

Denver Journal of International Law & Policy

Volume 31
Number 1 *Fall*

Article 3

January 2002

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Recommended Citation

Ved P. Nanda, Combating International Terrorism, 31 Denv. J. Int'l L. & Pol'y [v] (2002).

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Combating International Terrorism

Keywords

Terrorism, Military Law, War, International Court of Justice, States, United Nations

FOREWORD: COMBATING INTERNATIONAL TERRORISM

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I.

This symposium issue of the *Denver Journal of International Law and Policy* comprises much of the most timely thinking on international terrorism from a legal perspective. In the wake of the terrorist attacks on the United States on September 11, 2001, the United States and the international community are addressing the challenge of combating terrorism through enhanced domestic¹ and international efforts.² The United States responded by enacting the USA Patriot Act³ and providing for the establishment of military commissions for the detention and trial of alleged terrorists,⁴ creating a Department of Homeland Security,⁵ imposing immigration restrictions, and further tightening security measures.⁶ And in the boldest of its responses, the US entered into war in the attempt to prevent weapons of mass destruction believed to be present in Iraq from being used against our territory by the Iraqi government or rogue terrorist elements.

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1. See generally Sean Murphy, *Contemporary Practice of the United States Relating to International Law*, 96 AM. J. INT'L L. 237 (2002).

2. For a review of measures predating September 11, 2001, see Ved Nanda, *International, Regional and U.S. Responses to International Terrorism*, Address at the University of Denver - University of Bologna Colloquium, 2000 (manuscript on file with the *Denver Journal of International Law & Policy*) [hereinafter Responses to Terrorism]. For the status of international legal instruments related to the prevention and suppression of international terrorism, see *Status of international conventions pertaining to international terrorism*, extract from the *Report of the Secretary-General on Measures to Eliminate International Terrorism*, U.N. Doc. A/57/183, para. III.A, (2002) as updated on 10 December 2002 [hereinafter Report on Measures].

3. USA Patriot Act, Pub. L. No. 107-56, 115 Stat. 272 (2001).

4. See 66 Fed. Reg. 57,833 (Nov. 13, 2001) for the President's Military Order and Dept. of Def. MCO No. 1, Mar. 21, 2002, for the Secretary of Defense's Military Commission Order implementing the President's Order regarding policy, responsibilities, and procedures for trial before military commissions. See also Katharine Q. Seelye, *Military Tribunals—Staffing Defense at Guantánamo*, N.Y. TIMES, May 23, 2003, at A16 (describing the Pentagon's recruitment of civilian lawyers to serve as defense counsels for terrorist suspects in its military tribunals at the US Naval Base in Guantánamo Bay, Cuba).

5. See Exec. Order No. 13,228, 66 Fed. Reg. 51,812, Oct. 8, 2001, which established the Office of Homeland Security and the Homeland Security Council responsible for "advising and assisting the President with respect to all aspects of homeland security." *Id.* § 5(a).

6. See Aviation and Transportation Security Act, Pub. L. No. 107-71, 115 Stat. 597 (allows the federal government to have control of the security of airports). See generally Press Release, Office of the Press Secretary, Strengthening Homeland Security Since September 11 (April 11, 2002), available at http://www.whitehouse.gov/homeland/six_month_update.html (last visited June 1, 2003).

International measures have included adoption of new conventions such as the Inter-American Convention Against Terrorism of June 3, 2002,⁷ which provides for regional use of a variety of legal tools that have been employed effectively in the past against terrorism and transnational organized crime. The Inter-American Convention, building upon a number of multilateral and bilateral instruments already in place, is aimed at increasing the effective communication between the governments of the Organization of American States and provides for financial intelligence units for gathering terrorist financing information, measures improving the communication between law enforcement authorities, mutual legal assistance, and improved exchange of information for border controls. Accelerated efforts have also been undertaken toward implementing the 1997 Convention for the Suppression of Terrorist Bombings,⁸ which imposed binding legal obligations on parties to prosecute or extradite terrorists and provides an international framework for cooperation among states directed toward prevention of terrorism and punishment of offenders. And the 1999 Convention for the Suppression of the Financing of Terrorism,⁹ which criminalized financing of terrorist activities and established an international legal framework for cooperation in preventing such financing and punishing offenders, has also been given further impetus.

Perhaps the most significant development was the adoption by the UN Security Council of its Resolution 1373 on September 28, 2001.¹⁰ In this resolution, the Security Council stressed its determination to prevent acts of terrorism¹¹ and called for all "States to work together urgently to prevent and suppress terrorist acts,"¹² to prevent and suppress the financing of terrorism, and to "find ways of intensifying and accelerating the exchange of . . . information."¹³ It also formed a committee to monitor its implementation¹⁴ and directed the committee to establish a work program in consultation with the Secretary General on specific tasks under the program.¹⁵ States were asked to report in 90 days on the steps they had undertaken to implement the resolution.

Earlier, on September 12, 2001, the Security Council had adopted Resolution 1368,¹⁶ which unequivocally condemned "in the strongest terms the horrifying terrorist attacks" of the previous day and regarded such acts "as a threat to international peace and security."¹⁷ The resolution "called on all States to work

7. Inter-American Convention Against Terrorism, S. Treaty Doc. No. 107-18, AG/RES. 1840 (XXXII-O/02).

8. G.A. Res. 52/164, U.N. GAOR, 52d Sess., 72d Mtg., U.N. Doc. A/RES/52/64 (1997). All UN conventions are *available at* the UN website, <http://www.un.org>.

9. G.A. Res. 54/109, U.N. GAOR, 54th Sess., 76th Plen. Mtg., Agenda Item 160, U.N. Doc. A/RES/54/109 (2000). For the status of these and other such instruments, see Report on Measures, *supra* note 2, para. III.A.

10. S.C. Res. 1373, U.N. SCOR, 56th Sess, 4385th Mtg., U.N. Doc. S/RES/1373 (2001).

11. *Id.*, preamble.

12. *Id.*

13. *Id.*, para. 3(a).

14. *Id.*, para. 6.

15. *Id.*, para. 7.

16. S.C. Res. 1368, U.N. SCOR, 56th Sess, 4370th Mtg., U.N. Doc. S/RES/1368 (2001).

17. *Id.*, para. 1.

together urgently to bring to justice the perpetrators, organizers, and sponsors of these terrorist attacks and stressed that those responsible for aiding, supporting or harbouring the perpetrators, organizers and sponsors of these acts will be held accountable.”¹⁸ Also noteworthy was the report of the General Assembly’s Sixth Committee’s working group, which was earlier constituted to develop measures to eliminate international terrorism.¹⁹

To illustrate the efforts of international organizations, the World Bank and International Monetary Fund have accelerated their work on anti-money laundering and combating the financing of terrorism.²⁰ And the Commission on Security and Cooperation in Europe is enhancing its efforts in the war on terrorism.²¹ Finally, although the statute of the International Criminal Court²² was not drafted with terrorism as its primary focus, nevertheless, terrorism is a crime within the Court’s jurisdiction.²³

II.

The Bush administration’s policy for responding to the threat of international terrorism was announced on September 20, 2002.²⁴ Its centerpiece is the doctrine of preemptive military intervention: “We will not hesitate to act alone, if necessary, to exercise our right of self-defense by acting preemptively.”²⁵ This policy, based in essence on the concept of self-defense as embodied in UN Charter Article 51, goes beyond what has been accepted as a legal response to the threat of attack, since the Charter allows the use of force when the Security Council has determined that there is a breach of or threat to international peace, or an act of aggression; and force is allowed in self-defense only in case of an armed attack. Given that the situation presented by terrorist individuals and rogue states presents new challenges to the Charter, whose terms did not contemplate such dangers, the legal criteria must nevertheless always be met: the danger must be shown by clear evidence and military action may be taken only as a last resort when diplomatic, political and other nonmilitary means have failed. Following the US-led

18. S.C. Res. 1368, *supra* note 16, at para. 3.

19. *Measures to Eliminate International Terrorism: Report of the Working Group*, U.N. GAOR 6th Comm., 56th Sess., Agenda Item 166, U.N. Doc. A/C.6/56/L.9 (2001).

20. See generally Matthew Levitt, *Iraq, U.S., and the War on Terror, Stemming the Flow of Terrorist Financing: Practical and Conceptual Challenges*, 27 SPG FLETCHER F. WORLD AFF. 59 (2003).

21. See, e.g., Commission on Security and Cooperation in Europe report, “Hearing Before the Commission on Security and Cooperation in Europe,” CSCE 107-2-2 (May 8, 2002).

22. Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (1999), available at <http://www.un.org/law/icc/statute/rome.htm> (last visited June 1, 2003).

23. Art. 5 crimes are genocide, crimes against humanity, war crimes, and the crime of aggression. See art. 6-8 for definitions of these crimes. Under the statute, natural persons who commit these crimes are within the Court’s jurisdiction. *Id.* at art. 25.

24. The White House, National Security Strategy, Sept. 17, 2002, available at www.whitehouse.gov/nsc/nssall.html (last visited June 1, 2003).

25. *Threats and Promises; From the Document: A Stress on Disrupting Terrorism*, N.Y. TIMES, Sept. 9, 2002, at A14. See Ved Nanda, *Pre-emptive Danger*, The Nat’l L. J., October 21, 2002 [hereinafter Pre-emptive].

preemptive war in Iraq, many of these issues will have to be revisited and held up to the light of close analysis.²⁶

The use of military force to combat terrorism must be seen as a new powerful tool being wielded by the United States. Having employed it first in Afghanistan and now in Iraq, the US has been emboldened by its reception at home and seemingly undaunted by criticism of it overseas. Its implications are far-reaching, perhaps especially for the integrity of the law itself.

Domestically, as well, concerns have arisen with regard to the impact on civil liberties of stricter security precautions. Executive and legislative initiatives in the fight against terrorism have caused concerns among critics that, in the name of security, the freedoms and liberties Americans deeply cherish might be excessively abridged.²⁷ On May 20, 2003, the US Department of Justice released a report to members of Congress giving previously undisclosed data on the implementation by the Department of its new powers to fight terrorism.²⁸ The report reveals everything from the use of hundreds of secret search warrants to the fact that some 50 people have been detained without charges as material witnesses.²⁹

International terrorism constitutes a continuing menace for the world community two years after September 2001. After a brief lull following the war on Iraq, waves of terrorist attacks in Riyadh, Saudi Arabia,³⁰ and Casablanca, Morocco,³¹ in May 2003 killing scores of people and injured many more, were suspected to have been carried out by Al Qaeda or its supporters.³² Counterterrorism officials suspected that Al Qaeda had reorganized bases of operation in several locations, including Kenya,³³ Sudan, Pakistan, Saudi Arabia,³⁴ and Chechnya, recruiting and training new members and planning new attacks on Western targets.³⁵ This has led to further security measures, including heightened

26. See, e.g., Hurst Hannum, *Iraq, U.S., and the War on Terror: Bellum Americanum*, 27 SPG FLETCHER F. WORLD AFF. 29 (2003); Shashi Tharoor, *Iraq, U.S., and the War on Terror: Understanding & Defeating Terrorism, One Year Later*, 27 SPG FLETCHER F. WORLD AFF. 9 (2003); Nanda *supra* note 26.

27. See, e.g., ACLU, *FREEDOM UNDER FIRE: DISSSENT IN POST-9/11 AMERICA*, MAY, 2003, available at <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=12666&c=206> (last visited June 1, 2003); Letter from Kenneth Roth, Executive Director, Human Rights Watch, to Secretary Donald Rumsfeld, U.S. Secretary of Defense (Dec. 14, 2001), available at <http://www.hrw.org/press/2001/12/military-comm-ltr.htm> (last visited June 1, 2003).

28. Eric Lichtblau, *Justice Dept. Lists Use of New Power to Fight Terror*, N.Y. TIMES, May 21, 2003, at A1.

29. *Id.*

30. See, e.g., Neil MacFarquhar, *Saudis Are Shaken as Jihad Erupts at Their Front Door*, N.Y. TIMES, May 16, 2003, at A1.

31. See *Suicide Bombs Kill at Least 20 In Casablanca*, N.Y. TIMES, May 17, 2003, at A1.

32. See *Moroccans Assert Al Qaeda Financed Suicide Bombings*, N.Y. TIMES, May 23, 2003, at A16; Neil MacFarquhar, *Saudis Link 4 In Bomb Plot To Qaeda Cell*, N.Y. TIMES, May 19, 2003, at A1.

33. See, e.g., *Kenya Is on Terrorist Alert After Reported Sighting of Suspect in 1998 Embassy Bombings*, N.Y. TIMES, May 21, 2003, at A14; Alan Cowell, *Kenyan Asks U.S. and Britain To Ease Their Security Alert*, N.Y. TIMES, May 24, 2003, at A8.

34. See Don Van Natta, Jr. & Neil MacFarquhar, *3 Qaeda Cells Are Operating In Saudi Arabia, Officials Say*, N.Y. TIMES, May 20, 2003, at A16.

35. See Neil MacFarquhar & Don Van Natta, Jr., *Aftershocks: Warnings; New Tape, Linked To bin*

alerts both at home³⁶ and abroad when called for by intelligence developments,³⁷ often undertaken by governments working in close collaboration.³⁸

Among policy alternatives to combat terrorism, the use of military force dominates the US agenda today. The implications of this are far-reaching. As historically unprecedented as the challenges are, it would appear that more creative approaches are urgently called for, approaches that do justice to the multi-faceted character of this problem.³⁹

III.

The symposium sponsored by the International Legal Studies Program at the University of Denver and Public International Law and Policy Group, Washington, D.C., was organized with the excellent advice and help of my colleagues Paul Williams from Georgetown University and Michael Scharf from Case Western Reserve University Law School. The Carnegie Corporation and the Social Science provided the financial assistance that made the conference possible. Selected papers from the conference are included in this symposium issue. We are extremely proud to have the opportunity to present these outstanding pieces of legal analysis on this critical and unfortunately urgent topic.

This year's Myres S. McDougal Lecture was presented by James A.R. Nafziger, Thomas B. Stoel Professor of Law and Director of International Programs at Willamette University College of Law, and president of the American Branch of the International Law Association. Professor Nafziger set the stage for our symposium and does the same for this volume by providing an overview of the threat of terrorism and domestic and international responses to it. He calls this a "Grave New World of Terrorism," which warrants extremely close watching. Applying methods that do honor to the lecture's namesake,⁴⁰ Professor Nafziger examines both the ideas of "terrorism" and "war" and notes that both remain undefined, and he recounts the legal measures taken by the United Nations and the United States. Throughout, Professor Nafziger carefully analyzes the quagmire of effects set into motion by the Bush administration's chosen approach. He concludes his perceptive remarks with the query: "As we struggle through this

Laden Aide, Urges More Attacks, N.Y. TIMES, May 22, 2003, at A1; David Johnston & Don Van Natta, Jr., *U.S. Officials See Signs of a Revived Al Qaeda*, N.Y. TIMES, May 17, 2003, at A1, [hereinafter *Al Qaeda Signs*].

36. See, e.g., William K. Rashbaum, *Precautions—Security is Stepped Up at Landmarks and Borders*, N.Y. TIMES, May 21, 2003, at A15.

37. See, e.g., *Al Qaeda Signs*, *supra* note 35.

38. See Steven R. Weisman & Neil MacFarquhar, *U.S. Agents Arrive to Join Saudi Bombing Investigation*, N.Y. TIMES, May 16, 2003, at A14; Douglas Jehl, *Saudis Triple Bomb Inquiry; Vow Joint Antiterror Effort*, N.Y. TIMES, May 17, 2003, at A7; but see Douglas Jehl and David E. Sanger, *Five Requests to Saudis Went Unheeded, U.S. Says*, N.Y. TIMES, May 16, 2003, at A14.

39. See generally Michael Mousseau, *Market Civilization and Its Clash with Terror*, 27 INT'L SECURITY 5 (2002-2003); Audrey Kurth Cronin, *Behind the Curve: Globalization and International Terrorism*, 27 INT'L SECURITY 30 (2002-2003).

40. See Myres S. McDougal & Florentino P. Feliciano, *LAW AND MINIMUM PUBLIC WORLD ORDER: THE LEGAL REGULATION OF INTERNATIONAL COERCION* (1961).

unwanted war on terrorism, is it not better to be on the side of humanity and to follow the dictates of public conscience? . . . Why *not* allow reason and dialogue to shine on the Grave New World of Terrorism? Why not try to convert adversity into opportunity by doubling efforts to create a truly global community, identity and stability? The choice is ours.”⁴¹

Laura Dickinson’s focus is on the apprehension and punishment of the perpetrators of the September 11 attacks. She reviews the emerging “transitional justice mechanism—the mixed domestic-international tribunal—and consider[s] the role such tribunals might play in the fight against terrorism.”⁴² These are the tribunals in which local and international judges sit together and which have been used already in Kosovo and East Timor and now in Sierra Leone with some degree of success. She underscores the advantage of the hybrid nature of these courts when we consider issues of accountability in post-Taliban Afghanistan. She analyzes the legitimacy problems and capacity-building problems of such tribunals but feels that the advantages, based upon our prior experience, to outweigh the disadvantages. She does not, however, believe that these are the only forums for trying suspected terrorists, but suggests that international accountability mechanisms could also be used. Ultimately, she says, “[I]t is only through a combination of accountability and the establishment of rule of law that we will have a chance of holding the forces of terror in check. As we consider various models of justice in the aftermath of the September 11th attacks, the lessons learned elsewhere about forging justice after mass atrocity provide a fertile ground for creative innovation.”⁴³

Mary Ellen O’Connell, who has written extensively on war and peace issues, addresses the law of self-defense, clarifying this murky area. She goes on to what she calls the “law of exceptionalism,” which characterizes the US tendency to excuse itself from application of generally applicable international laws or to reinterpret the law or the facts so as to exempt itself. Especially concerned with the ramifications for the state of the law, she warns, “If the United States . . . declares itself above the law, it will help break down the commitment to law generally in the international community.”⁴⁴

Derek Jinks’ focus is on the applicability of international human rights law to the trials and prosecutions of alleged terrorists. He begins with an analysis of the International Covenant on Civil and Political Rights (ICCPR), looking at the US government’s position that the special circumstances of the war on terrorism allow for derogation of the ICCPR’s terms. He does not feel that the conditions for derogability exist in this case and reminds us that “[i]nternational human rights law recognizes the bare minimum of standards necessary to protect the safety and integrity of individuals from abuses of power. As such, it governs how states treat all people in all circumstances—even in time of war.”⁴⁵

41. *Infra*, page 22.

42. *Infra*, page 26.

43. *Infra*, page 42.

44. *Infra*, page 57.

45. *Infra*, page 67.

Mark Drumbl discusses the mixed criminal/military response to terrorism—the former under the traditional law enforcement model and the latter under Chapter 7 Security Council authorization after determination of a threat to international peace and security. He considers various alternative methods of obtaining justice and suggests that an international criminal tribunal might be a proper forum to try those who have committed heinous terrorist acts for crimes against humanity. He also compares the rhetorical and pragmatic positions of the US in response to the propriety of international criminal tribunals versus military tribunals in the context of the Rwandan genocide and the September 11 terrorist attacks. He cautions, “Law and due process are now often rhetorically presented as inconveniences to the pursuit of justice, whereas in other post-atrocity situations law and due process are rhetorically presented as requirements for justice.”⁴⁶

Larry Johnson, who has served as the Legal Adviser of the International Atomic Energy Agency, brings his profound knowledge of the subject to an examination of the potential threat from terrorist attacks upon nuclear facilities. He stresses that after September 11, 2001, it is manifestly clear that everything possible must be done on the international level to protect these facilities from breach and that the existing international measures do not even address this issue. He suggests preventive measures which should eventually be codified in a treaty form. Such binding preventive measures, in his estimate, are essential for the suppression of acts of nuclear terrorism. Thus, it is his advice that “policy-makers [must] focus on the treaty-making aspect of this campaign. The U.S. should go beyond “feel good” treaty amendments with no “bite.” If the drafters of nuclear terrorism treaties ignore the lessons of September 11th, they do so at their, and our, peril.”⁴⁷

IV.

Challenges to find effective means to combat terrorism remain with us. We are keenly aware of the shortcomings of the international instruments addressing terrorism, and yet some seem intent upon avoiding the ambit of international legal norms in general. It is feared that only through continued terror will we learn the impact of an unbalanced, military-centered approach dominated by the US. An effective, sustained, and multilateral response has yet to be found.⁴⁸

46. *Infra*, page 74

47. *Infra*, page 86.

48. *See generally* Nanda, Responses to Terrorism, *supra* note 2.

