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THE GRAVE NEW WORLD OF TERRORISM:

A LAWYER'S VIEW

JAMES A.R. NAFZIGER*

I. INTRODUCTION

It is truly a pleasure and an honor for me to present the 2002 Myres McDougal Lecture. When I first ventured into the field of international law, several distinguished colleagues of ours were especially kind and helpful to me. Believe me, I needed all the help I could get as the first Fellow of the American Society of International Law! I will always be grateful to Ved Nanda, Harold Lasswell, and Myres McDougal, among a handful of professional mentors, for their advice and encouragement despite my tainted past as a recent graduate of what was, for them – all of them good Yalies – the "other" New England law school.

Policy-oriented studies, which the Lasswell-McDougal team pioneered at Yale, have been instrumental in the transformation of international law from prescription to process during the last half century. One of these studies, Law and Minimum Public World Order,[1] which Professor McDougal co-authored, became a classic. From beginning to end, it still speaks to my topic today. The opening paragraph of the book, after noting the "high and still rising levels in tension and expectations of comprehensive violence,"[2] emphasized "the urgent need for rational inquiry into the potentialities and limitations of our inherited principles for controlling violence between peoples and for the invention and establishment of more effective alternatives in principles and procedures."[3] So there you have it: Myres McDougal never minced either big words or big agendas – not to mention big books! The penultimate chapter of his 872-page treatise on minimum public order concludes exactly as many of us might conclude today: "the ideal represented by a permanent international criminal court with jurisdiction over war

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1. MYRES S. MCDOUGAL & FLORENTINO P. FELICIANO, LAW AND MINIMUM PUBLIC WORLD ORDER: THE LEGAL REGULATION OF INTERNATIONAL COERCION (1961).

2. *Id.* at 1.

3. *Id.*

crimes remains a valid goal of world public order."[4] Myres McDougal was obviously a man of big vision.

Let us now go back to the future from another source. In the summer of 2001, while Easterners breathlessly awaited shark attacks on Atlantic beaches and the entire country speculated on the next installment in the Gary Condit soap opera, at least one serious issue hit the front pages, namely, stem-cell research. After years of public debate about artificial fertilization and cloning, we began to wonder, was this the *Brave New World*? Were we ready? Maybe we weren't quite ready for the Social Predestination Room, the Organ Store or the Bottling Room of Huxley's novel. But the planetary motto for the *Brave New World*– "Community, Identity, Stability"– sounded okay to us. And Helmholtz Watson, the Emotional Engineer in the book, seemed to describe our world, too, when he cheerfully concluded that "[t]he world's stable now. People are happy, they get what they want. . . ."[5] On the international level, weren't we also managing, in the tradition of the *Brave New World*, "to keep the world so orderly that it won't bother the United States"[6] in its national quest for invulnerability?

II. A GRAVE NEW WORLD OF TERRORISM

The terrorist attacks of September 11, 2001 jolted us out of our complacency. We became profoundly aware of a Grave New World. And we became quickly aware that many people did not share our particular sense of well-being. For them–to quote Helmholtz Watson in the Huxley novel again– "Being contented has none of the glamour of a good fight against misfortune . . . or a fatal overthrow by passion."[7] As if the Cultural Revolution in China, the brutal regime of Pol Pot in Cambodia, the nearly endless conflict in the Middle East and genocide in Africa had not haunted us enough in recent years, we found ourselves on September 11th face to face with the suicidal partners of yet another radical movement, this one already notorious, to quote the *Brave New World*, "by a campaign against the past; by the closing of museums, the blowing up of historical monuments . . . by the suppression of all books published before [a certain date]."[8] In the background of the suicide bombings you could almost hear the Second Solidarity Hymn of the *Brave New World*: "Come, Greater Being, Social Friend, Annihilating Twelve-in-One! We long to die, for when we end, Our larger life has but begun."[9] We quickly realized that Community, Identity and Solidarity could mean very different things to different people. Then came the anthrax scare. And, again, it was back to the future of Helmholtz Watson. As he asked seventy years ago in the *Brave New World* : "What's the point of truth and beauty or knowledge. . . when the

4. *Id.* at 731.

5. ALDOUS HUXLEY, BRAVE NEW WORLD (Harper Collins Perennial Classics ed. 1998) (first published by Harper & Brothers in 1932).

6. *See A Look Back/2001/A Look Ahead*, CHRIST. SCI. MON., Dec. 28, 2001, at 10, 11 (remarks of Ronald Steel, École des Hautes Études).

7. Huxley, *supra* note 5, at 228.

8. *Id.* at 51.

9. *Id.* at 81.

anthrax bombs are popping all around you?"[10]

A. Root Causes

What causes terrorism as a whole to pop all around us? Each of us would probably come up with a different list of the root causes, but we might agree on at least a few of the following: illiteracy and under-education; rampant population growth; widening disparities in wealth among peoples and states; deprivations of fundamental freedoms and human rights; a sensed loss of power as a result of modernization and secularization of traditional values; the mass displacement of persons and populations; denials of self-determination; political disenfranchisement; religious intolerance and militance;[11] de-privatization of religion to shape a new public order;[12] and the lack of a sustaining civic culture in so-called failed or politically disrupted states. Disruption breeds destruction.[13] Perhaps most important, however, is a shared sense of historic injustice that excites a relentless paranoia toward the outside world. One commentator has identified three elements of this shared sense: a widespread resentment of authoritarian rule, an overbearing foreign presence, and unequal income distribution.[14]

These sources of terrorism have become effective in today's world because of such phenomena as arms proliferation and trafficking, advances in electronic technology, and banking secrecy. The terrible instruments of violence are also apparent: they include a vast arsenal of weapons, from explosive shoes to cyber-sabotage to hijacked aircraft to weapons of mass destruction-biological, chemical, or nuclear.

In this lecture I was asked to set the stage for today's discussion of legal

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10. Huxley, *supra* note 5, at 228.

11. *See, e.g.*, Michael Scott Doran, *Somebody Else's Civil War*, 81 FOR. AFF. 22 (Jan./Feb. 2002); Bernard Lewis, *The Revolt of Islam*, NEW YORKER, Nov. 19, 2001, at 50; Andrew Sullivan, *This Is a Religious War*, N.Y. TIMES MAG., Oct. 7, 2001, at 44; Robert Worth, *The Deep Intellectual Roots of Islamic Terror*, N.Y. TIMES, Oct. 13, 2001, at A 13.

12. In other words:

> Acts of religious terrorism have thus been attempts to purchase public recognition of the legitimacy of religious world views with the currency of violence. Since religious authority can provide a ready-made replacement for secular leadership, it is no surprise that when secular authority has been deemed to be morally insufficient, the challenges to its legitimacy and the attempts to gain support for its rivals have been based in religion. When the proponents of religion have asserted their claims to be the moral force undergirding public order, they sometimes have done so with the kind of power that a confused society can graphically recognize: the force of terror.

Mark Juergensmeyer, *Terror in the Name of God*, 100 CURRENT HIST. 357, 361 (2001).

13. Terrorist operations have often been conducted in states that were supportive, internally disrupted or where governments were too weak to exercise control. With the increasing probability of disruption within states in many parts of the world, there should be no shortage of venues for terrorist bases in the future. W. Michael Reisman, *New Scenarios of Threats to International Peace and Security: Developing Legal Capacities for Adequate Responses*, in THE FUTURE OF INTERNATIONAL LAW ENFORCEMENT: NEW SCENARIOS - NEW LAW? 13, 37 (Jost Delbrück ed. 1993).

14. Mark Katz, *Osama bin Laden as Transnational Revolutionary Leader*, 101 CURRENT HIST. 81, 81-82 (2002).

issues and responses in the aftermath of September 11th. Ultimately, we will be concerned about preferred processes of world order, in the language of Myres McDougal, for addressing acts of terrorism in a Grave New World. Most of you are, no doubt, familiar with the salient issues and responses to them.[15] You may even be suffering from September 11th fatigue. You will appreciate that the so-called world of terrorism is not really new at all though it has seemed disturbingly immediate to Americans since September 11th. You will also appreciate that acts of terrorism are not necessarily international. They are often confined to national territory or are mixed, domestic and international. Finally, you will appreciate that the September 11th suicide bombings were extraordinary, indeed, and let us hope, unique. Given the diversity of contexts in which acts of terrorism occur, it is therefore unwise to generalize too much on the basis of our recent experience. Despite all of these disclaimers, however, the aftermath of September 11th provides a very good context for discussions today of terrorism.

B. Responses

1. Homeland Security

Considering, first, our homeland security, we can sense a state of national alert even without the color-coded warnings borrowed from Smokey the Bear to advise the public on the degree of danger from terrorism.[16] The war on terrorism is not quite reminiscent of Rosie the Riveter in the vanguard of the home front during

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15. For a summary of the events of September 11, 2002 and the responses to it, *see Contemporary Practice of the United States Relating to International Law*, 96 AM. J. INT'L L. 237, 255 (2002) (Sean D. Murphy ed.) (hereinafter Contemporary Practice).

16. Take, for example, an appeal to farmers from the Department of Agriculture:

> Farmers Can Play A Very Important Role in Preventing Terrorism
>
> Since September 11th, 2001 we will forever be changed in our thoughts of tragedy and destruction in this county [sic]. We have the responsibility to never let this happen again. It is our duty to be vigilant and report to the authorities any activity that is unusual or contrary to what we see day in and day out.
>
> Farmers across this land can help by:
>
> - protecting the fertilizer, chemicals and fuel sitting out in the fields from becoming a resource for terrorists.
> - keeping in closer contact with neighbors and report to authorities anyone who does not have the right to be around your livestock or on one's property.
> - practicing good biosecurity by requiring that all visitors to your livestock facilities wear clean outer clothing and wear clean disinfected boots.
> - making sure our pets and livestock are healthy and well vaccinated.
> - reporting any unusual level of sickness or death to the local veterinarian or state or federal authorities.
> - reporting any unusual occurrences such as higher than normal death rates observed in wildlife or local livestock populations or unusual symptoms such as vesicles (blisters) on animals' mouths or feet.
>
> It is suggested you have a list of telephone numbers available for your family to notify the appropriate authorities of any situations that make you suspicious.

United States Dep't of Agriculture, Farm Service Agency, FSA Fact Sheet – Feb. 2002, at 10.

the Second World War, but it is not business as usual, either. I want to highlight two developments in particular: the recent expansion of the federal government's investigative and prosecutorial powers and the reexamination of immigration procedures.

In enacting the USA PATRIOT Act of 2001,[17] the United States Congress sought to strengthen federal law enforcement.[18] The Act is comprehensive. It imposes, first, new record-keeping and reporting measures on financial institutions including banks, investment companies, commodity-pool operators and commodity-trading advisers. The measures are intended to discourage and detect money-laundering by relying on Suspicious Activity Reports, which are filed by banks and other financial institutions with a federal governmental agency know as the Financial Crimes Enforcement Network. The Act also provides for greater information-sharing among federal intelligence and criminal justice officials; enables a special intelligence court to authorize the collection by law enforcement authorities of data from roving wiretaps; enlarges the availability of information from grand jury investigations; restricts access to biological and chemical agents and criminalizes their possession for other than peaceful purposes; relaxes rules for gaining access to electronic communications and student records by subpoena; provides for limited detention of certified terrorists; and facilitates governmental eavesdropping and so-called "sneak and peek" searches of private premises. The USA PATRIOT Act also authorizes indefinite detention of certain aliens in renewable six-month increments.

These initiatives raise serious issues of civil liberties. We should all be concerned about any substantial erosion of our individual privacy, freedom of expression or freedom of association, whatever the tradeoffs for national security. Since September 11th people in this country have experienced new threats to their civil liberties, such as the selective interrogation of non-citizens regardless of the existence of any reasonable suspicion, the detention of non-citizens without disclosure of their names or details of their detention and for indefinite periods of time,[19] airport profiling, cultural insensitivities in security patdowns, plans for the installation of public surveillance cameras on Main Street, DNA profiling of suspected terrorists, dragnets of foreign employees at airports and other sensitive workplaces, and closed immigration hearings to protect the anonymity of sensitive sources.

Although the new initiatives taken by Congress may be rational, we should be wary about making too many tradeoffs for physical security. We might recall that Huxley's novel speaks to a mindless tradeoff of personal dignity and autonomy for an assurance of well-being and security. Ultimately, the best fortress against terrorism is to reject that kind of tradeoff. The best fortress is our Bill of Rights.

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17. Uniting and Strengthening America By Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act) Act of 2001 [sic], Pub. L. No. 107-56, 115 STAT. 272 (2001).

18. For a critique of this Act and related government measures, *see* Harold Hongju Koh, *The Spirit of the Laws*, 43 HARV. INT'L. L.J. 23, 34-39 (2002).

19. For a concise summary of this particularly troublesome aspect of the homeland security program, *see Contemporary Practice, supra* note 15, at 251.

A reexamination of immigration procedures primarily addresses two problems: snafus within an Immigration and Naturalization Service (INS) processing system that might have been inspired by Rube Goldberg or Franz Kafka[20] and the problem of visa overstays. The snafus are a reminder of the need to restructure the INS, especially to separate its law enforcement operations from its service functions. It is also time to improve management of clerical functions. But I want to focus my concern about immigration procedures primarily on the problem of visa overstays.

Of some four to nine million undocumented aliens in this country – nobody knows the exact number – about half are thought to be legally admitted persons who have stayed beyond the limits of their visas. For many foreign visitors, visa overstaying has become the immigration procedure of choice. The United States, unlike most other countries, has relied primarily on admission requirements to regulate migration of some twenty million foreign visitors a year. Once they are admitted, however, it is nearly impossible to ensure their exit from this country on schedule. We have no reliable system of exit controls, despite a congressional mandate in 1996 to establish such a system. Moreover, our long and strong tradition of protecting civil liberties, for which we should be thankful, has discouraged the introduction of a national identification card, resident permits, registration by non-immigrants and other techniques of control that are taken for granted in other countries.

Controlled departure of non-immigrants would, of course, provide no specific protection in itself against terrorism and only marginally greater capacity to locate and deport visa overstayers. But controlled departure would at least provide some deterrence of overstays as well as useful information about patterns of overstays, and, in some cases, the status of individual criminal suspects. Better data could help shape our general admission policies, including the visa-waiver program that enables visitors from many countries to be admitted into the United States without a visa.[21]

2. Initiatives Abroad

When we turn from homeland security to initiatives abroad against terrorism, it is clear how much we will have to depend on international cooperation. It is also clear, in the words of Justice Sandra Day O'Connor, that "[t]he power of international cooperation and understanding is greater than the obstacles we face."[22] But it is just as clear how little we have really cooperated in addressing the root causes of terrorism and how much catching up we have to do – on both

20. *See* Eric Schmitt, *The Rube Goldberg Agency*, N.Y. TIMES, Mar. 24, 2002, at 5. This article appeared the day after the author's remarks in Denver, giving him the satisfaction, for once, of being at least one day ahead of the New York Times. *See also* Abraham McLaughlin, *INS reaches for high-tech silver bullet*, CHRIST. SCI. MON., March 18, 2002, at 2 (describing INS failures and proposed improvements).

21. *See* 8 C.F.R. 217.5 (2001).

22. Sandra Day O'Connor, Keynote Address, Annual Meeting, American Society of International Law, March 15, 2002.

domestic and international fronts – to resume a position of constructive leadership in the global community.

On the domestic front, let me give just one example of the catching up we have to do. In an earlier McDougal Lecture, Leonard Sutton reflected on "what might be done to discourage international terrorism and how the United States seeks foreign cooperation."[23] One of two problems he cited was the difficulty of gaining extradition of suspected terrorists to face prosecution on capital charges in a world largely convinced that the death penalty is a fundamental violation of human rights. That is still a red flag that should prompt this country to reconsider its pursuit of final solutions to even the most monstrous criminal acts.

On the international front we have much to do. During the 1990s the United States failed to leverage its vaunted superpower status for the good of world order. We simply lacked the national will and leadership in Washington to assume the responsibility incumbent of a superpower. And it is much the same in the new century. Just a little over a month before the September 11th attacks, President Bush rejected a protocol to the 1972 Biological and Toxin Weapons Convention[24] that provides for investigation of treaty violations and suspicious outbreaks of illness, and greater transparency of research and other activity in bioscience. However intrusive such measures might seem to be, surely they would be in the national, not to mention global, interest. How can the United States expect Iraq to cooperate in an inspection regime if the United States itself doesn't?

You might say that we were our own worst enemy. It all reminds me of Pogo and his friends–not to put too light a touch on these remarks. Do you remember Walt Kelly's comic strip? Do you recall that when trouble broke out in the bayous, its denizens would form a rag-tag militia and march off to battle, only to discover, in Pogo's words, "We have met the enemy, and he is us"?[25]

Haven't we Americans also been our own worst enemy by failing to pay our dues to the United Nations, by disassociating ourselves from international organizations such as UNESCO, and by refusing to ratify one treaty after another, ranging from prohibitions on land mines to the International Criminal Court. The United States has certainly talked terrorism to the international community and the importance of collective action against it, as in President Clinton's 1998 address to the United Nations General Assembly. But even then the Administration failed to specify practical measures or the nature of the recommended collaboration. Perhaps, most tragically, since the end of the Cold War we have been our own worst enemy by declining to help construct a system of collective security of the sort that was to have been the cornerstone of the United Nations system. Why could we not have exercised more constructive, cooperative leadership during the last decade? Small wonder that it is often lonely for us in the Grave New World of

23. *See* Leonard v.B. Sutton, *Political Asylum and Other Concerns: Some Reflections on the World, Yesterday and Today*, 19 DENV. J. INT'L L. & POL'Y 475, 580 (1991).

24. *See* Raymond A. Zilinskas, *Rethinking Bioterrorism*, 100 CURRENT HIST. 438, 442 (2001).

25. *See* M. Thomas Inge, COMICS AS CULTURE 26 (1990) (Pogo had the same to say about rubbish heaps despoiling the environment).

Terrorism.

III. THE INTERNATIONAL LEGAL FRAMEWORK FOR COMBATING TERRORISM

What, then, is the international legal framework for combating terrorism and for evaluating the measures taken so far by the United States in the aftermath of September 11th? Let's begin with a couple of definitional problems.

A. Definitional Problems

1. "Terrorism"

What exactly *is* terrorism? Although modern terrorism, by that name, has roots as deep as Robespierre's Reign of Terror in eighteenth-century France, we still do not know how to define it exactly. It is broadly accepted as a phenomenon of some coherence that transcends isolated acts of savagery and frequently, though not always, calls for some sort of international legal response. And it has a long and varied history. Long before the terrorists of the French Revolutions, the zealots threatened Roman rule in Palestine, the assassins menaced the Crusaders, and the fraternity of thugs plundered Northern India. They all had their reasons, of course. As the cliché goes, one person's terrorist may be another person's freedom fighter. And that person may be us. We shouldn't forget, for example, our homegrown Sons of Liberty who tarred, feathered and forced the expulsions of loyalist citizens during the Revolutionary War. They were the original red-blooded patriots. They were us, and they were terrorists.

One problem in defining terrorism is the sheer diversity of objectives and characteristics we associate with terrorism, including religious vendettas, social revolution, transnational revolution, national self-determination, and even genocide. Narodnaya Volya, a seminal movement that erupted in 1879, sought to spark rebellion among Russian serfs by demonstrating the vulnerability of the civilian elite.[26] Such mass consciousness-raising, however, has been at most a secondary aim of the Red Brigade or the Basque ETA. Nor does it resemble the genocidal al Qaeda movement. Nor does mass consciousness-raising necessarily have much in common with mass aspirations for self-determination such as the long struggle for Palestinian statehood. Nor do the production of weapons of mass destruction and trafficking in them, which are apparently the criteria for membership in the "axis of evil,"[27] resemble the threats in Chechnya, Colombia, Georgia, India or Indonesia. Terrorism is a method, not a system of belief or set of common aspirations.

Given the enormous diversity of terrorist purposes and situations, a second

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26. *See* David C. Rapoport, *The Fourth Wave: September 11 in the History of Terrorism*, 100 CURRENT HIST. 419 (2001).

27. President's State of the Union Message, Jan. 29, 2002 Found at http://www.whitehouse.gov/news/releases/2002/01/200201-11.html (last visited September 11, 2002).

problem in defining terrorism is the lack of agreement among municipal legal systems on a definition. Typically, definitions are tailored to national contexts and a specific threat or range of threats to national security. It is therefore very difficult, if not impossible, to rely upon municipal practice or custom as an acceptable basis for defining terrorism at the international level. For example, India's Prevention of Terrorism Act, 2002[28] refers to specific instruments of terrorism, membership in officially designated associations, and the more or less common-law crime of conspiracy that generally does not exist in civil law systems. Moreover, the sheer complexity of the Indian definition, which runs to some 1½ pages of single-spaced print, would challenge efforts to distill a practicable international definition.

A third definitional obstacle is one of scale. When do sporadic acts of rock throwing, gang warfare, and animal rights violence exceed the bounds of ordinary criminal law? Taken together, when do they constitute terrorist violence? When do they justify an endless "War on Terrorism?"

A fourth problem infects any effort to overcome disparities of purpose, national context and scale: governments naturally want to keep their political options open. They are therefore reluctant to bring *all* assassinations and *all* military targeting of civilians within a definition of terrorism. Moreover, they do not want to condemn state acts, only acts of non-state actors.

Despite these and other problems, the exercise of trying to define terrorism is worthwhile. It will hardly do to apply Justice Stewart's famous definition of "obscenity" – "I know it when I see it."[29] Of course, impressions accumulated over time help shape a definition. We "know" that terrorism today is more sharply distinguishable from ordinary street crimes than it used to be, just as "piracy" today transcends mere robbery on the sea, as Justice Story famously defined it.[30] We therefore agree on the need to seek some sort of consensus on a definition of what we loosely call "terrorism." There is also substantial agreement on two elements of terrorism: the use of violence against innocent persons and the intent to frighten them into action or inaction according to the perpetrator's purpose. Beyond these two elements, however, there is little agreement on a definition of terrorism. Let me cite just four examples to demonstrate this problem.

When the Mitchell Commission addressed the problem of violence in the Middle East, it defined terrorism as "the deliberate killing and injuring of randomly selected noncombatants for political ends. It seeks to promote a political outcome by spreading terror and demoralization throughout a population."[31] But

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28. THE PREVENTION OF TERRORISM ACT, 2002, India. Cen. Act No. 15 of 2002.

29. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

30. *See United States v. Smith*, 18 U.S. (5 Wheat) 153 (1820) (defining piracy as a violation of the law of nations).

31. Michael J. Jordan, *Terrorism's Slippery Definition Eludes UN Diplomats*, CHRIST. SCI. MONITOR, Feb. 4, 2002, at 7, 8. *See also* M. Cherif Bassiouni, *Legal Control of International Terrorism: A Policy-Oriented Assessment*, 43 HARV. INT'L L.J. 83, 84 (2002) ("Terrorism is a strategy of violence designed to instill terror in a segment of society in order to achieve a power-outcome, propagandize a cause, or inflict harm for vengeful political purposes."). Professor Bassiouni

why single out political ends and a political outcome? What about violence to destroy an economic system, to force an unwanted ethnic population to flee its homeland, or to vindicate divine revelation?

A definition proposed by the Council of Ministers of the European Union overcomes the problem of a constricted focus on political change by defining terrorism to include *offenses* intentionally aimed at "intimidating [other countries], their institutions or people and seriously altering or destroying the political, economic or social structures of a country."[32] But the term "offenses" may be too broad. It may sweep in such legitimate activities as anti-globalization and environmental protests, labor demonstrations and other normally protected activity. What's more, any reference to motive or aims, such as in the European Union's definition, seems too subjective and implies that other motives or aims may be legitimate. On the other hand, if *all* violence against innocent citizens regardless of its ends constitutes terrorism, why should acts of terrorism be distinguished from common crimes already prohibited by most legal systems? We can begin to see why an operational definition remains the Holy Grail of the terrorism debate.[33]

In case a reference to the Holy Grail sounds too Western, let me cite a draft definition of terrorism put forward by the Convention of the Organization of the Islamic Conference on Combatting International Terrorism . Although this rather complicated definition has failed to generate agreement among all members of the Conference,[34] it nevertheless is noteworthy:

> "Terrorism" means any act of violence or threat thereof notwithstanding its motives or intentions perpetrated to carry out an individual or collective criminal plan with the aim of terrorizing people or threatening to harm them or imperiling their lives, honour, freedoms, security or rights or exposing the environment or any facility or public or private property to hazards or occupying or seizing them, or endangering a national resource, or international facilities, or threatening the stability, territorial integrity, political unity or sovereignty of independent States.[35]

This raises a number of important questions. Would a threat of military sanctions constitute terrorism if its purpose is to "threaten the stability" of an independent state like Iraq? Would a criminally irresponsible failure to contain oil pollution at sea fall within the same definition if it thereby exposed the environment to hazards? Are we prepared to accept the Islamic Conference definition insofar as it specifically excludes national liberation movements, such as in Kashmir, and movements of resistance to foreign occupation, such as the Palestinian *intifadas* on the West Bank? Indeed, can terrorists ever be "freedom

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acknowledges that the term terrorism "means different things to different people" and that the term has "never been satisfactorily defined." *Id.* at 101.

32. Jordan *supra* note 31 at 8.

33. *See* Jeffrey Laurenti ed., UNA-USA, COMBATING TERRORISM: DOES THE U.N. MATTER . . . AND HOW 25 (2002) [hereinafter COMBATING TERRORISM].

34. *See Muslims deadlocked on defining terrorism,* INT'L HERALD TRIB., April 3, 2002, at 1.

35. Convention of the Organisation of the Islamic Conference on Combatting International Terrorism § 2 (1999).

fighters?" Despite questions of this sort, the definition of terrorism proposed by the Islamic Conference must be considered seriously in today's world precisely because it is an Islamic formulation.

The alternative to a comprehensive definition of terrorism that the international community has taken so far is simply to define constituent offenses, one by one, that constitute terrorism. Some twelve major treaties take this approach.[36] Several of them rely for enforcement on the extradition principle of *aut dedere aut punire* – either render over or prosecute. They range from the first three agreements, which seek to suppress hijacking and other acts against aircraft safety, to conventions for the suppression of terrorist bombings and financing of terrorism. The suicide bombings of September 11th sounded a wake-up call for the United States to become a party to the latter two treaties. Accordingly, the Senate soon gave its advice and consent to the two treaties on December 5, 2002, the President signed instruments of ratification, and Congress enacted implementing legislation.[37] Meanwhile, efforts continue to complete the drafting of a comprehensive convention on terrorism.[38]

2. "War"

The term "war" raises a second major definitional problem. The vocabulary of warfare sparks patriotism and enhances public relations, but the term "war" has little general meaning under international law, except as a general topic such as the laws of war, war crimes and prisoners of war. Instead, the modern law of warfare uses the term "armed conflict," which avoids both the formal premise of the traditional use of the term that required an explicit declaration of war, as well as the ambiguity of applying the term to contemporary situations. Nevertheless, the term "war" has nominal significance, at least, in United States law because of the power of Congress to declare war[39] although that is seldom an issue anymore.

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36. Convention on Offences and Certain Other Acts Committed on Board Aircraft; Convention for the Suppression of Unlawful Seizure of Aircraft; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents; International Convention against the Taking of Hostages; Convention on the Physical Protection of Nuclear Material; Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation; Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation; Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf; Convention on the Marking of Plastic Explosives for the Purpose of Detection; International Convention for the Suppression of Terrorist Bombings; Convention for the Suppression of the Financing of Terrorism.

37. Terrorist Bombings Convention Implementation Act of 2002, Pub. L. No. 107-197, 116 Stat. 721; Suppression of the Financing of Terrorism Convention Implementation Act of 2002, Pub. L. No. 107-197, 116 Stat. 724.

38. COMBATING TERRORISM *supra* note 33, at 26. The United Nations General Assembly's Ad Hoc Committee on Terrorism has preliminarily approved a majority of the draft agreement's 23 articles, but difficult issues of definition and scope remain, such as the applicability of the "terrorist" label to members of armed forces while engaged in combat. WASHINGTON REPORT, Feb. 2002, at 8.

39. U.S. CONST. art. I, § 8.

What, then, does it mean to be caught up in a "War on Terrorism"? Perhaps President Bush had in mind a war in the colloquial sense of the War on Poverty or the War Against Drugs. Or perhaps he was simply responding to Osama bin Laden's own Declaration of War, his call for a jihad, against the United States in 1996.[40] Quite likely, however, the White House equates "war" with any major, sustained armed conflict abroad.

As to the laws of war and war crimes, there may be a growing recognition that terrorism is the peacetime equivalent of a war crime. One leading commentator has suggested that this identification helps close gaps in the existing international legal regime against terrorism, based as it is primarily on the twelve conventions.[41] But identifying acts of terrorism as war crimes carries with it certain problems such as granting terrorists a combatant's privilege and a right in some situations to exact collateral damage on civilians.

The term "war" is also legally significant in defining the status and rights of captives taken in armed combat, such as the suspected terrorists detained in Afghanistan and at Guantánamo Bay, Cuba.[42] How do we distinguish "prisoners of *war*" from so-called "unlawful combatants?" Ordinarily, a captive's command authority must enjoy a minimum of international legal personality. Since only Saudi Arabia and Pakistan ever recognized the Taliban, and no state ever recognized al Qaeda, neither the Taliban nor al Qaeda enjoyed international legal personality on a *de jure* basis. Technically, Afghanistan has not been engaged in international armed combat because its recognized government was not the Taliban but the Northern Alliance, which the United States and the United Kingdom have supported. On the other hand, the Taliban government was certainly the *de facto* authority, exercising a substantial measure of effective control over Afghan territory for more than five years. It therefore had some claim to represent the Afghan state and to maintain that Taliban fighters are entitled to international legal protection. The prisoner-of-war status of al Qaeda partisans, especially those of foreign origin with no direct links with the Taliban, is, however, tenuous.

It is clear, then, that members of neither the Taliban nor al Qaeda fit easily

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40. *See* Doran, *supra* note 11, at 26, 29, 31.

41. Michael Scharf notes:

> The proposal to define terrorism as the peacetime equivalent of war crimes necessitates application of the laws of war to terrorists. The approach would fill some of the gaps of the current anti-terrorism treaty regime. It would give the prosecution the ability to argue the doctrine of command responsibility, which was not previously applicable to peacetime acts. And it will encourage terrorist groups to play by the rules of international humanitarian law. On the other hand, the approach virtually declares open season on attacks on government personnel and facilities. It would encourage insurrection by reducing the personal risks of rebels. And it would enhance the perceived standing of insurgents by treating them as combatants rather than common criminals.

Michael P. Scharf, *Defining Terrorism as the Peace Time Equivalent of War Crimes: A Case of Too Much Convergence Between International Humanitarian Law and International Criminal Law?*, 7 ILSA J. INT'L. & COMP. L. 391, 397-98 (2001).

42. For a concise description of captive life at Guantánamo Bay, *see* Warren Richey, *A Prisoner's Day at Guantánamo*, CHRIST. SCI. MON., March 14, 2002, at 1.

into the rickety nation-state structure that undergirds the laws of war – more precisely, international law of armed conflict[43] – because the rules it supplies were never intended to cover the current situation. At first, the Bush Administration was reluctant to extend international legal protection to captives taken in Operation Enduring Freedom. Its refusal to extend the Geneva Conventions to the captives, however, provoked considerable criticism and resulted in embarrassment to the United States.[44] As a result, and under considerable political pressure, the Administration acknowledged[45] that the Geneva Conventions of 1949[46] apply to the Taliban, though not al Qaeda partisans, who are presumed to be unlawful combatants outside the protections of the laws of war.

The question then becomes whether Taliban captives are "prisoners of war," and if so, to what extent. Despite its acknowledgment of the applicability of the Geneva Conventions, the Administration insisted that none of the Taliban or al Qaeda captives are entitled to POW status because of the irregular nature of the Taliban militia. In coming to this conclusion, the Administration relied on interpretation of Article 4 of the Third Geneva Convention, the first paragraph of which extends POW status to members of the armed forces, militia or volunteer corps of a Party to the Convention. Members of other militias or voluntary corps belonging to a Party are entitled to POW status only if they are commanded by a person responsible for subordinates, have a fixed distinctive sign recognizable at a

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43. During the Cold War the law of armed conflict, like so much international law, developed rapidly. Among the achievements were the Nuremberg and Tokyo War Crimes Tribunals, and the 1949 Geneva Conventions that still define the basic rules of humanitarian law. Other important instruments of international law that bear on armed conflict include the two United Nations Covenants on human rights, the Vienna Convention on the Law of Treaties, the United States Convention on the Law of the Sea, and the Stockholm and Rio instruments that have shaped the development of international environmental law. Unfortunately, however, Cold Warriors discounted the growing role of non-state actors in the international legal system, such as the Red Cross, the Olympic Movement, multi-national corporations, and political cells spawned in the squalor of Palestinian refugee camps. The end of the Cold War inspired greater attention to the idea of a transnational civil society and non-governmental organizations. The rules of war, however, continued to be expressed in terms of national armed forces, state sovereignty, state responsibility, and a reliance on diplomatic protection of individual claims.

44. Michael O'Hanlon notes:

> [T]he administration's initial reluctance to guarantee the basic protections of the Geneva Conventions to Taliban soldiers and its continued refusal to apply them to al Qaeda were unwise. These decisions fostered the impression that the detainees were not being treated humanely. This perception was wrong, but it became prevalent. Rumsfeld had to go on the defensive after photos circulated around the world showing shackled prisoners kneeling before their open-air cells; Joint Chiefs of Staff Chairman General Richard Myers talked somewhat hyperbolically about how the detainees might gnaw through hydraulic cables on airplanes if not forcibly restrained; and some Pentagon officials even suggested that the detainees did not necessarily deserve Geneva treatment, given the crimes of al Qaeda on September 11. But Rumsfeld's comments came too late, and America's image in the Arab world in particular took another hit.

Michael E. O'Hanlon, *A Flawed Masterpiece*, 81 FOREIGN AFF., 47, 56 (May/June 2002).

45. *See* Katharine Q. Seelye, *A Nation Challenged: Captives; In Shift, Bush Says Geneva Rules Fit Taliban Captives*, N.Y. TIMES, Feb. 8, 2002, at 1.

46. Geneva Convention Relative To The Treatment Of Prisoners Of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter THIRD GENEVA CONVENTION] (adopted Aug. 12, 1949).

distance, carry arms openly, and act in accordance with the laws and customs of war.[47] Taliban captives technically did not "belong to a Party" to the conflict because the Party, Afghanistan, was still represented by the Northern Alliance and therefore not in conflict with the United States and other members of the allied coalition. But POW status is also extended to "members of regular armed forces who profess allegiance to a government *or an authority* not recognized by the Detaining Power."[48] Since the Taliban is clearly such "an authority," the remaining question is which members of the Taliban, if not all of them, were "members of regular armed forces."

Under international law, most of the Taliban captives would seem to be entitled to that status regardless of whether they individually displayed a fixed distinctive sign. Technically, to be entitled to POW status, members of the armed forces of either a recognized or non-recognized government or other authority must wear the required insignia despite the argument that members of regular armed forces do not have to satisfy the criterion.[49] But general practice has been quite tolerant. By international custom, failures to conform to all of the formal criteria for membership in "other militias" are overlooked. The badge of protection is one of function, not insignia.

Significantly, any cases of doubt about the POW status of particular detainees are to be resolved under Article 5 of the Third Geneva Convention by a "competent tribunal"[50] – it can be either a military or a civilian tribunal – of the detaining state. Of course, it would be possible for the United States to argue that there is no "doubt" about the non-applicability of POW status, despite the Geneva Convention, or that Article 5 provides no timelines for resolving individual cases. But such arguments would smack of bad faith. Even if the conflict in Afghanistan is deemed to be a civil war rather than one of an international character, common Article 3 of the four Geneva Conventions and the more expansive Article 75 of Protocol I to the Conventions[51] apply minimum standards of treatment to all protected persons in time of armed conflict. Also, Protocol II to the Geneva Conventions[52] expands the protections ensured to persons during non-international conflict. I will return to the legal status of captives toward the end of my lecture. Let me now turn, however, from definitional issues to substance.

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47. THIRD GENEVA CONVENTION, *supra* note 46, art 4(2); *see also* 1907 HAGUE CONVENTION, art. 1, *infra* note 82.

48. THIRD GENEVA CONVENTION, *supra* note 46, art. 4(3) (emphasis added).

49. *But see* Thom Shanker & Katharine Q. Seelye, *Who is a Prisoner of War? You Could Look It Up. Maybe.*, N.Y. TIMES, March 10, 2002, at Wk. 9 (remarks of Doug Cassell, arguing that regular members of armed forces do not have to satisfy the criterion).

50. THIRD GENEVA CONVENTION, *supra* note 46, art. 5.

51. PROTOCOL ADDITIONAL TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 AND RELATING TO THE PROTECTION OF VICTIMS OF INTERNATIONAL ARMED CONFLICTS (PROTOCOL I), art. 75, U.N. Doc. No. A/32/144 (1977), 16 I.L.M. 1391 (1977) [hereinafter PROTOCOL I].

52. PROTOCOL ADDITIONAL TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, AND RELATING TO THE PROTECTION OF VICTIMS OF NON-INTERNATIONAL ARMED CONFLICTS (PROTOCOL II), U.N. Doc. No. A/32/144 (1977), 16 I.L.M. 1442 (1977) [hereinafter PROTOCOL II].

B. Post-September 11th Law in Action

Law and minimum world public order have developed rapidly in the throes of the War on Terrorism. The suicide bombings of September 11th triggered a volley of new authority. We are seeing international law in action. That is fortunate, for the most part, given the antiquated nation-state premises of the law and the inadequacy of applicable rules in current circumstances. In the old cliché, the laws of war are always one war behind.

Immediately after the suicide bombings, the United States claimed that it had an inherent right to self-defense under Article 51 of the United Nations Charter.[53] At that point there was no clear precedent supporting the use of force in self-defense against non-state actors such as al Qaeda.[54] Nor was it clear that the famous *Caroline* doctrine,[55] permitting self-defense only as a sort of necessary reflex action, would support a delayed and long-distance response, even to an on-going threat. For example, in 1985 the United States bombing attack on the shores of Tripoli to avenge an alleged sabotage by Libyan agents of a Berlin nightclub filled with American GIs proved to be controversial under the *Caroline* doctrine.

In Resolution 1368,[56] however, the United Nations Security Council, responding to September 11th, confirmed a very broad right of individual and collective self-defense under Article 51 of the United Nations Charter. For the first time ever, the Security Council defined terrorism, whether undertaken by states or by non-state actors, as a threat to international peace and security under Chapter VII of the Charter, thereby enabling the Council to make decisions binding on all member states. Similarly, the North Atlantic Treaty Organization (NATO) also took unprecedented action, deciding, for the first time in its history, that the September 11th attack against one of its members, the United States, would be considered an armed attack against *all* members under Article 5 of the NATO Treaty.[57]

Resolution 1368[58] expressed the Security Council's determination "to combat by all means"[59] threats and acts of terrorism and to bring to justice all persons responsible for them. It stressed that those persons are to be held accountable

53. U.N. CHARTER, art. 51. Under Article 51, a member of the United Nations can undertake both individual and collective self-defense, for which no prior authorization by the Security Council is necessary so long as the member state is held accountable to the Council.

54. *See generally* Sean D. Murphy, *Terrorism and the Concept of "Armed Attack" in Article 51 of the U.N. Charter,* 43 HARV. INT'L L.J. 41 (2002).

55. In diplomatic correspondence with Great Britain arising out of an incident involving the vessel *Caroline* on the Great Lakes, United States Secretary of State Daniel Webster established what has become a customary confinement of self-defense to instances where "the necessity of that self-defense is instant, overwhelming, and leaving no choice of means, and no moment for deliberation." 2 MOORE, A DIGEST OF INTERNATIONAL LAW 409-14 (1906).

56. S.C. Res. 1368, U.N. Doc. S/RES/1368 (2001), 40 I.L.M. 1277 (2001).

57. *See* Press Release, Statement by the North Atlantic Council 124 (Sept. 12, 2001), 40 I.L.M. 1267 (2001). The statement applies Article 5 of the North Atlantic Treaty, Apr. 4, 1949, art. 5, 63 Stat. 2241, 2244, 34 U.N.T.S. 243, 246.

58. S.C. Res. 1368, *supra* note 56.

59. *Id.*, pmbl.

under international law. Finally, the Council stood ready to "take all necessary steps to respond to the terrorist attacks of 11 September 2001, and to combat all forms of terrorism."[60] The General Assembly unanimously endorsed the Security Council's action by calling for "international cooperation to bring to justice the perpetrators, organizers and sponsors" of the suicide bombings.[61] Although Resolution 1368 stopped short of authorizing the use of force, the global community acquiesced in the Afghan intervention after the fact.

In Resolution 1373[62] the Security Council took a further step by imposing substantial obligations on member states for the purpose of combating terrorism. These obligations are drawn heavily from the twelve anti-terrorist conventions that largely define the international regime today.[63] All member states were required to take certain specific steps under domestic law. The Security Council's action–truly law in action–accomplished instantly what years of effort to universalize and expand international treaty law had failed to accomplish. After Resolution 1373, states are expected to criminalize willful funding of terrorism, freeze financial assets or economic resources within broadly defined networks facilitating terrorism, suppress recruitment of members of terrorist groups, eliminate the supply of weapons and safe havens or bases of operations to them, offer early warning of terrorist activity to other States, exchange critical information on terrorists and terrorist activity, cooperate in investigating suspects, acquire evidence about them, prosecute them, deny safe haven and territorial bases of operation to support them, and institute effective border controls to constrain transboundary movement of terrorists. To help ensure that these requirements stick, Resolution 1373 also established a Counter Terrorism Committee for monitoring its implementation but unfortunately not for protecting civil liberties imperiled by abuses of the new authority. The same instrument also calls upon states to become parties to the twelve anti-terrorist treaties.

Subsequent Security Council Resolutions reinforced Resolution 1373 and elaborated further on the work of the Counter Terrorism Committee.[64] Also, within several months of Resolution 1373, nearly 150 governments had specifically reported to the Counter Terrorism Committee of the Security Council on their measures of implementation.[65] A successful program of notification, however, does not ensure that the Committee will be able to overcome great national divergencies, for example, in accounting and banking standards. Nor will it be easy for the Counter Terrorism Committee to gain agreement on the identification of entities and individuals suspected of engaging in the financing of terrorist acts. One state's list of terrorists is another state's list of revenue sources, if not freedom fighters. Nevertheless, the Security Council's deep involvement in

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60. S.C. Res. 1368, *supra* note 56, at ¶ 5.

61. G.A.Res. 56/1, U.N. Doc. A/RES/56/1 (2001), 40 I.L.M. 1276 (2001).

62. S.C. Res. 1373, U.N. Doc. S/RES/1373 (2001), 40 I.L.M. 1278 (2001).

63. *See* the Conventions listed *supra* note 36.

64. S.C. Res. 1377, U.N. Doc. S/RES/1377 (2001), 41 I.L.M. 503 (2002); S.C. Res. 1390, U.N. Doc. S/RES/1390 (2001), 41 I.L.M. 511 (2002).

65. *See* Negroponte Discusses Post-9/11 U.N. Agenda During House Appropriations Subcommittee Hearing, UNA- USA, WASH. REP., Mar. 26, 2002, at 1, 2.

giving effect to conventional law is compelling. In historical perspective, its actions follow an impressive series of decisions during the 1990s that provided for far-reaching leadership. In those decisions the Security Council organized peacekeeping operations around the globe, established so-called safe havens for refugees and internally displaced persons, conducted democratic elections, temporarily staffed new governments, and instituted the war-crimes tribunals for the Former Yugoslavia and Rwanda.

Let me cite one last example of post-September 11th law in action within the international community. The United Nations family of organizations includes such important specialized agencies as the United Nations Educational, Scientific and Cultural Organization (UNESCO). The only major country in the world that at that time was not a member of UNESCO was the United States. UNESCO, however, was the first specialized agency to affirm Resolution 1373 by emphasizing that "acts of terrorism can never be justified whatever the motives" and by confirming that "intolerance, discrimination, inequality, poverty and exclusion, among others, provide fertile ground for terrorism."[66] The UNESCO resolution also noted its role in facilitating a dialogue among civilizations to overcome inter-religious tensions. UNESCO's focus on root causes of terrorism ought to redirect some of the global efforts against terrorism. We need to do more than simply react. Just as the War on Terrorism and the U.N. Resolutions are intended to be of indefinite duration, so should be the commitment of states to serious dialogue with non-state actors. Surely, the United States, at least, has learned a lesson from its failure to listen in good faith to others.

C. *Emerging Issues of Law and Policy*

These examples of law in action bespeak both progress and the woefully inadequate framework of international law for dealing with the threat of terrorism. In improving that framework and developing a new regime of authority, several questions loom large: How far does the scope of self-defense extend under Article 51 of the U.N. Charter? For example, does Article 51 justify anticipatory measures against non-state actors? What exactly is the role of the United Nations Security Council or of the General Assembly, under the Uniting for Peace Resolution, after a unilateral act of self-defense? Can the U.N. Charter's prohibition on the use of force and the principle of non-intervention be reconciled with the humanitarian principle of intervention to restore or institute democratic institutions in the face of terrorism?

In the long run the war on terrorism, whether it is metaphorical or real, will require much more than the ethical and legal framework that has emerged in the aftermath of September 11th. We will need willpower more than military power. We will need to address root causes.[67] For starters, we should accelerate initiatives

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66. Negroponte Discusses Post-9/11 U.N. Agenda During House Appropriations Subcommittee Hearing, *supra* note 65, at 27.

67. Terrorists must be punished. But will Washington limit itself to a merely punitive agenda to treat only the symptoms of crisis in the Muslim world? A just settlement for the Palestinians

to establish a Palestinian state and a just settlement of Palestinian claims; adopt national energy and transportation policies and programs to encourage conservation of fuel resources; provide financial and technical support of such regional initiatives as the Central Asian Battalion of Peacekeepers and Central Asian Economic Community for water management, economic development and security; substantially increase funding for public diplomacy and education abroad, particularly through new media in the Islamic world and in Africa; and leverage higher levels of economic and military assistance to promote self-determination and encourage the development of democratic institutions.

D. *Treatment of Captives*

1. Basic Protections of POWs

Let me return now to the question of legal obligations involving the treatment of captives from Afghanistan, as well as suspects in the planning and execution of the suicide bombings and their accomplices. With respect to captives from Afghanistan, we have already seen from attempts to define the term "war" that international law is unclear about the status of partisans to a conflict who do not act under bright-colored authority of a recognized "Party" to the conflict. But the 1977 Protocol I to the Geneva Conventions[68] extends basic protections to all captives regardless of their formal POW status. Although the United States is not a Party to Protocol I, it seems to accept it as custom. Also, common Article 3 of the Geneva Conventions,[69] extends minimum standards of treatment to all protected persons in a non-international conflict. Any question about the entitlement of particular captives to POW status is to be resolved on a case-by-case basis by an Article 5 tribunal of the detaining state.

POWs are entitled to certain privileges and immunities.[70] For example, they may be required to disclose only their name, rank, serial number and date of birth. They are entitled to reasonable satisfaction of basic physical and spiritual needs. They are also entitled to protection by the International Committee of the Red Cross (ICRC). They must be returned to their home countries at the end of a conflict. This particular protection obviously presents a problem during a war on terrorism that is intended to be of indefinite duration. POWs may be prosecuted for war crimes, but only in full conformity with the rules and procedures of military courts martial, including provisions for appeal of decisions.

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and support of regional democratization remain among the key weapons that can fight the growth of terrorism. It will be a disaster for the United States, and another cruel chapter in the history of the Muslim world, if the war on terrorism fails to liberalize these battered societies and, instead, exacerbates those very conditions that contribute to the virulent anti-Americanism of today. If a society and its politics are violent and unhappy, its mode of religious expression is likely to be just the same.
Graham E. Fuller, *The Future of Political Islam*, 81 FOREIGN AFF., Mar./Apr. 2000, at 48, 60.

68. *See* PROTOCOL I, *supra* note 51 at art. 75.

69. THIRD GENEVA CONVENTION, *supra* note 46, at art. 3.

70. *See id., passim.*

2. Prosecution of Captives

Huge questions remain concerning the proposed prosecution of captives. Is Guantánamo Bay sufficiently outside United States territory and jurisdiction to deny captives full constitutional protections? What will be the charges against the captives? Will the charges include criminal conspiracy, as the Bush Administration has intimated? And what will be the rules and standards of evidence? Are anonymous or pseudonymous witnesses permissible? What about the prosecution of so-called "unlawful combatants" – primarily members of al Qaeda – who are suspected of terrorism? Have they been in "armed conflict" with the United States and the allied coalition? May they be prosecuted for war crimes on that or some other basis? May persons implicated in planning and executing the suicide bombings of September 11th be accused of war crimes? Or should they instead be prosecuted only for common crimes in civil courts and for crimes against humanity under international law? (That would seem to place prosecutions beyond the competence of a military commission but within the competence of an international tribunal or a mixed domestic-international tribunal). Where exactly is the line between military and civil justice when the defendants are non-state actors?

3. Military Commissions

Consider the proposed military commissions for trying captives who are neither citizens nor POWs.[71] Are the rules which would govern proceedings by the commissions consistent with the International Covenant on Civil and Political Rights?[72] When could a defendant's act or omission, otherwise not constituting a

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71. *See* Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 16, 2001); Department of Defense, Military Commission Order No. 1, Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism (March 21, 2002), *at* http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf. Generally, the rules and procedures for the military commission provide for proceedings before three to seven military officers (always seven in proceedings where the defendants face the death penalty), without a jury. The presiding officer must be a military lawyer who will decide legal issues, subject to being overruled by other members of the commission. The proceedings are to be open to the public except when publicity may threaten the safety of witnesses or national security. Defendants will be assured a presumption of innocence, a right to examine evidence, a "beyond a reasonable doubt" standard for conviction, a two-thirds vote of the commission for conviction, and a military lawyer or a combination of a military lawyer and a civilian lawyer of the defendant's choice. A unanimous vote of the commission is required in order to impose a death sentence. All convictions are appealable to a review panel composed of three military officers.

72. For example, Article 14 provides, *inter alia*, that:

> 3. In the determination of any criminal charges against him, everyone shall be entitled to the following minimum guarantees, in full equality: . . . (e) 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; . . .
>
> 5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher *tribunal* according to law.

INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, art. 14, Dec. 16, 1966, 993 U.N.T.S. 171, 6 I.L.M. 368 (1967) (emphasis added). The United States is a party to this agreement.

crime under United States law, be sufficient to sustain a trial and impose punishment directly under general principles of international law?[73] As a policy matter, how can prosecution before a military commission be reconciled with the insistence by the United States that Former Yugoslav partisans, Rwandan captives and potentially others should be prosecuted by *international* tribunals? In other words, is it acceptable for the United States to prescribe one procedure when its interests are implicated and another procedure when its interests are not implicated?

Are the military commissions constitutional and valid under international law?[74] The United States Supreme Court has ruled on the constitutionality of special military commissions in two cases, *Ex parte Milligan*[75] after the Civil War, and *Ex parte Quirin*[76] during the Second World War. Accordingly, their jurisdiction seems to be limited to the prosecution of certain combatants and unlawful belligerents or to instances when law enforcement and the legal order have broken down to the point that civilian courts are not functioning. Given the jurisdictional limitations, the Supreme Court decided in *Ex parte Milligan* that it was beyond federal authority to require a United States citizen to defend himself before a military commission "where the courts are open and their process unobstructed."[77] By the same token, however, the Court decided in *Ex parte Quirin* that a military commission was entitled to prosecute several German military saboteurs who had disguised themselves as civilians after coming ashore in the United States.[78] We should keep in mind, however, that *Quirin* was decided after Congress had declared war. Also, the decision was handed down several years before the 1949 Geneva Conventions and the adoption of the Uniform Code of Military Justice in 1950. Times have therefore changed since the Supreme Court's pronouncements on military commissions. For more than a half century now, the law has required that proceedings of special military commissions or tribunals to try non-citizens must be as full and fair as established court martial proceedings against citizens.

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73. Article 15 provides as follows:

> (1) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. . . .
>
> (2) Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

Id., art. 15.

74. *Compare* Jordan J. Paust, *Antiterrorism Military Commissions: Courting Illegality*, 23 MICH. J. INT'L L. 1 (2001) (questioning their validity) *with* Curtis A. Bradley & Jack L. Goldsmith, *The Constitutional Validity of Military Commissions*, 5 GREEN BAG 249 (2002) (defending the constitutional validity of the President's Order).

75. *Ex parte Milligan*, 71 U.S. (4 Wall) 2 (1866).

76. *Ex parte Quirin*, 317 U.S. 1 (1942). For an account of the affair, *see* Gary Cohen, *The Keystone Kommandos*, ATLANTIC MONTHLY, Feb. 2002, at 46.

77. 71 U.S. at 121 (1866).

78. 317 U.S. at 1 (1942).

What does all this mean *today*? Strictly speaking, most al Qaeda members and perhaps some Taliban are not POWs and are therefore not entitled under the Third Geneva Convention to the process due to defendants in a military court martial. But in bringing alleged terrorists to justice, the general practice, as in the endless conflict in Northern Ireland, has been to extend full protections to combatants. The Bush Administration unquestionably did the right thing in promising that during detention even "unlawful combatants" will be treated in a manner that is reasonably consistent with the Third Geneva Convention, including supervision of detention centers by the ICRC.[79] But the Administration should go a step further to ensure *ex gratia*, as a matter of grace, that captives will enjoy POW rights.[80] That would ensure them the due process rights ordinarily required in a court martial of United States military personnel, including a right of habeas corpus from detention and, if prosecuted, a right of appeal. That would be the right thing to do. Surely, within the dictum of the Supreme Court, we are not faced with a breakdown of the normal processes of justice. There are not, and it is unlikely that there will ever be, enough captives at a given point in time to burden the administration of justice. And, surely, we can protect classified information at trial without depriving defendants of their rights to a fair trial. At the very least, the United States would be well-advised to comply with Article 75[81] of Protocol I to the Geneva Conventions so as to extend fundamental guarantees to all captives. Surely it will accrue to the benefit of this country in the long run if we offer the same generous due process upon which our constitutional order and international reputation lie. No less than the security of reciprocity and the rewards of comity are at stake.

IV. CONCLUSIONS

Let me conclude by citing the famous Martens Clause, which is found in the preambles to the 1899 and 1907 Hague Conventions on the Laws of War.[82] These agreements still form a framework of general rules and expectations about implementation of the laws of war. Czarist Russia took the lead in promoting the first Hague Conference in 1899. A distinguished Russian delegate, Frédéric Martens, will go down in international legal history primarily for the principle still in effect that he formulated, as follows:

> Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, inhabitants and belligerents remain

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79. THIRD GENEVA CONVENTION, *supra* note 46, arts. 3, 8, 10.

80. *See* O'Hanlon, *supra* note 44, at 56.

81. PROTOCOL I, *supra* note 51, art. 75.

82. CONVENTION RESPECTING THE LAWS AND CUSTOMS OF WAR ON LAND, WITH ANNEX OF REGULATIONS, Oct. 18, 1907, pmbl., 36 Stat. 2277, 2279-2280, T.S. No. 539 [hereinafter 1907 HAGUE CONVENTION]; CONVENTION WITH RESPECT TO THE LAWS AND CUSTOMS OF WAR ON LAND, WITH ANNEX OF REGULATIONS, July 29, 1899, pmbl, 32 Stat. 1803, 1805, T.S. No. 403. *See* Theodor Meron, *The Martens Clause, Principles of Humanity, and Dictates of Public Conscience*, 94 AM. J. INT'L L. 78, 79 (2000).

> under the protection and empire of the principles of the law of nations as they result from the usages established between civilized nations, from the laws of humanity, and the dictates of the public conscience.[83]

As we struggle through this unwanted war on terrorism, is it not better to be on the side of humanity and to follow the dictates of public conscience? Would that not be a better choice when the enemy may sometimes be us? To quote the contemporary Afghan poet, Mohamed Yasin Niazi:

> We saw the results of the work of the ignorant.
>
> Now we should be rational.
>
> It is time for open windows
>
> Through which the sun shines.[84]

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. As Aldous Huxley wrote, at the end of his Foreword to the 1946 edition of *Brave New World*: "You pays your money and you takes your choice."[85] That still speaks to us today in our quest for minimum public world order rather than national invulnerability.

83. 1907 HAGUE CONVENTION, *supra* note 82 (with minor variations between the 1899 and 1907 Hague formulations).

84. *Quoted in* Andrew Solomon, *An Awakening After the Taliban*, N.Y. TIMES, Mar. 10, 2002, at 1, 20.

85. HUXLEY *supra* note 5, at xvii, *Foreword* to BRAVE NEW WORLD.