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RESPONSES TO THE FIVE QUESTIONS: THOUGHTS AFTER A DECADE

A. Mark Weisburd[†]

I am grateful to the William Mitchell Law Review for offering me the opportunity to express my views on a number of issues that come to mind now that a decade has passed since the September 11, 2001 attacks (9/11 attacks). Several of the questions call for expertise I lack, so I will primarily comment on the legal issues the questions raise.

1. TEN YEARS AFTER 9/11, WHAT IS THE MOST SIGNIFICANT LEGACY LEFT BY THE TERRORIST ATTACKS? ARE WE SAFER?

In my view, the 9/11 attacks led to several developments affecting American security. I will first address the non-legal effects and then examine the legal effects.

I. Non-legal Issues

Any statement of my views on the non-legal consequences of the 9/11 attacks on American security must necessarily be brief, since I lack the expertise to provide more than the views of one well-informed (I hope) layman. With that caveat, I have three observations.

First, it seems to me that the risk of hijacking commercial aircraft in the United States has declined significantly. News reports suggest that other countries have also tightened their security procedures for both passenger and cargo flights.¹

Second, it appears that the risk that Pakistan's nuclear weapons could fall into the hands of Islamist terrorists is greater

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1. E.g., Louise Cainkar, *Introduction: Global Impacts of September 11*, 24(1) COMP. STUD. OF S. ASIA, AFR. & THE MIDDLE E. 155, 155-58 (2004); Simon Duke, *CESDP and the EU Response to 11 September: Identifying the Weakest Link*, 7 EUR. FOREIGN AFF. REV. 153 (2002); *Reaction From Around the World*, N.Y. TIMES (Sept. 12, 2001), <http://www.nytimes.com/2001/09/12/us/reaction-from-around-the-world.html>.

today than in 2001. I say this because of the frequent reports of greatly increased activity by violent Islamist groups within Pakistan, apparently as a collateral effect of the continuing war in Afghanistan.² Further, there seems to be some reason to believe that elements of the Pakistani military are sympathetic to such groups.³ The possession of nuclear weapons by Islamist terrorist groups would pose obvious dangers to a number of states, including the United States.

Third, while the 9/11 attacks led to significant changes in Afghanistan and, of course, the United States, there have been developments in other areas as well. There seems to have been an increase in the overall degree of international cooperative efforts to deal with terrorism, in terms of intelligence collection, interdiction of financing, and actions by security forces directly against terrorist groups. It seems, for example, that the United States provided various kinds of assistance to Indonesia in that country's apparently successful effort to eliminate a particularly violent terrorist group active in its territory.⁴ On the other hand, groups professing some sort of connection with al Qaeda are active in the southern portions of the Arabian Peninsula and, most recently, in Nigeria; this was not the case, at least to the same degree, in 2001. Also, a terrorist group long active in western North Africa has renamed itself al Qaeda in the Islamic Maghreb and affiliated with al Qaeda,⁵ and there is reason to believe that al Shabaab in Somalia is cooperating with al Qaeda.⁶ In this connection, it also seems

2. See, e.g., *Pakistan*, N.Y. TIMES, (Mar. 20, 2012) <http://topics.nytimes.com/top/news/international/countriesandterritories/pakistan/index.html>; Varun Vira & Anthony H. Cordesman, *Pakistan: Violence vs. Stability, A National Net Assessment* 22-42 (Ctr. for Strategic & Int'l Studies, Working Draft, 2011), available at http://csis.org/files/publication/110504_stabilizing_pakistan.pdf.

3. See, e.g., Salman Masood, *Pakistan Detains Officer on Suspicion of Militant Ties*, N.Y. TIMES, June 21, 2011, at A7, available at <http://www.nytimes.com/2011/06/22/world/asia/22pakistan.html?pagewanted=all>.

4. THOMAS LUM, CONG. RESEARCH SERV., RL 31362, U.S. FOREIGN AID TO EAST AND SOUTH ASIA: SELECTED RECIPIENTS 18-20 (2008), available at <http://www.fas.org/sgp/crs/row/RL31362.pdf> (outlining the amounts of money the U.S. gave to Indonesia from 2005-2009).

5. E.g., Mark Mazzetti, *Al Qaeda Affiliates Growing Independent*, N.Y. TIMES, Aug. 29, 2011, at A8, available at <http://www.nytimes.com/2011/08/30/world/asia/30qaeda.html> ("[A] North African militant group that eventually agreed to rename itself Al Qaeda in the Islamic Maghreb.")

6. E.g., *Al Shabab*, N.Y. TIMES (Oct. 17, 2011), <http://topics.nytimes.com/top/reference/timestopics/organizations/s/al-shabab/index.html> ("Shabab leaders have claimed affiliation with Al Qaeda since 2007.")

reasonable to wonder whether the world would be closer to a resolution of the conflict between Israel and the Palestinians if the 9/11 attacks, and the reactions to it, had not taken place.

In short, it seems that, while we are safer from some dangers, other dangers present more serious threats now than in 2001.

II. *Legal Issues*

The main legal developments since the 9/11 attacks can be divided between those affecting international law and those affecting American domestic law.

A. *International Law*

Several significant developments in international law were prompted by the 9/11 attacks. First, the cooperation against terrorists was structured in part through adherence, by a number of countries, to treaties addressed to various aspects of terrorist functioning. While these treaties had been in existence prior to September 11, 2001, a number of states, including the United States, did not become parties to those treaties until after the 9/11 attacks. In the same connection, international organizations, especially the United Nations, have been the vehicles for cooperation to a striking extent. In adopting Resolution 1373,⁷ the United Nations Security Council imposed a binding legal obligation⁸ on states to take certain actions aimed at preventing terrorism⁸ and established a structure for monitoring state compliance with that resolution.⁹

It is also noteworthy that the United Nations Security Council's resolution 1368, adopted on September 12, 2001, included the following language:

Determined to combat by all means threats to international peace and security caused by terrorist acts,

Recognizing the inherent right of individual or collective self-defence in accordance with the Charter,

1. *Unequivocally condemns* in the strongest terms the horrifying terrorist attacks which took place on 11 September 2001 in New York, Washington, D.C. and Pennsylvania and *regards* such acts, like any act of

7. S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001).

8. *Id.* ¶¶ 1-2.

9. *Id.* ¶¶ 6-7.

international terrorism, as a threat to international peace and security¹⁰

This language seems to mean that the 9/11 attacks triggered the right of the United States to engage in self-defense, notwithstanding the fact that the attacks were the work of a terrorist group, not a state. This would seem to establish that a state threatened by terrorist groups based in a second state is exercising its inherent right of self-defense if it uses force against such groups within the territory of the second state, if the second state is either unwilling or unable to control the terrorists. To be sure, the International Court of Justice has rejected this conclusion in *Armed Activities on the Territory of the Congo*,¹¹ but that conclusion says more about the court than it does about the state of international law. Perhaps for this reason, the use of armed drones to kill persons actively involved in terrorist operations, but located in other states, seems less controversial than it was in 2001, at least if the persons targeted will not, for whatever reason, be arrested by local authorities.

It is also worth mentioning that the negative reaction to the Bush Administration's use of interrogation techniques that fit the definition of torture under the Convention Against Torture¹² seems to have underscored the depth of international opposition to that practice.

Beyond these clear developments, the 9/11 attacks have forced international lawyers to address certain issues that received little attention prior to that date. One of the most basic is the question of the treatment accorded terrorists. The basic tension is between treating the issue as a matter of criminal law or, alternatively, treating it as a matter of the law of war. If terrorists are treated solely as criminals, seizing them is arresting them, which means that those seizing the terrorists must comply with all of the requirements necessary to make an arrest. In particular, they may not be killed unless, at the time force is used against them, they are actively threatening physical harm to someone. Under American law, they are entitled to a lawyer as soon as they are seized, and the

10. S.C. Res. 1368, pmb., ¶ 1, U.N. DOC. S/RES/1368 (Sept. 12, 2001) (emphasis in original).

11. *Armed Activities on the Territory of the Congo* (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 168, 222–23 (Dec. 19).

12. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 108 Stat. 382, 1465 U.N.T.S. 85.

lawyer may be present when they are interrogated. They can be punished only if it is proven beyond a reasonable doubt that they are guilty of specific crimes, and the punishment must take the form of a criminal sentence. If, however, the law of war provides the appropriate framework, then a terrorist found on a battlefield bearing arms against the United States may be shot on sight. He may be seized without the protections of arrest and held, without trial, until the end of hostilities, in conditions no better than those accorded a prisoner of war. Such persons are not entitled to a trial if not charged with a crime and are likewise not entitled to legal assistance during interrogation.

The rationale for applying the law of war is straightforward. While the focus of a criminal prosecution is establishing responsibility for a past event, the focus of the law of war is preventing future harm. It is in that context that shooting, on sight, members of an enemy force, disabling prisoners from inflicting future harm by holding them until hostilities end, and interrogating prisoners without legal assistance can be justified. The rationale for treating terrorists as criminals is simply that the acts they are supposed to have committed will surely be crimes under the law of some state, and the proper response to crime is criminal prosecution. This disagreement continues especially with respect to terrorists operating in areas far from the scene of active combat operations but nonetheless engaged in planning and attempting to execute operations directed at, for example, the United States. There is a related uncertainty regarding the length of time terrorists captured on the battlefield may be detained. Under the Geneva Convention Relative to the Treatment of Prisoners of War, “[p]risoners of war shall be released and repatriated without delay after the cessation of active hostilities.”¹³ Assuming for the sake of argument that captured terrorists are entitled to no more protection than this treaty would accord enemy military personnel captured in a conventional war, how long can such captives be held, given that the shape of terrorist groups makes most unlikely any formal end to the conflict with al Qaeda?

Yet another legacy of the 9/11 attacks is the attention paid to the reach of human rights treaties. For example, the European Court of Human Rights has held that Great Britain was obliged to

13. Convention (III) Relative to the Treatment of Prisoners of War art. 118, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

apply the terms of the European Convention on Human Rights and Fundamental Freedoms to areas in Iraq assigned to British forces.¹⁴

B. Domestic Law

The domestic legal legacy of the 9/11 attacks has included breathtaking claims of executive authority, which, in part, have been turned back by the Supreme Court (for example, the claim that an American citizen arrested in the United States could be held indefinitely, without trial). The Bush Administration claimed as well that it was authorized to use interrogation techniques amounting to torture, despite prohibitions in both domestic law and international law. Distressingly, some persons continue to assert that the United States should use such techniques, brushing aside legal questions.¹⁵ Similarly, the continuing insistence from some quarters that terrorists never be tried in the United States and always be tried by a military tribunal seems more of a gut reaction than a considered opinion.

To be sure, issues said by some to arise from actions taken by the executive seem easily resolved. For example, there seems little doubt that an American citizen captured outside the United States while fighting for a terrorist group against the United States is entitled to no better treatment than noncitizens in a similar position. And no doubt the September 18, 2001, Authorization of Use of Military Force (the AUMF) allows the military

to use all necessary and appropriate force against those nations, organizations, or persons [the President] determines planned, authorized, committed, or aided the

14. *Al-Skeini v. United Kingdom*, App. No. 55721/07, Eur. Ct. H.R. ¶¶ 149–150 (2011). It is interesting that, in reaching this result, the court treated the fact that British forces had been assigned responsibility for the area as equivalent to exercising effective control over the area, *id.* ¶¶ 138–49, despite the British argument that the situation on the ground severely limited its ability to exercise control. *Id.* ¶¶ 22, 30. Also, although Britain argued that its obligations under articles forty-two to fifty-six of the Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, and articles twenty-seven to thirty-four and forty-seven to seventy-eight of the Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287, superseded any obligations it might have under the European Convention, the court made no reference to that argument in reaching its result. *Id.* ¶¶ 37, 89.

15. Jackie Kucinich, *GOP's Foreign Policy Test; Candidates Face Tough Challenge vs. Obama*, USA TODAY, Nov. 22, 2011, at 5A.

terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.¹⁶

This leaves such persons in detention conditions no better than those accorded prisoners of war—though the issue discussed above, that is, the duration of such confinement in the context of a conflict that will never formally end is relevant to this issue as well.

Between clearly excessive claims of executive authority and unduly broad challenges to that authority, difficult issues remain. One such issue is the extent of the authority conferred on the President by the AUMF. Groups formerly unconnected to al Qaeda have affiliated with that organization—for example, al Qaeda in the Islamic Maghreb and al Qaeda in the Arabian Peninsula; other groups, such as al Shabaab, not claiming to be al Qaeda affiliates, have nonetheless cooperated with al Qaeda in actions directed against the United States. Given the focus of the AUMF on groups in some way responsible for the 9/11 attacks, how are groups to be treated that were not involved in those attacks—indeed, may not have existed in 2001—but have allied themselves with groups that are clearly covered by the AUMF? The Obama Administration continues to rely on the AUMF as authority for its uses of force against such groups, but the matter cannot be considered settled.

2. WHAT IMPACT WILL THE “ARAB SPRING” HAVE ON AMERICAN NATIONAL SECURITY?

There is no possible way to know at this point. The answer to this question depends on, among many other things, the nature of the governments that eventually emerge in the region, the stability of such governments, the future policies of Israel, and the shape of unanticipated but likely events.

3. WHAT LESSONS CAN BE LEARNED FROM THE OBAMA ADMINISTRATION’S HANDLING OF THE AHMED WARSAME CASE?

To restate the relevant facts, Warsame is a member of al Shabaab, an Islamist group seeking to take control of Somalia. Warsame was captured on the high seas and held in custody aboard

16. Authorization for Use of Military Force Against September 11 Terrorists, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001).

a U.S. Naval vessel. During the first two months of that detention, he was not provided with *Miranda* warnings, was interrogated for intelligence purposes, and was denied access to the International Committee of the Red Cross (ICRC). The intelligence personnel interrogating Warsame were later replaced by members of the FBI, who questioned Warsame for purposes of a criminal prosecution; he received the *Miranda* warnings prior to the commencement of this interrogation. He also received a visit from the ICRC after the intelligence interrogation ended.¹⁷

This detention was criticized in a *New York Times* (the *Times*) editorial in July of 2011, primarily because Warsame was not given his *Miranda* warnings, was not seized on a battlefield, and was not personally involved in violent attacks.¹⁸ I think this goes too far. While Warsame was certainly entitled to humane treatment, a person seized in the course of warfare is not entitled to be *Mirandized*. The matter thus turns on the assumptions in the editorial that the laws of war cannot ever be applied away from a battlefield proper or to someone who is neither a member of a regular military force nor personally involved with violence. I think that the *Times* was mistaken to assume the crucial points on which it based its conclusion. As noted above, it is not obvious whether al Shabaab is one of the organizations covered by the AUMF; perhaps it is not, but the argument that it is covered is not absurd. If it is covered by the AUMF, Warsame's position is quite weak. The geographical reach of the AUMF is not clear, and it would be difficult to insist that it could not apply to an al Qaeda affiliate in Somalia. Likewise, it goes too far to argue that only someone personally involved in violence could be seized; that view grossly oversimplifies the ways in which persons not directly involved in violence can make essential, direct contributions to the activities of violent organizations. Indeed, the fundamental mistake in the editorial is its assumption that the only relevant framework within which to evaluate this incident is criminal law. As pointed out above, the law of war is also implicated, and its applicability is most

17. *Ten Years After the 2001 Authorization for Use of Military Force: Current Status of Legal Authorities, Detention, and Prosecution in the War on Terror: Hearing Before the H. Armed Services Comm.*, 112th Cong. (2011) [hereinafter *Ten Years After*] (prepared testimony of Robert Chesney, Professor, University of Texas School of Law), available at http://armedservices.house.gov/index.cfm/files/serve?File_id=dd0064b1-7416-44ab-bb0c-233d20cee4ef.

18. Editorial, *Terrorism and the Law*, N.Y. TIMES, July 16, 2011, at SR11, available at <http://www.nytimes.com/2011/07/17/opinion/sunday/17sun1.html>.

uncertain. I can do no better than to refer to Professor Robert Chesney's testimony last July before the House Armed Services Committee for a discussion of this issue.¹⁹

4. OF ALL THE THREATS TO NATIONAL SECURITY, WHICH TYPE IS THE UNITED STATES LEAST PREPARED TO HANDLE? WHERE IS THE UNITED STATES MOST VULNERABLE TO ATTACK?

Answering this question requires expertise I do not have.

5. WHAT FACTORS WILL HELP DETERMINE WHETHER AL QAEDA HAS BEEN DEFEATED?

If the question is how will we know when the fighting is over, I would say that we can know that only when al Qaeda and all its allies have ceased efforts to attack the United States. Since a formal end of the fighting, analogous to a surrender ceremony, will surely not happen, I can imagine no other way to make this determination. If the question is how do we defeat al Qaeda, we are, again, outside my area of expertise.

19. *Ten Years After*, *supra* note 17.