would again be used to assist the Canadian insurgents, American Secretary of State Daniel Webster acknowledged in 1841 the doctrine's validity, although he attempted to limit its application to the most extreme circumstances—where the need is "instant, overwhelming, and leaving no choice of means and no moment for deliberation"<sup>6</sup>—leading many subsequent commentators to conclude that the doctrine could be invoked only when the threat was imminent.<sup>7</sup>

Of course, robust anticipatory self-defense had been a well-accepted rule, firmly grounded in all-important State practice, for centuries before the *Caroline* went crashing over Niagara Falls. Indeed, Webster's rather restrictive wording of this rule was driven largely by the US desire to limit the circumstances in which Britain or any other European power could claim a legitimate basis for using force on American soil. In a sense, the *Caroline* doctrine was meant to provide

some additional legal scaffolding for the Monroe Doctrine, promulgated in 1823. Significantly, neither the practice nor the writings by the various international law authorities evidenced much regard for the notion of instantaneity invoked by Webster; indeed, many an attenuated or distant threat were judged to be a sufficient *casus belli*.

In 1587, for example, England's Queen Elizabeth I sent a fleet, commanded by Sir Francis Drake, to attack Spanish and Portuguese harbors—primarily Cadiz—in an effort to prevent, or at least to delay, the arrival of the “Invincible Armada.” Forty years later, Grotius endorsed the practice as lawful in his monumental treatise, *The Law of War and Peace*, noting that self-defense was permissible, both upon being attacked and also before, where “the deed may be anticipated.”<sup>8</sup> Writing over one hundred years later, another of modern international law's founding fathers, Emmerich de Vattel, also asserted in *The Law of Nations* that a country “may even anticipate the other's [aggressive] design, being careful however, not to act upon vague and doubtful suspicions.”<sup>9</sup> Over the next three centuries, anticipatory self-defense was regularly employed, whether openly or by implication.

By the 20th century, a robust self-defense prerogative was firmly rooted in international law. For example, in 1939 Britain and France acted in anticipatory self-defense, warning Germany that the democracies would consider an attack on Poland to be a *casus belli*, and going to war when that attack occurred. Germany's armed forces were not, of course, at that time menacing either Britain or France and the only legal right either State would have had to threaten Hitler—since Poland was not British or French territory—must have been based in their rights to anticipate future attacks. In fact, it is this same fundamental rule that justifies the Atlantic Alliance's “collective security” scheme—where more than two dozen States pledged armed support if the territory of any one were attacked—and the United Nations Charter's approval of “collective” self-defense.

### **Anticipatory Defense Today**

Preemptive use of force has always been an implicit component of American strategy, and during the Cold War the United States resolutely refused to adopt a declaratory no-first use position with respect to nuclear weapons. More recently, in a June 1, 2002, West Point speech, President Bush articulated a traditional policy justification for the anticipatory self-defense doctrine, noting that “we must take the battle to the enemy, disrupt his plans and confront the worst threats before they emerge” and that “if we wait for threats to fully materialize, we will have waited too long.”<sup>10</sup> These themes were further elaborated in the National Security Strategy of the United States (NSS),<sup>11</sup> issued by the Bush Administration in September of 2002.

Despite anticipatory self-defense's venerable pedigree, the Bush Administration's critics claimed that the NSS went too far by not limiting preemption to circumstances involving imminent threats, by giving preemption such a pride of place, and thereby alienating many friends and allies. This criticism is misplaced. American declaratory strategy has always been meant to serve a variety of purposes, including deterring enemies and reassuring friends. Most of the time both of these goals can be accomplished simultaneously. Whenever faced, however, with an unusually acute threat from groups or regimes difficult or impossible to deter—the situation the United States faces today—the deterrence imperatives may reasonably prevail. Thus, emphasizing the vigor of the American preemption strategy is meant to enhance, to the greatest extent possible, the quality of US deterrence.

### **Europe's Angst**

For all its ample legacy, however, anticipatory self-defense remains controversial. It is attacked for a variety of reasons, ranging from the more idealistic, albeit not necessarily prudent, desire to abolish war, or at least to limit the circumstances in which force can be used, to the belief that the application of the anticipatory self-defense doctrine inherently leads to abuses and causes instabilities, to the desire to limit American freedom of action. Indeed, many European officials assert that, absent a UN Security Council authorization, force can be used only to repel an armed attack on a State's territory—after it has been initiated. This was certainly the position articulated with considerable vigor during the Iraq-related debates by such countries as France, Germany and Russia.

What explains Europe's embrace of the restrictive view of self-defense? To begin with, the European criticisms on this subject are often laced with a heavy dose of anti-Americanism, since it is the United States that is currently viewed as the most obvious beneficiary of the anticipatory self-defense option.<sup>12</sup> Anti-Americanism aside, Europe's defense analysts appear to be more concerned with the possibility that the States' embracing the anticipatory defense strategy will overreact and strike first without sufficient provocation, rather than with the danger that a delayed response to a weapons of mass destruction (WMD)-wielding foe would prove disastrous.

Meanwhile, the more academically inclined pundits, who used to describe the Soviet nuclear buildup as a reaction to the United States-initiated arms race, now argue that the key to maintaining international stability and peace is to keep as high of a threshold as possible against the use of force and that allowing States to attack, based upon suspicions or intelligence warnings, would make the use of force a more frequent occurrence. Their common underlying assumption is that

misperceptions, mistakes and hair-trigger military deployments, geared towards preemption, are destabilizing and the main cause of wars.

These criticisms, however, even in their more refined versions, are fundamentally misplaced. The strategy, which would require States to wait until the smokestacks of an enemy fleet rose over the horizon and the first broadside was fired before responding, was hopelessly unrealistic even when the UN Charter was adopted in 1945. Particularly in the post-September 11 environment, when advance warnings may be calculated in seconds rather than days or weeks, or may not come at all, the consequences of allowing an enemy to get in the first blow may well be catastrophic. As President Bush has pointed out, even the most robust deterrence “means nothing against shadow terrorist networks with no nation or citizens to defend,” and containment is not possible “when unbalanced dictators with weapons of mass destruction can deliver those weapons surreptitiously to our shores or secretly provide them to terrorist allies.”<sup>13</sup>

In fact, far from being inconsistent with deterrence, a preemption strategy essentially broadens the range of conduct to be deterred to encompass not just the use of force—as was the case with the traditional deterrence model—but also efforts to acquire prohibited weapons (or even the efforts to pursue a strategy that appears to flirt with WMD development and acquisition) or render aid to terrorist groups. As such, preemption both buttresses and extends deterrence.

### **Distant Threats**

Additional criticisms of the Administration’s recasting of the anticipatory self-defense strategy come from those who claim that, even under the traditional centuries-old view of that doctrine, to justify response the threat had to be imminent. This argument, however, does not hold water. First of all, although Webster’s *Caroline* letter indeed formulated the anticipatory self-defense doctrine in terms that stressed the instantaneousness of the threat, leaving no opportunity for deliberation, this was not the formulation used by many of the earlier leading international law experts. Moreover, centuries of State practice in this area featured preemption against both immediate and more long-term threats.

In any case, the concept of an imminent threat is not synonymous with a short-lead time threat. A threat can be strategically imminent, albeit years away from full fruition. In today’s world, for example, a rogue regime or a pan-national terrorist group that is committed to our destruction and is seeking to acquire weapons of mass destruction, while undertaking in the interim more conventional attacks, poses a strategically imminent threat to the United States fully sufficient to justify the preemptive use of force. With regard to al Qaeda, in particular, this was the threat situation that we have been facing for a number of years now.

Moreover, given the nature of the al Qaeda-style attacks, the only way to preempt successfully against such groups is to do so months, and even years, in advance of these attacks being launched. This is because the way the enemy is preparing and carrying out such attacks makes near-term preemption by the United States inherently ineffective. For example, even if the United States had toppled the Taliban regime in the summer of 2001, or succeeded in eliminating bin Laden himself during that time period, it would not have necessarily prevented the September 11 attacks. Most of the perpetrators had already infiltrated the United States, and they could have proceeded without additional help or instructions from their superiors.

To be sure, to the extent that preemption is being contemplated in response to a long-term strategic threat, it is reasonable to hold that the threat involved must be extremely serious in nature. (Conversely, an immediate and certain threat, e.g., *Caroline*-style gun running, even if not particularly grave in nature, potentially justifies a preemptive response.) To proceed otherwise would admittedly render the anticipatory self-defense doctrine infinitely elastic, eroding all limitations on the use of force.

### **Intelligence Mistakes Revisited**

Another oft-invoked anti-preemption argument builds upon the Bush Administration's failure to find WMD stockpiles in Iraq, claiming that it underscores the inherent unreliability of all weapons programs intelligence and mitigates against trying to use force to forestall attenuated, long-term threats. This claim has some merit; prosecuting a robust preemption strategy may well lead to some erroneous uses of force. On balance, however, given the threats faced, erring on the side of being too cautious may not be a wise strategy. This is especially the case when dealing with Saddam Hussein and other regimes that have engaged in aberrant and unpredictable conduct.

Even more fundamentally, the fact that Saddam apparently eschewed, following the end of the first Gulf War, retaining and enhancing actual WMD stocks did not render his regime harmless. Iraq retained active WMD development programs and engaged in an elaborate strategic cat-and-mouse game, denying any WMD-related ambitions, while behaving as if it already had substantial weapon stockpiles.<sup>14</sup> Moreover, since Saddam himself was in the best position to determine when he would require a particular set of weapons, and producing sufficient quantities of chemical and biological agents and weaponizing them could have been done in a relatively short time, this just-in-time deployment strategy was perfectly viable. In any case, from beginning to end, the burden was on Saddam Hussein to prove that he had fully disarmed—not on the anti-Saddam coalition to prove that he retained

weapons stockpiles or research programs. The broader point, repeatedly made by the Bush Administration during the months leading up to the war, was that rogue regimes, instead of playing hide-and-seek games, were supposed to put forward various confidence-building measures capable of reassuring the international community that they were fully and irreversibly disarmed.

The real danger in today's world comes from rogue regimes and terrorist organizations that care not a whit about international law. As a result, the requirements of deterrence have become far more onerous, with many of our foes believing that the United States, in bin Laden's famous words, is "a weak horse."<sup>15</sup> In this situation, for the United States to accept the proposition that the anticipatory self-defense doctrine is no longer valid and that, aside from responding to an armed attack on one's territory, all uses of force require the blessing of the UN Security Council, would be nothing short of suicidal. More generally, adopting this model would create an unprecedented dissonance between the policy imperatives and the legal rules. This is a strain that the law cannot bear. It would lead to the eventual demise of all legal restrictions on the use of force.

### *What about the UN Charter?*

#### **Stassen's Revenge**

Not surprisingly, since the policy arguments about the benefits of narrowing the circumstances in which law-abiding States can use force are ultimately unpersuasive, its proponents have also sought to use the law as a trump card. They claim that the anticipatory self-defense doctrine, however venerable or consonant with *real politik* imperatives, did not survive the adoption of the United Nations Charter, a portion of which—Article 2—requires all members of the United Nations to "refrain in their international relations from the threat or use of force." The proponents of this restrictive view argue that, absent the Security Council's blessing, the Charter limits the lawful use of force to circumstances, set forth in Article 51, in which an armed attack already has taken place and, even then, only pending action by the Security Council. This assertion, however, relies on an implausible reading of Article 51 and of other UN Charter provisions. Even more fundamentally, it also reflects an erroneous, albeit widely held view, that the UN Charter has superseded and vitiated the entire pre-existing body of customary and treaty-based international law.

In fact, the Charter, upon which many of the Bush Administration's critics rely, neither abrogated the pre-existing body of international law nor abolished the anticipatory self-defense doctrine. To be sure, the goal of at least some of the individuals involved in the negotiations leading up to the United Nation's establishment was

to outlaw war and to limit the right of self-defense so far as to require a State to absorb an aggressor's first strike. Indeed, this appears to have been the position of Harold Stassen, who served on the American delegation and suggested that the right of self-defense was so narrowly crafted that the United States could not attack an enemy fleet steaming towards the Jersey shore.<sup>16</sup>

Yet, whatever Governor Stassen's purposes, when the Charter is read as a whole, its limitations on the use of force are far more modest. Article 2 of the Charter actually prohibits the use of force in only three circumstances: (1) to seize territory; (2) to impose a colonial-style government; and (3) in a manner "inconsistent with the Purposes of the United Nations." Thus, the use of military force that does not involve territorial expansion, or does not threaten a member State's independence, is not forbidden so long as it is not otherwise inconsistent with the United Nation's purposes. The first among these "purposes" is the maintenance of "international peace and security,"<sup>17</sup> a goal which, while worthy and laudable, is inherently ambiguous. For example, fierce debates have raged over whether a given use of force, be it against Slobodan Milosevic or Saddam Hussein, advances or retards "international peace and security." Meanwhile, the fact that Article 2 refers to "international peace and security" and not just peace also suggests that war avoidance, at all costs, was not the policy goal advanced by the Charter's drafters.

The notion that the Charter, taken as a whole, allows the unilateral use of force only in response to an armed aggression is also belied by the actual language of Article 51. If this restrictive interpretation was correct, Article 51 would have granted to the UN members the carefully defined self-defense rights.<sup>18</sup> Yet, Article 51 conveys no such authority; instead, it merely acknowledges the continued vitality of the pre-Charter's "inherent right of individual or collective self-defence," rooted in customary international law. It also employs a rather casual language, indicating that "the inherent right of individual or collective self-defence [attaches] if an armed attack occurs"; the term "armed attack" is not defined and there is no indication that this inherent right arises *only* if an armed attack takes place.<sup>19</sup>

This level of precision is perfectly acceptable if one construes Article 51 as an illustrative example of a much broader set of self-defense-related powers that are available to all sovereign States. It is, however, manifestly deficient if that article provides the only legally permissible avenue for using force, short of obtaining a Security Council authorization.<sup>20</sup> Moreover, a restrictive reading of Article 51, as the exclusive venue for using force, essentially renders Article 2's broad and rather permissive language regarding the use of force entirely superfluous. It is, of course, the common principle of statutory or treaty interpretation that any construction that vitiates some of the provisions is disfavored. By contrast, viewing Article 2 as the Charter's main provision for assessing the legitimacy of the use of force, with

the Article 51 being a rather narrow “safe harbor”<sup>21</sup>—if the use of force fits into the Article 51-compliant set of circumstances, there no is need to perform the broader “all facts and circumstance”-type analysis envisioned by Article 2—is both consistent with the relevant statutory language and gives meaning to both of the Articles.

Moreover, given the nature of the UN system, which features veto authority by the permanent members of the Security Council, and gives even non-permanent members an opportunity to block the Council from exercising its Chapter VII powers, it was predictable that a Security Council deadlock would be a common state of affairs. Indeed, it is significant that throughout its entire operating history, both during the Cold War and thereafter, the Council has *never* acted in the way that the proponents of the restrictive reading of the Charter expected it to act; while the Council has determined on several occasions that a breach of the peace or a threat to the peace existed, it has never engaged in enforcement measures, involving the mandatory use of military force.<sup>22</sup> It is, therefore, implausible to believe that the Charter’s drafters, aside from a few pacifists like Harold Stassen, would have vested that body with an exclusive authority to use force. When one considers that the Charter’s drafters were only too aware of the extent to which the obsession with the Kellogg-Briand Pact and the policy of appeasing Hitler had paved the way for World War II, this interpretation is even more incomprehensible.

### **Anticipatory-Defense “Lite”**

Some international law scholars also espouse the view that, while a broad version of anticipatory self-defense has been blocked by the Charter’s adoption, a more modest version of this doctrine has survived. Professor Dinstein, who is one of the leading proponents of this claim, has even coined the term “interceptive”<sup>23</sup> self-defense. This right is evidently triggered by an armed attack that is “imminent” and “unavoidable,” but that has not yet reached its intended victim.<sup>24</sup> In fleshing out this concept of interceptive self-defense, Dinstein has used such examples as the Japanese attack on Pearl Harbor and the 1967 Arab-Israeli War. Thus, he argues that if the United States were to have destroyed Admiral Yamamoto’s carrier battle groups as they were steaming towards Pearl Harbor, the United States would have been engaged in interceptive self-defense. When it comes to the 1967 War, given a wide range of hostile measures taken by Egypt—ejection of the UN observers from the Gaza Strip and Sinai, the closure of the Straits of Tiran, military mobilization and movement of forces, accompanied by shrill anti-Israeli rhetoric—in Dinstein’s view Israel’s early use of force was another example of interceptive self-defense. From the policy perspective, Dinstein’s somewhat elastic formulation is certainly

preferable to the most rigid formulation of Article 51, which would require the “victim” actively to absorb a first strike.

It is, however, not a particularly useful analytical tool for determining, on a prospective basis, the legality of any particular use of force. The reason for this is quite simple; unless one adopts a rather crude Marxist interpretation of historical events, in which certain events become inevitable because of the underlying workings of history, nothing is truly unavoidable and inevitable. Thus, unless one awaits until the attack has been physically launched (in which case, the doctrine becomes virtually indistinguishable from the traditional narrow reading of Article 51)—i.e., the missiles are in the air—one never knows in advance when an attack is unavoidable. History is replete with examples of crises building up to a crescendo, when the use of force seemed imminent, only to dissipate because of last-minute diplomatic interventions. Indeed, before the “lights went out,” in Lord Gray’s famous formulation, in 1914, there were several instances when European war was avoided at the last minute. Examples include the 1909 Austrian Annexation of Bosnia-Herzegovina, the 1911 “Agadir Crisis,” and the 1912–13 Balkan wars. When one looks at the Pearl Harbor example, it is certainly conceivable, albeit highly unlikely, that the Japanese government could have issued last-minute recall orders to Admiral Yamamoto. The same is true when one comes to the 1967 situation; an adroit US-Soviet diplomacy could have prevented it.<sup>25</sup>

However, the single greatest weakness of this anticipatory defense “lite” doctrine is that it is not based upon the Charter’s actual language. Article 51’s language uses the word “occurs,” rather than “launched or commenced,” in describing the triggering circumstances. Yet, to justify Dinstein’s “interceptive” concept, the word “occurs” would have to be stretched to the point where it loses any discernable meaning. Once this is done, “occurs” may just as well be construed to mean the birth of a future aggressor or the early hatching of an aggressive plan. The bottom line is that anticipatory self-defense “lite” is less supportable by the Charter’s language, than either the permissive or restrictive interpretations of Articles 2 and 51.

### **Assault on National Interest**

In parsing the UN Charter and assessing the legal merits of the various arguments relating to the legitimacy of the anticipatory self-defense doctrine, it is also significant that the arguments used by the Administration’s critics are internally inconsistent. For example, in trying to figure out whether a given use of force violates Article 2, one must ascertain whether the action at issue would promote the purposes of the United Nations. In this regard, it is certainly reasonable to argue that removing from power a man like Saddam Hussein—who for decades clearly

sought to acquire nuclear weapons; developed, deployed and used both chemical and biological weapons on his own people and his neighbors; viewed himself as a modern day Saladin; and defied Security Council resolutions for well over a decade—was entirely consistent with the UN Charter.

It is also possible to opine, of course, that the strategy of regime change in Iraq was not likely to promote international security. Indeed, some scholars argue precisely that, while also claiming that some other uses of force, which they happen to favor, like NATO's use of force against Milosevic's Serbia, were more consonant with United Nation's purposes. However, whatever one thinks about the analytical merits of the argument that Milosevic posed a greater threat to international peace and security than did Saddam Hussein, or that the Kosovars were oppressed (and thereby deserving of a rescue) more than the Iraqi Shiites and Kurds, the very elastic nature of these claims renders them utterly unsuitable as legal arguments.

It is also disingenuous to argue that, as a matter of law, humanitarian intervention to aid the residents of another country that are being brutalized by their rulers is legal under the UN Charter, presumably because it is always consistent with the Charter's laudable goals, but a national interest-driven intervention is somehow not similarly legitimate.<sup>26</sup> Leaving aside the issue of the rather idiosyncratic reading of the Charter, which, on its face, does not legitimize humanitarian interventions, it is not obvious why this humanitarian intervention principle only applies to the protection of foreign nationals, rather than a State's own citizens. In a post-September 11 world, US actions to destroy terrorist organizations and their sponsors are the clear equivalent of a humanitarian intervention in defense of American citizens.

### **Collective Action**

Then there are scholars who, perhaps realizing the utter un-workability of a pure restrictive interpretation of the UN Charter, try to read into it some modified version of the Security Council's primacy in the use-of-force area. They do this by extolling the legal legitimacy of collective actions, even if these do not command the support of the entire Security Council. From a policy perspective, an approach which postulates that force can be legitimately used even though one or two States have blocked the Security Council from acting is perhaps more manageable than requiring a Security Council's blessing; the only problem is that there is not the slightest support in the UN Charter or any other international legal document for this theory.

There are also commentators who purport to discover in the UN Charter provisions that bless regional actions, while leaving nation States acting "unilaterally" entirely to the mercies of Article 51. However, those provisions (found in Chapter

VIII of the UN Charter), do not permit a regional organization, such as the Organization of American States (OAS) or NATO, to operate as the Security Council's surrogate. Indeed, for example, the imprimatur of regional organizations, while perhaps valuable as a diplomatic tool, is of little legal value. During the Cuban Missile Crisis, for example, the foundation of both the right of the United States, and the OAS, to take action against the Soviet Union and Cuba was their inherent right of individual and collective self defense, including the right of anticipatory self-defense. As a matter of international law, a group of States has no more inherent right to use force than any one of its nation-State members. The champions of Chapter VIII of the Charter also do not seem to realize the inherent frailty of their approach: all one has to do to qualify, in an otherwise restrictive regulatory environment, for a broad anticipatory self-defense option, is to create a cooperative regional organization. This can be accomplished in a fortnight.

### **The Actual Practice of States**

Moreover, the notion that anticipatory self-defense is barred by the UN Charter has not been supported by the actual practice of States in the years since the United Nations was established. That, in the final reckoning, is the critical point. Anyone attempting to determine what international law, whether customary or conventional, truly provides on any particular point would do well to heed the Marquise de Merteuil's maxim in *Les Liaisons Dangereuses*<sup>27</sup>; don't listen to what people tell you, watch what they do. Here, the evidence is overwhelming that the traditional law of anticipatory self-defense has survived the adoption of the UN Charter. As Michael Glennon notes, since 1945 two-thirds of the members of the United Nations have fought 291 inter-State conflicts in which over 22 million people have been killed.<sup>28</sup>

Among the more important post-Charter instances of "anticipatory" self-defense must be counted the 1956 "Suez Crisis," where France, Britain and Israel launched military operations against Egypt based on Nasser's seizure of the Suez Canal. The affair was a political disaster for the governments involved, but it is highly significant that Britain and France, both charter members of the United Nations and permanent members of the Security Council, claimed that the Israeli-Egyptian military clash, which took place in a close proximity to the Suez Canal, was a threat to the world's economy and therefore adequate to justify armed action. Needless to say, this was a very broad formulation of a classical anticipatory self-defense argument, perhaps even broader than the argument used by the Japanese Prime Minister Tojo, who justified Japan's attack on Pearl Harbor by the claim that American economic sanctions were strangling imperial Japan.

In 1967, Israel acted preemptively against Egypt, Syria and Jordan, rather than await the attack of their massing forces. Israel was neither condemned nor sanctioned by the UN for this action. Similarly, Israel attacked and destroyed an Iraqi nuclear power facility in 1981, again citing “self-defense” as justification. Although, this time, Israel’s action was condemned in the Security Council, no action was taken to address this supposed “aggression.” Recalling the Marquise’s maxim, whatever the verbiage used, this strongly suggests a fundamental recognition that Israel acted in accordance with its rights under international law to anticipate, and foil, attacks before they are launched.

Israel, of course, has not been alone in exercising the right of anticipatory self-defense. In 1986, President Reagan ordered attacks against terrorist targets in Libya to prevent their use against US interests. In 1982, Britain claimed a 150-mile exclusion zone around the Falkland Islands as a preventative measure, and in 1983, Sweden asserted the right to use armed force against any foreign submarine sailing within 12 miles of her territorial sea. In 1989, the George H. W. Bush Administration used force to oust Panama’s strongman Manuel Noriega, arguing that he posed a threat to the safety of the American service members present in Panama and their families. All of these actions can be justified only by a right of anticipatory self-defense.

Yet, perhaps the most important modern example of anticipatory self-defense—before Operation Iraqi Freedom—came during the Cuban Missile Crisis caused by the Soviet efforts to install ballistic missiles armed with nuclear warheads in Cuba. Although there were absolutely no indications that the Soviets intended to launch these missiles against the United States, immediately or in even the distant future, the Kennedy Administration claimed that the purpose of the Soviet deployments—“to provide a nuclear strike capability against the Western Hemisphere”—was sufficient justification for the imposition of a naval “quarantine.”<sup>29</sup> Although the US threat assessment was also shaped by a perception that Soviet leader Khrushchev had engaged in nuclear saber rattling, threatened the United States in Berlin and elsewhere, and may have been irrational and impulsive, President Kennedy’s bottom-line conclusion was clearly that, in a nuclear age, a precipitous effort by an avowed American foe to change the strategic balance of power was enough of a threat to American security to justify the resort to an anticipatory self-defense doctrine.

To argue that all of these uses of force have been illegal under the UN Charter, as some proponents of the restrictive interpretation of the Charter have done, (or even that most of them were illegal has been done by those who advocate anticipatory defense “lite” or allow its use only when invoked by regional organizations) constitutes both a rejection of the validity of State practice—traditionally, the most

reliable and authoritative way to establish international legal norms—and a particular dogmatic approach to the Charter’s interpretation. Significantly, the fact that States involved have consistently claimed that their actions have been consistent with the UN Charter is neither hypocritical nor an effort to re-write the Charter through subsequent practice; rather, it is a proof of their embrace of the permissive interpretation of the Charter.

### *Conclusion*

Overall, the UN Charter, far from being a comprehensive legal edifice barring all uses of force, except for the Article 51-compliant situations and various forms of collective action, is actually a far more modest document. It basically reaffirms a long-standing rule, which was not always honored, but nevertheless, frequently announced, against an aggressive use of force, sets forth a safe harbor rule for the use of force in response to an armed attack against one’s territory or the territory of one’s allies, while not inhibiting a broader range of defensive uses of force, including in anticipation of an attack.

Although a nuclear Armageddon is far less likely today, the actual use of weapons of mass destruction, nuclear, chemical, and biological, has become a very real and immediate threat. The principal danger is not that one State will attack another with these weapons, but that non-State actors, such as al Qaeda, who are by definition beyond deterrence, will obtain and use WMDs. This is because, for the first time ever, modern technology has enabled private individuals, aided and abetted by failed States, to create military-style forces capable of projecting power across the globe. That, of course, is precisely what al-Qaeda achieved on September 11; it projected power. Traditional deterrence works poorly in this novel strategic environment.

This means that the traditional rules of international law, which permit States to anticipate threats and to act before an attack actually is initiated, are far more important than in the past. Unfortunately, while these rules have not been vitiated by the UN Charter and have been reflected in ample State practice, both prior to and post-1945, they have been subjected to strident legal and policy attacks by many States, international organizations and most international law experts. Given the importance of legal and ethical considerations in American policy-making, the United States must continue to defend the validity of these traditional rules. Only with these rules in place can the United States hope to protect its citizens from attack, maintain international stability, and defeat rogue States and terrorist groups that pose a grave threat to the entire civilized world.

Notes

1. HOMER, *THE ILIAD* (Robert Fagles trans., Penguin Books 1998) (8th century BC).
2. HUGO GROTIUS, *THE LAW OF WAR AND PEACE* 72 (Francis W. Kelsey, trans., 1925) (1625).
3. General Treaty for Renunciation of War as an Instrument of National Policy (Aug. 27, 1928), 94 L.N.T.S. 57.
4. To be sure, some scholars have questioned the relevance of the historical practice in this area, not only with regard to the anticipatory self-defense doctrine, but even as far as the self-defense concept as a whole is concerned. For example, Yoram Dinstein argues that “[u]p to the point of the prohibition of war, to most intents and purposes, ‘self-defence was not a legal concept but merely a political excuse for the use of force’. Only when the universal liberty to go to war was eliminated, could self-defence emerge as a right of signal importance in international law.” YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* 160–61 (3d ed. 2001), quoting E. Jimenez de Arechaga, *International Law in the Past Third of a Century*, 59-1 RECUEIL DES COURS 1, 96 (1978). This view, however, ignores the fact that legal and ethical restrictions on the use of force did not emerge in the 20th century; indeed, for centuries, there have been various forms and types of restrictions, some, but not all, of which were driven by religious imperatives—e.g., efforts to ban the waging of war by Christian States against other Christian States. The fact that they were often breached did not render them any more irrelevant than the frequently-ignored modern proscriptions. As far as anticipatory self-defense is concerned, the fact that the doctrine arose and was practiced during the time when the overall doctrinal attitudes toward the use of force were more permissive than the ones we encounter today is not particularly dispositive. Indeed, the fact that the doctrine was refined at the time when armed aggression was a more usual instrument of statecraft, makes it even more significant in the current, more restrictive legal environment.
5. For a description of the *Caroline* incident, see KENNETH R. STEVENS, *BORDER DIPLOMACY: THE CAROLINE AND MCLEOD AFFAIRS IN ANGLO-AMERICAN-CANADIAN RELATIONS, 1837–1842*, at 121 (1989).
6. Daniel Webster, Secretary of State, Letter to Lord Ashburton, British Plenipotentiary (Aug. 6, 1842), reprinted in JOHN BASSETT MOORE, 2 *A DIGEST OF INTERNATIONAL LAW* 412 (1906).
7. Some commentators have also argued that the *Caroline* incident is miscast as a poster child for the anticipatory self-defense doctrine, because the ship was used to re-supply the Canadian insurgents prior to its destruction and hence, could have been considered to engage in continuous armed operations against Britain. This claim is, of course, debatable. *Caroline*’s operations would have had to be continuous, rather than intermittent, and the relevant historical record does not evidence such a pattern. In any case, regardless of the actual facts on the ground, what makes the *Caroline* case significant in the development of the customary international law is that both the United States and Britain chose to apply the anticipatory defense paradigm in setting up the legal framework for handling the incident.
8. GROTIUS, *supra* note 2, at 173.
9. EMMERICH DE Vattel, 3 *THE LAW OF NATIONS* 130 (Charles G. Fenwick ed., 1983) (1758).
10. President’s Commencement Address of June 1, 2002 at the United States Military Academy in West Point, New York, 38 *WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS* 945 (June 10, 2002), available at <http://www.whitehouse.gov/news/releases/2002/06/20020601-3.html>.
11. OFFICE OF THE PRESIDENT OF THE UNITED STATES, *THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES* (Sept. 2002), reprinted in 2002 *DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW* 947.

12. Actually, as noted by George Orwell long before the Bush Administration came into office, pacifism has often been driven by a hefty dose of anti-Americanism. Writing in 1945, Orwell bemoaned the existence of

[I]ntellectual pacifists, whose real though unacknowledged motive appears to be hatred of Western democracy and admiration for totalitarianism. Pacifist propaganda usually boils down to saying that one side is as bad as the other, but if one looks closely at the writing of the younger intellectual pacifists, one finds that they do not by any means express impartial disapproval, but are directed almost entirely against Britain and the United States . . . .

George Orwell, *Notes on Nationalism* (1945), reprinted in GEORGE ORWELL: ESSAYS 878 (John Carey ed., 2002).

13. *Supra* note 10.

14. For a discussion of this issue, including the comparison of how Saddam's strategic deception policy was, in some key respects, similar to the missile bluff strategy pursued by the late Nikita Khrushchev, see David B. Rivkin, Jr. & Lee A. Casey, *Saddam, Nikita and Virtual Weapons of Mass Destruction: A Question of Threat Perception and Intelligence Assessment*, IN THE NATIONAL INTEREST, June 12, 2003, at <http://www.inthenationalinterest.com/Articles/Vol2Issue23/Vol2iss23RivkinCasey.html>.

15. See e.g., *Text: Bin Laden Discusses Attacks on Tape*, at [http://www.washingtonpost.com/wp-srv/nation/specials/attacked/transcripts/binladentext\\_121301.html](http://www.washingtonpost.com/wp-srv/nation/specials/attacked/transcripts/binladentext_121301.html).

16. *Minutes of the Thirty-Eighth Meeting of the United States Delegation, Held at San Francisco, Monday, May 14, 1945, 9:05 a.m.*, in 1 FOREIGN RELATIONS OF THE UNITED STATES 707, 709 (1945).

17. U.N. CHARTER art. 1, para. 1.

18. It is also worth noting that Article 51 refers only to an armed attack "against a member of the United Nations." When the Charter was ratified and for decades thereafter, a number of States chose not to join the UN. To construe Article 51 as the exclusive all-purpose rule for using force, that has supplemented the traditional customary law norms, would mean such States would have no self-defense rights at all.

19. The full text of Article 51 is as follows:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence 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. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

20. Article 51's language aside, its rather accidental legislative history also does not support the claim that the Charter's drafters conceived of it as an important substantive right-creating provision. In this regard, Andru Wall notes that

Article 51 was not in the original drafts because the drafters believed the customary international law right of self-defense was incorporated without alteration into the Charter. The US delegation in San Francisco proposed Article 51 to ensure that the obligations of collective self-defense against armed attacks arising from the Chapultepec Act were incorporated into the Charter. While self-defense was uniformly accepted as a customary right of States, collective self-defense was an emerging right.

Andru Wall, *International Law and the Bush Doctrine*, 33 ISRAEL YEARBOOK ON HUMAN RIGHTS 199, 200–201 (2003).

In a remarkable historical parallel, this view of a robust self-defense prerogative—as something that is so firmly entrenched in international law that it did not even require an explicit reaffirmation—was also expressed by Secretary of State Kellogg. Kellogg stated at the time when the 1928 Kellogg-Briand Pact (the very high point of the efforts to limit the use of force by States) was being negotiated “that there was no need to state it expressly in the terms of the pact; even the adoption of texts that seem inconsistent with exercise of the right, he said, do not preclude reliance upon it.” Telegram from Frank B. Kellogg, Secretary of State, to the US Ambassador in France, (Apr. 23, 1928) in 1 FOREIGN RELATIONS OF THE UNITED STATES 34, 36–37 (1928), *quoted in* Michael J. Glennon, *Military Action Against Terrorist Under International Law: The Fog of Law, Self-Defense, Inherence and Incoherence in Article 51 of the United Nations Charter*, 25 HARVARD JOURNAL OF LAW AND PUBLIC POLICY 539 n.62 (2002).

21. The view that Article 51 is meant to be merely an illustrative safe harbor has been criticized by the advocates of the restrictive reading of the Charter. For example, Yoram Dinstein notes in this regard

What is the point in stating the obvious (i.e. that an armed attack gives rise to the right of self-defence), while omitting a reference to the ambiguous conditions of preventive war? Preventive war in self-defence (if legitimate under the Charter) would require regulation by *lex scripta* more acutely than a response to an armed attack, since the opportunities for abuse are incomparably greater.

DINSTEIN, *supra* note 4, at 168. This question, however, can be easily answered by pointing out that the whole idea of a safe harbor in the law is to delineate precisely those circumstances that can be easily dealt with. Thus, the whole purpose of Article 51 is to indicate that, whenever one uses force after he has been the victim of an armed attack, he is always legally in the right, and no further analysis of the circumstances is necessary. By contrast, precisely because the application of anticipatory self-defense can be, and has been, used as a pretext for aggression that a more complex, all facts and circumstances-type analysis, under Article 2, is called for. This interpretation is certainly supported by the fact that the framers of the Charter were quite familiar with the arguments used by both the Nazi and Japanese leadership (which were subsequently replayed during the Nuremberg and Tokyo war crimes trials) that they were engaged in anticipatory self-defense. Looking to the future, leaders of a State that has used force in a manner consistent with Article 51 could feel safe from prosecution; even if that State had lost the war and they were subject to a war crimes prosecution.

22. At the time the Council adopted the Korean War Resolution (SC Res. 82 (June 25, 1950), *reprinted in* 5 RESOLUTIONS AND DECISIONS OF THE SECURITY COUNCIL 4 (1950)) and the Gulf War Resolution (SC Res. 678 (Nov. 29, 1990), *reprinted in* 29 INTERNATIONAL LEGAL MATERIALS 1565 (1990)), which many regard as its strongest actions, all it did was to recommend that member States render assistance to South Korea and Kuwait. Since both of these countries were victims of armed aggression, and countries coming to their aid were acting squarely within the ambit of Article 51, the Security Council’s blessing of these actions was primarily of a rhetorical and diplomatic value; it did not alter the legal landscape.

23. See Professor Dinstein’s article, *The Gulf War: 1990–2004 (And Still Counting)*, which is Chapter XV in this volume, at 337.

24. DINSTEIN, *supra*, note 4, at 172.

25. Ironically, and quite inconsistently with the Dinstein's anticipatory defense "lite," it is often easier to predict, based upon an analysis of the long-term trends, what is eventually going to happen, rather than what will happen tomorrow. Thus, the quality of strategic threat forecasts is often better than the assessment of tactical threats. Accordingly, anticipatory self-defense against medium- and long-term threats may well make more sense and be more reliable than the interceptive self-defense, geared for dealing with unavoidable and imminent attacks.
26. Unfortunately, only a few proponents of the legality of humanitarian intervention espouse the view that the Charter is similarly permissive when it comes to national security-driven interventions. For a notable exception to this idiosyncratic reading of the Charter, see Lee Feinstein & Ann-Marie Slaughter, *A Duty to Prevent*, 83 FOREIGN AFFAIRS 136, Jan.–Feb 2004.
27. PIERRE AMBROISE FRANCOIS CHODERLOS DE LACLOS, *LES LIAISONS DANGEREUSES* (1782).
28. Michael J. Glennon, *Why the Security Council Failed*, 82 FOREIGN AFFAIRS, May/June 2003, at 16 and Michael J. Glennon, *Preempting Terrorism: The Case for Anticipatory Self-Defense*, WEEKLY STANDARD, Jan. 28, 2002, at 24.
29. John F. Kennedy, President of the United States, *Radio and Television Report to the American People on the Soviet Arms Buildup in Cuba* (Oct 22, 1962), Public Papers of the Presidents of the United States: PRESIDENT JOHN F. KENNEDY: CONTAINING THE PUBLIC MESSAGES, SPEECHES, AND STATEMENTS OF THE PRESIDENT: JANUARY 1 TO DECEMBER 31, 1962, at 806, 806–07 (1963), available at <http://usgovinfo.about.com/library/weekly/aa102100b.htm>.

# XV

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## The Gulf War: 1990–2004 (And Still Counting)

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Yoram Dinstein\*

**T**here is a popular notion (based on some loose language used by the Bush Administration) that the hostilities conducted by the American-led Coalition of the willing against Iraq in 2003 were based on a legal doctrine of preemptive forcible action against a potential threat. From the standpoint of international law, this popular notion is as untenable as it is unnecessary. The present article will first set the proper predicate for the legality of the action taken against Iraq. Then, the article will turn to the spurious contention of preemptive action.

### *A Legal Analysis of the Various Phases of the Gulf War*

It is common practice to refer to the hostilities in Iraq in 2003 in a manner disconnected from the hostilities of the early 1990s: some media stories have even used the expressions “Gulf War I” and “Gulf War II.” However, in reality there has been only a single Gulf War which started in 1990 and is still not over in 2004. Admittedly, that war has consisted of a number of phases, yet each phase must be viewed as a part of the whole. The three main phases of the Gulf War are:

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### **The Invasion and Liberation of Kuwait (1990–1991)**

Iraq invaded Kuwait on August 2, 1990. Within a few hours, the United Nations Security Council adopted Resolution 660, which determined the existence of “a breach of international peace and security,” and demanded immediate and unconditional withdrawal of the Iraqi forces.<sup>1</sup> This was (and still is) only the second resolution in the history of the Security Council in which it used the phrase “breach of international peace” and then proceeded to take action. (The first being Resolution 82 of 1950 relating to the invasion of South Korea by North Korea,<sup>2</sup> although that resolution used the slightly different phrase “breach of the peace.”)

Following Resolution 660, the Council adopted a string of other resolutions which, *inter alia*, imposed on Iraq mandatory economic sanctions under Chapter VII of the Charter (Resolution 661<sup>3</sup>) and even a blockade (Resolution 665<sup>4</sup>). When Iraq did not relent, the Council—in Resolution 678 of November 29, 1990—authorized the “Member States co-operating with the Government of Kuwait,” should Iraq not fully comply with previous Council resolutions by January 15, 1991, “to use all necessary means to uphold and implement resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area.”<sup>5</sup> The formula “to use all necessary means” has since become the common and accepted euphemism for the use of force.

Pursuant to Resolution 678, and upon the expiry of the ultimatum, the armed forces of a large American-led Coalition struck at Iraq on the night of January 16/17, 1991. It is important to understand that at no time did the Council establish a United Nations force for combat purposes against Iraq.<sup>6</sup> The legal foundation of the use of force against Iraq by the coalition was collective self-defense.<sup>7</sup> Under Article 51 of the United Nations Charter, when an armed attack occurs, any State is entitled to respond by exercising its right of individual or collective self-defense.<sup>8</sup> A specific affirmation of “the inherent right of individual or collective self-defence, in response to the armed attack by Iraq against Kuwait, in accordance with Article 51 of the Charter,” was already incorporated into Resolution 661.<sup>9</sup> Even the phrase “Member States co-operating with the Government of Kuwait” suggests that these are “nations engaged in collective [self-] defense with Kuwait.”<sup>10</sup>

The meaning of Resolution 678 is that, while the Security Council abstained from deploying a veritable United Nations force as an instrument of collective security, it gave its blessing in advance to the voluntary exercise of collective self-defense by the members of the Coalition (following an interval of several weeks designed for the exhaustion of the political process). The core of the resolution was the prospective approval of future action.<sup>11</sup> In an ordinary constellation of events, States first employ force in individual or collective self-defense and only then report to the Council about the measures that they have taken, so that the Council

investigates the nature of the hostilities retrospectively. In the particular case of Iraq, the Coalition sought and obtained from the Council a green light for the exercise of collective self-defense against the perpetrator of an armed attack (Iraq) well before the projected military clash. Thereafter, the Coalition did not have to worry about the reaction of the Council, inasmuch as that reaction had predated the actual combat.

Considering that the military operations of the Coalition in 1991 were a manifestation of collective self-defense—rather than collective security—there was technically no need for the specific mandate of Resolution 678 to legally validate the employment of forcible measures against Iraq.<sup>12</sup> Article 51 *per se* ought to have sufficed in authorizing the Coalition to resort to force in response to the Iraqi armed attack, and arguably Resolution 678 only tied the hands of the countries cooperating with Kuwait in that they had to hold their fire until January 15.<sup>13</sup> Of course, in political and psychological terms, Resolution 678 had an incalculable effect: internationally (cementing the solidarity of the Coalition and swelling its ranks) as well as domestically (mobilizing public opinion to political support of the action against Iraq).

### **The Cease-Fire Period (1991–2003)**

Cease-fire terms were dictated to Iraq by the Security Council, in April 1991, in Resolution 687.<sup>14</sup> These were rigorous terms, which compelled Iraq, *inter alia*, to disarm itself of weapons of mass destruction (WMD), but Iraq accepted them. It must be appreciated that, although the conditions of the cease-fire were delineated by Resolution 687, the ensuing cease-fire constituted an agreement between the Coalition—rather than the United Nations (which remained above the fray)—and Iraq.

The cease-fire in Iraq went on for a dozen years, yet it failed to spawn peace. Instead of moving towards a peaceful settlement, the Coalition and Iraq were constantly at loggerheads, inasmuch as Iraq—from the very onset of the cease-fire—was unwilling to fully comply with its agreed-upon terms, especially as regards disarmament of WMD. Huge quantities of chemical weapons agents, and a variety of biological weapons production equipment and materials, were destroyed under the supervision of UN inspectors.<sup>15</sup> However, quite frequently between 1991 and 2003 (in particular, in 1998/1999), Coalition warplanes struck Iraqi targets, striving unsuccessfully to compel Iraq to abide by the cease-fire conditions and especially to cooperate with UN disarmament inspectors.<sup>16</sup> The sundry air strikes by the Coalition must be construed as a resumption of combat operations in the face of Iraqi violations of the cease-fire terms.<sup>17</sup>

Already under Resolution 688, adopted within a few days of the entry into force of the cease-fire, the Security Council (without naming Chapter VII) held that the

Iraqi repression of the civilian population (particularly the Kurds) “threaten international peace and security in the region” and insisted that Iraq “allow immediate access by international humanitarian organizations to all those in need of assistance in all parts of Iraq and to make available all necessary facilities for their operation.”<sup>18</sup> As a result, with the military help of armed forces of the United States and other Coalition countries, “access” to humanitarian aid was achieved through the creation of an air exclusion (“no-fly”) zone securing a Kurdish enclave in the north of Iraq. In 1992, another “no-fly” zone was established over the Shiite areas in the south of the country. In the next decade, many air strikes were conducted by Coalition warplanes against Iraq in response to Iraqi defiance of the “no-fly” zones.<sup>19</sup>

### **The Occupation of Iraq (2003)**

The state of war between Iraq and the Coalition continued notwithstanding the suspension of general hostilities in 1991. When the friction between Iraq and the Coalition culminated in the resumption of general hostilities of 2003, events were examined by a host of commentators against the backdrop of a doctrine of “pre-emption” set out by President George W. Bush (see below).<sup>20</sup> But, as conceded by the Legal Adviser of the Department of State: “Was Operation Iraqi Freedom an example of preemptive use of force? Viewed as the final episode in a conflict initiated more than a dozen years earlier by Iraq’s invasion of Kuwait, it may not seem so.”<sup>21</sup>

There is absolutely nothing preemptive about the resumption of hostilities when a cease-fire disintegrates. The leading partner of the United States in the Coalition against Iraq—the United Kingdom—formally took the position that the legal basis of the 2003 hostilities was a revival of the Coalition’s right to use force against Iraq consequent upon the Iraqi material breach of the cease-fire.<sup>22</sup>

As indicated, Iraqi reluctance to comply with its obligations of WMD disarmament brought about numerous clashes with the Coalition throughout the cease-fire period. Ultimately, in the face of persistent reports about Iraq’s violations of its obligations in this regard, the Coalition decided to terminate the cease-fire. The fact that no WMD were found in Iraq after its occupation is irrelevant: on the eve of the resumption of hostilities, everybody—including the UN inspectors—believed that Iraq had not fully observed its disarmament undertakings.<sup>23</sup> Iraqi refusal to cooperate unreservedly with UN inspectors led to a series of Security Council resolutions branding its conduct a “material breach” of its disarmament obligations.

It is wrong to argue (as was done by the United Kingdom) that the legality of the Coalition’s right to use of force against Iraq in 2003 hinged on a revival of Security Council Resolution 678.<sup>24</sup> Resolution 678 gave the blessing of the Security Council to the military action taken in 1991, and surely it had nothing to do with operations

conducted a dozen years later under totally different circumstances. However, there was no need for a revival of Resolution 678 in 2003, just as there was no strict need for its original adoption in 1990. Both in 1991 and in 2003, the Coalition acted on the basis of the right of collective self-defense with which it was directly vested by Article 51 of the Charter and by customary international law.

A cease-fire, which merely suspends hostilities without terminating the war, does not extinguish the right of collective self-defense that remains legally intact for the duration of the war.<sup>25</sup> The criteria for the legitimate exercise of this right remain anchored to the circumstances of the outbreak of the war (in this case, in 1990). The disintegration of a cease-fire by dint of its violation by one belligerent party—and the forcible response of the adversary—is not to be confused with the initiation of a new war.

Under Article 40 of the Regulations annexed to Hague Convention (II) of 1899 and to Hague Convention (IV) of 1907 Respecting the Laws and Customs of War on Land, a serious violation by a party to a cease-fire (“armistice” in the original wording of the Regulations) empowers the other side to denounce it and, in cases of urgency, to resume hostilities immediately.<sup>26</sup> The modern practice is to refer not to a serious violation but to a “material breach.” This phrase appears in Article 60(1) of the Vienna Convention on the Law of Treaties (as a ground for termination or suspension of bilateral treaties).<sup>27</sup> The applicability of the “material breach” criterion to general cease-fire agreements had been recognized in the international legal literature even before the Vienna Convention was crafted in its final form.<sup>28</sup>

The meaning of the phrase “material breach” is not unequivocal.<sup>29</sup> Article 60(3) of the Vienna Convention defines a “material breach” as either “a repudiation of the treaty not sanctioned by the present Convention” or a “violation of a provision essential to the accomplishment of the object or purpose of the treaty.”<sup>30</sup> Which provision is to be considered “essential”? It is generally recognized that, in the context of a material breach, the term covers any “important ancillary provision” of a treaty.<sup>31</sup> Thus, the WMD disarmament clauses in the cease-fire agreement with Iraq were decidedly essential (albeit ancillary to the suspension of hostilities), and their violation constituted a “material breach.”

It is therefore noteworthy that, as early as August 1991 (a few months after the entry into force of the cease-fire suspending hostilities), the Security Council—acting under Chapter VII of the Charter, in Resolution 707 (1991)—already condemned Iraq’s serious violation of its disarmament obligations and established that the violation “constitutes a material breach of the relevant provisions of resolution 687.”<sup>32</sup> Eleven years later, in Resolution 1441 (2002), the Security Council (again acting under Chapter VII) decided “that Iraq has been and remains in

material breach of its obligations under relevant resolutions, including resolution 687 (1991).”<sup>33</sup>

Many commentators maintain that—subsequent to Resolution 1441—the Coalition could not take military action against Iraq in 2003 without obtaining a specific go-ahead signal from the Security Council to resort to force.<sup>34</sup> The fact that the Coalition failed to persuade the Security Council to adopt a further resolution expressly authorizing—in the vein of Resolution 678—the use of “all necessary means” (i.e., force) against Iraq was regrettable from a political standpoint. But, legally speaking, such an additional resolution was not required. Even those contending that Resolution 1441 “does not contain any ‘automaticity’ as concerns the potential use of force” have to concede that the text lends itself to a different interpretation.<sup>35</sup> It most assuredly does not prescribe—or even necessarily imply—that, prior to recourse to force, the Coalition must return to the Security Council for a second (confirmatory) resolution.<sup>36</sup>

The clear inference from the determination by the Security Council as regards the Iraqi “material breach” was that the other side to the cease-fire agreement was released from its obligation to continue to respect the cease-fire.<sup>37</sup> A salient point, often missed by commentators on this topic,<sup>38</sup> is that the other side to the cease-fire agreement with Iraq was not the United Nations as such but the Coalition.<sup>39</sup> Resumption of the hostilities, therefore, did not require an explicit stamp of approval from the Security Council.

In reality, even the determination of the existence of an Iraqi “material breach” need not have been made by the Security Council.<sup>40</sup> By right, this determination could have been made by the Coalition itself. Differently put, there was no legal (as distinct from a political) need for the Coalition to have turned to the Security Council in the first place (just as in 1990/1991 the Coalition did not have to go the Security Council for Resolution 678 or, for that matter, Resolution 687). Yet, since the Coalition chose to bring the matter before the Security Council in 2002—and since the Council did set up an enhanced inspection regime, giving Iraq a “final opportunity” to comply with the disarmament obligation<sup>41</sup>—the Coalition was constrained to give that inspection regime a chance of success. Similarly to Resolution 678, which equally offered Iraq a “final opportunity”<sup>42</sup> and tied the hands of the Coalition by introducing a temporal interval during which it had to hold its fire, Resolution 1441 did not leave the Coalition the option to recommence hostilities immediately. Thus, despite the determination of the existence of a “material breach” of the cease-fire terms, the Coalition had to await new UN inspectors’ reports. However, when a number of reports were in, it became clear that there were still unresolved issues and that Iraq had failed to take all the steps required to put an

end to its “material breach.”<sup>43</sup> The freedom of action of the Coalition was accordingly regained.

Following a final ultimatum, the Coalition terminated the cease-fire with Iraq and resumed hostilities on March 20, 2003. Baghdad fell on April 9th, and in a few days major combat operations were over. All the same, irregular fighting has persisted long after the occupation of Iraq (with an upsurge in the violence a year later, in 2004). Already in May 2003, the Security Council determined that the situation in Iraq, although improved, continued to constitute “a threat to international peace and security.”<sup>44</sup> In October 2003, the Council expressly authorized “a multinational force under unified command” (structured around the Coalition military units) “to take all necessary measures to contribute to the maintenance of security and stability in Iraq.”<sup>45</sup> In June 2004, in accordance with Security Council Resolution 1546, the formal occupation of Iraq by the Coalition ended, and an Interim Government reasserted full responsibility and authority; nevertheless, the multinational (Coalition) force remained in the country and its authority “to take all necessary measures” was reaffirmed by the Council.<sup>46</sup>

### *Preemptive Self-Defense*

The United States has traditionally taken the position that a State may exercise “anticipatory” self-defense,<sup>47</sup> in response not merely to a “hostile act” but even to a “hostile intent” (a dichotomy elevated to the level of doctrine by the US Rules of Engagement).<sup>48</sup> In the past, the United States was careful to underscore that anticipatory self-defense—or response to a hostile intent—must nevertheless relate to the “threat of *imminent* use of force.”<sup>49</sup> The emphatic use of the qualifying adjective “imminent” is of great import. As we shall see, the imminence of an armed attack (provided that it is no longer a mere threat) does indeed justify an early response by way of interceptive self-defense. However, after the heinous terrorist attacks of September 11, 2001 (9/11), a well-known statement of policy on preemptive action in self-defense was issued as part of the US National Security Strategy,<sup>50</sup> and this is often referred to as the “Bush Doctrine” (after President George W. Bush).<sup>51</sup> The new policy appears to push the envelope by claiming a right to “preemptive” self-defense countering pure threats based on the “capabilities and objectives” of today’s adversaries, especially terrorists and in particular when the potential use of WMD comes into the equation.<sup>52</sup> It is not yet clear what practical effects the new policy will have in reality. But to the extent that it will actually bring about the preventive use of force in response to sheer threats, it will not be in compliance with Article 51 of the Charter.

Since Article 51 permits self-defense solely when an “armed attack” occurs, the question arises whether there exists—independently of the Charter—a broader customary international law right of anticipatory self-defense. The International Court of Justice, in the *Military and Paramilitaries Activities* case of 1986, based its decision on the norms of customary international law concerning self-defense as a sequel to an armed attack.<sup>53</sup> Yet, the Court stressed that this was due to the circumstances of the case, and it passed no judgment on the issue at hand.<sup>54</sup>

On the other hand, Judge Schwebel—in his Dissenting Opinion—did take a clear-cut position on the subject. In conformity with a scholarly school of thought maintaining that Article 51 only highlights one form of self-defense (viz., response to an armed attack), without negating other patterns of legitimate action in self-defense vouchsafed by customary international law,<sup>55</sup> Judge Schwebel rejected a reading of the text which would imply that the right of self-defense under Article 51 exists “if, and only if, an armed attack occurs.”<sup>56</sup>

In the opinion of the present writer, precisely such a limitative reading of Article 51 is called for. Any other interpretation of the Article would be counter-textual, counter-factual and counter-logical.

First, a different interpretation of Article 51 would be counter-textual because the use of the phrase “armed attack” in Article 51 is not inadvertent. The expression should be juxtaposed with comparable locutions in other provisions of the Charter. It is particularly striking that the framers of the text preferred in Article 51 the coinage “armed attack” to the term “aggression,” which appears in the Charter in several contexts (the Purposes of the United Nations (Article 1(1)), collective security (Article 39) and regional arrangements (Article 53(1)).<sup>57</sup> The choice of words in Article 51 is deliberately confined to a response to an armed attack.

An armed attack is, of course, a type of aggression. Aggression in its generic meaning may be stretched to include mere threats, although it is interesting that a consensus Definition of Aggression, adopted by the General Assembly in 1974—while not pretending to be exhaustive—does not cover the threat of force.<sup>58</sup> Yet, only a special form of aggression amounting to an armed attack justifies self-defense under Article 51. The French version of the Article sharpens its thrust by speaking of “*une agression armée*.”<sup>59</sup> Under the Article, a State is permitted to use force in self-defense only in response to aggression which is armed.

Second, the idea that one can go beyond the text of Article 51 and find support for a broad concept of preventive self-defense in customary international law is counter-factual. When did such customary international law evolve and what evidence in the practice of States (as distinct from scholarly writings) do we have for it? The right of self-defense crystallized only upon the prohibition of the use of force between States. That prohibition was first evinced in the Kellogg-Briand Pact

of 1928<sup>60</sup> and reiterated, in clearer and broader terms, in Article 2(4) of the Charter in 1945.<sup>61</sup> What preventive war of self-defense was unleashed between 1928 and 1945?

Third, the reliance on an extra-Charter customary right of self-defense is also counter-logical. After all, the framers of Article 51 introduced significant limitations on the exercise of self-defense (which is subject to the overriding powers of the Security Council). Does it make sense that the most obvious case of self-defense—in response to an armed attack—is subordinated to critical conditions, whereas self-defense putatively invoked in other circumstances (on a preventive basis) is absolved of those conditions? What is the point in stating the obvious (i.e., that an armed attack gives rise to the right of self-defense), while omitting any reference whatever to the ambiguous conditions of an allegedly permissible preventive war? Preventive war in self-defense (if legitimate under the Charter) would require regulation by *lex scripta* more acutely than a response to an armed attack, since the opportunities for abuse are incomparably greater. Surely, if preventive war in self-defense is justified (on the basis of “probable cause” rather than an actual use of force), it ought to be exposed to no less—if possible, even closer—supervision by the Security Council. In all, is this not an appropriate case for the application of the maxim of interpretation *expressio unius est exclusio alterius*?

Having said all that, it is the considered opinion of the present writer that the right to self-defense can be invoked in response to an armed attack as soon as it becomes evident to the victim State (on the basis of hard intelligence available at the time) that the attack is in progress. There is no need to wait for the bombs to fall—or, for that matter, for fire to open—if a moral certainty exists that the armed attack has actually begun (however incipient the stage of the attack is at that point). The target State can lawfully (under Article 51) intercept the armed attack with a view to blunting its edge.

The best way to illustrate the circumstances in which interceptive self-defense can be relied upon is to assume that the Japanese carrier striking force, en route to the point from which it mounted the notorious attack on Pearl Harbor in December 1941, had been destroyed by American forces before a single Japanese naval aircraft got anywhere near Hawaii.<sup>62</sup> If that were to have happened, and the Americans would have succeeded in aborting an onslaught which in one fell swoop managed to change the balance of military power in the Pacific, it would have been preposterous to look upon the United States as answerable for inflicting an armed attack upon Japan.

The proper analysis of the case should be based on three disparate hypothetical scenarios (all based on the counter-factual postulate that the Americans knew the Japanese plans).

The easiest scenario relates to the hypothetical shooting down by the Americans of the Japanese aircraft—following detection by radar or other means—in the relatively short time-frame between their launch from the air carriers and the actual execution of the attack mission. Once the launch was completed, there can be no doubt that (although theoretically the mission could still be called off) the United States as the target State had every right to regard the Japanese armed attack as having commenced and to intercept it.

The more difficult scenario pertains to a hypothetical sinking of the Japanese fleet when poised for the attack on Pearl Harbor but before the launch of the aircraft. In the opinion of the present writer, the turning point in the unfolding events was the sailing of the Japanese fleet towards its fateful destination (again, notwithstanding the possibility of its being instructed to turn back). Had the Americans—perhaps through the breaking of Japanese naval codes—been in possession of conclusive evidence as to the nature of the mission in which the Japanese Striking Force was already engaged, and had the Americans located the whereabouts of the Japanese fleet, they need not have relinquished the opportunity to intercept.

On the other hand, had the Americans sought to destroy the Japanese fleet before it sailed—while it was still training for its mission, war-gaming it or otherwise making advance preparations—this would have been not an interceptive (hence, lawful) response to an armed attack but an (unlawful) preventive use of force in advance of the attack which had not yet commenced. As and of themselves, training, war-gaming and advance preparations do not cross the red line of an armed attack.

The crux of the issue, therefore, is not who fired the first shot but who embarked upon an apparently irreversible course of action, thereby crossing the legal Rubicon. The casting of the die, rather than the actual opening of fire, is what starts the armed attack. It would be absurd to require that the defending State should sustain and absorb a devastating (perhaps a fatal) blow, only to prove an immaculate conception of self-defense. As Sir Humphrey Waldock phrased it: “Where there is convincing evidence not merely of threats and potential danger but of an attack being actually mounted, then an armed attack may be said to have begun to occur, though it has not passed the frontier.”<sup>63</sup>

Interceptive self-defense is lawful even under Article 51 of the Charter,<sup>64</sup> inasmuch as it takes place after the other side has committed itself to an armed attack in an ostensibly irrevocable way. Whereas a preventive strike anticipates an armed attack that is merely “foreseeable” (or even just “conceivable”), an interceptive strike counters an armed attack which is in progress, even if it is still incipient: the blow is “imminent” and practically “unavoidable.”<sup>65</sup> To put it in another way, there is nothing preventive about nipping an armed attack in the bud. But that bud is an

absolute requirement. Self-defense cannot be exercised merely on the ground of assumptions, expectations or fear. It has to be demonstrably apparent that the other side is already engaged in carrying out an armed attack (even if the attack has not yet fully developed).

### Conclusion

Based on the preceding analysis, it is clear that the Coalition case of taking military action against Iraq in 2003 was legally impregnable. Unfortunately, some leading spokesmen and supporters of the Administration in Washington—instead of focusing (like the British) on the issue of Iraqi “material breach” of the preexisting cease-fire—preferred to link the hostilities to preemptive self-defense, thereby exposing the military operations against Iraq to harsh and legitimate criticism. The moral of the story is that, at times, a wrong “spin” of the tool of international law can become a dangerous boomerang.

### Notes

1. SC Res. 660 (Aug. 2, 1990), *reprinted in* 29 INTERNATIONAL LEGAL MATERIALS 1325, *id.* (1990).
2. SC Res. 82 (June 25, 1950), *reprinted in* 5 RESOLUTIONS AND DECISIONS OF THE SECURITY COUNCIL 4, *id.* (1950).
3. SC Res. 661 (Aug. 6, 1990), *reprinted in* 29 INTERNATIONAL LEGAL MATERIALS 1325, 1326–1327 (1990).
4. SC Res. 665 (Aug. 25, 1990), *reprinted in* 29 INTERNATIONAL LEGAL MATERIALS 1329, 1329–1330 (1990).
5. SC Res. 678 (Nov. 29, 1990), *reprinted in* 29 INTERNATIONAL LEGAL MATERIALS 1565, *id.* (1990).
6. See Katia Boustany, *La Guerre du Golfe et le Système d'Intervention Armée de l'ONU*, 28 CANADIAN YEARBOOK OF INTERNATIONAL LAW 379, 391–2 (1990).
7. See Oscar Schachter, *United Nations Law in the Gulf Conflict*, 85 AMERICAN JOURNAL OF INTERNATIONAL LAW 452, 459–460 (1991).
8. U.N. Charter, *reprinted in* 9 INTERNATIONAL LEGISLATION 327, 346 (Manley O. Hudson ed., 1950).
9. SC Res. 661, *supra* note 3, at 1326.
10. JOHN NORTON MOORE, *Crisis in the Gulf: Enforcing the Rule of Law* 151 (1992).
11. See Alissa Pyrich, *United Nations: Authorizations of Use of Force*, 32 HARVARD INTERNATIONAL LAW JOURNAL 265, 268 (1991).
12. See Christopher Greenwood, *New World Order or Old? The Invasion of Kuwait and the Rule of Law*, 55 MODERN LAW REVIEW 153, 163 (1992).
13. See Christian Dominicé, *La Sécurité Collective et la Crise du Golfe*, 2 EUROPEAN JOURNAL OF INTERNATIONAL LAW 85, 104 (1991).
14. SC Res. 687 (Apr. 3, 1991), *reprinted in* 30 INTERNATIONAL LEGAL MATERIALS 847 (1991). The express reference to “a formal cease-fire” appears *id.* at 854.

15. See Sean D. Murphy, *Missile Attacks against Iraq*, 93 AMERICAN JOURNAL OF INTERNATIONAL LAW 471, 472 (1999).
16. For an overview of the sporadic hostilities between the Coalition and Iraq from 1992 to 2002, see Andru E. Wall, *The Legal Case for Invading Iraq and Toppling Hussein*, 32 ISRAEL YEARBOOK ON HUMAN RIGHTS 165, 183–187 (2002).
17. See Ruth Wedgwood, *The Enforcement of Security Council Resolution 687: The Threat of Force against Iraq's Weapons of Mass Destruction*, 92 AMERICAN JOURNAL OF INTERNATIONAL LAW 724, 726 (1998).
18. SC Res. 688 (Apr. 5, 1991), *reprinted in* 30 INTERNATIONAL LEGAL MATERIALS 858, 859 (1991).
19. See Wall, *supra* note 16, at 184–187.
20. See, e.g., Christian Henderson, *The Bush Doctrine: From Theory to Practice*, 9 JOURNAL OF CONFLICT AND SECURITY LAW 3, 15–16 (2004).
21. William H. Taft IV & Todd F. Buchwald, *Preemption, Iraq, and International Law*, 97 AMERICAN JOURNAL OF INTERNATIONAL LAW 557, 563 (2003).
22. Foreign and Commonwealth Office Paper, *Iraq: The Legal Basis for the Use of Force*, 52 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 812–814 (2003).
23. See John Yoo, *International Law and the War in Iraq*, 97 AMERICAN JOURNAL OF INTERNATIONAL LAW 563, 566 (2003).
24. Foreign and Commonwealth Office Paper, *supra* note 22, at 812–814.
25. See Wall, *supra* note 16, at 183.
26. Regulations Respecting the Laws and Customs of War on Land, Annexed to Hague Convention (II) of 1899, July 29, 1899, 22 Stat. 1803, 1 Bevans 247 and Regulations Respecting the Laws and Customs of War on Land, Annexed to Convention (IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631, *reprinted in* THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS 55, 66, 77 (Dietrich Schindler & Jiri Toman eds., 4th ed. 2004).
27. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, *reprinted in* 1969 UNITED NATIONS JURIDICAL YEARBOOK 140, 155.
28. See Quincy Wright, *The Termination and Suspension of Treaties*, 61 AMERICAN JOURNAL OF INTERNATIONAL LAW 1000, 1003 (1967).
29. For a detailed analysis of the expression “material breach,” see MOHAMMED M. GOMAA, *SUSPENSION OR TERMINATION OF TREATIES ON GROUNDS OF BREACH* 25–50 (1996).
30. Vienna Convention, *supra* note 27, at 156.
31. ANTHONY AUST, *MODERN TREATY LAW AND PRACTICE* 238 (2000).
32. SC Res. 707 (Aug. 15, 1991), *reprinted in* 46 RESOLUTIONS AND DECISIONS OF THE SECURITY COUNCIL 22, 23 (1991).
33. SC Res. 1441 (Nov. 8, 2002), *reprinted in* 42 INTERNATIONAL LEGAL MATERIALS 250, 251 (2003).
34. See, e.g., Rüdiger Wolfrum, *The Attack of September 11, 2001, the Wars against the Taliban and Iraq: Is There a Need to Reconsider International Law on the Recourse to Force and the Rules in Armed Conflict?*, 7 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 1, 15–18 (2003).
35. Rainier Hofman, *International Law and the Use of Military Force against Iraq*, 45 GERMAN YEARBOOK OF INTERNATIONAL LAW 9, 25–28 (2002).
36. See Taft & Buchwald, *supra* note 21, at 560–562.
37. See Michael Byers, *Preemptive Self-Defense: Hegemony, Equality and Strategies of Legal Change*, 11 JOURNAL OF POLITICAL PHILOSOPHY 171, 183 (2003).

38. See, e.g., Philippe Weckel, *L'Usage Déraisonnable de la Force*, 107 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 378, 386 (2003).
39. It is true that the Coalition of 2003 (still led by the United States) was of a different composition compared to the original anti-Iraq array of 1990/1991, but this is largely immaterial. Wartime coalitions are not engraved in stone: the Grand Alliance which defeated Germany and Japan in World War II underwent even greater permutations within a shorter period of time.
40. See Taft & Buchwald, *supra* note 21, at 560.
41. SC Res. 1441, *supra* note 33, at 251.
42. SC Res. 678, *supra* note 5, at 1565.
43. See Christopher Greenwood, *International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaida, and Iraq*, 4 SAN DIEGO INTERNATIONAL LAW JOURNAL 7, 31–32 (2003).
44. SC Res. 1483 (May 22, 2003), *reprinted in* 42 INTERNATIONAL LEGAL MATERIALS 1016, 1017 (2003).
45. SC Res. 1511 (Oct. 16, 2003), *reprinted in* 43 INTERNATIONAL LEGAL MATERIALS 254, *id.*, 256 (2004).
46. SC Res. 1546 (June 8, 2004), *reprinted in* 43 INTERNATIONAL LEGAL MATERIALS 1459, 1462 (2004).
47. ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK OF THE LAW OF NAVAL OPERATIONS 263 (A.R. Thomas & James C. Duncan, eds., 1999) (Vol. 73, US Naval War College International Law Studies).
48. United States Army, Judge Advocate General's Legal Center and School, Operational Law Handbook 75 (2004).
49. *Id.* See also ANNOTATED SUPPLEMENT, *supra* note 47, at 263.
50. OFFICE OF THE PRESIDENT OF THE UNITED STATES, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES (2002), *reprinted in* 2002 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 947 [hereinafter National Security Strategy].
51. See Henderson, *supra* note 20, at 8–9.
52. National Security Strategy, *supra* note 50, at 951–952.
53. See Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 102–6 (June 27) (merits).
54. See *id.* at 103.
55. See, e.g., MYRES S. MCDUGAL AND FLORENTINO P. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER 232–241 (1961).
56. Military and Paramilitary Activities, *supra* note 53, at 347.
57. U.N. CHARTER, *supra* note 8, at 331, 343, 347.
58. GA Res. 3314 (XXIX) (Dec. 14, 1974), paras. 2–4, 29(1) RESOLUTIONS OF THE GENERAL ASSEMBLY 142, 143 (1974).
59. U.N. CHARTER, *supra* note 8, at 346.
60. General Treaty for Renunciation of War as an Instrument of National Policy (Aug. 27, 1928), 94 L.N.T.S. 57.
61. U.N. CHARTER, *supra* note 8, at 332.
62. The Pearl Harbor example was adduced in debates in the United Nations. See MARJORIE M. WHITEMAN, 5 DIGEST OF INTERNATIONAL LAW 867–868 (1965).
63. C.H.M. Waldock, *The Regulation of the Use of Force by Individual States in International Law*, 81 RECUEIL DES COURS 451, 498 (1952).
64. For support of this view, see MALCOLM N. SHAW, International Law 1030 (5th ed. 2003).

65. Cf. Christopher C. Joyner and Michael A. Grimaldi, *The United States and Nicaragua: Reflections on the Lawfulness of Contemporary Intervention*, 25 VIRGINIA JOURNAL OF INTERNATIONAL LAW 621, 659–660 (1984–1985).

# XVI

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## The Right of Self-Defense in the Global Fight against Terrorism

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Christoph Müller\*

**T**he fight against the scourge of terrorism has become a key objective in international politics. It has become much more than a pure law enforcement task but a political fight in the widest sense that has to draw on all the resources of political action, including, if necessary, military options. When the fight against terrorism turns into military action abroad, international politics meets international law. The use of military force by a State beyond its borders is governed by international law. Still, given the political depth of the fight against terrorism that sometimes seems to acquire existential meaning—is it at all possible to discuss the right of self-defense in the global fight against terrorism in purely legal terms? When each and every legal argument may assume major political significance, are we still talking about international law or do we discuss politics? Apparently both. This article seeks to shed some light not only on the law but also on the dynamic interrelationship between State policies on the use of force and the evolution of the law: the historical background of the UN Charter law, the law as it stands, and the rift between world order as designed by the UN Charter and the real state of affairs. In conclusion, it will be argued that the political and legal benefits flowing from a

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strengthening of the UN Charter's framework on the use of force clearly outweigh the risks incurred by letting that framework fall into desuetude.

### *Historical Background*

Ninety years ago, in June 1914, a terrorist organization code-named "Black Hand" unsuccessfully tried to stop an assassination plot that it had earlier supported by supplying arms, training and money. On the 28th of June, one of the terrorists nurtured by "Black Hand" carried out the plot. He assassinated the crown prince of the Austro-Hungarian Empire and his wife.<sup>1</sup>

The empire then struck back. By turning against the State of Serbia, the presumed home base of "Black Hand," Austria-Hungary set into motion a world war and its own demise. It would seem to be an interesting, even though academic question how to qualify the Austro-Hungarian action in the context of the contemporary debate. Of course, given the mood of the day and the European system of trip-wire alliances, World War I was probably inevitable anyway. Still, the story of June 1914 seems a useful reminder of the deeper layers of terrorism's destructive power, a destructive potential that works indirectly, through the poisoning of international relations, and may even trigger wars that were not intended to happen the way they did.

The major lesson of the First World War was related to the broader question of legality and legitimacy of the use of force in international relations. After the horror experienced by the killing of some 10 million people, a new question was being asked: could it be that something was fundamentally wrong with a world in which any nation with the power to use force felt free to do so? President Woodrow Wilson of the United States tried to initiate a revolutionary alternative: an international organization of global reach, tying all States together in a system of collective security. He was ahead of his time; the US Senate did not follow his lead. The truncated League of Nations, as it did emerge, was too weak to deal effectively with the blows from Japan, Germany, and Italy.<sup>2</sup> World War II followed, more than 50 million people were killed, this time the majority of victims being civilians. During the war, it was again an American president who took the lead in starting a new search for an organizational framework to create world order.<sup>3</sup> These efforts resulted in the Charter of the United Nations, which sets forth the basic principles and rules intended to govern international relations.

For nearly sixty years, the UN Charter has been the basic legal document for public international law. Accordingly, this article will turn to the Charter to try and find some answers to the question of how to define the scope of self-defense in the fight against terrorism. There is no alternative starting point for finding the

applicable rules of international law. Furthermore, there is already evidence that legal practice under the Charter is adapting to the new threat.<sup>4</sup> At the same time, a lawyer working in the context of international politics has to note, of course, that time and again it seems fashionable to put into doubt the whole UN system.<sup>5</sup> It is true that the objectives of the United Nations are still far from being met. For decades, the Cold War paralyzed the Security Council. Even under the new, more favorable conditions existing since the 1990s, the Security Council's record in taking effective action has been mixed. To appreciate the United Nations, we have to imagine a world without it.<sup>6</sup> After the catastrophic breakdown of the old order of nation States in the first half of the 20th century there has never been any doubt for post-war Germany that the lead of the American architects of the new multilateral order should be followed, and that in addition to a robust defensive alliance of the West, an effective global system of collective security and cooperation must be sought.

### *The Law as it Stands*

No other article of the UN Charter plays such a prominent role in the current debate on the significance of international law for a stable and peaceful world order as does Article 51. How is it to be read after the events of September 11, 2001, the subsequent war in Afghanistan, the United States' presentation of its new security strategy in September 2002, and the Iraq war? How is it to be read in the light of the threats posed by failing States, the proliferation of weapons of mass destruction and international terrorism? Article 51 is the final provision of the UN Charter's Chapter VII which sets out the conditions that justify the use of force within the system of collective security created by the Charter should there be any threat to the peace, breach of the peace or act of aggression. The system of collective security is based on the prohibition of the use of force against other States. Only two exceptions to that prohibition are provided for in the Charter: coercive measures that must be authorized by the Security Council, and the "inherent" right of individual or collective self-defense. The first sentence of Article 51 reads as follows: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence 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."

The exercise of the "inherent right of individual or collective self-defence" is thus permissible only in the event of "an armed attack . . . against a Member of the United Nations." It cannot be invoked when faced with actions that do not reach the threshold of an armed attack and it may only be exercised until such time as the

Security Council has taken measures necessary to maintain international peace and security.<sup>7</sup> September 11 raised the question of whether the right of self-defense also applies in the face of terrorist action. The Security Council gave a clear answer immediately, on the day following the attack in Resolution 1368 (2001)<sup>8</sup> and again, at the end of the same month, in Resolution 1373 (2001).<sup>9</sup> It determined in general terms, first, all acts of international terrorism constitute a threat to international peace and security, and second, the right of individual or collective self-defense in accordance with the Charter could be applicable in connection with acts of international terrorism. No authorization is required from the Security Council in such self-defense actions, however, the measures taken by a State in the exercise of its right of self-defense must be immediately reported to the Security Council.

The Security Council's decision to recognize especially grievous terrorist attacks as an "armed attack . . . against a Member of the United Nations" was a very significant, evolutionary step in the reading of Article 51. Previously, legal doctrine generally assumed that an "armed attack" could not be carried out by non-State actors, but required action by a State. The new reading of Article 51 met with the virtually unanimous approval of international jurists and governments.<sup>10</sup> The recent advisory opinion, *Legal Consequences of the Construction of a Wall*,<sup>11</sup> of the International Court of Justice did not explicitly endorse the new reading of Article 51, but the Court's seemingly restrictive language—"Article 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State"<sup>12</sup>—should not be understood as a contradiction, either. The Court apparently aimed at emphasizing the point that an armed attack has to originate from a territory outside the control of the attacked party.<sup>13</sup>

Recognizing the possibility of non-State actors mounting an "armed attack" as meant by Article 51 leads to a tricky follow-on question: who or which entity constitutes a legitimate target when defending against such terrorist attack?<sup>14</sup> Following September 11 the answer to this question was relatively simple: given the obvious links between Al Qaeda and the Taliban, the use of force by the United States and coalition forces in Afghanistan to topple the Taliban regime was legitimate self-defense under Article 51 of the UN Charter. The German Government and all other NATO States shared this view. On October 2, 2001, the North Atlantic Council decided, for the first time in its history, to invoke the principle of collective defense contained in Article 5 of the North Atlantic Treaty. On the basis of Article 51 of the UN Charter, in conjunction with Security Council Resolutions 1368<sup>15</sup> and 1373,<sup>16</sup> the German *Bundestag* on November 16, 2001 issued a mandate authorizing the *Bundeswehr* to support the United States in Operation Enduring Freedom. This mandate was renewed for the second time in November 2003. As authorized

by that mandate, the German Government provided soldiers for the war in Afghanistan, as well as for naval duties in the fight against terrorism.

Defensive action after September 11 followed an armed attack. What about anticipatory self-defense?<sup>17</sup> Whether there is room for a right of preemptive or even preventive self-defense for individual States within the UN Charter's system of collective security is a highly controversial question.<sup>18</sup> The restrictive wording of Article 51 ("if an armed attack occurs") would seem to rule out a right of anticipatory self-defense. What little State practice there has been to date also seems to indicate caution. Prior to 2001, the question was explicitly discussed in the UN framework only on two occasions, during Israel's preventive strike against Egypt during the Six-Day War in 1967 and when Israel bombed the partially constructed Iraqi nuclear reactor Tamuz I in 1981. While a number of States felt that preventive self-defense was permissible in the former case,<sup>19</sup> in the latter case it was held to be impermissible and unanimously rejected by the UN Security Council in Resolution 487 (1981).<sup>20</sup> At that time the United States was among the States that opposed Israel's preventive action in the Security Council debate with particularly persuasive arguments based on international law. Those States which did not want to rule out the option of anticipatory self-defense absolutely and *a priori* have based their arguments on a case from the year 1837. The test introduced in the *Caroline* case permitted pre-emptive self-defense in very exceptional cases. US Secretary of State Daniel Webster formulated it as follows: "It will be for the government to show a necessity of self-defense, instant, overwhelming, leaving no choice of means and no moment for deliberation."<sup>21</sup>

The criteria of urgent necessity contained in this test led to the subsequent development in international law of the requirement that an attack must be imminent.<sup>22</sup> Very restrictive conditions have been placed on the concept of "imminence." Such imminence must moreover be apparent to an objective observer. The United States' national security strategy of September 2002, however, took a wider approach:

We must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries . . . . The greater the threat, the greater is the risk of inaction—and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack.<sup>23</sup>

Just how the United States will implement this concept remains an open question. No precise criteria have been specified yet. Nor does the security strategy place the right of self-defense within the context of the UN Charter and its system of collective security. The Iraq war may, in political terms, be viewed as an

application of the new national security strategy. In justifying its position under international law to the UN Security Council, however, the United States did not argue the asserted right of anticipatory self-defense. It rather stated that its military operations were in accordance with Resolutions 678 (1990)<sup>24</sup> and 687 (1991),<sup>25</sup> and in particular with the threat of serious consequences made in Resolution 1441 (2002).<sup>26</sup>

The European Union adopted a new security strategy in December 2003, which lays out a threat assessment similar to that contained in the US security strategy, also referring to the threats posed by terrorism, the proliferation of weapons of mass destruction, failing States and organized crime. It also recognizes the need for anticipatory action:

Our traditional concept of self-defence – up to and including the Cold War – was based on the threat of invasion. With the new threats, the first line of defence will often be abroad. The new threats are dynamic. The risks of proliferation grow over time; left alone, terrorist networks will become even more dangerous. State failure and organized crime spread if they are neglected – as we have seen in West Africa. This implies that we should be ready to act before a crisis occurs. Conflict prevention and threat prevention cannot start too early. . . . We need to develop a strategic culture that fosters early, rapid, and when necessary, robust intervention. . . . We need to be able to act before countries around us deteriorate, when signs of proliferation are detected, and before humanitarian emergencies arise. Preventive engagement can avoid more serious problems in the future.<sup>27</sup>

However, the objectives of the European Security Strategy are explicitly put into the context of “effective multilateralism” and a “rule-based international order”:

We are committed to upholding and developing International Law. The fundamental framework for international relations is the United Nations Charter. The United Nations Security Council has the primary responsibility for the maintenance of international peace and security. Strengthening the United Nations, equipping it to fulfill its responsibilities and to act effectively, is a European priority. . . . It is a condition of a rule-based international order that laws evolve in response to developments such as proliferation, terrorism and global warming.<sup>28</sup>

The common European view of international law governing the use of force is thus very much geared towards the United Nations. At the same time, it is not static, but open to new developments contributing to truly effective multilateralism. In this context, Secretary-General Kofi Annan’s statement in September 2003 seems highly relevant. After reiterating the traditional, narrow reading of Article 51, he stated:

Now, some say this understanding is no longer tenable, since an ‘armed attack’ with weapons of mass destruction could be launched at any time, without warning, or by a clandestine group. Rather than wait for that to happen, they argue, States have the right and obligation to use force pre-emptively, even on the territory of other States, and even while weapons systems that might be used to attack them are still being developed.

My concern is that, if it were to be adopted, it could set precedents that resulted in a proliferation of the unilateral and lawless use of force, with or without justification. But it is not enough to denounce unilateralism, unless we also face up squarely to the concerns that make some States feel uniquely vulnerable, since it is those concerns that drive them to take unilateral action. We must show that those concerns can, and will, be addressed effectively through collective action.

The Council needs to consider how it will deal with the possibility that individual States may use force ‘pre-emptively’ against perceived threats. Its members may need to begin a discussion on the criteria for an early authorization of coercive measures to address certain types of threats – for instance, terrorist groups armed with weapons of mass destruction.<sup>29</sup>

The German Government shares the assessment of the Secretary-General. While the UN Charter narrowly limits the use of military force by individual States for good reason, i.e., to prevent the escalation of violence, the Security Council does have a wide range of options at its disposal. Under Article 24 it is given the primary responsibility for the maintenance of international peace and security; under Article 39 it is granted the necessary powers to act in the event of a threat to or breach of the peace. This preventive competence bestowed on the UN Security Council, together with the conflict prevention instruments available to the UN Secretary-General, must be made easier to use in the future—precisely in order to prevent the escalation of violence and the spread of armed conflict.

Meanwhile, following his speech of the 23rd of September, Secretary-General Annan in November 2003 appointed a high level panel to develop recommendations for UN reform and for a collective response to the new threats.<sup>30</sup> The report of the panel was issued in December 2004.<sup>31</sup> All States were invited to contribute to its work. The European Union submitted a joint contribution whose thrust is clear—the Security Council should do more to assume its responsibilities under the Charter. The relevant paragraphs of the EU contribution read as follows:

The EU reaffirms that the provisions of the UN Charter regarding the use of force remain valid. The EU also recognizes the potentially devastating threat posed to UN member states by modern terrorism, and by weapons of mass destruction in the hands of non-state actors. The threat is devastating both to states targeted and to those where

they are allowed to operate. Military action may in certain circumstances – such as when a state is unwilling or unable to deal with the threat posed by a non-state actor on its territory – be required to meet the threat effectively. In this context, the EU is of the view that military action going beyond the lawful exercise of the right to self-defence should be taken on the basis of Security Council decisions. The Security Council, however, must be prepared to make a rapid assessment of any threat brought to its attention and, if necessary, to act quickly and decisively in order to neutralize it. Strong engagement by the Council on terrorism and weapons of mass destruction, as recommended above, and the expertise thereby commanded, would confer on it an additional strong measure of authority in demanding compliance with obligations, and of respect for its collective decisions.<sup>32</sup>

To sum up: Germany, like its European partners, clearly sees the necessity for more effective anticipatory action in the light of the new threats, including a wide spectrum of measures that may be grouped under preventive engagement by political means. Preventive military action, however, should be authorized by the UN Security Council. Only in cases where a previously indistinct threat turns into the threat of an imminent attack<sup>33</sup> is pre-emptive self-defence authorized under international law.

#### ***The Rule of Law—Squeezed by Machtpolitik, Saved by Realpolitik?***

Law transcends politics but time and again it has to meet the test of political acceptance. When legal norms are perceived as faltering or when they appear unsuited to meet their intended purpose, political pressures will mount to change the law. The UN Charter law on the use of force provides the legal framework designed to maintain international peace and security. However, even a cursory look around the globe reveals that peaceful order has remained as elusive a goal as ever. What went wrong with the UN Charter system of maintaining international peace and security? Are there better ways and means to create order in the world?<sup>34</sup>

Order cannot be created without harnessing power and establishing rules for the use of force. In a functioning nation State, government has a monopoly on the use of force. Internationally, the UN Charter system has envisaged a distribution of the authority to use force between the nation States and the UN Security Council. The system has shown three major deficiencies. First, a growing number of nation States have proved to be unable to establish internal peace and a monopoly on the use of force on their own territory, hence the increase in civil strife and cross-border violence by non-State actors, including terrorists. Second, governments have repeatedly used force beyond the limits set by the UN Charter. Third, the Security Council has only sometimes been able to take remedial action against the

disorder spreading from disintegrating States or the unauthorized use of force by governments. Of these three deficiencies, only the first eludes direct and swift remedies. The other two would seem to be remediable: given the political will, governments could cease to flout the UN Charter rules on the use of force, and those represented in the Security Council, especially the five permanent members, could make it work. Why don't they just do it?

Some governments apparently do not believe that playing by the rules of the UN Charter could ever satisfy their vital security concerns. During the Cold War, such skepticism was well-founded. Given the ideological rift and the imperial designs of the Soviet Union, the idea of collective security never really had a chance so that traditional patterns of great power rivalry and balance of power continued to shape international politics, establishing *de facto* rules on the use of force in international relations.<sup>35</sup> Following the demise of the Soviet empire, the 1990s seemed to witness a renaissance of the UN Charter's normative framework on the use of force.<sup>36</sup> Under the shock of September 11 and the twin threat of terrorism and the proliferation of weapons of mass destruction, the picture has become mixed; the United States in particular seems to have only limited confidence in the preventive and protective potential of the UN Charter system.<sup>37</sup>

It is true that the reality of today's world does not really fit the legal abstractions of the UN Charter. The Charter envisaged a world composed of nation States which implicitly were assumed to have a number of seemingly self-evident characteristics that allowed them to interact on the basis of sovereign equality, that made them share a common sense of purpose, and that gave them the ability to shape the course of events. Nation States were, by and large, implicitly assumed to be reasonably well organized, to be run by responsible governments, to be masters in their own house, to have a *bona fide* orientation towards the lofty goals of the Charter, to pursue power not as an end in itself, to overcome the traditional zero-sum-game mentality of international politics and to seek a better life through cooperation with others. The real world, of course, looks different. While States in some regions, in particular in Europe, have indeed buried their centuries-old rivalries and the very idea of war amongst themselves, others continue traditional power politics, whilst a third category of a growing number of States seems to be headed towards primeval chaos,<sup>38</sup> not to mention the dubious domestic legitimacy of too many dictatorships and authoritarian regimes. The dangers inherent in spreading zones of chaos are multiplied by new categories of powerful non-State actors in fields like organized crime, weapons proliferation, and terrorism, who are not only operating international networks, but sometimes have even acquired the capability to initiate and sustain a new type of armed conflict that may most aptly be called asymmetrical warfare.<sup>39</sup>

It is against the background of such a pointedly realistic world view—which, incidentally, is widely shared by both the United States as well as the EU security strategies<sup>40</sup>—that the normative thinking of some authors has returned to traditional patterns of power politics where little room is left for the UN Charter’s multilateralist concept of world order. These authors consider this concept as idealistic at best, as naive and irresponsible at worst. Their views are reflected in the following statements: “Although the effort to subject the use of force to the rule of law was the monumental internationalist experience of the twentieth century, the fact is that that experiment has failed”<sup>41</sup> and “The first and last geopolitical truth is that states pursue security by pursuing power. Legalist institutions that manage that pursuit maladroitly are ultimately swept away.”<sup>42</sup> But which order would emerge if the United Nations were thus swept away? Given the unipolar reality of the day, could it not, should it not be a *Pax Americana*? Robert Cooper provides a thoughtful comment on such an eventuality:

In general, monopolies are undesirable. One exception to this rule is the monopoly of force. This is not just desirable; it is the essential basis of order in the state and in the state system. What is wrong, then, with a virtual monopoly of force in the world? The answer is that the state is based on the *legitimate* monopoly of force and the difficulty with the American monopoly of force in the world community is that it is American and will be exercised, necessarily, in the interest of the United States. This will not be seen as legitimate. Legitimacy is as much a source of power as force. Force without legitimacy is tyranny – for those who are subject to it. In an age in which security will depend on taking early action against emerging threats abroad, legitimacy is more important than ever. And, like it or not, the United Nations remains the most powerful source of legitimacy for such action.<sup>43</sup>

In response, Robert Kagan suggests “the legitimacy of liberalism”—apparently meant to operate outside and independently of the UN framework—which the United States and the liberal democracies of Europe would exercise in harmony, could add to American power.<sup>44</sup> However, he puts this vision himself into doubt by assuming that “many Europeans are betting that the risks from the ‘axis of evil,’ from terrorism and tyrants, will never be as great as the risk of the American Leviathan unbound.”<sup>45</sup> It seems indeed doubtful whether a joint transatlantic push for legitimacy outside the United Nations could contribute to making US power politics a success—but not for the reason Kagan assumes. His assertion that many Europeans are more concerned about American power than the risks of nuclear proliferation and mega-terrorism seems totally beside the point. Robert Cooper’s remarks on legitimacy probably come closer to mainstream European thinking, but the core of European skepticism vis-à-vis the unrestrained use of American

power may be found in a more elementary thought that is the opposite of starry-eyed idealism: many Europeans simply believe that unipolar power politics, whether executed purely unilaterally or through a coalition of the willing, *are not practical and do not work*. Suicidal terrorists will not be moved by the “shock and awe” of a bombing campaign, the application of sheer power alone does not render the desired results under conditions of asymmetrical warfare, the transformation of deficient nation States into responsible liberal democracies requires different means than the application of military force.

The rebirth of democratic West Germany out of the ruins of the Third Reich is sometimes referred to as an example for successful State-engineering initiated by overwhelming force. Maybe it is—but only *ceteris paribus*: in Germany 1945, the Allies entered with huge armies and fully controlled a country that was utterly exhausted and destroyed by nearly six years of “total war” of the Germans’ own choosing. The *Wehrmacht* did not melt away to resurface later in a *guerilla* but fought until it was finished. Furthermore, people were demoralized not only by defeat, destruction and million fold deaths, but also, when faced with the truth of unspeakable crimes, by a rapidly growing sense of guilt. In that situation, it simply did not occur to the remaining young men to question defeat and to form suicidal bands of fanatics trying to fight asymmetrical war. Instead, the Germans, who also happened to consist of a homogeneous and highly educated population, took up the generous offer by the victors to re-enter the civilized world, chose to rebuild their country, and had another try at democracy.

Today’s threats are different and require different treatment. In the end, only non-military means will drain the breeding grounds of a suicidal terrorism that is fueled by pseudo-religious fervor. The battle for hearts and minds will involve a war of ideas where there is no substitute for the victory of reason. For reason to prevail, it will be essential that the use of force, when necessary, is properly understood as action in the common interest.<sup>46</sup> It appears hardly conceivable to achieve this objective without following a course of “effective multilateralism” as envisaged by the European Security Strategy,<sup>47</sup> with a reformed and revitalized UN Security Council assuming a central role. In that regard, it seems as if some American authors have replaced the old maxim “if it ain’t broke, don’t fix it” by a new leitmotif, “if it ain’t fixed yet, break it,” whereas a pragmatist would probably suggest “if it ain’t fixed yet, try and do it.” Therefore, if the implementation of the UN Charter system has indeed remained deficient, why sweep it away, why not try and fix it? A number of important steps into that direction have already been taken by the Security Council, not only before, but also after the unfortunate controversy preceding the Iraq war, including, *inter alia*, Security Council Resolution 1373 (2001) to fight international terrorism,<sup>48</sup> Resolution 1540 (2004) to fight the

proliferation of weapons of mass destruction,<sup>49</sup> and Resolution 1546 (2004) on Iraq's political transition and reconstruction.<sup>50</sup> The road towards international peace and security through effective multilateral action has been clearly laid out by Secretary-General Annan: it should follow the rule of law,<sup>51</sup> lead to a reform of the Security Council, and arrive at a new commitment for joint action that should include criteria on when and how anticipatory action by the Council is necessary to counter the terrorist threat.

In conclusion, it seems fair to say that the reading of the international law on the use of force as set forth above is strongly supported by contemporary political beliefs in Germany. The cataclysmic events in the first half of the 20th century, the German role in those events, and our national experience after 1945; all those factors have converged into a very strong conviction of mainstream foreign policy thinking in Germany: the conviction that we should follow the new course of international relations charted in San Francisco in June 1945, which had been inspired by the United States. Germans presumably will stay this course not only because they firmly believe that it is right, but also because they see no practical alternative in terms of *Realpolitik*.

### Notes

1. KARL D. ERDMANN, DER ERSTE WELTKRIEG 76–77 (1980).
2. STEPHEN SCHLESINGER, ACT OF CREATION: THE FOUNDING OF THE UNITED NATIONS 23–31 (2003). Schlesinger discusses the enthusiasm and vision of Wilson and his disappointment with the Senate.
3. See *id.* at 30. Schlesinger describes how Roosevelt followed Wilson's idea. He argues that Roosevelt's prior experience as Wilson's Secretary of the Navy helped him "forge a strategic vision" of the world.
4. For a discussion of Article 51 of the UN Charter, see *infra* pp. 353–58.
5. See e.g., Michael J. Glennon, *Why the Security Council Failed*, FOREIGN AFFAIRS, May/June 2003, at 16.
6. The question of the political adequacy of the UN Charter framework is discussed in more detail *infra* pp. 358–62. For some interesting contributions to the current discussion on changes in international law and the practice under the UN Charter, see John Yoo, *International Law and the War in Iraq*, 97 AMERICAN JOURNAL OF INTERNATIONAL LAW 563 (2003); Ruth Wedgwood, *The Fall of Saddam Hussein: Security Council Mandates and Preemptive Self-Defense*, 97 AMERICAN JOURNAL OF INTERNATIONAL LAW 576 (2003); Richard N. Gardner, *Neither Bush nor the "Jurisprudes"*, 97 AMERICAN JOURNAL OF INTERNATIONAL LAW 585 (2003); Mariano-Florentino Cuéllar, *Reflections on Sovereignty and Collective Security*, 40 STANFORD JOURNAL OF INTERNATIONAL LAW 211 (2004); Richard A. Falk, *What Future for the UN Charter System of War Prevention?*, 97 AMERICAN JOURNAL OF INTERNATIONAL LAW 590 (2003). For an opposition to Falk's article, see Michael D. Ramsey, *Reinventing the Security Council: The UN as a Lockean System*, 79 NOTRE DAME LAW REVIEW 1529 (2004).

7. For an opposing view, see Ramsey, *supra* note 6, at 1557.
8. SC Res. 1368 (Sept. 12, 2001), available at <http://daccessdds.un.org/doc/UNDOC/GEN/N01/533/82/PDF/N0153382.pdf?OpenElement>.
9. SC Res. 1373 (Sept. 28, 2001), available at <http://daccessdds.un.org/doc/UNDOC/GEN/N01/557/43/PDF/N0155743.pdf?OpenElement>.
10. See, e.g., Cuéllar, *supra* note 6, at 220; Jane E. Stromseth, *Agora: Future Implication Of The Iraq Conflict: Law and Force after Iraq: A Transitional Moment*, 97 AMERICAN JOURNAL OF INTERNATIONAL LAW 628, 633 (2003); Eric Rosand, *Security Council Resolution 1373, the Counter-Terrorism Committee, and the Fight against Terrorism*, 97 AMERICAN JOURNAL OF INTERNATIONAL LAW 333 (2003); Nicholas Rostow, *Before and After: The Changed UN Response to Terrorism Since September 11th*, 35 CORNELL INTERNATIONAL LAW JOURNAL 475 (2002).
11. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004 I.C.J. \_\_\_\_ (July 9), available at <http://www.icj-cij.org/icjwww/idocket/imwp/imwframe.htm>.
12. *Id.* ¶ 139.
13. See *id.* The relevant parts of paragraph 139 of the advisory opinion read as follows:

Article 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State. However, Israel does not claim that the attacks against it are imputable to a foreign State. The Court also notes that Israel exercises control in the Occupied Palestinian Territory and that, as Israel itself states, the threat which it regards as justifying the construction of the wall originates within, and not outside, that territory. The situation is thus different from that contemplated by Security Council resolutions 1368 (2001) and 1373 (2001), and therefore Israel could not in any event invoke those resolutions in support of its claim to be exercising a right of self-defence. Consequently, the Court concludes that Article 51 of the Charter has no relevance in this case.
14. Generally speaking, defensive military action targeting territory of another State should be considered lawful if that State is either unwilling or unable to prevent its territory from being used for preparing or launching an armed attack. See Albrecht Randelzhofer, *Commentary on Article 51*, in THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 799–802 (Bruno Simma ed., 2d ed. 2002).
15. *Supra* note 8.
16. *Supra* note 9.
17. For a discussion on pre-emptive self-defense after September 11, see generally Harold Hongju Koh, *On American Exceptionalism*, 55 STANFORD LAW REVIEW 1479, 1516 (2003). See also Yoo, *supra* note 6, at 571.
18. Stromseth, *supra* note 10, at 638–640, argues that the United States should draft together with its allies parameters for preemptive self-defense against threats posed by terrorism. See also Falk, *supra* note 6, at 593; and Ramsey, *supra* note 6, at 1558.
19. For a general analysis of the Six-Day War and its consequences for the Middle East, see Michael B. Oren, *Six days of War: June 1967 and the Making of the Modern Middle East* 6 (2002).
20. SC Res. 487 (June 19, 1981), available at <http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/418/74/IMG/NR041874.pdf?OpenElement>.
21. Letter from Daniel Webster to Lord Ashburton (Aug. 6, 1842), quoted in JOHN BASSETT MOORE, 2 A DIGEST OF INTERNATIONAL LAW 412 (1906).

22. Anthony Clark Arend & Robert J. Beck, *International Law and the Recourse to Force: A Shift in Paradigms*, in INTERNATIONAL LAW: CLASSIC AND CONTEMPORARY READINGS 327, 344 (Charlotte Ku & Paul F. Diehl eds., 1998).
23. See THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 15 (Sept. 2002), available at <http://www.whitehouse.gov/nsc/nss.pdf>.
24. SC Res. 678 (Nov. 29, 1990), available at <http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/575/28/IMG/NR057528.pdf?OpenElement>.
25. SC Res. 687 (Apr. 3, 1991), available at <http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/596/23/IMG/NR059623.pdf?OpenElement>.
26. SC Res. 1441 (Nov. 8, 2002), available at <http://daccessdds.un.org/doc/UNDOC/GEN/N02/682/26/PDF/N0268226.pdf?OpenElement>. See letter of Permanent Representative John D. Negroponte to the President of the Security Council of March 20, 2003. U.N. Doc. S/2003/351, available at <http://documents-dds-ny.un.org/doc/UNDOC/GEN/N03/290/79/pdf/N0329079.pdf?OpenElement>. The British and Australian justification of the Iraq war followed the same line of argument. See U.N. Doc. S/2003/350 (British) and U.N. Doc. S/2003/352 (Australia), available at <http://documents-dds-ny.un.org/doc/UNDOC/GEN/N03/290/73/pdf/N0329073.pdf?OpenElement> and <http://documents-dds-ny.un.org/doc/UNDOC/GEN/N03/290/85/pdf/N0329085.pdf?OpenElement>, respectively. For a more detailed account of the US legal argument, see William H. Taft IV & Todd F. Buchwald, *Preemption, Iraq, and International Law*, 97 AMERICAN JOURNAL OF INTERNATIONAL LAW 557 (2003).
27. See A SECURE EUROPE IN A BETTER WORLD – EUROPEAN SECURITY STRATEGY 7, 10 (Dec 12, 2003), available at <http://ue.eu.int/uedocs/cmsUpload/78367.pdf>.
28. *Id.* at 9,10.
29. Address to the UN General Assembly, Sept. 23, 2003, U.N. Doc. SG/SM/8891 GA/10157 (2003), available at <http://www.un.org/News/Press/docs/2003/sgsm8891.doc.htm>.
30. See UN Press Release, Nov. 4, 2003, U.N. Doc SG/A/857 (2003), available at <http://www.un.org/News/Press/docs/2003/sga857.doc.htm>.
31. A MORE SECURE WORLD: OUR SHARED RESPONSIBILITY, REPORT OF THE SECRETARY-GENERAL'S HIGH-LEVEL PANEL ON THREATS, CHALLENGES AND CHANGE (2004), available at <http://www.un.org/secureworld/>.
32. See PAPER FOR SUBMISSION TO THE HIGH-LEVEL PANEL ON THREATS, CHALLENGES AND CHANGE, approved for transmission to the panel by EU foreign ministers on May 18, 2004, available at <http://ue.eu.int/uedocs/cmsUpload/EU%20written%20contribution2.pdf>.
33. The German government, in answering a question from parliament, recently confirmed that it regards not only an actual but also an imminent attack as a sufficient basis for the exercise of the right of self-defense: “The right of individual or collective self-defense according to Article 51 of the UN Charter includes, in the Federal Government’s opinion, measures of defense against an imminent attack.” See Antwort der Bundesregierung: *Umsetzung der Europäischen Sicherheitsstrategie*, BUNDESTAGS-DRUCKSACHE 15/3181 (2004), at 25.
34. “Order in the world” is here understood in the narrow sense of security backed by the eventual use of force. Broader concepts of world order and global governance generally seem less applicable to the core security issues, cf e.g., ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER (2004), even though new analytical insights like those on the workings of the “disaggregated state” through government networks might be very useful in tackling the broader questions of promoting world stability short of the use of force, including law enforcement networks to fight international terrorism. On the other hand, it [a networked world order] would still feature States acting as unitary States on important issues, particularly in security matters. *Id.* at 6.

35. Thomas Franck described those rules as follows:

Under that new normative order, each superpower would refrain from attacking the essential interests of the other, but would be freed to use force at will in its own sphere of influence. States that were clients of a superpower would be freed to use force against those that were not, but would be restrained from using force against the clients of the other superpower . . . In this context, 'equality' and 'supremacy' did not merely define the equation of military power among states, but also states' respective de facto normative prerogatives and precautions in the use of force.

See Thomas M. Franck, *What Happens Now? The United Nations After Iraq*, 97 AMERICAN JOURNAL OF INTERNATIONAL LAW 607, 609 (2003).

36. *Id.* at 609, 610.

37. For an extremely critical view of the current and future role of the Security Council, see Michael J. Glennon, *supra* note 5, at 31: "The charter's use of force regime . . . petered out over a period of years. The Security Council itself hobbled along during the Cold War, underwent a brief resurgence in the 1990s, and then flamed out with Kosovo and Iraq."

38. See ROBERT COOPER, *THE BREAKING OF NATIONS: ORDER AND CHAOS IN THE TWENTY-FIRST CENTURY* (2003). Cooper distinguishes the pre-State, "post-imperial chaos" as typical example of the "pre-modern world," the classical State system of the "modern world" shaped by balance-of-power or hegemonic policies, and the "postmodern world" as exemplified by the European Union where the pattern of inter-State relations has been completely switched from the balance-of-power mode towards ever-growing cooperation and openness.

39. See HERFRIED MÜNKLER, *DIE NEUEN KRIEGE* 187 pp. (2002).

40. See *supra* notes 23 and 27.

41. See Michael J. Glennon, *supra* note 5, at 24.

42. *Id.* at 25.

43. See *supra* note 38, at 167.

44. See ROBERT KAGAN, *PARADISE & POWER: AMERICA AND EUROPE IN THE NEW WORLD ORDER* 149–158 (Atlantic Books 2003).

45. *Id.* at 158.

46. For reasons of legitimacy, but also in order to improve and not to erode the prospects of change induced by "soft power." Regarding the sources and the potential of the United States' soft power, as well as its inverse relationship to the unrestrained use of hard power, see JOSEPH S. NYE JR., *THE PARADOX OF AMERICAN POWER: WHY THE WORLD'S ONLY SUPERPOWER CAN'T GO IT ALONE* (2002). Regarding this interrelationship, *cf.* also THE 9/11 COMMISSION REPORT – FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 375 (2004):

Support for the United States has plummeted. Polls taken in Islamic countries after 9/11 suggested that many or most people thought the United States was doing the right thing in its fight against terrorism; few people saw popular support for al Qaeda; half of those surveyed said that ordinary people had a favorable view of the United States. By 2003, polls showed that 'the bottom has fallen out of support for America in most of the Muslim world. Negative views of the U.S. among Muslims, which had been largely limited to countries in the Middle East, have spread . . . Since last summer, favorable ratings for the U.S. have fallen from 61% to 15% in Indonesia and from 71% to 38% among Muslims in Nigeria.

47. See *supra* note 27.

48. See *supra* note 9.

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49. SC Res. 1540 (Apr. 28, 2004), *available at* <http://daccessdds.un.org/doc/UNDOC/GEN/N04/328/43/PDF/N0432843.pdf?OpenElement>.
50. SC Res. 1546 (June 8, 2004), *available at* <http://daccessdds.un.org/doc/UNDOC/GEN/N04/381/16/PDF/N0438116.pdf?OpenElement>.
51. See his address to the UN General Assembly on September 21, 2004, *available at* <http://www.un.org/apps/sg/sgstats.asp?nid=1088#>.

# XVII

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## The Legality of Operation Iraqi Freedom under International Law

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Michael N. Schmitt\*

In the months preceding the attack on Iraq by the US-commanded “coalition of the willing,”<sup>1</sup> few issues captured greater international attention than the legality of the impending armed conflict. Even United Nations Secretary-General Kofi Annan entered the fray, intimating that an attack without the imprimatur of a Security Council mandate would violate the UN Charter.<sup>2</sup> Once Operation Iraqi Freedom began on March 19, 2003, however, one might have expected the brouhaha to die down, particularly given the speed of victory, and the fact that the troubled occupation should have diverted attention from *jus ad bellum* reservations.<sup>3</sup> Indeed, controversy regarding the legality of the two campaigns the United States and United Kingdom had recently conducted, Operations Allied Force and Enduring Freedom,<sup>4</sup> faded quickly once hostilities ended.

Yet, as this article is being written in early 2004, the controversy over Iraqi Freedom rages on. The 2004 US presidential election campaign has contributed to the staying power of the issue. So too have the transatlantic and intra-European

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divides created, or at least exacerbated, by virulent opposition to the war on the part of some European States, especially France and Germany. The seeming inability of weapons inspectors to locate the alleged weapons of mass destruction (WMD) capabilities that President Bush pointed to so frequently as war clouds loomed, and the failure to find a smoking gun tying Iraq to Al Qaeda, have added fuel to the fire.

Given the panoply of justifications for the operation bandied about by governments, politicians, political commentators, legal experts, non-governmental organizations, and the public at large, Iraqi Freedom serves as a fascinating *jus ad bellum* case study. This article considers those most commonly posed—implicit Security Council authorization, self-defense against State support to terrorism, anticipatory (often mislabeled preemptive) self-defense against terrorism and weapons of mass destruction, breach of the 1991 cease-fire, humanitarian intervention, and regime change. States mounting the attack formally proffered only breach of the cease-fire that ended the first Gulf War as its legal basis. However, unofficial sources in policy and academic circles floated the others as independent grounds for the action, and the States involved cited each as a *de facto*, albeit not legal, factor legitimizing the attack.

### *Implicit Security Council Authorization*

The most universally accepted basis for the use of force is authorization by the United Nations Security Council. Before granting it, the Council must determine, pursuant to Article 39 of the UN Charter, that a particular situation amounts to a threat to the peace, breach of the peace, or act of aggression. Once it does so, the Security Council must first attempt to resolve the matter by employing non-forceful measures, such as an embargo.<sup>5</sup> If non-forceful actions prove unsuccessful, or if it believes that attempting them would be “inadequate,” the Council may then, acting under Article 42, “take such action by air, sea, or land forces as it may deem necessary to maintain or restore international peace and security.” Such actions are known as “Chapter VII enforcement operations,” a reference to the Charter chapter in which the relevant articles appear.

This decision generally comes in the form of a Security Council resolution containing a mandate to use “all necessary means” to achieve a specified end. For instance, Resolution 678 of 1990 authorized “Member States cooperating with Kuwait” to use all necessary means to “uphold and implement Security Council Resolution 660 and all subsequent relevant resolutions and to restore international peace and security.”<sup>6</sup> Resolution 660 had demanded the withdrawal of Iraqi forces from Kuwait following their August 1990 invasion.<sup>7</sup> Mandates can be issued to

individual States or an ad hoc coalition thereof, to a regional security organization such as NATO, or to a UN commanded and controlled force.<sup>8</sup>

As events unfolded in late 2002 and early 2003, the United States and United Kingdom actively sought a Security Council mandate for action against Iraq. However, the best they could achieve was Resolution 1441, which did not contain the desired “all necessary means” clause.<sup>9</sup> Both countries abandoned subsequent efforts to secure a follow-on use of force resolution when France and Russia threatened to exercise their veto authority.

Resolution 1441, passed unanimously on November 8, condemned Iraq’s failure to fully disclose information about its weapons of mass destruction and ballistic missile programs,<sup>10</sup> cooperate with weapons inspectors,<sup>11</sup> end ties to terrorism,<sup>12</sup> cease repression of its population,<sup>13</sup> facilitate humanitarian assistance by aid agencies,<sup>14</sup> and cooperate in accounting for missing individuals and property from the first Gulf War.<sup>15</sup> The resolution went on to find Iraq in “material breach” of these obligations under various resolutions, including Resolution 687, which, as conspicuously noted in 1441, set forth the terms of the 1991 cease-fire. After granting Iraq “a final opportunity” to comply with its disarmament obligations, imposing detailed requirements regarding the future weapons inspection regime, and demanding that Iraq “cooperate immediately, unconditionally, and actively” with inspectors from the International Atomic Energy Agency (IAEA) and United Nations Monitoring, Verification and Inspection Commission (UNMOVIC), the resolution ominously “recalled” “that the Council has repeatedly warned Iraq that it will face serious consequences as a result of its continued violations of its obligations.”

With war drawing close, some argued that Resolution 1441, standing alone, implicitly authorized the impending attack. The resolution specifically noted that the Security Council was operating under Chapter VII of the UN Charter, which provides the basis for authorizing the use of force in response to a threat to the peace. Although it gave Iraq a *final* opportunity to meet its obligations, Chief UN Weapons Inspector Hans Blix briefed the Council on March 7, 2003 that Iraq had not cooperated “immediately,” as required by Resolution 1441.<sup>16</sup> Finally, the resolution warned of “serious consequences” if Iraq failed to meet the Council’s conditions. Given prior sanctions on Iraq, the phrase could only have been a reference, so the argument goes, to forceful disarmament. Thus, when Iraq failed to cooperate immediately with the inspectors, the 1441 condition precedent for the use of force presented itself.

This line of reasoning is fundamentally flawed. First, the lack of the “all necessary means” clause evidences the Council’s discord over whether armed force constituted the appropriate remedy for Iraq’s failure to meet its obligations. Moreover,

in 1990 the Security Council had likewise given Iraq a “final opportunity” to meet its obligations under prior resolutions, most significantly withdrawal from Kuwait.<sup>17</sup> But on that occasion it also authorized Member States that were cooperating with Kuwait to “use all necessary means” to uphold and implement the resolutions and “restore international peace and security in the area” if Iraq failed to comply with them by January 15, 1991. Thus, Iraqi non-compliance automatically triggered the use of force mandate. Resolution 1441 contained no such trigger.

In fact, only the *non*-inclusion of the “all necessary means” language made Resolution 1441’s adoption possible. During the Security Council session that approved the resolution, France, Russia, and China insisted that they viewed 1441 as but the first step in a two-step process, and that only the Council could decide what to do in the event of Iraqi non-compliance. The French Ambassador was particularly pointed: “France welcomes the fact that all ambiguity on this point and all elements of automaticity have disappeared from the resolution.”<sup>18</sup>

Tellingly, US Ambassador Negroponte conceded as much in his own remarks.

As we have said on numerous occasions to Council members, this resolution contains no “hidden triggers” and no “automaticity” with respect to the use of force. If there is a further Iraqi breach, reported to the Council by UNMOVIC, the IAEA or a Member State, the matter will return to the Council for discussions as required in paragraph 12.<sup>19</sup>

Portentously, he went on to qualify his comments.

The resolution makes clear that any Iraqi failure to comply is unacceptable and that Iraq must be disarmed. And, one way or another, Iraq will be disarmed. If the Security Council fails to act decisively in the event of further Iraqi violations, this resolution does not constrain any Member State from acting to defend itself against the threat posed by Iraq or to enforce relevant United Nations resolutions and protect world peace and security.<sup>20</sup>

Consistent with this approach, the United States later returned to the Security Council to urge armed force, most famously on February 5, 2003 when Secretary of State Colin Powell briefed it on Iraq’s failures and urged the Council to “not shrink from whatever is ahead.”<sup>21</sup> As noted, the Council did not act, a failure that led President Bush to proclaim: “The United Nations Security Council has not lived up to its responsibilities, so we will rise to ours.”<sup>22</sup> Therefore, it should be apparent that when Coalition forces attacked days later, their legal basis for armed action was not Resolution 1441; nor would the resolution have provided a proper basis had they made such an assertion.

*Self-Defense against State Support to Terrorism*

Beyond Security Council authorization to use force under Chapter VII, the only other explicit exception to Charter Article 2(4)'s broad prohibition on the use of force<sup>23</sup> is self-defense pursuant to Article 51. Article 51 provides 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." Thus, whereas a mere threat to the peace suffices to engage the Security Council's right to mandate forceful enforcement measures, an armed attack is the condition precedent for self-defense.

The terrorist attacks of September 11, 2001 crystallized the applicability of the law of self-defense to acts of terrorism. The following day the Security Council passed Resolution 1368 affirming the "inherent right of self-defense as recognized by the Charter of the United Nations." On September 28, it again cited the right to self-defense in Resolution 1373, which set forth a number of measures to combat terrorism. Subsequent resolutions reaffirmed 1368 and 1373, thus implicitly acknowledging that the situation implicated the right to self-defense.<sup>24</sup>

However, by March 19, 2003, Iraq had not conducted terrorist attacks against the United States, nor was there an immediate threat of it doing so. True, in 1993, Iraq had been involved in an assassination plot against former President George Bush, Sr., to which the United States responded with cruise missile strikes. But since then, no known terrorist attacks have been conducted by Iraqi agents. Therefore, any justification of Operation Iraqi Freedom related to ongoing terrorism must be based on Iraq's *support* of terrorists, such as Al Qaeda.

The law surrounding the use of force against State supporters of terrorism has experienced a sea change over the past two decades. Recall that Operation El Dorado Canyon, the 1986 package of US air strikes against Libya following a terrorist attack in Berlin that targeted US military personnel, generated nearly universal condemnation. With the exception of Israel and the United Kingdom, even close allies of the United States criticized the operation.<sup>25</sup> The General Assembly passed a resolution condemning it as a violation of international law,<sup>26</sup> and Secretary-General Javier Perez de Cueller stated that he "deplored" the "military action by one member state against another."<sup>27</sup>

State support of guerilla forces surfaced in a judicial opinion rendered the same year. In *Military and Paramilitary Activities*, a case between the United States and Nicaragua, the International Court of Justice addressed the appropriateness of imputing an armed attack to a State because of its sponsorship of rebels such that military action against the State itself is appropriate in self-defense.<sup>28</sup> The Court held

that a State committed an armed attack by “the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to (*inter alia*) an actual armed attack conducted by regular forces, or its substantial involvement therein.”<sup>29</sup> The opinion went on to state that “[t]his description, contained in Article 3, paragraph (g), of the Definition of Aggression annexed to General Assembly Resolution 3314 (XXIX), may be taken to reflect customary international law.”<sup>30</sup> Reduced to basics, the requirement was that the group be acting on behalf of the State or that the State have been otherwise highly involved in the actual operation.

Yet, when the United States and United Kingdom directly attacked the Taliban, the de facto government of Afghanistan, because of its decision to “allow the parts of Afghanistan that it controls to be used by [Al Qaeda] as a base of operations,”<sup>31</sup> the international community was very supportive. In addition to UK participation in the initial strikes, Georgia, Oman, Pakistan, the Philippines, Qatar, Saudi Arabia, Tajikistan, Turkey, and Uzbekistan provided airspace and facilities. China, Egypt, Russia, and the European Union publicly backed the operations, while even the Organization for the Islamic Conference limited itself to urging the United States to restrict its campaign to Afghanistan.<sup>32</sup> Australia, Canada, the Czech Republic, Germany, Italy, Japan, The Netherlands, New Zealand, Turkey, and the United Kingdom offered ground troops.<sup>33</sup> Paradoxically, this all occurred in spite of the fact that the Taliban were more dependent on Al Qaeda (for support in its conflict with the Northern Alliance) than vice versa, and therefore did not appear to fit the *Military and Paramilitary Activities* standard.

Particularly indicative of the shifting attitude towards the degree of State support that rises to the level of an armed attack is the fact that the justification for attacking the Taliban was contained in the required US notification to the Security Council that it was acting in self-defense. Therefore, the international community was clearly on notice that the United States characterized its action as one in self-defense and it appears to have accepted the premise that, in appropriate circumstances, State supporters of terrorism risk a military response pursuant to that right.

That said, the precise level of State support that amounts to an armed attack remains uncertain. The horror of 9/11, particularly the number of casualties and the direct targeting of innocent civilians, clearly contributed to international acceptance of the US response. So too did the fact that the United Nations had repeatedly warned the Taliban to put an end to terrorist activities on its territory,<sup>34</sup> as had the United States post-9/11.<sup>35</sup> The fact that the Taliban were internationally ostracized made striking them even more palatable. Nevertheless, the attack against the Taliban and the response thereto were certainly watershed events for the law

surrounding lawful responses to State support of terrorism. Without any doubt, the degree of support necessary to constitute an armed attack has dropped precipitously.

And what of Iraq's complicity in terrorism? Failure of occupation forces to find a direct link between Saddam Hussein and Al Qaeda attacks (or any other terrorist forces actively conducting operations against the United States) is relevant, but not dispositive. International law judges actors by what they reasonably believed under the circumstances.<sup>36</sup> Therefore, the question is not whether there were links between Iraq and terrorists, but rather would any links the United States rationally thought existed, even mistakenly, have justified an attack on Iraq in self-defense?

Defensive actions must also meet the legal criteria of necessity and proportionality in the face of an immediate threat.<sup>37</sup> Necessity requires that there be no reasonable alternative to the use of force; proportionality limits the force used to that required to actually defeat the attack; and imminency requires the self-defense to occur only during the last window of opportunity to mount an effective defensive operation.

Secretary of State Powell provided the most comprehensive picture of what the United States believed regarding Iraqi complicity in his February 5, 2003 briefing to the Security Council. The Secretary made the case that "Iraq . . . harbours a deadly terrorist network headed by Adu Musab al-Zarqawi, an associate and collaborator of Osama bin Laden and his Al Qaeda lieutenants."<sup>38</sup> According to Powell, Zarqawi set up a terrorist training camp in Afghanistan, which he subsequently moved to northeastern Iraq after the United States ousted the Taliban from Afghanistan. Although this camp was located outside territory controlled by the Iraqi government, Baghdad did have an agent in Ansar al-Islam, the radical organization that controlled the area. That agent provided some members of Al Qaeda safe haven. Powell went on to claim that Al Qaeda associates had moved into the capital, where they operated freely. Further, he asserted that over the past decade there had been frequent contacts between Iraqi agents and Al Qaeda and that interrogation of an Al Qaeda detainee led to an admission that Iraq provided chemical and biological weapons training for two members of the organization.<sup>39</sup>

US concerns about Iraqi involvement in terrorism were not isolated. Even the Security Council had determined that "Iraq has failed to comply with its commitments pursuant to resolution 687 (1991) with regard to terrorism. . . ."<sup>40</sup> Assuming that the US allegations were reasonable and made in good faith, did they justify a response in self-defense?

To begin with, by linking Iraq to Al Qaeda, the issue of *anticipatory* self-defense becomes moot. Al Qaeda has been conducting a campaign of terrorism against the United States for at least a decade.<sup>41</sup> Its attacks (planned or executed) can hardly be

characterized as isolated, independent actions, with each response judged separately for compliance with the law of self-defense. US defensive actions are not anticipatory, but rather undertaken in the face of an ongoing campaign.

Was Iraq's involvement in this campaign sufficient to merit an attack directly against the country? It would appear not. The major factor that Powell emphasized was the presence of a key Al Qaeda operative in northern Iraq. However, this was an area beyond the control of the government. Further, to the extent Iraq harbored terrorists, that activity certainly did not rise to the level of Taliban/Al Qaeda connections, with terrorist camps operating openly in Afghanistan. The additional contacts that Powell cited were insufficiently developed to merit characterizing the Al Qaeda campaign as an armed attack by Iraq. As demonstrated by the international condemnation of the 1998 US cruise missile strike on a Sudanese pharmaceutical plant (in contrast to acceptance of a related strike against a terrorist facility in Afghanistan), the international community insists that the evidence on which States base counter-terrorist defensive operations be reliable.<sup>42</sup>

### *Anticipatory Self-Defense against WMD and Terrorism*

Although some commentators argued that Iraqi ties to Al Qaeda legally justified Operation Iraqi Freedom as self-defense against an ongoing attack, anticipatory self-defense<sup>43</sup> found greater support within the legal and policy communities, specifically anticipatory defense against the dual evils of weapons of mass destruction (whether wielded by a State or terrorists) and transnational terrorism (whether State sponsored or not). And Operation Iraqi Freedom made good on President Bush's September 2002 National Security Strategy promise, echoed in his published weapons of mass destruction and terrorism strategies, to act preemptively when necessary.<sup>44</sup>

The inability to deter a potential attacker, the immediacy of today's threats, and the magnitude of potential harm that could be caused by our adversaries' choice of weapons do not permit [relying on a reactive posture]. We cannot let our enemies strike first.<sup>45</sup>

Legal arguments based on anticipatory self-defense usually falter on the criterion of imminency. Recall the international law requirements that an act of self-defense be proportional and necessary to an armed attack that is either imminent or underway. They derive historically from an 1837 incident involving the *Caroline*, a vessel used to supply Canadian rebels fighting British rule during the Mackenzie Rebellion. British forces crossed into the United States (after asking the United States,

without result, to put an end to rebel activities on its territory), captured the *Caroline*, set it ablaze, and sent it over Niagara Falls. Two US citizens perished.

An exchange of diplomatic notes ensued in which Secretary of State Daniel Webster argued that defensive actions require “a necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation . . . [and must be] justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it.”<sup>46</sup> Lord Ashburton, his British counterpart, accepted this formula as the basis of their exchange.<sup>47</sup> Both the International Military Tribunal at Nuremberg and the International Court of Justice have cited the standard with approval.<sup>48</sup>

By any measure of estimation, Iraq was not about to launch an attack on the United States, with weapons of mass destruction or otherwise, in the immediate future. Nor is there any compelling evidence of Iraq distributing weapons of mass destruction to transnational terrorists or in any other way directing or sponsoring specific and imminent attacks on the United States. Rather, the United States believed that Iraq had failed to fully disarm as required by the UN disarmament regime; had not fully accounted for the biological and chemical weapons, such as anthrax and the nerve agent VX it possessed immediately after the first Gulf War; could rapidly produce and disperse more such weapons; was actively concealing efforts to develop additional weapons of mass destruction, as well as existing capabilities, for instance, by dispersing rocket launchers and warheads containing biological warfare agents into western Iraq while Resolution 1441 was under negotiation; was determined to develop a nuclear weapon and was seeking the capability to produce fissile material; and was developing the ability to deliver weapons of mass destruction with ballistic missiles and unmanned aerial vehicles (UAV).<sup>49</sup> Although assertions that Iraq possessed biological and chemical weapons and a nuclear weapons development program are highly doubtful in light of the failure of post-attack weapons inspectors to discover convincing evidence thereof,<sup>50</sup> bear in mind that it is the reasonable belief of the attacker, even if mistaken, that is legally relevant.

While these “facts” arguably fail to meet the imminency criterion as it is traditionally understood, in its National Security Strategy the United States has asserted that imminency must be interpreted more liberally in the current circumstances:

We must adapt the concept of imminent threat to the capabilities and objectives of today’s adversaries. Rogue states and terrorists do not seek to attack us using conventional means. They know such attacks would fail. Instead, they rely on acts of terror and, potentially, the use of weapons of mass destruction—weapons that can be easily concealed, delivered covertly, and used without warning.<sup>51</sup>

Indeed, the Congressional joint resolution authorizing the President to commit US forces to battle against Iraq adopted exactly this liberal interpretation of anticipatory self-defense. Whereas Iraq's demonstrated capability and willingness to use weapons of mass destruction, the high risk that the current Iraqi regime will either employ those weapons to launch a surprise attack against the United States or its Armed Forces or provide them to international terrorists who would do so, and the extreme magnitude of harm that would result to the United States and its citizens from such an attack, combine to justify action by the United States to defend itself. . . .<sup>52</sup>

Those who urge fidelity to an outdated restrictive interpretation of imminency fail to grasp the realities of twenty-first-century conflict. In an era when the enemy may be a shadowy non-State group intent on remaining invisible until it strikes its blow, a requirement to withhold defensive action until that blow is about to land would render the right to self-defense meaningless. Exacerbating matters is the fact that, given WMD proliferation, any miscalculation as to when an attack will come could be fatal.

If international law is to contribute to the maintenance of global order, the rights and duties it sets out must be interpreted not only in conformity with their core purposes, but also with sensitivity to the security context in which they are applied. The requirement of imminency deters States from resorting precipitously to the most powerful—and potentially destabilizing—option available in international relations. On the other hand, the right of self-defense exists to allow States an effective shield against aggression. In the Charter framework, the recognition of this inherent right compensates for the possibility (a *de facto* likelihood) that the Chapter VII scheme for maintaining or restoring international peace and security might fail.

A careful balancing of the presumption against using force with the need to allow States an effectual defense suggests the appropriate standard. Stated in the affirmative, a State may act anticipatorily (preemptively) if it must strike immediately to defend itself in a meaningful way and the potential aggressor has irrevocably committed itself to attack. The determinative question when evaluating claims to anticipatory self-defense is whether the defensive action occurred during the last possible window of opportunity in the face of an attack that was almost certainly going to occur.

This approach to imminency generally operates synergistically with the necessity criterion. After all, if the use of force is not the sole remaining viable option for resolving the matter, then in most cases the last window of opportunity will not have been reached.

Assuming, for the sake of analysis, the facts believed by the Coalition at the moment it acted, the case for acting anticipatorily was weak. There is no doubt that

Iraq presented some threat to the United States and its Coalition partners, particularly given its ties to transnational terrorism, its demonstrated willingness to use weapons of mass destruction, its possession of such weapons, and its decade-long hostility to the United States. However, little evidence existed of an Iraqi intention to use WMD in the near future. Nor did Iraq possess a reliable means of delivering those weapons over great distances. Further, although Iraq unquestionably had connections to terrorism, there was no suggestion that it was about to transfer the weapons it reportedly possessed to terrorists.

On the contrary, both individual States and the United Nations had the country under a microscope. Moreover, the lessons of Afghanistan could not have been lost on the Iraqis. The Iraqi leadership must have realized that any use of WMD against the United States, whether by themselves or Iraqi-supported terrorists, would have proven suicidal. Indeed, use against any State, or even an internal group, would have been exceedingly irrational, for such use would have immediately silenced opposition to a use of force mandate in the Security Council. In fact, UN pressure was serving as an incentive for compliance, a fact apparent in Iraqi acceptance of inspectors pursuant to Resolution 1441, and its subsequent cooperation, however grudging, with them; clearly, the Iraqis feared an attack. To conclude in these circumstances that Iraq was simultaneously planning a strike against the United States or any Coalition partner, and that March 2003 represented the last window of opportunity to mount an effective defense, would have been illogical.

In the case of Iraq, anticipatory self-defense arguably fails on the other two criteria as well. That the Iraqis had not fully complied with the requirements of the relevant Security Council resolutions is unquestionable; but international pressure on Iraq had seen progress, particularly following the US and UK saber rattling and the Council's adoption of Resolution 1441. Neither inspection team believed it had reached a dead end. And the Security Council could not even agree that force was needed to enforce its prior resolutions, an easier conclusion to reach than one that held an attack was forthcoming and only an immediate armed response could stave it off. Thus, Operation Iraqi Freedom falters on the necessity criterion.

But even had an attack been necessary in March 2003, some might have argued that conquest and belligerent occupation of the country was disproportionate. For instance, selected air strikes against WMD-related targets, or perhaps even a rolling campaign designed to impose ever-greater costs, might have compelled Iraq to dismantle its capabilities, cooperate fully with international weapons inspectors, and refrain from further involvement with terrorists. That said, given Saddam Hussein's record of intransigence (and in light of Operation Desert Fox's inability to convince him to readmit weapons inspectors), assertions of disproportionality

are unconvincing. Of course, because the operation was not “necessary” as that term is understood in the law of self-defense, the entire issue is purely theoretical.

### *Breach of the 1991 Cease-Fire*

The lead Coalition partners, the United States and United Kingdom, did not base the *legality* of their attack against Iraq on a self-defense argument, anticipatory or otherwise. Before commencing hostilities, the United Kingdom made this clear in a formal opinion of the Attorney General.<sup>53</sup> The United States issued no comparable official legal opinion, a problem because the US administration was publicly discussing possible reasons for the attack that ranged from WMD and enforcing cease-fires to terrorism and regime change.<sup>54</sup> However, immediately after launch of Operation Iraqi Freedom, the United States addressed a letter to the President of the Security Council in which it outlined its legal rationale for resorting to armed force, a justification very similar to that contained in the earlier Attorney General opinion.<sup>55</sup> The United Kingdom did likewise.<sup>56</sup>

It is important to distinguish these *formal legal* justifications from the myriad other justifications suggested by the US and UK governments, many of which appeared to be robed in the mantle of the law. For instance, in his notification to Congress that the United States was employing force against Iraq, the President stated he has determined that “further diplomatic and other peaceful means alone will neither adequately protect the national security of the United States against the continuing threat posed by Iraq, nor lead to enforcement of all relevant United Nations Security Council resolutions regarding Iraq.”<sup>57</sup> Some might conclude that such statements indicate application of the preemptive self-defense strategy announced in the 2002 National Security Strategy. Such assertions confuse strategy with the underlying legal basis for application of a strategy in particular circumstances. Precision requires distinguishing strategic rationale from underlying legal justification.

To date, the most complete “official” presentation of the legal position taken by the United States is contained in an article coauthored by the US State Department’s Legal Adviser, William H. Taft IV, and the Assistant Legal Adviser for Political/Military Affairs, Todd F. Buchwald, in the *American Journal of International Law*.<sup>58</sup> In that piece, they amplify on the rationale contained in letters to the Council President. They begin by accurately dispensing with the notion that preemptive self-defense is either necessarily legal or illegal; such assertions are red herrings because the legality of preemptive actions is always fact-specific.<sup>59</sup> They then turn to the US legal basis for Operation Iraqi Freedom, one grounded in both the situation in 2002–3 and the history of the Iraq case over the past dozen years. Their analysis

combined with that contained in the US and UK notifications to the Security Council and the Attorney General's opinion yield the following justification for the war.

After Iraq invaded Kuwait on August 2, 1990, the United Nations Security Council passed Resolution 660, declaring the attack a breach of the peace and demanding immediate withdrawal.<sup>60</sup> Over the ensuing two months, it passed a number of resolutions imposing sanctions on Iraq in the hope of pressuring it to comply with 660.<sup>61</sup> Finally, on November 29 the Council, pursuant to its Chapter VII authority, adopted Resolution 678, which authorized States cooperating with Kuwait to use "all necessary means" to implement 660 and subsequent resolutions and "to restore international peace and security in the area."<sup>62</sup> The latter phrase is particularly relevant as it empowered the use of force not merely to expel the Iraqi military from Kuwait, but also to create the conditions necessary for regional stability. In order to afford Iraq "one final opportunity," the resolution set a compliance deadline of January 15, 1991. Meanwhile, the United States and a number of other States had deployed forces to the region "in the exercise of the inherent right of individual and collective self-defense."<sup>63</sup>

When Iraq failed to comply with the UN resolutions by the deadline, Coalition forces attacked. This action was taken pursuant to 678, not a new Security Council mandate; thus, individual States—not the Security Council—determined Iraq had not complied and took the decision to attack. By March 3, Iraqi forces were in retreat and field commanders negotiated a cease-fire.

Exactly one month later, the Security Council adopted Resolution 687.<sup>64</sup> It set forth the terms of a cease-fire that would come into effect upon Iraqi acceptance, including terms relating to such issues as borders, terrorism, and, most significantly, WMD disarmament. A system of inspections (and weapons destruction) by the United Nations Special Commission (UNSCOM) and IAEA was set up for this latter purpose. Iraq grudgingly accepted the terms on April 6 in a letter to the Security Council.<sup>65</sup>

As a matter of law, material breach of the terms of a cease-fire by one side releases the other from its own obligations, including that to refrain from the use of force.<sup>66</sup> Those who suggest that breach of a cease-fire contained in a Security Council resolution requires a subsequent use of force mandate before resuming hostilities ignore the fact that the state of war continues during a cease-fire.<sup>67</sup> Cease-fires are merely temporary cessations of hostilities, usually agreed upon in order to facilitate negotiations on formal termination of hostilities. Only when hostilities have formally ended, for instance through a peace agreement, does the UN Charter Article 2(4) prohibition on the use of force become operative again as between the parties to the conflict.<sup>68</sup>

On a number of occasions, Coalition forces had responded to Iraqi breaches forcibly, most notably in 1993 and 1998. Although the Security Council did not specifically authorize the use of force either time, significant indications of concurrence with the position that Resolution 678 alone sufficed to justify a resumption of hostilities existed in both cases. Not only did France (an opponent of the 2003 action) participate in the 1993 operation with the United States and United Kingdom, but Secretary-General Boutros-Ghali stated:

the raid was carried out in accordance with a mandate from the Security Council under resolution 678 (1991), and the motive for the raid was Iraq's violation of that resolution which concerns the cease-fire. As General-Secretary of the United Nations, I can tell you that the action was taken in accordance with the resolutions of the Security Council and the Charter of the United Nations.<sup>69</sup>

Similarly, following the 1998 Operation Desert Fox strikes, a vituperative debate over the necessity of a Security Council Resolution finding Iraq in material breach as a condition precedent to attack took place; tellingly, this debate assumed that if the Security Council had rendered such a finding, States could have used force in response thereto.<sup>70</sup>

In fact, in the years following implementation of the cease-fire, the Security Council found Iraq in non-compliance with Security Council resolutions on multiple occasions. For instance, in August 1991, the Council condemned Iraq's "serious violation of a number of its obligations under . . . resolution 687 (1991) and of its undertakings to cooperate with the Special Commission and the International Atomic Energy Agency, which constitutes a material breach of the relevant provisions of that resolution which established a cease-fire. . . ."<sup>71</sup> In March 1998, the Council issued a stern warning to Iraq that "compliance . . . with its obligations . . . to accord immediate, unconditional and unrestricted access to the Special Commission and the IAEA, in conformity with the relevant resolutions, is necessary for the implementation of resolution 687 (1991) . . . [and] that any violation would have the severest consequences for Iraq."<sup>72</sup> That November, the Council condemned Iraq for "the decision . . . of 31 October 1998 to cease cooperation with the Special Commission" and labeled the step a "flagrant violation of resolution 687 (1991) and other relevant resolutions. . . ."<sup>73</sup> Operation Desert Fox commenced on December 16, 1998 and continued for three days, but Iraq refused to admit inspectors for the next four years.

The most relevant finding of breach came when the Security Council unanimously adopted Resolution 1441 on November 8, 2002. As outlined above, in that resolution the Council determined that Iraq had failed to comply with

requirements to disclose WMD information, cooperate with weapons inspectors, cut ties to terrorists, cease repression of its population, facilitate humanitarian assistance, and cooperate in accounting for human and property losses from the first Gulf War. It affirmed “Iraq has been and remains in material breach of its obligations under relevant resolutions, including resolution 687 (1991), in particular through Iraq’s failure to cooperate with United Nations inspectors and the IAEA and to complete actions required under paragraphs 8–13 of resolution 687 (1991).”<sup>74</sup> Resolution 1441 also specifically “recalled” that Resolution 678 had authorized the use of “all necessary means” to uphold and implement both prior *and subsequent* relevant UN resolutions (thereby including 1441) and restore international peace and security. The Council afforded Iraq a “final opportunity” to meet its obligations, but “failure by Iraq at any time to comply with and cooperate fully in the implementation of this resolution [which requires a declaration on all aspects of the Iraqi WMD program and cooperation with inspectors] shall constitute a *further material breach* of Iraq’s obligation. . .” (emphasis added). Resolution 1441 concluded with a stern warning of “serious consequences” in the event of “continued violation [by Iraq] of its obligations.” Significantly, 1441 required the Security Council to reconvene if Iraq did not fulfill its obligations. As noted earlier, the Council did so to consider the reports of weapons inspectors, who did not give Iraq a clean bill of health, and the concerns of individual States, most notably the United States.

What Resolution 1441 did not contain was a requirement to return to the Council for a use of force authorization. As noted by the US legal advisers, earlier drafts circulated among the Security Council members required the Council to meet again to “*decide* any measures to ensure full compliance of all its relevant resolutions.”<sup>75</sup> Negotiations led to the rejection of this wording.

Based on these facts, the United States and its coalition partners presented a rather linear argument. Resolution 687 (1991) conditioned the cease-fire on Iraqi compliance with its terms. Iraq had not fully complied, resulting in several Security Council declarations that such non-compliance amounted to material breach. The Council even gave Iraq a “final opportunity” to bring itself into conformity and placed Iraq on notice that further non-compliance would constitute a material breach which could result in serious consequences. In the US view, the Security Council should have acted at that point to enforce its own resolutions, but did not. Therefore, the United States and other Coalition States were released from their cease-fire obligations and the initial use of force authorization contained in Resolution 678 became operative again, as it had on multiple occasions in the previous decade. The sole limitation on their actions was that they do no more than authorized by the broad mandate contained in Resolution 678 —to enforce past and

future Council resolutions and restore international peace and security. Given more than a decade of violation of Security Council resolutions intended to create the conditions for stability, ousting Saddam Hussein and the Baathists from power fell neatly within that mandate.

As a matter of law, this line of argumentation is sound. Under the principles of humanitarian law, cease-fires are clearly temporary measures that bind parties thereto only so long as the other side is not in material breach. The Security Council had agreed in November 2002 that Iraq was in breach (thereby mooted any argument about whether a US or UK assertion of breach was justified). Further, immediately prior to the attack the UN's own inspectors asserted that the Iraqis were not meeting all the requirements imposed on them, a situation which 1441 had pre-determined to be a further material breach. As a general matter of law, hostilities may immediately resume in the event of material breach. In this particular case, the right to resume hostilities was clearer still, for the cease-fire resolution specifically reaffirmed Resolution 678, which authorized the use of force, "except as expressly changed." The only change to that resolution was imposition of the cease-fire itself. But with the cease-fire materially breached, the 678 use of force authorization came back into play by the express terms of Resolution 687.

Some have claimed that only the Security Council was authorized to determine how to respond to the cease-fire breach it had acknowledged in Resolution 1441 and previous resolutions. However, such assertions ignore the fact that the cease-fire was not between the United Nations and Iraq, but, according to 687, "Iraq and Kuwait and member States cooperating with Kuwait in accordance with resolution 678 (1990)." Therefore, those States were empowered under international law to determine whether to resort to force once a material breach of the cease-fire to which they were a Party occurred.<sup>76</sup> The fact that Resolution 687 provided the Security Council remained "actively seized of the matter" has similarly been misinterpreted as indicating that exclusive authority to mandate a response resided in the Council. In fact, the phrase is nothing more than standard text appearing in many resolutions indicating the Security Council will continue to address the situation at hand (as it did with 1441 and other post-687 resolutions). Unless specifically provided, such text does not preclude actions (that are in compliance with international law) taken by States or other international governmental organizations to respond to a situation. It has also been argued that the use of force authorization was limited to expelling the Iraqis from Kuwait, and that any use of force beyond that purpose would require further Council authorization. However, the stated purpose of 678 was to "uphold and implement resolution 660 (1990) and all subsequent resolutions and to restore international peace and security in the area." That this was a broad grant of authority is evidenced by inclusion of the diversity of

cease-fire terms (from borders to disarmament) in Resolution 687. Clearly, in 1990–91, the Council understood that restoring international peace and security involved much more than merely liberating Kuwait.

Admittedly, this line of analysis, albeit legally valid, poses a difficult practical dilemma, for the views of the Security Council on the use of force against Iraq differed dramatically in March 2003 from those of April 1991. Yet, the Council, in the face of US and UK opposition, was powerless to withdraw, or even modify, either its 1990 use of force authorization or the terms of its 1991 cease-fire.<sup>77</sup> This is a particularly vexing problem given post-conflict difficulties of finding the WMD or terrorism smoking guns. Thus, we witnessed a use of force based on Security Council resolutions that the Council itself would not have approved had it been the sole decision-maker. It represented the triumph of law over policy.

In the future, the Council is likely to be very reticent about granting open-ended continuing authority to employ force. In particular, it can be expected to carefully craft its Chapter VII resolutions to require explicit follow-on authorization for any resumption of hostilities should a cessation of hostilities occur. That said, the paradoxical legal fact remains that based on the interplay of a series of Security Council resolutions and the law of cease-fires, Operation Iraqi Freedom was legal.

### *Humanitarian Intervention*

There is no question that the Security Council could have authorized an intervention into Iraq based on the regime's mistreatment of its population. In doing so, the internal situation need merely have represented a "threat to the peace" under Article 39 of the Charter, such that the Council's Article 42 authority vested. Since the Council itself determines when a threat has emerged, it enjoys unfettered discretion in authorizing a forcible humanitarian intervention under Chapter VII of the Charter.

The Security Council has mandated such interventions on numerous occasions. For instance, when internal order in Somalia collapsed in 1992, the Council authorized "member States . . . to use all necessary means to establish as soon as possible a secure environment for humanitarian relief operations in Somalia."<sup>78</sup> The United States responded with Operation Restore Hope, conducted by the multinational Unified Task Force (UNITAF). The following year, acting under Chapter VII, the Council approved the replacement of UNITAF by the United Nations Operation in Somalia (UNOSOM) II.<sup>79</sup>

The nature of the intervention need not be classically humanitarian. In 1994, the Security Council authorized member States to forcibly intervene in Haiti to effect the "restoration of the legitimate authorities of the Government of Haiti."<sup>80</sup>

Although the resolution cited the humanitarian situation in the country, including the denial of civil liberties, the intent was clearly political in purpose—regime change through “the prompt return of the legitimately elected President, Jean-Bertrand Aristide, within the framework of the Governors Island Agreement.”<sup>81</sup>

Some humanitarian interventions mounted without Security Council sanction have subsequently acquired the support of the Council. In 1990, the Economic Community of West African States (ECOWAS) intervened in Liberia without UN approval. The following year, a Security Council Presidential Statement “commended the efforts made by the ECOWAS Heads of State and Government to promote peace and normalcy in Liberia.”<sup>82</sup> When fighting broke out again in 1992, the Council praised ECOWAS for its role in addressing this “threat to international peace and security.”<sup>83</sup> ECOWAS conducted yet another humanitarian intervention without Security Council sanction in 1997 when events in Sierra Leone slipped out of control. As in the Liberia case, an *ex post facto* Presidential Statement commended ECOWAS for the “important role” it was playing “towards the peaceful resolution of this crisis.”<sup>84</sup>

Although also conducted without Security Council objection, these cases can be readily distinguished from the situation in Iraq. First, regional organizations carried them out, thereby adding some degree of legitimacy to the operations. Further, there was no apparent opposition to the interventions in the Security Council, and certainly none from any of the Permanent Five. Finally, in both countries the humanitarian crisis was widespread, immediate, and horrendous.

The 1999 NATO intervention in Kosovo represents a closer case because there the Security Council had previously labeled the situation a threat to the peace as in Iraq and the operation was mounted in the face of opposition on the Security Council, most significantly from Russia. Unsurprisingly, Operation Allied Force generated significant criticism from the international legal community. Although few contested the legitimacy of the NATO operation, many supporters acknowledged the frailty of its asserted legal basis. Kosovo was not, after all, Rwanda, where deaths numbered in the hundreds of thousands. In that case, individual States and the international community were roundly criticized for inaction; but it was the scale of the tragedy that tended to underpin such criticism.<sup>85</sup>

Even with the rise of concepts such as human rights, human dignity, world order, and sovereignty residing in the citizenry rather than the government, international law continues to react negatively to the prospect of State A determining that events in State B merit resort to the use of force. UN Charter Article 2(4), which prohibits the use of force against the territorial integrity or political independence of any State, continues to enjoy normative positive valence. Asserting exceptions to this prohibition beyond those found within the four corners of the Charter—

self-defense and Security Council authorization—invariably generates skepticism and opposition.

Iraq lies further down the continuum of situations that might legally justify humanitarian intervention than the aforementioned cases. With Iraq, no regional organization rose to the challenge of intervention. On the contrary, close allies of those who did attack Iraq were openly opposed to intervention without Council approval. Further, the humanitarian situation in the country, albeit deplorable, did not rise to the level of suffering of the previous precedents. In the period preceding the attack, there is no question that torture was widespread, ethnic minorities were expelled from their homes, infant and child mortality rates had grown dramatically as a result of Saddam Hussein's non-cooperation with the "food-for-oil" program assets, and that the humanitarian situation was generally deteriorating.<sup>86</sup> Nevertheless, the scale and scope of suffering had not reached genocidal proportions as it had in Rwanda, nor was there fear of an imminent campaign of genocide, as in Kosovo. Simply put, the human situation in the country was not at a point where a majority of international legal scholars and practitioners would agree that a factual basis for humanitarian intervention, a controversial matter in international law even in the abstract, existed.

Thus, while the regime's treatment of the Iraqi population was morally and legally reprehensible, and although President Bush repeatedly cited such treatment as a rationale for action against Iraq (for example, during his 2002 State of the Union Address), it did not justify humanitarian intervention absent Security Council *de jure* or *de facto* acquiescence. Although the *jus ad bellum* has moved in the direction of increased acceptance of humanitarian intervention since the end of the Cold War, by March 2003 it had not reached situations such as that in Iraq. Thus, it is unsurprising that none of the countries participating in Operation Iraqi Freedom formally cited the internal suffering as legally justifying their action.

### *Regime Change*

In 1998, a distinguished group of individuals, many of whom now occupy key positions in the Bush administration, openly urged the removal by force of Saddam Hussein's regime.<sup>87</sup> Clearly, the Administration desperately desired regime change in Iraq. Yet, despite a self-evident need for a new regime in the country, and although the US administration actually demanded on March 17, 2003 that Saddam Hussein step down within 48 hours or face forceful removal,<sup>88</sup> there is no independent basis in international law for regime change. Rather, regime change can only be a legitimate consequence of otherwise legal uses of force.<sup>89</sup>

For example, the Security Council may determine that continued governance by a particular group threatens international peace and authorize the removal of that government under Chapter VII, as it did in the case of Haiti in 1994. Or it may determine that another situation amounts to a threat to the peace, breach of peace, or act of aggression and authorize the use of military force pursuant to Article 42 to restore international peace and security. If the fall of a regime results from the ensuing military action, that regime change would be legal. For instance, many argue that Coalition forces should have marched on Baghdad in 1991 to topple Saddam Hussein because with the dictator still in power it was impossible to permanently restore international peace and security pursuant to Resolution 678. Similarly, an effective defense, either individual or collective, may result in the fall of the regime that mounted an aggressive attack. It is even possible that a humanitarian intervention could result in removal of a regime, either as a coincidental consequence of the operation or because doing so is necessary to safeguard the civilian population. That certainly would have been the case with the Hutu-dominated government of Rwanda had external forces intervened in 1994 to stop its slaughter of the Tutsis. However, States may not, absent Security Council mandate, act for the sole purpose of removing a regime of which they disapprove; doing so would constitute a patent violation of Article 2(4) of the UN Charter. Therefore, in the absence of a separate legal basis for action (which existed in this case), any effort to remove Saddam Hussein from power would have been illegal.

### *Conclusions*

Despite the often-confusing rhetoric that has accompanied Operation Iraqi Freedom, there is only one legal basis on which the action could have been plainly justified, and it is on that basis that the States forming the coalition against Saddam Hussein rested their case. Therefore, the war against Iraq is unlikely to impact current understanding of the *jus ad bellum* in any dramatic way, as Operation Enduring Freedom did with regard to the use of force against terrorists and their State supporters.

If anything (and somewhat counter-intuitively), the affair is likely to strengthen the centrality of the UN Charter use of force regime and the Security Council's role in determining when States may employ armed force. All parties agreed that first resort in the matter was to the Security Council. Indeed, the United States and its Coalition allies actively sought a use of force mandate from the Council. When they did not receive one, they nevertheless justified their actions on a string of Security Council resolutions reaching back over a decade. Analogously, States opposed to Operation Iraqi Freedom based their resistance on

the argument that the Coalition should not have attacked without an explicit Council mandate.

Had the Coalition chosen any other ground to justify the attack, currently prevailing interpretations of the *jus ad bellum* would have been placed under significant stress, with some scholars and practitioners arguing for new interpretations of existing law in light of changed circumstances, others suggesting the emergence of new norms, and many asserting that the attack was quite simply unlawful. It is fortunate that the Coalition avoided alternative justifications, for, as every law student knows, hard cases make bad law. Instead, the lesson of this experience is that States will continue to look to the Security Council as the font for authorization to use force; therefore, that body must exercise its discretion with great care, surgical precision, and an eye to the future.

### Notes

1. At the time of the attack, 49 nations were publicly committed to the Coalition. Support ranged from contributions of troops to political actions. White House Press Release, Operation Iraqi Freedom: Coalition Members, Mar. 27, 2003, available at <http://www.whitehouse.gov/news/releases/2003/03/20030327-10.html>.
2. Patrick E. Tyler & Felicity Barringer, *Annan Says U.S. Will Violate Charter If It Acts Without Approval*, NEW YORK TIMES, Mar. 11, 2003, at A10. Many academics also found the war illegal. See, e.g., the letter from 16 law professors, THE GUARDIAN (London), Mar. 7, 2003, at 29. But see also Adam Roberts, *Law and the Use of Force After Iraq*, SURVIVAL, Summer 2003, at 31 (2003). For an excellent compilation of articles on both sides of the issue, see *Future Implications of the Iraq Conflict*, SELECTIONS FROM THE AMERICAN JOURNAL OF INTERNATIONAL LAW (2004).
3. That component of international law that governs when a State may resort to force in pursuit of its national interests, such as defending itself from armed attack or acting pursuant to a mandate from the United Nations Security Council. It is distinguished from the *jus in bello*, which addresses the conduct of actual hostilities, for example by providing certain objects and individuals protected status during hostilities.
4. The 1999 NATO war against the Federal Republic of Yugoslavia and the 2001 war against Afghanistan, respectively.
5. U.N. CHARTER art. 41.
6. SC Res. 678 (Nov. 29, 1990).
7. SC Res. 660 (Aug. 2, 1990).
8. The Council used *ad hoc* coalitions for operations against Iraq in 1990-1 (SC Res. 678, *supra* note 6) and to set up the initial International Security Assistance Force in Afghanistan in 2001 (SC Res. 1368 (Sept. 12, 2001)). By contrast, the Council turned to NATO to lead KFOR in Kosovo in 1999 (SC Res. 1244 (June 10, 1999)). An example of a "blue helmeted" force is UNAMSIL in Sierra Leone, which received its first mandate in 1999 (SC Res. 1270 (Oct. 22, 1999)).
9. SC Res. 1441 (Nov. 8, 2002).
10. Required by SC Res. 687 (Apr. 3, 1991).
11. Specifically, the United Nations Special Commission (UNSCOM), International Atomic Energy Agency (IAEA), and United Nations Monitoring, Verification and Inspection

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- Commission (UNMOVIC). Although Resolution 687 required cooperation with the first two, Iraq expelled both in 1998. UNMOVIC was established as the successor to UNSCOM (SC Res. 1284 (Dec. 17, 1999)).
12. Required by SC Res. 687, *supra* note 10.
  13. Required by SC Res. 688 (Apr. 5, 1991).
  14. Required by *id.*
  15. Required by SC Res. 686 (Mar. 2, 1991); 687, *supra* note 10; 1284, *supra* note 11.
  16. Text of 4714th meeting, SC, U.N. Doc. S/PV.4714 (Mar. 7, 2003).
  17. SC Res. 687, *supra* note 10.
  18. Text of 4644th mtg., SC, U.N. Doc. S/PV.4644 (Nov. 8, 2002).
  19. *Id.*
  20. *Id.*
  21. Briefing by Secretary of State Powell to the Security Council, U.N. Doc. S/PV.4701 (Feb. 5, 2003).
  22. White House Press Release, President Says Saddam Hussein Must Leave Iraq within 48 Hours. Remarks by the President in Address to the Nation, Mar. 17, 2003, *available at* <http://www.whitehouse.gov/news/releases/2003/03/20030317-7.html>.
  23. "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." U.N. CHARTER art. 2, para 4.
  24. *E.g.*, SC Res. 1378 (Nov. 14, 1991); SC Res. 1386 (Dec. 20, 2001); SC Res. 1390 (Jan. 20, 2002).
  25. *See, e.g.*, W. Michael Reisman, *International Legal Responses to Terrorism*, 22 HOUSTON JOURNAL OF INTERNATIONAL LAW 3, 33-4 (1999); Stuart G. Baker, *Comparing the 1993 U.S. Airstrike on Iraq to the 1986 Bombing of Libya: The New Interpretation of Article 51*, 24 GEORGIA JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 99 (1994).
  26. GA Res. 41/38 (Nov. 20, 1986).
  27. *Israelis Praise It While Arabs Vow to Avenge It*, CHICAGO TRIBUNE, Apr. 16, 1986, at A9.
  28. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27).
  29. *Id.* at 103, para. 195.
  30. *Id.*
  31. Letter from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2001/946 (Oct. 7, 2001).
  32. Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 96 AMERICAN JOURNAL OF INTERNATIONAL LAW 237 (2002); Sean D. Murphy, *Terrorism and the Concept of "Armed Attack" in Article 51 of the U.N. Charter*, 43 HARVARD INTERNATIONAL LAW JOURNAL 41 (2002).
  33. Murphy, *Contemporary Practice*, *supra* note 32, at 248. The European Council "confirm[ed] its staunchest support for the military operations . . . which are legitimate under the terms of the United Nations Charter and of Resolution 1368." Declaration by the Heads of State or Government of the European Union and the President of the Commission: Follow-up to the September 11 Attacks and the Fight Against Terrorism, Oct. 19, 2002, SN 4296/2/01 Rev. 2.
  34. *See, e.g.*, SC Res. 1267 (Oct. 15, 1999); SC Res. 1363 (July 30, 2001); SC Res. 1378, *supra* note 24; SC Res. 1390, *supra* note 24.
  35. President George W. Bush, Address Before a Joint Session of Congress on the United States Response to the Terrorist Attacks of September 11, 37 WEEKLY COMPILATION OF PRESIDENTIAL

DOCUMENTS 1347 (Sept. 20, 2001). The United States also made back-channel demands through Pakistan.

36. This principle was articulated most notably in the *Rendulic* case. German General Rendulic was accused of excessive destruction during the German evacuation of Norway. He was acquitted of the charge on the basis of his (mistaken) belief that his forces were being pursued by the Russians and that therefore the destruction was necessary to deny them resources. The Hostages Case (*U.S. v. List et al.*), 11 T.W.C. 759, 1253–54 (1950). Note that the International Criminal Court Statute provides that mistake of fact is a ground for excluding criminal responsibility if it negates the mental intent element of the offense. Rome Statute of the International Criminal Court art. 32, July 17, 1998, 2187 U.N.T.S. 90.

37. Proportionality and necessity have specifically been cited as customary international law by the International Court of Justice. Military and Paramilitary Activities, *supra* note 28, at 103, para. 194; Oil Platforms (Iran v. U.S.), Merits (Nov. 6, 2003), 42 INTERNATIONAL LEGAL MATERIALS 1334, 1353, 1361, paras. 43 & 74, available at <http://www.icj-cij.org/icjwww/idocket/iop/iopframe.htm>.

38. U.N. Doc. S/PV.4701 (Feb. 5, 2003).

39. *Id.* at 14–7.

40. SC Res. 1441, *supra* note 9.

41. For a fuller discussion of this analysis, see Michael N. Schmitt, *Counter-terrorism and the Use of Force in International Law*, 32 ISRAEL YEARBOOK ON HUMAN RIGHTS 53 (2002). Prior to the attacks of September 11, 2001, the various attacks were primarily characterized as criminal in nature. 9/11, as explained in the cited article, fundamentally altered the international community's perspective on transnational terrorism as a matter of law.

42. See *id.* for a fuller discussion of this point.

43. For a comprehensive analysis of the law underpinning anticipatory self-defense, see George Walker, *Anticipatory Collective Self-Defense in the Charter Era: What the Treaties Have Said*, in THE LAW OF MILITARY OPERATIONS 365 (Michael N. Schmitt ed., 1998) (Vol. 72, US Naval War College International Law Studies).

44. THE WHITE HOUSE, NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (2002); THE WHITE HOUSE, NATIONAL STRATEGY TO COMBAT WEAPONS OF MASS DESTRUCTION (2002); THE WHITE HOUSE, NATIONAL STRATEGY FOR COMBATING TERRORISM (2003).

45. The Secretary of Defense's Annual Report makes the same point in a "lessons learned" section: "[D]efending the United States requires prevention and sometimes preemption. It is not possible to defend against every threat, in every place, at every conceivable time. The only defense . . . is to take the war to the enemy. The best defense is a good offense." Donald H. Rumsfeld, Annual Report to the President and the Congress 30 (2002), available at [www.defenselink.mil/execsec/adr2002/pdf\\_files/chap3.pdf](http://www.defenselink.mil/execsec/adr2002/pdf_files/chap3.pdf).

46. Letter From Daniel Webster, US Secretary of State, to Henry Fox, British Minister in Washington (Apr. 24, 1841), in 29 BRITISH AND FOREIGN STATE PAPERS 1840–1841, at 1138 (1857).

47. Letter from Lord Ashburton to Daniel Webster, US Secretary Of State (July 28, 1842), in 30 BRITISH AND FOREIGN STATE PAPERS 1841–1842, at 1858 (1857), available at <http://www.yale.edu/lawweb/avalon/diplomacy/britain/br-1842d.htm>.

48. International Military Tribunal (Nuremberg), Judgment And Sentences, 41 AMERICAN JOURNAL OF INTERNATIONAL LAW 172, 205 (1947); Military and Paramilitary Activities, *supra* note 28, at 94, para. 176; Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 245, para. 41 (8 July); Oil Platforms, *supra* note 37, at 1353, 1361, paras. 43 and

74. See also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES 905 (1987).
49. Powell Briefing, *supra* note 21.
50. For instance, former Director of the Iraq Survey Group, David Kay, admitted that “we were almost all wrong” with regard to the Iraqi weapons of mass destruction programs when testifying before the Senate Armed Services Committee in January 2004. That said, he opined that Iraq clearly violated Resolution 1441. Transcript: David Kay at Senate Hearing, Jan. 28, 2004, <http://www.cnn.com/2004/US/01/28/kay.transcript/>.
51. NATIONAL SECURITY STRATEGY, *supra* note 44, at 15.
52. Authorization for the Use of Military Force Against Iraq Resolution of 2002, Public Law No. 107–243, 116 Stat. 1498, 1499 (2002).
53. Lord Goldsmith, Attorney General Clarifies Legal Basis for the Use of Force Against Iraq (Mar. 18, 2003), <http://www.fco.gov.uk/servlet/Servlet?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1007029393879&a=KArticle&aid=1047661460790>.
54. In the days immediately preceding the attack, President Bush did indicate, however, that the primary basis for the forthcoming operation was to be found in Security Council Resolutions 678, 687, and 1441. White House Press Release, *supra* note 22. This speech was made on March 17, the same day the UK Attorney-General appeared before the House of Lords and offered essentially the same position. It would appear that by this point, the United States and United Kingdom had reached agreement on the justification, among the many that had been circulating unofficially, for their forthcoming action.
55. Letter dated March 20, 2003 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2003/351 (Mar. 21, 2003), available at <http://documents-dds-ny.un.org/doc/UNDOC/GEN/N03/290/79/doc/N0329079.DOC?OpenElement>.
56. Letter dated March 20, 2003 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2003/350 (Mar. 21, 2003), available at <http://documents-dds-ny.un.org/doc/UNDOC/GEN/N03/290/73/pdf/N0329073.pdf?OpenElement>.
57. Text of a Letter from the President to the Speaker of the House of Representatives and President Pro Tempore of the Senate, Mar. 21, 2003, available at <http://www.whitehouse.gov/news/releases/2003/03/20030321-5.html>.
58. William H. Taft & Todd F. Buchwald, *Preemption, Iraq, and International Law*, 97 AMERICAN JOURNAL OF INTERNATIONAL LAW 557 (2003).
59. On the topic of preemption in international law, see Michael N. Schmitt, *Preemptive Strategies in International Law*, 97 MICHIGAN JOURNAL OF INTERNATIONAL LAW 513 (2003).
60. SC Res. 660, *supra* note 7.
61. SC Res. 661 (Aug. 6, 1990); 662 (Aug. 9, 1990); 664 (Aug. 18, 1990); 665 (Aug. 25, 1990); 667 (Sept. 16, 1990); 670 (Sept. 25, 1990); 674 (Oct. 29, 1990); 677 (Nov. 28, 1990).
62. SC Res. 678, *supra* note 6.
63. Letter dated 9 August 1990 from the Permanent Representative of the United States of America to the United Nations, U.N. Doc. S/21492 (Aug. 10, 1990).
64. SC Res. 687, *supra* note 10.
65. Letter from Permanent Representative of Iraq to Secretary-General and Security Council President, U.N. Doc. S/22456 (Apr. 6, 1991), reprinted in JOHN N. MOORE, CRISIS IN THE GULF 497 (2002).

66. This is a matter of customary international law, codified in the context of armistices, in Articles 36 and 40 of the 1907 Hague Regulations Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631.
67. See, e.g., Jules Lobel & Michael Ratner, *Bypassing the Security Council: Ambiguous Authorizations to Use Force, Cease-fires and the Iraqi Inspection Regime*, 93 AMERICAN JOURNAL OF INTERNATIONAL LAW 124 (1999).
68. On this point, see Yoram Dinstein, *War, Aggression, and Self-Defence* (3d ed., 2001).
69. Transcript of Press Conference by Secretary-General Boutros Boutros-Ghali Following Diplomatic Press Club Luncheon, Paris, Jan. 14, 1993, U.N. Doc. SG/SM/4902/Rev. 1, at 1.
70. Taft & Buchwald, *supra* note 58, at 560. The United States specifically grounded its operation on previous resolutions. As President Clinton noted, the armed action was “consistent with and has been taken in support of numerous U.N. Security Council resolutions, including Resolutions 678 and 687. . . .” Letter to Congressional Leaders on the Military Strikes against Iraq, *reprinted in* 2 PUBLIC PAPERS 2195 (Dec. 18, 1998).
71. SC Res. 707 (Aug. 15, 1991).
72. SC Res. 1154 (Mar. 2, 1998).
73. SC Res. 1205 (Nov. 5, 1998). Other significant examples of the Security Council finding Iraq in non-compliance include SC Res. 1060 (June 12, 1996); SC Res. 1115 (June 21, 1997); SC Res. 1137 (Nov. 12, 1997).
74. Paragraphs 8–13 provide for the destruction under international supervision of weapons and missiles, reports on possession of particular items, cooperation with UNSCOM and the IAEA, and a commitment to refrain from further development or acquisition of prohibited items.
75. Taft & Buchwald, *supra* note 58, at 562.
76. There is some controversy over the impact of the Vienna Convention on the Law of Treaties (considered a restatement of customary law for non-Parties) on the cease-fire breach. Vienna Convention, May 23, 1969, 1155 U.N.T.S. 331 (entered into force January 27, 1980). Article 60(2) provides that in the event of a material breach by one of the parties to a multilateral treaty, the others can suspend the treaty’s operation in whole or in part by unanimous agreement. However, it also provides that if a party is “specially affected” by the breach, that party can unilaterally suspend as between itself and the breaching party. Thus some have suggested the former principle means that the United States and the United Kingdom could not alone determine the cease-fire to be suspended, whereas others argue they are specially affected and, therefore, could do exactly that. A better approach is to view the matter less legalistically and focus instead on the *lex specialis* of the humanitarian law of cease-fires. This would allow any party to the cease-fire to resume hostilities in the event of a material breach.
77. The practice of the Security Council in terminating a use of force authorization is to either expressly terminate in a subsequent resolution or provide an expiration date in the authorization itself. An example of the former is Resolution 1031 (SC Res. 1031 (Dec. 15, 1995) (Bosnia), whereas examples of the latter include Resolutions 954 (SC Res. 954 (Nov. 4, 1994)) (Somalia) and 929 (SC Res. 929 (June 22, 1994)) (Rwanda).
78. SC Res. 794 (Dec. 3, 1992).
79. SC Res. 814 (Mar. 26, 1993).
80. SC Res. 940 (July 31, 1994).
81. *Id.*
82. U.N. Doc. S/22133 (Jan. 22, 1991).
83. SC Res. 788 (Nov. 19, 1992).
84. U.N. Doc. SC/6481 (Feb. 26, 1998).

85. See Report of the Independent Inquiry into the Actions of the United Nations During the 1994 Genocide in Rwanda, annexed to Letter dated 15 December 1999 from the Secretary-General addressed to the President of the Security Council, U.N. Doc. SC/1999/1257 (Dec. 16, 1999), available at <http://daccessdds.un.org/doc/UNDOC/GEN/N99/395/47/IMG/N9939547.pdf?OpenElement>.
86. HUMAN RIGHTS WATCH, FORCIBLE EXPULSION OF ETHNIC MINORITIES (March 2003); HUMAN RIGHTS WATCH, IRAQ: THE DEATH PENALTY, EXECUTIONS, AND "PRISON CLEANSING" (2003); HUMAN RIGHTS WATCH, THE IRAQI GOVERNMENT ASSAULT ON THE MARSH ARABS (2003); AMNESTY INTERNATIONAL, ANNUAL COUNTRY REPORTS (1995–2003), available at [www.amnestyusa.org/countries/iraq/index.do](http://www.amnestyusa.org/countries/iraq/index.do); Reports of the Special Rapporteur of the UN Commission on Human Rights on the Situation of Human Rights in Iraq, available at [http://ap.ohchr.org/documents/dpage\\_e.aspx?m=88](http://ap.ohchr.org/documents/dpage_e.aspx?m=88).
87. Letter to the President (William Clinton), Jan. 26, 1998, [www.newamericancentury.org/iraqlintonletter.htm](http://www.newamericancentury.org/iraqlintonletter.htm). The group included Richard Armitage, John Bolton, Peter Rodman, Donald Rumsfeld, and Paul Wolfowitz.
88. White House Press Release, *supra* note 22.
89. The Iraq Liberation Act expressed the "sense of Congress" that it should be the policy of the United States to support efforts to remove the regime headed by Saddam Hussein from power in Iraq and to promote the emergence of a democratic government to replace that regime. The act authorized support to the Iraqi opposition, but did not purport to authorize any use of force by the United States. Public Law No. 105–338, 112 Stat. 3178 (1998).

# PART VII

## TARGETING TERRORISTS



# XVIII

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## Debating the Issues

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### **Kenneth Roth and Robert F. Turner\***

**Moderator:** The last set of questions to the preceding panel members is a perfect segue to questions of law enforcement and military responses to fighting terrorism, and in this particular case, targeting terrorists. We are now going to take a closer look at questions of preemption and prevention, as well as specific techniques that might apply to combating terrorists and terrorist groups.

I am a journalist and generally examine the issue of targeting terrorists through a domestic lens focused on homeland security and criminal justice, so I am looking forward to a debate that broadens the focus to include international law and military operations. This debate is much more interesting when we start to compare activities conducted beyond the borders of the United States with activities conducted within our borders, and then determining what standards will be applied in targeting terrorists abroad versus within the United States.

Our first speaker is Mr. Ken Roth, who has been Executive Director of Human Rights Watch since 1993, and served as the deputy director of that organization from 1987 to 1993. Human Rights Watch is the largest human rights organization based in the United States. Its researchers conduct fact-finding investigations into human rights abuses in all regions of the world and then publishes those findings in dozens of books and reports every year, generating extensive coverage in local and international media.

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\* Mr. Kenneth Roth is the Executive Director of Human Rights Watch. Professor Robert F. Turner is Associate Director, Center for National Security Law at the University of Virginia School of Law.

**Mr. Roth:** It is an honor to be here. I am grateful for the invitation. I am also grateful to the Supreme Court for waiting to hear the benefits of today's conversation before deciding the *Hamdi* and *Padilla* cases now pending before it so that we can address the issues from a blank slate. What I will address this morning is the question: what are the limits to the war on terror. More specifically, when is the war on terror a real war and when is it a metaphor more akin to the war on drugs or the war on poverty or various other efforts to mobilize the population to pursue an important goal.

Obviously Afghanistan was a war. There is no question that armed conflict occurred there. Insofar as Iraq had anything to do with terrorism, no question, that was a war, too. But what about elsewhere? President Bush has spoken about the war on terror being global, since al Qaeda has cells around the world, so the war against it and the war on terrorism must be pursued globally. Is he speaking in a metaphoric sense or literally? The answer to that question is important because if we're talking only metaphor, then we are obviously applying the rules of peacetime law enforcement. And under those rules, as you all know, you have a duty to arrest a suspect if at all possible—indeed only arrest the suspect upon probable cause. Then the suspect is brought before a judge, represented by a lawyer, entitled to a trial, et cetera. Lethal force can sometimes be used but only if strictly necessary to stop a threat to life or a threat of serious bodily injury to another. And so lethal force is carefully circumscribed. In a war context, you look at the law of armed conflict. If you have detained an enemy combatant, there is no need to give him a lawyer, no need to give him a trial, no need to charge him with anything. In the midst of battle, you can shoot to kill. You don't have to attempt arrest. Obviously, if an enemy surrenders, you have to respect that. But if, for example, the enemy combatant is walking down the street or operating on patrol, you can shoot to kill. You don't need to first attempt an arrest. Those are big differences. The question is: which set of rules should apply to combating terrorists—those for law enforcement or those for law of armed conflict.

Unfortunately, the law of armed conflict provides relatively little guidance for making that decision. It sets forth detailed rules that apply once you have an armed conflict. But it is unclear, however, exactly when the circumstances are such that they may be considered to be an armed conflict.

If you look at the commentary to the 1949 Geneva Conventions, for example, there are references to the intensity of the violence and to the regularity of armed clashes. You can argue that the series of al Qaeda operations from the African embassies to the *USS Cole* to the World Trade Center are but a series of very important criminal acts, or you might argue that those are various acts of war. There is no

terribly good way to resolve that argument by looking to the Geneva Conventions and the accompanying commentary. You end up having a battle of metaphors.

What I propose to do is to look beyond the metaphors and to try to examine a few cases—some troublesome cases—to see whether they help us decide the point at which the real war on terrorism should end and the metaphor should begin. I would like to examine these cases from a policy prospective to determine what really makes sense. I'll conclude by proposing a general rule that might provide guidance in drawing that line.

The obvious place to start is the Padilla case. Padilla, of course, is the alleged "Dirty Bomber" who flew from Pakistan to Chicago's O'Hare Airport. It now appears that maybe he wasn't pursuing a dirty bomb; maybe he was going to blow up an apartment building. But whatever he was doing, he seems to have been up to no good. The US Government, after initially arresting him as a material witness, very quickly moved to classify him as an enemy combatant and then shipped him to the naval brig in South Carolina. There he was denied access to his lawyer for long periods of time on the grounds that he didn't have to be charged with a crime.

Now, does that make sense? Is Padilla, who was far from any traditional battlefield, an enemy combatant? One way to address that question is to seriously consider what it would mean if Padilla really were an enemy combatant. Because if stepping off that plane in O'Hare Airport and through the terminal to pick up his luggage were sufficient to make him an enemy combatant as alleged, there would be no duty to arrest him. He could simply have been shot under the provisions of the law of armed conflict that entitle a belligerent to kill enemy combatants.

I am troubled by that conclusion. I suspect many of you are as well. But it leads me to question whether the characterization of an individual, even if he is up to no good, as an enemy combatant is appropriate. One of the reasons I am troubled is that there was a functioning legal system in the United States. Padilla easily could have been arrested and brought before it. Indeed, he was, as a material witness, before being made an enemy combatant.

Another enemy combatant who was arrested in the United States was al-Marri. He was arrested in his house in Peoria, Illinois. We now know his main offense was being a nephew of the alleged 20th hijacker but at the time it was alleged that he was a member of a sleeper cell. Again if he was really an enemy combatant, he could have been shot as he came to open the door. He didn't have to be arrested. Is that really where we want to go?

If you think about another war that is generally understood to be metaphoric—the war on drugs—we are dealing with comparable dangers in many respects. Drug trafficking is also an international phenomenon; there is a raging armed conflict in Columbia. Even though drug cartels send clandestine agents to the United States

who engage in violent activities that kill thousands of people, nonetheless we are uncomfortable treating drug traffickers as combatants. We don't start shooting them—we arrest and prosecute them. Why is terrorism different when we are in a situation where prosecution is possible?

Now let's look on the other side of the spectrum. This morning's panel discussed the 2002 attack on a senior al Qaeda operative in Yemen. This is an instance where I think it was appropriate to classify him as a combatant, but the United States never made a good case at explaining its reasoning. At the time, all we knew was that a CIA-operated Predator drone flying over Yemen launched a missile which struck a car carrying Abu Ali al-Harithi, along with several of his alleged coconspirators, and that they were all killed. Very little else beyond that was known. In fact, even that information was not supposed to be made public. No effort was made at the time to justify the killing of al-Harithi as an enemy combatant.

So let me try to do that in retrospect. I think that this was probably a circumstance in which it was appropriate to classify him as an enemy combatant. First, although it appears al-Harithi had been responsible for the attack on the *Cole*, in and of itself that would not be sufficient because if you've simply committed a crime in the past, that doesn't justify shooting you today. To be shot today, you have to be engaged in ongoing combatant activities. So the allegation has to be that al-Harithi was engaging in continuing terrorist activities—an allegation that the United States never made publicly. Yet my understanding is that this was believed to be the case.

Second, the United States never made the case publicly as to why he couldn't have been arrested. In fact, we know that it would have been very difficult to arrest him. In a prior attempt by Yemen forces to arrest him, a dozen Yemeni soldiers were killed. Al-Harithi stayed in the tribal areas of Yemen where he was basically beyond the reach of the Yemeni government.

You might ask, "Couldn't the United States, with Yemen's permission, send in troops to arrest him?" I understand that the United States considered this alternative, but apparently felt it would be impossible for troops to infiltrate that area without the tribal forces immediately knowing they were there. Under those circumstances, there would have been fierce resistance with casualties far in excess of those sustained in the Predator attack.

I think the case could have been made that with respect to al-Harithi you had an active combatant engaged in ongoing plans against the United States and no capacity to use traditional law enforcement means to arrest him. Under those circumstances, no one should contend that the United States could not take action to defend itself. Treating him as an enemy combatant and resorting to lethal force was appropriate. In that case, war rules were the right rules, even though the United

States didn't explain its case well. But the al-Harithi case is more of an exception than the rule.

Just to give you a few more examples, there were six Algerians arrested in Bosnia. In that case, the United States decided initially to employ the law enforcement approach and brought these individuals before a Bosnian court. The court, which had been created by the United States, agreed to accept the cases and asked for the evidence, but it then found the evidence insufficient to hold the suspects. The United States responded by saying that it had decided instead to treat the six as enemy combatants and whisked them off to Guantanamo Bay despite the fact that the Bosnian court order directed their release.

That I find troublesome because here was an available, clearly functioning legal system, hardly hostile to US interests, in which honest justices looked at the case and determined they had not been provided sufficient evidence to warrant prosecution. Rather than produce the evidence, rather than using the functioning judicial system, the United States sent them off to Guantanamo Bay.

Something very similar happened in Malawi where five al Qaeda suspects were picked up. The local court system looked at the evidence, determined there was no evidence of criminal conduct, and ordered them released. The United States said, "No problem, we'll treat them as enemy combatants," and detained them anyway.

In that case, sometime later the United States decided that in fact the Malawian court was correct; there was no evidence. The suspects were then released. This illustrates the problem with allowing war rules to be applied globally even where law enforcement is an option. Frankly, it means that there is nothing that prevents the US Government from picking up any one of us, declaring us an enemy combatant, and whisking us away without access to a lawyer. Indeed, as we know from al-Harithi, there's nothing to stop the US Government from shooting us by declaring us enemy combatants and just firing away. I had the chance to ask Attorney General Ashcroft about this and he said, "Oh, trust us; we've only done this twice," referring to the *Padilla* and the *al-Marri* cases.

I think it's fair to say those are test cases. If the Bush Administration gets the ruling it wants from the Supreme Court, we are going to see many more of those cases. We already have many more of them outside of the United States. This is particularly worrisome in terrorism cases because much of what is said to be known about terrorists is based on intelligence that can be of varying reliability. Particularly in that situation, you want the evidence tested in an open court in some kind of adversarial process.

With those dangers in mind, I would like to propose a three-part test, a series of rules that I believe should govern our efforts to draw the line between war rules and law enforcement rules.

Obviously, you have Afghanistan and Iraq (at least in the initial stages of the military campaign) as traditional battlefields. But in the absence of a traditional battlefield, I would first argue that you need to be able to make the case that there is a regularity and level of intensity to the violence such that it is fair to characterize the overall campaign as one of war; that a mere criminal act here or there will not be sufficient.

Second, in determining whether a particular individual is a combatant, he must be a direct participant. Here I refer to the traditional rules on when an irregular or civilian can be treated as a combatant. You need some direct participation in this violent activity, although that does not necessarily imply carrying a gun or placing a bomb. I understand the role of planners or organizers, but the case has to be made that this is a direct participant, not a sympathizer or a financier. We have to keep in mind the traditional line that we draw even in a classic war between combatants and others who provide support, but who may not be directly targeted.

Finally, and most important, law enforcement options have to be unavailable. If someone can reasonably be arrested, if there is a functioning court system, those avenues should be pursued. We should reserve the use of war rules to situations when armed combat is really the only option—situations like those that exist in the tribal areas of Pakistan or in Afghanistan before the conflict broke out, where you had an uncooperative government that was sheltering individuals who were actively in the process of launching attacks against the United States. Those are not circumstances where we want to require the law enforcement option.

Now let me just briefly say a word about torture.

I don't have to repeat the international humanitarian law rules prohibiting torture for this audience; you know these all too well. I want to note that even in situations where the Geneva Conventions are inapplicable; there is a parallel body of law that military lawyers often forget about, that is, human rights law. That law applies even in the absence of the Geneva Conventions. So, for example, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment prohibits torture in any circumstance. There are no exceptions whatsoever. In explicit terms, it similarly prohibits cruel, inhuman or degrading treatment. Similarly, the International Covenant on Civil and Political Rights prohibits both torture and cruel and inhuman treatment. It is clear that both of those are nonderogatory. Even in a public emergency you can never use torture. You can never engage in cruel, inhuman or degrading treatment. With that background, this should be an open and shut case, and we should have nothing to address on that issue.

In fact, a series of decisions by appointed lawyers in the Bush Administration did set us on that road where torture and cruel and inhuman treatment are being openly discussed by the American (and international) public. The decisions were taken step-by-step. The first was to decide that the 1949 Geneva Convention III Relative to the Treatment of Prisoners of War was inapplicable not only to al Qaeda, but initially to the Afghan conflict. This decision was reached using some combination of a novel failed-State theory and/or by arguing that the Taliban didn't distinguish itself from the civilian population even though every Afghan knew exactly who the Taliban was by the turban and the dress they wore. Nonetheless, facts didn't get in the way of the Bush Administration, which declared the Geneva Convention inapplicable. That was step one.

Step two was to completely ignore the parallel requirements of human rights law. The initial decisions made in January 2002 determined the Prisoners of War Convention was inapplicable but did indicate that those who were in US hands were to be treated humanely. Until August of that year, there was no public mention of the Torture Convention at all.

When we finally see mention of the Torture Convention it is in that notorious August 2002 Jay Bybee memorandum from the Justice Department. In that memorandum, we see that the use of torture is dealt with in an extremely narrow way. There is no mention of the parallel prohibition of cruel, inhuman or degrading treatment, other than to say torture is much worse than that. There is not a hint that there is actually a requirement to refrain from cruel, inhuman or degrading treatment. I think the reason for that is that the Torture Convention doesn't require criminalization of cruel and inhuman treatment, only of torture, and the Justice Department lawyers were mainly worried about avoiding prosecution.

It wasn't until June 2003, after a series of meetings that Human Rights Watch staff members and others had with Condoleezza Rice, the National Security Adviser, that the Bush Administration mentioned publicly the prohibition on cruel, inhuman and degrading treatment. The Department of Defense General Counsel stated (in a well thought out statement) that the prohibition on cruel, inhuman and degrading treatment proscribes the same conduct in the United States under the US Constitution as international law proscribes overseas. In other words, if you can't do it at the local police station, you can't do it anywhere. This correct statement of the law was, as evidenced by the various interrogation techniques that we now know were authorized, promptly ignored. In some cases, the authorized interrogation techniques even involved torture.

Indeed, even after meeting with Condoleezza Rice a few weeks ago to press her to disown coercive interrogation as contrary to the US Army's *Intelligence Interrogation* manual and contrary to the prohibition of cruel and inhuman

treatment, the Bush Administration still insists that there is a realm of coercive interrogation that is permissible and appropriate. Thus, this is not an issue of individual aberrant interrogators but one of policy involving senior levels of the Administration.

We're all aware that various defenses have been offered for the Bush Administration's decisions. I won't spend much time on them other than to say it is embarrassing to see a lawyer putting them forward. The first is that the President, in the exercise of his commander-in-chief authority, can authorize torture—can, in effect, rip up the Torture Convention and the Geneva Prisoners of War Convention. The second theory put forward is that in self-defense you can torture. Of course, war involves self-defense but in that instance the use of force is governed by a whole body of law—the law of armed conflict. That law is absolutely clear in prohibiting torture—you simply can't do it! The Bush Administration's decisions may be equated to the rules for a barroom brawl—anything goes.

Finally, the Bush Administration puts forward the argument of necessity—if you really have to, it's permissible. But one of the requirements of necessity is that the legislature has not prohibited a certain type of response. The Administration states the rule of necessity, but then ignores the US ratification of the Torture Convention with its provision that you can never torture or use cruel or inhuman treatment, even in extreme situations. There is no exception to this prohibition in the Convention.

What this all adds up to is a highly permissive environment when it comes to coercive interrogation. We don't have evidence yet of orders from the top. I doubt we ever will find an explicit order to torture. But we do have a group of politically appointed lawyers who, rather than conscientiously applying clear international prohibitions, were basically looking for legal loopholes of enormous dubiousness and sending the signal, "do whatever you want, we'll get you off." It should be no surprise under this circumstance that torture and abuse were the result. Thank you.

**Moderator:** Thank you, Mr. Roth. Our second speaker is Professor Bob Turner, who serves as the Associate Director of the Center for National Security Law at the University of Virginia School of Law. Professor Turner knows these issues from both a personal and academic standpoint having served two Army tours in Viet Nam. He has served in the Pentagon as Special Assistant to the Under Secretary of Defense for Policy, in the White House as Counsel to the President's Intelligence Oversight Board, at the State Department as Principal Deputy Assistant Secretary for Legislative Affairs, and as the first President of the congressionally established United States Institute of Peace.

**Professor Turner:** Our time is limited. I want to leave a lot of time for not only questions but also comments because there are many people in the audience who know as much about these issues as I do and almost as much as Ken does, so we'll cut to the chase.

There are a lot of differences between us; but I think, at its core, the difference is going to be about whether the law enforcement paradigm or the law of armed conflict paradigm ought to govern in the war against terrorism. On that issue we profoundly disagree. I don't deny we have the legal option of arresting enemy combatants and trying them in Article III federal courts, but we also have the option of resorting to traditional methods of self-defense under the law of armed conflict, which include the legal right to target enemy combatants, even enemy leaders who take no actual part in the hostilities, and to detain them without trial until the end of the conflict.

I was pleased to hear Ken recognize that. I would remind you that during World War II the United States detained hundreds of thousands of German and some Italian prisoners of war within our territory without judicial oversight and without access to lawyers. During the more than eight years that some American pilots were held as prisoners of war in North Viet Nam, not once did we ask the North Vietnamese to give them a right to a lawyer nor did they receive a judicial hearing.

We understood that under existing international law, in the Geneva prisoners of war convention, during a period of armed conflict it is permissible to essentially "warehouse" enemy soldiers for the duration of the conflict. To be sure, if they are accused of criminal behavior they then obtain a number of procedural rights and essentially international due process of law. But even in that setting they're not supposed to be sent into Article III courts. Article 84 of the Geneva Convention provides expressly that if POWs are accused of criminal behavior, either committed while prisoners or war crimes committed during the conflict and before they were captured, they are to be tried only by military courts.

Ken and I disagree about whether law enforcement or law of armed conflict rules should apply. But that's not a hard decision to make and it seems to be important to ask who ought to make that decision. It seems to me one can argue under our constitutional system that, as chief executive officer, as commander in chief in charge of fighting our wars, and so forth, maybe it is the President's decision to make.

Our very first speaker at this conference told us that the war on terrorism is in fact a war. He said terrorism is an act of war. That I think is clear. I don't think anybody will dispute this.

The President views this war as governed by the law of armed conflict. But then again, maybe we can say that it's not the President's decision; that it ought to be the law-making authority that makes this decision so maybe it's a decision for

Congress. Or perhaps this is really a question of international law, so maybe it ought to be the United Nations—and since it involves the issue of war and peace, perhaps it's the UN Security Council, which is the primary organ of the United Nations for the maintenance of international peace and security.

The response to the suggestion that it is other than the President's decision, I would submit, is that it was determined on September 18, 2001, when the United States Congress, by overwhelming votes in both houses, enacted Public Law 107-40, which authorized the use of US armed forces against and, I quote, "those nations, organizations or persons, he [the President of the United States] determines planned, authorized or committed or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons in order to prevent any future act of international terrorism against the United States."

Thus, I would submit the war on terrorism is not really a metaphor like the "war on poverty" or the "war on drugs." The United States has been the object of numerous armed attacks within the United States and abroad that have claimed thousands of human lives and Congress has by law authorized a military response against those persons whom the President determines played a role in the 9/11 attacks or belonged to an organization involved in those attacks.

That Joint Resolution was the constitutional equivalent of a declaration of war. And there is no provision in the statute for judicial review, no provision saying that before you can target an enemy terrorist you have to take him before an Article III judge and make a determination beyond a reasonable doubt that he did belong to that organization or did take part in that activity. That is not the way wars are fought.

Ken may not like it, many of us may not like it, but the decision has been made by our President and our Congress that the law of war governs. And ten days after Congress authorized the use of armed force on September 28, 2001, the UN Security Council unanimously passed Resolution 1373, which reaffirmed that all acts of international terrorism constitute a threat to international peace and security and may be combated by all means. Not just by law enforcement means, but by all means, specifically mentioning the inherent right of individual or collective self-defense as recognized by the Charter of the United Nations.

Once again, this is the language of armed conflict, not the language of law enforcement. And earlier this year, in Security Council Resolution 1526, the Council again reaffirmed the need to combat, "by all means in accordance with the Charter of the United Nations and international law threats to international peace and security caused by terrorist acts."

Now, I submit that at least until the Supreme Court orders otherwise, and I would say personally I'm delighted the Supreme Court is looking at this, this issue

has been resolved and the law of armed conflict is an appropriate paradigm in the war against international terrorism.

I might add that if Human Rights Watch and other NGOs really believe that this is only a law enforcement problem, it's hard to understand all the concerns we've heard from them about the Geneva Conventions in the last few years.

It is true by definition that terrorists do not abide by the law of armed conflict and thus do not qualify under international law as lawful combatants. But the argument that this misconduct should somehow entitle them to preferred treatment to that given to lawful combatants when engaged in acts of war eludes me.

I am not suggesting that there is not an important role for the law enforcement paradigm in the war on terror. Various Security Council resolutions have noted, for example, the importance of using law enforcement tools to criminalize the provision of funds to terrorist organizations and the like. We have the *option* of arresting and trying terrorist suspects. When those individuals are US persons, that may well be the most appropriate approach.

Again, I'm pleased the Supreme Court is looking at the *Padilla* and *al-Marri* cases. When you are dealing with US persons under our legal system you sometimes get a different situation than dealing with foreign nationals.

Now, it is true that mistakes can happen and that innocent people honestly believed to be terrorists might be apprehended and detained against their will and in violation of fundamental principles of justice. Despite the best intentions of everyone involved, sometimes innocent people are *killed* in wartime. It's happened in Iraq. It's happened in Afghanistan. It happened in Viet Nam. It happened in World War II.

There may be a war in history where mistakes were not made or innocent people were not killed, but I am unaware of any such situation. War is often a necessity, a choice between lesser evils, and if we demand that no enemy be targeted unless we are absolutely certain of their identity and that no collateral damage will occur, we are not going to win very many wars and a lot of good people on our side are going to be killed by the enemies we elect not to target.

Under the law enforcement paradigm, presumably when Jose Padilla arrived in the United States with instructions to explore the possibility of exploding a radiological weapon, we should have told the FBI, "Hey, this guy may be up to no good, kind of keep an eye on him. Don't violate his rights, don't profile him, don't harass him. Follow him around a little bit if you can. If you happen to see him kill a million people, bring him in so we can try him." That is the criminal paradigm.

One may say he was already guilty of conspiracy. An interesting bit of information is that when he was in Afghanistan and Pakistan he in fact did meet with senior

al Qaeda leaders and came back home on a mission that was a conspiracy to commit some horrible felonies.

Thirty-five years ago, as a junior Army lieutenant, I had the experience of going through a chemical-biological-nuclear warfare course. Every graduate of that course, even those who weren't paying much attention, focused on the discussion of radiological poisoning and the symptoms and the painful death that follows. And I can tell you with reasonable certainty, because we talked about it during the breaks, that if any of us were told there's going to be a nuclear war and you have the choice of being at ground zero or being far enough away that it's going to take you a few weeks to die of radiological poisoning, every one of us would have said, "Please God, let me be at ground zero." It is one of the most painful ways to die I can think of.

As I say, perhaps Padilla was involved in a criminal conspiracy when he stepped off that plane. But I doubt seriously we could have proven that in federal district court without seriously compromising our counterterrorism infrastructure.

Hearsay prohibitions do not exist in international law or most of the world's legal systems, but presumably US evidentiary rules would have required us to bring in our most sensitive intelligence sources from Pakistan or Afghanistan to be identified and cross-examined in open court in order to get a conviction of Mr. Padilla. That means, of course, those sources would not have been able to return to al Qaeda cell meetings to find out what targets were planned for next week and next month. That obviously is too high a price to pay for one conviction. So under Ken's preferred paradigm, we would have been limited to following Padilla around, again without violating his rights, in the hopes that perhaps if he murdered a few thousand or a few hundred thousand or a few million of our fellow citizens with a radiological device we might be able to catch him in the act and get a conviction. Of course, even to get that conviction, we would likely have to disclose in open court how we managed to keep track of him, the various technologies used to monitor his activities, to intercept his communications and the like, and his friends would no doubt be sitting there taking careful notes. If they didn't, in reporting on the trial, *Time* magazine would help the American people and al Qaeda understand what tools the United States can use that al Qaeda needs to avoid.

Let me turn briefly to the issue of targeting individual terrorist leaders, an issue that is incorrectly described as "assassination." Some of you know this has been an issue close to my heart going back many, many years to my service in Viet Nam, where one of my jobs was investigating acts of terrorism and assassination. In fact, I wrote a very long classified study called *The Viet Cong Tactic of Assassination* in 1970. I don't think it went anywhere. They couldn't get it declassified so it probably was left behind. These are issues of interest to me.

For five years in the mid-70s I worked as national security adviser to a member of the Senate Foreign Relations Committee and followed both the Church and the Pike hearings. The Church Committee issued a several-hundred-page report at the end of which they concluded they could not identify a *single* incident anywhere in the world where the CIA had ever assassinated anyone. That didn't make the front pages. Most surprising today!

In 1981, a few days after President Reagan issued Executive Order 12333, I was hired by the White House to be the Counsel to the President's Intelligence Oversight Board charged with the job of overseeing the activities of all of the intelligence community and reporting directly to the President any violation of the law or of Executive Order 12333. As most of you know, Section 2.11 of that Order provided, and I quote, "Prohibition on Assassination. No person employed by or acting on behalf of the United States Government shall engage in or conspire to engage in assassination."

Now again, by way of background, you may remember Frank Church being very indignant about the role of the CIA. Prior to the Church Committee coming into existence, two CIA directors—Director of Central Intelligence William Colby and his predecessor Richard Helms—had issued internal regulations prohibiting assassination by anyone in the CIA.

So this issue was not really a major problem. But again, this is an issue I have been thinking about and working on since 1974, if not before. And I think it is very important we define our terms. The Executive Order does not define "assassination."

Over the years, I have come up with almost two dozen different definitions in various dictionaries and legal dictionaries and the like, and in almost every instance one word is used—"murder." A typical definition is that assassination is the "murder of a person by lying in wait for him and then killing him, particularly the murder of prominent people for political motives; e.g., the assassination of President Kennedy."

I would suggest what we are talking about is not *murder* at all, and thus it is not assassination, but rather it is the intentional targeting of terrorists as an act of self-defense. Approaching the subject in that way eliminates a lot the very burdensome baggage of being linked with Abraham Lincoln, John Kennedy and Martin Luther King. I think we should agree that "assassination" is wrong and ought not to be an option.

On the other hand, "self-defense" is a good thing, at least a relatively good thing considering the alternatives. What I am talking about are situations in which the intentional taking of life of one wrongdoer might be expected to prevent the slaughter of large numbers of innocent people. I would submit that directing our

force primarily against the leadership of terrorist groups is morally preferable to a strategy that kills large numbers of their foot soldiers. It is difficult to deter people who really want to die for their religion, although I have my doubts about the eagerness to die of some of their leaders. You will note, for example, we haven't seen Osama bin Laden rushing out in front of gunships waving his arms and saying "please make me a martyr."

There are numerous aspects of this issue that time simply will not permit me to address. One thing I do want to emphasize is that in using lethal force that right is, of course, limited by the duties to avoid unnecessary suffering and to mitigate collateral damage.

In conclusion, let me emphasize that the war on terrorism is serious business. It is not a game. An overwhelming presumption in favor of the terrorists is neither mandated by the law or by prudent policy. If we relax our guard and tie the hands of our leaders and our militaries, al Qaeda will be given an opportunity to kill vast numbers of our fellow citizens. Be assured that they will take full advantage of that opportunity. I, for one, will be surprised if they don't hit us again hard before November.

At the same time, if we sacrifice our Bill of Rights in the war on terrorism, Osama bin Laden will have won a far greater victory than was apparent as we dug through the rubble of the World Trade Center and the Pentagon in September of 2001 looking for survivors.

If we demand unrealistic and inappropriate standards, insisting that the war on terrorism be waged in federal district court by law enforcement rules, while our enemy is using military weapons and tactics against our civilian population, we will likely soon be burying large numbers of our citizens—and the cause of civil liberties will not be served by the likely public reaction.

Preserving the rule of law is critically important in our struggle against terrorism, but preserving the lives of our citizens is also important. The constitutional framework set forth in the Fifth Amendment establishes three values I think are particularly important. They are that no person shall be deprived of *life, liberty* or *property* without "due process of law." But it is not an alphabetical list. We cherish life above liberty because we understand that when your life is taken from you so also expire your liberties. In the war on terrorism, these are in fact values we have to balance. If we err on the side of civil liberties, our fellow citizens may pay with their lives. Civil liberties are one of the things that have distinguished this country from so much of the world. They are cherished values we have to uphold. But the Congress, the President, and the UN Security Council all recognize that the law of armed conflict is the appropriate paradigm in this struggle.

International law makes Osama bin Laden and other al Qaeda leaders lawful targets for the intentional application of lethal force. That is not, in my view, a close call. Thank you.

**Moderator:** Thank you, Professor Turner. In the interest of keeping this a little bit more a like a debate, I'll give Ken maybe two minutes to rebut and then we'll go to the audience for questions.

**Mr. Roth:** On the *Padilla* case, Bob seemed to sort of vie back and forth between a nuclear explosion and a radiological weapon, which we know are quite different. In any event, the government now admits he wasn't going to use a radiological weapon; he had some other bombing plan in mind.

Be that as it may, the alternative was not to try to follow him until he kills thousands of people. The alternative was quite simply to arrest him on criminal charges, demonstrating probable cause. To do that would not have required any revelation of clandestine techniques.

An FBI agent or some other law enforcement official could have come before an Article 3 judge and said a source has told me under the following circumstances that Mr. Padilla was plotting to blow up buildings. That would have been sufficient to arrest him. Hearsay works. I can speak from experience—personal experience—here. You don't need eyewitness testimony to get an arrest warrant.

So you get Padilla arrested under probable cause. Then under the Speedy Trial Act you make application for an interest of justice exclusion to delay his actual trial until such time as it is possible to produce whatever witnesses need to be brought to court. This is a doable proposition.

We should be realistic here that there were quite genuine law enforcement options that were not pursued because the Bush Administration wanted to push their radical theory that anyone they pick up is an enemy combatant.

Second point. It is a red herring to say that Human Rights Watch or critics of the Bush Administration believe that terrorism has to be fought simply through law enforcement agents. I thought I made that clear at the outset: there are times when war is perfectly appropriate. Indeed there are traditional battlefields where clearly war rules apply. Afghanistan is a perfect example of that. The question is: does some declaration of the war against al Qaeda justify war rules around the world. Because if it does, what that means very simply is that we have taken a couple of centuries of due process protections, international human rights law and constitutions, and set them aside. It means that governments, simply by declaring someone an enemy combatant can, without any evidence, lock that person up for forever. That is a radical notion, but that is what the global application of war rules entails.

You should be very reluctant to do that. We should insist that war rules be applied only in circumstances when there is some level of actual armed conflict. We should not be handing out this extraordinary power that essentially obliterates our civil rights. Thank you.

*Question and Answer Period*

**Question:** Professor Turner, you mentioned the Joint Congressional Resolution. I think it is important to assess the scope of that Resolution in light of another statute, Title 18 USC § 4001A, known as the Non-detention Act that Congress passed, about 35 years ago. That statute said the government can't detain a United States citizen even for offenses like espionage or sabotage. Shouldn't we at least read the Joint Resolution and that statute together to provide that any enemy combatants are subject to procedural safeguards like judicial review and right to counsel?

**Professor Turner:** That is a good question. I have not spent a lot of time looking at that issue and I don't have a complete answer to it. I think perhaps an answer might be, but this is very much a lay opinion, that what Congress is talking about is the American judicial process or domestic law and that an exception exists in international armed conflict settings, but I don't know if that is the answer.

To the extent the President has independent power to do this, the question then becomes can Congress take away that power even by statute. I would argue, despite separation of powers in many areas, the President does have constitutional authority to do some things that can effectively amount to a taking away of a statutorily derived right. You don't amend the Constitution by a statute that Congress passes purporting to tell the President he must do thus and so.

I will just give you one example. Bob Dole, when he was running for President against Bill Clinton, pushed through a statutory amendment that provided that the President had to move the American embassy from Tel Aviv to Jerusalem. I can't imagine why, in an election year, he'd want to be bothered with something like that, but he seemed to think it had some benefit. The Supreme Court has determined that the decision as to where to site an embassy is part of the decision on what government is to be recognized as the lawful government of a foreign sovereign, and thus an act of Congress trying to usurp power that clearly belongs to the President is null and void.

I think a case can also be made, particularly after Congress has authorized use of lethal force—has authorized war—that the President has certain powers that cannot be limited by statute, and the best way to interpret the statute is to narrow its reading so as not to infringe upon the President's power.

This is really an off-the-cuff response to your question. It is a good question. Maybe somebody else has a better answer to it. Another option is that you may well be right. It is an issue that needs to be raised. I was delighted that the Supreme Court took these three cases. I think that it is fairly clear from the existing precedents that there were one and arguably two German soldiers in the *Quirin* case who were US persons. I think two of them claimed citizenship and I believe the Court concluded at least one was an American. But the Court said when a US citizen joins the armed forces of the enemy he becomes subject to the same consequences that enemy soldiers face. It seems to me that principle governs until the Supreme Court decides otherwise. But I am delighted it is considering these cases and I look forward to reading the opinions when they come out.

**Question:** First, a comment. Both speakers, by desperately trying to keep within the confines of current international law, are contributing to the undermining of basic principles of the law of armed conflict. As we have been discussing throughout the conference, the ultimate legal justification to target and kill terrorists, which I agree is not assassination, is based on the right of self-defense. Yet combating terrorism does not fall within the traditional definitions of either international or non-international armed conflict. Obviously I agree that terrorism must be combated under the right of self-defense and that the use of military force must be part of that effort, but rather than attempting to apply the law of armed conflict, which was developed initially to regulate wars between States, in circumstances for which it was not intended, the focus should be on the development of a new legal regime governing what can be done to address the threat of terrorism.

When we attempt to apply the law of armed conflict to the conflict between States and non-State actors, we are shaking the very fundamental principle of the law of armed conflict—the principle of reciprocal rights and obligations between States in a truly international armed conflict. The “war on terror,” if I may call it that, raises novel issues that simply defy analysis under the law of armed conflict since one party to that war is not a State. Thank you.

**Mr. Roth:** I’m not entirely sure I understand the point. There is much of the law of armed conflict that isn’t entirely dependent on reciprocity among governments. Take Common Article 3. In this case we’re dealing with an internationalized, but not an intergovernmental conflict. I know the Bush Administration is taking the view that Article 3 only applies to civil wars, but I don’t know the basis for that position. There’s no reason why it can’t apply across borders as well.

Yes, of course, there’s the right of self-defense. Nobody challenges that. But does that right allow you to use war methods every place or is there some kind of limit to

that? You can certainly launch a war wherever you want. Once it looks like a real war we know that classic war rules apply. But can you go into a country and when you fail to arrest the people through judicial means declare a war for that five minutes it takes to detain them and pull them out as enemy combatants? I don't think so. That kind of playing games with war rules is the problem.

**Professor Turner:** I agree with most of the points you made as I understood them. It seems to me when the Security Council and the US Congress have authorized measures of self-defense that you have the option of resorting to law enforcement, but since both the Security Council and Congress clearly identified al Qaeda as the source of the attacks, you can engage in self-defense actions against individual members of al Qaeda. Should you decide initially to arrest them and then change your mind and decide you would rather use a law of armed conflict approach, I don't have a problem with that.

To me it is unjust to tell the President that you can't arrest someone who you honestly believe to be an enemy combatant and hold them in detention. If that is the case, it would seem to follow with a lot more force that you obviously can't make a decision to shoot them or can't order a cruise missile strike vice arresting them. If we're going to apply law enforcement rules, presumably every soldier needs to be told before you take a shot at that guy on the other side who's pointing a rifle at you, you need to first take him back to the 9th Circuit, perhaps to the Supreme Court, to obtain a ruling that there is no doubt about this person's identity.

By the same logic that says the President is allowed to authorize a private (hopefully through a general, a colonel and maybe a lieutenant) to kill a suspected enemy combatant, it would seem to follow that they could also detain him under the rules of the law of armed conflict.

**Comment (Audience Member):** I too share the fears of the questioner about undue categorization. I would like to make a comment about the war on terror. In March 2004, the Human Rights Committee of the United Nations made a very important general comment, General Comment Number 31. It states that international humanitarian law and human rights law are complementary. It's not a question of either/or. Now, if we are faced with a war on terror and this war that will never end, a war in which there will never be a ceasefire or a peace treaty, we really have to rethink the interaction between human rights law and the law of armed conflict. I believe that's something we really need to think about. In fact, it could be the subject of a conference in its own right.

**Question:** Mr. Roth, you talked about the troublesome hypothesis of the government shooting Mr. Padilla upon his arrival at O'Hare Airport. Let's change that hypothetical slightly. Say he vaulted over his would-be captors and was about to step into a taxi. The law enforcement choice would have been to kill him or to let him go. What is your solution to that situation?

**Mr. Roth:** Well, under classic law enforcement rules you are allowed to use lethal force if you are a cop on the beat and it's necessary to stop an imminent threat of loss of life or serious bodily injury.

Now my understanding of Padilla is that he was nowhere near posing such an imminent threat. In that case, a mere fleeing suspect cannot be shot. If you change the hypothetical a little bit, if he's about to go and plant the bomb, of course you can shoot him. You do not need international humanitarian law to do that.

But in a situation like this where there is a sole operator and you have everybody tracking him and an available judicial system, there is no reason why you shouldn't use law enforcement rules. The danger of allowing war rules is that it potentially applies to all of us.

**Professor Turner:** There is a reason we authorized the President to delegate the authority to take human life without a judicial hearing. It has to do with the nature of war. Just as we authorized the President to fight a war against al Qaeda, if the President really wanted to order a cruise missile to be launched against one of us, I am not sure what formal check on his authority would prevent that. I know what the aftereffects of that will be. I know the American people will be outraged over it. I know the American Congress would be outraged over it. There are checks in our system that are less formal.

When I spoke recently in Munich, I made the point that if the United States, which has this unchecked military power, uses that power in an aggressive manner, the American people aren't going to tolerate it. Just as they stopped the war in Viet Nam, they will stop the war on terrorism if they conclude, rightly or wrongly, that violations are going on.

There are lots of quieter checks if the President were to give an order to launch a missile at John Kerry's home. You would have lots of people in that chain of command presumably resigning, going public, doing whatever was necessary to prevent that from happening. But the difference between that situation and a situation where you say a federal district court has to authorize the taking of life in armed conflict is tremendous.

The President has to be able to protect the nation to save lives. If that means a decision is made to shoot Mr. Padilla, that may be a decision with which some

would disagree. And, of course, it would be a particularly unfortunate decision if Mr. Padilla or someone similarly situated turns out to be an innocent person.

But the consequences of the alternative, the alternative of saying you can't take human life, you can't deprive someone of due process or personal liberty, are far greater. Do you want the President to be able to authorize the US armed forces to take the lives of people that they have strong reason to believe are al Qaeda operatives? I think most of us want him to be able to do that. To those who argue that it is permissible to shoot al Qaeda members but they can't be detained, I say there is a disconnect in the logic that I can't understand.

**Question:** Mr. Roth has referred, on a couple of occasions, to the question of the application or characterization of a war zone on a global scale. I would suggest that a state of war exists. We have an adversary who is pursuing a set of policy aims through the use of armed force. That is what distinguishes this from metaphorical wars, like the war on drugs or the war on poverty. In terms of the place of execution, or the battlefield as it were in which that war is executed, one of the things that we teach at the Naval War College is that the enemy gets a vote. Al Qaeda has chosen the battlefield of the world and the nontraditional battlefield of soft targets worldwide. The choice is theirs, not ours. The choice that is ours is do we respond, do we fight back, do we engage in a war that has been declared against us, or do we not. To get to the question, I would prefer to see the panelists address the issue, which is very real, of given that situation, which is almost unprecedented, of how do we protect our civil liberties and how do we protect the values of our culture while still fighting in that battlespace.

**Mr. Roth:** Let me say it's not so easy to distinguish the war on drugs. It's worth taking that analogy seriously because there too you have clandestine groups that have chosen a global battlefield, routinely use violence, and kill many, many more people than terrorism does. Nonetheless we have chosen to keep it a metaphorical war because we understand the consequences of not doing so would be devastating for the type of democracy in which we live.

Similarly, al Qaeda has chosen to use violence worldwide. I don't doubt that. How should we respond? If we choose to respond with lethal force using traditional military means as in Afghanistan, then war rules apply. But should we be responding elsewhere, such as in Hamburg, as if it's a war? I think to do so would be devastating.

I think we need to draw those lines establishing that in some instances the use of military force operating under the law of armed conflict is the appropriate response, but in other instances law enforcement means should be used. As a matter

of policy—and of prudence—I would argue, it would be a mistake to respond as if the war is global, because the consequences for the civil rights that we view as the center of our society would be quite severe.

**Comment (Audience Member):** If I may, just one follow-on comment. It is a challenge and that is what I am asking you to try to respond to. It is a war and it is global because there are policy objectives being pursued by our adversary through the use of armed force. The drug lords don't have policy objectives. They have profit objectives. That is part of the distinction that defines war and makes this a state of war that is, in fact, occurring on a global battlefield. We can't change that. What we can change or what we can address, and hopefully will, is how to protect our freedoms while fighting on the battlefield that they have chosen.

**Mr. Roth:** The profit motive is not the distinction. Saddam invaded Kuwait for profit. Yes, al Qaeda is using violent means. As a matter of policy that is what it's doing. That still begs the question of how we should respond. We should be very selective in how we apply war rules. In some instances, the option of law enforcement means should be preferred because that is more likely to produce the kind of society that we desire.

**Professor Turner:** Under our constitutional system, the President has been given a great deal of unchecked power. In *Marbury v. Madison*, Chief Justice John Marshall wrote that certain matters, which are of a political character, are confided to the President's discretion. But he said these things affect the nation, not individual rights, and that Congress has the primary responsibilities for preservation of individual rights. By passing the equivalent of a declaration of war, Congress decided that the United States may use lethal force against al Qaeda and other terrorists wherever they may be found. If we find them in Germany, however, we don't launch cruise missiles into Germany.

Let me raise a more fundamental question about human rights because some feel, since 9/11, that I've become the poster boy for government repression because I've sat on so many panels addressing the issues that have been discussed at this conference. I'm convinced that if the American people become really scared, they're going to make a decision to demand lessening restraints on the use of force and more limitations on civil liberties.

I will give you one example to think about. Go back 62 years to a decision made by President Roosevelt. Of all of our presidents there are very few that had a better record in civil liberties and humanitarian issues. Yet President Roosevelt issued an order to arrest, to apprehend, and to detain thousands of American nationals, most

of them US citizens and many of them native-born Americans. Most of them were not even suspected of the slightest wrongdoing. These thousands of our fellow citizens were sent to detention camps, which were, in many respects, the equivalent of concentration camps except folks were not killed when they arrived.

These people were quite properly outraged. They applied for release to the federal courts. Who argued the case before the courts that this detention was a lawful act? Earl Warren, then the Attorney General of California, who later became Chief Justice of the United States. He argued that the order was a proper exercise of presidential authority because it was believed that the security of the United States was threatened. The case finally made its way to the Supreme Court on appeal. The Court unanimously upheld President Roosevelt's order. Who was the justice who wrote the opinion in that case? Justice Hugo Black. There probably has never been a finer civil libertarian in the history of the US Supreme Court and yet he, like President Roosevelt, was afraid. In that fear they sacrificed the human rights, the civil liberties, of tens of thousands of innocent people.

Now, one reason that I favor reasonable measures, even understanding they may involve the unjust detention of a few innocent people, is because I understand if the fundamental responsibility of protecting the lives of our people is not carried out, the demand for casting aside the Bill of Rights is going to be overwhelming. We saw that in 1942. We will see that in 2004, 2005, or 2006, if we don't continue an effective war against terrorism.

The thought of losing our civil liberties terrifies me, but if you look at public opinion polls, the American public will support it. We must preserve our lives if we're going to preserve our liberties. Thank you.

**Moderator:** Thank you Mr. Roth and Professor Turner for your insightful discussion of very important issues. As is often the case in discussions such as this, one doesn't necessarily reach specific conclusions, but the dialogue is very helpful in outlining those things that must be considered in reaching those conclusions.

# APPENDIX

## CONTRIBUTORS



## Contributors

*Editor's Note: In order to most accurately portray the events of the colloquium, the biographical data in this appendix reflects the position in which the authors were serving at the time of the colloquium, as reflected in the colloquium brochures and materials.*

**Mr. Fred Abrahams** worked from 1995 to 2000 as a Senior Researcher at Human Rights Watch, covering the South Balkans. He subsequently worked as an analyst in the prosecutor's office at the International War Crimes Tribunal for the Former Yugoslavia. He is currently finishing a book on Albania's recent political history and the transition from communism.

**Professor Craig H. Allen** joined the University of Washington faculty in 1994, following his retirement from the US Coast Guard. He is a licensed master mariner, a fellow in the Nautical Institute and a member of the Royal Institute of Navigation and the US Maritime Law Association. Professor Allen is on the board of editors of *Ocean Development and International Law* and is the author of the forthcoming new edition of *Farwell's Rules of the Nautical Road*. Professor Allen teaches courses in international, admiralty, constitutional and foreign relations law.

**Mr. Lee A. Casey** is a partner in the Baker & Hostetler LLP and works in that firm's Washington, D.C. office. He focuses on federal, environmental, constitutional, election, and regulatory law issues, as well as international and international humanitarian law. From 1986 to 1993 Mr. Casey served in various capacities in the federal government, including the Office of Legal Counsel (1992–93) and the Office of Legal Policy (1986–90) at the US Department of Justice. In addition, from 1990 to 1992, Mr. Casey served as Deputy Associate General Counsel at the US Department of Energy. Mr. Casey has authored or co-authored articles on such topics as the International Criminal Court, the presidential war powers, and the Senate's treaty interpretation power.

**Professor Yoram Dinstein** is the Yanowicz Professor of Human Rights at Tel Aviv University (Israel), where he is the immediate past President. Professor Dinstein has recently concluded a second term as the Charles H. Stockton Professor of International Law at the US Naval War College (2002/2003, 1999/2000). He was also a Humboldt Fellow at the Max Planck Institute for International Law at Heidelberg (Germany), 2000/2001. Professor Dinstein is a Member of the Institute of International Law. He has written extensively on subjects relating to international law, human rights and the law of armed conflict. He is the founder and Editor of the *Israel Yearbook on Human Rights*. His latest book is *The Conduct of Hostilities under the Law of International Armed Conflict*.

**Colonel Charles H. B. Garraway**, CBE, is serving as a Senior Research Fellow at the British Institute of International and Comparative Law prior to taking up the Charles H. Stockton Chair of International Law at the US Naval War College in August 2004. Colonel Garraway's previous tours of active duty have included assignments in Cyprus, Germany, Belgium (SHAPE) and Hong Kong, and various tours in the United Kingdom. He is a former Visiting Fellow at the Research Centre for International Law, Cambridge University (now the Lauterpacht Centre) and a Member of the International Institute of Humanitarian Law at San Remo. Colonel Garraway is also a member of the Board of Directors of the International Society for Military Law and the Law of War and was one of the General Rapporteurs for the 2003 Congress in Rome and served as Chairman of the General Affairs Committee. He has represented the United Kingdom at various international conferences, including the Preparatory Committee for Amended Protocol II to the Conventional Weapons Convention, the Diplomatic Conference on the Second Protocol to the Hague Cultural Property Convention and negotiations on the establishment of an International Criminal Court. During the 1990–1991 Gulf War, he served as senior Army Legal Services Officer where he was involved, in particular, with prisoner of war handling. In December of 2002, Colonel Garraway was appointed a Commander of the Most Excellent Order of the British Empire by Her Majesty The Queen.

**Colonel David E. Graham**, JA, US Army (Ret.), is the Special Assistant to the Judge Advocate General of the US Army. His active duty assignments include Chief, International and Operational Law Division, Office of the Judge Advocate General; Director, Center for Law and Military Operations at the Judge Advocate General's School of the Army and Chief, Strategic Planning, Office of the Judge Advocate General. Colonel Graham also served as a legal advisor to the Multinational Force and Observers (MFO) in Sinai (1981–82). Colonel Graham earned a Bachelor of

Arts in History from Texas A&M University, and Master of Arts in International Affairs from the George Washington University and a Juris Doctorate from the University of Texas. He is also a Distinguished Graduate of the National War College.

**Professor Leslie C. Green** is a former Charles H. Stockton Professor of International Law at the US Naval War College (1996–98). After serving in the British Army during World War II, he held university appointments at the University of London; University of Singapore; University of Alberta, where he is University Professor Emeritus; Kyung Hee University, Seoul, South Korea; University of Colorado; and the University of Denver. Professor Green's many government appointments include Member and Legal Advisor to the Canadian delegation to the Geneva Conference on Humanitarian Law in Armed Conflict (1975–77) and special consultant to the Judge Advocate General, National Defence Headquarters. In the latter capacity, he wrote the Canadian Manual on Armed Conflict Law. Professor Green is the author of numerous books, including *The contemporary law of armed conflict* and over 300 papers and articles.

**Professor Wolff Heintschel von Heinegg** is the Charles H. Stockton Professor of International Law at the US Naval War College and is a former Professor of International Law at the University of Frankfurt-Oder and the University of Augsburg, Germany. He was the Rapporteur of the International Law Association Committee on Maritime Neutrality and is currently the Vice-President of the German Society of Military Law and the Law of War. Professor Heintschel von Heinegg was among a group of international lawyers and naval experts who produced the San Remo Manual on International Law Applicable to Armed Conflicts at Sea. He is a widely published author of articles and books on the law of sea and naval warfare.

**Professor Stuart Kaye** was appointed Dean of Law at the University of Wollongong in July 2002. Prior to his appointment, he was Head of the Law School at James Cook University in Cairns. He holds degrees in Arts and Law from the University of Sydney and a doctorate in Law from Dalhousie University. He is admitted as a solicitor of the Supreme Court of New South Wales, a barrister of the Supreme Courts of Tasmania and Queensland, and of the High Court of Australia. Professor Kaye has an extensive research interest in the law of the sea and international law generally, and has published extensively in these areas. He has written a number of books including *Australia's Maritime Boundaries, The Torres Strait and International Fisheries Management*. He was appointed by Australia to the International Hydrographic Organization's Panel of Experts on Maritime Boundary Delimitation in 1995 and in 2000 was appointed by Australia to the List of Arbitrators under

the 1991 Madrid Protocol to the Antarctic Treaty. Professor Kaye was chair of the Australian Red Cross International Humanitarian Law Advisory Committee in Tasmania in 2000 and in North Queensland in 2001–02.

**Lieutenant Colonel William K. Lietzau**, United States Marine Corps, is currently serving as a research fellow at the National War College, Washington, D.C. His preceding assignment was as Special Advisor to the General Counsel of the Department of Defense. Lieutenant Colonel Lietzau's duties in that capacity involved legal advice on numerous international law matters associated with the global war on terrorism including establishing the military commission process. His previous assignments included duty as Deputy Legal Counsel to the Chairman of the Joint Chiefs of Staff; Circuit Judge for the Atlantic Judicial Circuit, Navy-Marine Corps Trial Judiciary; and Head Law of Armed Conflict Branch, International and Operational Law Division Office of the Navy Judge Advocate General. Lieutenant Colonel Lietzau has served on several US delegations in recent multilateral treaty negotiations including those adopting the Terrorist Bombing Convention, the Ottawa Convention banning anti-personnel landmines, the Second Protocol to the Hague Cultural Property Convention and the Rome Statute for the International Criminal Court. He also led the United States negotiating team responsible for drafting elements of crimes for the International Criminal Court. Lieutenant Colonel Lietzau has taught international law as an adjunct professor in Georgetown Law Center's Master of Laws program. He has published several articles on international law, criminal law, and constitutional law subjects.

**Lieutenant General Fabio Mini**, Italian Army, holds a Business Administration Diploma; a Master's Degree in Strategic Sciences; one post-university degree in Strategic Sciences; two post-university degrees in Humanistic Sciences from the "Accademia Agostiniana," Lateran University; and one post-university degree in International Negotiation from the University of Trieste. He is a 1965 graduate of the Italian Military Academy. He has commanded all levels of mechanized units from platoon to brigade. In 1992, following the mafia assassination of two judges he led his brigade in the "Vespri Siciliani" operation against organized crime in Sicily. As a major general, he was Director of the Joint Services Senior Staff College (ISSMI) and Chief of Defense Public Information. He was Chief of Staff for NATO's Allied Forces Southern Europe (AFSOUTH) for two years. In 2002, Lieutenant General Mini was appointed as Commander, Kosovo Force (KFOR), the NATO-led international force responsible for establishing and maintaining security in Kosovo. He has written widely on military, strategic and geopolitical issues.

He lectures regularly at various universities on geopolitics and at national intelligence schools on Far East and Asian strategies, terrorism and organized crime.

**Doctor Christoph Müller** has served as the Deputy Director General for Legal Affairs, German Foreign Office, Berlin since July 2003. Previous assignments within the German Foreign Office include Head, South Asia Division, German Foreign Office, Berlin; Head, Political Department, German Embassy, New Delhi; Deputy Chief of Mission, German Embassy, Harare, Zimbabwe; Deputy Head, Public International Law Division, German Foreign Office, Bonn; Deputy Head of the German Delegation to the Conference on Disarmament, Geneva, 1990–93, German Embassy, Beijing; Arms Control Directorate, German Foreign Office, Bonn; and the German Mission at NATO Headquarters, Brussels. Doctor Müller has a Juris Doctor degree from the University of Augsburg, Germany and a Master of Arts degree from The Fletcher School of Law and Diplomacy, Medford, Massachusetts.

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