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INTERNATIONAL LAWLESSNESS, INTERNATIONAL POLITICS AND THE PROBLEM OF TERRORISM: A CONUNDRUM OF INTERNATIONAL LAW AND U.S. FOREIGN POLICY

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INTRODUCTION

At the dawn of the 21st century, the world was (as it is today) in the process of working out the power dynamics that would shape this coming century. China, India, Brazil, and many other countries have demonstrated that they are financially and politically stable enough not to be dictated to by the so-called powerful countries. At this time, the United States continues to face the aftermath of the terrorist attacks of September 11, 2001 in New York, Washington D.C., and Pennsylvania. Now the world has begun to analyze whether it should allow the United States' 20th century power monopoly to continue. Will the United States lose its unilateral power base in the 21st century as Great Britain did in the 19th century and continental Europe did in the 18th century? What is the impact that the war on terror has or will have in terms of the sustainability of the power monopoly of the United States? These questions are appropriate this year as the United States and the world community observe the consequences of the decade-long global war on terror that followed the September 11th, terrorist attacks. Since 9/11, many foreign policy practitioners and international legal scholars delivered their perspectives and claim that the event changed the world, the understanding of international law, and the *modus operandi* and dynamics of international relations. There is also a contrary view that U.S. foreign policy and the approach to international law in that foreign policy has not been world changing. The United States continues to practice the same foreign policy that it did before 9/11, an approach that did not change even after the Bush presidency.¹ The purpose of this article is to address the 21st century world and what

* Assistant Professor, Gonzaga University School of Law. I am honored to contribute to the celebration of the Journal's 40th Anniversary Festschrift in Honor of Professor Ved Nanda. I would like to express my thanks to Professor Gerry Hess, Attorney Jeannie Young and Professor Amy Kelly for their valuable insights. I also am thankful to my research assistant, Jessica Campbell, for her hard work, insight and support.

1. See Melvyn P. Leffler, *9/11 in Retrospect: George W. Bush's Grand Strategy, Reconsidered*, FOREIGN AFF., Sept/Oct. 2011, at 33, 33.

place international law should have in international relations and in U.S. foreign policy. In addressing this conundrum, the article will explore the effects of the global war on terror on international law and U.S. foreign policy, what has resulted from these developments, and what, if anything, should be done to eliminate or reduce any negative consequences.

GLOBAL WAR ON TERROR, OR WAR WITH AL QAEDA

On September 11, 2001 members of al Qaeda hijacked four U.S. commercial aircrafts *en route* to California from the East Coast.² The al Qaeda members threatened the passengers and attacked the crewmembers, then redirected the aircrafts to New York and Washington D.C. and used the aircrafts as weapons to attack the United States causing the deaths of 2,973 innocent people.³ On the evening of September 11, 2001, President George W. Bush, in an address to the nation stated:

The search is underway for those who are behind these evil acts. I've directed the full resources of our intelligence and law enforcement communities to find those responsible and to bring them to justice. We will make no distinction between the terrorists who committed these acts and those who harbor them.⁴

On September 20, 2001, in a speech to a joint session of Congress, President Bush announced that the hijackers were part of an anti-American radical Muslim network known as al Qaeda and whose leader was Osama Bin Laden.⁵ President Bush also accused the Taliban government of Afghanistan of sheltering and supplying terrorists, he demanded that the Taliban government hand over al Qaeda leaders to the United States immediately or share the consequences.⁶ President

2. See NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 2-4 (2004), [hereinafter 9/11 COMMISSION REPORT], available at <http://www.gpoaccess.gov/911/pdf/fullreport.pdf>.

3. See *id.* at 4-14 for a detailed account of the attacks. 9/11 casualties: 2,749 people were killed at the World Trade Center, 184 people were killed in the Pentagon, and 40 passengers died in rural Pennsylvania. Those figures do not include the terrorists. *Id.* at 311 n.188.

4. George W. Bush, President of the U.S., Address to the Nation in Light of the Terrorist Attacks of September 11 (Sept. 11, 2001), available at <http://www.nationalcenter.org/BushGW91101Address.html>.

5. See George W. Bush, President of the U.S., Address to a Joint Session of Congress (Sept. 20, 2001), [herein after Bush, Joint Session], available at http://articles.cnn.com/2001-09-20/us/gen.bush.transcript_1_joint-session-national-anthem-citizens?_s=PM:US.

6. See *id.* ("[The terrorists] are recruited from their own nations and neighborhoods and brought to camps in places like Afghanistan where they are trained in the tactics of terror. They are sent back to their homes or sent to hide in countries around the world to

Bush announced the beginning of the global war on terrorism as follows:

We will direct every resource at our command—every means of diplomacy, every tool of intelligence, every instrument of law enforcement, every financial influence, and every necessary weapon of war – to the disruption and to the defeat of the global terror network. . . . We will starve terrorists of funding, turn them one against another, drive them from place to place, until there is no refuge or no rest. And we will pursue nations that provide aid or safe haven to terrorism. Every nation in every region, now has a decision to make. Either you are with us, or you are with the terrorists. From this day forward, any nation that continues to harbor or support terrorism will be regarded by the United States as a hostile regime.⁷

Further, President Bush stated in his 2004 State of the Union Address to Congress, justifying the global war on terror, “[a]fter the chaos and carnage of September the 11th, it is not enough to serve our enemies with legal papers. The terrorists and their supporters declared war on the United States. And war is what they got.”⁸

The United States invaded Afghanistan to hunt down terrorists shortly after 9/11. Then in 2003, the global war enterprise extended to Iraq. The United States led a “coalition of the willing” to topple Saddam Hussein’s government, but never found the weapons of mass destruction President Bush had claimed were there.⁹ Despite the United States’ efforts to bring peace and democracy to these countries, Iraq and Afghanistan are still in chaos a decade later.¹⁰

When President Barack Obama took office, the new administration dropped the term “war on terror” and replaced it with “war with al

plot evil and destruction. The leadership of al Qaeda has great influence in Afghanistan and supports the Taliban regime in controlling most of that country. . . . The Taliban must act and act immediately. They will hand over the terrorists or they will share in their fate.”)

7. *Id.*

8. George W. Bush, President of the U.S., 2004 State of the Union Address (Jan. 20, 2004) [hereinafter Bush, *2004 State of the Union*], available at http://www.washingtonpost.com/wp-srv/politics/transcripts/bushtext_012004.html.

9. See *US Invasion of Iraq 'inevitable,'* BBC NEWS, Mar. 18, 2003, http://news.bbc.co.uk/2/hi/middle_east/2862273.stm.

10. See Dan Zak & Asaad Majeed, *Iraq Bombings Kill, Injure Dozens*, SAN FRANCISCO CHRONICLE, Oct. 13, 2011, at A5, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2011/10/12/MN161LGVPM.DTL>; *Afghanistan: Recent Developments*, N.Y. TIMES (last updated Nov. 22, 2011), <http://topics.nytimes.com/top/news/international/countriesandterritories/afghanistan/index.html>.

Qaeda and its affiliates.”¹¹ This transformation of “Global War on Terror” to “War with al Qaeda” seemed to change the legal framework of the war and make it more limited; however, in reality, Obama’s foreign policies are not significantly different from Bush’s — the “War with al Qaeda” is still a global war.¹² There was an expectation that Obama would adopt an approach based on reasoned judgment rather than a dogmatic ideology, and would dismiss Bush’s black-and-white policy of war on terror (either you’re with us or against us).¹³ Instead, Obama kept the Bush administration’s surveillance program intact, the Patriot Act remained on the books, the authority to use rendition continued, the Military Commission was preserved (albeit with more procedural safeguards), the number of unmanned drone strikes increased at suspected terrorist hideouts along the Pakistan-Afghanistan border and in Pakistan (the strikes are suspect from an international law viewpoint and also could be strategically dangerous), and troop levels in Afghanistan were tripled (immediately after Obama received the Nobel Peace Prize).¹⁴ Obama banned the use of waterboarding, but refused to release photographs showing abuse of detainees and a memo about C.I.A. interrogation techniques.¹⁵ Finally, President Obama re-declared that “[o]ur nation is at war” after the Detroit terrorist attempt.¹⁶ The Economist did not hesitate to declare President Obama “[a]nother war president, after all.”¹⁷ The global war on terror continues: Afghanistan and Iraq are still occupied by U.S. troops, and, moreover, the war is expanding into other states including Pakistan,¹⁸ Yemen,¹⁹ and Somalia²⁰ through the use of unmanned drones.

11. Ved P. Nanda, *Introductory Essay: International Law Implications of The United States “War On Terror,”* 37 DENV. J. INT’L L. & POL’Y 513, 514 (2009) [hereinafter Nanda, “War on Terror”] (citing Sue Fleming, *Obama Team Drops “War On Terror” Rhetoric*, REUTERS, Mar. 31, 2009, available at <http://www.reuters.com/article/politicsNews/idUSTRE52T7MH20090330>).

12. *Id.* at 515 (noting that the “[Global War on Terror] raised questions about the administration’s real—contrasted with its professed—commitment to faithfully adhere to the rule of law.”); Peter Baker, *Obama’s War Over Terror*, N.Y. TIMES MAGAZINE, Jan. 6, 2010, at 6, available at <http://www.nytimes.com/2010/01/17/magazine/17Terror-t.htm> (“I don’t think it’s even fair to call it Bush Lite . . . It’s Bush. It’s really, really hard to find a difference that’s meaningful and not atmospheric. You see a lot of straining on things trying to make things look repackaged, but they’re really not that different.”).

13. See Baker, *supra* note 12, at 2.

14. *Id.* at 5.

15. *Id.* at 3, 6.

16. *Id.* at 9.

17. See *Barack Obama and terrorism: Another war president, after all*, THE ECONOMIST, Jan. 7, 2010, available at <http://www.economist.com/node/15213339>.

18. Jane Perlez & Ismail Khan, *Deadly Drone Strike by U.S. May Fuel Anger in Pakistan*, N.Y. TIMES (Apr. 22, 2011), available at <http://www.nytimes.com/2011/04/23/world/asia/23pakistan.html>.

The war on terror has become global in other ways as well. The United States is no longer the only state fighting a war against terrorism; other states are employing U.S.-style tactics against their own "terrorists." Instead of using international legal mechanisms for dealing with conflict, some states are taking politically driven unilateral action to suppress dissent within their own states in the name of fighting terrorism. China, for example, has been accused of "opportunistically using the post-September 11 environment to make the outrageous claim that [Muslim Uighurs] in Xinjiang are terrorists" in order to suppress the Uighurs' religious activities and condemn them as illegal.²¹ Russia's struggle to control separatists in Chechnya also turned into part of the war on terror after 2001, allowing Putin to justify his use of force, human rights violations, and Geneva Convention violations as a necessary part of the global war on terror.²² Taking a non-legal political approach instead of relying on lawful means of conflict resolution as these countries are doing in following the U.S. approach is threatening to create an anarchistic world order and contributing to global disorder and chaos.

CONSEQUENCES OF THE WAR ON TERROR

The global war on terror has raised concerns and issues in many areas of international law and international affairs. These include questions regarding the use of force, human rights, international humanitarian law, irregular rendition, torture, the fate of Afghanistan and other countries that are directly or indirectly said to be connected with terrorism, the legality of the United States military campaign, and the extraterritorial reach of individual nations or groups of nations in securing peace and security in the world.²³ In all of these areas, the international rule of law has been disregarded or violated.

The U.S. War on Terror undermined different rubrics of international law, making international law a primary victim of the

19. David S. Cloud, Jeffrey Fleishman, & Brian Bennett, *U.S. drone strike in Yemen kills U.S.-born Al Qaeda figure Awlaki*, L.A. TIMES (Oct. 1, 2011), available at <http://articles.latimes.com/2011/oct/01/world/la-fg-awlaki-killed-20111001>.

20. Greg Jaffe & Karen DeYoung, *U.S. Drone Targets Two Leaders of Somali Group Allied With Al-Qaeda, Official Says*, WASH. POST (June 29, 2011), available at http://www.washingtonpost.com/national/national-security/us-drones-target-two-leaders-of-somali-group-allied-with-al-qaeda/2011/06/29/AGJFzrH_story.html.

21. *China 'crushing Muslim Uighurs'*, BBC NEWS, Apr. 12, 2005, available at <http://news.bbc.co.uk/2/hi/asia-pacific/4435135.stm>.

22. Colonel James P. Terry, *Moscow's Corruption Of The Law Of Armed Conflict: Important Lessons For The 21st Century*, 53 NAVAL L. REV. 73, 205 (2006) ("The Putin government seized upon the September 11, 2001, attacks by al Qaeda as an opportunity to recast the war in Chechnya as a 'counter-terrorist operation.'").

23. See Ved Nanda, *War on Terror Altered Laws*, DENVER POST (Sept. 9, 2011), available at http://www.denverpost.com/opinion/ci_18855233.

war. The already questionable status of international law incurred further distrust. First, the war on terror made provisions of the UN Charter confusing with regard to the legality of the use of force. It is clear that, after 9/11 the problem of terrorism was not addressed through the rules of international criminal law as that law is outlined in the UN Charter and a majority of treaties and resolutions.²⁴ The Bush administration never bothered to determine whether an act of terrorism constitutes an act of aggression in breach of Article 2(4) justifying an armed response in self-defense within the scope of Article 51 of the UN Charter²⁵ or whether an act of terrorism constitutes an act of aggression in breach of international peace and security that justifies a collective security approach by the Security Council under Chapter VII of the UN Charter.²⁶ There are three primary sections contained in the Charter of the United Nations that govern the use of force against Member States.²⁷ First, Article 2(4) of the Charter provides a blanket mandate against the use of force “in any manner inconsistent with the purposes of the United Nations.”²⁸ Second, Article 51 of the UN Charter is the initial legal structure for self-defense when an armed attack occurs against a Member of the United Nations.²⁹ Third, Chapter VII of the UN Charter empowers the Security Council to take those actions necessary to maintain international peace and security.³⁰

The post-9/11 War on Terror has made international law a quiet observer by undermining majority resolutions and treaties related to terrorism and Articles 2(4) and 51 of the UN Charter.³¹ Previously, Article 2(4) was limited to state actors; however, after 9/11, a tacit interpretation was advanced that not only state actors but also non-

24. See Upendra D. Acharya, *War On Terror Or Terror Wars: The Problem In Defining Terrorism*, 37 DENV. J. INT'L L. & POL'Y 653, 664-68 (2009) [hereinafter Acharya, *Terror*] (providing a detailed analysis of Security Council and General Assembly Resolutions and major treaties suggesting that terrorism should be treated as an act of crime rather than an act of war).

25. See U.N. Charter art. 2, para. 4 (“All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”); U.N. Charter art. 51 (“Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations . . .”).

26. See U.N. Charter arts. 39-45.

27. U.N. Charter art. 2, para. 4, arts. 39-45, 51.

28. *Id.* art. 2, para. 4. This article expressly indicates that a state is prohibited to use force against another state, it does not bring non-state actors within the scope of this article.

29. *Id.* art. 51.

30. *Id.* arts. 39-45.

31. See Acharya, *Terror*, *supra* note 24, at 664–68; U.N. Charter art. 2, para. 4, art. 51.

state actors can violate Article 2(4).³² The entire international community rushed to endorse the use of self-defense as a justification of the United States' actions against al Qaeda, a non-state actor, in Afghanistan, which in turn eviscerated the thrust of Article 2(4).³³ Further, the doctrine of self-defense against the attack by a state under Article 51 of the UN Charter was distorted when the United States included Saddam Hussein's regime in Iraq in the war on terror and invaded Iraq, giving birth to the concept of preventive self-defense.³⁴ Now force could be used where a state or non-state actor is believed to have plans for an attack, based solely on the unilateral prediction of the country using force that an attack may occur in the near or remote future – even though that prediction may be baseless.³⁵ Furthermore, Chapter VII of the UN Charter was violated as well, because the United States usurped the power and authority of the UN Security Council by acting unilaterally rather than bringing the pursuit of the 9/11 attack organizers before the Council for lawful, collective action.³⁶ On the one hand, the United States declared a global war on terror and made 9/11 a global issue by claiming that the attack breached international peace and security and, on the other, it acted in collective self-defense without letting the Security Council act on the matter of the threat to or breach of international peace and security. This further eroded the legitimacy of the Security Council and of international law.

32. See Acharya, *Terror*, *supra* note 24, at 676, for a detailed description of the interpretation of U.N. Charter art. 2, para. 4; see also YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* 207–08 (4th ed. 2005); Colonel Kenneth Watkin, *Canada/United States Military Interoperability and Humanitarian Law Issues: Land Mines, Terrorism, Military Objectives and Targeted Killing*, 15 *DUKE J. COMP. & INT'L L.* 281, 293 n.54 (2005).

33. See DINSTEIN, *supra* note 32, at 207–08.

34. U.N. Charter art. 51; see GEORGE W. BUSH, *THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA* 15 (2002), available at <http://www.globalsecurity.org/military/library/policy/national/nss-020920.pdf> (“The greater the threat, the greater is the risk of inaction—and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy’s attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively . . . in an age where the enemies of civilization openly and actively seek the world’s most destructive technologies, the United States cannot remain idle while dangers gather.”).

35. See Leffler, *supra* note 1, at 40, for a historical perspective on the United States and preventative foreign policies.

36. Acharya, *Terror*, *supra* note 24, at 676–77; see U.N. Charter, arts. 39–45; see also UN Charter art. 51 (“Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.”); see also Bush, *2004 State of the Union*, *supra* note 8 (“America will never seek a permission slip to defend the security of our country.”).

In the process of fighting the Global War on Terror, the Bush administration focused not only on al Qaeda, but also on terrorist threats generally and on the regimes alleged to harbor terrorists. In order to gather intelligence, the United States resorted to the indefinite detention of terror suspects without charging them or giving them a trial, irregular rendition, torture, and in many cases, the killing of civilians, forsaking basic human rights and violating international humanitarian laws.

The military campaigns in Afghanistan and Iraq caused the deaths of thousands of innocent civilians, frequently in violation of the Geneva Convention Protocol on the Protection of Victims of International Armed Conflicts.³⁷ In the past 10 years, at least 137,000 civilians were killed in Iraq and Afghanistan.³⁸ When U.S. AC-130 gunships strafed the farming village of Chowkar-Karez, 25 miles north of Kandahar, Afghanistan on October 22 and 23 2001, killing at least 93 civilians, a Pentagon official said, “[T]he people there are dead because we wanted them dead.”³⁹ The reason? The villagers sympathized with the Taliban.⁴⁰ In two accidental air bombings of villages in eastern Afghanistan resulting in the deaths of 17 people, 15 of them children, the United States neither apologized nor offered compensation.⁴¹ In the infamous Haditha killings of November 2005, U.S. Marines shot and killed 24 Iraqis, including 15 innocent civilians, and then tried to cover up the incident by filing a false report which stated that the civilians

37. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 48, Dec. 12, 1977, 1125 U.N.T.S. 3 (“In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.”).

38. Joseph E. Stiglitz, *The Price of 9/11*, PROJECT SYNDICATE (Sept. 1, 2011), <http://www.project-syndicate.org/commentary/stiglitz142/English>.

39. Marc W. Herold, *A Dossier on Civilian Victims of United States’ Aerial Bombing of Afghanistan: A Comprehensive Accounting*, CURSOR (Mar. 2002), http://cursor.org/stories/civilian_deaths.htm; Murray Campbell, *Bombing of Farming Village Undermines U.S. Credibility*, TORONTO GLOBE & MAIL (Nov. 3, 2001); see also *Merciless U.S. Bombing Obliterates Village: 60 Killed*, DAWN (Nov. 2, 2001), <http://archives.dawn.com/2001/11/02/int10.htm>. For more on civilian deaths in Afghanistan, see Faiz Ahmed, *Afghanistan’s Reconstruction, Five Years Later: Narratives of Progress, Marginalized Realities, and the Politics of Law in a Transitional Islamic Republic*, 10 GONZ. J. INT’L L. 269, 279 (2007); *Afghanistan’s Civilian Deaths Mount*, BBC NEWS (Jan. 3, 2002), available at http://news.bbc.co.uk/2/hi/south_asia/1740538.stm (“The number of Afghan civilians killed by US bombs has surpassed the death toll of the 11 September attacks . . . nearly 3,800 Afghans died between 7 October and 7 December [2001].”).

40. Herold, *supra* note 39.

41. Ahmed, *supra* note 39, at 280 n.29 (citing Ahmed Rashid, *The Mess in Afghanistan*, THE NEW YORK REVIEW 27 (Feb. 12, 2004)).

were killed in a roadside bombing, clearly violating customary international law concerning civilian casualties.⁴²

In addition to the killing of innocent civilians, the War on Terror under the Bush administration ignored the rights of captured terror suspects as well. First, by defining them as “unlawful enemy combatants,” which is not a term mentioned in the Geneva Convention or in other treaties concerning the laws of war, the United States government could legally justify not allowing detainees basic rights afforded to prisoners of war under international law.⁴³ “Unlawful enemy combatants” were subject to torture, abuse, and humiliation at Abu Ghraib and other prisons in Iraq⁴⁴ and habeas corpus violations at Guantanamo Bay.⁴⁵ In a series of recent cases, the United States Supreme Court attempted to stop the unlawful deprivation of rights taking place at Guantanamo Bay by holding that the statutory and constitutional right to habeas corpus review apply at Guantanamo.⁴⁶ In

42. Melissa Epstein Mills, *Brass-Collar Crime: A Corporate Model For Command Responsibility*, 47 WILLAMETTE L. REV. 25, 39 (2010); see also Colin H. Kahl, *How We Fight*, FOREIGN AFF., NOV./DEC. 2006, at 83, 83–84 (explaining that the attack violated internationally recognized legal principles regarding civilian casualties, as only acceptable as a “byproduct of attacks on legitimate military targets” not exceeding “the anticipated military benefit.”); see also Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287.

43. See Leila Nadya Sadat, *A Presumption of Guilt: the Unlawful Enemy Combatant and the U.S. War on Terror*, 37 DENV. J. INT'L L. & POL'Y 539, 539 (2009) (“[B]ecause terrorists are so-called ‘unlawful enemy combatants,’ they were not entitled to the protections of the laws of war as regards their detention and treatment”); Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2601, available at http://www.loc.gov/rr/frd/Military_Law/pdf/PL-109-366.pdf (“The term ‘unlawful enemy combatant’ means—(i) a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant [including a person who is part of the Taliban, al Qaeda, or associated forces]”); Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316.

44. See ANTONIO M. TAGUBA, U.S. ARMY, ARTICLE 15-6 INVESTIGATION OF THE 800TH MILITARY POLICE BRIGADE 16 (2004), available at http://www.npr.org/iraq/2004/prison_abuse_report.pdf (“between October and December 2003, at the Abu Ghraib Confinement Facility (BCCF), numerous incidents of sadistic, blatant, and wanton criminal abuses were inflicted on several detainees.”); *Iraq Torture ‘Worse after Saddam’*, BBC NEWS (Sept. 21, 2006), available at <http://news.bbc.co.uk/2/hi/5368360.stm>.

45. See e.g., Nick Childs, *Guantanamo Controversy Rumbles On*, BBC NEWS (Oct. 4, 2004), available at <http://news.bbc.co.uk/2/hi/americas/3754238.stm>; Kenneth Roth, *After Guantanamo, The Case Against Preventive Detention*, FOREIGN AFF., MAY/JUNE 2008, at 9, 11–12 (“The White House claims that it is waging a ‘global war on terrorism’ and that terrorism suspects worldwide with alleged connections to al Qaeda can thus be arrested as combatants. But since this ‘war’ knows no geographic or temporal bounds, it has become increasingly controversial as a continuing basis for detention, especially because many of the Guantanamo detainees were arrested far from any recognizable battlefield.”).

46. *Rasul v. Bush*, 542 U.S. 466 (2004) (holding that federal habeas statute conferred on district court jurisdiction to hear challenges of aliens held at Guantanamo Bay); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (holding that due process required that United

response, Congress took counter-actions to deprive United States courts of their jurisdiction over detainees at Guantanamo Bay, giving the President control over detainees through the use of military tribunals and limited review of detention.⁴⁷

When President Obama took office in 2008, he made some changes to the Bush detainee policies to conform them to international law. In 2009, President Obama announced he would close Guantanamo Bay in one year.⁴⁸ He also ordered that prisoners be treated according to the mandates of the Geneva Convention and ordered immediate review of the status of each detainee.⁴⁹ Despite these initial steps taken to restore human rights to detainees (though Guantanamo Bay still has not been closed), Obama's policies are still "fundamentally consistent with the positions of the prior administration," especially with regard to detention of suspected terrorists.⁵⁰

CONSEQUENCES TO THE UNITED STATES

After 9/11, the United States made Afghanistan and Iraq its concerted focus and drained its financial and leadership capital on these two countries in the name of the war on terror. Many scholars argue that the start of the War on Terror marked the beginning of the decline of American world dominance.⁵¹

States citizen being held as enemy combatant be given meaningful opportunity to contest factual basis for his detention); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (holding that the Detainee Treatment Act (DTA) did not deprive Supreme Court of jurisdiction over habeas appeal, pending at time of DTA's enactment, by alien detained by Department of Defense at Guantanamo Bay, Cuba); *Boumediene v. Bush*, 553 U.S. 723 (2008) (holding that the habeas corpus privilege and Suspension Clause provided in the United States Constitution applied to detainees held at Guantanamo Bay).

47. Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005, 119 Stat. 2739, 2742 (2005) ("no court, justice, or judge shall have jurisdiction to consider an application for a writ of habeas corpus filed by or on behalf of an alien detained at Guantanamo Bay, Cuba . . ."); Military Commissions Act of 2006, Pub. L. No. 109-366, § 5, 120 Stat. 2600, 2631 (2006), available at http://www.loc.gov/rr/frd/Military_Law/pdf/PL-109-366.pdf ("No person may invoke the Geneva Conventions or any protocols thereto in any habeas corpus or other civil action or proceeding to which the United States, or a current or former officer, employee, member of the Armed Forces, or other agent of the United States is a party as a source of rights in any court of the United States or its States or territories.").

48. Nanda, "War on Terror," *supra* note 11, at 516.

49. *Id.*

50. *Id.* at 519 (quoting Steven A. Engel, senior attorney for the Bush Administration's Department of Justice Office of Legal Counsel, in William Glaberson, *U.S. Won't Label Terror Suspects as 'Combatants'*, N.Y. TIMES, Mar. 14, 2009, at A1).

51. See Malcon Fraser, *America's Self-Inflicted Decline*, PROJECT SYNDICATE (Aug. 30, 2011), <http://www.project-syndicate.org/commentary/fraser2/English> ("America's leadership in world affairs began to weaken with the unilateralism of Bush, and today's economic problems are reinforcing this tendency."); but see Fareed Zakaria, *The Future of American Power: How America Can Survive the Rise of the Rest*, FOREIGN AFF., May/June

The War on Terror took a huge economic toll on the United States. According to the Congressional Research Service, as of March 2011 the United States Congress had approved a total of \$1.283 trillion dollars of funding for military operations, base security, reconstruction, foreign aid, embassy costs, and veterans' health care in Afghanistan and Iraq, and for other War on Terror operations since 9/11.⁵² Military spending now nearly equals that of the rest of the world combined.⁵³ The U.S. budget, which had surplus of \$128 billion, was drastically reversed to a deficit of \$458 billion.⁵⁴ Federal debt as a percentage of GDP rose from 32.5 percent in 2001 to 53.5 percent in 2009.⁵⁵ Now the United States is in a financial crisis at home, while its financial strength and dominance internationally has been seriously weakened, opening the door for emerging nations like China to step up.⁵⁶

The War on Terror has also taken a serious toll on the reputation of the United States abroad. The Abu Ghraib abuse scandal, the use of torture, extraordinary rendition, deprivation of habeas corpus rights, and indiscriminate killings of civilians hurt the "moral authority" of the United States.⁵⁷ President Bush's "you are either with us or against us" foreign policy and disregard for the United Nations Charter and other international laws succeeded only in alienating potential allies. Although that kind of unilateral action may have worked a decade or two ago, when there existed a unipolar world in which the United States was dominant, it does not work well in the 21st century multipolar or nonpolar world, where the United States is not the only

2008, at 18, 19 (proposing that though America has a "dysfunctional" political system, its "society is vibrant" and its economy "remains fundamentally vigorous when compared with others.").

52. AMY BELASCO, CONG. RESEARCH SERV., RL33110, THE COST OF IRAQ, AFGHANISTAN, AND OTHER GLOBAL WAR ON TERROR OPERATIONS SINCE 9/11, ii (2011), available at <http://www.fas.org/sgp/crs/natsec/RL33110.pdf>; see *id.* at 1-5, for a breakdown of the costs by operation and agency; see also *id.* at 10 (estimating the approved budget to reach \$1.4 trillion in 2012); see also Leffler, *supra* note 1, at 37-38 (noting that defense spending went from \$304 billion in 2001 to \$616 billion in 2008); Stiglitz, *supra* note 38 (estimating total War on Terror expenditures to be closer to \$2 trillion and to reach \$3 trillion by the time all the bills are paid for).

53. Stiglitz, *supra* note 38.

54. Leffler, *supra* note 1, at 38.

55. *Id.*

56. Gideon Rachman, *Think Again: American Decline*, FOREIGN POL'Y (Jan. 2, 2011), http://www.foreignpolicy.com/articles/2011/01/02/think_again_american_decline ("China's economic prowess is already allowing Beijing to challenge American influence all over the world.").

57. Stiglitz, *supra* note 38 ("America's real strength . . . is its "soft power," its moral authority. And this, too, was weakened: as the US violated basic human rights like *habeas corpus* and the right not to be tortured . . . "); see also Kahl, *supra* note 42, at 84 (describing a survey which showed that citizens from many other states "felt that the United States 'didn't try very hard' to avoid civilian casualties in Iraq.").

center of power.⁵⁸ Because of these factors, the United States must now make extra efforts to convince the world that it still has due regard for international law and can still act collectively with others.

The War on Terror may have also weakened the United States' own security and perpetuated an "endless" war on terror. Animosity toward the United States resulting from military invasions and occupations, use of torture and detention, killing of innocent civilians, bombing villages and homes, and the undercurrent of religious warfare, actually helped terrorist recruiters create more terrorists.⁵⁹ Once the War on Terror began, the incidences of terrorism in fact increased, as presumably did the number of terrorists.⁶⁰ A 2008 report from the Center for Strategic and Budgetary Assessment, an independent non-partisan think tank, states:

While the United States and its partners in the war on terrorism have made important strides in combating jihadi groups worldwide since September 11th, they have not weakened the jihadis' will or their ability to inspire and regenerate. . . . Since 2002–2003, however, the overall US position in the [Global War on Terror] has slipped. To be sure, the United States has made considerable progress Those gains, however, have been offset by the metastasis of the al Qaeda organization into a global movement, the spread and intensification of Salafi-Jihadi ideology, the resurgence of Iranian regional influence, and the growth in number and political influence of Islamic fundamentalist political parties throughout the world. Both Salafi-Jihadi and Khomeinist branches of Islamic radicalism have spread rather than receded since 2003. The continued presence of US military forces in Iraq has been a boon for the jihadi movement's propaganda effort and bolstered the legitimacy of its call to defensive jihad.⁶¹

Though the recent deaths of Osama bin Laden and several other high-ranking al Qaeda officials have been a positive development for the War on Terror and its reputation, the overreaction to 9/11 and consequences of the War on Terror to the United States and to the

58. *Bush says it is time for action*, CNN.COM (Nov. 6, 2001), <http://edition.cnn.com/2001/US/11/06/ret.bush.coalition/index.html>; see Richard Haass, *The Age of Nonpolarity: What Will Follow U.S. Dominance*, FOREIGN AFF., May/June 2008, at 44, 44-45, 51-53. "The United States will no longer have the luxury of a 'You're either with us or against us' foreign policy." *Id.* at 56.

59. Roth, *supra* note 45, at 16 (arguing that detention begets more detainees).

60. Leffler, *supra* note 1, at 39.

61. ROBERT C. MARTINAGE, CTR. FOR STRATEGIC & BUDGETARY ASSESSMENT, THE GLOBAL WAR ON TERRORISM: AN ASSESSMENT 5-6 (2008), available at <http://www.csbaonline.org/wp-content/uploads/2011/02/2008.02.23-The-Global-War-on-Terrorism.pdf>.

world have arguably far outweighed the atrocities committed on 9/11 and the progress of the United States thus far in defeating terrorism. This begs the question: who won the Global War on Terror — al Qaeda or the United States?⁶² Did the United States take the right approach toward defeating terrorism? Or perhaps the question should be: can terrorism be defeated at all?⁶³ To what extent has international law been accommodated in dealing with the problem of terrorism? Can a power (realist) approach resolve this problem? Or do we need to employ legal methods or force of law to address this problem?

U.S. HEGEMONY: IR THEORY AND PASSIVE APPROACH OF INTERNATIONAL LEGALISTS

The declaration of the global war on terror and the political and legal tactics used in support of it have resulted in skepticism regarding the continuation of the leadership of the United States in world affairs. Why did the United States take such a risk to its status in dealing with the problem of terrorism? There may be several known and unknown reasons and answers to this question. One of the answers may be that the United States engaged in a short-term political fix to serve the existing power base of governing elites.⁶⁴ In other words, U.S. strategy was dominated by a realist approach that unduly minimized the use of international law in international relations and in U.S. foreign policy. What the realist approach does is kill the operational role of international law in international behavior. When a country does not allow existing international standards to play their operational roles in addressing terrorism and other international problems, it drags itself into a long-term process that peels away its power and authority. Afghanistan and Iraq are such examples of the effects of the failure of the United States to follow international legal standards in its foreign policy. Realists imagined a weeklong military campaign to defeat al Qaeda in Afghanistan (an already failed state) and, in the name of the war on terror, the U.S. extended its military reach into Iraq where the suppression of terrorism remains a dream that has been chased for a decade. The situations in Afghanistan and Iraq developed because realists never believed that international law was really law that could be a useful tool to resolve the problem of terrorism.

62. See William McCants, *Al Qaeda's Challenge: The Jihadists' War With Islamist Democrats*, FOREIGN AFF., Sept/Oct. 2011, at 20, for a history of Al Qaeda and bin Laden and their goals.

63. See Haass, *supra* note 58, at 53 ("Terrorism, like disease, cannot be eradicated. . . . The goal should be to reduce the impact of even successful attacks."). I propose that though terrorism may be a disease; it can still be treated with legal tools and judicial means.

64. See Leffler, *supra* note 1, at 37, 41.

The question of whether international law is really law is not new.⁶⁵ However, the question of what relevance or force international law can have in shaping states' behavior in international affairs has received little attention.⁶⁶ Now is the time to consider more deeply the question of the relevance and force of international law in addressing the problem of terrorism and its effects in other areas of international law and international relations. The question of the reality of international law is no longer a subject of discussion because of the existence of a large body of international laws, organizations to administer international laws, and the reliance of nations on international laws to either legitimize their actions or enhance their positions in international negotiations. However, the relevance and force of international law is still an important question. In order to address this issue, we need to ponder whether we want to legalize international politics or politicize international law. The answer to this question will reveal how the international community will address terrorism and problems associated with it. The question of whether international politics should be legalized or whether international law should be politicized explores the law and non-law nature of international law in the context of compliance and enforcement. There are scholars who like to believe that international law in fact matters and that nations comply with it.⁶⁷ Other scholars argue that

65. See Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599 (1997), for a detailed discussion on why nations obey international law. Professor Koh has discussed and analyzed international political and relation theorists and international legal scholars including Hans Morgenthau, Louis Henkin, Abram Chayes & Antonia Handler Chayes, Oran Young, Thomas M. Franck and many other scholars. He describes obedience of international law from ancient and primitive international law to modern institutional era and post-cold war era of international law. He has mainly focused on the compliance issue of international law analyzing managerial approach of Chayes and fairness approach of Franck and has argued that "richness of transnational legal process can provide the key to unlocking the ancient puzzle of why nations obey." However, he does not address the issue of international power politics that has been a major obstacle to the structure, function and thus perception of international law.

66. See Francis A. Boyle, *The Irrelevance of International Law: The Schism Between International Law and International Politics*, 10 CAL. W. INT'L L.J. 193 (1980). The author has analyzed the claim of international politicians that international law is essentially irrelevant in addressing international problems due to vital national interests and has suggested that emergence of international organizations might lead to the path where international law can become relevant in addressing the international problems. He demonstrates his thesis 'the relevance of international law' by quoting Morgenthau: "[I]n a world of nuclear weapons systems developed to the current level of technical expertise where the instantaneous destruction of mankind is imminently possible, power politics as a principle for the conduct of international relations has become fatally defective and could ultimately result in the destruction of the human race . . ." *Id.* at 217.

67. See LOUIS HENKIN, *HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY* 47 (2d ed. 1979) (asserting that "almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time"); see also THOMAS M. FRANCK,

international law does not matter at all,⁶⁸ or, matters only when it serves the interests of the nations concerned in the given circumstances.⁶⁹ These divided viewpoints regarding the role of international law in resolving international problems represent various spectrums of international relations theorists and international legal scholars. While the divisions among international relations theorists and international legal scholars are pertinent, Professor Christopher C. Joyner claims that the divided groups of scholars share a “dirty little secret” and further explains: “both groups know that the presence of international law is critical for international relations to occur, and both know that the practice of international politics is essential for international law to evolve and function. But each is still reluctant to admit the necessity of the other.”⁷⁰ Although both groups share a “dirty little secret,” the realist approach of international theory has dominated U.S. policy on the war on terror. The realist approach believes that international relations are governed by a selfish lust for power that defines interests setting the standard that directs political actions and that universal moral principles are only a pretext for the pursuit of national politics where state is the unitary actor.⁷¹ For the realists, international politics is a struggle for power where one state is able to control and influence another state’s behavior to serve the interests of the more powerful state.⁷² Realists believe that maximizing political

THE POWER OF LEGITIMACY AMONG NATIONS 25 (1990); Thomas M. Franck, *Legitimacy in the International System*, 82 AM. J. INT'L L. 705 (1988); Oscar Schachter, *Dag Hammarskjöld and the Relation of Law to Politics*, 56 AM. J. INT'L L. 1, 2-3 (1962).

68. See Charles Krauthammer, *The Curse of Legalism: International Law? It's Purely Advisory*, THE NEW REPUBLIC, Nov. 6, 1989, at 44. The author dismisses the concept of international law and says international law may be used after the political action of a nation for retroactive legal justification. He states:

Legalism starts with a naive belief in the efficacy of law as a regulator of international conduct. [I]nternational relations is not contract law. And treaties are not retained simply because their provisions are fully observed or renounced simply because they are breached. One has to make a larger judgment. . . . That is a policy judgment to which a reading of treaty text, no matter how close, contributes nothing. . . . [I]nternational law—is an ass.

Id. at 44, 50. This is purely a realist approach to the conduct of international relations.

69. Koh, *supra* note 65, at 2611 (noting that legal scholars of the Hobbesian Rationalist approach follow the theory that nations sometimes follow international law when it serves their self-interests.); see also Kenneth W. Abbott, *Elements of a Joint Discipline, International Law and International Relations Theory: Building Bridges*, 86 AM. SOC'Y INT'L L. PROC. 167, 169-70 (1992); Boyle, *supra* note 66, at 210-11; Robert Kaufman, *Morgenthau's Unrealistic Realism*, 1 YALE J. INT'L AFF. 24, 29 (2006); John K. Setear, *An Iterative Perspective on Treaties: A Synthesis of International Relations Theory and International Law*, 37 HARV. INT'L L.J. 139, 142-47 (1996).

70. Christopher C. Joyner, *International Law Is, as International Relations Theory Does?*, 100 AM. J. INT'L L. 248, 248 (2006) (book review).

71. Kaufman, *supra* note 69, at 24-29.

72. Joyner, *supra* note 70, at 251.

advantage rather than justice, morality, or law will prevail in international politics.⁷³ According to the realists, in a global condition where there is no superior authority, sovereign states are the only supreme authorities and they must act rationally and their rational actions are lawful when those actions maximize their political, economic, and security interests.⁷⁴ Basically the realists believe that “international law—is an ass.”⁷⁵

There are other approaches in international relations theory that soften the harshness of the realist approach, but do not distance themselves from its substance. International legal scholars like to celebrate the recognition of international law by reference to international relations theory within the sphere of these less harsh approaches. The constructivist approach is one of a few other approaches in which international legal scholars find themselves attached to international law. The constructivists argue that states and their interests are socially constructed by “commonly held philosophic principles, identities, norms of behavior, or shared terms of discourse.”⁷⁶ Rather than arguing that state actors and interests create rules and norms, constructivists contend that “[r]ules and norms constitute the international game by determining who the actors are, what rules they must follow if they wish to ensure that particular consequences follow from specific acts, and how titles to possessions can be established and transferred.”⁷⁷ Thus, constructivists see norms as playing a critical role in the formation of national identities. Similarly, the liberal approach,⁷⁸ neo-liberal approach,⁷⁹ and institutionalist approach⁸⁰ have

73. *Id.*

74. *Id.* at 251-52. This realist approach can be called rational choice theory.

75. Krauthammer, *supra* note 68, at 50.

76. MARTHA FINNEMORE, NATIONAL INTERESTS IN INTERNATIONAL SOCIETY 15 (1996). For further information on constructivists see ALEXANDER WENDT, SOCIAL THEORY OF INTERNATIONAL POLITICS (1999); Alexander Wendt, *Collective Identity Formation and the International State*, 88 AM. POL. SCI. REV. 384 (1994); Alexander Wendt, *Constructing International Politics*, INT'L SECURITY, Summer 1995, at 71. For a recent, systematic treatment of norms from a constructivist perspective, see THE CULTURE OF NATIONAL SECURITY: NORMS AND IDENTITY IN WORLD POLITICS (Peter J. Katzenstein ed., 1996).

77. NGAIRE WOODS, *The Uses of Theory in the Study of International Relations*, in EXPLAINING INTERNATIONAL RELATIONS SINCE 1945 9, 26 (Ngaire Woods ed., 1996) (emphasis omitted).

78. See Koh, *supra* note 65. Mr. Koh states “[t]he determinative factor for whether nations obey can be found, not at a systemic level, but at the level of domestic structure. Under this view, compliance depends significantly on whether or not the state can be characterized as ‘liberal’ in identity, that is, having a form of representative government, guarantees of civil and political rights, and a judicial system dedicated to the rule of law. Flipping the now-familiar Kantian maxim that ‘democracies don’t fight one another,’ these theorists posit that liberal democracies are more likely to ‘do law’ with one another, while relations between liberal and illiberal states will more likely transpire in a zone of politics.” *Id.* at 2633 (citing Anne-Marie Burley, *Law Among Liberal States: Liberal Internationalism and the Act of State Doctrine*, 92 COLUM. L. REV. 1907, 1920-21 (1992);

been identified by international legal scholars as justifications for strengthening the place of international law in international politics.

On the one hand, the realists have undermined the role of international law in international politics. On the other hand, the constructivists, liberalists, neo-liberalists, and institutionalists have softened their arguments regarding the roles of international law and

Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 EUR. J. INT'L L. 503 (1995); Anne-Marie Slaughter & Alec Stone, *Assessing the Effectiveness of International Adjudication*, 89 AM. SOC'Y INT'L L. PROC. 91, 91 (1995) (positing that "[l]iberal states will rely more heavily on legal rules--such as those established by treaties--to govern their relations, and they will more often rely on adjudication to resolve disputes, both intergovernmental and transnational.")).

79. See S.G. Sreejith, *Public International Law and the WTO: A Reckoning of Legal Positivism and Neoliberalism*, 9 SAN DIEGO INT'L L.J. 5 (2007). Mr. Sreejith notes that neoliberalism is a 'global policy regime that comprises free trade and the free flow of resources via market mechanisms.'" *Id.* at 47 (citing GEORGE DEMARTINO, GLOBAL ECONOMY, GLOBAL JUSTICE: THEORETICAL OBJECTIONS AND POLICY ALTERNATIVES TO NEOLIBERALISM 125 (2000)). He also notes "neoliberalism is considered the ideology of the process of globalization. Such a view generally provides an economic logic which justifies the emergence of a single global market and upholds the principle of global competition." *Id.* at 46-47. Mr. Sreejith further states neoliberalism has brought "multinational corporations, NGOs, and other agents of change--a forum built on the principles of universalism, individualism, rational voluntaristic authority, progress, and world citizenship. These institutions are imbued with neoliberal culture, concerns, content, norms, and shape. Although they cannot claim to have totally taken over the baton from the states, they lobby and criticize states, mobilize around and elaborate global cultural principles, and convince states to act on those principles." *Id.* at 51 (citing John Boli & George M. Thomas, *World Culture in the World Polity: A Century of International Non-Governmental Organization*, 62 AM. SOC. REV. 171, 187 (1997)).

80. See ROBERT O. KEOHANE, AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY 85-109 (1984); David J. Townsend, *Stretching the Dispute Settlement Understanding: U.S.—Cotton's Relaxed Interpretation of Cross-retaliation in the World Trade Organization*, 9 RICH. J. GLOBAL L. & BUS. 135, 160-61 (2010) ("Institutionalists emphasize that international organizations facilitate information sharing, transparency and monitoring of compliance with obligations, and reducing but not eliminating obstacles to cooperation posed by power disparities."); see also Robert O. Keohane & Lisa L. Martin, *The Promise of Institutional Theory*, INT'L SECURITY, Summer 1995, at 39 (1995). Within the umbrella of this approach, scholars have discussed regime theory and rationalism theory. For more information, see generally ROBERT M. AXELROD, THE EVOLUTION OF COOPERATION (1984); ROBERT O. KEOHANE, AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY (1984); ROBERT O. KEOHANE, INTERNATIONAL INSTITUTIONS AND STATE POWER: ESSAYS IN INTERNATIONAL RELATIONS THEORY (1989); ORAN R. YOUNG, COMPLIANCE AND PUBLIC AUTHORITY: A THEORY WITH INTERNATIONAL APPLICATIONS (1979); ORAN R. YOUNG, INTERNATIONAL COOPERATION: BUILDING REGIMES FOR NATURAL RESOURCES AND THE ENVIRONMENT (1989); ORAN R. YOUNG, INTERNATIONAL GOVERNANCE: PROTECTING THE ENVIRONMENT IN A STATELESS SOCIETY (1994); Oran Young, *The Effectiveness of International Institutions: Hard Cases and Critical Variables*, in GOVERNANCE WITHOUT GOVERNMENT: ORDER AND CHANGE IN WORLD POLITICS 160 (James N. Rosenau & Ernst-Otto Czempiel eds., 1992); Robert M. Axelrod, *An Evolutionary Approach to Norms*, 80 AM. POL. SCI. REV. 1095 (1986).

international institutions. Even modern politico-legal realists suggest that international law is nothing more than “an endogenous outgrowth of individual state interests,” that international law can never constrain those interests, and that international laws change as the interests of states change.⁸¹ Under this view international law, therefore, has a very limited operational role, and it promotes limited cooperation when states’ interests make cooperation among states desirable.⁸² However, Kal Raustiala criticizes this politico-legalist view, noting an enormous growth in the number of international agreements and institutions in the post-war era as evidence that international law has not been dismissed.⁸³ If these international laws and institutions do not have any roles, he asks, why are states continuing to invest their economic and political resources in creating them?⁸⁴ He also argues that credibility, reputation, the inherent market system, and the delegational nature of international law strengthen the role of international law.⁸⁵

Other scholars justify the use of international relations theory in international law as a diagnostic and policy-perspective tool to address international terrorism and other international issues.⁸⁶ Although all these efforts to reconcile international relations theory and international law are absolutely apprehensible, they miss a substantial point: the root of international law is derived from a realist approach and all other approaches (constructivism, liberalism, neo-liberalism, institutionalism) are parts of the realist approach. Because all these approaches of international relations theory make international law serve the interests of power in a complex international system of behaviors, less powerful countries struggle to resist the power of dominant countries. First, less powerful countries perceive that

81. Kal Raustiala, *Refining the Limits of International Law*, 34 GA. J. INT’L & COMP. L. 423, 423 (2006).

82. *Id.* (citing JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005)).

83. *Id.* at 426.

84. *Id.* at 429.

85. *Id.* at 430-33.

86. See Anne-Marie Slaughter, Andrew S. Tulumello, & Stepan Wood, *International Law And International Relations Theory: A New Generation of Interdisciplinary Scholarship*, 92 AM. J. INT’L L. 367, 369, 373-74 (1998). The authors have analyzed the use of an interdisciplinary approach to international law and international relations and have used international relations theory in the development of international law. *Id.* at 373-74. They argue that international relations theory is valuable in identifying and resolving international terrorism. *Id.* at 374. The authors have identified six approaches for both international relations theory and international law to make a collaborative research agenda, which are: regime design, process design, basis of shared norms and the role of power, historical and cultural constitutive structures of international affairs, government networks within state regimes, and domestically embedded international institutions (embedded institutionalism). *Id.* at 369.

international laws are generally made to enforce the hegemony of power⁸⁷ and second, they make efforts to negotiate to reduce the influence of power and achieve justice by using existing international legal instruments and institutions. Most international legal scholarship is confined to the second aspect rather than addressing how powerful states create, interpret, and employ international law to maintain the power status quo.⁸⁸

There are other scholars who have addressed the fundamental issues of how international law is either abused or dismissed by power, and international law has come to resemble the 19th century imperial international law.⁸⁹ International law as reflected in the UN structure can be justified on the grounds that because the Security Council's purpose is rendering order and justice, it can act in furtherance of that purpose to solve any problem when the Council's five permanent members find a solution politically feasible.⁹⁰ Otherwise, international law becomes little more than an object to be manipulated by realists in a political theatre. Other than a few international legal scholars who explore the roots of international law, scholars pursue the argument that the development of international law took place within the evolution of international relations theories.⁹¹ Therefore, there is a tendency of international legal scholars not only to admit the importance of international relations theory but also treat it as a primary discipline and international law as a secondary discipline.

The foreign policy of the United States as reflected in its international behavior appears to be based on the realist approach of international relations theory rather than international law. After the 9/11 event, the (dis)recognition of the role of international law in addressing the global problem of terrorism has been prevalent in U.S. foreign policy (as prescribed by realist theory).⁹² This prevalence has

87. Acharya, *War on Terror*, *supra* note 24, at 658-59 (describing how 13 international treaties created to address terrorism were agreed to before 9/11 without the treaties or the parties having an acceptable definition of terrorism).

88. Upendra Acharya, *Is Development a Lost Paradise? Trade, Environment, and Development: A Triadic Dream of International Law*, 45 ALBERTA L. REV. 401, 403 (2007).

89. Antony Anghie, *Rethinking Sovereignty in International Law*, 5 ANN. REV. L. & SOC. SCI. 291, 291 (2009).

90. Martti Koskenniemi, *The Police in the Temple: Order, Justice and the UN: A Dialectical View*, 6 EUR. J. INT'L L. 325, 327 (1995), available at <http://www.ejil.org/pdfs/6/1/1299.pdf>.

91. Joyner, *supra* note 70, at 249-50.

92. U.S. foreign policy is well presented in The National Security Strategy of the United States of America (NSS) as prescribed in 2002 and in 2006. President George Bush, *The National Security Strategy (2002)*, available at <http://georgewbush-whitehouse.archives.gov/nsc/nss/2002/>; President George Bush, *The National Security Strategy (2006)*, available at <http://georgewbush-whitehouse.archives.gov/nsc/nss/2006/>. The NSS is important for two aspects in international law, first, preventive use of force is legal when it is used against rogue states, and second, liberal democratic countries (here

not only posed questions regarding the behavior (rule of law) of states and non-state actors concerning terrorism, value (equality) among nations and peoples of the world, and democracy (process and transparency) in the governance system of the modern-day world, but also has downgraded the status of U.S. foreign policy and its insistence on unilateral international behavior.⁹³ This declining opinion of U.S. foreign policy may be credited to the U.S. disregard of international law and its sole reliance on the realist approach. International legal scholars have further contributed to this negative perception by justifying the realist approach mirrored in U.S. foreign policy within the framework of existing international law.⁹⁴ If this is the case, then international legal scholars have promoted a power politics agenda and have been oblivious to important legal aspects prescribed by the UN Charter and other international laws, such as human rights law and humanitarian law (limited human rights of civilians in the war zone, treatment of captured detainees, irregular rendition, indefinite detention without charge, and death of civilians). The use of self-defense measures, particularly through unmanned drone attacks, is one example of U.S. foreign policy that undermines the basic tenets of the laws of war. Drone attacks do not allow opponents to participate in the

the US) can and should take responsibility in maintaining international order and international peace and security against the threat of terrorism, not rely on international law and institutions. Anghie, *supra* note 89, at 292. The United States adopted the self-defense measures under Article 51 rather than collective security measures under Chapter VII of the UN Charter. Many legal scholars have recognized the US adoption of self-defense measures while recognizing the problem of terrorism is global and poses a threat to international peace and security. *See Id.* at 293-94. If the problem of terrorism is a global one and poses a threat to international peace and security, it must be dealt with by adopting the collective security measures. Because the operational role of international law is undermined there has not been tendency to distinguish self-defense measures from collective security measures as to when each should be applied. This non-distinction is credited to the realist approach in its foreign policy and submission of international legal scholars to this approach. The perception that the United States can demonstrate its power in keeping and maintaining international law and order by adopting self-defense measures in order to deal with the global war on terror has caused undue human, economic, and political (long-run) burdens.

93. *See* Anghie, *supra* note 89, at 291-307 (arguing that President Bush invoked nineteenth century principles of international law and that his foreign policy is dominated by the realist approach); *see also* CHRISTINE GRAY, *INTERNATIONAL LAW AND THE USE OF FORCE* (3d ed. 2008) (arguing that international law on the use of force after 9/11 is more speculative than ever before); *see also* Kaufman, *supra* note 69, at 29 (discussing Hans Morgenthau); *see also* GOLDSMITH & POSNER, *supra* note 82, at 225-26. Both Morgenthau and Goldsmith are lawyers by training who argue that international law is useful if it corresponds with the interests of powerful states.

94. *See* John Yoo, *Using Force*, 71 U. CHI. L. REV. 729, 732 (2004). The author argues that it is naïve to rely on international law and international institutions for international peace and security and self-preservation due to the lack of effectiveness of international law and institutions.

conduct of war in the same way that terrorist attacks do not give opportunity to the attacked party to fight back.⁹⁵

The void of collective security measures and the adoption of self-defense measures in the global problem of terrorism have led to a tacit competition between the terrorists and the United States, and may have created a cycle of perpetual war. Therefore, perhaps the solution to the problem of terrorism has been lingering particularly since the 9/11 event and may continue to linger, which could result in a situation where politics (power) can have unfettered discretion to abort law (justice) on both sides of the war of terror — one, giving rise to terrorist groups and invisible networks of those groups, and, two, giving rise to short-term, national-interest driven political tactics to suppress the problem. If power politics is the principle to resolve international problems, then both sides politicized international law. The launchers of terrorist activities argue that their actions are not the cause but the effect of domination and dehumanization, and suppressors of terrorist activities argue that security within their territory and global peace and security are of the supreme primacy with or without international legal guidance.⁹⁶ In this scenario, if international law is employed, it will be used only to justify the interests of power.

CONCLUSION

With the analysis made above, we can arguably come to the conclusion that there are two approaches to address the problem of terrorism — first, the legal approach and second, the political approach. Both approaches have been utilized to address terrorism because the legal approach has a minimal role within the scope of the realist theory, where power politics is the primary element in addressing the problem of terrorism and where law and legal elements have a limited supporting role, being applied only when they serve the interests of power. The global war on terror from Afghanistan to Iraq, Pakistan, Yemen, and Somalia, and its techniques — indefinite detention, irregular rendition, torture, and detention without charges — have killed international law.⁹⁷ The cause of death was that, historically,

95. Paul F. M. Zahl, et al., *Drones: Is It Wrong to Kill by Remote Control?*, CHRISTIANITY TODAY, Aug. 2011 at 64.

96. Joe Devanny, *Justifying Terrorism*, IDEA: INTERNATIONAL DEBATE EDUCATION ASSOCIATION (Feb. 21, 2011), http://www.idebate.org/debatabase/topic_details.php?topicID=309.

97. See Thomas M. Franck, *The Use of Force in International Law*, 11 TUL. J. INT'L & COMP. L. 7, 17 (2003). The author has expressed his doubt about the core principle of international law regarding the use of force in his earlier article too. Thomas M. Franck, *Who Killed Article 2(4)? Or Changing Norms Governing the Use of Force by States*, 64 AM. J. INT'L L. 809, 809-10 (1970). See also Nanda, "War on Terror," *supra* note 11, at 514; Sadat, *supra* note 43, at 545. Both authors have analyzed how the US has violated several aspects of international law in their respective articles.

international law was not believed to produce a legal solution to international problems, including terrorism. The role of international law is within the domain of international relations theory. It has been used for *ex post facto* justification of political decisions for the purpose of serving national interests and power politics.⁹⁸ This is the very reason why international governance and institutional processes under the UN structure lack democratic methods. Therefore, the existing system of international governance does not have complete faith in democracy and rule of law.⁹⁹ On the one hand, it neither supports a formal majority ruling nor establishes a process for governance by majority. On the other, treaties related to terrorism are designed to exclude terrorist activities conducted by powerful nations. International politics either dictates that weaker nations submit their loyalty to powerful nations or confront the consequences, or requires nations to cooperate when the interests are shared. This way, international law and institutions confirm that powerful nations' activities are legitimate and civilized.¹⁰⁰ It does carry some value (peace, security, equality, justice etc.) in its linguistic formality, but does not really bother with the question of whether those values can be achieved. When these conditions remain intact regarding the application of international law, the world is not as safe as we hope it to be. If United States foreign policy dealing with the problem of terrorism continues disregarding the principles of international law, basing its policy on international relations theory (the realist approach) and if American international legal scholars continue to embrace the approach that international law is a subsystem in a broader system of a realist approach of international relations theory, neither the problem of terrorism is resolved nor will U.S. foreign policy be uplifted. The 21st century may well become a post-American world where the United States will lose its appetite for global leadership. The international power dynamics is a zero-sum game (contrary to what Obama stated during his first visit to

98. Kaufman, *supra* note 69, at 28.

99. GERRY J. SIMPSON, GREAT POWERS AND OUTLAW STATES 165-93 (2004). The author suggests that the great powers were focused on maintaining power privilege during the creation of the UN Charter and they were successful in taking the policing power in international affairs by pushing their hegemony over less-powerful countries. This way the great powers legalized a class division between powerful and powerless countries through the UN Charter.

100. See Eyal Benvenisti, *The US and the Use of Force: Double-edged Hegemony and the Management of Global Emergencies*, 15 EUR. J. INT'L L. 677, 694 (2004) (arguing that formal inequality among nations is an essential part of international law, and the international law bows to military and economic power to accommodate needs and to maintain coherence).

China)¹⁰¹ if it is exercised without reference to the standards of international rule of law. Even a prominent advocate of the modern realist school, Hans Morgenthau, at the Hoffmann's Seminar on American Foreign Policy admitted that "power politics as a principle for the conduct of international relations has become fatally defective and could ultimately result in the destruction of the human race through a suicidal . . . [w]ar."¹⁰² Therefore, it is important for U.S. foreign policy to respect the international rule of law and democratic process in the international system of governance. The United States has a greater opportunity and responsibility than any other nation to promote the international rule of law and the virtues thereof in its foreign policy by respecting international law, complying with it, and making it the standard for international relations. The exercise of power without regard to international law and the conduct of war as a manifestation of power will neither resolve the problem of terrorism nor serve the interests of the United States' foreign policy. It will only help establish (and has already created) a never-ending process of war on (or of) terror.

101. President Obama during his first visit to China, said, "Power does not need to be a zero-sum game, and nations need not fear the success of another....We welcome China's efforts to play a greater role on the world stage." *See* Rachman, *supra* note 56.

102. *See* Boyle, *supra* note 66, at 217.