STRETCHING THE LIMITS OF INTERNATIONAL LAW: THE CHALLENGE OF TERRORISM

Asli Bâli[*]

I. INTRODUCTION 403
II. TWO PARADIGMS FOR AN INTERNATIONAL RESPONSE TO TERRORISM: POLITICO-MILITARY AND INTERNATIONAL-LEGALIST 405
III. EXTENDING THE BOUNDARIES OF INTERNATIONAL LAW 412

I. INTRODUCTION

When this panel was originally conceived, we could not have anticipated the extent to which the limits of international law would have to be stretched by events in the city where our conference would be held. Our thinking about the pace and nature of changes shifting the boundaries of international law have had to be radically revised and the aftermath of September 11th has necessarily prompted a significant change in the thinking about the limits of international law. In the place of the sense of confidence in the consistent deepening of globalization, and the attendant web of international legal frameworks for the regulation of transnational activity, we are confronted with a sudden pessimism of the impotence of law in the face of violence. Rather than taking up the question of evolving practices of inclusion in and exclusion from international participation, as I had originally intended, I will focus my discussion on the available paradigms through which we might understand the spectrum of international options in responding to the attacks of September 11th.[1] This

* J.D., Yale Law School, 1999; M.P.A., Princeton University, 1999; M.Phil., University of Cambridge, 1995; B.A. Williams College, 1993. These remarks were presented at the International Law Association ILA Weekend, October 2001, New York, New York, United States.

1. There is a subtle relationship between this question and the original subject of my remarks, but the constraints of the presentation on which these remarks are based did not allow more than an allusion to this link. Practices of inclusion in and exclusion from international participation—by which I mean formal mechanisms of recognition and accession to international legal regimes, as well as informal mechanisms for the entry into or exclusion from regular channels of inter-state transactions—can also be described as strategies of engagement or

subject requires a somewhat more prescriptive approach than legal academics are in the habit of adopting. However, the urgency of the current international crisis, and the convergence of policy and legal approaches on the question of designing new mechanisms to counter terrorism, warrants stepping out of character.

The first question to which we must turn our attention in asking how to wage the battle against terrorism is whether we are best served by conceptualizing the attacks as criminal acts or acts of war.[2] While there

---

containment. The classic mechanism of inclusion is the entry into diplomatic relations. The classic mechanism of exclusion is the withholding of recognition or the imposition of sanctions. Between these examples, there is a wide array of practices of inclusion and exclusion that may be considered. Recent trends in American foreign policy, including the use of unilateral and multilateral sanctions, has given rise to the question whether the formal mechanisms of membership in the international community (recognition as a declaratory statement that an entity meets the objective test of statehood through effective control of its territory) are being displaced by the development of normative or quasi-normative criteria governing inclusion in and exclusion of states from participation in a variety of international fora. For an example of the definition of this "objective test," see the Convention on the Rights and Duties of States, Dec. 26, 1933, art. 1, 49 Stat. 3097, 3099, 165 L.N.T.S. 19, 21 (providing that "[t]he State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other States.").

The question, when we turn our attention to developing responses under international law to the threat of terrorism, is whether there is any effective means of "containing" terrorism through exclusionary practices whereby states are subjected to coercive intervention. As I will suggest below, treating terrorism as an international crime, and attacks of the kind witnessed on September 11th as massive crimes against humanity, would permit the invocation of principles of universal jurisdiction in the pursuit of those responsible for such acts, wherever they may be located. Under such a conception, states may be engaged through a series of international legal obligations in a transnational effort to pursue, prosecute and punish terrorists found within their territory, with appropriate sanctions associated with the failure to do so. For a discussion of proposed principles for the implementation of universal jurisdiction through national courts, see STEPHEN MACEDO, THE PRINCETON PROJECT ON UNIVERSAL JURSIDICTION, THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION (2001). In contrast, to treat acts of international terrorism as acts of war authorizing the use of force against territories from which terrorists may operate suggests a military paradigm for countering the threat of terrorist violence. Where the use of force encompasses not only those responsible for terrorist acts, but states where they may be present (with no necessary requirement of state-sponsorship) such a strategy would contribute to the development of exclusionary mechanisms under international law by broadening the grounds on which states may become subject to coercive intervention. However, the effectiveness of conventional uses of force in combating what may be a transnational phenomenon not bound to a particular territorial base is questionable, especially when the high costs to the international system of destabilizing military interventions and their aftermaths are taken into consideration. I will provide principled and pragmatic arguments for the privileging of a legalist paradigm over a military one. For the purposes of the remainder of this discussion, however, the inclusionary or exclusionary implications of different strategies in combating terrorism are of secondary concern, and will have to be left to be taken up elsewhere.

2. Although this has been conceived as an either/or question in most discussions of the status of the attacks under international law, it is more accurate to say that the attacks blurred the lines between criminal acts and acts of war. The question remains, however, whether the appropriate response to the attacks should draw more on the resources in international law to

are strong arguments for both paradigms, when viewed from the perspective of fashioning an effective, long-term strategy for countering international terrorism, I will argue that drawing on international criminal law is the more promising avenue of response. In particular, I will make the case that adopting a politico-military approach rather than a legalist paradigm undermines the effectiveness of international law, in ways dangerous to international order, and potentially detrimental to efforts to prevent and punish acts of terrorism. In the third section of this essay, I will turn to the question of the resources already available in international law, and the ways that the boundaries of international law may be shifted, to address terrorism.

II. TWO PARADIGMS FOR AN INTERNATIONAL RESPONSE TO TERRORISM: POLITICO-MILITARY AND INTERNATIONAL-LEGALIST

While the September 11th attacks were an unprecedented form of international terrorism, international law is not without resources for developing an appropriate and effective response. International law, like all bodies of law, develops through the application of precedents to like cases, or the adaptation of precedents to suit new circumstances by way of extrapolation and analogy. There are two relevant precedents for considering how an international response to massive terrorist attacks may be fashioned in the wake of the September 11th attacks. The first is the Nuremberg war crimes tribunal,[3] and the international legalist paradigm

address transnational crime or whether there should be a reliance on the use of force. This is the question that I mean to evoke here, and not the diversionary debate over the fit between the attacks and pre-existing conceptions of terrorism and war. *See also infra* note 7.

3. One challenge to the applicability of the Nuremberg precedent and the developing practice of international criminal tribunals in this context is that in each case these tribunals have been convened in the aftermath of a war or crime against humanity. According to this reasoning, the use of international tribunals cannot be relevant until the conclusion of the military campaign against the particular terrorist organization or network implicated in the September 11th attacks. But this argument presumes the necessity of undertaking military action in response to the attacks and subordinates the use of an international tribunal to a secondary and subsequent phase of response. If, however, the convening of an international criminal tribunal were considered as an *alternative* to a military approach, this objection ceases to be relevant. That is, if the attacks of September 11th were conceptualized as a crime against humanity, then the convening of the tribunal would clearly be subsequent to the crime, and thus the timing objection would have been met.

Aside from this timing objection, however, there are at least three other disadvantages that may be cited to convening international tribunals to prosecute terrorists for crimes against humanity: 1) the difficulty of apprehending the perpetrators; 2) the inadequacy of international criminal law to the task of deterring transnational crime; and 3) the risk of acquittal.

The first two objections are pragmatic, and as a matter of practical urgency, will be resolved. In the first case, transnational efforts to develop an international policing capacity, through the United Nations or through a specific, separate multilateral framework, are long

that developed out of that precedent, leading to the creation of the International Criminal Tribunal for the former Yugoslavia (the "ICTY"),[4] the International Criminal Tribunal for Rwanda (the "ICTR"),[5] and ultimately the drafting of the statute for the International Criminal Court (the "ICC").[6] The other is the Kosovo War of 1999, with the political and military paradigm of a coalition that represents a subset of the international community and that operates outside of a United Nations framework to undertake an enforcement action in response to aggression or crimes

---

overdue. In response to the second objection, one can readily point to the tremendous acceleration in the formulation of international criminal law over the last decade. The particular objection in this instance could be overcome by the convening of an *ad hoc* tribunal, the statute of which would provide all of the relevant legal grounds necessary for prosecution. I discuss this option below. Beyond this, the deterrence debate is one intrinsic to all instances of criminal prosecution, whether domestic or international. While no application of law can fully deter extremism, raising the costs of sponsoring or facilitating terrorist acts will serve as an important deterrent to state sponsorship. A full discussion of the deterrent value of a legalist paradigm, with all of its complexity, is beyond the scope of this essay. For one thorough analysis of the question of deterrence in applications of international criminal law, see JUDITH SHKLAR, LEGALISM (1964).

As for the third objection, it seems misplaced. In the past, international criminal tribunals, including the Nuremberg tribunal, have issued a (quite limited) number of acquittals. In light of the magnitude of the crimes against humanity in question at Nuremberg, and in the ICTY and the ICTR, if the risk of acquittal was deemed acceptable in these cases (and in the cases of the latter two tribunals, they were convened in the absence of the "total" military defeat of the parties accused of the crimes), then it is difficult to imagine the distinct principled or pragmatic argument against permitting the possibility of acquittal in the case of trials of alleged terrorists. After all, the possibility of the innocence of at least some persons brought before such a tribunal cannot be excluded.

4. This is the official abbreviated title for the Tribunal. *See* U.N. Press Release, No. IT/13, Nov. 30, 1993, and No. IT/30, Feb. 11, 1994. The full title of the ICTY is the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991. For the Security Council resolution establishing the ICTY, see U.N. SCOR, U.N. Doc. S/RES/827 (1993).

5. The full title of the ICTR is the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States Between 1 January and 31 December 1994. For the Security Council resolution establishing the ICTR, *see* S. Res. 955, U.N. SCOR, U.N. Doc. S/RES/955 (1994).

6. The Statute for the International Criminal Court was drafted at the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court [hereinafter, "U.N. Diplomatic Conf. of Plenipotentiaries on the Establishment of an ICC"] held in Rome, Italy (1998). *See Statute of the International Criminal Court, U.N. Diplomatic Conf. of Plenipotentiaries on the Establishment of an ICC*, U.N. Doc. A/CONF.183/9 (1998).

against humanity.[7] I will consider the former to represent the international legalist tradition, and the latter a politico-military approach.

---

7. By "Kosovo war" I am referring to the eleven-week bombing campaign conducted by NATO against the Federal Republic of Yugoslavia, beginning on March 24, 1999. This campaign was designated "Operation Allied Force" and had many unique features worth bearing in mind. Most importantly, the Kosovo war may represent a precedent for expanding the international legal basis for the use of force. As at least one international legal scholar has noted, Operation Allied Force represented "the first time a major use of destructive armed force had been undertaken with the stated purpose of implementing UN Security Council resolutions but without Security Council authorization." Adam Roberts, *NATO's 'Humanitarian War' Over Kosovo*, 41(3) SURVIVAL 102, 102 (1999).

In this sense, this is a more pertinent example than the common references to the Pearl Harbor attack as the relevant precedent for a military response. Where the Pearl Harbor attack had all of the features of a conventional form of state aggression (on the part of Japan) giving rise to a straightforward right of self-defense on the part of the victim of that aggression (the U.S.). The bombing campaign against Afghanistan by Anglo-American forces—initially dubbed 'Operation Infinite Justice,' but later renamed 'Operation Enduring Freedom'—which began on October 7, 2001, resembles the Kosovo campaign in that it does not enjoy direct Security Council authorization, though two resolutions in September express the United Nations's support for efforts to combat terrorism.

In the case of the air campaign against Afghanistan, the American representative to the United Nations, Ambassador John Negroponte, presented a letter to the Security Council on October 8, 2001 stating that the attacks against Afghanistan were acts of self-defense under Article 51 of the Charter of the United Nations. *See* Christopher Wren, *U.S. Advises U.N. Council More Strikes Could Come*, N.Y. TIMES, Oct. 9, 2001, at B5. Absent evidence establishing state sponsorship on the part of Afghanistan of the attacks of September 11th, this invocation of the right of self-defense reflects an expansive interpretation of the Article 51. In particular, while Article 51 recognizes an "inherent right of individual or collective self-defence [sic] if an armed attack occurs against a Member of the United Nations" it has not previously been interpreted to permit uses of force against a state not held directly responsible for the attack in question. *See* U.N. CHARTER art. 51.

Thus the question arises whether the right of self-defense extends to attacks on states on whose territory non-state actors believed to be responsible for an armed attack may be present. Some international jurists have argued that the unprecedented nature of the September 11th attacks combined with the apparent absence of a direct state-sponsor require a broadening of the United Nation Charter's authorization of the use of force to cover actions like Operation Enduring Freedom, and future uses of military force to attack terrorists wherever they may be located. *See, e.g.*, Richard Falk, *Falk Replies*, THE NATION, Nov. 26, 2001, at 2. Such a broadened definition of the justified use of force would only be necessary if it could be established that the nature of the threat is of a continuous, military onslaught by an organization or network with access to military technologies.

What the attacks of September 11th have so far proved is the ability of non-state actors to hijack *civilian* technologies and use them in acts of political violence. Hijacking itself is not, of course, a new phenomenon, and it is a phenomenon that has been defined in the past as an instance of transnational crime, which has largely been deterred or prevented through national security precautions and international coordination. Whether hijacking coupled with the use of the hijacked planes to attack civilian or military targets transforms the criminal act into an act of war depends on a definitional question requiring the adaptation of existing definitions to these circumstances, as there is no clear precedent. The September 11th attacks constitute a blurring of the line between criminal acts and acts of war in a way that challenges pre-existing international legal categorizations, and accordingly challenges international lawyers to fashion

The international legal community has been somewhat disabled in formulating an adequate account of what a response in the first tradition might be. On September 11th, it would seem, from this perspective, that we reached the limits of international law. Events overtook theory and as the military attacks on Afghanistan began, consideration of international legal mechanisms became moot. Despite the apparent current pessimism regarding the adequacy of legal mechanisms, considerable resources are available in the international legal arsenal to formulate an adequate non-military response. Further, military action may have unfortunate international legal consequences, establishing new norms with problematic implications and undermining the perceived legitimacy behind subsequent efforts at a legalist response in the wake of a military campaign.

The attacks of September 11th were widely seen by media commentators and international legal scholars alike as demonstrating a series of deficiencies in international law. These include, but are not limited to:

- the absence of a comprehensive international legal framework to address terrorism;
- the absence of adequate international criminal law infrastructure to address massive crimes against humanity and/or acts of war, particularly by non-state actors;
- the absence of sufficient international legal mechanisms for regulating, monitoring, prosecuting, and punishing non-state actors; and
- the absence of international policing capacities and adequate cooperative arrangements to undertake intelligence gathering and crime prevention at the international or multilateral level.

The response of the international legal community to these deficiencies in the immediate aftermath of September 11th has been a woeful retreat from the earlier trend of increasing the range of issues brought within the purview of international law.[8]

---

new categories, drawing by analogy on our existing taxonomy. The debate, then, should not be whether the attacks were criminal or military in nature, but rather whether the international response should draw more heavily on existing resources for international crime prevention or for authorizing uses of force. I will come to this question below.

8. This retreat reflects the view, supported by the deficiencies listed above, that the severity of the threat posed by international terrorism dooms the legalist paradigm to irrelevance. *See, e.g.*, Falk, *supra* note 7. However, many facets of the present multilateral efforts, beyond the military campaign against Afghanistan, reflect a tacit reliance on the legalist paradigm, in the form of international cooperation in intelligence-gathering, policing, law enforcement, and the prosecution of suspected terrorists. *See, e.g.*, Elisabeth Bumiller, *Spain to Study U.S. Requests to Extradite Terror Suspects*, N.Y. TIMES, Nov. 29, 2001, at B4. The question remains whether

Yet avenues of response to the challenge of terrorist crimes against humanity had already been proposed and developed during the 1990s by the Sixth (or Legal) Committee of the United Nations General Assembly ("Legal Committee") to suggest an international legal framework within which to conceptualize international responses to the present challenge. These proposals developed in conjunction with the push to establish a statute for an international criminal court. Even as the ICC statute was being formulated in Rome in 1998,[9] in New York the General Assembly ("UNGA") commissioned an *ad hoc* committee on international terrorism to begin drafting a new comprehensive convention on international terrorism. The declared goal of the UNGA and its Legal Committee was to convene a high-level conference in the year 2000 under United Nations auspices to "formulate a joint, organized response of the international community to terrorism in all its forms and manifestations."[10] It is perhaps useful to note that this language would not sound out of place in describing the goals of the United States in its efforts to form a multilateral coalition to wage the "war on terrorism."[11]

The UNGA approach of 1996 onward was well suited to the nature of the threat posed by international terrorist activities; transnational threats require the development of a framework for coordinated international effort. But there are two further questions to consider. First, in light of these efforts, what international legal mechanisms are available to cope with an attack on the scale of what was witnessed on September 11th? Second, why are such mechanisms preferable to the *ad hoc* military

---

these approaches, rather than short-term military strategy, are not the more likely to characterize the battle against international terrorism in the long run, and if so, whether an acceleration in the development of international law in these areas, coupled with the use of existing international organizations (like the United Nations) to coordinate present efforts does not represent a viable and highly relevant legalist paradigm in addressing the terrorist threat.

9. *See supra* note 6.

10. U.N. Doc. GA/L/3103.

11. Several commentators have noted the parallel between the metaphor of war in the struggle against terrorism and the deployment of the same metaphor in American policies to counter international narcotics trafficking. *See, e.g.*, Tim Golden, *A War on Terror Meets a War on Drugs*, N.Y. TIMES, Nov. 25, 2001, § 4 (Week in Review), at 4. The limitations of the metaphor in invoking the most effective mechanisms for preventing international narcotics trafficking may be instructive in considering the prospects for success of a military effort to curb terrorism. In particular, if the organization or network in question does not operate primarily from a single territorial base, then the benefits of destroying particular physical infrastructure (which in the case of a state is often devastating to its capacity to continue to pose a threat) may have little consequence in the long-term. The problem, in dealing with transnational threats is precisely fashioning responses that are not territorially specific, and that address the sources that sustain the threat, which in the case of terrorism, as with narcotics trafficking, may have little to do with physical location.

approach now being undertaken? Let us come at this in reverse order, and ask first what the politico-military approach has been.

The strategies in this approach have ranged from measured to hysterical, but have largely revolved around dividing states between those that join in an international coalition against terrorism and those that sponsor terrorism.[12] The former are admitted into a loose military and diplomatic alliance, while the latter are targeted for military and diplomatic attack. The specific strategy of the military attack, at least in the early stages against Afghanistan, was an attempt to target areas where physical infrastructure associated with terrorist organizations or networks may have been located. The absence of substantial terrorist infrastructure, coupled with a frustration with the regime in power in Afghanistan, quickly led to an expansion of the military strategy to the toppling of that regime and support to a rival faction on the ground. In the process, collateral damage with respect to civilian targets occurred and there may have been substantial violations of the laws of war.[13] The expansion of the aims of the military campaign, the strategy of dividing nations between those that support the coalition and those that support terrorism, and the absence of

---

12. This strategy has been developed primarily by the Bush administration in the United States and the government of Prime Minister Tony Blair in the United Kingdom. *See, e.g.*, Elisabeth Bumiller, *Prepare for Casualties, Bush Says, While Asking Support of Nation*, N.Y. TIMES, Sept. 20, 2001, at A1 (noting that President Bush "posed a stark choice to other nations. 'Every nation, in every region, now has a decision to make,' he said. 'Either you are with us, or you are with the terrorists.'"); Nicholas Blatt and Suzanne Goldenberg, *Blair Delivers the Final Warning: Tough New Rhetoric May Signal Strike at Regime Within Week*, THE GUARDIAN (LONDON), Sept. 26, 2001, at 1. The Bush-Blair military campaign is not, of course, the only means by which a politico-military strategy for dealing with the threat of terrorism might be formulated. However, it is instructive that the approach they adopted required identifying state entities that might be the legitimate target of a use of force, although no allegations of state-sponsorship of the actual attacks of September 11th were ever issued. Accordingly, the impulse to divide the international system between those that will join a coalition against terrorism and those that will be targeted by it is a politically expedient policy for distinguishing appropriate targets of attack. The absence of a connection between the states that are potential targets of the military campaign and direct responsibility for the attacks is an indication of the poor fit between the military strategy and the atrocity it is intended to address.

13. *See, e.g.*, Nicholas Watt, Richard Gordon-Taylor, and Luke Harding, *Allies Justify Mass Killing*, THE GUARDIAN (LONDON), Nov. 29, 2001, at 1 (noting that "Britain and the United States were facing growing international pressure . . . to explain their role in the deaths of up to 400 Taliban prisoners who were killed by United States warplanes and Northern Alliance fighters at a fortress outside the northern Afghan town of Mazar-i-Sharif"). Whether the circumstances surrounding this massacre rise to the level of a violation of the Third Geneva Convention is unclear, but other aspects of military policy have also raised concerns. *See, e.g.*, Dexter Filkins and Carlotta Gall, *Foreign Militants Seek Safe Passage From Afghan City*, N.Y. TIMES, Nov. 22, 2001, at A1 (noting that United States Secretary of Defense Donald Rumsfeld "was firmly opposed to any agreement to evacuating the foreigners" from the besieged city of Kunduz).

any clear allegation that the state(s) targeted by the military campaign bear direct responsibility for the September 11th attacks are all sources of serious concern.

More generally, the politico-military response glosses over a number of obvious difficulties, such as defining terrorism, determining how to address different forms of terrorism (ranging from state-terrorism to terrorism by transnational non-state actors that may or may not have state sponsorship to terrorism by domestic groups with no international ambitions), and developing an internationally coordinated strategy that includes policing capabilities, intelligence gathering and sharing arrangements, and enforcement mechanisms. Arrangements involving sufficient international cooperation to develop effective intelligence sharing and policing capacities have proven historically to involve enormous obstacles, which is part of the reason that a legal framework on terrorism has been slow in developing, as have frameworks on international narcotics trafficking. I would argue that the only means of assuring long-term multilateral cooperation in these areas is through an agreed, legally binding framework.

One short-cut around developing complex mechanisms to cope with the surveillance, policing, and enforcement capacities required to combat non-state terrorism currently being tested is to develop criteria whereby individual states may be penalized through existing international mechanisms, thereby generating state-level incentives to do the dirty-work of prevention, prosecution, and/or punishment. By attributing responsibility to putative state sponsors, international pressure might be brought to bear on individual states to undertake the massive intelligence gathering, policing, and enforcement measures necessary to combat terrorism. Thus, states that are known to have terrorist bases within their borders, or states that appear to be involved in the financing of terrorist networks, would bear the costs of international prevention efforts. While this alternative seems attractive at first, and certainly underlies current efforts to identify states that "harbor" terrorists, absent a coherent and comprehensive legal framework this approach encounters difficulties. First, if physical location (*i.e.*, provision of a "harbor") is a basis for guilt-by-association then presumably one should attribute culpability as much to Hamburg, London, and parts of Florida, Maryland, and New Jersey, not to mention Riyadh and Dubai, as to Kandahar. Second, if facilitating the financing of terrorist networks is a basis for guilt then, again, it would appear that several major Western banking groups would have to face as much international scrutiny and pressure as Pakistan or Saudi Arabia. What this shows is not that we should bomb Germany or dismantle major

banking groups, but that the definitions being used are overly broad or unsound and require precision and systematization.

Bypassing these difficulties by invocation of an us-and-them strategy that divides the world between the coalition against terrorism and those that allegedly sponsor terrorism is unhelpful. So long as sponsorship of the IRA in Northern Ireland or ETA in the Basque region of Spain or the FARC in Colombia is not at issue, the question is not a division between those that do and do not sponsor terrorism, but rather a division between different forms of terrorism, with different goals and different tactics. Efforts to draw a sharp line between those that oppose and those that support terrorism also run certain risks, not least because the civilizational overtones of these efforts confirm the worldview of the very terrorist groups that the coalition is seeking to combat. In light of the potential disadvantages of the military approach, let us now to turn to an account of the alternative legal mechanisms available for managing the threat of international terrorism.[14]

III. EXTENDING THE BOUNDARIES OF INTERNATIONAL LAW

Well in advance of September 11th, international jurists had begun to undertake the monumental task of extending the boundaries of international law to develop mechanisms to deal with transnational criminal actors, whether terrorists, mafia, or international traffickers of illegal materials. Viewed widely as the underside of globalization, the transnationalization of crime and the trade in commodities previously regulated exclusively by states (including precious minerals, drugs, and weapons of mass destruction) requires a coordinated international legal response, involving international policing capacities, intelligence-gathering, and prevention work, as well as development of international criminal law to prosecute

14. I should note at the outset, however, that there are a series of legal mechanisms that are relevant to the current crisis—especially now that it has entered the phase of actual military action against a state—that are beyond the scope of this essay, though they are highly relevant. These are the laws of war, both *jus ad bello* and more importantly *jus in bello*. Clearly, to the extent that a politico-military approach is adopted, any use of force must be governed by the laws of war—including the requirements of the Geneva Conventions and the Hague Regulations—beginning with the principles of necessity, proportionality, and discrimination between combatants and non-combatants. Convention Respecting the Laws and Customs of War on Land, with annex of regulations, October 18, 1907, 36 Stat. 2277 (Hague Convention); Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 (First Geneva Convention); Convention for the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 (Second Geneva Convention); Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (Third Geneva Convention); Convention 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 (Fourth Geneva Convention).

those accused of undertaking such crime. In the face of these realities, the UNGA began efforts in earnest to draft a comprehensive convention against international terrorism by the mid-1990s, parallel to the efforts to draft a statute for a permanent international criminal court.

The first draft that emerged from these efforts was the draft International Convention for the Suppression of the Financing of Terrorism, which was opened for signature in January 2000, in the hopes of having enough state signatories to have it take effect by December 31, 2001.[15] The convention would make it an international crime for any person to intentionally and unlawfully finance the commission of an act that constitutes a terrorist offense. Terrorist offenses, in turn, were defined not only within the convention, but also in relation to definitions in nine other terrorism related treaties already in effect, ranging from the criminalization of attacks on civil aviation to prohibitions on bombings. These treaties already provide a basis for prosecution of the terrorists behind the September 11th attacks.[16]

Although the UNGA goal of convening an international conference on terrorism has not yet been accomplished, the impetus to convene such a conference is clearly present today. The creation of an *ad hoc* criminal tribunal for September 11th with a statute providing a definition of terrorism would also be an important step toward developing a comprehensive international legal framework on terrorism.

While the favored metaphor for conceiving the September 11th attacks has been that of "war" or a "military" act, the attacks challenge our categories for conceptualizing the distinction between criminal acts and acts of war. Nonetheless, understanding the attacks by analogy to crimes against humanity is more constructive than the current efforts to cast the attacks, and the response to them, militarily. Understood in terms of

---

15. This Convention was adopted by the General Assembly on December 9, 1999, G.A. Res. 54/109, U.N. GAOR 6th Comm., 54th Sess., U.N. Docs. A/54/607-16 (1999).

16. Convention on Offenses and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, 20 U.S.T. 2941; Convention for the Suppression of Unlawful Seizure of Aircraft (Hijacking), Dec. 16, 1970, 22 U.S.T. 1641; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Sabotage), Sept. 23, 1971, 24 U.S.T. 564; Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons Including Diplomatic Agents, Dec. 14, 1973, 28 U.S.T. 1975; International Convention against the Taking of Hostages Dec. 17, 1979, T.I.A.S. No. 11,081, 1316 U.N.T.S. 205; Convention on the Physical Protection of Nuclear Materials, with annex, Oct. 26, 1979, T.I.A.S. No. 11,080; Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention of Sept. 23, 1971, Feb. 24, 1988, Senate Treaty Document No. 100-19; Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, with protocol, Mar. 10, 1988, Senate Treaty Document No. 101-1; International Convention for the Suppression of Terrorist Bombings, Dec. 15, 1997, 37 I.L.M 249.

crimes against humanity, the attacks immediately invoke a series of innovative international legal remedies that we have grown accustomed to contemplating in the last decade, including: the application of principles of universal jurisdiction; the convening of *ad hoc* criminal tribunals; the invocation of United Nations Security Council collective security powers; and other comparable measures. These remedies have had a mixed record of success over the course of the last decade, but they have been refined and could be adapted to fashion an effective response in the aftermath of the September 11th attacks.[17]

In concluding my remarks, let me identify three constructive approaches for making use of the spectrum of relevant international law and suggesting productive directions for legal developments that could contribute to restoring international security in the wake of September 11th.

First, I would advocate the immediate adoption of the United Nations General Assembly proposal to convene an international conference to draft a comprehensive international convention on terrorism, based on the UNGA Legal Committee's preliminary works.[18] Such a conference would produce a working framework to coordinate international policing and intelligence-gathering efforts that would greatly accelerate the process already underway to identify perpetrators, their methods and their organizational structure so as to prevent future attacks.

Second, I would propose the convening of an *ad hoc* criminal tribunal (similar to the ICTY and the ICTR)[19] for the terrorist attacks on New York and Washington, DC. The statute of such a tribunal could establish important precedents, including:

- upholding a principle already being developed by the ICTR, namely the extension of the definition of a crime against humanity in customary international law to include crimes perpetrated by non-state actors;

17. At least one scholar has observed that it has always been in the wake of terrorist acts that gaps in the existing international legal frameworks have been identified and have stimulated negotiations. *See, e.g.*, David Freestone, *The 1988 International Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*, 3 INT'L J. ESTUARINE & COASTAL L. 305, 305-06 (1988). The same can, of course, be said for military strategy, which is also currently being adapted to suit the purposes of a war against actors that have neither effective control over a territory nor a regular army at their disposal.

18. *See supra* notes 6, 10, and 14, and accompanying text.

19. *See supra* notes 4, 5, and 6. It should be noted that such a tribunal need not remain in existence once the permanent International Criminal Court is established.

- providing a definition of international terrorism, with a proper carve-out for national resistance movements,[20] and including a criminal theory of conspiracy analogous to the one developed at Nuremberg; and
- reinforcing the criminalization of the trade in controlled substances or illegal materials, especially where used to finance terrorist activities (a provision might be developed that would include all black-market activities for such financing, encompassing the trade in precious commodities like diamonds as well).

Of the mechanisms I would mention here, the final one is the extension of the United Nations Security Council's peace and security mandate to include threats to international peace and security emanating from international terrorism and other actions by non-state actors or transnational actors. The precedents set by Security Council resolutions 1368 (2001)[21] and 1373 (2001)[22] move precisely in this direction and, particularly in the case of Resolution 1373, go a considerable distance in defining an international legal agenda for preventing and punishing terrorism. Specifically, 1373 envisions action under Chapter VII[23] of the United Nations Charter to:

- prevent and suppress the financing of terrorist acts;
- criminalize all forms of state support to terrorist entities and persons and assign serious criminal penalties proportionate to the crimes;

---

20. An abiding difficulty in international efforts to establish a comprehensive framework on terrorism have been definitional debates, largely centered on drawing a distinction between a "legitimate struggle for self-determination" and terrorism. *See, e.g.*, *Press Release: Consensus Eludes Legal Committee in Final Act of Session As It Recommends Blanket Condemnation of Terrorism—Abstaining States Decry Failure to Distinguish Legitimate Struggle for Self-determination from Terrorism*, U.N. GAOR 6th Comm., 54th Sess., U.N. Doc. GA/L/3140 (1999). The current international effort to combat terrorism has drawn a clear division between non-state actors using political violence to advance self-determination claims (ETA in Spain or the IRA in Ireland) and the terrorist organizations with a global dimension targeted by the coalition against terrorism. In this light, it would appear that there is a *de facto* agreement to the distinction between terrorist groups and groups exercising either a national right of self-determination or of self-defense (depending on the perspective adopted). The proposed tribunal might build on this pragmatic consensus to develop a working definition of terrorism that would command broad international support.

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

22. S.C. Res. 1373, U.N. SCOR, 56th Sess., 4385th mtg., U.N. Doc. S/RES/1371 (2001).

23. U.N. CHARTER ch. 7, arts. 39-51 (entitled "Action With Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression").

- facilitate cooperation in intelligence-gathering, investigation, and prevention, and the exchange of operational information between states to track the movement of terrorist networks;
- address the links between international terrorism and transnational crime, illicit drugs, money-laundering, illegal arms-trafficking and illegal movements of weapons of mass destruction; and
- encourage all states to become parties to the relevant international conventions for the prevention of terrorism in order to develop coordinated mechanisms of prevention and punishment.

The claim that the attacks of September 11th transcend the capacities of the United Nations, and international law more generally, suggests that neither the organization nor the law is equipped to deal with crime by transnational or non-state entities. However, it remains an undeniable fact of international life that the system is organized around states as basic units and that even terrorist networks have to operate in a system of state boundaries. In such a system, any response to terrorism will also be organized around states, whether it be legal or not. International law and international organizations enjoy the distinct comparative advantage of being designed to facilitate inter-state interaction and coordination, an advantage with which military strategy can scarcely compete when faced with an enemy that is not organized militarily but through transnational coordination.

The insight shared by those who adopt a legalist paradigm in response to terrorism is that there can be no *ad hoc* or unilateral solution to terrorism. Nor in the long run can there by a military solution. Terrorism as it emerged on September 11th is a transnational phenomenon that requires a concerted, consistent and coordinated international cooperative framework if there is to be any chance of eliminating the threat. The only viable mechanisms available for accomplishing integration and coordination of strategy are those of international law and organization. Efforts to short-cut the development of an international legal framework to cope with terrorism, in favor of military coalitions and a binary division of states between good and evil, though possibly more satisfying to some in the short-term, run the risk of aggravating the very international divisions that can most easily be exploited to coordinate further underground criminal and terrorist enterprise. Entrenching an us-and-them paradigm is in tension with the need for coordination—it is both unlikely to yield vital information in the short-run and less likely to yield international security in the long run. A preferable alternative is to employ the resources already in place within the boundaries of existing international law, and to pursue constructive proposals on how to shift those boundaries outward. These efforts, more than any military campaign, hold the long-term promise of a more secure international system.