

The Roles of Law in the Fight Against Terrorism

by Jacques deLisle

In the immediate aftermath of September 11, the Bush administration and political leaders from both parties proclaimed a “war on terrorism” in response to what they characterized as acts of war directed against the American homeland. At the same time, they declared that the United States was determined to “bring to justice” those responsible for the September 11 attacks, as well as members and accomplices of the wider international network of terror directed against the United States and American interests.

In the weeks after September 11, the war on terrorism came to include military operations in Afghanistan and contemplation of pursuing a similar course on additional fronts. Talk in Washington turned to possible U.S.-led moves against Iraq or, less likely, North Korea, Somalia, Sudan, Syria, Yemen, or perhaps Libya, Iran, or other states that harbored or supported terrorists or developed weapons of mass destruction that—absent trustworthy safeguards—could take terrorism to devastating new levels. The United States urged less recalcitrant governments to take immediate forceful steps against terrorist groups and supporters in their own territories (along the lines of the December 2001 attack on Al Qaeda elements in Yemen), and used various means to encourage a wide spectrum of friendlier governments in the region and beyond to support the war on terrorism. The measures taken and considered have generated predictable arguments about their political feasibility, normative acceptability, and likely consequences.

Meanwhile, the prospective means for meting out justice evolved as well. Congressional legislation, presidential orders, and other executive branch actions introduced significant substantive and procedural changes in the laws that could be used in the fight against terrorism. Controversy quickly grew up around the possible spectrum of methods for dealing with the

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individual targets of American action. Sharp disputes arose over the legality, morality, and wisdom of U.S. forces seeking out identified individuals, trial by American military tribunals, prosecution before a special international court or criminal proceedings in the civilian judicial organs of the United States or other states with jurisdiction.

Similarly contentious were ancillary issues of procedures for investigation and prosecution that departed from the process used for ordinary criminal suspects under U.S. law but that still accorded a good deal more than the rough justice of bombing and ground combat. Questions also emerged over what law or combination of laws would apply: the laws of the United States (both already-existing and later-enacted), the laws of other countries, or the handful of international legal principles, including those developed at multilateral trials born of earlier international and internal wars.

Many observers saw a still broader set of problems than those intrinsic to either a military or prosecutorial approach. The emergence of so many divergent means to a relatively clear end revealed a troubling ambivalence in grappling with the choice between a war paradigm and a criminal justice paradigm in responding to the terrorism threat.¹ For those who favored a war model, judicial methods implied pointless self-restraint or dangerous unilateral disarmament.² Those of the prosecutorial school saw an opportunity to vindicate American or civilized values in a second Nuremberg, resisting the temptation to pursue military victory without great regard for justice and proof.³ In the apparent muddling of the two models in U.S. policy thinking, some saw the war paradigm “infecting” the justice paradigm, legitimating an erosion of liberties that could sweep more broadly than the current dangers might warrant.⁴

This conventional wisdom is roughly half right in two respects. First, the initial phases of what promises to be a protracted fight against terrorism have been marked by the absence of a firm adoption of either “war” or “justice” as the defining model. This lack of a clear choice poses real risks. Genuine confusion over the basic paradigm can produce costly incoherence in more discrete policies and tactics.⁵ Intentional uncertainty in the

¹ See, e.g., George P. Fletcher, “We Must Choose: Justice or War?” *Washington Post*, Oct. 6, 2001; “This Evidence Would Not Convict in Court, but it Does Justify a Limited War,” *Independent*, Oct. 5, 2001.

² See, e.g., Charles Krauthammer, “To War, Not to Court,” *Washington Post*, Sept. 12, 2001, p. A29; Harvey Sacherman, “Bleak New World,” *FPRI E-Note*, Sept. 13, 2001.

³ See, e.g., Burt Neuborne, “Tribunals Without the Military,” *New York Times*, Dec. 16, 2001, section 4, p. 13. For a critique of such arguments, see Jack Goldsmith and Bernard Meltzer, “Swift Justice for bin Laden,” *Financial Times*, Nov. 7, 2001.

⁴ See, e.g., Anthony Lewis, “Right and Wrong,” *New York Times*, Nov. 24, 2001; James D. Zirin, “Will U.S. Civil Liberties be Another Victim?” *Times* (London), Dec. 4, 2001; Clarence Page, “Selling Our Judicial System Short,” *Chicago Tribune*, Dec. 2, 2001, p. 21.

⁵ One concrete example in the opening months is the U.S. administration’s uncertainty whether those captured in Afghanistan or elsewhere were to be regarded as prisoners of war or as “unlawful combatants.” See William Glaberson, “Critics’ Attack on Tribunals Turns to Law Among Nations,” *New York Times*, Dec. 26, 2001.

overarching vision invites suspicions of opportunism and attempts to avoid accountability by picking and choosing the model that best suits the aims of the moment. But it is wrong to suggest that the choice between military and legal models for fighting terrorism is dichotomous. Each in its own way is seriously unsatisfactory. Also, the two are not as antithetical as they are typically portrayed. There is much law in the prosecution of the war, and much that looks like war in the pursuit of law-based solutions.

The conventional wisdom is right in worrying that the blurring of legal and military frameworks may have corrosive effects on civil liberties that outweigh its potential contributions in defeating terrorism. But the conventional wisdom is often cast in overly broad terms, failing to note features of the war against terrorism that make the threat to liberties both particularly alarming and more easily defended than many critics contend. Moreover, the focus on civil liberties in the debate over law and terrorism has mistakenly emphasized the impact on the United States' domestic legal order. It has slighted a second and ultimately more difficult dimension of the "internal law question." In pursuing the prosecution of terrorists and their enablers and the longer-term goals of eradicating the refuges, training camps, breeding grounds, and sleeper cells of terrorism, much will depend on the laws and legal institutions of countries other than the United States. An approach to the battle against terrorism that includes a significant legal element will have to concern itself with the legal systems in countries as diverse as Germany, Pakistan, and post-war Afghanistan.

The Law Paradigm at War

A criminal law model for fighting terrorism is obviously appealing. The idea of bringing the perpetrators to justice has resonated for many Americans in their outrage over the September 11 attacks. The prosecutorial approach promised a degree of moral satisfaction in a country where professional and popular conceptions of criminal punishment accord a large role to retribution (in comparison to the goals of deterrence, disablement, or rehabilitation that have greater prominence in many other Western countries' approaches). Trial and conviction also seem to offer a special form of vindication for American victims and values because of the aura of political neutrality and fair process that—especially in the United States' uniquely legalist political culture—surrounds scrupulous court proceedings, notwithstanding the many recognized flaws that can beset judicial processes in politically charged settings. Casting terrorist groups as a law enforcement problem has the additional attraction of assimilating the tasks at hand to the familiar and often-successful campaigns against organized crime groups, with which Al Qaeda and similar entities share many practices and characteristics. Regarding them as outlaw organizations akin to the Mafia offers the further

satisfaction of denying them the respect inevitably if grudgingly extended to even the most loathed enemy state in a war. The war paradigm's approach (reflected in the international law of war) of letting go the enemy's foot-soldiers and many of its leaders at the cessation of hostilities and its ethos of setting aside even recent conflicts when security interests so dictate are features that seem unappealing with respect to the Taliban, and more so for Al Qaeda and other terrorist groups.⁶ The depth of the law paradigm's appeal was strikingly reflected—albeit with a divine, nearly apocalyptic gloss—in an early name for the war against terrorism: Operation Infinite Justice. (This was quickly renamed Operation Enduring Freedom when the possible offense to Muslims of the earlier name was realized.)⁷

A law-based approach also seemed to offer the advantage of being a relatively straightforward and uncontroversial way to deal with both the terrorist acts that demanded an immediate response and those activities that created a longer-term terrorist threat. Relevant U.S. laws included garden-variety proscriptions of homicide, expansive definitions of criminal conspiracy, specialized federal legislation addressing terrorism, war crimes, and hijacking dating back to the 1970s and expanded after September 11, most notably to widen proscriptions on harboring anyone whom one knows or has reason to believe is an active terrorist, providing material support to terrorist organizations or engaging in conspiracies to commit terrorism.⁸

Activities and individuals outside the United States could be brought legally within the reach of the U.S. criminal justice process. American law enforcement, prosecutors and courts have long adopted a broad construction of U.S. statutes' extraterritorial reach, particularly where Congress explicitly so provides, as it has in the case of antiterrorism legislation. Accepted doctrines of international law permit a state to enact laws punishing non-citizens' overseas behavior where only part of a complex offense takes place in the state claiming jurisdiction. Other international legal principles may permit a state to prohibit and sanction actions threatening its security or harming its nationals, even though undertaken by foreigners abroad. Further, the intentional targeting of massive numbers of civilians in the September 11 attacks, the particular methods of destruction deployed, and the prior declaration by apparently responsible parties of a "war" against the United States all support the claim that this new strain of terrorism counts among the handful of offenses—including war crimes, crimes against humanity, piracy, hijacking, and sometimes international terrorism—that any state may reach

⁶ See, e.g., Nicholas Kristoff, "Let Mullah Omar Get Away," *New York Times*, Dec. 26, 2001, and the highly critical readers' letters it prompted.

⁷ Arundhati Roy, "The Algebra of Infinite Justice," *Guardian*, Sept. 29, 2001.

⁸ See, e.g., Act for the Prevention and Punishment of Crimes Against Internationally Protected Persons, 94 P.L. 467, 90 Stat. 1997 (1976); 1984 Act to Combat International Terrorism, 98 P.L. 533, 98 Stat. 2706 (1984); and Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (U.S.A. Patriot Act) of 2001, 107 P.L. 56, 115 Stat. 272 (2001).

and punish, without regard to where they occur.⁹ Moreover, international law arguably permits a state to enact and apply retroactively laws punishing such universally condemned crimes.¹⁰

Potentially satisfactory fora for implementing a criminal justice paradigm included ordinary American courts for prosecuting those caught within the United States, extradited by cooperative foreign powers, or captured by U.S. or allied forces.¹¹ Indeed, the problems that have often frustrated reliance on extradition might be expected to be less serious in the present context. The usual political reluctance to extradite might be lessened by the reluctance to appear to be harboring terrorists, the growing appreciation among many states that they too faced terrorist threats, the broadly recognized international legal obligation to extradite those charged with war crimes and crimes against humanity, and the complete collapse of the government in Afghanistan, the state where some of the most wanted suspects resided. And, for those brought before U.S. judicial institutions by less orthodox means, it is clearly (if controversially) settled in American law that U.S. courts will allow prosecutions of aliens despite serious irregularities in how they were brought before the court.¹²

If necessary in order to secure other states' support or enhance the process's legitimacy, an international tribunal looked to some like a viable option, given the increasingly robust international notion of individual responsibility for international crimes, the ongoing war crimes proceedings in the former Yugoslavia and elsewhere, the nascent international criminal court, and the Nuremberg precedent.¹³ On the other hand, for those less sanguine about using domestic (much less international) courts, more summary processes might be acceptable and could be squared with the law paradigm. That view was part of the idea behind President Bush's executive order proclaiming the authority to establish special military tribunals to conduct "full and fair" trials of foreign nationals for terrorist activities and his purporting to derive that power

⁹In international law, these several bases for jurisdiction are generally referred to as territorial, protective, passive personality, and universal. The Statute of the International Criminal Court defines a crime against humanity, a core basis of universal jurisdiction, as including murderous acts "when committed as part of a widespread or systematic attack directed against a civilian population." Some have argued that bin Laden's late 1990s declaration of a "war" against the United States subjects his organization's actions to the laws of war, which define attacks on non-combatants as a war crime—another standard basis for universal jurisdiction. The contours of universal jurisdiction are unsettled and the subject of much debate. For an account of one recent attempt at a systematic formulation, known as "The Princeton Principles of Universal Jurisdiction," see Laura Secor, "Justice Without Borders," *New York Times*, Dec. 9, 2001.

¹⁰Examples of acceptance of this principle include Israel's prosecution of Adolf Eichmann and the United States' willingness to extradite John Demjanjuk.

¹¹See Harold Hongju Koh, "We Have the Right Courts for bin Laden," *New York Times*, Nov. 23, 2001.

¹²See, e.g., *U.S. v. Alvarez-Machain*, 504 U.S. 655 (1992), allowing prosecution even if the foreign defendant's abduction to the U.S. was "shocking" and "in violation of general international law principles." International law arguably accepts the same principle. When Israeli agents abducted Adolf Eichmann from Argentina to stand trial in Jerusalem, the kidnapping was acknowledged to be in violation of international law but the prosecution was not.

¹³See Anne-Marie Slaughter, "Al Qaeda Should be Tried Before the World," *New York Times*, Nov. 17, 2001.

from specific congressional authorization, the constitution and laws of the United States, and general principles of international law, including a state's right to take steps necessary for its own security.¹⁴

Yet, for all its appeal, the law paradigm has failed to become the dominant model for the United States' fight against terrorism, and for good reason. At its best, the criminal justice paradigm is inadequate in important ways. Existing laws and new ones that the United States or others might adopt will not reach many of the targets that American leaders have identified in the war on terrorism. Protracted alien detentions, arrests and prosecutions for abetting, funding, and conspiring as well as actively participating in terrorist activities, expanded powers to freeze or seize assets, and toughened immigration rules are poor tools for reaching diffuse networks of support for terrorists or members of quiescent terrorist cells that have yet to do or even plan any specific act. In an international legal order that zealously protects states and state powers, reaching state or government actors through legal means is notoriously difficult, except in cases of the most extreme behavior, which can ground individual criminal responsibility or make lawful a resort to the military option. While these features of the legalist approach may not pose problems in going after the Taliban, they become significant as the U.S.-led war on terrorism comes to target more subtle but still dangerous varieties of state involvement with terrorism, such as harboring, indirect financing, or simply failing to crack down.

Legal cooperation from other states in capturing or rendering up suspects will not always be forthcoming, especially in cases where the United States will seek to prosecute actions short of the calculated mass killing of civilians, offer evidence that is less than incontrovertible and overwhelming, or pursue an agenda that is suspected of being overly political. Even in cases that are easy on the merits, requests for extradition will fall on deaf ears in governments with politics or powerful constituencies sympathetic to the terrorists' agenda, as well as in some European states that object to the U.S. insistence on an option to impose the death penalty or to use military tribunals.

Securing convictions of those brought before tribunals is hardly a certainty. Despite the successful prosecution in the first World Trade Center terrorist attack in 1993 and the truck bombings of U.S. embassies in East Africa in 1998, and the quick federal indictment of one co-conspirator in connection with September 11, recent misadventures in American criminal justice—most famously in the O. J. Simpson and Rodney King cases—understandably give pause to some who contemplate the prospect of turning vital aspects of the fight against terrorism over to juries. Talk of closed proceedings and anonymous juries, expansion of police powers to gather evidence, and authorization of military courts with relaxed rules of evidence,

¹⁴ "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," Executive Order of Nov. 13, 2001 (www.whitehouse.gov/news/releases); Jan Ting, "In War, What Happens to Civil Liberties?" *Philadelphia Inquirer*, Nov. 1, 2001.

limited rights to appeal, and conviction based on a two-thirds vote all indicate worries about the sufficiency of ordinary judicial processes.

International tribunals have failed to win American support. The dominant American view remains that any such institution is likely to be overwhelmed and slow (even more so than American courts), compromised by political pressure to be too soft on terrorists or too tough on the United States, and unwilling to impose sufficiently severe sanctions (most notably capital punishment). Such concerns led to the United States' frosty relations over the last twenty years with the International Court of Justice, the International Criminal Court, and other similar bodies.

"Mere" criminal convictions—even where they can be reliably obtained—fail to capture the enormity of the recent terrorist attacks and to address the special motivation behind them. While a Nuremberg-like process might address this shortcoming, such an approach is unlikely given American skepticism toward multilateral processes, and of uncertain promise given Nuremberg's unparalleled context of Nazi atrocities and allied victory and the questions that even that tribunal had to face about victors' justice and retroactive legal standards.

Moreover, the expected international political value of the legal model may be illusory. As was made clear by the international response to evidence of Osama bin Laden's involvement in the September 11 attacks, even the most unimpeachable legal process would be challenged to overcome flat denials and elaborate theories of American-orchestrated conspiracies, or the troubling squishiness of support among many members of the supposedly universal coalition against terrorism.¹⁵ Worse still, the United States' embrace of the criminal justice paradigm creates political vulnerabilities. It has raised the prospect of a public trial, in whatever forum, that could afford bin Laden or others a stage from which to proclaim their vision, enhance their international status, or stake their claims to martyrdom. It has given critics opportunities to point out the tension between Washington's now seeking international legal cooperation after years of shunning international tribunals and internationalism more generally. It has produced the unseemly sight of Taliban leaders, Chinese President Jiang Zemin, and other potentates whose domestic legal systems are not known for particularly high standards of proof and fairness, demanding that the United States produce incontestable proof of bin Laden's and other suspects' guilt and accept legal procedural preconditions for trials or the use of military force.¹⁶ And it has created occasions for critics to claim hypocrisy, opportunism and creeping authoritarianism in the administration's departures

¹⁵ See, e.g., Marjorie Miller, "The bin Laden Tape: Many Watch, but Opinions Mostly Unchanged," *Los Angeles Times*, Dec. 15, 2001; Susan Sachs, "Look at bin Laden Is Unlikely to Change the Minds of Arabs Hostile to U.S.," *New York Times*, Dec. 14, 2001; Fawaz A. Gerges, "A Time of Reckoning," *New York Times*, Oct. 8, 2001.

¹⁶ Patrick E. Tyler and Jane Perlez, "World Leaders List Conditions on Cooperation," *New York Times*, Sept. 19, 2001, p. A1; John F. Burns, "Taliban Refuse Quick Decision Over bin Laden," *New York Times*, Sept. 18, 2001.

from a purist legal model that accords full due process and other constitutional and statutory protections provided in U.S. law and courts. This already has left U.S. officials scrambling to defend the military tribunals and other contemplated or adopted legal changes at home and abroad.

The American claim of a legal and moral right to use force against terrorists and their sponsors constrains—for good or ill—the United States’ ability to press for restraint by other nations that suffer terrorist attacks, most notably Israel and most recently India. Embracing the law model could risk conferring greater legitimacy to calls for prosecution—perhaps as war criminals—of American troops or leaders for actions in military or paramilitary operations in Afghanistan or elsewhere.

Still, the legal paradigm has played an important role in U.S. conceptions of the war against terrorism, in part because it has not been as inconsistent with a war model as is often thought. Much that some may find legally and morally unseemly is fully consistent with a prosecutorial model. The formal legal changes to address the specific circumstances of the immediate war on terrorism are part of this pattern, including the much-discussed military tribunals, exceptional secrecy to protect sources of intelligence, indefinite detention of aliens suspected of terrorist activities and involvement with terrorism, authority to listen to conversations between federal detainees and their lawyers, increased power to conduct surveillance and to gain access to information, dragnet questioning (with formal consent) on the basis of little more than national origin, toughened immigration rules and enforcement efforts, and substantive criminal proscriptions that cast a wider net for providers of material, organizational, and even some forms of moral support to terrorists. While such measures may be objectionable and even ill advised, they are not a thorough rejection of the law paradigm but an effort to make a legal model work under the extraordinary and dangerous conditions of a proclaimed (though legally undeclared) war.

Moreover, less exceptional features of a criminal law approach applied in the fight against terrorists include much that is not for the purist or the squeamish. Bringing suspects and evidence before tribunals sometimes requires questionable means. Success in finding, capturing, and prosecuting defendants routinely entails dealing with highly odious and criminal characters, enlisting their cooperation, rewarding them, and promising them immunity. It should hardly be surprising that such ordinary practices of police and district attorneys have analogs in intelligence operatives’ dealings with terrorist elements or in the United States’ overlooking the sins of now-useful cooperative governments in the region. These are indeed features of a law paradigm that retains coherence, some prospect of efficacy and broad appeal precisely because it thus partakes of some of the moral ambiguity and political realism that are more obviously and more often associated with its supposed polar opposite, the war paradigm.

The War Paradigm and the Roles of Law

A war model is the most obvious framework for a fight against terrorism and has evident attractions. As the frequent invocation of Pearl Harbor sought to underscore, the September 11 attacks looked very much like a military assault, calling for a response in kind. A military answer also promised to capitalize on the United States' comparative advantage (its technologically superior armed forces) rather than to play to one of its weak suits (the difficult-to-secure sustained and extensive international cooperation that is vital to the success of many important elements in a law-based solution).

More broadly, the idea of "war" implies freedom from the troublesome constraints, niceties, and risks of failure that bedevil a legalist approach. As the Clausewitzian continuation of politics by other means, war is a dirty and violent business. It includes much that would be illegal under ordinary circumstances and tolerates collaboration with unappealing and lawless allies and agents. Such notions resonate in the vice president and attorney general's assertion that terrorists "do not deserve" the protections that U.S. laws accord to citizens (and many aliens), and in the relative lack of controversy that has attended the Bush administration's cooperation with the Northern Alliance and the military government of Pakistan. The idea of war also suggests a more long-term undertaking on a grander scale than likely could be sustained in a quest merely to bring criminals—however evil and dangerous—to justice. As an event of national peril and purpose, war provides justification for demanding extraordinary sacrifices—of blood, treasure, or liberties—that might prove useful in a protracted campaign to root out terrorism. The war paradigm offers the further virtues of apparent fit with an agenda that counts states—the quintessential enemy in a war—among the key targets.

Moreover, and despite the amorality often thought to characterize the military solution, the notion of war offers a promising vehicle for the strong sense of outrage over the attacks—especially in the context of the moralism that so often pervades America's engagement with the world, particularly in times of ideologically charged conflict. The use of armed force in the fight against terrorism could be cast as a just war, in keeping with a long tradition of morally defensible resorts to violence in defense of values ranging from human rights to the autonomy of the national political community.¹⁷

The appeal of this set of ideas was evident in the rhetoric of the opening phases of the war on terrorism. Tellingly, the name finally chosen for the military operations in the war against terrorism was "Enduring Freedom," a moniker in the rhetorical tradition of the elder Bush administration's

¹⁷ For the classic modern treatment, see generally Michael Walzer, *Just and Unjust Wars*, 2nd ed. (New York: Basic Books, 1992). For examples of the theory's application to the war on terrorism, see, e.g., Bill Broadway, "Challenges of Waging a 'Just War,'" *Washington Post*, Oct. 13, 2001; Celestine Bohlen, "Facing the Limits of a Just War," *New York Times*, Sept. 22, 2001; Thomas L. Friedman, "We're All Alone," *New York Times*, Oct. 26, 2001.

“Operation Just Cause” in Panama. Many in Washington described U.S. efforts as a defense of “civilization.” More immoderately, the president initially spoke of a “crusade,” a term soon dropped because its resonance with the Holy Land campaigns of medieval Christian soldiers played badly at home and disastrously in the Islamic world. Commentators fixed on the notion of a Huntingtonian “clash of civilizations” between the liberal democratic West and its radical Islamic adversaries.¹⁸

However, the war model also ill-fits the task at hand in important ways and includes several problematic features. War—both in the literal sense of the use of military force and more broadly in its extension to other aspects of the war on terrorism—can be a blunt, overbroad and even counterproductive instrument. The idea may not track very well—and thus may fail to adequately justify or constrain—many of the non-military, subtle methods of investigation, intelligence-gathering, law-enforcement, asset-seizure and the like that must be vital parts of any successful long-term drive to defeat the terrorist threat that became so vivid and palpable on September 11.

Even in its conventional sense, the war approach has notorious difficulties dealing with non-state enemies. The deployment of armed forces in another state’s territory to disable a terrorist group predictably will stir the hornet’s nest of political and legal issues that have surrounded American interventions from the former Yugoslavia back to the nineteenth century.

Further, the political consequences abroad of the adoption of a just war paradigm are potentially problematic. While the idea of a war in defense of America’s and Americans’ rights and, more broadly, in defense of civilization surely has helped to secure the support of almost the entire community of nations, any invocation of values is a dicey business in contemporary international politics. Among the governments of some states and the restive publics that worry the governments of many more states, “civilized” values are pilloried as Western or American values, the “war” for which is then cast as another violent turn in the long and ignominious history of imperialist depredation of the non-European world. Where the United States and its closest allies portray a “just war,” their adversaries declare a jihad. The superficial equivalence allows much of the world to stand on the sidelines, with some clucking about the American hegemon again trying to cloak its pursuit of power with the pretense of right.

The war model’s ability to mobilize resources and to make exceptional demands acceptable to the American public can be a weakness as well, since it may reach too far for the good of the cause it serves. The risk of seeking too much too soon can hasten public fatigue with the fight against

¹⁸ See generally Samuel P. Huntington, *The Clash of Civilizations* (New York: Simon and Schuster, 1996). For discussions of the idea’s application in the post-9/11 context, see, e.g., “Q&A: A Head-on Collision of Alien Cultures?” *New York Times*, Oct. 20, 2001; William Pfaff, “The ‘Clash of Civilizations’ Is for History’s Dustbin,” *International Herald Tribune*, Oct. 18, 2001, p. 9; Chris Patten, “We in the EU Stand by the Americans,” *Guardian*, Sept. 15, 2001; Salman Rushdie, “Yes, This is About Islam,” *New York Times*, Nov. 2, 2001.

terrorism or backlash against measures affecting civil liberties at home that are initially accepted as justified by wartime exigencies. These issues seem especially likely to arise in the context of a protracted war against elusive and sometimes invisible foes.

Despite such drawbacks, the war paradigm has been central to the U.S. approach to the early phases of the drive against terrorism. This is partly due to the presence of a good deal more “law” in the war model than is commonly recognized. Although the battle is fought in a political realm where the most irrefutable legal arguments can fail to win over opponents and third parties, focusing the debate on the legality of the American use of force can help prevent the slide into claims of moral equivalence and mere politics in the U.S.-led war against terrorism.

“Just war” is an ancient and renascent international legal category, as well as an ethical–political concept. Not all purportedly just wars are in fact just and therefore lawful wars, typically defined as wars that seek to re-establish a status quo that existed before an act of aggression and that avoid harm to non-combatants while using force only to the extent necessary, proportional, and effective in the pursuit of their legitimate ends. The circumstances of massive, calculated slaughter of innocent civilians in the September 11 attacks, the credible threat of additional attacks, the trail leading to international terrorist networks with substantial state support, and the U.S. military’s capacity and commitment to minimize collateral damage all give the United States and its allies a strong case in claiming a just war, provided that the use of force remains limited in the ways that just war doctrine demands. If the use of military force expands to other targets or begins to cause significant civilian casualties, the U.S. claim to be conducting a just war will require persuasive arguments that the new targets are sources of serious terrorist threats and that the harm U.S. measures inflict on non-combatants remains limited, non-culpable, and unavoidable.

More straightforwardly, international law accepts a state’s right of self-defense. The September 11 strikes and the danger of more to come ground a solid claim to the use of military force under a legal doctrine that accepts a state’s “inherent right” to “individual or collective self-defense” in the event of “an armed attack” or an imminent threat of such an attack.¹⁹ Against Al Qaeda and other non-state actors, the U.S. right to use force is expansive indeed, the legal limits on states’ use of force reflecting primarily concern for the sanctity not of non-state actors but rather of other states that would suffer the affronts of military action in their territory. With respect to Taliban-ruled Afghanistan, the regime’s entanglement with Al Qaeda strips away the otherwise-formidable legal deference to a fellow state’s autonomy and integrity.²⁰

¹⁹ UN Charter, art. 51.

²⁰ See, e.g., UN Charter, art. 2(4).

To the extent that the U.S. war on terrorism turns military force against targets in other states, the case will have to be made that the actions remain within the scope of international law's notion of a state's right to use force in self-defense.²¹ Such arguments become more difficult as the evidence less easily satisfies international legal thresholds for attributing the acts of terrorist groups to state sponsors or hosts. But this task is not as difficult as it may sound given the robustness of the basic international law doctrine of self-defense and the possibility of invoking or extending several other doctrines, including (1) a broadening standard for holding states responsible for the actions of non-state actors with which states are closely entwined; (2) principles that count as aggression a state's making its territory available for the launching of armed attacks against another state; and (3) an emerging notion of necessity as a grounds for using force across borders to prevent serious human rights violations and war crimes even where there are problems with attributing the force-justifying acts to the target states.²² Similarly, the international legal case becomes more difficult where the terrorist threat is not yet imminent (as with the development and potential distribution of weapons of mass destruction by Iraq and North Korea) or the terrorist groups have not yet completed, attempted, or plotted attacks. But where these cases can be made, the war paradigm can help justify American action and rebut critics' arguments.

In keeping with its partial embrace of a law paradigm, the United States has been careful, in pursuing the war model, to cast its goals in terms that suggest attention to what is legally plausible. American statements and formal legal acts have routinely emphasized the argument of self-defense, often in terms that tracked the international legal doctrine's accepted contours.²³ Bush's speech to Congress outlining the conflict's parameters stressed that the targets were not all forms of terrorism but only terrorist organizations that threatened the United States and its interests or, somewhat more expansively, that had "global reach" and thus implicitly were within

²¹The latter requirements arguably derive only from the rights of states that are the objects or sites of U.S. actions, not from any restrictions on U.S. actions toward targeted non-state terrorist organizations that are not, on the mainstream view, entities with which a state can be "at war" under international law and the members of which are not on a plausible reading lawful combatants or clearly non-combatants, and thus do not enjoy the protections of the laws of war.

²²Such doctrines do not fit perfectly because each emerged with something unlike the current war on terrorism in mind. Thus, doctrines of state responsibility for non-state actors' actions looked to questions of the state's control over the non-state actors as agents (rather than fusions between weak states and strong non-state actors), doctrines regarding the use of state's territory for aggression looked to use by another state—which alone can commit "aggression" under international law, and notions of necessity in the context of uncertain attribution to the state (as in the former Yugoslavia) took shape against the background of acts against target-state residents. Nonetheless, all translate relatively readily to the terrorism context and can be applied with moderate extension of the sort that often characterizes the development of international law. President Bush's formulation that "we will not distinguish between terrorists and the states that harbor them" arguably seeks to invoke such relatively expansive principles of state responsibility.

²³See, e.g., Executive Order on Detention, Treatment, and Trial of Certain Non-Citizens and the congressional resolution, "Authorization for the Use of Military Force," 107 P.L. 40, 115 Stat. 224 (2001).

what international law recognizes as the proper scope of U.S. action because of their impact on the United States and its citizens or at least because they fell within principles of universal jurisdiction that any state can invoke. And senior U.S. officials were often careful not to characterize those captured in Afghanistan as “prisoners of war,” thus leaving open the claim that they were unlawful combatants not entitled to all the protections set forth in the Geneva Conventions or other sources of the laws of war.²⁴

More simply, the United States has sought formal authorization and obtained at least acquiescence from key international organizations for actions in Afghanistan and against Al Qaeda and international terrorism. These efforts have yielded Security Council Resolutions reaffirming states’ rights of self-defense, condemning the September 11 attacks, supporting “combat by all means” against terrorist threats to international peace and security, calling on all states to fulfill responsibilities (many embodied in international conventions) to eliminate terrorism, and condemning the Taliban regime for its violations of human rights and international humanitarian law.²⁵ Therein lies important support for U.S. actions, although some critics see it as pregnant with negative implications in its failure to authorize explicitly the use of force against Afghanistan, much less other alleged harborers of terrorists.

Other collective security fora have been somewhat more forthcoming. NATO invoked the Article 5 provision that treats an attack on any member as an attack on all and that contemplates “such action as [the attacked state] deems necessary, including the use of armed force” in response. And the Organization of American States supported U.S. measures as an exercise of a member state’s inherent right of self-defense under the Rio Treaty. The United States has also pursued consensus among the great majority of states that the U.S. action is legitimate and lawful, which can help to make it so in the decentralized system of interpretation that characterizes international law.

Moreover, several elements of U.S. domestic law govern American actions within a war paradigm, establishing legally binding constraints that can rebut charges that the U.S. use of force is unchecked. The examples are legion and include the long-standing executive order prohibiting assassination of foreign heads of state, the War Powers Resolution requiring the president to provide reports to Congress and to seek its authorization for protracted deployments of military forces, “operational law” that regulates what American forces are authorized to do in the field (including, for example, individual targeting of soldiers and officers), the international law-based rules for the treatment of non-combatants and captured combatants,

²⁴ See, e.g., Michael J. Glennon, “Justice Demands Different Treatments for Those Who Wage War Against U.S.,” *Washington Post*, Dec. 23, 2001; Glaberson, “Critics’ Attack on Tribunals.”

²⁵ UN Security Council Resolutions 1368 (Sept. 12, 2001); 1371 (Sept. 28, 2001); 1377 (Nov. 12, 2001); 1378 (Nov. 14, 2001).

the congressional resolution authorizing the use of force in Afghanistan, and the rules governing the operation of the military tribunals authorized by the executive order, as well as the underlying legal and constitutional rules that may be determined to permit or prohibit portions of that order.

To make these rules meaningful and to limit opportunistic interpretation or disregard of these and other applicable legal principles, teams of lawyers in the White House, Congress, and the Departments of Defense, State and Justice and commentators and critics outside the government have been poring over these and other sources of law that may be relevant to the fight against terrorism. Their handiwork is evident in many places, including: the recitation in formal legislative and executive law-making and looser policy statements of constitutional and statutory authority for the use of military force and military tribunals; the inclusion in post-September 11 legislation of provisions for suspected terrorist detainees' rights to *habeus corpus* review and exclusion of activities protected by the First Amendment from the scope of expanded information disclosure rules; several senior officials' defenses of possible military tribunals and expanded detention authority as measures that do not apply to U.S. nationals and that are consistent with World War II-era, Civil War and other precedents that survived legal and constitutional challenges; and arguments drawing distinctions between illegal assassination of foreign leaders and lawful killing in combat of targeted individuals who play military roles.²⁶

Expecting this intragovernmental law lobby and its external supporters and monitors to constrain U.S. actions within a war paradigm may sound idealistic. Believing that its arguments and analyses will carry the day is clearly naïve, and arguably undesirable. But the notion that it has no impact is belied by tragicomic incidents (such as the reported instances of U.S. government officials' all-night session to cobble together a grant proposal to meet the legal requirements for extending funds to anti-Taliban Afghans, or an Army lawyer's mistakenly interpreting legal proscriptions on assassination to scotch a request to bomb a building in which Mullah Omar and Taliban soldiers had been located) and serious and sustained debates over legal aspects of the war against terrorism (such as the heated battles that have erupted around efforts to change or reinterpret U.S. laws that implicate core constitutional values).

Civil Liberties at Home and Legality Abroad

Many of the legal measures adopted or considered in the wake of September 11 have drawn fire from points across the American political

²⁶See, e.g., the executive order on the Detention, Treatment and Trial of Certain Non-Citizens, and the congressional resolution on the Authorization for the Use of Military Force. See also George Lardner, Jr., "On Left and Right, Concern over Anti-Terrorism Moves," *Washington Post*, Nov. 16, 2001, p. A40.

spectrum for encroaching on civil liberties and undermining principles of limited and accountable government.²⁷ As many critics saw it, due process, privacy rights, associational and expressive freedoms, the separation of powers, governmental transparency, and government under law were disturbingly slighted in several aspects of the new laws already discussed and the means of their adoption, including the executive branch's expansive insistence on its independent authority to act and its snubbing of congressional offers to pass authorizing legislation, in Congress' rapid and nearly unanimous adoption of a broad antiterrorism bill giving the president almost everything he asked for, and in the extensive discretion granted to or claimed by the president and subordinate executive branch officers to fill in the details of new rules later (as in the case of the military tribunals executive order) or to retain considerable discretion in identifying which individuals were subject to detention, military trial, or governmental eavesdropping on conversations with their lawyers.²⁸

The civil liberties and related critiques have been too blunt and too broad, insensitive to context in two quite different respects with nearly opposite implications. The war on terrorism's combination of a perceived Manichean ideological struggle and an enemy that is, at one level, a "concept" and, at a more tangible level, composed primarily of members of an identifiably different race from the vast majority of Americans echoes past conflicts that have been especially conducive to liberties-restricting measures that are now seen as regrettable. The United States' involvement in the Second World War led to the internment of Japanese Americans, which the Supreme Court upheld but which has since faced widespread condemnation and yielded congressional reparations.²⁹ While camps are clearly beyond contemplation, this history does resonate in the considerable alarm that citizens and legal aliens of Arab or South or Central Asian descent will face milder forms of the same sort of discrimination. This concern is especially strong in an era when the "war on drugs" (and its progenitor, the "war on crime") have made more credible criticisms that fights against intangible enemies can erode civil rights-based barriers to racially skewed use of police powers, exacting what are later judged to be excessive costs in the rights of innocent members of a group that disproportionately includes perpetrators of the targeted offenses.³⁰

²⁷ See, e.g., Lardner, "On Left and Right;" Nat Hentoff, "Abandoning the Constitution to Military Tribunals," *Village Voice*, Nov. 27, 2001; and William Safire, "Seizing Dictatorial Power," *New York Times*, Nov. 15, 2001.

²⁸ Ibid. See also Matthew Purdy, "Bush's New Rules to Fight Terror Transform the Legal Landscape," *New York Times*, Nov. 25, 2001, p. A1; David G. Savage, "Bush Writes Off Congress, Takes Reins in War," *Los Angeles Times*, Dec. 10, 2001.

²⁹ *Korematsu v. U.S.*, 323 U.S. 214 (1944); U.S. Commission on Wartime Relocation and Internment of Civilians, *Personal Justice Denied* (Washington, D.C.: U.S. GPO, 1982); Restitution for World War II Internment of Japanese Americans and Aleuts, P.L. 100-383, 50 U.S.C. Section 1989.

³⁰ Congress implicitly acknowledged some of these concerns by explicitly condemning discrimination against Arab, Muslim and Sikh Americans in the U.S.A. Patriot Act, the principal post-9/11 antiterrorist legislation.

The paradigmatic American long war against a concept—the Cold War—generated a number of now-deplored policies, practices and laws that compromised civil liberties. While McCarthyism produced the most notorious examples, it was hardly the only chapter in a story that included much now-acknowledged overreaching by the FBI and that began at least as early as the free speech cases of the First World War, in which the Supreme Court upheld criminal sanctions for allegedly subversive, pro-socialist propaganda, on one occasion over a vigorous dissent that today is far more widely quoted and respected than the majority opinions.³¹ In light of this background, greater plausibility and political force attach to worries that the pursuit of enhanced investigative, prosecutorial and punishment authority and reduced transparency and public accountability may portend extensive and excessive encroachments on civil liberties and open, law-governed government.³²

On the other hand, much of the civil libertarian critique has been nearly blind to the fact of the war model's powerful grip and its implications in the context of a fight against terrorism. Many of the criticisms would be far more persuasive if the war on terrorism were being waged exclusively or primarily under either a law paradigm or as a traditional war. But it is not. Wars exact sacrifices of many sorts, including some temporary surrenders of some civil liberties. The issue is especially acute in combating terrorism because, as September 11 made all too clear, the current enemy made diabolically effective use of the instruments of the United States' open, liberal, and liberty-protecting order, including relatively porous international borders, effectively enjoyed freedoms to travel within the country, tightly limited latitude for government surveillance of citizens and other residents, uncoordinated and institutionally fragmented organs of law enforcement and intelligence gathering, and habits and preferences for inobtrusive, unimpeding and ultimately ineffective security measures at airports and in immigration control. So too, being "at war" tends to increase the national taste and the force of consequentialist moral arguments for shifts in law and political practice that produce a stronger government in general and a stronger executive in particular. Here too, the exceptional sense of vulnerability at home and a shadowy enemy that the September 11 attacks produced may magnify those tendencies.

There is no simple answer to what is justifiable or wise among the legal changes that have been or may be proposed or adopted. A national identity card has been somewhat controversial, as have moves to tighten the visa and immigration process for citizens from specified Middle Eastern countries. Other, more significant alterations of laws relating to privacy and due process have been and will be a good deal more contentious. Those

³¹ *Schenk v. U.S.*, 249 U.S. 47 (1919); *Debs v. U.S.*, 249 U.S. 211 (1919); *Abrams v. U.S.*, 250 U.S. 616 (1919) (including the dissent by Justice O. W. Holmes).

³² Here too Congress implicitly acknowledged some of these concerns by including in the U.S.A. Patriot Act specific provisions limiting some new investigative powers where they reach First Amendment-protected activities.

worried about the impact on law and liberty in the United States must realize that they must engage in the debate over such measures on terms that recognize that the fight against terrorism has created a setting in which it is unusually plausible to argue that the benefits of apparently liberty-threatening changes outweigh the costs.

Finally, the intense debate over the consequences for U.S. law and civil liberties at home has drawn attention too much away from another dimension of the domestic law question in the fight against terrorism. Absent U.S. and allied military action on an unimaginable scale and with inconceivable efficacy, success in the war against terrorism will depend on what happens inside other countries. As the Yemeni moves against Al Qaeda and stepped-up U.S. training for Philippines military units indicate, some of the means will be military. But much of what needs to be done will depend on laws, legal institutions and law enforcement in foreign lands.

Here, the issues and problems cover a broad range. European allies will have to grapple with some of the same civil liberties and related issues that are arising in the United States. While the generally strong solidarity with the United States and their own status as potential terrorist targets push them toward the kinds of responses the U.S. agenda requires, there are more than a few bumps in the road. New security and surveillance measures in Great Britain—by far America's staunchest ally in the new war—have prompted criticism on civil liberties grounds. Elsewhere throughout Europe, similar objections have been louder in response to analogous measures and stepped up law enforcement. Anything that looks like racially targeted uses of state power is a touchy matter in Germany, given the shadow of past atrocities, the robust civil liberties culture that has arisen in response to that history, and the large population of guest workers from the Near East. French cooperation with some U.S. aims in the legal aspects of the fight against terrorism is less than sure, as is suggested by France's objection to U.S. consideration of capital charges against French national Zacarias Moussaoui in connection with September 11, the recent bilateral flaps over more mundane criminal matters (such as the long-delayed extradition of Ira Einhorn, tried and convicted in absentia in Philadelphia for murder after jumping bail and fleeing the country, and the honorary Parisian citizenship bestowed on Mumia Abu-Jamal, convicted in Philadelphia of murdering a policeman) and France's large minority population of immigrant Muslims. And, as recurrent frictions with France on the issue underscore, the United States' desire to retain the death penalty as an option for punishing terrorists predictably will generate problems if and when the United States seeks extradition of suspects captured in Europe.³³

³³ On these issues see Warren Hoge, "U.S. Terror Attacks Galvanize Europeans to Tighten Laws," *New York Times*, Dec. 6, 2001; Steven Morris, "Police to Begin Round-up of U.K. Terror Suspects: Dozen Islamists Listed to be Held as an Example," *Guardian*, Dec. 17, 2001; Haig Simonian and Hugh Williamson, "Germany Lives with Less Liberty," *Financial Times*, Dec. 19, 2001; Keith B. Richburg and T. R. Reid, "France Cautions U.S. Over Sept. 11 Defendant," *Washington Post*, Dec. 13, 2001.

At the other end of the spectrum, post-war Afghanistan poses a formidable task of state-reconstruction if it is not to relapse into a likely shelter and base for terrorists. A significant part of this work will include building effective legal and law-enforcement institutions that can monitor, detect and punish terrorist activities and preparations for them. Such institutions also serve the more vital functions of, first, maintaining a level of social and political order that diminishes the space available for the emergence and growth of Al Qaeda—like pseudo-states and quasi-governments within existing states and, second, fostering stability and prosperity to reduce the desperation and resentment that breed support for radical agendas. It has become easy to deride institution-building and root-causes approaches in light of past failures (as President Bush himself did in declaring that his administration is “not into nation-building”). And the task in Afghanistan is, as it has been elsewhere, something that the United States cannot achieve unilaterally. The United States should not repeat the error of adopting an overly idealistic or impossibly ambitious vision such as bringing liberal democracy, capitalist market economics, and a robust rule of law to weak or broken states. Nonetheless, the problems that the often unsuccessful efforts of the past have sought to address are ones a sustained war against terrorism cannot ignore. If the Afghanistan scenario is repeated in ventures that topple hostile, terrorist-linked regimes in other states, the same challenges and issues are, of course, likely to recur.

At intermediate points on the spectrum, there are states with intermediate capacity and inclinations toward cooperation in the U.S. agenda and its law-related components. In dealing with Pakistan, Saudi Arabia, Jordan, Egypt, and Algeria (all of which have been homes to Al Qaeda and similar terrorists) as well as less obviously relevant states such as China (which has been a source of arms and—much to its consternation—recruits for Al Qaeda) and Mexico (which, like Canada, provides an entry point to the U.S. for terrorists) and other states too (including the dozens in which Al Qaeda has operated), the United States faces the task of using pressure and bribes, making the case that the scope of targets of Al Qaeda and kindred groups is universal, and offering programs of legal and law-enforcement training and technical assistance to induce governments to develop and deploy substantive legal proscriptions and tools of investigation and prosecution against local terrorist operatives and leaders.

As this dimension of the war on terrorism suggests, the future of the conflict surely will be less dramatic than its initial phases, less characterized by unambiguously villainous criminals, clearly enemy regimes, and swift and sweeping victories. The war on terrorism will display the definitive characteristics of protracted conflict, including maddeningly slow or hard-to-measure results and growing international and domestic disagreement over specific ends and means. The challenges of crafting and sustaining a commitment grow formidable under such conditions. Forging and maintaining

support for a successful and adequately durable commitment further requires—but will not be assured by—careful attention to the mix of elements of the law and war paradigms, the justification of legal changes at home, and how much we must depend on appropriate legal changes abroad.

