



# ILSA Journal of International And Comparative Law

## INTERNATIONAL PRACTITIONER'S NOTEBOOK

*International Law Weekend '02 presented by:*

THE AMERICAN BRANCH OF THE INTERNATIONAL LAW ASSOCIATION

**"THE CHALLENGE OF SEPTEMBER 11:  
INTERNATIONAL LAW AND THE CONTROL OF VIOLENCE"**

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# TEACHING INTERNATIONAL LAW TO UNDERGRADUATES AND OTHER NON-LEGAL AUDIENCES: PRACTICAL SUGGESTIONS FOR PEDAGOGICAL APPROACHES

*Howard S. Schiffman\**

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## I. INTRODUCTION

Unquestionably, there is growing interest in the subject of international law at several educational levels and among a broad constituency of students. This is due to a variety of factors. Not the least of which is a widespread desire to better understand the events of September 11, 2001 and the international response to terrorism. In addition, as the world becomes more interdependent, the importance of the field continues to expand. This phenomenon is hardly surprising when one considers that matters, which have always constituted a focus of international law, such as terrorism, trade, human rights and global environmental protection resonate through a number of different disciplines today. Accordingly, there is a visible demand for courses in the subject at many

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graduate schools, business schools, undergraduate political science, and continuing education programs.

Over the last several years, I have had the honor and the responsibility of teaching courses in public international law, international dispute settlement and international environmental law to student bodies with little or no formal background in the study of law. This undertaking is most enjoyable as I consider it a privilege to give students an introduction to a discipline I value so highly. At the same time, teaching international law to undergraduates and other non-legally trained audiences carries with it unique challenges that need to be addressed by the conscientious educator. This paper highlights a few such challenges and offers suggestions and observations on how best to address them in the academic environments in which they are experienced.

## II. AN ACADEMICALLY DIVERSE STUDENT BODY

Indeed, one cannot refer to “undergraduates and other non-legal audiences” pursuing courses in international law as a homogeneous educational class. On the contrary, this population typically presents far greater diversity of educational background and skills than are observed in international law classes at the law school level. This is because law school entrance requirements and uniformity of law school curricula generate students with a certain predictable level of knowledge and skills at the various stages of their legal education. At the undergraduate level, however, a student might be law school bound, taking a course in international law as part of her major field of study. In this case, the student might express a great interest in, and curiosity for, the study of international law. On the other hand, an undergraduate student might be majoring in a completely unrelated field and choose the class because it fits an open time-slot on his course schedule. Both types of students, and many others with diverse interests, are found in undergraduate international law courses; the thoughtful instructor must take their respective needs and aspirations into account.

In graduate programs, such as international affairs, where courses in international law are often an important, if not required, part of the course of study,<sup>1</sup> students are often very familiar with the underlying issues and political disputes that are addressed by international law, but at the same time may be quite unfamiliar with the legal instruments and institutions by which they are addressed. In continuing education programs, perhaps the most challenging venue of all, an instructor is likely to find a dizzying variety of students ranging

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1. Degree requirements and fields of specialization of key graduate programs in international affairs may be accessed on the Association of Professional Schools of International Affairs (APSIA) website, at <http://www.apsia.org>. *Id.* APSIA is a non-profit association and information source for two-year master's degree programs. *Id.* APSIA presently has 23 member institutions and 15 affiliated institutions.

from undergraduates to those simply curious about the subject, to United Nations diplomats and experienced professionals with advanced graduate degrees.<sup>2</sup>

As international lawyers we can probably agree that broader and deeper appreciation for our field across many disciplines is a very healthy sign. Admittedly, our subject is difficult and not widely understood. To those who are not lawyers, indeed to many who are, an introduction to international law is often met with skepticism and resisted with biases. For example, “international law isn’t really law because there is no enforcement” and “what good is a world court if states need to consent to its jurisdiction?” In my experience, these comments more often than not reflect unfamiliarity with the subject as opposed to deeply held convictions. The job of the good international law teacher is to give the student the tools and the knowledge to test these beliefs in a rational and well-informed manner.

### III. WHERE TO START?

As a teacher of international law I proceed from the assumption that my subject matters, that it has a role to play in world affairs and that it offers potentially effective, yet admittedly imperfect, mechanisms to address serious global problems. Making the case that the study of international law is a worthwhile endeavor is a good place to start.

#### A. *Develop the Idea that International Law Matters*

The primary actors of public international law may be nation-states, but ultimately it is about real people. There is a tendency among students new to the discipline to think of international law as an esoteric discipline that is only of concern to diplomats and law professors. To the surprise of many students, this misconception is one of the easiest to disabuse. For most instructors, one of the first cases we teach in any introductory course is the *Paquete Habana*.<sup>3</sup> This U.S. Supreme Court opinion, so often used to demonstrate the role of *opinio juris* as an element of customary international law, can also be used to demonstrate the applicability and availability of public international law to individuals. In that case the owners of fishing boats wrongfully seized during the Spanish-American War successfully availed themselves of a principle of

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2. In my experience teaching at the New York University School of Continuing and Professional Studies, such academic diversity is the norm in a typical international law course.

3. The *Paquete Habana*, 175 U.S. 677 (1900) (holding that as a matter of customary international law, fishing vessels peacefully practicing their trade are exempt from capture as prize of war).

international law in the federal courts of the United States.<sup>4</sup> Similarly, the classic cases of *Nottebohm*<sup>5</sup> and *Mavrommatis Palestine Concessions*<sup>6</sup> to name just a few examples, offer excellent opportunities to humanize the study of international law.

In other words, international law is about real people with real problems. The field of human rights arose from the very real experiences of the Holocaust and other abominations. The legal framework through which we address the threat of global terrorism is so dramatically influenced by the events of September 11, and continues to evolve with world events. When this is pointed out, the most skeptical student needs to acknowledge the genuineness and importance of the subject.

At the same time we are demonstrating the importance of international law, it is useful to say something about its acceptance and appreciation within the community of nation-states. Do states abide by international law? How often? Why? As we can all agree, these questions are the subject of much philosophical, doctrinal and contextual debate. The need to raise them in the context of an introductory course, however, should be beyond question. To a new student, an introductory course in international law is often about shifting, or at least expanding, their existing paradigms of what "law" is. A student's pre-conceived notion of law, as derived from her likely point of reference — a domestic legal system — should be challenged to assimilate the new concept of international law.

A deliberate dialogue with the class early in the semester, developing the reasons why states participate in the international legal system, will lay the foundation for much of what will follow. If assisted to do so, in their own time, students will appreciate that international law is predicated on state consent, that reciprocity of obligations is a driving force and that most states want to be perceived by other states as stable and responsible actors in world affairs. The fact that international law is not followed in a great many highly visible examples need not be fatal to the enterprise. Are all laws followed in domestic legal systems? Does this diminish the significance of all international legal objectives in the first instance?

If a discussion of the importance and applicability of the subject precedes more substantive aspects of the study of international law, an instructor will find

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4. *Id.* This case was actually two appeals from decrees of the United States district court for the southern district of Florida condemning two vessels and their cargo as prizes of war taken during the Spanish-American War.

5. *Nottebohm Case (Liech. v. Guat.)*, 1955 I.C.J. 4 (Judgment of Apr. 6) (holding that only an individual's state of "real and effective" nationality may exercise diplomatic protection on his behalf).

6. *Mavrommatis Palestine Concessions (Jurisdiction) (Greece v. Gr. Brit.)*, 1924 P.C.I.J. (ser. A) No. 2, at 11 (Aug. 30) (holding that a state may espouse the claim of one of its nationals in an international tribunal thereby converting a private dispute into a matter of public international law).

students more receptive to material built upon that foundation. With that as a point of departure, other pedagogical considerations fall into place more easily.

### *B. Choose an Excellent Textbook*

One of the most important decisions the teacher of a legally oriented course needs to make is the decision of what textbook to adopt. While classic casebooks at the law school level allow for more authentic review of actual international legal cases, there is no shortage of textbooks that are specifically geared to the needs of international law courses offered in venues other than traditional law schools. Some utilize a modified case-method of instruction while some proceed from a policy-oriented or political science framework. Still others simply aim to present the reader with the basic factual and conceptual elements of the subject. The most useful texts are those that convey the necessary information while permitting the instructor the flexibility to adapt to the particular focus of the academic program in which the course is offered. Some of the better texts that are available are:

Peter Malanczuk (ed.), *MODERN INTRODUCTION TO INTERNATIONAL LAW* (7th Rev. ed.), Routledge (1997) (8th edition due in early 2003);

Valerie Epps, *INTERNATIONAL LAW FOR UNDERGRADUATES*, Carolina Academic Press (1998);

Martin Dixon, *TEXTBOOK ON INTERNATIONAL LAW*, Blackstone Press Ltd. (1996);

William Slomanson, *FUNDAMENTAL PERSPECTIVES ON INTERNATIONAL LAW* (3d ed.), West (2000);

James H. Wolfe, *MODERN INTERNATIONAL LAW: AN INTRODUCTION TO THE LAW OF NATIONS*, Prentice Hall (2002).

Whatever textbook is chosen it is useful to give students some exposure to the case method of study. This is not only because some, or perhaps many, of the students found in undergraduate or continuing education international law courses are law school bound, but also because exposure to the methods of the discipline should be part of introductory study. Of the textbooks enumerated above, only Epps features cases in sufficient form to facilitate case study. Slomanson, however, offers edited and abbreviated cases in highlighted boxes that give students the key aspects of important international law cases. The other textbooks listed above all refer to and discuss major cases in international law as part of the textual explication of topics and issues.

Where the instructor chooses a textbook without cases, it might be advisable to assemble some of the key international legal cases in a separate reader. Most university bookstores can arrange copyright compliance on

supplemental course materials requested by the professor. Integrating case study with classic college learning paradigms allows students to gain a flavor for law school-style case study.

Because of the subtle aspects of some topics and the fact that most students are being exposed to the subject for the very first time, it is advisable to require that reading assignments be completed in advance of class discussions. While advanced reading is certainly necessary for the case method of study to be effective, it is recommended under any circumstance to sensitize students to the substance and direction of class discussions. If the instructor does not specify this, there may be a tendency to treat the chapter on human rights, for example, as “homework” to be completed after the lecture on human rights. The goal of reading assignments should be to maximize preparedness for classroom learning.

#### IV. DIDACTIC APPROACHES: SUBSTANCE AND PROCESS

##### A. *Experiment with Problem-Based Learning*

Many students indicate that the study of a new subject becomes more meaningful for them when they have some opportunity, however limited, to apply what they are learning. Accordingly, at least once during a semester it can be helpful to introduce a hypothetical dispute or problem that the students can work on either as a class or in smaller groups.

This type of exercise can be a hypothetical territorial dispute where the students are asked to negotiate a settlement. Similarly, they could be asked to negotiate the terms of a *compromis* to create an arbitral tribunal or a special agreement to confer jurisdiction on the International Court of Justice. To suggest another possibility, it could be a “use of force” problem where students are asked to play the role of a head of state that needs to make decisions about military action based on an evolving set of facts (i.e., “When is force justified under international law?”). Such hypothetical exercises allow students the opportunity to work with and apply what they have learned, but in a very controlled way.

##### B. *Devote at Least One Class Session to Research Methods*

At some point in the semester, but well before any writing assignments are due, an instructor should devote some class time to the tools and techniques of researching international legal issues. While adequate research skills, such as the use of LEXIS-NEXIS, can be presumed at the graduate and law school levels, undergraduate and continuing education instructors need to help their students develop these skills. As every international lawyer knows, the ability to access treaty databases, acts, and resolutions of international organizations,

major yearbooks, and key professional journals are among the most important skills of the profession. Giving students an elementary exposure to available resources allows them to take their first real steps as scholars in their own right.

At most colleges and universities, library personnel are ready and able to orient students to the resources available at the school. This typically includes electronic databases, journals, and reference materials for designated subjects. This may also include access to law libraries where students can conduct more traditional legal research and avail themselves of law reviews and professional journals.

In conjunction with a library orientation, it is important that students receive some instruction in Internet resources in international law. There is no shortage of websites containing excellent resources in both public and private international law, including intergovernmental organizations (IGOs), nongovernmental organizations (NGOs), professional associations and those maintained by academic institutions and practicing attorneys. The websites of United Nations,<sup>7</sup> Multilaterals Project of the Fletcher School of Law and Diplomacy at Tufts University<sup>8</sup> and the World Trade Organization (WTO)<sup>9</sup> are among the very best and contain lots of information that students can use for research purposes and to better understand coursework. It is even helpful to provide them with a list of websites as part of the course syllabus.

### *C. Class Assignments and Assessments Should Address as Many Skills as Possible*

To determine students' performance and assign grades it is both useful and fair to rely on a variety of factors. As with most academic learning this may include one or more exams, a writing assignment and class participation. Basing grades on several components will allow students to demonstrate their skills across a spectrum of those necessary to achieve some mastery of the discipline. This includes not only knowledge of key concepts and terminology but also analytical thinking, persuasive writing and the ability to articulate subtle ideas. It also affords those who are deficient in one area an opportunity to balance it with others.

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7. United Nations website, at <http://www.un.org> (last visited Mar. 9, 2003).

8. Multilaterals Project of the Fletcher School of Law and Diplomacy website, at <http://fletcher.tufts.edu/multilaterals.html>. The Multilaterals Project contains an excellent searchable treaty database.

9. World Trade Organization (WTO) website, at <http://www.wto.org> (last visited Mar. 9, 2003).

### 1. Exams

There are several ways an instructor can design an exam for an introductory course in international law. While it may be appropriate in some courses to adopt the traditional law school hypothetical format, it is important for lawyers to remember that most non-law school exams do not test students' knowledge in this way. Therefore the skills of "issue-spotting" which become second nature to law students would need to be explained and taught in other academic milieus. Multiple-choice examinations are useful to determine, for example, definitional knowledge of key principles or the structure and objectives of international organizations, but this format undervalues the nuances of many international legal concepts. It is probably wiser to utilize essay-type questions that can be drafted to adapt to the level and needs of a particular course. Essays can test course content at definitional, conceptual and theoretical levels. In addition, this style of exam is generally familiar to undergraduates and others.

### 2. Term Papers

Term papers are excellent tools to introduce students to the research techniques and information resources of the field. Researching and writing a paper for an international law course should require a student to discover, analyze and integrate facts, law and scholarly commentary. These skills, necessary for many other fields of study as well, form the cornerstone of international legal scholarship. I strongly recommend that students have the broadest possible latitude in the selection of their term paper topic. This is because it is important for them to be engaged in the process; allowing them to pursue what interests them will help keep them engaged. Requiring students to submit their paper topics for pre-approval, along with a brief outline and partial bibliography will help insure that their intended focus is appropriate and productive.

### 3. Class Participation: Socrates or Aristotle?

To the extent an instructor bases a grade on class participation it should represent not only the level of preparation and knowledge of the student, but also his or her willingness and ability to articulate that knowledge. Expressing oneself in the unfamiliar tongue of international legal discourse is not easy for many. Credit should be given to those who try hard to master it and share their thoughts with others.

Styles for classroom discussions will certainly vary among instructors (not to mention the group dynamics of each individual classroom), but one of the biggest questions facing new instructors is the extent they should utilize the

“Socratic” method of teaching that has tested the intellect of every American law student since time immemorial. To offer just one perspective, the classic Socratic method is probably not so constructive a didactic tool in non-law school environments. If it is utilized at all, it should probably be used only occasionally.

There are several reasons to disfavor the Socratic method. First, the Socratic method, as it is commonly practiced in American law schools, may be seen as intimidating and confrontational to students unfamiliar with its spirit and purpose. Second, to the extent the goal of class-time is to clarify principles from reading assignments, convey information and promote a general understanding of the subject matter, traditional university lecturing may be a more practical and effective way of achieving those objectives. This can be contrasted with the domain of legal education where the objective is to produce lawyers with finely honed analytical skills sufficient for professional practice.

Finally, a Socratic exchange between teacher and student may stifle other types of discussion of course content where a diversity of opinions and perspectives should be encouraged. For example, classroom debate on political and legal issues can be initiated more easily when students feel comfortable expressing their own ideas as opposed to simply responding to the professor’s questions. It is widely understood that students learn a great deal from each other.<sup>10</sup> Vigorous and open classroom discourse is consistent with the best traditions of liberal arts education. On the other hand, there is no real harm in giving students a taste of the Socratic method as part of an overall strategy of teaching international law.

## V. INSTILL A LIFELONG INTEREST IN THE SUBJECT

It is almost axiomatic in education to assert that a teacher who creates passion for a subject among her students will be more effective.<sup>11</sup> Motivation is a key to better learning.<sup>12</sup> One way for an instructor to do this is to explain why they themselves are passionate about the subject and why they entered the field. Another is to encourage the students to reflect on the importance of the subject of international law at the end of a semester as compared with their ideas about it when the semester began. Before the end of a semester ask students to read a morning newspaper and find international law issues even where they are not expressly presented as such. In so doing, students will realize that what they have learned allows them to read the same news stories as they had before but

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10. See James B. Levy, *The Cobbler Wears No Shoes: A Lesson for Research Instruction*, 51 J. LEGAL EDUC. 39, 50 (2001).

11. See Deborah Maranville, *Infusing Passion and Context into the Traditional Law Curriculum Through Experiential Learning*, 51 J. LEGAL EDUC. 51 (2001).

12. See Levy, *supra* note 10, at 41-45.

with greater insight and understanding as to the legal context and consequences of world affairs. The framework of international law addresses, for example, military conflicts, trade disputes, territorial disputes and environmental disasters – in other words, important world events. When students understand this they may be interested in keeping up-to-date in the field or in pursuing it with further education.

If students are interested in keeping current with the subject, a good way for them to do so is with membership in a professional organization like the American Society of International Law (ASIL).<sup>13</sup> Membership in a key professional association not only provides access to valuable educational resources but also an opportunity to demonstrate commitment to an area of study on their *curriculum vitae*. Some students may even choose to pursue international law at the law school or graduate level and then perhaps as a career. There are few moments so satisfying for an educator as when they hear they were responsible for introducing a student to their life's work.

## VI. CONCLUSIONS

Interest in international law at various educational levels is a developing phenomenon that will likely continue for some time. Teachers of the subject need to be responsive to the particular needs of individual student constituencies and appreciate the differences between legal education at the law school level and other academic venues. Students should be encouraged to challenge their initial assumptions about the subject of international law and be allowed to express their ideas in vigorous classroom debate. Conscientious instructors should seek to instill some passion and fascination for the subject that will allow students to make informed and reasoned choices about further study and career paths. Whatever professional fields students ultimately pursue, they should go forward with a meaningful, albeit introductory, understanding of the subject of international law and the important global problems it addresses.

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13. Membership applications for the American Society of International Law (ASIL) are available on the American Society of International Law website, at <http://www.asil.org/member.htm> (last visited Mar. 9, 2003). The ASIL is a premier professional organization with many useful resources for students and scholars. It welcomes as members all who are interested in the subject. Annual membership includes six issues of the ASIL Newsletter and a one-year subscription to the American Journal of International Law. *Id.*

# DISSECTING THE LAWFULNESS OF UNITED STATES FOREIGN POLICY: CLASSROOM DEBATES AS PEDAGOGICAL DEVICES

*Christopher C. Joyner*

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## I. INTRODUCTION

Simulations can be used as educational exercises that enable students in the classroom to appreciate better the difficulties and nuances of legal issues affecting international relations. The simulations discussed in this paper are constructed as debates, which are used as role-playing games that compel students to act as advocates on the lawfulness of various United States policy positions on international issues. The students marshal evidence in support of their respective positions, attempt to persuade other class members of the correctness of their views, and defend their positions against an opposing team. In this classroom, simulated debates are intended to represent real-world politics in operation.

These debates are part of an upper-level undergraduate course, International Law and United States Foreign Policy, taught at Georgetown University. The course covers various roles played by international law in the formation and implementation of United States foreign policy. Understanding the constraints that international law places on American actions, as well as the ways in which international law is used by the United States (and other states) to legitimize and justify actions taken in the national interest, are central to the course objectives.

Confronting international law in practice is critical to achievement of the course objectives, and is greatly facilitated through a series of debates on the legal aspects of key United States foreign policy issues. Students try to “win” the games by attracting support from the rest of the class based on the merits and persuasion of their legal arguments, although past experience indicates that clear winners are not often produced. The success of these debates rests on two key factors: First, the willingness of students to assume their adopted roles with enthusiasm, and second, the extent to which student debate participants can learn and communicate how, where, and why international law is integrated into the United States foreign policy decision-making process. To this end, they must also be able to demonstrate the tensions between national security considerations and international legal constraints in the formulation of United States foreign policy. Taken in tandem, these two ingredients produce a successful and unique learning experience that fosters a deeper understanding of the subject matter and the relevance of international law than would likely be attained through a lecture-format course. They also allow for insights into the theoretical implications of international law and the nuances presented for policy-making.

## II. THEORETICAL CONSIDERATIONS

International law constitutes a set of binding rules that seeks to regulate the behavior of international actors by conferring on them specific rights and duties.<sup>1</sup> These rules are the products of various processes of international norm-creation, usually accomplished through customary state practice or international agreements. Traditionally, three principal sources for the rules of contemporary international law are acknowledged: international conventions and treaties; international custom; and general principles of law recognized by “civilized” nations. Judicial decisions and the writings of publicists is a fourth, subsidiary source and albeit serves mainly as means for interpretation of the rules of law.<sup>2</sup>

While international relations professors often refer to the “state” as the focal actor in international relations, states themselves do not in fact act internationally. Nor do “states” actually make foreign policy or international law. Rather, it is the decision-making officials in the national governments of states who make policy and determine the course of action for states.<sup>3</sup>

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1. See generally Christopher C. Joyner, *International Law In The 21st Century: Legal Rules For Global Governance* (2003).

2. See *International Court of Justice*, 1945, 59 Stat. 1055, 1 U.N.T.S. XVI.

3. See generally Eugene Wittkopf et al., *American Foreign Policy: Pattern And Process* (6th ed. 2003); James M. McCormick, *American Foreign Policy And Process* (3rd ed. 1998); Glenn P. Hastedt, *American Foreign Policy: Past, Present, Future* (4th ed. 2000). It is interesting to note that in these textbook

Accordingly, it falls to these same officials to recognize, interpret, and apply relevant international law to a policy situation.

Although often portrayed as a collection of bureaucratic offices and agencies, the United States government is actually operated by individual persons. People, not anthropomorphic polities, make policy. United States foreign policy is assessed, designed, and determined by decision-makers in the United States government. International law is negotiated, drafted, and agreed through the diplomatic interactions of these same government officials. And it is those same government officials who ultimately decide whether, when, how much, and under what particular circumstances the United States will or will not obey a certain rule of international law. How legal norms affect United States foreign policy thus becomes an important question for practitioners and students alike.

Perception is critical to policy-making. Perception (and misperception) by United States decision-makers shape national approaches to international reality. The political ideology of those persons who are decision-makers in the United States government will determine the way in which that government perceives international affairs, and those perceptions are the main ingredients for the United States' policy options and action choices. In a real sense, what American decision-makers perceive internationally results in United States foreign policy. And these perceptions, of course, are greatly influenced by the political values, social mores, and ideological norms of the political culture in American society. A realist, power-focused view of foreign policy is not inconsistent with this picture. What is true of persons is also true of states. Young and old see the world through different eyes, as do great powers and lesser powers. National capability can influence world perspectives, affect international politics, and shape foreign policies. In these ways, power can govern the American policy-maker's perception of the world and the United States role in it. In this sense, policy makers may accept the realist paradigm of international relations in interpreting the world, without even giving it a second thought.

A host of other factors combine to influence United States governmental decision-makers' perceptions of the world and their government's role in it: the United States' economic needs and geographic position; the perceived military threats to the United States and the historical sense of security and insecurity; memories of earlier threats, past wars and previous political persecutions; the

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treatments of the American foreign policy process, the term "international law" does not appear in the index, albeit "diplomacy" does.

country's relative conditions of development and access to natural resources; the United States' controlling political ideology and its pervasive economic conditions; and its national character and national morale. All these factors and others go into shaping and shading the political perceptions of decision-makers that determine United States foreign policy.

It is critical to appreciate that perceptual differences exist between decision-makers of all governments, including the United States. The tendency of the United States government to move toward lawful or unlawful behavior can be affected by these perceptions. It is largely in the shaping of such perceptions that international legal rules become relevant.

### III. THE RELEVANCE OF INTERNATIONAL LAW

Is international law really as irrelevant in the foreign policy-making process as realist international relations theorists would have us believe? After examining how officials proceed in discussing decisions that determine the foreign policy of the United States government, is it accurate to conclude that the rules of international law have little or no impact on those decisions? When analyzed within the context of the actual process of policy-making, rather than through hypothesis and theoretical conjecture, it becomes clear that United States government officials cannot help but be mindful of international law's real-world effects. International law promotes stability and regularity in the conduct of international relations. For United States decision-makers, international law thus creates expectations about the behavior of other actors in the international system.<sup>4</sup> Similarly, if United States decision-makers know what the law is, then they can fashion policy to conform to the expectations of other governments. In this manner, international rules facilitate regularity in international behavior and promote cooperation over conflict, yielding greater stability in interstate relations.

American foreign policy-makers cannot escape the fact that international law shapes the international system in several ways: first, international law embraces and legitimizes the concept of sovereignty. Sovereignty is the paramount political feature of the state. A sovereign state is independent from any authority superior to its own, cannot be bound to a rule without its consent, and enjoys juridical equality among other states. The state is politically independent, with equal legal status in the international community. While the exercised sovereignty of a state may fluctuate, the concept still constitutes a fundamental operating principle of international relations. International

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4. See Christopher C. Joyner, *The Reality And Relevance Of International Law In The Post-Cold War Era*, In *The Global Agenda: Issues And Perspectives* 241 (6th ed. Charles W. Kegley, Jr. & Eugene R. Wittkopf, eds., 2001).

relations theorists sometimes overlook sovereignty as a cardinal principle of international law as well.<sup>5</sup>

A second way that international law shapes the international system is by determining the rules for membership and participation in the international community. International legal rules set standards for one government's recognition of the lawful existence of another state.<sup>6</sup> This means that international law determines the ground rules for a state's legitimacy in the international system. Furthermore, international law also sets out the rights and duties of states. These general rights and duties are guidelines for foreign policy makers as to what actions are permissible in international intercourse.<sup>7</sup>

Third, international law provides the language of interstate diplomacy for national foreign policy makers. When the United States government communicates with another state, it usually does so through international legal channels, using the discourse of international law. When foreign policy makers in the United States criticize another government for its actions, some reference to the other state's failure to abide by international legal precepts is made in virtually every case. When a dispute or confrontation breaks out between the United States and another government, legal principles nearly always become pivotal considerations in the international negotiations that usually ensue.

No less important for American foreign policy-makers is that international legal rules enable normative judgments of actions and assertions by made the United States government. International legal rules serve as indicators or guidelines for policy-makers regarding the procedures or actions to be pursued in order for some particular policy to be considered internationally legitimate. United States foreign policy makers might decide to disregard those guidelines because they are not compatible with United States national interests or specific foreign policy objectives. Even so, that does not obviate the fact that those officials are aware of those rules' existence, legal meaning, and policy implications, and do realize when those rules have been breached.

The point here is clear: American foreign policy decision-makers nearly always will seek to determine what international legal implications are posed by a particular course of action. While they might opt not to comply with the law, United States decision-makers want to know the relevance that law holds for the policy in question. Otherwise, they would be blind to the rules of the road for international intercourse, and would invite unintentional and unnecessary

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5. See generally Alan James, *Sovereign Statehood: The Basis O-f International Society* (1986); Louis Henkin, *How Nations Behave: Law And Foreign Policy* (1979).

6. See Gerhard Von Glahn, *Law Among Nations: An Introduction To Public International Law* 66-90 (7th ed. 1996); William R. Slomanson, *Fundamental Perspectives On International Law*, at 64-73 (4th ed. 2002).

7. See Von Glahn, *supra* note 6, at 123-200.

collisions with other governments. Obviously this can complicate relations between the United States and other governments.

It is apparent that international law is expressly relevant for American foreign policy. While academics are right to recognize and highlight theoretical deficiencies of international law, it is essential to realize that the United States government does not deem those international rules to be irrelevant in formulating real world foreign policy choices. Without question, the United States government formally and officially attaches considerable importance to international rules, and American decision-makers expend much energy and effort contending over issues concerning their interpretation and evolution. Clearly, American policy-making officials strive to fashion, revise, and interpret international law so that the outcome best serves their purposes and advances United States national interests. This is evident from the functional role assigned to legal advisers throughout the United States government's foreign policy apparatus.

The rules of international law are interpreted by American decision-makers to serve United States national interests. When international law is viewed away from the academic realm (where it is regarded as weak, debilitated idealism), its role becomes elevated to the dimension of practical policy utility. International legal considerations remain salient and significant for policy choices for United States government officials. The classroom debate exercises described and analyzed below strive to illustrate how international legal rules influence United States foreign policy-making.

#### IV. WHY DEBATE INTERNATIONAL LAW AND UNITED STATES FOREIGN POLICY?

Simulations generally, and debates more specifically, are well-recognized tools for education in the social sciences.<sup>8</sup> The American Educators' Encyclopedia notes as an advantage of debate that it "serves to crystallize an issue, presents both sides objectively, and stimulates interest."<sup>9</sup> Debates, sometimes in the form of "moot courts," are often used to teach principles of United States domestic law, especially constitutional law.<sup>10</sup> Role-playing more

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8. As one work on the subject points out, "the function of social science is, of course, to formulate theories that explain and predict human behavior. Simulation is a very useful device for this exploration of verbal theories and the testing of hypotheses, for the reason that it is often impossible to subject an actual group of human beings to experiments. By successfully simulating the significant variables, it is possible to explore such phenomena by experimenting with the simulated system." Fannie R. Shaftel & George Shaftel, *Role-Playing For Social Values: Decision-Making In The Social Studies* 10 (1967).

9. Dejnozka & Dapel, *American Educators Encyclopedia*, at 149.

10. See Gerald P. Long, *Understanding Religious Freedom through Courtroom Simulation*, 5 *OAH Magazine Of History* 1990, at 31-34.; Eileen H. Tamura, *Should the Minimum Drinking Age Be Changed?*

generally is often used to teach international issues, where students can take the part of a particular country in treaty negotiations, interstate conflicts, or UN discussions.<sup>11</sup> Debates, like other role-playing simulations, help students understand different perspectives on a policy issue by adopting a certain perspective as their own. But unlike other simulation games, debates do not require that a student participate directly in order to realize the benefit of the game. Instead of developing policy alternatives and experiencing the consequences of different choices in a traditional role-playing game, debates present the alternatives and consequences in a formal, rhetorical fashion before a judgmental audience. Having the class audience serve as “jury” helps each student develop a well-considered opinion on the issue by providing contrasting facts and views and enabling audience members to pose challenges to each debating team.

The debates in this course invite students to examine the international legal implications of various United States foreign policy actions. Their chief tasks are to assess the aims of the policy in question, determine its relevance to United States national interests, ascertain what legal principles are involved, and conclude how the policy squares with relevant principles of international law. The debates compel students to consult the vast literature of international law, especially the nearly 100 professional law-school-sponsored international law journals now being published in the United States. This literature furnishes an incredibly rich body of legal analysis that often treats topics affecting United States foreign policy, as well as other more esoteric international legal subjects. Most of these journals are accessible in good law schools, but are largely unknown to the political science community specializing in international relations, much less to the average undergraduate.

By assessing the role of international law in United States policy making, students realize that United States actions do not always measure up to international legal expectations. At times, international legal rules are compromised or short-circuited for the sake of perceived national interests. Concepts and principles of international law, like in domestic law, can be interpreted, manipulated, and twisted in order to justify United States policy in various circumstances. In these ways, the debate format gives students the benefits ascribed to simulations and other “action learning” techniques, in that it “requires that students be actively engaged with their subjects, and not be

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A Simulation on the Legislative Process, 83 Soc. Stud. J. 201-206 (1992); Karen E. Cope, Teaching the Constitution by Simulation, 18 Soc. Stud. J. 10 (1989).

11. See Mary Louise Williams & George Mowry, Global Responses To Potential Climate Change: A Simulation (1995); Joe Regenbogen, A Mock U.N. Game: Teaching Global Awareness, 15 La. Soc. Stud. J. 20-21 (1988).

mere passive consumers. Students should be seen as cultural participants, observing, reacting to, and structuring their world."<sup>12</sup>

The debate exercises carry several more specific educational objectives. First, students on each team must work together to refine a cogent argument that compellingly asserts their legal position on a foreign policy issue confronting the United States. In this way, they gain greater insight into the real-world legal dilemmas faced by policy makers. Second, as they work with other members of their team, they realize the complexities of applying and implementing international legal rules and the difficulty of bridging the gaps between United States policy and international legal principles, either by reworking the former or creatively reinterpreting the latter. Finally, the simulations familiarize students with contemporary issues on the United States foreign policy agenda, and the role that international law plays in formulating and executing these policies.<sup>13</sup> The debate simulation provides an excellent vehicle for pushing students beyond stale arguments over principles into the real world of policy analysis, political critique, and legal defense.

A debate simulation is particularly suited to an examination of United States foreign policy, which in American political science courses is usually studied from a theoretical, often heavily realist, perspective. In such courses, international legal considerations are usually given short shrift, if discussed at all. As a result, students may come to believe that international law plays no role in United States foreign policy making. In fact, serious consideration is usually paid by government officials to international law in the formulation of United States policy, albeit sometimes *ex post facto* to justify policy, rather than as a *bona fide* prior constraint on consideration of policy options. In addition, lawyers serve as prominent advisers at many levels of the foreign-policy-making process. Many students in the class are in Georgetown's School of Foreign Service, and intend to pursue careers in diplomatic service or in law. This course aims to make students appreciate the relevance of law for past and current United States actions (e.g., the invasion of Grenada and the refusal to sign the land mines convention), as well as for hypothetical United States policy options (e.g. hunting down and arresting war criminals in Bosnia or assassinating Saddam Hussein).

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12. George Mehaffy, et al., *Action Learning In Social Studies*, in *Eightieth Yearbook Of The National Society For The Study Of Education*, Pt. II 191 (Howard D. Melinger and O.L. Davis, Jr. eds., 1981).

13. The choice of issues for debate reflects this objective: each debate topic is a concern widely discussed in the news media, and often in Congressional hearings and debates. In addition, each subject tests the lawfulness of United States policy vis-à-vis current treaties, principles, and norms of international law to which the United States is formally committed.

## V. PREPARATION

A key problem in designing the simulation is deciding which United States policy decisions should be examined in the debates. Three key criteria are used:

1. The issue must be highly salient for contemporary United States foreign policy and be (or have been) prominent in the news. In this way, students can gain a better appreciation for the relevance of international law to the real world of international relations.
2. The issue must involve tensions in defining the United States national interest, often including tensions between international legal requirements and United States national security interests. By examining the propriety assassination or the destruction of chemical or biological weapons factories in Iraq, students become aware that the United States might not have the lawful right to act unilaterally, irrespective of national security implications. By considering the United States attitude toward the Kyoto Protocol on global warming, students learn that varying views on interdependence among Washington policy makers can lead to opposing definitions of the national interest and opposing policy proposals.
3. The events chosen for assessment must be conducive to lively debate in that there is no clearly correct legal analysis of the issue, and the analyses in contemporary political and legal literature might be clouded by political or economic considerations.

To aid in generating possible topics, several colleagues are asked to suggest what three events over the past two years seem most important for contemporary United States foreign policy. From this list of responses, eleven topics are selected which best illustrate various facets of international law and its relationship to United States foreign policy. (NB: Each year the list of topics varies according to which topics are newsworthy and the implications they present for United States foreign policy.) For each topic, debate propositions are then formulated to highlight the international law context (e.g., "Resolved: that the United States should refuse to pay its UN dues until reform of that organization is successfully completed").

Students are permitted to choose which of the available topics they want to debate and which position (affirming or negating the stated proposition) they prefer to defend. This is done by circulating a schedule for the debates with blanks for students to fill in their names as team members under each topic. In the past, nearly all students were pleased with the choices available to them. In some cases, however, where students were forced by circumstance (i.e., the position they wanted was taken when the sign-up sheet reached them) to take a position opposite to their true opinion or to take on a topic with which they were unfamiliar, they generally took on the challenge with zeal. In particular,

Georgetown's large population of foreign students helps to ensure that some might be called upon to defend the lawfulness of United States policy positions that they might find distasteful, while many United States nationals must assume the role of legal critics of the United States.

The desired format for the debates is then explained to the students. Students are also encouraged to meet as a team and make arrangements to visit the professor together during office hours, in order to receive guidance on researching their respective positions and on what essential policy and/or legal issues should be addressed in their presentations. These office visits, brief though they usually are, also serve two practical purposes: First, they bring each team together and compel the students to work together toward a mutual goal; second, they reveal to the professor how the work is being distributed among the team members so that their individual efforts can be fairly evaluated in grading their performances. Students are directed to conduct research on the legal arguments surrounding their topic, even including those arguments that support the opposing team's position.

Students are made aware on the first day of class that the debates carry considerable weight as an academic requirement. Preparation for and participation in the debate count as 20 percent of the student's final grade. The course syllabus includes an example of the form on which debaters will be evaluated, so that on the very first day, students can have a clear idea of what is expected. Mandatory attendance for the entire class is declared for the debate sessions, and substantive materials covered during the debates are included on both the mid-term and final examinations. Special reading assignments for each debate are included on the syllabus for the class as a whole to provide them with background on the topics and legal principles that will be addressed. Class discussion and questioning of the debate teams are central parts of each day's debate, and both the teams and audience learn to prepare accordingly.

## VI. THE EVENT<sup>14</sup>

The debates follow a well-defined structure and strict time allotment. Each team of two to three members is given, in turn, 15 minutes to make an initial presentation, in which they provide some historical background for the issue and describe the legal underpinnings of their positions. (Usually the team members split this time among them, so that two students each present 7.5 minutes of the argument). Each team is then given 10 minutes to rebut the arguments of the opposing side. The teams are instructed to prepare a detailed "brief" outlining their view of the issue and the legal rationale for the policy position they

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14. The course syllabus, attached as an appendix to this paper, lays out the debate format as explained to the students.

support, and they are encouraged to exchange their briefs with the opposing team the night before the debate. This “trading” strategy ensures more effective, well-thought-out rejoinders, and keeps the event focused more on the legal arguments at stake rather than on the rhetorical skills of the students. The briefs are also distributed to the rest of the class, providing them with study guides and a substantive outline of their debate points. Following the formal presentations and the rebuttals, the professor or teaching assistant sums up the important course themes that emerge from the presentations, and invites the rest of the class to question the teams. Class questions and moderated discussion occupy the remainder of the class period.

Several aspects of the debate format enhance its effectiveness as a role-playing exercise. The professor or teaching assistant opens each debate as a formal event, welcoming the audience, stating the “proposition” at issue that day, and introducing each team’s members by name. The introduction lends an air of ceremony to the proceedings that encourages students to take the event seriously. Students are encouraged to show respect for the opposition, as if they were in a court of law (with the professor as judge, the graduate teaching assistant as bailiff, and the remainder of the class serving as a jury of peers). The sense of formality extends to the preparation of the “briefs” and even to the dress students chose for their presentations: Most wear coats and ties, suits, or dresses, and refer to each other in a formal manner (i.e., by last name or as “my colleagues” or “the opposition”).

It is worth noting that the enrollment in this course is usually around 50 students, with a large cohort of seniors and juniors. With this class size, a whole-class simulation exercise might be unwieldy, while a lecture format would risk leaving more passive students disengaged from the subject matter. Structured debates, each including four to six students, place the spotlight in turn on each student individually while simultaneously promoting team spirit and team effort. This format appears to succeed in motivating all but the most lackadaisical learners. The requirement that students confront an audience in a debate format also contributes to the students’ rhetorical ability, as well as their ability to address perspectives with which they might not be familiar or sympathetic.

Unlike many simulations, the objective of the debate format is not to teach bargaining techniques or to produce a negotiated outcome. Rather, the main aim in this class is to make students aware that United States policy, like the policies of all states, is predicated on international legal constraints, and that, at times, those constraints are compromised by the pressures of interests (often couched in terms of “national security”) perceived by policy makers to have a higher priority.

Students are encouraged to be highly assertive during the debates. Players are not merely to stand and read a position paper. Rather, they are to argue

forcefully the legal merits of their cases, and in the process refute the contentions of the other side. The drama of the debates tends to catch the attention of the class as a whole, and the more lackluster presentations seem to spark resolve among the other students to do better themselves when their turn comes, in order to provide a good show for the class. Some teams have been very creative: For example, one debater shook a handful of coins at the audience, telling them that the measly amount she held in her hand represented the cost per day per capita to the United States taxpayer of supporting the United Nations.

## VII. GRADING

In this simulation, each student must participate actively and demonstrate his or her own competence and mastery of the material. Each student is evaluated on his or her performance only. No team grade is assigned. Rather, students are graded on how well they as individuals argue their portion of the case and on what they contribute to the team's briefing paper.

No "winner" is formally declared at the end of a debate session, although in many instances it becomes clear which team presented the most compelling legal argument and facts to support its case. In other instances, though, the class discussion mirrors the real-world policy debate in that it reflects genuine tensions between the requirement to comply with international legal dictates and the imperative to pursue the best interests of the United States.

## VIII. EVALUATION

Generally, the debate simulations have proven very successful and elicited high praise from the students. They enjoy the opportunity to play the role of legal advocates and to try to persuade the class of the merits of their positions. Students also appreciated the chance to respond directly (in questions and discussion) to the performances of their peers, and they seem to enjoy delving into the politics of how international law and national interests mesh (or clash) in the formulation of United States foreign policy.

The students take their debating roles to a surprisingly serious degree, engaging in animated discussions that have sometimes continued after class with joint appeals to the professor to serve as referee. The spectator often has the sense he is watching the proceedings of the UN Security Council or sometimes the United States Congress, and that stakes no less than the prestige and national interests of the United States are at risk. As might be expected, those students who read the assigned materials and listen carefully to the teams' presentations become most caught up in the issues, participate most actively in the discussions, and demonstrate in their written examinations the best

understanding of the ways in which international law serves as a restraint on, and an instrument of, United States policy.

Certain problems are notable, however. In a few instances, individual students have been less than cooperative in meeting with their team members to divide labor and prepare the briefs. This places an undue burden on their teammates. A second problem has been the tendency of some students to read their brief (perhaps with some annotations) as their oral presentation. This creates a less than exhilarating experience for the audience, which sometimes tunes out or merely follows along in rote-reading the text, rather than engaged in thinking about the legal issues being raised. Third, during the past three years, there has been the problem of students having to journey across the city to Georgetown's law library in order to secure the materials they needed to research their positions. That has proven at times to be frustrating. Since Georgetown undergraduates cannot check out books or periodicals from the Georgetown law library, all research has had to be done on the premises unless students were willing to invest considerably in photocopying. Since 2001, increased access for students to Lexis/Nexus on line has greatly alleviated this problem.

Essential to the success of the simulation as a learning tool is the question/discussion period that follows each debate. This period, which usually runs the last 25 minutes of a 75-minute class, enables the audience to present challenges to or ask for clarifications of points made in the debaters' formal presentations. While the discussion tends to be ad hoc, it often generates mini-spin-off debates of its own on particular points of law or on the implications of particular United States policies. Debaters who are underprepared faced questions they cannot answer well, illustrating the incentive they face to prepare thoroughly and to have more facts and arguments at their disposal than they present in their prepared statements. The discussion also helps to highlight the legal principles at issue and the recurring themes of the course that are illustrated in the debate topics. The professor and teaching assistant interject comments and pose queries to aid in spotlighting issues for the class to consider.

Past experience suggests two types of students who seem to gain the most from the debate experience. First are those students who start out by signing up for a debate topic because they already hold a firm, relatively dogmatic or simplistic view of a given issue. One semester, for example, the class included several students from Gulf Arab states who wanted to argue for the lawfulness of the United States-led war against Iraq, but one Arab woman was forced by circumstance to join the team that opposed the United States action. She took on the assignment and was a credit to her team, demonstrating that she had reflected on the issue in a way she would otherwise have been unlikely to do. Likewise, last year's class included a student who saw no reason for international law to stand in the way of United States security interests

regarding the proposed landmine ban treaty. But the debate experience helped him see how banning landmines was congruent not only with humanitarian values, but also with international humanitarian law to which the United States was already bound by convention and customary practice.

The second group of students who benefit most from the debate format are those students who would typically sit passively (though perhaps attentively) through a lecture course without being particularly engaged by the material and without interacting significantly with the professor. The debate format prompts these students to take a firm stance on an issue, play a role, and develop a level of expertise on a specific issue. Moreover, it gives them the opportunity to display their expertise by educating the rest of the class on how to view their topic.

## IX. CONCLUSION

This debate simulation provides students with deeper insights into and an appreciation of the complexities of integrating international law into the United States foreign policy making process. The success of any given debate depends upon the quality of the team members' efforts to research and present a topic, and on their ability to relate concepts and principles of international law to the ways in which United States foreign policy objectives are formulated and achieved. The exercise is *not* intended to train international lawyers or to promote forensics as a skill. Rather the intention is to give students a greater sense of the real-world process by which United States foreign policy is made and implemented, and of the place international legal considerations are given in that process.

The lasting impact of the debates on the class as a whole is reflected in the fact that many issues first raised in the debate carry over into serious exchanges after class and into subsequent class lectures and discussions. In this way, the knowledge gained from the debates accumulates over the semester and contributes to the achievement of the course objectives.

# TEACHING INTERNATIONAL LAW: BEYOND THE LAW SCHOOL EXPERIENCE

*Charlotte Ku\**

As teachers, it is perhaps natural for us to think about teaching in the classroom context, although this panel is demonstrating the teaching opportunities that may exist outside of a single course or courses in international law. I would like to address the teaching opportunities (and needs) that exist beyond the classroom and beyond the law school experience. I would like to throw this into the discussion not only because this is what I have been working on at the American Society of International Law (ASIL), but also because of the pace and volume of change now taking place in international law. Even for those who may have taken a course, more is constantly being generated and sometimes now coming from sources not previously thought of as an actor in the international legal system.

In April 2000, ASIL President Arthur Rovine appointed Roy Lee (Chair), James Apple and John Gamble<sup>1</sup> to a working group to consider possible ASIL initiatives for teaching outside of the classroom. In his letter setting up the working group, President Rovine wrote:

As I have reflected on the ASILs strengths prior to assuming the presidency, I concluded that one of the Society's major assets is its many world-renowned teachers. It further occurred to me that the Society would do itself and international law some good if we could find ways to tap these individuals to teach—not in a university classroom which is the primary occupation of many of our members, but to teach more broadly.

Audiences I have in mind are legal officers in government ministries and international organizations, including people from developing countries, who may need time to reflect on their work or may profit from an opportunity to learn from experts. I further have in mind the staff of courts and attorneys in the early years of their practice as they begin to develop a specific professional focus. This is teaching beyond the traditional classroom years, and is exposure to the best our field (and Society) has to offer worldwide.

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1. Roy Lee is formerly of the United Nations Office of Legal Affairs in New York, James Apple is President of the International Judicial Academy in Washington, DC and John Gamble is Professor of Political Science and International Law at Pennsylvania State University in Erie, Pa.

ASILs interest in teaching originates with a mandate in its charter. As early as 1907, Elihu Root, ASILs founder and first President, had already noted that international law should be the centerpiece of an educated citizenry. Given career and legal developments today, learning in international law cannot end with the classroom particularly since many entering the legal profession may not have had any exposure to international law during their formal training.<sup>2</sup> Furthermore, the ASILs worldwide academic membership is one of its strongest assets.

ASIL believes that international law is more central today than ever, but recognizes that it has to compete with many more subjects for the attention of students, practitioners, government officials and even academics. Teaching in international law is something that one increasingly hears a need for whether through continuing legal education, law reform, or encouraging the rule of law.

The Working Group adopted a broad definition of the teaching of international law outside the classroom and developed a list of possible audiences. These include:

- a) Judges and law clerks;
- b) Practicing lawyers;
- c) Undergraduate and law students;
- d) Members of the media;
- e) Diplomats, including UN diplomats;
- f) Legislators, legislative staff;
- g) Corporate executives;
- h) High school students;
- i) Military;
- j) General public;
- k) Law professors.

Recent ASIL outreach activities share several common features:

- a) They identify audiences that are important for the effective practice and development of international law and provide them with the information and network resources to enable them to play their role (e.g., the judicial and media programs);
- b) They select and filter information to make it accessible to the target audiences (e.g., hard copy print materials, e-mail distributed materials, and web-based resources);
- c) They seek to create a network of international law specialists by joining the ASIL membership and their associates with the outreach audiences (e.g., the ASILForum web-based discussion group);

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2. See Hans Corell, UN Under-Secretary-General for Legal Affairs and The Legal Counsel, *An Appeal to the Deans of Law Schools Worldwide*, available at <http://www.un.org/law/counsel/info.htm> (last visited Jan. 31, 2003).

d) They convene interested and important groups in international affairs to address specific problems or needs (e.g. formation of task forces on issues like those related to terrorism and the ASIL Annual Meeting).

These features were developed based on several assumptions:

a) That the nature of the audience is either that these are busy people who do not need more to do or who may feel a need for information, but may not know how to get it;

b) That the target audience can provide valuable insight into how most effectively to reach members of a target group. Working from within a group is important not only to give teaching the subject matter credibility, but also to ensure its relevance and meaning to the audience. It engages and creates “stakeholders;”

c) That listening may be as important as teaching to the organizing of effective programs and that each contact provides an opportunity for further understanding of the practice and development of contemporary international law.

We have learned that for our judicial program, for example, texts need to be concise, but yet well documented to provide authority as well as to provide reference for further research. We have also learned that a preliminary introduction often needs to be followed up with a longer treatment of a daylong course or even short course. So, credibility within the target audience, drawing from the target audience for program development, multiple opportunities to learn, and follow up materials are key elements of effective teaching outside the school setting.

Techniques that we have used or are developing to accomplish these purposes include:

a) Briefings by individual experts or panels of experts with or without supporting material;

b) Supporting or regular information resources – ASIL Insights and International Law In Brief. Making known the availability of the other information resources like the AJIL, ILM;

c) Short courses – seminars of one day, weekend to two weeks for appropriate audiences;

d) Providing opportunities to address issues – list serves and columns in publications;

e) Touring seminars and collaboration with existing short courses to add international law as it relates to a particular topic – UNITAR programs, for example;

f) Web-based teaching – nothing that ASIL has done yet, but seems to have potential. Or combining web-based and in-person teaching seems a possibility;

- g) Enrichment programs for legal professionals – CLE programs in association with law firms or organized off site;
- h) Business and government roundtables to focus on a specific policy area.

Where academia is relevant to the above is that the trainers or resources for these approaches are often professors. Teaching material largely derives from materials developed originally for classroom use. The development of supporting materials is often done by academics. So, it may be teaching beyond the classroom, but it is teaching as part of a professional's working life, which means that the classes are in fact brought to where the target audience works. Technology provides unprecedented opportunities for storing and disseminating information as well as putting together virtual classrooms. It takes infrastructure – staff to organize meetings and equipment; it takes information – individuals who can shape the issues to create a meaningful teaching and learning experience; and those who will contribute to the program.

If we think more expansively about the teaching opportunities that exist throughout our professional lives, perhaps the challenge of making the legal profession and broader public aware of international law will appear less daunting because it increases the number of teaching opportunities and venues. The effectiveness of such continuing education, however, is based on an assumption of a sound foundation to build on. And so, I would end by inviting both professorate and practitioner to identify the core components of law and international law that would make future teaching more effective. Will the University of Michigan's required course on Transnational Law accomplish this? Time will tell.

More generally, there seems an opportunity for international lawyers to reflect on the core principles on which international law is based and to emphasize those in traditional law school teaching. The question for the formal legal curriculum might then be one of how to equip students most broadly for substantive growth and development in international law throughout their professional lives. This would seem a question worth pursuing in a fast changing professional environment.

# INTERNATIONAL LAW ASSOCIATION PANEL DISCUSSION ON “THE HOLOCAUST AS CATALYST FOR INTERNATIONAL JUSTICE”: SUMMARY OF EXTEMPORANEOUS REMARKS

*Benjamin B. Ferencz\**

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## I. THE DREAM

After more than 40 million persons had been killed in war, there was an overwhelming determination to prevent the recurrence of such tragedies. The slaughter of six million Jews and millions of others, such as the Roma and others perceived as enemies of the Reich, certainly served as a sharp catalyst for the creation of a more humane world order. The United Nations was created “to save succeeding generations from the scourge of war” by serving as the forum for peaceful resolution of disputes. The principles of international criminal law that emerged from the International Military Tribunal and the twelve subsequent war crimes trials at Nuremberg was to serve as the foundation cornerstone for a new rule of international criminal law designed to deter future aggression, genocide and other crimes against humanity. That was the dream.

## II. WHAT HAPPENED TO THE DREAM?

An unfair veto power had to be written into the United Nations Charter to win the needed consent by two-thirds of the United States Senators; as required by our constitution. It took 40 years to ratify even the genocide convention that we sponsored. The cold war between the Soviet Union and the United States blocked effective action in the United Nations. Charter provisions calling for universal disarmament and the creation of an international military force were simply ignored. The Security Council, instead of acting as the arm to maintain peace on behalf of all nations, became a political instrument to uphold the interests of its privileged Permanent Members. Many provisions of the Charter

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\* Ben Ferencz, a former Nuremberg war crimes prosecutor served as a soldier in the army of General Patton and participated in the liberation of many concentration camps at the end of World War II. He focused his remarks around three themes: 1) the dream of world peace that emerged after that war 2) the obstacles that arose and 3) the conclusions that could be drawn for international justice.

were never given a chance. General Assembly mandates for the creation of an international criminal court were referred to United Nations committees that were unable to reach any consensus. The world went back to killing as usual. The dream of hope was replaced by a nightmare.

With the collapse of the Soviet Union, competing nationalisms erupted in violent strife. When it was reliably reported that more than 10,000 women had been raped in the former Yugoslavia as part of a program of "ethnic cleansing", major powers could no longer remain indifferent. The Security Council created a special International Criminal Tribunal to try the leading perpetrators of crimes committed in that territory since 1991. Shortly thereafter, rival ethnic tribes in Rwanda butchered 800,000 innocent people. World leaders were aware of danger but did little or nothing to prevent the murder. It will remain the everlasting shame of this century that such atrocities could be allowed to occur. President William Clinton and United Nations Secretary General Kofi Annan went to Rwanda to apologize to the survivors. Perhaps it was better than nothing, but it was certainly not enough. This new holocaust became the catalyst for the creation of yet another ad hoc tribunal by the Security Council to deal with the atrocities committed in Rwanda.

With similar crimes being committed elsewhere all over the globe, it soon became apparent to many that a permanent international criminal court was needed. An assortment of retroactive courts, created a la carte after the crimes were committed, left much to be desired. United Nations committees went back to work and, after much wrangling and many compromises, a statute for a Permanent international criminal court was finally adopted in Rome in July 1998 by overwhelming vote. The minimum of 60 ratifications needed to put the treaty into effect was reached on July 1, 2002 and had passed 80 ratifications a few months later. A truly international criminal court—the first since Nuremberg—became a reality.

### III. CONCLUSIONS:

What lessons can be drawn from this brief scan of history? It is clear that progress toward the rule of law cannot be quickly or easily obtained. But it is also clear that the progress is real – even though there are many steps still to be taken. It is a sad irony that the United States that had inspired the world at Nuremberg, by its insistence upon rules of universal law, was not ready to accept the new criminal court. It justified its opposition by completely unfounded fears about political persecutions by uncontrolled prosecutors. It ignored the many safeguards against such risks and the priority given to all national courts so that the ICC could never intervene if the defendant's national courts were willing and able to provide a fair trial to the wrongdoer.

The new court has very limited jurisdiction. Only crimes of concern to the international community as a whole can even be considered and there is no retroactivity. Even war itself—the crime of aggression, condemned at Nuremberg as “the supreme international crime”—cannot be considered by the court until there is an agreed definition and other safeguards to assure that the role of the Security Council is not diminished. The Court statute provides that victims of crimes against humanity shall be entitled to “restitution, compensation, and rehabilitation.” How these farsighted principles will be implemented will depend upon the member states.

We see therefore that misguided opposition by the current United States administration is a hurdle yet to be overcome. Before it can move closer to universality, the court will have to prove that it is a fair and effective instrumentality to help curb major international crimes and to bring to justice those who threaten the peace and security of humankind. The American Bar Association and leading American jurists as well as the Secretary General of the United Nations and the entire European community have hailed this new legal institution as the missing link in the world’s legal order. I am convinced that when the American public recognizes the truth they will agree that the most effective way to prevent future holocausts and to secure the tranquility of humankind is through the rule of law. The International Criminal Court deserves the full support of all nations.

# INTERNATIONAL LAW ASSOCIATION PANEL DISCUSSION ON “THE HOLOCAUST AS CATALYST FOR INTERNATIONAL JUSTICE”

*Abraham B. Krieger*

I first wish to thank Prof. Nunes, Director of the Institute on the Holocaust and the Law and Moderator of this panel, for the opportunity to serve on this distinguished panel. I serve as General Counsel of the American Gathering of Jewish Holocaust Survivors. Benjamin Mead, its Chairman, was originally to have served on this panel, but was unable to because of a conflict. I represent an extraordinary group of people – Survivors of the Holocaust. They have two imperatives, one to bear witness and the other to preserve memory.

The murder of an individual is, of course, a crime. The murder of a *people* under the euphemisms of “Final Solution” or “ethnic cleansing” should elicit broader accountability, prosecution and punishment. Survivors, more than others, recognize that while the murder of an individual is a crime against family and state, the murder of a people is, what we have come to refer to as, a “crime against humanity.” If the Final Solution was not sufficiently unfathomable, at the end of the war, Survivors, trying to return to their homes, continued to be killed by the thousands. The “final” solution was not quite *that* final, while the suffering and losses continued.

Prof. Peter Longerich of the Holocaust Educational Trust in London suggests that “a dispute over the genesis of the Final Solution involves finding answers, not only to questions of when and where, but also ultimately, why?” These questions are integral to the judicial process. But they are questions that the survivors alone live with *each and every day* of their lives. What likewise comes to mind is Eichman’s statement, also expressed by Josef Stalin, that “the death of an individual is a tragedy – the death of a million...a statistic.” Add that to Hitler’s statement in the early 30’s that “after all, who now speaks of the Armenians?” and the Final Solution and later genocides become more foreseeable.

As lawyers, we recognize the importance of “choice of forum” decisions. Forum played a determinative role in the outcome of post-World War II prosecutions, involving military tribunals, courts in East and West Germany and trials in other countries, the most important of which remains the Eichman trial addressing crimes against humanity, later serving as a model for the Rwanda trials and International Criminal Court.

The results in each forum are telling. The Nuremberg trials in particular, on which my co-panelist, Benjamin Ferenz, will speak in greater detail and with pre-eminent knowledge, were compelling and cathartic. Tragically however, there were too few convictions due to lack of prosecutors, judges, facilities and funding.

Statistics involving post-war prosecutions by East and West Germany are distressing. Fully 80% of the judges in post-war Germany were former members of the Nazi party. Their appointments originated in the late 1800's under the authoritarian Bismark government. They retained their civil service positions through the liberal Weimar Democratic Republic and subsequent Nazi regime which benefited from a supportive judiciary already in place. This, among other reasons, contributed to the relative ease and speed with which the legal and legislative systems collapsed. Judges, lawyers and legislators, who should otherwise have served as a buffer, simply *folded*, permitting the Final Solution to proceed for the most part unopposed.

Between 1963 and 1967, approximately 300 war crimes cases were pending in the Berlin prosecutor's office. Almost every one was eventually dismissed on statute of limitations defenses.

Every survivor bears witness. But bearing witness in a prosecution is different from personally remembering, which carries with it a different responsibility. How many war crime prosecutions failed to lead to convictions because the survivor/witness was simply unable to recount and relive that which remains unthinkable?

Immediately after World War II, many were arrested, fewer were prosecuted, fewer yet were found guilty and even fewer were actually punished. After punishment, more often than not, those convicted had their sentences reduced or commuted – a process, as we know, tragically continuing to this very day. How unimaginable that must be to the survivors who committed no crime and continue to suffer in part for the remainder of their lives, with no prospect of *their* suffering being commuted? Abe Foxman of the Anti-Defamation League suggests that the best an international tribunal can hope for is “symbolic justice” since actual justice in the face of any genocide, is arguably unachievable. Survivors are often asked about the subject of forgiveness. Most express a much stronger preference for justice, recognizing at the same time the impossibility of it ever being fully or even substantially realized, especially at this late date.

In closing, Prof. Yehuda Bauer, a renowned Israeli Holocaust scholar suggests that, in the Post-Holocaust era, three commandments should be added to the original ten: (1) Thou shalt not be a perpetrator; (2) Thou shalt not be a

victim; and finally and perhaps most importantly - (3) Thou shalt not be a bystander.

Abraham B. Krieger

Oct. 25, 2002

International Law Association

Panel Discussion on

“The Holocaust as Catalyst for International Justice”

Association of the Bar of the

City of New York

# A SEMIOTIC APPROACH TO A LEGAL DEFINITION OF TERRORISM

*Susan Tiefenbrun\**

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## I. INTRODUCTION

It is hard to believe that a word like “terrorism,” which is used so frequently these days in different contexts and in casual, colloquial, political, and legal discourses, does not have a universally-accepted definition.<sup>1</sup> It is not enough to say, as United States Supreme Court Justice Potter Stewart once said of pornography, “we know it when we see it.”<sup>2</sup> Terrorism must be deconstructed<sup>3</sup> to distinguish between domestic and international terrorism,<sup>4</sup> state-sponsored and non-state sponsored terrorism, and terrorism per se and legal revolutionary violence<sup>5</sup> that falls within the laws of war.<sup>6</sup> Semiotics is the

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1. M. CHERIF BASSIOUNI, *INTERNATIONAL TERRORISM; MULTILATERAL CONVENTIONS (1937-2001)* 14, n.48 (Transnational Publishers, Inc. 2001) [hereinafter BASSIOUNI]. See also Kevin J. Greene, *Terrorism as Impermissible Political Violence: An International Law Framework*, 16 VT. L. REV. 461 (1992) (“Terrorism has ‘no precise or widely accepted definition.’”).

2. See Stephen Yagman, *Defining the Weapon of Terrorism: Frustrated People Without Another Method Resort to ‘Politico-Military’ Violence Instead*, L.A. DAILY J., 6 Mar. 12, 2002.

3. See Susan Tiefenbrun, *Legal Semiotics*, 5, 1 CARDOZO ARTS & ENT. L.J. 89-156 (1986) (discussing the application of semiotics to the law and the meaning of “deconstruction”).

4. In the US Antiterrorism Act of 1990, the United States defines the term “international terrorism” to mean activities that: (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any state, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; (B) appear to be intended (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by assassination or kidnapping; and (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum. (US Antiterrorism Act of 1990, Publ L. No. 101-519, 104 St. 2250 (codified at 18 U.S.C. § 2331 (Supp. 1991), cited in U.S. FEDERAL LEGAL RESPONSES TO TERRORISM 74-75 (Yonah Alexander and Edgar H. Brenner, eds., Transnational Publishers 2002)).

5. YONAH ALEXANDER, MICHAEL S. SWETNAM AND HERBERT M. LEVINE, *ETA: PROFILE OF A TERRORIST GROUP 4* (Transnational Publishers, Inc. 2001). “The ETA proclaims the right of the Basque people to self-rule and the use of the most appropriate means to achieve its goal.” *Id.* at 4.

6. CHRISTOPHER L. BLAKESLEY, *TERRORISM, DRUGS, INTERNATIONAL LAW, AND THE PROTECTION*

science of signs<sup>7</sup>. A semiotic approach to the meaning of the term “terrorism” includes an investigation of its hidden meanings, its connotations as well as denotations, in order to expose the deep structure of the term and to unravel its complexities. A semiotic approach is designed to uncover the basic structural elements of the meaning of a term, and each element acts as a sign for the identification of a terrorist act. The elements of the definition are either necessary or sufficient for the act to be deemed a terrorist act.

There are two major obstacles to overcome in order to arrive at a universally-accepted definition of the term. First, it is necessary to distinguish between three different conceptions of terrorism: terrorism as a crime in itself, terrorism as a method to perpetrate other crimes, and terrorism as an act of war. When terrorism is conceived of as a crime, its elements and defenses can be identified and analyzed. When terrorism is conceived of as a method to perpetrate other crimes, terrorism will sometimes overlap with other crimes like crimes against humanity, genocide, war crimes, rape, etc. When terrorism is conceived of as an act of war, the laws of war will cover the legal responses to terrorism. State responses to terrorism require the balancing of a state’s right to defend itself proportionally against threats or the illegal use of force or acts of aggression, as included under the United Nations Charter norms.<sup>8</sup>

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OF HUMAN LIBERTY 17, 20 (1922). Blakesley defines terrorism as violence aimed at innocents (or non-combatants) to gain an edge over, or to coerce, a third party. This is different from justifiable and legal revolutionary violence, which seeks liberation from oppression or restriction on one’s own sovereignty (assuming such acts of revolutionary violence fall within the law of war) (cited in DOUGLAS J. DAVIDS, *NARCO-TERRORISM: A UNIFIED STRATEGY TO FIGHT A GROWING TERRORIST MENACE 2* (Transnational Publishers, Inc. 2002)). Louis Rene Beres, Article: *The Legal Meaning of Terrorism for the Military Commander*, CONN. J. INT’L. L. 9 (1995). (Beres argues that the failure of insurgents to comply with the laws of war does not convert these military forces into terrorists but it does make them guilty of war crimes and possibly even crimes against humanity). Cherif Bassiouni argues convincingly that terrorist methods can occur during armed conflict and, therefore, terrorism can be included under war crimes. I maintain that terrorism can be included under war crimes only if the five elements of the definition of terrorism are present.

7. Any attempt here at a definition of semiotics is at best preliminary and partial. See Tiefenbrun, *supra* note 3, for a history of semiotics as it applies to the law. See also COLLECTED PAPERS OF CHARLES SANDERS PEIRCE 335 (Charles Harshone & Paul Weiss eds., The Belknap Press of Harvard University 1960). By semiotics or semiosis Peirce means the interplay of three subjects: a sign, its object, and its interpretant. See also UMBERTO ECO, *A THEORY OF SEMIOTICS 7* (Indiana University Press 1976), citing Ferdinand de Saussure’s definition of semiotics: “a science that studies the life of signs at the heart of society.”

8. See U.N. CHARTER art. 2, para. 4: “All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations,” available at <http://www.un.org/Overview/Charter/chapter1.html> (last visited Jan. 31, 2003).

See U.N. CHARTER art. 51: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security,” available at <http://www.un.org/Overview/Charter/chapter7.html> (last visited Jan. 31, 2003).

The second obstacle to overcome in an attempt to arrive at a universally-accepted definition of the term is the necessity to resolve its underlying paradoxes. Terrorism is a phenomenon steeped in varying and oftentimes conflicting political and ideological beliefs. Given that states have a fundamental right to self-defense and the right to self-determination, is terrorism legitimate if it is perpetrated in self-defense or in an attempt to achieve self-determination?

The Article will uncover five basic elements of the crime of terrorism that are deeply embedded in each of the many definitions of terrorism proposed by the United States in its laws, and by many other nations, scholars, and organizations like the United Nations. This Article will attempt to show that under certain circumstances requiring the presence of the basic five elements of the crime, terrorism can be included in other specifically defined international crimes like war crimes, crimes against humanity, and genocide. The Article will also look comparatively at United States, English, French, European, and Canadian definitions of terrorism. It will look closely at the United Nations' attempt to define terrorism in its seventeen multilateral conventions. It will also examine different definitions proposed by leading scholars in the field of international law and the law of terrorism.

This Article will distinguish between international and domestic terrorism and will uncover the existence of three different conceptions of terrorism that have profound implications for the adjudication of terrorist acts. Terrorism is conceived of as a crime, as a method, and as an act of war. These different conceptions of terrorism lead one to question which tribunal would be appropriate to try international terrorists. Finally, the Article will focus on the paradoxes inherent in the concept of terrorism. The paradoxical nature of terrorism complicates the establishment of a universally-accepted definition of the term.

## II. ELEMENTS OF THE CRIME OF TERRORISM

Black's law dictionary defines terrorism as: "the use or threat of violence to intimidate or cause panic, esp. as a means of affecting political conduct."<sup>9</sup> Scholars have attempted to further define the term,<sup>10</sup> resulting in many different definitions of terrorism<sup>11</sup> that can all be reduced to five basic structural elements:<sup>12</sup>

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9. BLACK'S LAW DICTIONARY 1484 (7th ed. 1999).

10. DAVIDS, *supra* note 6, at 2.

11. See *infra* Emanuel Gross, *Legal Aspects of Tackling Terrorism: The Balance Between the Right of a Democracy to Defend Itself and the Protection of Human Rights*, 6 U.C.L.A. J. INT'L L. & FOR. AFF. 89 (2001).

12. See *Id.* "It is difficult to classify the term "terrorism" or provide it with a clear definition or

- 1) The perpetration of violence by whatever means;
- 2) The targeting of innocent civilians;
- 3) With the intent to cause violence or with wanton disregard for its consequences;
- 4) For the purpose of causing fear, coercing or intimidating an enemy;
- 5) In order to achieve some political, military, ethnic, ideological, or religious goal.<sup>13</sup>

Normally the violence associated with terrorism is perpetrated without justification or without excuse in an aim to gain publicity for the cause.<sup>14</sup> In this sense terrorism is similar to extreme forms of civil disobedience<sup>15</sup> in which the perpetrators resort to violence in order to gain publicity for a cause that is presumably an unjust law or societal oppression. Normally state-sponsored terrorists do not seek publicity whereas individual terrorists thrive on publicity for their cause.<sup>16</sup> State responses to acts of civil disobedience have sometimes resulted in the use of force. Similarly, the peacetime use of terrorism by a state against passive resistance is arguably justified in order to maximize compliance to a new state policy.<sup>17</sup> This Article will attempt to show that terrorism in any form and for whatever reason is unjustified.

The structural elements of the definition of terrorism need further analysis. What actually constitutes "violence?" The dictionary definition of violence includes unjust or unwarranted use of force, usually accompanied by fury, vehemence, or outrage; physical force unlawfully exercised with the intent to harm.<sup>18</sup> But there is a broad spectrum to the definition of "violence." Some

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interpretation ...Nonetheless, the majority of the definitions have a common basis—terrorism is the use of violence and the imposition of fear to achieve a particular purpose, generally entailing the aspiration to overthrow an existing regime, or fight it, and where the persons forming the group organize in a tightly controlled structure ...need to determine whether the activities of the particular group are morally supported by the state."

13. These basic five elements are a variation of Blakesley's elements. BLAKELSEY, *supra* note 6, at 37. Blakesley's five elements include "conducting the above acts without justification or excuse" and do not include "ethnic or ideological" goals (termed "benefits" in Blakesley's listing). Blakesley's elements do not include the word "fear" which is key to the definition of the term "terrorism".

14. See Walter Laqueur, *Reflections on Terrorism*, FOREIGN AFFAIRS 65 (1986) at 86-88 (cited in DAVIDS, *supra* note 6, at 2).

15. See Susan W. Tiefenbrun, *Classic Greek Themes in Contemporary Law: On Civil Disobedience, Jurisprudence, Feminism and the Law in the Antigones of Sophocles and Anouilh*, 11 CARDOZO STUD. L. & LIT. 35 (1999), and Susan Tiefenbrun, *Semiotics and Martin Luther King's "Letter from Birmingham Jail,"* 2 CARDOZO STUD. L. & LIT. 255-87 (1992).

16. BASSIOUNI, *supra* note 1, at 29.

17. *Id.* at 32.

18. BLACK'S LAW DICTIONARY, *supra* note 9, at 1564.

courts have held that violence is not limited to physical contact or injury, but may include picketing in a labor dispute conducted with misleading signs, false statements, erroneous publicity, and veiled threats by words and acts.<sup>19</sup> Violence has many forms and degrees of severity. However, an act is violent only if it causes harm to persons and things.<sup>20</sup> Violence in any form can inspire terror in its victims and in those indirectly affected by the violence.

What is an “innocent civilian?” There is no agreement as to who is actually included in this category,<sup>21</sup> but one is tempted to say “we know an innocent civilian when we see one.” If only one innocent civilian is killed or seriously injured during an act of war motivated by self-defense, will this be enough to call it a “terrorist” act? What are the legitimate defenses of the unintentional killing of an innocent civilian during wartime? Is collateral damage of the use of force during wartime a legitimate defense to killing innocent civilians? These are only some of the questions that the element of violence against “innocent civilians” raises in proposing a universally-accepted definition of terrorism.

The element of intent or wanton disregard is less troublesome because of established definitions used by the courts to determine the mental state of an accused. What is more troublesome is the element of “fear” which is not a legal term but a psychological phenomenon that is manifested by various signs and symptoms such as trembling, shaking, sweaty palms, etc. Intimidation, which was established as a tort in England as early as 1964,<sup>22</sup> is unlawful coercion that produces harm.

The manifold purposes of terrorism include the accomplishment of a political, military, ethnic, ideological, or religious cause. The overriding purpose is a necessary element of the definition. Political, ethnic, ideological and religious goals are not troublesome within the definition of terrorism. However, the accomplishment of a “military goal” is controversial. If a military goal is added to the definition of terrorism, this inclusion places a burden on combatants never to use terrorism during wartime. Individuals, small groups, and states have been known to commit terrorist acts in the context of wars of national liberation.<sup>23</sup>

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19. *Id.*

20. BASSIOUNI, *supra* note 1, at 8.

21. *Id.* at 15.

22. *Rookes v. Barnard*, 1 Lloyd's Rep 28 (H.L. 1964).

23. BASSIOUNI, *supra* note 1, at 19. See also Jordan Paust, *Use of Armed Force Against Terrorists in Afghanistan, Iraq, and Beyond* 35 CORNELL INT'L L.J. 533 (2002).

### III. THE MANY DEFINITIONS OF TERRORISM

Even though there are many definitions of terrorism<sup>24</sup> available for legislative purposes, “terrorism” per se has never been explicitly defined in any of the seventeen existing multilateral anti-terrorism conventions.<sup>25</sup> Moreover, the multilateral conventions are not applicable to state-sponsored terrorism. They apply only to terrorism committed by individual actors. The absence of a universally-accepted definition of terrorism and the inapplicability of multilateral anti-terrorism legislation to state-sponsored terrorism reflect the deeply political nature of the term terrorism and the absence among nations of commonly shared values<sup>26</sup> about the rule of law, the legitimacy of goals, and the means to achieve these goals. For example, the international community cannot agree on whether “innocent civilian” is a necessary or simply a sufficient element of the definition. It also cannot agree on who should be included in the category of “innocent civilians” or “diplomats” or “civilian installations” or “legitimate targets.”<sup>27</sup> The international community cannot agree on whether terrorism is illegal under all situations or whether it is sometimes permissible in order to achieve a legitimate goal. Some international organizations proclaim that the right to self-rule legitimizes the use of the most appropriate means, including terrorism, to achieve the goals of liberation and independence.<sup>28</sup>

#### A. United States' Definitions of Terrorism

In the United States there is a general confusion about what constitutes terrorism.<sup>29</sup> The United States has shifted its conception of terrorism as a

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24. *Id.* at 15. Bassiouni provides a long list of scholarly articles that attempt to define the term “terrorism.” See also John F. Murphy, *The Future of Multilateralism and Efforts to Combat International Terrorism*, 25 COL. J. TRANS'L L. 35 (1986) and Thomas M. Franck & Bert B. Lockwood, *Preliminary Thoughts Towards an International Convention on Terrorism*, 68 AM. J. INT'L L. 69, 70-72 (1974).

25. BASSIOUNI, *supra* note 1, at xxvi. In the Convention for the Suppression of the Financing of Terrorism, Article 2.1(b), U.N. Doc. A/54/109 (9 De. 1999), there is an indirect definition of terrorism proposed: “Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.” *Id.*

26. *Id.* at 15.

27. *Id.*

28. ALEXANDER, SWETNAM, & LEVINE, *supra* note 5, at 4: (“Between 1963 and 1965 the terrorist organization adopted the principles of revolutionary war because it was influenced by the successes of the independence war in Algeria and the Cuban revolution. Marxist theory was predominant in its ideology. ETA’s purpose was to change the state through an uprising of the people, the destruction of the oppressor state, and finally, the assault to power.” *Id.* at 6.

29. TERRORISM AND THE LAW 3 (Yonah Alexander and Edgar H. Brenner, eds., Transnational Publishers, Inc. 2001).

“crime” to terrorism as an “act of war.”<sup>30</sup> In the past, the United States classified international terrorism as a crime and applied legal means as the primary tool to fight it.<sup>31</sup> More recently, however, the United States has moved away from reactive counter-terrorism law enforcement methods towards more proactive techniques to fight international terrorism. This shift has occurred because the United States now perceives terrorist acts as acts of war.<sup>32</sup> In its war against terrorism, the United States now uses expanded law enforcement and intelligence agencies like the FBI and the CIA to fight terrorism, and these agencies have their own definitions of terrorism.

In the United States federal system, each state determines what constitutes an offense under its domestic criminal or penal code. States define terrorism generically as a crime. For example, the Arkansas Criminal Code provides that “a person commits the offense of terroristic[sic] threatening if, with the purpose of terrorizing another person, he threatens to cause death or serious physical injury or substantial property damage to another person.”<sup>33</sup>

The United States Congress has not been able to reach a consensus on a working definition of terrorism.<sup>34</sup> The executive branch has also not developed a coordinated position on the meaning of the term.<sup>35</sup> The absence of a generally-accepted definition of terrorism in the United States allows the government to craft variant or vague definitions which can result in an erosion of civil rights and the possible abuse of power by the state in the name of fighting terrorism and protecting national security.

### 1. United States 1996 Anti-Terrorism Act’s Definition of Terrorism

In the 1996 United States Antiterrorism Act and Effective Death Penalty Act,<sup>36</sup> the United States defines international terrorism as:

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30. Malvina Halberstam, *The US Right to Use Force in Response to the Attacks on the Pentagon and the World Trade Center*, 9 CARDOZO J. INT’L & COMP. L. 101 (2001), “Terrorism is a form of war, probably the most serious form of war used against the United States since World War II, if not ever.” See also Malvina Halberstam, *Terrorist Acts Against and on Board Ships*, 331 ISR. Y.B. HUM. RTS. (1987); Malvina Halberstam, *Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety*, 82 AM. J. INT’L L. 269 (1988); Malvina Halberstam, *The Evolution of the United Nations Position on Terrorism: From Exempting National Liberation Movements to Criminalizing Terrorism Whenever and By Whomever Committed* (COLUMBIA J. ON TRANSNATIONAL LAW, forthcoming 2003).

31. Tyler Raimo, Notes and Comments, *Winning at the Expense of Law: The Ramifications of Expanding Counter-Terrorism Law Enforcement Jurisdiction Overseas*, 14 AM. U. INT’L. L. REV. 1473, 74 (1999) [hereinafter Raimo].

32. *Id.*

33. ARK. CODE ANN. § 5-13-301 (Michie 2002).

34. Raimo, *supra* note 31, at 4.

35. *Id.*

36. Jason Binimow & Amy Bunk, Annotation, *Validity, Construction, and Operation of “Foreign Terrorist Organization” Provision of Anti-Terrorism and Effective Death Penalty Act (AEDPA)*, 8 U.S.C.A.

the unlawful use of violence against the United States, citizens of the United States or any other nation, outside the boundaries of the United States, apparently intended to intimidate or coerce a civilian population, influence government policy, or to affect the conduct of a government for political or social objectives.<sup>37</sup>

This definition includes the five basic elements outlined above, but does not list specific terrorist acts that can be classified as criminal.<sup>38</sup> The advantage of not listing specific acts as “terrorist acts” is that as new forms of technology are created, new forms of terrorist acts are likely to develop, and this law will still cover these news modalities. The disadvantage of not listing specific acts as “terrorist acts” is that the decision will be left up to policy makers to determine who is and who is not committing “terrorist acts.” A subjective definition leaves too much room for political bias to affect the decision.

Despite the presence of a definition of terrorism in the United States 1996 Antiterrorism Act, some civil libertarians have attacked this law, basing their objection on a dubious claim that the Act does not contain a definition of terrorism. A more valid claim might be that the United States Antiterrorism Act of 1996 does not explicitly designate specific acts that constitute terrorism. Civil libertarians have expressed a legitimate fear that the alleged absence of a definition will have the following deleterious result: “ ‘Terrorism’ is whatever the Secretary of States decides it is ...the Secretary of State may designate a foreign group as a terrorist organization if the Secretary of State finds that the group ‘engages in terrorist activity’ that threatens the security of United States nationals or the national security of the United States.”<sup>39</sup> The absence of a universally-accepted definition of terrorism and the failure to list specific acts as terrorist acts could cause this bad result to happen in other countries besides the United States.

## 2. The 2001 United and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (United States Patriot Act)<sup>40</sup>

The President of the United States has defined terrorism in a recent anti-terrorism act known as the United States Patriot Act. The definition is as

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§ 1189, 178 A.L.R. FED. 535 (2002). See also U.S. Antiterrorism Act of 1990, 18 U.S.C. § 2331 (1991).

37. RAIMO, *supra* note 31, at 4.

38. *Id.* at n. 46.

39. JAMES X. DEMPSEY & DAVID COLE, *TERRORISM & THE CONSTITUTION: SACRIFICING CIVIL LIBERTIES IN THE NAME OF NATIONAL SECURITY* 119 (First Amendment Foundation 1999) [hereinafter DEMPSEY]. See also Binimow & Bunk, *supra* note 36.

40. USA Patriot Act, Pub.L.No. 107-56, 115 Stat. 296-342 (2001).

follows: “For crimes to be defined as ‘terrorist acts’ the government must show that they were calculated to influence or affect the conduct of government by intimidation or coercion or to retaliate against government conduct.”

This definition requires insight into the mental state of the perpetrator, does not specifically identify the necessary element of violence, and reduces the purpose clause to achieving political goals (i.e., influencing government conduct).

Some civil libertarians have objected to the erosion of civil liberties in the 2001 United States Patriot Act because it authorizes executive detention on the mere suspicion that an immigrant has at some point engaged in a violent crime or provided humanitarian aid to a proscribed organization. This provision authorizes guilt by association and gives the government the power to deny entry to aliens for reasons that are arguably “pure speech” acts.<sup>41</sup>

### 3. The International Money Laundering Abatement and Financial Anti-Terrorism Act of 2001

The United States Financial Anti-Terrorism Act of 2001, which is the counterpart of the United Nations International Convention for the Suppression of the Financing of Terrorism (1999),<sup>42</sup> was signed into law on October 26, 2001, as Title III of the United States Patriot Act. This statute requires the Secretary of the Treasury to implement numerous changes under a strict timetable in order to follow the trail of those who finance terrorism. Due diligence measures require the identification of beneficial owners of bank accounts.<sup>43</sup>

The United States has designated a variation on the domestic form of “terrorism” called “global terrorism.” For example, President Bush signed Executive Order 13244 on September 23, 2001, requiring United States persons to block the assets of a new category of sanctioned parties, known as “specially designated global terrorists (SDGTS).” This category includes individuals, organizations, charities, and business entities. It includes United States persons, United States citizens and permanent residents, United States corporations, and their non-United States branches. The Office of Foreign Assets Control of the United States Department of the Treasury will implement the executive order. The President has threatened to freeze assets and transactions of banks and other financial institutions that refuse to share information about terrorists.<sup>44</sup> An

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41. DEMPSEY, *supra* note 39.

42. See International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, 39 I.L.M. 270 (2000).

43. Edward J. Krauland and Stephane Lagonico, *The New Counter-Money Laundering and Anti-Terrorist Financing Law*, INT’L L. NEWS 1 (2002).

44. Executive Order on Terrorist Financing, available at <http://www.whitehouse.gov/news/releases/>

action to freeze assets was also taken by the United Nations Security Council in Resolution 1267 on October 15, 1999, under Chapter VII of the United Nations Charter. Similar actions were taken against Osama bin Laden on December 19, 2000 pursuant to Security Council Resolution 1333.<sup>45</sup>

#### 4. FBI's Definition of Terrorism

Since 1980, the Federal Bureau of Investigation (FBI) has defined terrorism as: "the unlawful use of force or violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in the furtherance of political or social objectives."<sup>46</sup>

The FBI's definition does not include the basic five elements because it omits the necessary element of intent and limits the purpose to the achievement of "political or social objectives." Moreover, the definition does not specifically include or exclude state-sponsored terrorism. If the definition of terrorism does not include the element of intent to coerce or intimidate, then any criminal, like the Son of Sam, who kills just for the sake of bloodthirsty violence, could be deemed a terrorist.

#### 5. United States State Department's Definition of Terrorism

The United States Department of State defines the term "terrorism" as: "premeditated, politically motivated violence perpetrated against noncombatant targets by sub-national groups or clandestine agents, usually intended to influence an audience."<sup>47</sup>

This definition includes all five elements and the requisite intent, but it limits the purpose to "politically motivated" goals. The United States State Department's definition arguably excludes terrorism committed by a state because it lists only "sub-national groups or clandestine agents." However, if the term "agents" refers to "agents of the state," then state-sponsored terrorism is included in this definition.

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2001/09/20010924-1.html (last visited Jan. 31, 2003).

45. Peter D. Trooboff, *Antiterrorism Measures*, THE NAT'L L.J. A19 (2001).

46. United States Department of Justice, FBI, *Terrorism in the United States, 1988* (Terrorist Research and Analytical Center, Counter-terrorism Section, Criminal Investigative Division, December 31, 1988), at 34, cited in TERRORISM AND THE LAW, *supra* note 29, at 4, n 7.

47. 22 U.S.C. Section 2656f(d), cited in TERRORISM AND THE LAW, *supra* note 29, at 4.

## 6. United States State Department Definition of International Terrorism

The United States Department of State defines the term “international terrorism” as: “terrorism involving citizens of the territory of more than one country.”<sup>48</sup>

The requirement of more than one country in the United States State Department definition refers to both perpetrators and victims. The State Department also defines the term “terrorist group” to mean “any group practicing, or that has significant subgroups that practice international terrorism.”<sup>49</sup> Since international terrorism refers back to “terrorism,” which includes only sub-national groups or clandestine agents, arguably the United States State Department definition of international terrorism does not cover state-sponsored terrorist acts, unless the term “agents” refers to the state.

### B. English Definition of Terrorism

The United Kingdom has undergone an evolutionary process in the definition of terrorism. The English defined terrorism in the English Prevention of Terrorism (Temporary Provision) Act of 1984<sup>50</sup> and in the English Prevention of Terrorism (Temporary Provision) Act of 1989<sup>51</sup>: “Terrorism means the use of violence for political ends and includes any use of violence for the purpose of putting the public or any section of the public in fear.”

This definition is overly broad, does not include the element of intent, expansively includes “civilians” in the category of “any section of the public”(which could include combatants), and limits the goal to “political” benefit. The perpetration of violence without a requirement of intent could produce odd results. For example, demonstrators for a political cause that end up in a brawl might be deemed “terrorists.” An accidental killing by the police or by the army, which is hardly an act of terror, might fall within this definition of terrorism.<sup>52</sup>

In 1996 Lord Lloyd defined terrorism as: “The use of serious violence against persons or property or the threat to use such violence, to intimidate or coerce a government, the public, or any section of the public, in order to promote political, social, or ideological objectives.”<sup>53</sup>

48. *Id.*

49. *Id.* See 17 YONAH ALEXANDER & DONALD J. MUSCH, TERRORISM DOCUMENTS OF INTERNATIONAL AND LOCAL CONTROL, 170-71 (Oceana Publications, Inc. 1999).

50. English Prevention of Terrorism (Temporary Provision) Act of 1984, Section 14(1).

51. English Prevention of Terrorism Act of 1989, Section 20(1). available at [http://www.hmso.gov.uk/acts/acts1989/Ukpga\\_19890004\\_en\\_6.htm](http://www.hmso.gov.uk/acts/acts1989/Ukpga_19890004_en_6.htm) (last visited Feb. 1, 2003). See Gross, *supra* note 11 at fn. 20.

52. See Gross, *supra* note 11, at n. 20.

53. See Lord Lloyd, *Inquiry into Legislation Against Terrorism*, H.L., March 1996 (cited in

This definition remedies the earlier one that placed limitations on goals, modifies the act of violence by describing it as “serious violence,” maintains the element of “civilians” in the broad category of “any section of the public” but still falls short of including an element of intent.

In the 1999 Prevention of Terrorism Bill, the British government defined terrorism even more broadly to include expressions of extremism by groups such as the Animal Liberation Front that had only one issue as its cause. The more recent United Kingdom Terrorism Act of 2000<sup>54</sup> defines terrorism in Section 1(1):

Terrorism means the use or threat of action where the action falls within subsection (2) (i.e. violence, serious damage, endangering life, etc.) and (b) the use or threat is designed to influence the government or to intimidate the public or a section of the public, and (c) the use or threat is made for the purpose of advancing a political, religious or ideological cause.

Terrorist action is further defined in Section 1(2) as:

Acts involving serious violence against a person, serious damage to property, acts that endanger a person’s life, other than that of the person committing the action; acts that create a serious risk to the health or safety of the public or a section of the public, or acts designed seriously to interfere with or disrupt an electronic system.<sup>55</sup>

Thus, English law continues to omit the element of intent in its definition of terrorism. United Kingdom law specifically lists certain acts that are terrorist acts, like environmental terrorism, biological terrorism, and even computer hacking. English law on terrorism is extraterritorial and covers terrorist actions outside the United Kingdom and committed by governments of a country outside the United Kingdom.<sup>56</sup>

As a matter of comparative law, United States law and United Kingdom law are quite different with regard to the definition of terrorism. The United Kingdom Terrorism Act of 2000 provides a broad definition of the criminal act of terrorism (“serious violence against a person, serious damage to property, acts that endanger a person’s life”) and also specifically names certain terrorist acts (“acts that create a serious risk to the health or safety of the public ...or disrupt an electronic system”). In contrast, the United States 1996 Antiterrorism

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TERRORISM AND THE LAW, *supra* note 29, at 4-5).

54. United Kingdom Terrorism Act of 2000, Ch. 11 § 1(1) (July 20, 2000).

55. TERRORISM AND THE LAW, *supra* note 29, at 4-5.

56. *Id.* at 6.

Act includes the element of intent but softens the requirement by adding the adverb “apparently” to the element of intent (“apparently intended to intimidate or coerce a civilian population....”). The United States law on terrorism does not specifically list the acts that constitute terrorist criminal acts.

The English approach to terrorism may have odd but beneficial results. If Greenpeace were to threaten to disrupt a government computer system (e.g. in order to put pressure on Iraq for dealing with its Kurd population in an inhumane manner), the Greenpeace movement would be committing an act of terrorism.<sup>57</sup> As odd as this result may seem given its laudable purpose, in my view the identification of the Greenpeace organization’s act as a terrorist act would be correct in this instance because terrorist acts are not justified, even if they are committed for humanitarian purposes.

### C. French Definition of Terrorism

The French coined the term “terrorism” during the French revolution,<sup>58</sup> in the period that followed the fall of Robespierre in 1793-1794, under the infamous Reign of Terror.<sup>59</sup> The French define terrorism in the dictionary as “violence committed by an organization in order to create a climate of insecurity or in order to overthrow the established government.”<sup>60</sup> This definition eliminates the elements of intent and harm to innocent civilians and limits the purpose to the achievement of political goals. In France the term terrorism is also included under the definition of crimes against humanity. As a result of the famous Klaus Barbie case,<sup>61</sup> a new law defining crimes against humanity had to be adopted in the French Criminal Code. The term “terrorism” is also specifically defined in the French Criminal Code:<sup>62</sup>

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57. *Id.*

58. David B. Kopel and Joseph Olson, *Preventing a Reign of Terror: Civil Liberties Implications of Terrorism Legislation*, 21 OKLA. CITY U.L. REV. 247, 251 (1996). The term “terrorism” was conceived during the French Revolution when the government created a reign of terror to execute political opponents, requisition their property, and impose terror over the remainder of the population until they yielded to the government.

59. Le Petit Larousse (1991 ed.) and Le Petit Robert (1972 ed.).

60. *Id.*

61. See Leila Sadat Wexler, *The Interpretation of the Nuremberg Principles by the French Court of Cassation: From Touvier to Barbie and Back Again*, 32 COLUM. J. TRANSNAT’L L. 289 (1994). As a result of the French court decision in the Barbie case, the court found that to be guilty of a crime against humanity one had to intend to take part in carrying out a common plan by systematically committing inhumane acts and illegal persecutions in the name of a state practicing a hegemonic political ideology. Since Vichy, France could not be considered a hegemonic state, Touvier could not, as a matter of law, have committed a crime against humanity. Sadat points out that there is no requirement to prove a “hegemonic state.” As a result of this case, a new French Criminal Code defining crimes against humanity was adopted. However, nowhere in this definition is “terrorism” specifically mentioned.

62. French Criminal Code, Article 421-1 (Loi No. 96-647 du 22 juillet 1996 art. 1 Journal Officiel

“Acts are terrorist acts when they are intentionally committed by an individual entity or by a collective entity in order to seriously disturb law and order by intimidation or by terror.”<sup>63</sup>

Unlike the United States law, which does not list particular acts as terrorist acts, the French law specifically names and describes the acts that constitute terrorism. Article 421-1 of the French Criminal Code lists the following acts as terrorist acts:

Attempted murder, assault, kidnapping, hostage-taking on airplanes, ships, all means of transport, theft, extortion, destructions, and crimes committed during group combat, the production or ownership of weapons of destruction and explosives including the production, sale, import and export of explosives, the acquisition, ownership, transport of illegal explosive substances, the production, ownership, storage, or acquisition of biological or chemical weapons, and money laundering.

Article 421-2 of the French Criminal Code<sup>64</sup> continues the list of terrorist acts to include environmental terrorism: “...Placing in the air, on the ground, under the ground and in the water (including territorial water) any substance that would put the health of man and animals or the environment in danger.”

Article 421-2-1 of the French Criminal Code<sup>65</sup> makes it illegal to belong to or participate in a group that is formed for the purpose of planning one of the terrorist acts named above.

Article 421-2-2 of the French Criminal Code<sup>66</sup> makes it illegal for anyone to finance a terrorist organization by intentionally providing funds, collecting funds, or managing funds of any value whatsoever, or by giving advice for the purpose of financing terrorism, if that person knows that these funds are going to be used fully or partially for the purpose of committing terrorist acts, and whether or not the terrorist act actually occurs.

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du 23 juillet 1996) (Loi No.98-467 du 17 juin 1998 art. 84 Journal Officiel du 18 juin 1998) (Loi No. 2001-1062 du 15 novembre 2001 art. 33 Journal Officiel du 16 novembre 2001). See [http://222.legifrance.gouv.fr/html/frame\\_codes 1.htm](http://222.legifrance.gouv.fr/html/frame_codes 1.htm).

63. Translations of Article 421-1 and other pertinent Articles of the French Criminal Code are provided by Susan Tiefenbrun. The term “ordre public” refers to “public policy” or to “law and order.”

64. Article 421-2 of the French Criminal Code (Loi No 96-647 du 22 juillet 1996 art. 2 Journal Officiel du 23 juillet 1996).

65. Article 421-2-1 of the French Criminal Code (Loi No. 96-647 du 22 juillet 1996 art. 3 Journal Officiel du 23 juillet 1996).

66. Article 421-2-2 of the French Criminal Code (Loi No 2001-1062 du 15 novembre 2001 art. 33 Journal Officiel du 16 novembre 2001).

Article 421-3 of the French Criminal Code<sup>67</sup> sets forth penalties ranging from six years to life imprisonment for the commission of a terrorist act. Article 421-4 of the French Criminal Code<sup>68</sup> adds monetary penalties to the prison sentence. For example, if the terrorist is convicted to fifteen years of imprisonment, he or she might also be required to pay a monetary penalty of 225,000 Euros. If an alleged terrorist is convicted of killing one or several people, he or she would be sentenced to imprisonment for life and would be required to pay a penalty of 750,000 Euros. Article 421-5 of the French Criminal Code<sup>69</sup> provides that an alleged terrorist who is convicted for ten years of imprisonment must also pay a penalty of 225,000 Euros.

Article 422-1 of the French Criminal Code<sup>70</sup> provides an exemption for informants. Anyone who had attempted to commit a terrorist act and who, having informed the administrative and judicial authorities in advance of the commission of the act, facilitated the avoidance of the terrorist act and the identification of the other guilty parties will be immune from imprisonment and penalties.

Article 422-2 of the French Criminal Code permits the reduction of a prison sentence by half for anyone who committed a terrorist act or aided in a terrorist act if that person, by warning or informing the administrative or judiciary authorities, enabled the terrorist act to be avoided, or enabled anyone's death or permanent injury to be avoided, or provided the names of the other guilty parties. A life sentence will be reduced to twenty years for such assistance.

Article 422-5 of the French Criminal Code expressly requires that corporations ("personnes morales") engaging in terrorist activities pay monetary penalties. Article 422-6 of the French Criminal Code<sup>71</sup> includes confiscation of property as a penalty for any person or corporation engaging in terrorist activity.

Article 422-7 of the French Criminal Code<sup>72</sup> provides that any financial penalties imposed on the terrorists will be given to the victims' funds.

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67. Article 421-3 of the French Criminal Code (Loi No 96-647 du 22 juillet 1996 art. 4 Journal Officiel du 23 juillet 1996).

68. Article 421-4 of the French Criminal Code (Ordonnance No. 2000-916 du 19 septembre 2000 art. 3 Journal Officiel du 22 septembre 2000 en vigueur le 1er janvier 2002).

69. Article 421-5 of the French Criminal Code (Loi No. 96-647 du 22 juillet 1996 art. 5 Journal Officiel du 23 juillet 1996)(Loi No. 2001-1062 du 15 novembre 2001 art. 33 Journal Officiel du 16 novembre 2001)(Ordonnance No 2000-916 du 19 septembre 2000 art. 3 Journal Officiel du 22 septembre 2000 en vigueur le 1er janvier 2002).

70. Article 422-1 of the French Criminal Code.

71. Article 422-6 of the French Criminal Code (Loi No. 2001-1062 du 15 novembre 2001 art. 33 Journal Officiel du 16 novembre 2001).

72. Article 422-7 (Loi No. 2001-1062 du 15 novembre 2001 art. 33 Journal Officiel du 16 novembre 2001).

Article 434-2 of the French Criminal Code<sup>73</sup> imposes five years of imprisonment and a fine of 75,000 Euros on anyone attempting to harm the fundamental interests of the nation by a terrorist act.

Article 434-6 of the French Criminal Code<sup>74</sup> imposes a penalty of three years imprisonment and 45,000 Euros for anyone aiding a terrorist convicted of ten years of imprisonment. Aiding and abetting may be simply offering a terrorist lodging, subsidies, means of subsistence or any other form of assistance. The penalty for aiding and abetting can be increased to five years of imprisonment and 75,000 Euros. However, relatives of the terrorist (parents, brothers, sisters and their spouse) and the spouse of the terrorist or the person with whom the terrorist is living are not included in the list of aiders and abettors.

#### *D. European Nations' Definition of Terrorism*

The European Convention on the Suppression of Terrorism<sup>75</sup> was signed by 17 out of 19 member states of the Council of Europe in January 1977. According to this treaty, all states must treat assassination, hostage taking, bomb attacks, and hijacking (major terrorist offenses), as "common crimes" and can not refuse extradition. However, an escape clause was inserted into the European Convention on the Suppression of Terrorism permitting the contacting state to reserve the right to regard a certain offense as a political one. This escape clause would enable that state to withhold extradition. The member states of the European Union strengthened this provision by the European Convention on Extradition.<sup>76</sup>

#### *E. Canadian Definition of Terrorism*

Canada has recently made strong legislative proposals in an attempt to combat terrorism. The Canadian Anti-terrorism Act takes aim at terrorist groups, but also seeks to strike an appropriate balance between respecting Canadian values of fairness and respect for human rights while protecting Canadians and the global community from terrorism. This balance is

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73. Article 434-2 (Ordonnance No. 2000-916 du 19 septembre 2000 art. 3 Journal Officiel du 22 septembre 2000 en vigueur le 1<sup>er</sup> janvier 2002).

74. Article 434-6 (Loi No. 96-647 du 22 juillet 1996 art. 7 Journal Officiel du 23 juillet 1996) (Ordonnance No. 200-916 du 19 septembre 2000 art. 3 Journal Officiel du 22 septembre 2000 en vigueur le 1<sup>er</sup> janvier 2002).

75. European Convention on Suppression of Terrorism (Jan. 27, 1977), available at [http://www.ciaonet.org/cbr/cbr00/video/cbr\\_ctd/cbr\\_ctd\\_39.html](http://www.ciaonet.org/cbr/cbr00/video/cbr_ctd/cbr_ctd_39.html) (last visited Feb. 1, 2003).

76. PAUL WILKINSON, TERRORISM VERSUS DEMOCRACY: THE LIBERAL STATE RESPONSE 193 (Frank Cass 2001).

accomplished by providing what the Canadian Department of Justice refers to as checks and balances in the form of “clear definitions”<sup>77</sup> of terrorism.

Terrorist activities in Canada have always been treated as criminal offenses. Under the Canadian Criminal Code terrorists can be prosecuted for hijacking, murder, and other acts of violence. The Government of Canada has signed all 12 United Nations Conventions and Protocols<sup>78</sup> related to terrorism and has ratified 10, including those that protect against harming aircraft, civil aviation and airports, international shipping, internationally protected persons and diplomats, the safety of nuclear material, and the prevention of the taking of hostages and terrorist bombings. According to the Justice Department, Canada plans to ratify the remaining two United Nations counter-terrorism conventions dealing with the suppression of terrorist financing and the suppression of terrorist bombings. Canada also expects to ratify the Convention on the Safety of United Nations and Associated Personnel Convention (1994), ensuring the safety of United Nations personnel, including peacekeepers, from attacks against their person, official premises, private accommodation and modes of transport. Canada proposes to amend its Criminal Code to implement these United Nations Conventions and to establish provisions aimed at disabling and dismantling the activities of terrorist groups and those who support them.

Canadian law defines a “terrorist activity” in the Criminal Code as an action that takes place either within or outside of Canada that “is an offense under one of the ten United Nations anti-terrorism conventions and protocols; or is an action”: “taken or threatened for political, religious, or ideological purposes and threatens the public or national security by killing, seriously harming or endangering a person, substantial property damage that is likely to seriously harm people or by interfering with or disrupting an essential service, facility or system.”

This Canadian definition of terrorism does not explicitly include the words “violence,” but it is implied in the descriptive term “seriously harming or endangering.” While the element of “innocent civilians” is not designated with particularity, the broad term “a person” and “people” implies civilians.

The element of intent is also not specified but merely implied vaguely in the words “an action is taken.” Some insight into the element of intent implied in these words can be gleaned by looking at the list of specific acts of terrorism which Canadian law provides. Unlike the terrorism definition in United States law, the Canadian law lists specific terrorist acts, including the disruption of an

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77. See Report from Department of Justice, October 15, 2001, on “Highlights of Anti-Terrorism Act” from the Minister of Justice of Canada, available at [http://www.canada.justice.gc.ca/en/news/nr/2001/doc\\_27787.html](http://www.canada.justice.gc.ca/en/news/nr/2001/doc_27787.html) (last visited Feb. 1, 2003).

78. See *infra* Part III (F) for discussion of UN Definitions of Terrorism in Conventions, Protocols, and Resolutions.

essential service, facility or system. It is interesting to note that in an effort to balance civil rights with the protection of national security, Canadian law does not include under the definition of a terrorist act the disruption of an essential service during a lawful protest or a work strike, if the action does not intend to cause serious harm to persons. Therefore, the emphasis on intent as a condition of terrorist activity in this context strongly supports the view that the element of intent is implied in the definition of terrorism under Canadian law. The element of “fear, coercion or intimidation” is not specified explicitly but implied in the term “threatens.” The Canadian definition specifically designates the purpose of the terrorist action as political, religious, or ideological and omits “military” and “ethnic.”

Canadian law permits the designation of groups as “terrorist groups” if their activities meet the definition of terrorist activity.

The Canadian Criminal Code makes it a crime to knowingly collect or provide funds, either directly or indirectly, in order to carry out terrorist crimes. The maximum sentence for this offense would be ten years. It is a crime to knowingly participate in, contribute to or facilitate the activities of a terrorist group. Participation or contribution could include knowingly recruiting into the group new individuals for the purpose of enhancing the ability of the terrorist group to aid, abet, or commit indictable offences. The maximum sentence for the offense of participating or contributing would be ten years of imprisonment. The maximum sentence for facilitating would be fourteen years of imprisonment. Anyone who instructs another to carry out a terrorist act or an activity on behalf of a terrorist group (“leadership” offense) carries a maximum life sentence. Anyone knowingly harboring or concealing a terrorist would receive a maximum sentence of ten years.

A careful analysis of the Canadian definition of terrorism with respect to the five necessary elements shows that the definition is not as “clear” as the Canadian Department of Justice would have us believe. It is, however, more specific than United States law which does not list with particularity any acts of terrorism.

#### *F. United Nations’ Definitions of Terrorism*

The United Nations and other international organizations have failed for decades to agree on a common universal definition of terrorism. United Nations General Assembly and Security Council resolutions repeatedly affirm their determination to combat terrorism in all its forms “irrespective of motive, whenever and by whomever committed.”<sup>79</sup>

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79. G.A. Res. 1269, U.N. GAOR Security Council, 4053rd mtg. at 1, U.N. Doc. S/RES/1269 (1999). See G.A. Res. 1373, U.N. GAOR Security Council, 4385th mtg. at ¶¶ 7,8, U.N. Doc. S/RES/1373 (2001), which mandates that U.N. member states take measures to combat terrorism, and it creates a Counter

The United Nations' definition of terrorism contained in a critical 1991 General Assembly Resolution reflects the consensus of the General Assembly and resolves the issue of whether terrorism constitutes a legal response by a state to safeguard its undeniable right to self-determination and self-defense. The General Assembly Resolution "unequivocally condemns, as criminal and unjustifiable, all acts, methods and practices of terrorism, wherever and by whoever committed."<sup>80</sup>

The United Nations General Assembly's definition contained in its Resolution of 1991 has reappeared in several subsequent resolutions. This definition makes it clear that even though all people have certain rights—the right under racist regimes or alien domination to self-determination, the right to freedom and independence, and the right to struggle legitimately to achieve this end—notwithstanding these rights, peoples fighting against colonial domination may not resort to the acts proscribed in the antiterrorism conventions.<sup>81</sup>

In December 1999 the United Nations General Assembly Resolution 54/109<sup>82</sup> defined terrorism as:

Criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstances unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or other nature, that may be invoked to justify them.<sup>83</sup>

Kofi Annan further reinforced the United Nations' blanket prohibition of terrorism: "Terrorism strikes at the very heart of everything the United Nations stands for. It presents a global threat to democracy, the rule of law, human rights and stability ...the methods and practices of terrorism [are] criminal and unjustifiable—whenever commits them and wherever they occur."<sup>84</sup>

The coexistence of a proliferation of anti-terrorism conventions and the recent increase of terrorist acts in 2001 and 2002 indicates the legislative failure by the United Nations to deter acts of terrorism. The international community has been trying to define terrorism since 1937 when the League of Nations first

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Terrorism Committee to monitor the implementation of that resolution. See Jennifer Trahan, *Terrorism Conventions: Existing Gaps and Different Approaches*, 8 NEW ENG. J. INT'L & COMP. L. ANN. 215, 239 (2002).

80. Michael P. Scharf, Book Review: *Rebels With a Cause: The Minds and Morality of Political Offenders*, 96, A.J.I.L. 276, 278 (Jan. 2002).

81. *Id.* at 278.

82. UN GAOR, 54th Sess., 76th mtg. at art. 6, U.N. Doc. A/RES/54/109 (1999).

83. *Id.*

84. "International Instruments Related to the Prevention and Suppression of International Terrorism, (United Nations 2001), in Preface.

drafted the Convention for the Prevention and Punishment of Terrorism<sup>85</sup> that was signed by twenty-four nations but ratified ultimately only by one nation, India. The United Nations began drafting anti-terrorism conventions in the 1960s because of a high incidence of aircraft hijackings. The United Nations has continued to draft specific anti-terrorism conventions for the past sixty-two years to respond to different kinds of terrorist attacks against civilians, diplomats, civilian aircrafts, commercial maritime navigation and sea-based platforms involving the use of explosives and weapons of mass destruction.<sup>86</sup>

There are currently seventeen specialized international United Nations conventions on terrorism,<sup>87</sup> three international conventions on the control of

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85. LEAGUE OF NATIONS, Convention for the Prevention and Punishment of Terrorism, O.J. 19 at 23 (1938), League of Nations Doc. C. 546 (I). M.383 (1),1937,V(1938).

86. BASSIOUNI, *supra* note 1, at 1.

87. The U.N. Conventions on Terrorism, and one Draft Convention on the Suppression of Acts of Nuclear Terrorism are as follows:

Convention on the High Seas, Apr. 29, 1958, 13 U.S.T. 2312;

United Nations Convention on Law of the Sea, Dec. 10, 1982, 21 I.L.M. 1261;

Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, 27 I.L.M. 668;

Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, IMO. Doc. Sua/Con/16/ Rev.1; 27 I.L.M. 685 (10 Mar. 1988);

Convention on Offences and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, 2 I.L.M. 1042;

Convention for the Suppression of Unlawful Seizure of Aircrafts (Hijacking Convention), Dec. 16, 1970, 18 I.L.M. 1419;

Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (CWC Convention), Jan. 13, 1993, 32 I.L.M. 800;

Convention for the Suppression of the Financing of Terrorism [Terrorism Financing Convention]; U.N. Doc. a/54/109 (9 Dec. 1999) 133 (16 Dec. 1970);

Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Jan. 26, 1973, 10 I.L.M. 1151;

Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving Civil Aviation [Montreal Protocol], Jan. 12, 1988, 27 I.L.M. 627;

Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents [Diplomats Convention], Dec. 14, 1973, 13 I.L.M. 41;

Convention Against the Taking of Hostages [Hostage-Taking Convention], Dec. 17, 1979, 18 I.L.M. 1456;

Convention on the Safety of United Nations and Associated Personnel [U.N. Personnel Convention], available at <http://www.un.org/law/cod/safety.htm> (last visited Feb. 1, 2003);

Convention on the Marking of Plastic Explosives for the Purpose of Detection, Mar. 1, 1991, 30 I.L.M. 721;

Convention for the Suppression of Terrorist Bombings [Terrorist Bombing

weapons of mass destruction, two international conventions containing general United Nations provisions; two United Nations' Draft Comprehensive Conventions on terrorism; eight regional conventions against terrorism that have been developed by the Organization of American States, the Council of Europe, the South Asian Association for Regional Cooperation, the League of Arab States, the Organization of African Unity, the Commonwealth of Independent States and the Organization of the Islamic Conference.<sup>88</sup> There are also international humanitarian law conventions on the prevention and punishment of torture which is related to terrorist acts. In addition, there are twenty-one international crimes conventions whose commission involves terrorism. Thus, terrorism is included in many different laws prohibiting crimes and human rights violations and covered under international humanitarian law conventions. Nevertheless, the increase in international terrorism and the magnitude of the tragic events that have occurred in the years 2001 and 2002 bear witness to the failure of these international conventions to deter the crime.

What is needed is not more laws but better enforcement of existing norms. Due to the political nature of terrorism, states have not been able to reach an agreement on a comprehensive convention that would include all types of terrorist acts and that would be applicable to state-sponsored terrorism.<sup>89</sup> Moreover, since terrorism has been committed in the past by many state actors during the time of war or revolution, many states prefer to leave the definition of terrorism as vague as possible. More conventions will have to be adopted in the future to prevent against the threat or use of weapons of mass destruction, cyber-terrorism, and other new forms of terrorism.<sup>90</sup> The many existing terrorist laws would be more efficiently collected in one comprehensive multilateral convention. Nevertheless, the protections that are needed against terrorism will not be adequately provided simply by the creation of new norms. What is needed is the effective enforcement of existing laws, the adoption of one universally-accepted definition of terrorism, the agreement by all nations that

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Convention], U.N. Doc. A/Res/52/164 (9 Jan. 1998);

Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction [BWC Convention], Apr. 10, 1972, 11 I.L.M. 309;

Convention on the Physical Protection of Nuclear Material, IAEA Doc. C/225;1456 U.N.T.S. 101; 18 I.L.M. 1419 (3 Mar. 1980)

Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (CWC Convention), U.N. Doc. A/Res/47/39; 1974 U.N.T.S. 3; 32 I.L.M. 800 (13 Jan. 1993)

Draft Convention on the Suppression of Acts of Nuclear Terrorism [Nuclear Terrorism Convention], U.N. Doc. A/AC.252/L.3 (28 Jan. 1997).

88. BASSIOUNI, *supra* note 1, at xxviii.

89. *Id.* at xxv.

90. *Id.* at xxvi-xxvii.

terrorism must be prohibited irrespective of its motivation, and the application of the existing laws to state-sponsored terrorist acts.<sup>91</sup>

In December 1999, the United Nations General Assembly adopted by consensus the text of a draft of the International Convention for the Suppression of the Financing of Terrorism in which terrorism was indirectly defined in the same terms as the United Nations General Assembly Resolution 54/109 above:

Criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstances unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious, or other nature, that may be invoked to justify them.<sup>92</sup>

This definition in the United Nations Convention for the Suppression of the Financing of Terrorism does not specifically refer to acts of violence but refers, instead, to “criminal acts.” The definition arguably includes the element of targeting innocent civilians in the term “general public.” It includes the element of intent by the words “intended or calculated to provoke.” The requirement of coercion or intimidation is included in the term “terror.” However, this definition does not include state-sponsored actors. Moreover, the definition expands the motivation of terrorism to almost any possible cause, other than military. The definition does convey very clearly that the root cause or motivation of the terrorist act does not provide any justification whatsoever for terrorism. In other words, according to the United Nations, the ends do not justify the means.

### *G. Scholars' Attempts at Definition of Terrorism:*

One terrorism expert has produced a working definition of terrorism that still falls short of including all five elements: “Terrorism is defined as the calculated employment or the threat of violence by individuals, sub-national groups, and state actors to attain political, social, and economic objectives in the violation of law, intended to create an overwhelming fear in a target area greater than the victims attacked or threatened.”<sup>93</sup>

This definition does not specifically include the targeting of innocent civilians and limits the perpetrator’s motivations to illegal political, social, and

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91. WILKINSON, *supra* note 76, at 13: “The difference between state and factional terrorism is that the former is more lethal and may be antecedent to, and a contributory cause of, factional terrorism.... Guerrilla insurgents often use terrorism ...States conduct “terror” and substate organizations conduct “terrorism.” *Id.* at 19.

92. UN GAOR, 54th Sess., 76th mtg. at art. 6, U.N. Doc. A/RES/54/109 (1999).

93. TERRORISM AND THE LAW, *supra* note 29, at 7.

economic purposes. This definition opens the door for states to engage in terrorism by simply declaring that the purpose of the terrorist activity is justified by a legal political, social or economic goal.

Cherif Bassiouni, who is one of the world's leading experts in the field of international criminal law, has also proposed a definition of terrorism that specifically includes state-sponsored terrorism, which is conceived of not explicitly as a crime but rather as a "strategy," and which specifically excludes the intent of the perpetrator and the targeting of innocent civilians:

Terrorism is an ideologically-motivated strategy of internationally proscribed violence designed to inspire terror within a particular segment of a given society in order to achieve a power-outcome or to propagandize a claim or grievance, irrespective of whether its perpetrators are acting for and on behalf of themselves, or on behalf of a state.<sup>94</sup>

By referring to the "ends" as a "power outcome," a "claim" or a "grievance," Bassiouni's definition cleverly eliminates the consideration of the worthiness of the goals or the claimed justifications for terrorist acts. Arguably, the definition does not specifically include the element of intent. However, since the act is conceived of as a "strategy," which requires a mental process, the intent element is presumed. Moreover, the term "designed to inspire terror" evokes the pre-meditated intent of the actor. If the element of intent were absent from this definition, one could presumably be condemned as a "terrorist" if, in the course of a carefully conducted attack not specifically intended to produce fear and not specifically targeted at innocent civilians, the bomb blast did, in fact, cause fear in the population and cause the accidental injury of one or two civilians. The element of intent should be a necessary requirement in the definition of terrorism in order to permit justifiable attempts at self-defense not involving intentional terrorist acts.

Bassiouni's definition also does not include the targeting of "innocent civilians" but refers, instead, to "a particular segment of a given society." This broad designation of a particular segment of the population could include the military, especially if acts of "international terrorism" are claimed to arise in the context of a conventional war or armed conflict of an international or of a non-international character. Bassiouni specifically states that international terrorism arises in the following contexts:

1. Armed conflicts of an international character or of a non-international character:

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94. BASSIOUNI, *supra* note 1, at 16-17.

- a) conventional wars;
  - b) wars of national liberation;
  - c) against settler regimes, the intended power outcome is either the removal of the settlers or transfer of power from settler group to indigenous population;
  - d) against foreign occupation and/or colonial regimes.
2. International political conflicts, which may or may not involve armed conflict or non-international character.<sup>95</sup>

By excluding the “innocent civilian” element, Bassiouni’s definition of international terrorism would include an attack on combatants as well as non-combatants during an armed conflict. Arguably, an intentional attack on combatants during an armed conflict with the aim of inspiring fear (or terror) within the population of combatants should not be deemed “terrorism.” It is war, pure and simple. Bassiouni’s definition of international terrorism is brilliantly articulated, and would be enhanced if it included the element of “innocent civilians”<sup>96</sup> in peacetime as well as wartime. Bassiouni uses the word “terror” rather than fear to define “international terrorism,” thereby preserving the original denotation of the Latin word “terrore” (fear producing).

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95. *Id.* at 18.

96. Many scholars and journalists include “innocent civilians” in their definition of terrorism. See CALEB CARR, *THE LESSONS OF TERROR* (2002). Carr is a military historian who defines terrorism as “the contemporary name given to, and the modern permutation of, warfare, deliberately waged against civilians with the purpose of destroying their will to support either leaders or policies that the agents of such violence find objectionable.” (cited in Stephen Yagman, *Defining the Weapon of Terrorism: Frustrated People Without Another Method Resort to ‘Politico-Military’ Violence Instead*, L.A. DAILY J. 6 (Mar. 12, 2002). See also William Pfaff, *The Politics of Terrorism, or Civilians vs. Civilians*, INT’L HERALD TRIBUNE 8, (Jan. 10, 2002), at op ed page. Pfaff defines as “a form of politico-military combat that attacks civilians ...because terrorists can’t get at the political and military figures they really want to kill. Terrorism is the weapon that oppressed populations have always employed against those they consider their oppressors, usually because it is the only weapon available.” Note that Yagman objects to Carr’s insistence on “civilians:”

There have been numerous attacks on the military that surely can be characterized as terrorism: Japanese attack on Pearl Harbor, attack on American garrison at Kobat Towers in Saudi Arabia, the terrorist attack on the U.S.S. Cole, while it was moored in Yemen ...during France’s horrific repression in Algeria, France regularly and openly employed military terrorism against innocent civilians to make concessions to France. American military bombing of a mental hospital in Grenada in ...1984 was allegedly fought to free American medical students studying in Grenada. America’s bombing with Thatcher’s assistance, of Libyan Col Muammar Al al Qaddafi’s family’s home in Tripoli to get even for what Reagan claimed was Qaddafi’s terrorism in which one of Qaddafi’s small children was murdered; President Clinton’s bombing of a pharmaceutical factory in Sudan, where innocent night watchman was murdered.

These are all military terrorist acts conducted upon innocent civilians.

Bassiouni's definition of terrorism requires the act of violence to be "internationally proscribed." He carefully lists fourteen specific acts of terrorism (including, aggression, war crimes, crimes against humanity, genocide, apartheid, unlawful human experimentation; torture, slavery and slave-related practices; piracy, and unlawful acts against the safety of maritime navigation; kidnapping of diplomats and other internationally protected persons; taking civilian hostages; serious environmental damage; or serious violation of fundamental human rights.)<sup>97</sup> The advantage of this specific listing is the establishment of clarity and certainty in the law. However, the disadvantages are important to recognize. New forms of terrorist acts that develop with the advancement of technology, such as computer hacking, are not specifically included and may fall afoul of the definition. However, this list is very broad and seems to cover the unanticipated act of terrorism under such umbrella categories as "aggression," or "serious violation of fundamental human rights." Absent from this list, however, is "the use of weapons of mass destruction" which will necessarily, if not intentionally, inflict harm on "innocent civilians." Does that mean that the use of the A bomb during war time is a "terrorist" act because it necessarily resulted in the killing of innocent civilians? There may be a political reason to exclude the use of weapons of mass destruction from the list of proscribed terrorist acts.

#### IV. WHAT IS THE DIFFERENCE BETWEEN INTERNATIONAL AND DOMESTIC TERRORISM?

International terrorism is covered under the seventeen United Nations multilateral anti-terrorism conventions that provide legal measures, in a piecemeal and ad hoc fashion, against different manifestations of international terrorist conduct like hijacking, hostage-taking, and violence against diplomats or internationally protected persons. For a terrorist act to be deemed "international," the act of violence must also contain an international element, be directed against an internationally protected target or violate an international norm.<sup>98</sup> Internationally proscribed conduct that is applicable to terrorist violence includes aggression, war crimes, crimes against humanity, genocide, apartheid, unlawful human experimentation, torture, slavery, piracy,<sup>99</sup> hijacking and sabotage of aircraft, kidnapping of diplomats, taking civilian hostages, serious environmental damage or serious violations of fundamental human rights.<sup>100</sup>

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97. BASSIOUNI, *supra* note 1, at 18.

98. *Id.* at 17.

99. MARITIME TERRORISM AND INTERNATIONAL LAW 43 (Natalino Ronzitti, ed., Martinus Nijhoff Publishers 1990) (discussing the legal relationship between piracy and maritime terrorism).

100. BASSIOUNI, *supra* note 1, at 18.

Domestic terrorism is harder to define than international terrorism because domestic terrorism is usually included in state criminal statutes under acts committed by common criminals.<sup>101</sup> Some states define terrorism as a crime, others define it as an “act of war,”<sup>102</sup> and most states consider terrorism to be a method used to commit other more specifically defined crimes against the person or against property.

International terrorism, like domestic terrorism, is a method used to perpetrate other crimes, and as such international terrorism is arguably included under the category of other international crimes but only if the five necessary structural elements of terrorism are present. Typical tools of modern international terrorism are explosive and incendiary bombings, shooting attacks and assassinations, hostage-taking and kidnapping, hijacking, narco-terrorism,<sup>103</sup> cyber-terrorism information warfare,<sup>104</sup> and the use of nuclear, chemical, or bacteriological weapons.<sup>105</sup> Terrorists can be convicted of committing war crimes, crimes against humanity, genocide, torture, and even piracy (i.e. the Achille Lauro incident), if they committed these crimes by using terrorist methods. Thus, international terrorism is an elusive concept that overlaps with other international crimes but which can be included in the definitions of these other crimes, if the five necessary elements are present, like the intentional use or threat of violence for political, religious or ideological purposes resulting in the harm of innocent civilians.

#### V. TERRORISM IS NOT ONLY A CRIME BUT A METHOD TO ACHIEVE SELF-DETERMINATION

One of the underlying causes of the resurgence of terrorism in the 1960s and 1970s is the development of social movements dedicated to achieving self-determination or the revolutionary transformation of the socio-economic order and the concomitant belief by these groups that terrorism is an effective and legitimate weapon to realize their goals.<sup>106</sup> In the 1990s in the course of tragic ethnic wars in the Balkans and in Rwanda, mass terror was used as a weapon on both sides of the respective conflicts, requiring the establishment of ad hoc

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101. *Id.* at 19.

102. Raimo, *supra* note 31, at 1481 (discussing the shift in US away from reactive counter-terrorism law enforcement methods and towards more pro-active techniques to fight international terrorism because the US now perceives of terrorist acts as acts of war).

103. DAVIDS, *supra* note 6, at 2.

104. See CYBER TERRORISM AND INFORMATION WARFARE: THREATS AND RESPONSES (Yonah Alexander and Michael S. Swetnam, eds., Transnational Publishers, Inc. 2001).

105. WILKINSON, *supra* note 76, at 13. See also SUPERTERRORISM: BIOLOGICAL, CHEMICAL, AND NUCLEAR (Yonah Alexander and Milton Hoenig, eds. 2001).

106. WILKINSON, *supra* note 76, at 13.

international tribunals,<sup>107</sup> and later an international criminal court,<sup>108</sup> to bring to justice the perpetrators of genocide, crimes against humanity and war crimes.<sup>109</sup>

Terrorism *per se* is not listed as a crime under the subject matter jurisdiction of the *ad hoc* tribunals.<sup>110</sup> In the Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY), Article 5 defines crimes against humanity and includes in this category “crimes committed in armed conflict, whether international or internal in character, and directed against any civilian population, including murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecutions on political, racial and religious grounds and other inhumane acts.” Even though this description of crimes against humanity contains all five elements of the definition of terrorism, it fails to name or include “terrorism” as a “crime against humanity.”

Similarly, the Statute of the ICTY at Art. 3 defines war crimes or “violations of laws or customs of war,” but it does not include the term terrorism *per se*. Nevertheless, under the definition of war crimes, the Statute of the ICTY proscribes the “employment of poisonous weapons, the wanton destruction of cities, towns or villages, or devastation not justified by military necessity; an attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings; and the seizure or destruction or willful damage done to institutions dedicated to religions, charity, and education, the arts and sciences, historic monuments and works of art and science.” This definition of war crimes also contains most of the elements of terrorism (use of violence, with intent, to harm innocent civilians (i.e. “undefended towns”), but does not include the necessary elements of fear, intimidation and coercion for the purpose of accomplishing a political (military, ethnic, ideological or religious goal). Moreover, in order for terrorism to be a war crime, the terrorist act has to be perpetrated during an armed conflict. If these last two elements plus the requirement of an armed conflict were included in the act constituting a war crime, that war crime as defined above could also be deemed a terrorist act.

The Statute of the ICTY at Art. 4 defines “Genocide” as “acts committed with intent to destroy in whole or in part, a national, ethnical, racial or religious group.” The definition of genocide does not specifically include “terrorism” *per se*. Nevertheless, if a genocidal act were perpetrated with the intent of furthering a cause by intentionally inspiring fear through violence committed

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107. Secretary-General’s Report on Aspects of Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia, May 3, 1993, 32 I.L.M. 1159; Establishing the International Tribunal for Rowanda, Nov. 8, 1994, 33 I.L.M. 1598.

108. Rome Statute of the International Criminal Court, art. 1, *available at* [http://www.un.org/law/icc/statute/99\\_corr/1.htm](http://www.un.org/law/icc/statute/99_corr/1.htm) (last visited Feb. 1, 2003).

109. WILKINSON, *supra* note 76, at 48.

110. *See* Statute of the ICTY, *supra* note 107, at Art. 5 defining “Crimes Against Humanity.”

on an innocent civilian population, such a genocidal act would necessarily be a terrorist act.

Similarly, the Rome Statute of the International Criminal Court<sup>111</sup> has long lists of elements of different crimes such as crimes of aggression, war crimes, crimes against humanity, and genocide, but terrorism per se is not specifically listed as a crime. Nevertheless, many of the criminal acts listed that can cause terror among the civilian population could arguably be included under the categories of aggression, war crimes, crimes against humanity and genocide, such as enforced disappearance of persons, rape, the crime of apartheid, and other inhumane acts of a similar character intentionally causing great suffering, or serious injury to the body or to mental or physical health.<sup>112</sup>

The implication of conceiving terrorism as a method (strategy, tool) rather than as a crime is that terrorism can be included in other international crimes of aggression, war crimes, crimes against humanity, genocide and piracy, or torture, if the acts of terror and violence also fulfill the five structural elements of the definition of terrorism.

## VI. INTERNATIONAL CRIMES ARE ALSO METHODS OF COMMITTING TERRORISM

Just as terrorism is both a crime and a method to perpetrate other crimes, the reverse is true--international crimes of genocide, war crimes, and crimes against humanity can, under the right circumstances, also be considered methods of terrorism intentionally designed to intimidate and cause fear in a given civilian population.<sup>113</sup> The right circumstances constitute the presence of

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111. Rome Statute of the International Criminal Court, *supra* note 108, and Preparatory Commission on the International Criminal Court, Finalized Draft of the Elements of Crimes, U.N. Doc PCNICC/2000/1/Add.2 (2000), available at <http://www1.umn.edu/humanrts/instreet/iccelementsofcrimes.html> (last visited Feb. 1, 2003).

112. Rome Statute of the International Criminal Court, *supra* note 108, at Article 7.

113. BASSIOUNI, *supra* note 1, at xxvi.:

International crimes such as genocide, crimes against humanity, war crimes, and torture are strategies of terror violence designed to instill terror within a given civilian population. How else could one describe the policies and practices carried out in Cambodia, the former Yugoslavia, Rwanda, and Sierra Leone, to name only a few of the most egregious examples. However, these international crimes are a result of state policy and which are committed by state officials, i.e. the military, the police, other forces under the command of public officials. The commission of these crimes depend on the availability of state resources, financial and otherwise. Yet, these crimes are not considered part of what is commonly referred to as "terrorism" by the international community. The reason, as mentioned above, is that states, which are the regulators, have seen fit to not include themselves in the context of "terrorism." Nevertheless, international crimes committed by states which constitute terror-violence should be deemed part of that category. *Id.*

the five structural elements of terrorism. Unless a genocidal act includes acts of violence, the intent to inspire fear in the civilian population for the purpose of accomplishing a political cause, the genocidal act will not be a terrorist act. Similarly, rape,<sup>114</sup> torture, piracy, and other crimes can also be deemed methods of accomplishing terrorism only if the five elements of terrorism are present. Arguably, even if the subject matter jurisdiction of the ad hoc tribunals does not specifically cover “terrorism” under the list of triable crimes, terrorism as a method may, nevertheless, be included under the subject matter jurisdiction of the tribunal because it provides the means to perpetrate the specifically delineated crimes.<sup>115</sup> This is also true of the International Criminal Court. But without a consensus about what terrorism means and without a commonality of values, some states prefer to keep the definition of terrorism in multilateral and domestic legislation as vague and ambiguous as possible.<sup>116</sup> This will not prove to be an effective legal response to terrorism. Indeterminacy in the law, brought about by a vague or nonexistent definition of terrorism, can result in the multiplicity of interpretation and the instability of the legal system.

#### VII. IF TERRORISM IS NOT ONLY A CRIME BUT A METHOD OR AN ACT OF WAR, THEN WHAT COURT SHOULD TRY INTERNATIONAL TERRORISTS?

Should international terrorists be tried in a military court, a United States District Court, an ad hoc international tribunal or a permanent international criminal court?<sup>117</sup> These questions are left open by the failure of the international community to define terrorism or to include it as a crime in the jurisdiction of existing international courts. If terrorism is not listed specifically as a crime in the statutes of either of the two ad hoc tribunals (ICTY and ICTR) or in the statute of the new International Criminal Court, the question remains as to where international terrorists can be tried.

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114. CATHARINE A. MACKINNON, *SEX EQUALITY: RAPE LAW 906* (Foundation Press 2001): “Rape in conflict is also used as a weapon to terrorize and degrade a particular community and to achieve a specific political end. In these situations, gender intersects with other aspects of a woman’s identity such as ethnicity, religion, social class or political affiliation. The humiliation of pain and terror inflicted by the rapist is meant to degrade not just the individual woman but also to strip the humanity from the larger group of which she is a part.” *Id.*

115. See Michael P. Scharf, *Editorial: The Case for an International Trial of the Al-Qaeda and Taliban Perpetrators of the 9/11 Attacks*, Newsletter of the Interest Group on International Organizations of the ASIL, at 12-15 (Spring 2002) (discussing the advantages and disadvantages of expanding the jurisdiction of the ICTY to cover terrorist acts committed on Sept. 11, 2002 in the United States and to include them under war crimes, crimes against humanity and genocide by simply amending the temporal and geographic jurisdictional limitation).

116. BASSIOUNI, *supra* note 1, at xxvi.

117. See Jennifer Trahan, *Trying A Bin Laden and Others: Evaluating the Options for Terrorist Trials*, 24, 3 HOUS. J. OF INT’L L. 475 (2002).

In order to try terrorists in either of the two ad hoc international tribunals, the temporal and geographic limitations imposed on the subject matter jurisdiction of these tribunals would have to be expanded by amendment, and terrorism would have to be presumptively included under the definitions of crimes.

Even if the International Criminal Court included terrorist acts as crimes, the terrorist act of September 11, 2001 committed in the United States could not be adjudicated there for at least two good reasons. The United States has not ratified the Rome Treaty establishing the International Criminal Court, and the terrorist act occurred before the actual establishment of the International Criminal Court.

Trying terrorists in the United States District Courts may be a viable solution, but this solution is not without problems including the potential for undesirable disclosure of sensitive evidence that might endanger national security; the security of judges and witnesses; and the fairness of trying foreigners in an American court where a heinous terrorist act is committed on United States soil.

It is beyond the scope of this article to analyze the relative merits of adjudicating international terrorist suits in each of these tribunals, but it is noteworthy to recognize that the problem of where to try terrorists has arisen primarily because of the failure of the international community to establish a universally-accepted definition of terrorism and the failure of the courts to recognize that terrorism is actually included in other defined international crimes.

#### VIII. THE PARADOXES INHERENT IN THE MEANING OF TERRORISM

The main problem in defining the term "terrorism" is not its overlap with other crimes but the paradox inherent in the meaning of the word. President Ronald Reagan has coined this paradox in the proverbial statement: "One man's terrorism is another man's freedom fighter" or the poetic parallelism articulated by the international law scholar Cherif Bassiouni: "What is terrorism to some is heroism to others."<sup>118</sup> The paradox is related to the distinction between illegal terrorism and legal revolutionary violence. The antinomy in the term "terrorism" is based on the coexistence of conflicting rights of self-defense and self-determination, on the one hand, and the fundamental right to the protection of human rights, on the other hand. Another manifestation of this paradox is the state's obligation to protect the national security of its people, which, if zealously enforced through overly broad legislation, may be in direct conflict with the state's obligation to protect its citizens' civil liberties.

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118. Bassiouni, *supra* note 1, at 15.

Article 51 of the United Nations Charter provides the right to individual or collective self-defense if an armed attack occurs against a member of the United Nations. Moreover, every nation has a right to self-determination. In 1979 Algeria, Libya and a few other countries wanted the United Nations to make an exception in one of its multilateral conventions<sup>119</sup> against hostage taking for national liberation movements<sup>120</sup> in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination. However, the Western countries rejected this demand on the grounds that even armies may not take civilian hostages because such an act would violate the Geneva Convention. There must be a balance established between the right of a democracy to defend itself against terrorism and the preservation of civil liberties and human rights.<sup>121</sup> The difficulty to achieve this delicate balance has resulted in the proliferation of global treaties and declarations aimed at combating international terrorism and the abysmal failure by the international community to define terrorism and to prohibit state-sponsored terrorist acts. The time has come to take a more active approach to defining the term terrorism.

## IX. CONCLUSION

The semiotic approach to defining terrorism has uncovered five basic structural elements which must be present in order to identify a violent act as terrorism. The paradoxical nature of the concept of terrorism renders the establishment of an acceptable definition difficult but not much different from the work that judges must do in the typical "hard case," as defined by Ronald Dworkin.<sup>122</sup> Balance is the essence of the law iconographically represented by the scales of justice. Judges understand the sensitive nature of prioritizing two conflicting rights of equal importance. Who is to say that the right of self-determination or the right of self-defense against an armed attack is more important than the right of civilians to live in a safe environment, to enjoy their own fundamental human rights and basic civil liberties?

It is possible to de-center this paradox and to reduce the definitional difficulty by proposing a categorical prohibition on the use of terrorism, no matter how lofty the purpose may be, no matter how worthy the political or

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119. International Convention Against the Taking of Hostages, U.N. Doc. A/Res/34/146(1979), Article 12.

120. See Malvina Halberstam, *How Serious Are We About Prohibiting International Terrorism and Punishing Terrorists?* 11, 1 THE JEWISH LAW (1996) (discussing the exception for national liberation movements in Article 12 of the International Convention Against the Taking of Hostages, U.N. Doc. A/Res/34/146 (1979)).

121. See Gross, *supra* note 11, at 89.

122. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 81-130 (1977).

ideological cause may seem to those oppressed by tyrannical regimes. There is no justification for terrorism. It is not defensible to argue that terrorism needs to be viewed from a political context and that the “motivation” of the actor and the sociological context in which the act occurs must be taken into consideration. Such an approach would legitimize terrorist acts by claiming that the ends justify the means. The Macchiavelian principle that the ends justify the means simply does not comport with the generally accepted principles of the rule of law.

# TAXONOMIES OF INTERNATIONAL PEACEKEEPING: AN ALTERNATIVE NARRATIVE

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The taxonomies of “peacekeeping” utilized within academic and policy discourse provide a framework for comparison across (usually United Nations-conducted) peace operations. One point of distinction often made between different operations is the level of complexity.<sup>1</sup> Whether operations are “basic” or “complex,” “simple” or “multifunctional” is usually determined according to size, scope of mandate, and the presence or absence of a civilian component in addition to a military component. Many commentators adopt “generational” language to denote these different levels of complexity. In this short article, I consider the particular narrative device of peacekeeping “generations” in the light of the long history of one particular type of international peace operation: granting administrative prerogatives over territory to international organizations, what I term “international territorial administration.”<sup>2</sup> I argue that the generational taxonomy is unhelpful in its own terms, and problematic on a normative level.

The dichotomy between simple and complex peace operations is often described in terms of old versus new<sup>3</sup> or first generation versus second

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1. Another basis for classification is, of course, the relationship of the operation to the pursuit of peace: “peace keeping” “peace building” etc.

2. Ralph Wilde, *From Danzig to East Timor and Beyond: the Role of International Territorial Administration*, 95 AM J. INT’L L. 583, 584 (2001).

3. E.g., THE EVOLUTION OF UN PEACEKEEPING: CASE STUDIES AND COMPARATIVE ANALYSIS 9 (William J. Durch ed., 1994); Oliver Ramsbotham & Tom Woodhouse, *Encyclopedia of Int’l Peacekeeping Operations* (1999); STEVE RATNER, *THE NEW UN PEACEKEEPING, BUILDING PEACE IN LANDS OF CONFLICT AFTER THE COLD WAR* (1995).

generation,<sup>4</sup> suggesting that changes in the complexity of peace missions have occurred in a linear fashion, with missions becoming progressively more complex. Such a suggestion is no accident. For many commentators, there was a sea change in the nature of peacekeeping from the late 1980s onwards; a “turning point,” in the words of Jarat Chopra.<sup>5</sup> With the backdrop of the supposed post-cold war internationalist revival, and the emergence of “new” types of conflict that were both international and internal in character, there was a dramatic growth in complex United Nations peace operations starting with UNTAG in Namibia in 1989.<sup>6</sup> Accordingly, there was a paradigm shift from “first generation” to “second generation,” from “old” to “new” peacekeeping.<sup>7</sup> With the Kosovo and East Timor administration projects—Kosovo has been administered by the United Nations Interim Administration Mission in Kosovo (UNMIK) since 1999, and East Timor was administered by the United Nations Transitional Administration in East Timor (UNTAET) from the end of 1999 until May 2002—it has been suggested that complexity has reached such a level that we can now talk about a further “generation” of peacekeeping. Christine Gray remarks that these two projects could be described as “third generation” peacekeeping.<sup>8</sup> Boris Kondoch, citing W. Kühn, considers “peace enforcement” missions such as UNOSOM II in Somalia “third generation” peacekeeping and UNTAET and UNMIK, because of their complexity, examples of “fourth generation” peacekeeping.<sup>9</sup> Thus, the language of “generations” and the

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4. See, e.g., Yasusi Akashi, *The Politics of UN Peacekeeping from Cambodia to Yugoslavia*, in UNITED NATIONS PEACEKEEPING OPERATIONS: AD HOC MISSIONS, PERMANENT ENGAGEMENT 149 (Ramesh Thakur & Albrecht Schnabel eds., 2001); Jarat Chopra, Peace Maintenance: A Concept for collective Pol. Authority, Address Before the American Soc’y of Int’l L. Proc. (Apr. 5-8, 1995), in *UN Peacekeeping: An Early Reckoning of the Second Generation*, 89 AM. SOC’L INT’L L. PROC. 275, 280 (1995); Michael Doyle, Remarks at the American Soc’y of Int’l L. Proc. (Apr. 5-8, 1995), in *UN Peacekeeping: An Early Reckoning of the Second Generation*, 89 AM. SOC’L INT’L L. PROC. 275 (1995); Christine Gray, INTERNATIONAL LAW AND THE USE OF FORCE 159 (2000); Margaret P. Karns & Karen A. Mingst, *Peacekeeping and the Changing Role of the United Nations: Four Dilemmas*, in UNITED NATIONS PEACEKEEPING OPERATIONS: AD HOC MISSIONS, PERMANENT ENGAGEMENT 215, 230 (Ramesh Thakur & Albrecht Schnabel eds., 2001); RAMSBOTHAM & WOODHOUSE, *supra* note 3, at 93, 218-19; RATNER, *supra* note 3; Boris Kondoch, *The United Nations Admin. of East Timor*, 6 J. CONFLICT & SEC. L. 245, 246 (2001).

5. Chopra, *supra* note 4, at 280.

6. On the supposed change in the nature of conflict since 1988, see, for example, Mary Kaldor, NEW & OLD WARS (1999) On UN peace operations since 1988, and the increase in them, see, for example, THE EVOLUTION OF UN PEACEKEEPING, *supra* note 3, at 9-12; Ramsbotham & Woodhouse, *supra* note 3 at xiii-xix. Many scholars assert a causal relationship between the post-1988 upsurge in peacekeeping and the end of the cold war. See, for example, Ratner, *supra* note 3 at 14-16. For a critique of this thesis, see, for example, ALAN JAMES, PEACEKEEPING IN INTERNATIONAL POLITICS, 362 - 66 (1990).

7. In a complementary development in academic discourse, Mary Kaldor describes a paradigmatic shift in the nature of armed conflict, from “old wars” to “new wars.” Kaldor, *supra* note 6.

8. Gray, *supra* note 4.

9. Kondoch, *supra* note 4. Most scholars consider “peace enforcement” missions as a special type

“old/new” dichotomy presents the history of international peace operations as a progressive evolution through successive generations of ever-increasing complexity. How does this presentation stand up to scrutiny?

In the first place, the history of international territorial administration suggests that describing the relative complexity of peace operations so as to denote a progressive increase in complexity over time as between individual missions is in its own terms mistaken. Elsewhere, I have described this history in the following terms:

International organizations first exercised territorial administration in the Free City of Danzig, where the League of Nations enjoyed certain governmental prerogatives from 1920 to 1939. In addition, the League administered the German Saar Basin (the Saar) between 1920 and 1935, and the Colombian town and district of Leticia (Leticia) from 1933 to 1934. It also appointed the president of the Upper Silesia Mixed Commission in 1922 and the chair of the Memel Harbor board in Lithuania in 1924. Immediately after the Second World War, Germany and Austria were administered by the Allies. With the creation of the United Nations, the new international organization was authorized in 1947 to exercise certain governmental powers in what would have become the Free Territory of Trieste, but the free territory plan was never realized.

The United Nations first exercised territorial administration in the 1960s, asserting various administrative prerogatives in the Congo between 1960 and 1964, and administering West Irian for seven months between 1962 and 1963. In 1967, the United Nations Council for what was then South West Africa (later Namibia) was established to administer the territory, but South Africa prevented the council from taking up this role. Over twenty years later, in 1991 the United Nations was authorized to perform administrative functions in Western Sahara and Cambodia; although these functions were exercised in Cambodia from 1991 to 1992, they are yet to be fully performed in Western Sahara. From 1994 to 1996, a different institution—the EUAM [the European Union Administration in Mostar]—administered the city of Mostar in Bosnia and Herzegovina. Then, as part of the Dayton process, the territory of Eastern Slavonia, Baranja, and Western Sirmium (Eastern Slavonia) in Croatia was placed under UN administration from 1996 to 1998. In some of the aforementioned missions, and in others as well, the mandates of international organizations have called for the performance of two particular administrative functions: controlling or conducting some form of territory-wide popular consultation and/or ‘community

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of “second generation” peacekeeping, rather than a separate “generation” of the peacekeeping paradigm. See, e.g., *UN Peacekeeping: An Early Reckoning of the Second Generation*, *supra* note 4.

building' through the creation of local institutions. In addition to the authorized projects, other ITA projects were proposed but never agreed upon for Fiume in Dalmatia (in 1919), Memel (between 1921 and 1923), Alexandretta in Syria (in 1937), Jerusalem (since 1947) and Sarajevo (in 1994).<sup>10</sup>

In addition to the plenary administration project in Kosovo, another mission, involving partial administration by the Office of the High Representative, has taken place in Bosnia and Herzegovina since the start of 1996.<sup>11</sup>

Whether one is focusing on plenary administration or partial administration, international organizations generally or the United Nations in particular, the above history suggests that the complex international peace operations from 1988 onwards are, in terms of their complexity, nothing new. The first complex peace operations involving plenary international territorial administration were the Saar in 1920 (in the League era) and West Irian in 1962 – 63 (in the United Nations era).<sup>12</sup> The first such missions involving partial administration were Danzig in 1920 (in the League era) and the Congo in 1960 – 64 (in the United Nations era).<sup>13</sup> Insofar as the Kosovo and East Timor missions involve plenary administration exercised by the United Nations, they are not unprecedented but follow on from the West Irian and Eastern Slavonia missions. If the focus is broadened to international organizations generally, the precedents run back even further to the start of the League of Nations in 1920.

Some of the "generational" commentators focus on the "state building" aspect of "post conflict" peace operations. Exercising territorial prerogatives is one thing, but the use of such prerogatives with a "nation building" purpose is a relatively new phenomenon. As far as the "nation building" purpose is concerned, the United Nations mission in the Congo (ONUC) in the 1960s is widely regarded as the first United Nations operation to engage in "peace enforcement."<sup>14</sup> The equally pioneering "nation building" administrative activities of that same mission, exercising administration to enable the operation of certain government institutions, are rarely acknowledged.<sup>15</sup> Yet once the full scope of ONUC's operation is borne in mind, it becomes just as difficult to see a clear distinction between post-and pre-1998 operations on "state building"

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10. Wilde, *supra* note 2, at 586 (footnote omitted).

11. *Id.* at 584.

12. *Id.* at 583.

13. *Id.*

14. E.g., Roy S. Lee, *United Nations Peacekeeping: Developments and Prospects*, 28 *Cornell Int'l L. S.* 619, 624 (1995); THE EVOLUTION OF PEACEKEEPING, *supra* note 3, at 8.

15. See RATNER, *supra* note 3, at 105-09.

grounds as it is on “enforcement” grounds.<sup>16</sup> Certainly, the next operations of these types did not take place until the post-1998 era (Namibia in 1989 for “state building” and UNOSOM II in 1991 for “peace enforcement”). The point is that the enterprise that lay behind these later operations was not unprecedented.

“Nation building” is not, then, an exclusively post-1998 phenomenon. But a qualitative distinction can perhaps be made between UNMIK and UNTAET, on the one hand, and the “nation building” missions that came before them, on the other. Arguably, the degree to which these two missions have engaged in the reconstruction of infrastructure and governmental institutions is unprecedented at least if one discounts the Allied administration in Germany after the Second World War.<sup>17</sup> A question remains, however, whether the scope of a “state building” mandate should be the primary indicator, in addition to the breadth of the administrative prerogatives exercised, by which complexity and distinctiveness are measured. For example, what of plenary administration concerned with territorial disposition? Is the United Nations administration in Eastern Slavonia, from 1996-98, which necessitated the eventual transfer of a population to authorities from whom local militias had hitherto sought independence, necessarily less complex than the two and a half-year East Timor mission, where, infrastructural problems notwithstanding, the eventual outcome for the territory was overwhelmingly supported?<sup>18</sup> Similarly, what of administration missions aimed at facilitating a particularly controversial policy? Stepping back to the League-era, can it really be said that the three-year long mission in East Timor is more complex than the fifteen-year mission in the Saar? The League was involved in administering a territory bitterly contested between France and Germany, enabling a key component of Germany’s much-resented reparations program to proceed, before organizing what was in effect a self-determination referendum and then implementing the result of that referendum.<sup>19</sup>

To be fair, neither Agenda for Peace, nor Agenda for Peace Supplement,<sup>20</sup> nor the Brahimi Report seem particularly interested in a progressivist presentation of the complexity of international peace operations, even though,

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16. Like “state building,” “peace enforcement” is often presented as a “new” phenomenon through the use of generational language, whether second or third.

17. Wilde, *supra* note 2, at 592 text accompanying n. 47. See also RAMSBOTHAM & WOODHOUSE, *supra* note 3 at xx (remarking that “[t]he most extensive peace-building effort in history took place in Europe and Asia in the post-World War II era when the US and its allies assisted nations in those continents devastated by a decade of war”).

18. Wilde, *supra* note 2 at 589.

19. *Id.*

20. *Report of the Secretary-General on the work of the Organization*, Supplement to an Agenda for Peace: Position of the Secretary-General on the occasion of the Fiftieth Anniversary of the United Nations paragraph 11, U.N. Doc. A/50/60-S/1995/1(1995).

by virtue of their remit, they are able to discount the League-era projects that so obviously undermine such a presentation. In *Agenda for Peace*, the terms “new” and “second-generation peacekeeping are conspicuous by their absence.<sup>21</sup> Only one, passing reference (in a table) is made to “classical” and “multifunctional” peacekeeping in *Agenda for Peace Supplement*.<sup>22</sup> Similarly, Brahimi makes the odd reference to “newer generations” of peacekeeping without defining this term or drawing any conclusions from its use.<sup>23</sup> Nonetheless, the language of “generations” has come to play a central role in academic discourse on peace operations since the early 1990s. So we have, on the one hand, a set of historical circumstances placing into question the notion that complex international peace operations are an exclusively late twentieth century phenomenon and, on the other hand, an established academic discourse predicated on this notion.

One of the few scholars writing in the “new” era to acknowledge the long-standing existence of complex international peace operations is Steven Ratner in *The New UN Peacekeeping*.<sup>24</sup> However, as his title suggests, Ratner nonetheless adopts the language of “generations” and the “new/old” dichotomy in his study of such operations, perhaps because of the widespread currency such an approach now enjoys. One quarter of his book concerns operations, the League projects and ONUC, for example, that take place before the “new” era, in some cases seventy years before.<sup>25</sup> Ratner must describe these projects as examples of the “new peacekeeping,” and in an effort to accommodate the obvious problem this raises with the new/old dichotomy, the presence of these projects in the “old” era is explained in terms of “earlier efforts” at the “new” paradigm.<sup>26</sup> For example, the League administration in the Saar is “second generation peacekeeping before its time.”<sup>27</sup> When there are so many earlier efforts, stretching back over such a long period, of a supposedly “new” phenomenon, one should surely ask whether or not the dichotomies of new/old and first generation/second generation are helpful. Why insist that 1989 is the “time” of complex peace operations, and not also 1919?

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21. As are the terms “old” and “first generation” peacekeeping.

22. Report of the Secretary-General on the Work of the Organization, *supra* note 20.

23. *Report of the Panel on United Nations Peace Operations*, United Nations Secretary-General, UN Doc. A/55/305 – S/2000/809 (2000), paras. 102, 128, 140.

24. RATNER, *supra* note 3.

25. *Id.* Part II.

26. *Id.* Ch. 4.

27. *Id.* at 91. The League mandate in Danzig is “a variation on a theme”, *Id.* at 94. The various uses of international territorial administration in Leticia, Upper Silesia and Memel are described as “forgotten forays here and there”, *id.* at 95. On these missions, *see e.g.*, Wilde, *supra* note 2, at 587-88 (Leticia) & nn. 17-28, 597-600 (Upper Silesia) & 600 (Memel) and sources cited therein.

Clearly some peace operations are more complex than others. Moreover, some projects have a “state building” purpose; others do not. The point is that the complexity of peace operations has waxed and waned since the start of the League. Similarly, the involvement of such operations in “nation building” has been present since at least the 1960s and much earlier if one includes the Allies in post-war Germany and Austria. The “time” of complexity and civilian involvement in international peace operations has been the entire twentieth century. To be sure, with the administration projects in Cambodia, Mostar, Eastern Slavonia, Bosnia and Herzegovina, Kosovo, East Timor, and United Nations -run refugee camps,<sup>28</sup> and the other complex peace missions without an administration component, the final decade of that century witnessed a marked upsurge in the use of peace operations that are both complex and engaged in a “nation building” enterprise. However, an upsurge in and intensification of an activity with a long-standing pedigree (with the possible exception of the ambitious scope of state building in Kosovo and East Timor) is not the same as the emergence of a “new” type of peace operation. The year 1988, then, marks a particular moment of renewal, not a qualitative (rather than quantitative) “turning point.” Also, it is perhaps worth pointing out that the increase in peace operations since 1988 has covered both “complex” and relatively straightforward operations. Just as the “old” era contains several important examples of the “new peacekeeping,” so the “new” era is replete with “old” style peacekeeping operations.<sup>29</sup>

Adopting a progressivist narrative to denote changes in complexity may in any case be problematic because of the way it can serve as a legitimizing device. As “third” or “fourth” generation missions, the projects in East Timor and Kosovo are positioned as the culmination of a historical process. They represent progress in the development of peace operations from the “old” or “traditional” days. Not only does relative complexity mean “newness,” then, suggesting a break from the past. The language of generations, with its evolutionary connotations of progressive improvement, has a normative import. By ascribing differences in complexity through the use of this language, therefore, peace operations are classified normatively simply according to the changes in their complexity. Thus, UNMIK and UNTAET merely by virtue of their comparatively complex nature are presented in terms that suggest relative legitimacy.

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28. On these missions, *see e.g.*, Wilde, *supra* note 2, at 584-85 and sources cited therein.

29. Most scholars accept that in the “new” era, “old” and “new” peacekeeping coexists. *See e.g.*, RATNER, *supra* note 3 at 17 (stating “[t]oday we witness both the continuation of older first-generation missions as well as the establishment of new ones. Moreover, a given operation can evolve from one [first generation] to the other [second generation] over time...”).

Of course, the adoption of relative complexity as the benchmark of legitimacy seems absurd. The point is not that scholars who use the language of “generations” necessarily wish to make such a suggestion, but rather that the language used has this effect. Indeed, some commentators do seem to suggest that increased complexity is somehow inherently superior. John Sanderson, for example, although not using the generational language, focuses exclusively on the degree of powers exercised by the East Timor mission and proclaims this to be a “step forward of millennial proportions” in United Nations peace operations with the mission being of a “high-quality.”<sup>30</sup> Furthermore, the progressivist nature of the “generations” language rationalizes international territorial administration, by constructing a chain of reasoning that presents this activity as the logical conclusion.

The language of “generations” and “old” versus “new” peace operations (or peacekeeping) should perhaps be substituted with a taxonomy that does not connote a linear process of historical evolution, for example “basic” versus “complex” or “multifunctional.” Otherwise, we risk misunderstanding the history of international peace operations, and ascribing normative value to certain operations on spurious grounds.

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30. John Sanderson, *The Cambodian experience: a success story still?*, in UNITED NATIONS PEACEKEEPING OPERATIONS AD HOC MISSIONS, PERMANENT ENGAGEMENT 155,159 (Ramesh Thakur & Albrecht Schnabel eds., 2001). A mirror image of this approach is adopted by Roger MacGinty and Gillian Robinson, who assert that smaller-scale missions “hold a greater possibility for success” than their larger counterparts. *Id.* at 26.

# HOW CAN WE REALLY PROTECT NATIONAL SECURITY?

*Curtis F. Doebbler*

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(prepared for the ILA conference, November 2002)

...we have about 50% of the world's wealth but only 6.3% of its population. This disparity is particularly great as between ourselves and the peoples of Asia. In this situation, we cannot fail to be the object of envy and resentment. Our real task in the coming period is to devise a pattern of relationships which will permit us to maintain this position of disparity without positive detriment to our national security.<sup>1</sup>

## I. INTRODUCTION

National Security has been defined in a variety of ways. According to some scientists, the prevention of AIDS is a matter of national security.<sup>2</sup> According to American steel industry, protecting this industry is a matter of national security.<sup>3</sup> Roy D. Follendore thinks national security is a matter of putting science over religion.<sup>4</sup> The United States' Joint Forces Command thinks national security is a matter of "Full Spectrum Dominance" that means almost total control of the lives of people in strategic areas including rural areas on this

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1. George Kennan, United States State Dept., Policy Planning Study 23 (24 February 1948).

2. David F. Gordon, National Intelligence Officer at the National Intelligence Council, speaking in a Panel "Comparative Perspectives on the Stability Implications of AIDS in Africa" at a conference entitled "France and the United States: Strengthening Collaboration on HIV/AIDS in Africa" organized by The Center for Strategic and International Studies, in collaboration with The Brookings Institution's Center on the United States and France (3 December 2001).

3. AMERICAN IRON & STEEL INST., SPECIALTY STEEL INDUS. OF NORTH AMERICA, STEEL MFR. ASS'N & THE UNITED STEELWORKERS OF AMERICA, A STRONG U.S. STEEL INDUSTRY: CRITICAL TO NATIONAL DEFENSE AND ECONOMIC SECURITY (2001).

4. Roy D. Follendore, *Science a Matter of National Security* (July 5, 2002) at [http://www.noisetoknowledge.com/a\\_matter\\_of\\_national\\_security.htm](http://www.noisetoknowledge.com/a_matter_of_national_security.htm) (last visited Mar. 12, 2003).

planet as well as outer space.<sup>5</sup> And according to American President Bush, “confronting Iraq is a matter of national security.”<sup>6</sup>

In recent times, national security has been used to justify the direct and indirect projection of American military force around the world.<sup>7</sup> Thus, for example, American’s invasion of Afghanistan was justified as an obscure form self-defense premised on a broad understanding of national security. And America’s unyielding support of the Israeli regime, despite its massive violations of human rights and the often heard claim that this support is a partial cause of terrorist attacks against Americans, has been justified as in the interest of American’s national security. To many these examples make it appear that just as beauty is often said to be in the eye of the beholder, national security appears to depend on one’s perspective rather than on empirical evidence or a broad consensus as to its definition.

National security appears to be a national interest that we merely know when we see it. It is something that every American understands, if not explicitly at least implicitly enough to be able to stand behind a foreign policy of military excursion abroad in the name of national interests. What if we viewed these two examples from the eyes of some of those against whom the acts are committed in the name of national security the contradiction becomes even more pronounced?

An Afghan soldier, for example, defending his country as he has done under successive regimes and because it the only work available, has a different perspective of the bombs that fall out of the sky from unseen planes cruising at unimaginable heights. He might not understand the need for America to promote its national security by destroying his country. He might not understand why he, like the young American soldiers who attack him, should not patriotically defend his family and country from attack. And he may not be able to accept in peace the bomb that falls on his village while he is out trying to defend his country and kills all eleven members of his extended family. This ordinary Afghan might well be driven to devoting the rest of his life to extracting retribution from a foreign government that destroyed all he held dear and those whom he had protected even through the country’s protracted civil war. He might even be willing to give his life to extract revenge on those who hurt so many he loved.

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5. Jim Garamone, *Joint Vision 2020 Emphasizes Full-spectrum Dominance*, AMERICAN FORCES PRESS SERVICE (2002).

6. George W. Bush, *Bush Says Confronting Iraq Is “Matter of National Security*, Radio address to the Nation” (Oct. 12, 2002).

7. Ivo H. Daalder, James M. Lindsay, & James B. Steinberg, *The Bush National Security Strategy: An Evaluation*, Brookings Institution Policy Brief (Oct. 4, 2002).

Similarly a young Palestinian woman who has witnessed the oppression of her people all her life and who suffered repeated indignations as she tries to finish her university degree might not understand American's support for the government that oppresses her people. After she has seen her friends killed by Israeli soldiers shooting American bullets or been harassed countless times at ad hoc check points she might not be able to accept how American interests require causing her and her people this suffering. Finally, when she graduates and the only perspective for her life appears to be a harrowing existence under an oppressive regime, she might also be willing to sacrifice her life to strike out against the oppressor by all means at her disposal.

To the Afghan and the Palestinian, and to most people in the world, the American's national interests, particularly the national security, are not as easy to understand as we may think. Furthermore, perhaps our failure to understand how people understand us is actually undermining our own national security. To many people around the world America's national interests may seem more like the version of national interests described by noted British Prime Minister Winston Churchill who referred to

[A] party of great vested interests, banded together in a formidable confederation, corruption at home, aggression to cover it up abroad ... sentiment by the bucketful, patriotism by the imperial pint, the open hand at the public exchequer, the open door at the public-house, dear food for the millions, cheap labour for the millionaire.<sup>8</sup>

## II. HOW WE PROTECT AMERICAN'S NATIONAL SECURITY RIGHT NOW

The way we understand national security has of course influenced how we protect it. Thus when we defer to the President's understanding of national security—as both Congress and the American people appear to have done—we also defer to his means of protecting it. To date these means have meant reliance on the analysis of friendly private bodies and our own government's intelligence agencies, which are part of the executive. The former have been more involved in macro policy issues. For example, the National Heritage Foundation has studied terrorism and claims to know that the goal of terrorists are “first to change United States policy, and ultimately to destroy American and Western civilization.”<sup>9</sup> While this might be true this superficial insight adds little to efforts to end terrorism, however, this vague term may be defined.

The government's own intelligence agencies are the bodies we really count on to protect national security. These bodies appear to view national security

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8. Winston Churchill quoted in Lapham, L., “Spoils of war. (Notebook). (reflecting on whether or not 9/11 attacks have really changed the world),” *Harper's* (March 2002).

9. Heritage Foundation National Security Task Force *Defending the National Homeland* ix (2002).

as a function of their own capacity building and the projection of force around the world. This means surveillance, law enforcement and analysis of information within the United States and, as the Joint Forces' Vision 2020 report cited above ensures us, the projection of military force abroad. Furthermore, since 7 October 2001 the United States government has been more than ready to use force abroad. Its attack on Afghanistan, launched less than a month after the 11 September tragedies in New York and Washington are confirmation. As it is the use of force abroad that is the means of protecting national security that perhaps more than any other influences how people abroad view our security, let me concentrate on a few points related to this policy.

First, it is important to understand that the decision to use force is almost exclusively made by the executive branch of government. This is not only the case when Congress has granted the American President broad powers as it has recently concerning Iraq,<sup>10</sup> but also in broader area of national security policy. Although popular sentiments and country or region specific analysis may play a role, they are digested inside the White House like hors d'oeuvres before the entrée of discussions start within the National Security Council. From the first ever use of a nuclear weapon by the United States in 1945 to the decision to invade Afghanistan decisions to use force abroad to protect national security ultimately rest with the President of the United States.<sup>11</sup> And the primary advice to the President is given by the National Security Council (NSC). This body advises "the President with respect to the integration of domestic, foreign, and military policies relating to the national security."<sup>12</sup>

Second, the NSC, established in 1947 and moved to the White House in 1949,<sup>13</sup> is concerned first and foremost with protecting America's national interests as viewed internally. This might not be surprising except that its mandate includes national security and foreign policy, in other words, how America behaves towards the rest of the world as well. In recent years it has become increasingly clear that the NSC has the upper hand in foreign policy. Thus even if the country or region specialists in the Department of State suggest a particular course of action in a crisis situation, it will only be the chosen policy path when the NSC agrees with it. And while the Secretary of State is one member of the NSC he is outnumbered by other members whose understanding

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10. "Authorization for the Use of Military Force Against Iraq," H.R.J. Res. 114, 2nd Sess. (2002).

11. See LOUIS MORTON, *THE DECISION TO USE THE ATOMIC BOMB* 493-518 in K.R. Greenfield, *COMMAND DECISIONS* (1960) and Letter dated 7 October 2001 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, UN Doc. S/2001/946 (7 October 2001).

12. US Commission on National Security/21st Century, *Organizational Description: The National Security Council* 2 (21 April 2001).

13. See National Security Act of 1947, Pub. L. No. 235, 61 Stat. 496, 50 U.S.C. 402, amended by the National Security Act Amendments of 1949, 63 Stat. 579, 50 U.S.C. 401 *et seq.*

of international society is often much more limited and often partisan to narrow American national interests. As a result, much of American's national security policy—especially that part which concerns the international community—is based on what is best for America. President Bush expressed this basis best when he threaten the rest of the world stating that “You’re either with us or against us in the fight against terror.”<sup>14</sup>

Third, our national security system, in part because it has become so centralized in the Executive branch of government, is also increasingly opaque. Thus when the United States decided to assassinate suspected terrorist in Yemen on 3 November 2002 hardly anyone new that such an action was even possible under US law. Or rather hardly anyone knew that the President had reversed a previous moratorium on overseas assassinations by a secret decision. Thus National Security Advisory Condoleezza Rice, could describe the killing as “well within the bounds of accepted practice” in an interview in which she further assured her audience “that no constitutional questions are raised here.”<sup>15</sup> What else the government can do? Americans may never know as interests of national security trump their right to know. More and more Americans right to participate in their own government is being restricted.

And finally, because American is willing to use unilateral means to protect its national security—including the use of force abroad—there are more frequent opportunities for clashes with international law. The attack on Afghanistan is an example of the use of force in clear violation of international law. It was not under United Nations auspices, although it could have been if the United States had cared to ask. And it was not self-defense because the United States itself admitted that it had not been attacked by the government of Afghanistan. The only possible legal qualification of American action is as the use of force against another sovereign country's territorial integrity and political independence—a clear violation of international law. This is at least what most legal observers outside the United States believe, but American jurists have often voiced less certainty. They do this by stretching the definition of armed attack beyond its breaking point or by claiming the law has changed, which is just another way of saying that the law can be ignored when the primary basis for the alleged change is merely what the American government thinks.

An observer is bound to conclude that United States people today allow national security to protected by the Executive branch without little control, on the basis of narrow national interests, with little transparency of process, and often in violation of international law.

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14. CNN, *You are either with us or against us* (Nov. 6, 2001), available at, <http://www.cnn.com/2001/US/11/06/gen.attack.on.terror/> (last visited Mar. 12, 2003).

15. Bill Vann, *White House Defends CIA Killing of US Citizen in Yemen* (Nov. 12, 2002) at, <http://www.wsws.org> (last visited Mar. 12, 2003).

### III. WHAT OTHERS THINK AND WHY IT IS IMPORTANT

Colin Powell's words that the 11 September 2001 attack was not merely an assault on America, but was "an assault on civilization, it was an assault on democracy, it was an assault on the right of innocent people to live their lives,"<sup>16</sup> could just as well be uttered by any of the than three billion people around the world commenting on how the United States' world dominance has left them impoverished, living on less than \$2 USD per day. These people will be unlikely to sympathize with the national security interests that allow the United States to use force in their country in the ways described above. Some of them, not an insignificant number, are likely to be sympathetic to anyone who offers them as chance to revenge attacks that have harmed them, their families or their country.

President Bush has suggested that the war on terrorism is merely "good against evil."<sup>17</sup> Observers, and the American government's own actions, have extended this understanding to mean that terrorism has no cause.<sup>18</sup> Such understandings, however, fly in the face of the facts and the clear words of terrorist themselves. The facts indicate that American enjoys some immense advantages in the world. It has the world's strongest military and it is the world's largest per capita consumer of goods and energy. In fact, if every other country consumed the world's resources at the wide pace that America is doing so, we would have, since the middle of the last century, already exhausted the earth's habitable environment.<sup>19</sup>

As individual Americans we may wish for the basic values of respect for international law, human rights, human freedoms, the equal value of human life, and a life of plenty, but as a group of people we have been unable to admit that to achieve these at the level which we desire them, we have to exploit and even harm others around the world. Even after 11 September 2001 and in light of polls that declare that more people hate America today than did fourteen months ago, Americans refuse to believe that this might be they do not practice what they breach.

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16. Paula J. Dobriansky, *The Diplomatic Front of the War on Terrorism: Can the Promotion of Democracy and Human Rights Tip the Scales?*, Address to the Heritage Foundation (Dec. 21, 2001) (quoting Collin Powell), available at, <http://www.heritage.org/Research/NationalSecurity/HL724.cfm> (last visited Mar. 12, 2003).

17. See, e.g., President George W. Bush, & Japan Prime Minister Koizumi "Remarks at Press Photo Opportunity in front of the White House Colonnade" (Sept. 25, 2001).

18. Michael Radu, *E-Notes: The Futile Search for "Root Causes" of Terrorism*, available at, <http://www.fpri.org/> (last visited Mar. 12, 2003).

19. WORLD WILDLIFE FUND, *LIVING PLANET REPORT* (2002).

If America were to accept that terrorism is “a political act, a response to United States foreign policy”<sup>20</sup> then perhaps they could understand how those who are exploited could view terrorism it as “an act of war waged by people too weak to have a conventional army or one large enough to take on the United States.”<sup>21</sup> If terrorism is understood in this way then it is not difficult to understand the response of national security in terms of peace making whereby concessions might have to be made to preserve our way of life. These concessions might require a depreciation of our standard of living in order to increase the standard of living of others around the world whose resources we exploit. But this is perhaps the price why must pay for national security. This is perhaps what we do not want to accept. But America were to think in terms of adding to what it gives the world instead of limiting what it takes from the world, then perhaps we could live in peaceful co-existence.

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20. Charley Reese, *Face It: United States Foreign Policy Contribute to Acts of Terrorism*, ORLANDO SENT., Aug. 18 1998. Reese is a former soldier in the United States military.

21. *Id.*

# **THE INTERNATIONAL CRIMINAL COURT, NATIONAL SECURITY, AND COMPLIANCE WITH INTERNATIONAL LAW**

*James C. Kraska\**

Thank you, Mark, for your kind introduction.

The question before the panel today is whether the United States, actions regarding national security over the last year or so are in harmony with international law, or, in the alternative, are the United States, policies on a collision course with international law. The panel introduction mentioned several issues that can be examined in this light in the wake of 9-11, including the United States military and intelligence activities in the global war on terror, indefinite detention of suspected foreign terrorists and the renunciation of the International Criminal Court ("ICC"). These remarks focus on the latter issue—United States involvement with the ICC, and we will examine why the United States, actions toward the ICC have been in compliance with international law. First, we will begin with a brief background of the history of the ICC, then we'll identify and discuss the major flaws of the treaty, and then examine the United States, efforts to deal with the existence of the treaty and its entry into force.

The ICC was created through the Rome Treaty on July 17th, 1998, and it entered into force on July 1st of 2002. To date, the treaty has 139 signatories and 81 state parties. The court is located in the Hague, The Netherlands. Jurisdiction of the court began on July 1st, 2002, and jurisdiction is not retroactive. The court is now being constituted and should be operational in the spring of 2003.

The ICC claims jurisdiction to try war crimes, genocide and crimes against humanity. The court also claims jurisdiction to try the "crime of aggression," which the treaty has not yet defined. In this regard, one may view the ICC as related to the "Uniting for Peace" resolution of the General Assembly, and as an effort by the General Assembly to seize a more active role in dealing with threats to peace and security.

The United States signed the ICC on December 31st, 2000. At the time, President Clinton said the treaty was "fundamentally flawed," and the President

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would not forward the treaty to the Senate for ratification. President Clinton also recommended that his successor not do so as well. President G. W. Bush has acknowledged the same flaws that President Clinton identified, and he also has not forwarded the treaty to the Senate for advice and consent. On May 6th, 2002, the United States notified the United Nations, and virtually every nation on the planet by demarche that the United States did not intend to be bound by the treaty. This “unsigned” of the treaty was consistent with United States obligations under Article 18 of the Vienna Convention on the Law of Treaties, which states that a state is obliged to refrain from acts that would defeat the object and purpose of the treaty “until it shall have made its intentions clear not to become a party to the treaty.”

Why did President Clinton announce the treaty was “fundamentally flawed?” We will introduce some of the major provisions of the treaty that serve to highlight flaws in the convention.

First, the treaty is a threat to the sovereignty of states. The treaty claims jurisdiction over nationals of non-parties without their state’s consent. This leads to the problem that Ambassador David Scheffer identified with jurisdiction of the court. Jurisdiction of the court is both too broad and too narrow. In testimony before the Senate Foreign Relations Committee on 23 July 1998, Ambassador David Scheffer set forth one of the United States’ fundamental disagreements with the parameters of the ICC’s jurisdiction. Article 12 of the Statute establishes jurisdiction, absent a Security Council referral, when either the state on whose territory the crime was committed is a party or when the accused person’s state of nationality is a party. This jurisdiction is both too broad and too narrow. The jurisdiction is far too narrow because under Article 12 construction a state could simply stay a non-party and remain outside the reach of the ICC. Thus, the ICC fails to capture perhaps the leading cause of genocide and mass murder in modern history—governments killing their own citizens. On this subject, it is useful to make reference to the work of Professor Rudy Rummel at the University of Hawaii. His research, which was funded by the United States Institute of Peace, indicates that the greatest numbers of mass murders in the modern era have been committed by governments against their own people. His findings indicate that 170 million people have been murdered by their own governments, aside from war, in recent memory. Because the ICC purportedly does not apply to non-parties, it potentially cannot establish jurisdiction over governments that reject the treaty—potentially leaving the mass human rights crimes of the world’s more heinous leaders untouched by the jurisdiction of the court.

While ICC jurisdiction is too narrow, failing to be able to assert jurisdiction over the worse genocide and human rights offenders, the jurisdiction is also overly broad. A non-party, e.g., the United States, participating in a peacekeeping operation in a state party’s territory, could be

subject to ICC jurisdiction. Moreover, because a non-party cannot opt out of war crimes jurisdiction for the permitted seven years, its exposure may be even greater than that of state parties.

Second, serious defects in the treaty threaten United States freedom of action and expose United States civilian and military leaders, as well as military servicemen and women, to politically motivated prosecution. The ICC prosecutors are self-initiating and largely unaccountable. The ICC establishes an independent prosecutor that has the power to initiate investigations either referral from either a state party or the United Nations Security Council. There are inadequate checks and balances on powers of prosecutors and judges to the ICC. The judges and prosecutors are not responsible to the UN or elected officials, and a consensus of 2 out of 3 judges can decide to go forward on a case.

Related to the issue of inadequate checks and balances on the ICC is that it does not provide the extensive criminal procedure rights and protections guaranteed in the United States Constitution, such as the right to a trial by jury and high standards of evidence. As a result, the ICC might fail to recognize a United States prosecution that ends in an acquittal because of a constitutional technicality or the requirement that all elements be proved "beyond a reasonable doubt." The ICC prosecutor is self-initiating, tantamount to a global version of the domestic independent prosecutor, which has been charged by both Republicans and Democrats as operating from a politically motivated bias. Without internal checks and balances on the prosecutor, there is no protection against politicized prosecutions.

This makes the relationship between the ICC and national judicial processes uncertain. Under the Rome Statute, the ICC claims the authority to second guess the actions taken and the results reached by sovereign states with respect to the investigation and prosecution of crimes. Even in cases in which the United States has appropriately exercised its responsibilities to investigate and/or prosecute in a particular case, the ICC prosecutor, with the approval from a three-judge panel, could still decide to initiate an ICC investigation or prosecution. Such a decision by the ICC prosecutor is not inconceivable. Many of the features of the United States common law system diverge from the European continental approach and other legal systems throughout the world. An ICC prosecutor may not understand, or may disagree with the operation of the common law system, including the jury system, constitutional protections for criminal defendants, and rights of appeal, that are fundamental aspects of the American system. Reservations to the statute might have been able to address these issues, but the treaty prohibits state reservations to the treaty. Lacking important reservations, the treaty is inconsistent with United States law and establishes a dangerous precedent. Thus, the court's claimed jurisdiction over nonparties encroaches on United States constitutional safeguards.

This leads to the fourth problem with the ICC, which is that it dilutes the role of the United Nations Security Council (“UNSC”), as set forth in the United Nations Charter. Text excludes a proper and adequate role for the UNSC—degree of UNSC control over prosecutions. In contrast to the ad hoc tribunals for Rwanda and Yugoslavia which worked in conjunction with and under the authorization of the UNSC, the ICC is independent of the UNSC. As an independent body, it usurps the authority of the Security Council. I would add that the United States has been a major proponent of these proper international tribunals. Slobodan Milosevic is on trial for his crimes because a coalition of nations led by the United States, gave political support and funding to the International Tribunal for the former Yugoslavia. The United States has also provided practical cooperation and assistance to the new leadership in Belgrade in this regard. The United States also supported the International Criminal Tribunal in Rwanda, and the American government recently announced a “Rewards for Justice” program on Central Africa with the goal of bringing to Arusha the authors of the Rwandan genocide who are still at large.

The vague and ambiguous definitions of crimes are especially susceptible to abuse. In particular, the undefined “crime of aggression” could extend to some United States troop deployments, and the alleged crime of “settlement in an occupied territory”, arguably implicates Israeli leaders for activities in the West Bank and Gaza strip. Traditionally, a crime of aggression is what the Security Council determines it to be. The current text usurps the UNSC’s authority to define aggression, but paradoxically, the court establishes ICC jurisdiction over crimes of aggression—all while leaving the definition of aggression to subsequent amendment.

The current system—based upon the UNSC—delivers accountability. The global community is best served by relying on national judicial systems and international tribunals established where appropriate by the Security Council within the framework of the United Nations Charter. If someone disagrees with this arrangement and the involvement of the UNSC, then the solution is not to create a new mechanism that is at odds with the existing security architecture, as the ICC is, but to amend the present United Nations Charter.

The United States approach to the ICC has been to seek agreements with other nations that exempt United States nationals from the jurisdiction of the treaty. These agreements, authorized by Article 98 of the Rome Treaty, are fully consistent with and contemplated by the treaty framework. In fact, during the UNSC debate on protection for peacekeepers from the ICC, countries that are leading proponents for the court urged the United States to make use of Article 98 agreements as a means of addressing American concerns about the court. It is, then, a bit disingenuous; to now argue that proposing Article 98 agreements somehow undermines the treaty. One more note with regard specifically to the military. Some proponents of the treaty maintain that the

existence of bilateral or regional Status of Forces Agreements (“SOFAs”) already provide protection for United States service men and women, and should be sufficient to address United States concerns. SOFAs typically govern the status of military forces in a particular partner nation. While criminal jurisdiction issues within the context of the host nation’s laws are dealt with in SOFAs, there is no inherent conflict in signing an Article 98 agreement. Moreover, the Article 98 agreements sought by the United States are not limited to protecting only military and civilian employees of the Department of Defense, as most SOFAs are, but will protect all United States nationals.

In these few minutes, I have set forth why President Clinton termed the Rome Treaty “fundamentally flawed,” as well as the major reasons why the United States and other nations have departed from cooperation with the court. By utilizing the United Nations Charter framework, which has taken fifty years to evolve and gain acceptance as a mechanism for stabilizing global order, the United States is preserving national security while strengthening international legal regimes.

# ICC PRETRIAL PROCEEDINGS: AVOIDING GRIDLOCK

*David Stoelting\**

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## I. INTRODUCTION

Millions of people have extraordinary hopes for the new International Criminal Court (“ICC”), the world’s first permanent tribunal for genocide, war crimes and crimes against humanity. As the most highly visible and ambitious permanent institution in furtherance of international justice ever created, the ICC simply cannot fail. These lofty expectations, however, should be tempered by a number of factors. Some are obvious, such as whether the ICC will be given adequate financial and logistical support and whether the ICC’s initial Prosecutor and judges will perform their duties capably and responsibly. Other factors, while less obvious, are no less important in determining how the ICC will operate and how it will be perceived. Chief among these are concerns relating to the ICC’s pretrial procedures, which are unusual and largely untested. Indeed, the principles that guide these procedures—“admissibility,”

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“complementarity” and “State consent”—are not concepts that any national or international court has extensive experience in adjudicating.

Designed to give effect to the fundamental principle that the ICC must be a court of last resort, these procedures also involve weighty political issues regarding the genuineness of a government’s representation that it will (or will not) prosecute an accused. The stakes in every case before the ICC, moreover, will be enormous: not only will the ICC determine an individual’s culpability for the most serious crimes but such determinations are inherently imbued with political conflicts and sensitivities. The consequence is that counsel will likely take full advantage of these pretrial procedures which, in practical terms, may mean that the first cases before the ICC may be consumed by months or even years of pretrial motion practice.

These motions will pose an enormous challenge for the ICC’s judges because, although they will certainly need to act expeditiously, they will also have to get it right. The first pretrial motions to be decided will shape initial perceptions of the ICC and largely determine the new institution’s credibility. Any decisions that are perceived as politically motivated or legally unprincipled could have lasting repercussions. These extraordinary pressures on the ICC’s judges must be handled in the context of resolving the numerous pretrial motions that are permitted by the Rome Statute’s cumbersome pretrial framework, which results from a confluence of the following factors.

First, the system of complementarity between the ICC and national courts, designed to permit national courts to take precedence, will require significant pretrial motions if it is to work as anticipated. The ICC is only supposed to prosecute when a national court with jurisdiction is unable or unwilling to legitimately proceed, and this principle is given effect through procedures governing “admissibility.” In large part, these procedures are due to the fact that the Rome Statute was written during political negotiations between governments, and some governments were uncomfortable with untethered prosecutorial power. The United States negotiators in the 1998 Rome Diplomatic Conference, in particular, ensured that the ICC’s jurisdiction would be narrow, that cases could only proceed in circumstances when a national court could not do the job, and that the Prosecutor’s discretion would be circumscribed. These issues will be teed up by pretrial motions arguing a government’s genuine willingness or ability to investigate.

Second, the unusual State consent requirements that apply in cases not initiated by the Security Council require the consent of either the territorial State or the State of the nationality of the accused. Consent is given by the act of ratification or (for non-State parties) by a special declaration. While this may seem straightforward, ambiguities regarding cross-border conduct and even a person’s nationality may lead parties to make motions arguing that a State’s

consent is inadequate because the conduct “occurred” outside its territory or because the accused is a “national” of another State.

Third, safeguards designed to prevent politically motivated prosecutions mean that the Prosecutor will have to seek and obtain authorization from the Pre-Trial Chamber to proceed.

Fourth, the fact that victims are permitted to have representation before the ICC, even in the pretrial investigatory stages, may complicate pretrial proceedings. Thousand of victims may mean thousands of lawyers with the right under the Rome Statute to make submissions at certain stages.

Finally, the omnipresent right to appeal may serve to derail investigations as multiple parties exercise rights of appeal that exist even regarding interlocutory admissibility and jurisdictional issues.

The question that should be asked is whether—apart from serving the political purposes of the Rome Statute’s creators—these procedures will advance the goals of ending impunity for international crimes and contributing to the prevention of such crimes. Only time will tell, of course, and almost everything about the ICC’s pretrial procedure is a venture into uncharted territory. The ICC’s system of State consent, admissibility and complementarity differs significantly from previous international criminal tribunals; indeed, it is largely *sui generis*. Because of the nature of the ICC’s subject matter jurisdiction, every decision of the ICC will have political overtones, especially ones deciding the question of whether a national government has engaged in an “unjustified delay”<sup>1</sup> in bringing a person to justice. These pretrial decisions also invite motions and submissions by States and other entities and persons.

There is another risk resulting from protracted pretrial proceedings: persons may be identified as targets of the ICC long before trial. An accused, of course, can object to the charges and challenge evidence at a confirmation hearing under Article 61, which requires the Pre-Trial Chamber to determine whether “substantial grounds” exist to believe the person committed the crimes. However, to the extent that pretrial proceedings unduly lengthen the time when a target of an investigation has been named and the resolution of that person’s trial, the rights of persons accused of crimes by the ICC may be adversely affected. The eighteen judges of the ICC will have to resolve these challenges and administer the Rome Statute in a fair, impartial and decisive manner.

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1. United Nations, Rome Statute of the International Criminal Court, July 17, 1998, art. 2(b), 37 I.L.M. 999 [hereinafter “Rome Statute”].

## II. GETTING OFF THE GROUND: REFERRALS BY THE SECURITY COUNCIL AND STATE PARTIES

Three entities may initiate investigations: the Security Council, State Parties or the Prosecutor. Cases referred by the Security Council will likely proceed quicker through the pretrial stages than cases referred by State Parties or initiated by the Prosecutor. Security Council referrals, which are made pursuant to the Security Council's universally binding powers under Chapter VII of the UN Charter,<sup>2</sup> are not subject to the State consent requirements. In addition, preliminary rulings regarding admissibility are not permitted. And, of course, there would be no threat of a Security Council deferral.

The best hope for avoiding ICC pretrial gridlock, then, is for cases to originate with Security Council referrals. This avenue, however, at least for the foreseeable future, is unrealistic. The United States, with its veto over any Security Council action, remains steadfastly opposed to the ICC. It is highly unlikely, therefore, that the United States will permit any Security Council referrals to the ICC. It remains to be seen whether this will change when the Security Council attempts to refer a matter that does not infringe on United States interests. For example, in October 2002, President Bush signed the Sudan Peace Act, which accused the Sudanese government of genocide. Would the United States use its veto to prevent the Security Council from referring a genocide prosecution of Sudan to the ICC?

Referrals by State Parties offer a slightly more streamlined alternative to investigations by the Prosecutor because the investigation can commence without the necessity of a determination by the Pre-Trial Chamber. Under Article 14, any State Party is entitled to refer to the Prosecutor a "situation in which one or more crimes within the jurisdiction of the Court appear to have been committed."<sup>3</sup> State referrals must be "in writing."<sup>4</sup> Following such a referral, the Prosecutor investigates the situation and determines whether any "specific persons should be charged."<sup>5</sup>

The Statute provides little guidance on the content of referrals except that the submission "shall specify the relevant circumstances" and must "be accompanied by such supporting documentation as is available to the State referring the situation."<sup>6</sup> There is no requirement that a referral be made public.

The Prosecutor does have discretion to decline to investigate a State Party's referral if "there is no reasonable basis to proceed," taking into consideration:

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2. *Id.* at art. 12(3)(b).
  3. *Id.* at art. 14(1).
  4. Rule of Procedure and Evidence 45.
  5. Rome Statute, *supra* note 1, at art. 14(1).
  6. *Id.* at art. 14(2).

(1) whether there is no legal or factual basis to seek a warrant or a summons; (2) whether the case is inadmissible because a national court has exercised jurisdiction; or (3) whether prosecution is “not in the interests of justice.”<sup>7</sup> The Pre-Trial Chamber may, at the request of the referring State or the Security Council, review the Prosecutor’s decision not to proceed.<sup>8</sup> The Pre-Trial Chamber also may act “on its own initiative” to review decisions of the Prosecutor not to proceed based on the “interests of justice” criteria.<sup>9</sup> This presents yet another avenue for pretrial proceedings: disputes between the Pre-Trial Chamber (acting on its own or at the behest of a State or the Security Council) and the Prosecutor regarding the propriety of the Prosecutor’s decision not to proceed.

### III. FIRST HURDLE: REQUEST FOR AUTHORIZATION

Due to Security Council paralysis, the Prosecutor probably will originate most investigations. In investigations initiated by the Prosecutor, however, the potential for gridlock arises early because although the Prosecutor can “initiate” an investigation he or she cannot “commence” an investigation without authorization. This authorization comes from the Pre-Trial Chamber, which at several critical stages is given oversight when the Prosecutor acts independently. In contrast, the Prosecutor needs no such authorization to commence an investigation when the referral comes from the Security Council or a State Party.

There are no limits on the sources from which the Prosecutor can receive information.<sup>10</sup> Following receipt of such information, the Prosecutor “may initiate investigations.” At this early stage, before the necessity of requesting authorization, the Prosecutor is given leeway to look into a situation and to conduct a preliminary investigation unfettered by outside limitations. Thus, the Prosecutor may “analyze the seriousness of the information received,” and may even “seek additional information” from states, nongovernmental organizations, international organizations or any “other reliable sources.”<sup>11</sup> Even at this preliminary stage, State Parties are obliged to “cooperate fully” with any requests for information.<sup>12</sup>

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7. *Id.* at art. 53(2).

8. *Id.* at art. 53(3)(a).

9. *Id.* at art. 53(3)(b).

10. *Id.* at art. 15(2).

11. Rome Statute, *supra* note 1, at art 15(2).

12. *Id.* at art. 86.

The Prosecutor is also permitted to “receive written or oral testimony at the seat of the Court.”<sup>13</sup> This testimony may be recorded or videotaped,<sup>14</sup> and presumably may later be admissible at trial. This geographical limitation, permitting testimony only “at the seat of the Court” in The Hague, seems designed to limit the Prosecutor’s fact-finding capabilities by curtailing on-site investigatory capacity before the Pre-Trial Chamber has given authorization.

Once this preliminary investigation is concluded, the Prosecutor will either determine that further proceedings are not required or that there is “a reasonable basis to proceed with an investigation.”<sup>15</sup> If the latter,<sup>16</sup> then the Prosecutor “shall submit to the Pre-Trial Chamber a request for authorization of an investigation.”<sup>17</sup> Requests for authorization under Article 15(4) seem to be essentially *ex parte*, with no allowance made for submissions in opposition, although victims are permitted to “make representations” to the Pre-Trial Chamber.

The criterion to be applied by the three-judge Pre-Trial Chamber is somewhat vague: it need only determine whether “there is a reasonable basis to proceed with an investigation and that the case appears to fall within the jurisdiction of the Court.”<sup>18</sup> If so, then the Pre-Trial Chamber “shall authorize the commencement of an investigation.”<sup>19</sup> It remains to be seen whether Article 15(4) authorizations will be a significant roadblock for investigations initiated by the Prosecutor or merely a rubber stamp. This is one-sided request, with potential targets not permitted to make submissions. As a result, this stage may be more mechanical than substantive. The Pre-Trial Chamber, however, has a strong interest in ensuring that the jurisdictional basis of an Article 15(4) authorization is proper and therefore will have compelling reasons making sound Article 15(4) determinations.

The request-for-authorization stage will also serve to publicize an investigation because the Prosecutor is required to notify victims. The means of notification may be through the Victims and Witnesses Unit or “by general means” consistently with the integrity of the investigation and the safety of

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13. *Id.* at art. 15(2).

14. Rule of Procedure and Evidence 112.

15. Rome Statute, *supra* note 1, at art. 18(1).

16. Somewhat conversely, art. 53(1) of the Rome Statute states that “the Prosecutor shall initiate an investigation unless he or she determines there is no reasonable basis to proceed.” In referrals by the Security Council or a State, this seems to create a presumption that an investigation will be initiated unless the Prosecutor determines otherwise.

17. Rome Statute, *supra* note 1, at art. 15(3).

18. *Id.* at art. 15(4).

19. *Id.*

victims and witnesses.<sup>20</sup> Although the notice is of a general “investigation,” it is possible that the notification process may have unintended consequences by identifying targets at a preliminary stage and by impacting the presumption of innocence or by triggering actions by persons subject to the investigation. However, this should be viewed as an acceptable trade-off because the notice provision advances the legitimate goals of minimizing frivolous prosecutions and maintaining transparency.

#### IV. SECOND HURDLE: NOTIFICATION AND POSSIBLE STATE DEFERRAL

The next threshold involves notification of certain States not only of a generalized investigation but of an intention to investigate and prosecute persons alleged to have committed crimes within the ICC’s jurisdiction. This notification process begins once the Pre-Trial Chamber authorizes the “commencement” of an investigation under Article 15 or once a State Party makes a referral and the Prosecutor determines that there is “a reasonable basis to proceed.”<sup>21</sup>

At this stage, the Prosecutor must issue a written notice to all States, including States not party to the Rome Statute, that “would normally exercise jurisdiction over the crimes concerned.” The notice may be “on a confidential basis” if necessary “to protect persons, prevent destruction of evidence or prevent the absconding of persons.”<sup>22</sup>

A State receiving notice has one month from receipt to inform the Court “that it is investigating or has investigated” persons within its jurisdiction.<sup>23</sup> If requested, the Prosecutor “shall defer to the State’s investigation.” State deferrals have no time limit and may permanently stop an investigation. The purpose is to give teeth to the premise of the Rome Statute that national courts have primacy. All a national government has to do is make a request and the ICC must defer—although, as discussed in Part V *infra*, such deferral may be reviewed in six months “based on the State’s unwillingness or inability genuinely to carry out the investigation.”<sup>24</sup>

The mandatory nature of Article 18(2) deferrals—the Prosecutor “shall defer to the State’s investigation” upon receipt of a request to do so—may prove difficult to overcome. If multiple states assert jurisdiction, there may be multiple States making Article 18(2) requests. The result could be years of delay.

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20. Rule of Procedure and Evidence 50(1).
  21. Rome Statute, *supra* note 1, at art. 18(1).
  22. *Id.* at art. 18(1).
  23. *Id.* at art. 18(2).
  24. *Id.* at art. 18(3).

## V. THIRD HURDLE: PRELIMINARY RULING ON ADMISSIBILITY AND APPEAL

Although the Prosecutor must stop the investigation upon receipt of a request,<sup>25</sup> the mandatory cessation can be circumvented if the Prosecutor makes an application to the Pre-Trial Chamber to “authorize the investigation” notwithstanding a State’s request for a deferral.<sup>26</sup> Upon such application, the Pre-Trial Chamber can nonetheless “decide[] to authorize the investigation.”<sup>27</sup> It appears that only the Prosecutor can make such an application, and that State Parties do not have standing to do so. The standards to be applied by the Pre-Trial Chamber, as well as the timing, are somewhat elastic. The Prosecutor can seek review in six months, presumably on any basis, or “at any time when there has been a significant change of circumstances based on the State’s unwillingness or inability genuinely to carry out the investigation.”

The “preliminary” ruling is also the first opportunity for a trip to the Appellate Chamber. In one of the more open-ended articles of the Rome Statute, either the Prosecutor or the State concerned may appeal any decision “with respect to jurisdiction or admissibility” within five days of an adverse decision.<sup>28</sup> The likely effect of an appeal will be to suspend proceedings for many months because, even though the Article 82(3) of the Rome Statute states that an appeal “shall not of itself have suspensive effect,” the Rules permit the appellant to request, in effect, a stay pending appeal.<sup>29</sup> Certainly a State that has previously served a deferral request under Article 18(2) would demand a stay pending an appeal of a decision of the Pre-Trial Chamber vacating a deferral.

Even an adverse decision of a preliminary ruling at this stage, however, does not prevent a State from challenging admissibility at later stages of the proceedings. Indeed, in an apparent recipe for gridlock, Article 18(7) guarantees the right of a State which has failed in a preliminary motion on admissibility to make a separate motion on admissibility at a later stage. While Article 18(7) requires a change in facts and circumstances, this should not be a burdensome hurdle to overcome. As a result, in cases where the crimes in question occurred in several States or involve persons of different nationalities, there may be multiple motions and appeals on the same admissibility issue under both Article 17 and Article 19.

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25. In “exceptional” cases, the Prosecutor can continue to collect evidence in spite of a State request if necessary to preserve evidence. Rome Statute, *supra* note 1, at art. 18(6).

26. Authorizations under article 18(2) must be made by a majority of the three judges of the Pre-Trial Chamber. Rome Statute, *supra* note 1, at art. 57(2)(a).

27. Rome Statute, *supra* note 1, at art. 18(2).

28. Rome Statute, *supra* note 1, at art. 82(1)(a); Rule of Procedure and Evidence 154(1).

29. Rule of Procedure and Evidence 156(5).

## VI. FOURTH HURDLE: JURISDICTION AND ADMISSIBILITY CHALLENGES AND APPEALS

As noted, the most active areas for pretrial motion practice relate to issues of jurisdiction and admissibility. These issues relate to the Court's basic competence to hear a case, and can be raised at any time before or at the commencement of trial (or after, if the basis is that the person has already been tried). Indeed, it is likely that a new area of legal expertise will evolve pertaining to admissibility challenges under Articles 17 and 19 focusing on whether a national court is able or willing to prosecute. The area demands the creation of uniform standards so that the adjudication of these issues will appear objective. National court judges and other international legal scholars may offer the equivalent of expert testimony regarding the legitimacy of a government's investigation.

Procedurally, the Rome Statute treats jurisdictional and admissibility similarly. The Court's "jurisdiction" encompasses both the substantive crimes to be prosecuted by the ICC, and the system of State consent. Thus, a jurisdictional challenge could argue that the actions of the accused do not constitute crimes within the jurisdiction of the ICC. In addition, jurisdictional challenges could argue that (assuming no Security Council referral), either the territorial State or the State of nationality of the accused has not consented because, for example, there are questions about the citizenship of the defendant or, in crimes that occur in several countries, the State in which the conduct occurred.

The potential for lengthy delays resulting from Article 19 challenges to admissibility and jurisdiction arises from the fact that the Rome Statute places no clear limits on the number of these motions that can be made and on the parties that can make them. Consider, for example, the list of entities eligible to bring motions challenging admissibility and jurisdiction:

- 1) An accused;
- 2) A person for whom a warrant or summons has been issued based on a finding of the Pre-Trial Chamber that reasonable grounds exist to believe the person committed a crime within the jurisdiction of the ICC;
- 3) A State which has jurisdiction over a case and has investigated or prosecuted;
- 4) The State of nationality of the accused;
- 5) The territorial State; and
- 6) The Prosecutor or the Court.<sup>30</sup>

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30. Rome Statute, *supra* note 1, at art. 19(2), (3).

Each of these entities appears to have the ability to bring motions regarding jurisdiction and admissibility; and each motion may suspend the investigation and then be appealed. It is not too far-fetched to imagine multiple motions brought seriatim on essentially the same area.

There is a textual argument for strictly limiting motion practice. Article 19(4) states that jurisdiction and admissibility challenges can be brought “only once by any person or State.” This would have to be interpreted literally – “only once” means “only once.” However, because each moving party would have different circumstances and arguments, it seems improbable this literal approach would be adopted because it could lead to unfairness in many cases. The more likely interpretation is that each person or State is limited to one bite at the apple, and not that all States and persons collectively are limited to a single challenge. Moreover, Article 19(6) refers to “challenges” to admissibility and to jurisdiction, suggesting multiple opportunities.

Article 19 challenges are unlikely to be expeditious. The issue of the adequacy of a State’s investigation may require significant testimony and evidence to the extent the inquiry goes to the merits. When brought by a State, moreover, Article 19(7) requires the Prosecutor to suspend the investigation. “Observations” from other interested States, the Security Council and from victims must be solicited, and the Pre-Trial Chamber may hold a hearing. These hearings will probably be mini-trials, especially if a State is attempting to prove the genuineness of its investigation. Article 19 challenges conceivably could tie up the ICC for years if there are serial motions with suspensive effect that are subject to appeal.

## VII. FIFTH HURDLE: SECURITY COUNCIL DEFERRAL

Functioning as a kind of sword of Damocles over the ICC, the Security Council has the power to intervene under Article 16 to stop any investigation or prosecution for renewable twelve-month periods. The mechanism in Article 16 is a resolution adopted under the Security Council’s enforcement powers in Chapter VII of the UN Charter. The ICC has no authority to circumvent such a Security Council resolution.

The purpose of Article 16 was to permit the Security Council to prevent the ICC from proceeding when an ICC prosecution might interfere with ongoing diplomatic negotiations necessary to maintain international security. An open question is whether the Security Council would permit Article 16 to be used not because of ongoing diplomatic negotiations but rather because of a Security Council member’s ideological bias against any ICC investigation or prosecution.

### VIII. CONCLUSION

Pretrial proceedings before the International Criminal Court present unusual and unprecedented challenges. The Rome Statute requires that national courts be given every opportunity to prosecute the crimes within the ICC's jurisdiction, and that the Prosecutor's independence be limited. The only way to make these requirements real is to permit challenges to be made to the ICC's ability to exercise its jurisdiction. The Rome Statute, however, creates a recipe for lengthy delays by permitting multiple challenges and appeals in the same areas.

The judges of the ICC face a daunting task in effectuating these principles of the Rome Statute while at the same time protecting the rights of defendants to a swift and fair trial and ensuring that the victims of the world's worst crimes receive redress. They will have to decide many thorny questions, such as how to limit admissibility motions and whether a government is unable or unwilling to prosecute. These are largely issues that no judges in any national or international court have had to deal with in such a systematic fashion. The discretion and wisdom with which the ICC's initial judges and Prosecutor deal with these issues will largely determine the ultimate success of the International Criminal Court in achieving its critically important purpose.

# THE SKEWED RESPONSIBILITY NARRATIVE OF THE “FAILED STATES” CONCEPT

*Ralph Wilde\**

The “failed state” concept, which came to prominence in academic and policy discourse in the early 1990’s with the publication of David Helman and Steven Ratner’s 1991 article *Saving Failed States*,<sup>1</sup> continues to enjoy widespread currency as a way of denoting situations where the governmental infrastructure in a state has broken down to a considerable degree.<sup>2</sup> It can be criticized on a number of levels, from its essentialist use of language to the particularist basis for defining “failure,” and the manner in which it sets up a dichotomous opposition within international relations between “successful” and “failed” states.<sup>3</sup> In this brief article, I discuss one such criticism: the way that the term “failure” suggests exclusive responsibility on the part of the state and its people for the breakdown in governance. I consider the problematic aspects of this suggestion with reference to one of the key policy prescriptions that are associated with the failed states paradigm: granting administrative responsibilities over the territory concerned to international organizations, which in the context of governmental collapse can be used to fill the

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1. See Gerald B. Helman & Steven R. Ratner, *Saving Failed States* 89 *Foreign Pol’y* 3 (1992).

2. E.g. Margaret P. Karns & Karen A. Mingst, *Peacekeeping and the Changing Role of the United Nations: Four dilemmas*, in UNITED NATIONS PEACEKEEPING OPERATIONS: AD HOC MISSIONS, PERMANENT ENGAGEMENT 215 (Ramesh Thakur & Albrecht Schnabel eds., 2001).

3. For some of these criticisms, see Henry J. Richardson, “Failed States,” *Self-Determination, and Preventative Diplomacy: Colonialist Nostalgia and Democratic Expectations*, 10 *TEMP. INT’L & COMP. L. J.* 1 (1996) and Ruth Gordon, *Saving Failed States: Sometimes A Neocolonialist Notion*, 12 *AM. U.J. INT’L L. & POL’Y* 903 (1997).

governmental vacuum and/or to construct, or reconstruct, essential state institutions.<sup>4</sup> This policy institution, currently underway in Kosovo and conducted in East Timor from the end of 1999 to May 2002, was proposed by Helman and Ratner as a mechanism (termed “United Nations Conservatorship”) for “saving” failed states. It is invariably considered when the different policy options available as responses to particular situations of governmental collapse are being reviewed, as in Afghanistan after the fall of the Taliban at the end of 2001. Although in practice plenary international territorial administration is often ultimately rejected in this context (Cf., Afghanistan). Moreover, it is sometimes used to pursue entirely different objectives (e.g. enabling the transfer of territory from one actor to another, as in West Irian in 1963-64 and Eastern Slavonia in 1996-98).<sup>5</sup>

The “failed state” label arguably suggests that when governmental infrastructure collapses, the state, its people, and its leaders are solely responsible; it is the “state” that has “failed.” Henry Richardson highlights this feature of the “failed state” concept, and criticizes it as simplistic.<sup>6</sup> Of course state collapse is often due, to a considerable degree, to indigenous factors, whether civil conflict or corrupt leadership. At the same time, clearly the involvement of foreign states, international financial institutions such as the IMF and the World Bank, multinational corporations, and the like often plays a major role in mediating the state of local conditions, thereby affecting the viability of the economy and governmental infrastructure. For example, should exclusive responsibility for the governmental breakdown in the Congo in the 1960’s lie at the door of the Congolese people and their leaders?<sup>7</sup> To make this assertion, one should somehow discount the role of Belgium, for example, who “failed” to prepare local people for government before independence, and then intervened militarily in the country afterwards to support certain factions during the civil war.<sup>8</sup> East Timor became a state in May 2002. If, in two years time, the government there collapses, would it really be appropriate to conceive responsibility for that solely in terms of the local population? Clearly, one cannot look only at the behavior of local actors in seeking to appraise a particular national economy and political system. Regrettably, this is exactly what the “failed state” concept does.

The skewed notion of responsibility arguably suggested by the failed state idea is not only misconceived; it also leads to policy prescriptions that, by

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4. On this use of international territorial administration, see Ralph Wilde *From Danzig to East Timor and Beyond: the Role of International Territorial Administration*, 95 AM. J. INT’L L. 583,592-93 (2001).

5. *Id.* at 588-89.

6. Richardson, *supra* note 3.

7. On this period in the Congo’s history, see Wilde, *supra* note 4, at 592 and sources cited therein.

8. *Id.* at 592.

themselves, may ignore the structural causes of the problems they seek to address. The use of international territorial administration to respond to situations of infrastructural collapse is a case in point. Necessarily, international territorial administration is concerned exclusively with the local causes of this situation, seeking, for example, to improve local capacities for governance. Clearly, it has no remit with respect to, for example, the foreign states, international financial institutions and multinational corporations that will play as important a role in shaping the future of the territory's economy as local people and their leaders. I am not suggesting that international territorial administration should somehow be able to perform that second role. My point is that as a policy device, it is necessarily limited to addressing the local causes of whatever problem it is concerned with.

Considering the remarkably intrusive nature of this policy device, there is no comparable device that intervenes within other states and international institutions, to try to prevent, as international territorial administration does on the national level, these states and institutions from making decisions that contribute to the factors that hamper a recovery from governmental collapse, or precipitate such a collapse in the first place. So when Helman and Ratner discuss the "saving" of failed states, their prescription – foreign administration – is necessarily limited to the indigenous governmental structure.<sup>9</sup> They do not concern themselves with proposing other, similarly intrusive mechanisms with respect to, say, rich countries and multinational corporations. Necessarily, the proscription is reactive, in that it is concerned with responding to state collapse when it has happened, thereby focusing exclusively on indigenous factors, rather than seeking to prevent it in the first place, which would require a focus on both indigenous and exogenous factors.

The result is a somewhat naïve and simplistic proposal that fits well with the narrow notion of responsibility of the "failed state" paradigm. So when Margaret Karns and Karen Mingst state that the key question for the international community is what are the responsibilities of states, the United Nations (or regional IGOs), and other actors when states fail, the responsibilities in question concern remedial measures of intervention "post-failure" in the territory concerned, not prophylactic measures concerning the behavior of these actors that might lead to state collapse in the first place.<sup>10</sup> Moreover, the "responsibilities" are conceived in terms suggestive of the charity of innocent bystanders, not the liability of those who are partially complicit. The sub-title to Karns and Mingst's question about the international community's

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9. See Helman & Ratner, *supra* note 1.

10. Karns & Mingst, *supra* note 2, at 218.

responsibilities when states fail is: [h]ow should choices be made as to where to direct scarce resources?<sup>11</sup>

The asymmetrical conception of responsibility of the failed state concept, then, is reflected in and supported by the regime of international policy institutions. One might venture that this asymmetry is, of course, no accident. One might ask who uses the language of “failed states” and what their interests are in doing so. The “failed states” concept originated in Western scholarship, and has been utilized in Western policy discourse. Examining this language may be helpful, therefore, in understanding Western ideas of a “failed” other and a “successful” self. Just as Edward Said studied “Orientalism” *inter alia* as a way of understanding how Western culture conceives itself through an alienated, oriental “other,” the failed state concept may be illuminating insofar as our understandings of those who use it are concerned.<sup>12</sup> As a basis for policy, however, it may be limited, precisely because it reflects the interests of those who use it, and these interests may conflict with the interests of those in relation to whom it is used. Indeed, exclusively locally-based connotations of responsibility exculpate Western states and multinationals, and the international financial institutions they control, in terms of whatever actions these actors may have conducted that contributed to the so-called “failure” by the state concerned. Similarly, these actors do not face the prospect of intrusive policy institutions, like international territorial administration, that seek to prevent whatever policies they may prosecute that lead to state collapse.

We have, therefore, a suggestion of responsibility, and an institution for addressing this responsibility, that only takes in part of the picture. Can this not be supported, however, as the best that can be hoped for in an unequal world? Was Helman and Ratner’s limited focus an attempt to address legitimate concerns about state collapse, while staying within the bounds of what was realistic in terms of the proscription put forward? In the first place, on pragmatic grounds it may have little effect. The work done on the ground with local people may be undermined by the absence of comparative processes operating in those other arenas that are equally determinative of the policies concerned. Even if this were not the case, however, there is a further problem.

The failed states concept is not only about emphasizing a certain area of responsibility. It can also be seen as repudiating the notion that responsibility can reside elsewhere as well. The notion of the failed state, then, and its associated policy institutions like international territorial administration, may reflect and constitute not good first steps, but rather the impediments that exist to broader notions of responsibility and mechanisms for implementing that

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11. *Id.* at 220.

12. EDWARD SAID, *ORIENTALISM: WESTERN CONCEPTIONS OF THE ORIENT* (1995) (reissue with new afterword).

responsibility. The failed state concept not only reflects our unequal world, but buttresses that inequality. When international territorial administration is used in circumstances of state collapse, it may be serving merely to distract attention away from the structural, exogenous factors that both contributed to the collapse and will mediate the future economic development of the territory.

# A NEW LIBERAL TRADE POLICY FOUNDATION

*Hal S. Shapiro\**

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## I. IS IT TIME TO RECAST THE LIBERAL POSITION ON TRADE?

With the enactment of Trade Promotion Authority legislation in August of 2002<sup>1</sup> and a lackluster performance by Democrats in the November elections that followed,<sup>2</sup> a profound question looms over the left wing of the American body politic, a question that has attracted all too little attention to date: Has the time come for a new liberal approach to international trade and globalization? The answer to this question in turn depends on the answer to a second, but related question: Is the gap between the developed and developing worlds one of, if not the, greatest economic, political, and moral issues of our time?

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1. The 2001-02 battle to renew fast-track procedures, now known as Trade Promotion Authority, in 2002 was a bitter, partisan battle in the House of Representatives. The bill first passed the House by just one vote; see Helene Cooper, David Rogers, and Jim VandeHei, *House Votes Wide Trade Powers for Bush – 'Fast Track' Authority Wins Passage in 215-214 Tally; Senate Passage Expected*, WALL ST. J., Dec. 7, 2001, at A3; it then obtained an important procedural victory in the House by again just one vote; "see House Passes Motion on Conference with Scant Democratic Support," see *Inside U.S. TRADE*, June 28, 2002; and it gained ultimate passage in the House by of 215 to 212. In the end, the bill garnered support from 190 Republicans but only 25 Democrats.

2. See, e.g., R.W. Apple, Jr., *The 2002 Elections: News Analysis; President's Risks Are Rewarded at Polls*, N.Y. TIMES, NOV. 6, 2002, AT A1 (NOTING THE SHIFT IN CONTROL FROM THE DEMOCRATS TO THE REPUBLICANS AND THE DEMOCRATS' LOSS OF SEATS IN THE HOUSE OF REPRESENTATIVES).

As explained below, the answer to both questions, for progressives at least, undoubtedly should be yes. The current liberal position on trade is internally inconsistent and unlikely to achieve the ends that its well-intentioned advocates hope to achieve. It is grounded in unrealistic premises that have spawned a thousand law review articles but achieved precious little in terms of tangible results. It is used by protectionists as an excuse to halt market liberalization efforts,<sup>3</sup> and it threatens to deny the people who most need economic advancement the avenues of opportunity that would lead to better lives.<sup>4</sup>

This critique of the liberal orthodoxy is not intended to bury liberal goals in trade policy, but to more sharply define them and hopefully start a dialogue to find better ways to obtain them. The liberal orthodoxy has transformed the trade debate in important and lasting ways. It has brought to the fore concern for the habitability of the planet on which we live, the conditions in which we toil, and the equities of how we spread the wealth we create.<sup>5</sup> The challenge is to advance these very same goals by unleashing, rather than harnessing, trade, which in and of itself is an engine for attaining a more progressive, sustainable, and humane world: economic growth.<sup>6</sup> What follows is designed to begin a

3. See, e.g., Edmund G. Brown, Jr., *Free Trade is Not Free*, in *THE CASE AGAINST FREE TRADE*, at 65-68 reprinted in Raj Bhala, *INTERNATIONAL TRADE LAW: THEORY AND PRACTICE* at 99-101 (2001) (arguing that free trade agreements only help powerful corporations and produce a "race to the bottom" in which countries lower environmental and labor standards to attract foreign investment). See also Herman E. Daly, *FROM ADJUSTMENT TO SUSTAINABLE DEVELOPMENT: THE OBSTACLE OF FREE TRADE*, 15 *LOY. L.A. INT'L J.* 33, 36-42 (1992) (arguing that free trade prevents countries from internalizing the external costs of protecting the environment).

4. See, e.g., P.T. Bauer, *Equality, the Third World and Economic Delusion* at 76-80, reprinted in Raj Bhala, *International Trade Law: Theory and Practice* at 1417-20 (2001)

The allegations that external trade, and especially imports from the West, are damaging to the populations of the Third World reveal a barely disguised condescension towards the ordinary people there, and even contempt for them. The people, of course, want the imports. If they did not, the imported goods could not be sold. Similarly, the people are prepared to produce for export to pay for these goods. To say that these processes are damaging is to argue that people's preferences are of no account in organizing their own lives.

5. See, e.g., Charles Tiefer, *'Alongside' the Fast Track: Environmental and Labor Issues in FTA's*, *MINN. J. OF GLOBAL TRADE* 329, 331-33, 338-41 (1998) (describing the debate over environmental and labor issues that arose in connection with efforts to renew fast track during the Clinton Administration).

6. According to the World Bank, "Trade is a vital engine for poverty-reducing growth. Those countries that have intensified their links with the global economy through trade and investment have tended to grow more rapidly over a sustained period and have experienced larger reductions in poverty. Even the pro-development." See, *Trade*, *THE WORLD BANK GROUP*, (Sept. 2002) available at, [http://www.worldbank.org/wbsite/extrnl/news/trade/leveraging trade for development](http://www.worldbank.org/wbsite/extrnl/news/trade/leveraging%20trade%20for%20development) (last visited Mar. 12, 2003). Even the left leaning Oxfam has recognized the potential for trade to produce growth in the developing world. See "*Harnessing Trade for Growth*," *Oxfam Briefing Paper*, August 2001, at 1.

International trade can be a force for poverty reduction by overcoming local, national, and regional scarcity, and by creating livelihoods and employment opportunities. However, rich countries and powerful corporations have captured a disproportionate share of the benefits of trade, while developing countries and poor men and women have been left behind or made worse off.

conversation that will hopefully better connect policy choices with these aspirations.

## II. DEFENDING THE LIBERAL POSITION

In order to fully answer whether it is time for a new liberal approach on trade, it is necessary first to explain what that means. The liberal position on trade – in particular, liberal from a United States political perspective – is principally characterized by three baskets of policy initiatives. The first is the “linkage” of trade with a host of other issues – from labor and the environment to human rights, anti-corruption initiatives, and even anti-narcotics efforts.<sup>7</sup> The second is the promotion of an array of border protection measures including, but not necessarily limited to, the retention of ordinary tariffs and quotas, use of escape clause or safeguard actions, and the imposition of antidumping and countervailing duties.<sup>8</sup> And the third is a neo-mercantilist support for market liberalization that results in an increase in the exportation of domestically-made products, a tolerance for imports used in domestic production, but an aversion to imports that compete directly with domestic products.

In sum, the predominant liberal position on trade is not hostile to trade *per se*, but it accepts only what is often referred to as “fair” trade. In practice, however, the distinction between the two can be difficult to see. The pursuit of “fair” trade has led to continued use of quotas on textile and apparel products, tariff peaks on agriculture, and an explosion of trade remedy cases, including perhaps most famously, the recent safeguard action on steel.<sup>9</sup>

## III. CONTRASTING THE CLASSICAL CONSERVATIVE POSITION

The liberal position on trade stands in contrast to the classic conservative position, which, at least in theory, is unabashedly pro-free trade. Just as the liberal position is maddeningly complex – drawing fine-line distinctions between useful and harmful imports and circumstances in which “linkage” is appropriate – the classic conservative position is almost naïve in its simplicity. In its purest form, it ignores the extraordinary domestic pressures that can mount

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7. See, e.g., letter of Representatives Rangel, Levin, and Matsui, dated September 26, 2001, critiquing the Trade Promotion Authority bill introduced by Republican Ways & Means Chairman Bill Thomas for lack of language ensuring adequate labor and environmental protections in trade agreements, reprinted in *INSIDE U.S. TRADE* (2001).

8. See, e.g., *More than 100 House Democrats Support Dayton-Craig* in *INSIDE U.S. TRADE* (May 24, 2002) (noting strong Democratic support for amendment to Trade Promotion authority that would exclude from fast-track consideration any provision in a United States trade agreement proposing to change a United States trade remedy law).

9. While it was President Bush who formally launched the United States safeguard action and imposed it, liberals in Congress have been seeking such protection for steel for years.

to impose trade barriers. The reality, of course, is another matter. Leading conservative politicians have supported protective measures when it is *their* constituents whose businesses and jobs are threatened by import competition. In practice, the differences between liberals and conservatives when it comes to trade may be more one of degree than kind. Liberals may be more eager, or perhaps comfortable, to impose trade protection than conservatives, but both appear ready to do so when the circumstances in their view justify it.<sup>10</sup>

#### IV. THE CENTRAL ROLE OF “LINKAGE”

In the past, the seminal distinction between the liberal and conservative positions has been “linkage.” While liberals have pursued “linkage,” conservatives have resisted. The enactment of Trade Promotion Authority legislation revealed that conservative opposition to “linkage” in the United States may be waning. Between 1994, when fast track was last in effect, and 1998, the debate turned in large part on the relationship between trade, on the one hand, and labor and environmental standards on the other. During this time, two fast-track bills failed to become law.<sup>11</sup>

In 2001 and 2002, controversy over labor and the environment all but disappeared, as even the main proposals from the Republican-led House of Representatives included United States negotiating objectives that called for trade-related labor and environmental issues to be accorded equal weight with conventional trade issues and to be enforced in the same way as other provisions in trade agreements – that is, through the use of trade sanctions. Instead, the key issues were the adoption of benefits for workers who lose their jobs due to trade; proposed reforms to investor-state dispute-resolution proceedings; and the extent to which new trade agreements can weaken United States trade remedy laws.<sup>12</sup>

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10. One need only look at the United States safeguard action on steel. President Bush, who campaigned for office on a strong pro-free-trade platform, requested the United States International Trade Commission to investigate steel imports and, as a result of that investigation, he chose to impose significant protections for the steel industry. President Bush’s action has been roundly denounced and characterized as protectionist in many quarters. It is the subject of numerous World Trade Organization dispute-settlement proceedings. The President, however, was not alone, on the American political right in endorsing protection for United States steel. A number of conservative members of Congress are members of the Steel Caucus, which generally favors greater protection from imports. And, southern Republicans and Democrats alike have backed protection for United States textile manufacturers.

11. See Jutta Hennig, *Bipartisan Opposition Leads to 180-243 House Defeat of Fast Track*, in *INSIDE U.S. TRADE* (1998); *Finance Aide Calls for Broad Debate in Wake of Fast Track Collapse* in *INSIDE U.S. TRADE* (Nov. 28, 1997) (Chronicling effects of decision to withdraw fast track legislation on eve of vote.).

12. See, e.g., *Final Trade Bill Agreement Falls Short of Senate TAA Provisions*, in *INSIDE U.S. TRADE* (2002).

## V. A POLICY AT WAR WITH ITSELF

At first blush, the central pillars underlying the predominant liberal position on trade – “linkage” between trade and other issues, comfort with protection in certain contexts, and a degree of hostility to import competition – advance classic liberal goals. They attempt to use trade policy to bolster liberal causes such as worker rights and clean air. They also attempt to protect blue-collar workers from the vicissitudes of uncertain market forces – market forces that not only may arguably advantage the privileged few over the ordinary masses, but that also may be unfairly manipulated by “foreigners” who do not live and play by the same rules as we do (however “we” may be defined).

But, in actuality, the predominant liberal trade position is a policy argument at war with itself, or at least with core liberal values. “Linkage” in the abstract may be laudable. It might indeed be just and wise to link trade benefits to improved labor and environmental standards, but almost all attention concerning “linkage” has been over how to word abstract United States negotiating principles in fast-track bills rather than making concrete progress on these issues in international trade agreements.

The plain truth is that United States trade partners have shown little interest in pursuing “linkage.” Developing countries in particular view “linkage,” at best, as a legitimate policy that incidentally minimizes aspects of their comparative advantage in certain sectors. At worst, they view it as a naked attempt to impose discriminatory and protectionist measures by developed countries against the goods and services of developing countries.<sup>13</sup>

Either way, developing countries have a point. International trade rules that would permit a measure barring the importation of a blouse made in Bangladesh through child labor opens the door to import barriers to blouses made by Indonesian workers who make less than a prescribed minimum wage, or Guatemalan workers who toil in unpleasant or unsafe factories, or Chinese workers who live in a country that doesn’t have adequate pollution safeguards or Western civil liberties. Developing countries that resist acceptance of such measures argue, with a large degree of historical accuracy, that developed countries attained their current level of economic advancement without such government intervention in the marketplace, yet they now want to impose a new set of rules on the rest of the world.

Only the coldest of hearts would want children to work instead of attend school, or allow workers to endure the hardship of sweatshops or earn less than a subsistence wage. But, to many in the developing world, only the coldest of

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13. See, e.g., JOHN H. JACKSON ET. AL., *LEGAL PROBLEMS OF INT’L ECON. RELATIONS* 1186 (4th ed. 2002) (“some developing countries have also expressed concern that some of the ‘new’ issues for the GATT/WTO system – environment, human rights, labor standards – may lead to disguised protectionism”).

hearts would take jobs away from a child who must work to support her family, or deny a job – menial though it may be – to a worker who has no better alternative. It has yet to be proven that closing developed country borders to developing country goods will improve the standards such policies may be designed to achieve, but market barriers almost surely will have a painful impact on those least able to endure further economic setbacks.

There can be little doubt that liberal acceptance of protective measures has decidedly illiberal effects. One need not be an economist to understand that tariffs or quotas not only harm the interests of foreign exporters, but also domestic importing enterprises, domestic retailers that sell imported goods, domestic manufacturers that rely on imported inputs in their products and, perhaps most important of all, domestic consumers who pay more for whatever products reach the shelves of their local stores. Consumer welfare is generally the first casualty of trade protection. Consumers are forced to pay more for less choice and, in some instances, less quality.

At bottom, tariffs and quotas are regressive in nature. They disproportionately affect the poor and small businesses. The notion of increased domestic sales taxes are often anathema to liberal policymakers and politicians because they are regressive taxes, yet tariffs are embraced because of the charade that they are somehow borne only by foreigners. The reality is that the cost of tariffs, at least in part, is passed on to all of us. Compounding this reality is that trade protection often begets more trade protection. Thus, the regressive tariffs we impose on United States consumers today may be imposed on their German, Japanese, or Brazilian counterparts tomorrow.

While the twin-headed hydra of “linkage” and limited protectionism may be justifiable in liberal terms by a reasonable desire to provide additional security to domestic workers – an important concern – it does nothing to help the billions of people around the world living in abject poverty, conditions most of us in the United States would consider unthinkable in the 21st century. As much American Democrats may want to preserve well-paying manufacturing jobs for middle-class workers in Ohio and Michigan, they should not want to do it at the expense of the four billion people in the world who survive by tilling the soil,<sup>14</sup> or the three billion who have never made a phone call,<sup>15</sup> or the 2.8 billion who live on less than two dollars a day,<sup>16</sup> or the 1.2 billion who live on one dollar a day.<sup>17</sup>

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14. See Ambassador Robert B. Zoellick, Commencement Address at St. Joseph's College, Rensselaer, Indiana (May 5, 2002).

15. *Id.*

16. The World Bank Group, *Twenty Questions About Poverty and Development*, at 1, available at <http://www.worldbank.org/poverty/quiz/whole.htm> (last visited Mar. 12, 2003).

17. The World Bank Group, *World Development Indicators 2002, Economy, Growth and*

To be perfectly clear: this is *not* a call for the diminution of American prosperity in order to close the North-South gap. A policy based on such a wealth transfer is not only of questionable morality; it is politically unfeasible. Instead, United States liberal trade policies should be retooled to promote growth both at home *and* abroad in developing countries, especially for those within and without the United States who have the least and need the most. As Presidents Kennedy and Clinton said, two pro-free trade liberals, we need a trade policy that creates a rising tide that lifts all boats.<sup>18</sup>

## VI. AN END TO "LINKAGE"

So, how can such an admittedly utopian vision be attained? First, it is time to move away from "linkage." Delinking trade from labor and environmental standards *does not* mean turning our backs on lifting environmental and labor standards in nations where these standards are lacking or inadequate. It means putting industrialized country money where our mouths are. If we are serious about cleaning the air, purifying drinking water, ending child labor and sweatshops, and promoting freedom and democracy, as we should be, then we ought to enhance the international programs designed to do so. We should be honest with ourselves and recognize that pollution in Mexico or Argentina was not created by international trade, and it will not be cured through international trade agreements.<sup>19</sup> The same can be said for impure water or smog in Egypt or Pakistan. International trade is for the most part a small fraction of the economies of the countries of the developing world, and in most instances it is but a tributary to the main rivers of problems that course through them. It thus is at the margins of the problems that are now being linked with trade.

What we need is not defensive measures to guard against the so-called "race to the bottom." Trade "linkage" merely locks in existing environmental and labor standards that have proven in the United States view to be ineffective. The labor and environmental provisions of the NAFTA and the United States-Jordan Free Trade Agreement, for example, do not lift standards, but rather fix in place the very policies that such provisions were initially proposed to counteract. Instead, what we need are affirmative measures to create a "race to

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*Development*, at 2, available at <http://www.worldbank.org/data/wdi2002/economy.pdf> (last visited Mar. 12, 2003).

18. For example, President Kennedy encouraged free trade reforms by arguing, "[a]s they say on my own Cape Cod, a rising tide lifts all the boats." President's Address in the Assembly Hall at the Paulskirche in Frankfurt, *Published Papers*, 519 (June 25, 1963).

19. See, e.g., HAKAN NORDSTROM & SCOTT VAUGHAN, WTO SECRETARIAT, Special Studies No. 4, Trade and Environment (1999) (reviewing prior studies and concluding that international as opposed to domestic trade may exacerbate negative environmental conditions or diminish enthusiasm for environmental reforms, but there is little evidence that it is the cause of world's major environmental problems).

the top.” If we want workers to have a right to organize, if we want the cutting of rain forests to stop, we must put the full weight of the United States and the developed world behind initiatives that will strive to meet these goals.

This of course also means tapping the treasuries of the United States and developed countries to invest in these initiatives. We must offer carrots and not just trade sanction sticks. Even if it could be shown to produce results, threatening to cut off market access for developing country agriculture or textiles is a rather indirect way to secure cleaner air in Peru. United States consumers and Peruvian farmers, two groups liberals should want to help, are asked to shoulder a considerable burden so that other liberal priorities may advance.

Of course, a “race to the top” will not come cheap. But, the truth is that United States foreign aid lags behind almost every other industrialized nation as a percentage of GDP. It has stood at roughly ... of United States GDP, and almost all of the richest countries in the world consistently fail to meet their established goal of... We of course cannot fund all of the initiatives that might be deserving of funding, but we can do more.

Some might wonder where the money will come from, especially at a time when the United States budget has slipped from surplus into deficit. The answer to the question is too complex to go into depth here, but United States to its credit has responded to various crises throughout its history by mobilizing resources commensurate to quell the disturbances at hand. If United States liberals would unify around the notion that two billion people in the world today living without sanitation, and one billion people living without clean water, is a crisis, I believe the money can be found.

## VII. REDUCING CORPORATE TAXES FOR GOOD CORPORATE CITIZENS

Beyond an end to “linkage,” I submit that the liberal position on trade should begin to turn away from border measures and turn to a new approach to the treatment of corporations and the use of subsidies.

It is remarkable that the same zeal liberals apply to curbing the “race to the bottom” in international trade is not applied to corporate law in the United States. Currently, we have fifty different state corporate laws that to some extent compete with each other. It is axiomatic that Delaware is one of the best places for businesses to incorporate because it offers executives the greatest discretion and corporations the greatest protections. And, relaxation of local rules and regulations to attract businesses to a region are commonplace.

A new and better approach need not punish corporations or encumber their operations. What it should do is provide corporations with incentives to be

better United States and global citizens and to keep good jobs in the United States. If we want United States companies that do business overseas to pay a living wage, or adhere to environmental practices akin to those required here, we should give them an economic reason to do so. We could of course pass a law that all United States businesses must pay their employees wherever located the United States minimum wage, and require these companies to meet United States environmental standards everywhere in the world. Doing so, however, would likely lead to a retrenchment of United States investment in the countries that desperately need it.

Rather, liberals should study, and perhaps seek to implement, a reduction in United States corporate taxes conditioned on corporate behavior that advances certain core values. A reduced tax might operate as follows:

- a) The United States corporate rate could work on two tracks. The current system could remain in effect and operate precisely as it does now;
- b) However, a second, lower United States tax rate could be applied for income earned as a result of the production of goods in the United States or services supplied in or from the United States. The rate reduction should be calibrated to be at the low end of major developing countries. It need not be the lowest rate among industrialized nations, since the United States has sufficient efficiencies and benefits to overcome a small tax advantage offered by its main developed competitors;
- c) This reduction likely would pay for itself in part. A large number of companies would increase production and operations in the United States if the United States tax rate were lower;
- d) This lower rate, however, would be conditioned on companies pledging to be good corporate citizens. These companies would have to meet certain minimum environmental and labor standards overseas. These companies would have to be willing to act as United States business ambassadors, promoting improved practices around the world. These companies would have to agree to be run for the benefit of workers and shareholders as much as executives. In this post-Enron, Arthur Andersen, and Worldcom world, there may never be a better time to retool the United States approach to how and for whom companies should be operated;
- e) This lower tax rate also would be available for companies doing business in least developed countries. This would avoid a lower United States corporate tax rate steering investments away from the countries that need it most.

Some might criticize such a dual tax system as violating the principal of tax neutrality – that is, a tax system should not be used to affect where business

activities take place. However, such a principal is honored mostly in the breach. Indeed, the WTO's export subsidy rules actually are skewed to allow countries to tax export income earned offshore less than income earned domestically. Such a regime only fuels the fire that leads many on the left to charge that international trade leads to an evaporation of good jobs in developed countries.

This tax proposal is intended to balance and advance several liberal goals. It would diminish the need for border protection and hopefully pave the way to retain and expand developing country access to the United States market. To the extent developing country goods make inroads in the United States, the answer would not be protection, but a reduction in taxes to make United States companies more competitive. A tax reduction of course can affect the conditions of competition, but unlike a tariff or quota, a tax cut would at least give developing country goods a fighting chance. It would also energize the private sector to improve overseas standards, rather than resorting to border-closing sanctions to punish countries that fail to meet certain prescribed goals. And, it would take one of the most important policy tools of the right and convert it to progressive ends – no small political advantage.

#### VIII. USE OF PRINCIPLED SUBSIDIES

Finally, a new approach to the use of subsidies could advance the liberal goals of helping United States workers and producers without unduly harming the interests of the developing world. Unlike the recent farm bill, in which large portions of \$180 billion dollars in subsidies will in no small measure go to parties other than family farmers or farmers in distress, new United States subsidies should:

- 1) Fund research and development (which likely will have spill-over effects that will offer benefits well beyond the enterprise or product at hand);
- 2) Help businesses and industries that are in need of adjustment (using subsidies rather than border-closing safeguard actions);
- 3) Provide aid to small businesses;
- 4) Cover the costs of worker training, relocation, and benefits; and
- 5) Aid industrial modernization.

While here too it is possible that developing country competitors may be disadvantaged through increased United States subsidies, resort to subsidies in general should be less harmful than tariffs or quotas. This would be especially true if safeguards are put in effect to ensure that subsidies are not used simply to alter the terms of competition or to help large players get an even greater share of the market.

## IX. CONCLUSION

In conclusion, it may be true, from the perspective of developing countries, that the best United States trade policy would be the conservative trade policy. That is, a trade policy in which markets are simply opened and products can compete strictly on economic terms. Such a vision, though, would ignore the fact that the conservative position is generally predicated on reciprocity, which would mean that developing countries must abandon their often double-digit tariffs to see an end to United States tariffs that in most cases are lower. It also ignores the political reality that a protection-free world is simply not possible at this time.

What is realistic is a shift away from trade-reducing policies that emanate from “linkage,” the exponential growth in the use of trade remedies, and straight-out protection. Meaningful labor, environmental, and human rights projects, reduced corporate taxes in exchange for improved corporate behavior, and targeted use of subsidies would advance liberal ideas while enhancing the welfare of the average consumer and the poor. It may be that such policies would not provide the guaranteed protections the current liberal position on trade seeks, but such policies would not harm the very people liberals in general want to help.

Robert Bork, a well-known United States conservative jurist and legal scholar, was once asked how he came to be such an ardent right-winger when he was a socialist early in life. He responded by saying that “anyone who is not a socialist at eighteen has no heart; anyone who is a socialist at forty-eight has no brain.” Paraphrasing Bork, it may be correct to say that “any liberal who strives to protect a small number of United States jobs at the expense of the developing world has a heart in need of resuscitation; but a liberal who strives to protect those most in need of protection here in the United States and in the developing world have both a heart and a brain.”

# A DEEP STRUCTURE CONNECTION: CHILD LABOR AND THE WORLD TRADE ORGANIZATION

*Sara Ann Dillon\**

I would like to begin my remarks by making two utterly contradictory statements with regard to the relationship, as I see it, between the global phenomenon of child labor, and the World Trade Organization (WTO).

The first is that there is no relationship whatsoever between these two subjects, that the WTO has no institutional capacity to respond to concerns about even the worst forms of child labor; and indeed that much of the academic writing on the subject of a notional relationship between these topics has been largely wasted effort.

The other, contrasting, statement, is that attempts to imagine an effective and enforceable global regulatory response to child labor, as well as to other human rights abuses, is inextricably connected with the rise of World Trade Organization law since the mid 1990s, in the sense that a set of genuine “rights to trade” (with states acting as proxies for their most powerful transnational economic actors) has offered an irresistible model for the achievement of other kinds of global regulatory structures.<sup>1</sup>

The idea, however, that the WTO *as it is*, and with the name it carries, can or will influence the destiny of most or even many child laborers, is completely fanciful. For one thing, there is quite literally nothing in WTO law concerning child labor, apart from the abstract debate as to whether or not Article XX of the GATT should *allow* member countries to maintain import bans on the products of child labor. I would like to make clear that in stating that the WTO lacks capacity to be effective in this area, I am not motivated by hostility towards proposals for a WTO “social clause,” one that might incorporate core labor standards as part of the necessary preconditions to state participation in the WTO system of trade rights and obligations. For the most part, advocates of a social clause have been well intentioned, seeking to preserve labor rights in the developed world, while assisting the workers of the developing world.<sup>2</sup> At the

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1. Much has been written on the “new legalism” of the WTO, as compared with the looser and more diplomatic structures of the former GATT system. *See, e.g.* Robert L. Howse, *The House That Jackson Built: Restructuring the GATT System*, 20 MICH. J. INT’L L. 107 (Winter 1999).

2. For a description of what a WTO “social clause” would look like, *see, e.g.*, Anjali Garg, *A Child Labor Social Clause: Analysis and Proposal for Action*, 31 NYU J. INT’L L. & POL. 473 (Winter/Spring 1999)

same time, it is clear to me that a legally binding “social clause,” however vital to the creation of a fairly regulated global order, actually belongs elsewhere than within the WTO.

It is of course significant that the WTO is the ultimate symbol of globalization, as it is the legal mechanism for the dismantling of the national economic impulse.<sup>3</sup> The phenomenon of child labor, on the other hand, must be seen as the ultimate symbol of a failure to achieve a corresponding global protection for the vulnerable. The urgency with which the issue of child labor should be approached has little to do with the question of whether child labor has in fact increased specifically to service the “global economy.” It would appear that a relatively small percentage of child labor in the developing world participates directly in the “global” or export economy, but this is beside the point, and in no way absolves global institutions and/or developed country governments from responsibility.<sup>4</sup> Globalization exists; strong transnational actors have access to global markets; and child labor of all kinds continues to exist and dominate the lives of a significant proportion of the world’s children. Beyond this clear proposition, there is no necessity for attribution of blame; there is only a compelling reason to seek a solution.

It is very telling that the WTO’s Singapore Ministerial Declaration of 1996 stated that the International Labor Organization (ILO) alone had the “competence” to enforce global labor standards.<sup>5</sup> This was particularly ironic, since the then newly minted WTO did in fact have enforcement “competence,” albeit only as far as trade principles were concerned; whereas the ILO was well known not to enjoy such competence. While the ILO clearly has responsibility for generating international labor standards, it lacks the type of enforcement arm that sets the WTO apart from other international law systems.

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(arguing that a social clause would provide a mechanism to deter hazardous and exploitative international child labor); see also, Adelle Blackett, *Whither Social Clause? Human Rights, Trade Theory and Treaty Interpretation*, 31 COLUM. HUM. RTS. L. REV. 1 (Fall 1999).

3. See Jeff Atik, *Global Trade Issues in the New Millennium: Democratizing the WTO*, 33 GEO. WASH. INT’L L. REV. 451 (2001). Atik writes: “The WTO is feared as a super-government, driven by the logic of free trade to override national preferences.”

4. For recent statistics on the scale and nature of child labor worldwide, see *Every Child Counts: New Global Estimates on Child Labour*, I.L.O. (2002).

5. Certain member delegations had argued in favor of inclusion of a commitment to a “core labor standards” provision in the declaration, but this was ultimately defeated, mainly by the resistance of developing countries. See James L. Kenworthy, *U.S. Trade Policy and the World Trade Organization: The Unraveling of the Seattle Conference and the Future of the WTO*, 5 GEO. PUB POL’Y REV. 103 (2000). Kenworthy writes that “during the Singapore conference, the United States...had pushed for a significant statement by the ministers that could lead to future negotiations in the area of core labor standards and trade and environment. ...However, Washington was forced to give way on its demands for further work on labor standards in the WTO as the price of bringing Pakistan, India and some other hardline developing countries on board.” *Id.* at 107.

“We renew our commitment,” the Singapore Declaration states, “to the observance of internationally recognized core labor standards. The ILO is the competent body to set and deal with these standards, and we affirm our support for its work in promoting them.”<sup>6</sup> The Declaration goes on to say that “We believe that economic growth and development fostered by increased trade and further trade liberalization contribute to the promotion of these standards.” And most significantly, reflecting the suspicions of many developing countries, “We reject the use of labor standards for protectionist purposes, and agree that the comparative advantage of countries, particularly low wage developing countries, must in no way be put into question.”

It has baffled me, as a long-time observer of writing on the topic of “trade and...”—trade and human rights, trade and labor, trade and the environment—that there has been a near-obsession by many academics with the question of what the WTO might, through the interpretation of GATT Article XX by panels and the Appellate Body, “allow.”<sup>7</sup> Or what those two bodies could be induced to “take on board” in terms of a non-economic, human dimension. Or what the Appellate Body will “come to understand” with regard to an ultimate synthesis of conflicting state obligations arising from different and opposing treaties—trade versus labor, the environment, human rights. I have no doubt that such a synthesis must be carried out, but not by any organ of the WTO. Rather, the real and inescapable need is for another, as yet undefined, global institution to carry out this synthesis; not a trade organization the sole focus of which, the sole ethos and objective of which, is to facilitate trade.<sup>8</sup>

I would term the entire “Article XX” approach, with its narrow WTO focus, reductionist at best. At worst, it is a distraction that leads one to ignore the actual facts of global child abuse; the reality of child trafficking for the

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6. For a complete discussion of the history and characteristics of the ILO, see HECTOR J. BARTOLOMEI DE LA CRUZ ET AL., *THE INTERNATIONAL LABOUR ORGANIZATION: THE INTERNATIONAL STANDARDS SYSTEM AND BASIC HUMAN RIGHTS* (Boulder, Colo. And Oxford, England: Westview Press) (1996).

7. Article XX of the General Agreement on Tariffs and Trade deals with “general exceptions” to the substantive GATT requirements. With the caveat that trade restrictions covered by this article may not be “applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on trade,” GATT parties are allowed to maintain measures that can be justified for reasons of public morals, the protection of human, animal or plant life, relating to the products of prison labor, or to the conservation of exhaustible natural resources, and similar public interest objectives. For a general discussion of the relationship between Article XX and human rights issues, see Salman Bal, *International Free Trade Agreements and Human Rights: Reinterpreting Article XX of the GATT*, 10 MINN. J. GLOBAL TRADE 62, 72 (2001).

8. For an exploration of the clash between trade and non-trade values, see Frank J. Garcia, *The Universal Declaration of Human Rights at 50 and the Challenge of Global Markets: Trading Away the Human Rights Principle*, 25 BROOK J. INT’L L. 51 (1999).

purposes of work in sweatshops and in the sex industry. That is why, in my view, the *fact* of a global economy leads inevitably to the need for a global solution to such economic outrages; at the same time, I maintain that the WTO itself, as an institution, is not the place to look for that solution.

There have been periodic bursts of academic speculation on the subject of what the WTO's Appellate Body would now do if clearly faced with a challenge to a national import restriction on imports of products made from child labor. The favored hypothetical in these discussions is the case of a WTO member country that creates an import ban on the products of child labor. (The US and EC do, in fact, maintain certain restrictions on the import of products of child labor, but these are far from comprehensive and of course cannot begin to identify all incoming products that might contain elements produced through the agency of child labor.<sup>9</sup>)

By way of background to the "child labor hypothetical", the recent history of conflict between national regulation in the public interest and GATT rules probably dates most explicitly to the famous "Tuna Dolphin" (pre-WTO) cases of the early 1990s. The upshot of these two (unadopted) panel decisions was that (i) the US could not engage in "extraterritorial" imposition of its dolphin conservation law, by in essence demanding these standards of its GATT trading partners, and that (ii) under GATT principles, a party could only deal with the end "product"; in other words, could not justify differential treatment of that product based on the "process" through which the product was made, or in this case, caught. Though the Tuna-Dolphin panel reports remained unadopted, and thus without real legal effect, they caused a serious ripple of alarm across the environmental community worldwide; the message was that hard-won environmental regulation could be invalidated by the operation of GATT law.<sup>10</sup> The possible chilling effect on future environmental laws, at least those that relied on import restrictions as a means of national enforcement, was clear. Equally clear was that other non-trade, public interest values were also potentially at risk.<sup>11</sup>

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9. See Benjamin James Stevenson, *Pursuing and End to Foreign Child Labor Through US Trade Law: WTO Challenges and Doctrinal Solutions*, 7 UCLA J. INT'L L. & FOREIGN AFF. 129, 145 - 151 (2002) (describing the US framework of laws attempting to discourage imports of goods produced through child labor).

10. See United States—Restrictions on Imports of Tuna (Tuna Dolphin I), Report of the Panel, DS21/R-39S/155, 3 September 1991; and United States—Restrictions on Imports of Tuna (Tuna Dolphin II), DS 29/R, 16 June 1994. For a complete discussion of these attempts to rely on Article XX to defend national environmental laws, see Padideh Ala'i, *Free Trade or Sustainable Development? An Analysis of the WTO Appellate Body's Shift to a More Balanced Approach to Trade Liberalization*, 14 AM. U. INT'L L. REV. 1129 (1999).

11. For early reaction to the Tuna-Dolphin reasoning, see Mary Ellen O'Connell, *Using Trade to Enforce International Environmental Law: Implications for United States Law*, 1 IND. J. GLOBAL LEG. STUD. 273 (1994).

Trade law specialists have made much of the fact that the more recent Shrimp/ Turtle cases have led to national conservation laws being treated more deferentially by the WTO's Appellate Body, and the objectives of the Convention on Trade in Endangered Species (CITES) at least acknowledged by the WTO bodies.<sup>12</sup> A supposed evolution in the thinking and sensitivity of the Appellate Body has been pointed to; sometimes even celebrated. Although in the Appellate Body's hands not an "Article XX" case per se, this positive tendency has also been noted in the "Asbestos" case, wherein a French ban on asbestos-containing products was allowed to stand, on the basis that the inherent danger of the products concerned legitimized the French difference in treatment of otherwise similar products--some with asbestos, some without.<sup>13</sup> These developments have been hailed by some as the end of the old Tuna Dolphin product/process line of reasoning. The logic of these discussions is that the Appellate Body will continue to pursue a more enlightened set of principles allowing for the happy co-existence of economic and non-economic principles, and national governments will supposedly be free to implement other international obligations through the device of import bans where these are felt to be central to the attainment of non-trade goals.

My dominant impression in reading such academic discussions has been: What on earth does this have to do with the broader effects of the momentum of globalization? With environmental degradation, with the frantic drive to develop, with the suffering of people caught up in these processes? And, as a very fundamental matter, it must be asked whether developed countries do in fact maintain import restrictions capable of dealing more than superficially with human rights and environmental abuses, based on consideration of the "processes" through which certain items are produced for export by trading partners in the developing world? Isn't it true that the products likely to be identified through such import bans represent only the tip of the iceberg, when it comes to child labour and other abuses? Aren't many academic discussions of Article XX wastefully theoretical, given the scale of the problem, and of the non-trade values at stake?

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12. See United States—Import Prohibition of Certain Shrimp and Shrimp Product, Report of the Appellate Body, WT/DS58/AB/R (October 12, 1998); United States—Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 by Malaysia, Report of the Appellate Body, WT/DS58/AB/RW (October 22, 2001). For a complete discussion of the reasoning in both phases of the case, see Robert Howse, *The Appellate Body Rulings in the Shrimp/Turtle Case: A New Legal Baseline for the Trade and Environment Debate*, 27 COLUM. J. ENVTL. L. 491 (2002).

13. See European Communities—Measures Affecting Asbestos and Asbestos-Containing Products, Report of the Appellate Body, WT/DS135/AB/R (March 12, 2001). See also Laura Yavitz, *The World Trade Organization Appellate Body Report, European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, 11 MINN. J. GLOBAL TRADE 43 (2002) (describing the Appellate Body's decision as "positive and important").

Despite the fact that import restrictions on goods produced under abusive labor conditions may do little to ameliorate these conditions on any scale, we may nevertheless be about to see a showdown at the WTO between just such a set of import restrictions and free trade principles. This impending dispute, described below, is symbolic of the hostility so often expressed by developing countries towards the prospect of “trade and” restrictions by wealthy countries against products from the developing world that, in their production process, have offended against non-economic principles (such as core labor standards) derived from some other sector of international law.<sup>14</sup> And while the true “trade and human rights” debate goes far beyond the question of how the WTO bodies will treat national labor-based import restrictions, we should nevertheless take this opportunity to recognize the symbolic value of this upcoming dispute, described below.

In a perverse way, the very narrowness of the “trade and” academic debate to date has generated a “trade and” backlash on the part of developing countries in the WTO, who fear that the developed world is merely seeking a new set of excuses to deny market access to products from the developing world, where a production process does not meet certain externally imposed standards.<sup>15</sup> By way of background to the dispute alluded to above, both the US and the EC maintain certain import restrictions as preconditions on participation in their “generalized system of (tariff) preferences” for products from the developing world.<sup>16</sup> These GSP programs, dating from the early 1970s, were created under pressure from developing countries, and enjoy a specific GATT waiver allowing the wealthier GATT countries to offer preferential tariff terms to a wide variety of manufactured goods from the developing world. India’s principal claim in the present dispute, still at consultation stage, is that the labor and environmental conditions being set by the EC as the cost of participation in its GSP program is not in accordance with the language of the original provisions

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14. Indian Minister for Commerce and Industry Murasoli Maran was reported to state that “developing countries have long opposed the linkage of trade with labor and environmental standards on the grounds that they might be used as an excuse to distort competition, undermine comparative advantage and provide a ‘Trojan horse’ of protectionism.” *Maran Opposes New Non-Trade Issues at WTO Meeting*, THE HINDU, June 20, 2001.

15. Professor Jadish Bhagwati has been quoted as saying that “The bid to bring the social clause under the World Trade Organization must be resisted tooth and nail,” and perhaps more disingenuously, that “[if] you change the WTO to reflect the Western view that everything is right with the West and is bad with developing countries, then you are putting a bomb under the WTO.” *Resist Bid to Bring Social Clause Under the WTO*, THE ECONOMIC TIMES OF INDIA, December 17, 2000.

16. The US Trade and Development Act of 2000 made a grounds of ineligibility to participation in the US GSP scheme that a country “has not implemented its commitments to eliminate the worst forms of child labor.” Trade and Development Act of 2000, Pub. L. 114 Stat. 251. The same act also added to the general prohibition against the importation into the United States of the products of “convict labor,” a prohibition against importing products made from the “forced or indentured child labor.” *Id.* at § 411.

enabling the EC to deviate from GATT Article I in order to grant the preferences in question. The GATT language of the “enabling clause” demanded that “generalized non-reciprocal and non-discriminatory preferences” be “beneficial to the developing countries in order to increase the export earnings, to promote the industrialization, and to accelerate the rates of economic growth” and that the preferences should be designed “to facilitate and promote the trade of developing countries”, and to “respond positively” to their developmental, financial and trade needs. India argues that the EC conditions cannot be reconciled with the original requirements, as they create “undue difficulties for India’s exports to the EC.”<sup>17</sup>

India is unlikely to prevail in this dispute, assuming it goes forward, for a number of reasons. More cautious and politically aware these days, the WTO bodies might well decide to interpret the GSP enabling language conservatively, and avoid a hot-button clash between trade and non-trade principles. However, if a violation of GATT law were to be found, the stage would be set for arguments under Article XX, to the effect that national concern for labor standards justifies the trade restriction—the very stuff of the academic hypotheticals! Whatever happens, it is significant that, just as the Indian Pharmaceuticals cases made us realize that the developed world was going to use TRIPS aggressively whatever the ultimate effects,<sup>18</sup> this current action by India demonstrates the level of hostility to the idea of “linage”—linking international trade law, and WTO law in particular, to non-trade values, resulting in import restrictions. This hostility obtains even where violation of core labor standards plainly amounts to violation of international human rights law, and can have little to do with anyone’s traditional notion of “comparative advantage.”

Interestingly, this hostility of developing world governments is aimed at a relatively modest attempt to influence labor standards extraterritorially:

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17. See European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries, Request for Consultations by India, WT/DS246/1/G/L/521-, (March 12, 2002). For a discussion of the EU’s approach to GSP, see William H. Meyer & Boyka Stefanova, *Human rights, the UN Global Compact and Global Governance*, 34 CORNELL INT’L L.J. 501 (2001). They write: “The key features of the EU’s GSP include tariff modulation, country-sector graduation, and special incentive arrangements. The special incentive arrangements, operational as of 1998, refer to labor rights and environmental protection. Special trade provisions are given to countries that comply with ILO Conventions Nos. 87 and 98 concerning the rights to organize and bargain collectively, and No. 138 with respect to the minimum age for employment.” The more recent version of the EU scheme makes even stronger demands on developing countries, in terms of application of the ILO “core labor standards.” *Id.* at 508.

18. See India—Patent Protection for Pharmaceuticals and Agricultural Chemical Products, Report of the Appellate Body, WT/DS50/AB/R (December 19, 1997). In this case and a similar complaint was brought by the EC against India. India was required to create a legally sound transitional “mailbox” system for the filing of patents; and in more general terms, to confront, soon after the coming into effect of the TRIPS Agreement, the deficiencies, from a developed country point of view, in its national patent law.

conditions on participation in a GSP program. We are not even in the realm of the “social clause” here—the social clause being a far more ambitious idea, one that would impose actual core standards on WTO members. We are not even near the possibility of making widespread reliance on child labor part of an accepted theory of unfair trade in the form of “social dumping.”

We are probably now far enough removed from November/December 1999 that we can bear to think about the ministerial debacle of “Seattle.” At the time, President Clinton made these famous remarks: “I believe the W.T.O. should make sure that open trade does indeed lift living standards, respect core labor standards that are essential not only to workers’ rights, but to human rights. That’s why this year the United States has proposed that the W.T.O. create a working group on trade and labor.”<sup>19</sup> The rest is, of course, history. There was fierce resistance to Clinton’s proposals from some of the most powerful of the developing countries, with India in the lead. Certain popular intellectuals, foremost among these Jagdish Bhagwati of Columbia University, were scathing in their criticism of the “pro labor standards”—and decidedly anti-WTO—street demonstrators who came to prominence at Seattle. Disorganized and divided as they were, the demonstrators had come to see the WTO as a main contributor to the death of national regulation in the public interest.

Oddly, depending on the issue, I both strongly agree and strongly disagree with Professor Bhagwati. On the one hand, he has come out in favor of a World Bank sponsored program of wealth transfers to deal with problems caused by adjustments to economic globalization in the developing world.<sup>20</sup> (It is, in my view, often this wealth transfer dimension that eludes the “pro-social clause” progressives who critique the WTO.) Bhagwati has also made the point, over and over again, that trade sanctions and import restrictions will not “make a dent” in the problem of child labor. I believe he is correct in this. He cites to the frequently mentioned example of female children in the Bangladeshi textile industry who, having been let go under the threat of the Child Labor Deterrence

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19. See Clyde Summers, *The Battle In Seattle: Free Trade, Labor Rights, and Societal Values*, 22 U. PA. J. INT’L ECON. L. 61 (2001) [hereinafter Summers]. Summers writes: “[Clinton] further inflamed the issue by making an unplanned statement to a newspaper that the trade group should at some point use sanctions to enforce core labor rights around the world. Clinton’s statement provoked an adamant response from developing countries, which saw any tying of trade to labor or environmental rights as disguised protectionism by developed countries to keep out exports from developing countries and stymie their development.” *Id.* at 62.

20. “I have therefore argued that the Bretton Woods institutions must be geared to providing compensation or adjustment assistance to poor countries harmed by the freeing of trade at the WTO.... It is time to put the president of the World Bank to work systematically to buttress the world trading system and the helpful freeing of trade that the WTO oversees and encourages, by aiding the poor as necessitated by those WTO actions.” Jagdish Bhagwati, *Afterword: The Question of Linkage*, 96:1 AM. J. INT’L L. 126-127 (2002).

(Harkin) Act of 1995 (unenacted), soon found themselves in far worse circumstances, particularly in the sex trade.<sup>21</sup>

His continued attacks on concerned young people in the West, however, fail to make sense, as most of these protestors are attempting to bring a human dimension to a globalizing world, an agenda that in itself can hardly be seen as anything but positive. In a recent article, Bhagwati decries the fact that many of these are young people trained in comparative literature, rather than economic, leading them into delusions about the nature of “global capitalism.” “Capitalism,” Bhagwati writes, “should be defended against ignorant, ideological, or strategic assaults.”<sup>22</sup>

Who could seriously argue that there is in fact no gross disproportion between the laws favoring transnational economic activity on the one hand, and those devoted to human rights and labor concerns on the other? And who would advocate that this discrepancy continue *as is* into the indefinite future? To the extent that reliance on child labor, especially in its worst forms, is indicative of societal failure and economic breakdown, a quantitative assessment of the relationship between globalization and child labor is unnecessary. What matters is that the two phenomena co-exist. Whether or not there are certain elements in the United States motivated by job protectionism when they denounce reliance on child labor is equally irrelevant. Social dumping may well be a fact; there is no shame in wishing to preserve one’s job; and the labor movement in the developed world does have important principles to preserve.<sup>23</sup>

It is important to recognize that denunciation of those who are advocating some version of good global governance and a fairer world trading order leaves us no nearer to solving the most pernicious forms of abuse, including child labor. At its most virulent, this sort of denunciation creates a false dichotomy between the interests of concerned citizens in the developed world and people in the developing world, who suffer the most from the gross disparities discussed above. One UPI correspondent goes so far as to say that many NGOs involved in the anti-globalization movement are peopled by “busybodies, preachers, critics, do-gooders, and professional altruists,” encroaching “on state sovereignty in the name of international law.”<sup>24</sup>

However, as Professor Clyde Summers asked in a recent article, we need to question how far some are willing to take the idea of comparative advantage.

21. See Jagdish Bhagwati, *Coping with Antiglobalization: A Trilogy of Discontents*, FOREIGN AFFAIRS, S January/February 2002-, at 2.

22. *Id.*

23. See George Ross, *Labor versus Globalization*, 570 ANNALS Am. ACAD. POL. & SOC. SCI. 78 (2000) (describing the empirical difficulties faced by the “international” labor movement in an age of globalization).

24. See Sam Vaknin, *Commentary: The Self-Appointed Altruists*, UPI, October 9, 2002.

He points out that it is not even an option for us to include within the stock of a nation's comparative advantage violations of ILO Convention 182 on the Worst Forms of Child Labor, since to say that such violations are merely the sovereign business of a particular state is to countenance human rights violations in the name of free trade—a plainly irrational position.<sup>25</sup> Summers also makes the point that many of the countries most adamantly opposed to using any trade-related device to enforce core labor standards have themselves ratified the relevant conventions and are bound by their (admittedly more or less unenforceable) obligations.<sup>26</sup>

Naturally enough, there is a fear that the wealthy developed countries might hide behind these standards to engage in some form of insidious protectionism. However, as Robert Howse has suggested, this need not be the case at all. As far as the “import restriction and Article XX” issue is concerned, even the WTO would at least carry out a review of the exact nature of the import restriction concerned.<sup>27</sup> If claims for the effectiveness of import restrictions in dealing with such abuses as the worst forms of child labor have been fanciful, then certainly the claims made regarding the protectionist dangers inherent in allowing such restrictions have also been wildly exaggerated.

But I have already made clear that my own focus is not the narrow question of whether or not national import restrictions may be maintained, within the terms of GATT Article XX. The WTO has no interpretive capacity to deal with larger human rights issues; no mandate; no substance. No national import restriction can in fact greatly influence the empirical fact of widespread labor abuses, such as the worst forms of child labor.

In the concluding section of this paper, I will suggest my own approach to the problem of “trade and child labor.” My vision is not one of a new and more enlightened WTO; nor do I subscribe to the doctrine that “time alone” will bring about development that will of itself eliminate child labor and other economically-based human rights abuses.<sup>28</sup>

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25. See Summers, *supra* note 19, at 65-68, 86, 90.

26. Summers at 67.

27. For a positive view of the possibility of synthesizing core ILO principles and WTO obligations, see Robert Howse, *The World Trade Organization and the Protection of Workers' Rights*, 3 J. SMALL & EMERGING BUS. L. 131 (1999). (Howse writes of the 1998 Declaration on Fundamental Principles and Rights at Work, adopted by the ILO membership, as a “watershed,” in that “the Declaration makes achievement of compliance with fundamental labor rights an obligation arising from the very status of membership in the ILO. When the issue is egregious violations of these rights—such as violent suppression of collective bargaining, gender discrimination, forced or slave labor, or exploitative child labor—trade measures are not necessarily a protectionist attempt to level the playing field. Instead they may resemble the kinds of sanctions against gross human rights violations that have been imposed by many members of the world community against South Africa under apartheid and, more recently, against Serbia.” *Id.* at 133.

28. [Malaysian Prime Minister] Mahathir criticized some of the new WTO proposals, that link and

As far as methodology is concerned, there has been far too much attention paid to the study of the WTO in isolation from other global institutions, and indeed from empirical phenomena generally. Joseph Stiglitz has clearly identified the deeply flawed and ideologically based functioning of the IMF and World Bank, and it is plain that the WTO cannot serve as an instrument for development in the absence of a genuine “linkage” among all three of these institutions.<sup>29</sup> It is almost unthinkable that, in the absence of targeted investment mediated by a global finance body, there could be adequate levels “spontaneous” development attained in much of the developing world.

It could be said that the creation of the WTO, with its mechanisms of enforcement, highly unusual in the context of “international law,” has generated a collective imagination in the direction of a more structured set of global institutions. This in turn must lead to a recognition of the need for a court-like body capable of synthesizing conflicting international obligations, including conflicts between trade rights and labor standards. Key to the success of such a global system is a redistributive body to fund programs proven effective in eliminating abuses like the worst forms of child labor.

I understand it when Professor Summers laments that “There is no international agency other than the WTO able to effectively exert pressure for observance of rights on a global basis.”<sup>30</sup> But this absence of an alternative body is not adequate reason for allowing or expecting the WTO to do that which it does not know how to do. Summers is surely right, though, when he states that “freedom of international trade is subject to observance of internationally recognized basic human rights.”<sup>31</sup> The concept of “subject to,” however, is both mysterious and deeply ambiguous. How can we make countries “subject to” that which they insist they cannot afford? But how, on the other hand, can we countenance transnational corporations, many based in the developed world, continuing to profit from their access to resources and markets in the developing world, where widespread abuses against children proliferate?

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condition trade and investment to non-trade issues, such as labor standards, human rights, democracy, child labor. Making those conditional will retard the growth of many developing countries, he warned. He noted rich countries had taken more than a century to teach their present status of social and economic sophistication. ‘It is unrealistic to expect developing countries to achieve such levels of sophistication overnight,’ he said. Sonia Jessup, *Malaysia PM decries globalization, WTO*, UPI, September 10, 2001.

29. See JOSEPH STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS* 12 - 13 (2002). As for the IMF, Stiglitz writes “[o]ver the years, since its inception the IMF has changed markedly. Founded on the belief that markets often worked badly, it now champions market supremacy with ideological fervor.” And of the hand-in-glove activities of the IMF and World Bank during the 1980s, he writes that “[t]he IMF and World Bank became the new missionary institutions, through which these ideas [free market ideology] were pushed on the reluctant poor countries that often badly needed their loans and grants.”

30. Summers, *supra* note 19, at 89.

31. *Id.* at 90.

A significant amount of attention has been paid to attempts to take action in US courts against US multinational corporations involved in serious labor/human rights abuses; as well as to the production of corporate “codes of conduct” meant to govern the conduct of developed world multinationals.<sup>32</sup> There have been a number of actions brought against US corporations under the Alien Tort Claims Act, a statute that allows alien plaintiffs to seek a remedy in US courts where another party has acted “in violation of the law of nations or treaty of the United States.”<sup>33</sup> While such actions are very important devices for drawing attention to abusive conduct by US corporations, the statute is quite difficult to use, in that it applies to only a small band of corporate acts. One must link the conduct to international law principles; normally by demonstrating that a US corporation has been complicit in the abusive conduct of a repressive foreign regime. This kind of legal action bears little relationship with the mass phenomenon of child labor, though it is conceivable that certain particularly egregious corporate conduct could fall within the net of the statute. As for self-regulatory codes, these too are potentially significant, but are unlikely to have any generalized effects on the general problem of child labor. Although one might argue over the precise figures, it should be recalled that only a certain, perhaps small, proportion of labor abuses against children involve Western multinationals.

Without either fetishizing or ignoring the connection between international trade law and child labor, I would propose a multifaceted approach to eliminating the worst forms of child labor, a task which must be seen as an international obligation falling on all parties having any degree of influence over the process of globalization. First of all, the reality of the contentious divide between the views of the developed and developing worlds with regard to the fairness of relying on import restrictions as a device to promote higher labor standards must be recognized. Penalizing countries with the most vulnerable economic profiles actually makes little sense, and cannot have the desired global effect, despite the reams of academic writing on the subject of “trade and labor, and the role of GATT Article XX”.

Where OECD-based multinationals are involved in the exploitation of children for economic gain, any sanctions should be against the corporations in question. This would involve the creation of a far more effective set of OECD

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32. On actions brought in US courts, see Andrew Ridenour, *Doe v. Unocal Corp., Apples and Oranges: Why Courts Should Use International Standards to Determine Liability for Violation of the Law of Nations Under the Alien Tort Claims Act*, 9 Tul. J. INT'L & COMP. L. 581 (2001) (discussing reliance on the Alien Tort Claims Act in US courts); and on voluntary international codes of conduct for MNEs, see Meaghan Shaughnessy, *The United Nations Global Compact and the Continuing Debate About the Effectiveness of Corporate Voluntary Codes of Conduct*, 2000 COLO. J. INT'L ENV'T'L L. & POL'Y 159 (2000).

33. 28 USC § 1350 (1993), stating that “district courts shall have original jurisdiction of any civil action by an alien in tort only, committed in violation of the law of nations or treaty of the United States.”

rules, with mandatory national implementation, than anything that exists to date.<sup>34</sup> I could not in good conscience state that such a development is politically likely. Nevertheless, it is clear that where developed world MNEs are directly involved in labor/human rights abuses, regardless of the minimal or nonexistent labor standards of the host country, the proper target of sanctions in most cases is the MNE, not the host country.<sup>35</sup> (I make the point below that sanctions against the host country could become appropriate, but only after a transition period during which significant investment had been made in programs to eliminate the worst forms of child labor and other abusive labor practices.)

As has been pointed out, most child labor is tied to a given national economy, and does not bear any direct relationship to MNEs. Nor is most child labor related to export trade, although clearly some is. Relying on GATT Article XX to justify import bans in such cases is certain to generate more hostility, and have little effect on the underlying problem. Where there is no relationship of the labor exploitation to exports, GATT Article XX is essentially irrelevant in any case.

I would like to posit a "deep structure linkage," in which the very fact of globalization means that the global economic institutions should be required to act in a concerted manner to invest in the elimination of particular abuses. This would necessitate a reorientation of the agendas of the IMF and World Bank in particular. Whether seen in the context of human rights or long term economic development, the elimination of the worst forms of child labor would be a starting point for such targeted investment. While far too small in scale, there are model programs, such as the ILO's International program on the Elimination of Child Labour (IPEC), designed to allow countries to eliminate child labor, by giving children access to school and replacing child labor with adult labor--a far more certain route to development than waiting for market liberalization to work its magic.<sup>36</sup> The IMF and World Bank should be held to the achievement of specific, empirically based goals, derived from the principles contained in international conventions, including those of the ILO.

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34. See for instance, the OECD's aspirational Declaration on International Investment and Multinational Enterprises of 1976. The OECD emphasis in that document and its annexes was to ensure that MNEs should meet the employment standards of the *host* country.

35. I use the phrase "in most cases" to distinguish between general sanctions brought to bear against a generally repressive and illegitimate regime; and the situation where a poor country lacks the resources to eliminate the exploitation of child labor in its less virulent forms.

36. See Mary Gray Davidson, *The International Labour Organization's Latest Campaign to End Child Labor: Will It Succeed Where Others Have Failed?* 11 *TRANSNAT'L L. & CONTEMP. PROBS.* 203 (2001) (describing the IPEC campaign, which is based on assistance for a phased elimination of the worst forms of child labor).

My own perspective on the WTO is that it provides a model of international regulation; not in its substance so much as in its “non-voluntariness”. Assuming that there was an international fund to assist in the elimination of child labor, at that point developing countries and developed countries should indeed have their participation in bodies like the WTO conditioned on their good faith efforts to bring about results. The expansion of global economic activity does bear a logical relationship to the impulse towards global regulation. The WTO is possessed of an unusual and even exciting non-voluntary quality, contributing to the prospect that non-trade law, including labor and human rights law, might share that same non-voluntariness. How one counters the economic forces that created the WTO with non-trade values, such that a similar urgency could inform a project to eliminate the worst forms of child labor, is a difficult political problem. For a start, there should be a redirection of the content of anti-globalization protests, through the creation of a list of firm “trade and” demands. The message of the global dissidents should be more focused, centered on the principle that the right of developed countries to profit from global business activity should depend on the contribution of those same countries to high levels of targeted investment in a global regime to protect core labor standards.

# THE LEGALITY OF THE UNITED STATES WAR ON TERROR: IS ARTICLE 51 A LEGITIMATE VEHICLE FOR THE WAR IN AFGHANISTAN OR JUST A BLANKET TO COVER-UP INTERNATIONAL WAR CRIMES?

*Matthew Scott King*

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## I. INTRODUCTION

On September 11, 2001, a network of terrorists hijacked four commercial airliners and crashed them into the World Trade Center and Pentagon, killing and injuring thousands of Americans, as the world watched in shock and disbelief.<sup>1</sup> In a perfect biblical setting, the government of the United States would invoke the “eye for an eye” doctrine and retaliate with lethal force, seeking justice for the thousands of men, women, and children that our country lost in the blink of an eye. However, when the United States signed the United Nations Charter on June 26, 1945, it became bound by international law and the limits of warfare that accompany it.<sup>2</sup>

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1. Frank Hyland, *Terrorism Hits Home: Hundreds Feared Dead as Planes Hit World Trade Center; Pentagon also Hit by Suicide Attack from the Air; All Airline Flights Nationwide are Canceled*, ATLANTA J. & CONST., Sept. 11, 2001, at 1A; Michael Grunwald, *Terrorists Hijack 4 Airliners, Destroy World Trade Center, Hit Pentagon; Hundreds Dead*, WASH. POST, Sept. 12, 2001, at A1.

2. U.N. CHARTER, pmb., <http://www.un.org/Overview/Charter/preamble.html>. Provides that “[a]ccordingly, our respective Governments, through representatives assembled in the city of San Francisco, ... have agreed to the present charter of the United Nations and do hereby establish an international organization to be known as the United Nations.”

At the time the charter was ratified, the purpose of the United Nations was to promote harmony and peace around the world and to save future generations from the horrors of war.<sup>3</sup> Although the United Nations and its charter have signified a noble and important idealism, much debate has occurred over recent years concerning the limitations of a state's right to defend itself. In the wake of September 11, the argument more specifically involves whether a State can invoke Article 51 of the United Nations Charter in the event of a terrorist attack and subsequently attack the state that harbors those terrorists.<sup>4</sup> The United States emphatically, and without hesitation, has responded to this issue.<sup>5</sup>

On October 7, 2001, the permanent representative of the United States sent a letter to the United Nations, addressed to the President of the Security Council, claiming the United States has an inherent right of individual and collective self-defense, and reporting it had initiated actions designed to prevent and deter further attacks on the United States.<sup>6</sup> Since then, the United States has taken direct military action in Afghanistan, leading and partnering with governments from around the world to form a coalition whose purpose is to do everything possible to eliminate the threat posed by international terrorism, and to deter states from supporting, harboring, or acting complicity with international terrorist groups.<sup>7</sup>

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3. *Id.* Provides that "[w]e the peoples of the United Nations determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and for these needs to unite our strength to maintain international peace and security."

4. U.N. CHARTER, art. 51, <http://www.un.org/Overview/Charter/chapter7.html> [hereinafter U.N. CHARTER] (reference is made to a states inherent right to self defense and allows for a state to take measures in the event of an armed attack).

5. *A Nation Challenged; Bush's Remarks on U.S Military Strikes in Afghanistan*, N.Y. TIMES, Oct. 8, 2001, at B6. In a presidential announcement, President Bush announced "[o]n my orders the United States military has begun strikes against Al Qaeda terrorist training camps and military installations of the Taliban regime in Afghanistan."

6. Letter dated October 7, 2001, from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, U.N. SCOR, 56th Sess. at 1, U.N. Doc. S/2001/946 (2001), <http://www.un.int/usa/s-2001-946.htm> ("In accordance with Article 51 of the Charter of the United Nations, I wish ... to report that the United States of America ... has initiated actions in the exercise of its inherent right of individual and collective self-defense following the armed attacks that were carried out against the United States."); See also Sean D. Murphy, *Terrorism and the Concept of "Armed Attack" in Article 51 of the U.N. Charter*, 43 HARV. INT'L. L.J. 41, 42 (2002). On the same day in which the letter was sent, the United State and the United Kingdom launched cruise missiles and long-range bombers against Al Qaeda and Taliban targets in Afghanistan" *Id.*; See Patrick E. Tyler, *U.S. and Britain Strikes Afghanistan, Aiming at Bases and Terrorist Camps: Bush Warns "Taliban Will Pay a Price,"* N.Y. TIMES, Oct. 8, 2001, at A1.

7. *Campaigning Against Terrorism: A Coalition Update*, at <http://www.whitehouse.gov/march11/coalition/military.html> (Mar. 11, 2002) ("To date, 17 nations have deployed to the US Central Command's area of responsibility with over 16,500 troops.")

This article will consist of two main parts. First, this paper will provide an overview and breakdown of Article 51 of the United Nations Charter, including the settings and circumstances in which a state can invoke the article and retaliate against another state in self-defense. Then, this paper will provide an analysis of the United States war in Afghanistan, focusing on the war's legality under the United Nations Charter and Article 51, in an objective format that will provide both narrow and broad interpretations of the controversial legal concepts embedded within Article 51.

## II. THE UNITED NATIONS CHARTER AND ARTICLE 51

When the United Nations Charter was signed following World War II, the basic premise of the treaty was to outlaw war.<sup>8</sup> This principal is inferred from the general provisions of the Charter. Article 2(3) requires that all members are to settle their disputes in a peaceful manner,<sup>9</sup> while Article 2(4) goes on to say that all members, in their international relations, shall refrain from using force against any state, or in any manner inconsistent with the purposes of the United Nations.<sup>10</sup> According to the International Court of Justice, these provisions regarding the restraint of force are not just United Nations Charter provisions, but are now regarded as a rule of customary international law.<sup>11</sup> Accordingly, peace and tranquility have become the customary rule of international law with few exceptions.<sup>12</sup>

Although peace and security was the ultimate objective of the United Nations Charter, the framers still understood the long-established right of a state to defend itself.<sup>13</sup> Therefore, as an exception to the general rules regarding the

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8. Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620 (1984) [hereinafter Schachter].

9. U.N. CHARTER art. 2, <http://www.un.org/Overview/Charter/chapter1.html> Provides that "[a]ll members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered."

10. *Id.* Provides that "[a]ll members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations."

11. *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, 100 (June 27) [hereinafter *Nicar v. U.S.*]; Jack M. Beard, *America's New War on Terror: The Case for Self-Defense under International Law*, 25 HARV. J.L. & PUB. POL'Y 559 (Spring 2002) [hereinafter Beard].

12. *Nicar. v. U.S.*, *supra* note 11; . YORAM DINSTEIN, *WAR, AGGRESSION, AND SELF-DEFENSE*, 72 (2nd ed.) (1994). -Distinguishing from the modern limits on warfare that accompany treaties and agreements, Dinstein points out that the predominant conviction of the 19th and early 20th centuries was that every state had a right to embark upon war whenever the state pleased. With all the discretion they need, states could "resort to war for a good reason, a bad reason, or no reason at all"; See also H.W. BRIGGS, *THE LAW OF NATIONS* 976 (2nd ed, 1952).

13. *Nicar. V. U.S.*, *supra* note 11, at 94 ("On one essential point, this treaty itself refers to pre-existing customary international law; this reference to customary law is contained in the actual text of Article

use of force, the framers drew up Article 51.<sup>14</sup> According to Article 51, “Nothing in the present charter shall impair the inherent right of individual or collective self defense if an armed attack against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security...”<sup>15</sup>

As international conflicts have grown prevalent in today’s society, the text of Article 51 has drawn much debate over how the Article should be interpreted and, in particular, what circumstances must be present for a state to legally defend itself.<sup>16</sup> The inconsistency and incoherence surrounding Article 51 is due primarily to the lack of definitions and references given to certain terms in the text of the Article.<sup>17</sup> For instance, before Article 51 can be invoked, there must have been an “armed attack” on a nation.<sup>18</sup> However, nowhere in the provision does it say what constitutes an “armed attack”.<sup>19</sup> Can an armed attack be a terrorist attack? What about the assassination of a government leader? Then there is the controversial issue as to what the framers of the article meant by the expression “self-defense.”<sup>20</sup> What degree of self-defense is allowed? Should the term “self-defense” be interpreted the same way that “self-defense” is interpreted under certain state statutes? Under Florida law, the use of deadly force would be justifiable if a person reasonable believes that such force is necessary to prevent imminent death or great bodily harm.<sup>21</sup> Should the same standards be used in the case of an attack on a country? Here lies the confusion that surrounds Article 51 and scratches the head of legal scholars around the globe.

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51, which mentions the ‘inherent right’ of individual or collective self-defence.”); Schachter, *supra* note 8, at 259-60.

14. U.N. CHARTER, *supra* note 4.

15. U.N. CHARTER, *supra* note 4. The article goes on to say that “[m]easures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.”

16. Micheal J. Glennon, *The Fog of Law: Self Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter*, 25 HARV. J.L. & PUB. POL’Y 539, 540 (2002) [hereinafter Glennon] (“Between 1945 and 1999, two-thirds of the members of the United Nations – 126 states out of 189 – fought 291 interstate conflicts in which over 22 million people were killed.”).

17. U.N. CHARTER, *supra* note 4. There are no definitions in Article 51 to any of the broad terms used in the charter.

18. *Id.*

19. *Id.*

20. *Id.*

21. FLA. STAT. §. 776.012 (2002) (Use of Force in Defense of Others).

### III. ARMED ATTACK

#### A. Framers Intent

The lack of authority as to what constitutes an “armed attack” has promulgated a heated debate among legal scholars. There are many who believe that it was the United Nations intent to apply a narrow definition to the term “armed attack” under Article 51.<sup>22</sup> Under such a view, the term “armed attack” would not include attacks from terrorist organizations.<sup>23</sup> This rationale could be reasoned to be accurate and consistent with traditional views considering, at the time the charter was signed, military attacks, not terrorist attacks, occupied the minds of world leaders.<sup>24</sup> Furthermore, these same scholars have argued that if it were the framers intent to apply a broad interpretation rather than a narrow interpretation, then there would be no limitation as to whether an armed attack has occurred.<sup>25</sup> An e-mail threat from abroad could be argued to constitute an “armed attack” under such a broad view. However, a narrow interpretation would allow many acts of war to easily take place without any legal resistance. “Interpreting the concept of ‘armed attack’ restrictively, where the underlying attack is terrorist in nature would merely serve to transform a necessary state response into an ‘unlawful’ response under the United Nations Charter.”<sup>26</sup> States that utilize terrorists to carry out acts of war on other nations would essentially be protected under the United Nations Charter.<sup>27</sup> The expression “armed attack” should therefore be construed using a broad view, ensuring that the September 11 attacks constituted an “armed attack” under Article 51.

#### B. *Nicaragua v. United States of America*

It also has been argued that a situation in which a country harbors a terrorist organization does not come within the meaning of the term “armed attack” as interpreted by the International Court of Justice in *Nicaragua v. United States of America*.<sup>28</sup> In this infamous case, Nicaragua had claimed that

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22. Glennon, *supra* note 16, at 542.

23. *Id.* Ian Brownlie, writing as early as 1963, opined that “sporadic operations by armed bands also would seem to fall outside the concept of armed attack.”

24. *Id.* at 546 (“The intent of the Charter’s framers was to make acceptable uses of force readily distinguishable from unacceptable uses of force.”).

25. David Turndorf, *The U.S. Raid on Libya: A Forceful Response to Terrorism*, 14 BROOK. J. INT’L L. 187, 218 (1988).

26. *Id.*

27. *Id.* (“Under a restrictive interpretation, states which sponsor terrorists are essentially permitted to utilize surrogates to carry out acts which might otherwise lead to war had those acts been carried out overtly.”).

28. *Nicar. v. U.S.*, *supra* note 11.

the United States had violated Article 2(4) of the United Nations Charter, “to refrain from the threat or the use of force,” by conducting military actions against them.<sup>29</sup> The United States argued that Nicaragua had been providing weapons and other support to rebels in order to help them overthrow the government of El Salvador, and the fact that Nicaragua had provided these weapons and support to the rebels was evidence of an “armed attack” against El Salvador.<sup>30</sup> It was the court’s opinion that the conduct of the United States towards Nicaragua could not be justified by the right of collective self-defense in response to an alleged armed attack on one of Nicaragua’s neighbors.<sup>31</sup> The court went on to say “while the concept of an armed attack includes the dispatch by one State of armed bands into the territory of another State, the supply of arms and other support to such bands cannot be equated with armed attack.”<sup>32</sup> Although this type of activity may constitute a breach of Article 2(4) and the principles of peace and international harmony, it is “of lesser gravity than an armed attack.”<sup>33</sup> While this decision has been noted for setting a standard in which the term “armed attack” is analyzed under Article 51, other interpretations have recently emerged and been used to determine what constitutes an “armed attack.”<sup>34</sup>

### C. Terrorist Attacks

When analyzing the expression “armed attack” from a literal standpoint, terrorist acts taken out by armed bands with the support and encouragement of a foreign state should be considered an “armed attack.”<sup>35</sup> There is no language in Article 51 that states an “armed attack” is limited to an attack by another state.<sup>36</sup> This leads open the possibility that the article can be read broadly enough to include the terrorist attacks that occurred on September 11, 2001. “Armed attacks by non-State armed bands are still armed attacks, even if commenced only from- and not by- another State.”<sup>37</sup> However, because a state

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29. *Id.* at 18.

30. *Id.* at 126-27.

31. *Id.*

32. *Id.*

33. *Nicar. v. U.S.*, *supra* note 11, at 127.

34. Mark M. Baker, *Terrorism and the Inherent Right of Self-Defense (A Call to Amend Article 51 of the United Nations Charter)*, 10 *HOUS. J. INT’L. L.* 25, 38-39 (1987) [hereinafter Baker].

35. Baker, *supra* note 34, at 38-39; *See also* Ruth Wedgwood, *Responding to Terrorism: The Strikes Against Bin Laden*, 24 *YALE. J. INT’L. L.* 559, 563-564 (1999) (“There is nothing in the U.N. Charter or international practice that restricts the identity of aggressors against whom states may respond - private actors as well as governments may be the sources of catastrophic conduct.”).

36. Baker, *supra* note 34, at 41-42.

37. *See* DINSTEIN, *supra* note 12 at 238. (“The crucial question is whether an armed attack actually occurred. Thus, a hypothetical military action by the United States against drug traffickers in Columbia would

responding in force to an isolated act of terror would undoubtedly be condemned for its actions, other factors should also be considered before responding to terrorism.<sup>38</sup> Yehuda Blum believes that factors such as the level of state support given to the terrorists, and whether the attack was an isolated terrorist act, are but one link in a long chain of acts that are relevant when considering if a terrorist act rises to the level of an "armed attack."<sup>39</sup> Furthermore, subjective factors such as the terrorist threat to a state's safety and the motives of the state's government where the terrorists operate have been noted as being issues that may be considered when trying to determine whether an attack constitutes an "armed attack."<sup>40</sup>

When considering recent terrorist activity, it seems at first glance that the September 11 attacks were isolated from other terrorist attacks by Al Qaeda and should therefore not rise to the level of an "armed attack."<sup>41</sup> However, this is simply not the case. The sheer magnitude of crashing a commercial airliner into the world trade center, killing thousands of people, and causing massive destruction to a nation's most symbolic city cannot be compared to sporadic and minor isolated attacks.<sup>42</sup> The September 11 attacks were not the first attacks on American targets and, according to Al Qaeda leaders, they will probably not be the last.<sup>43</sup> Consequently, this makes many confident that the September 11 attacks represent an on-going pattern of behavior involving terrorist activity, raising them to the level of an "armed attack" under Article 51.<sup>44</sup> In addition, the situation here is not one in which a terrorist organization overpowered a weak non-supportive state government. The United Nations Security Council

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not be justifiable as self-defence"); See J.R. Edmunds, *Nonconsensual U.S. Military Action against the Columbian Drug Lords under the U.N. Charter*, 68 WASH. U. L.Q. 129, 154 (1990).

38. Baker, *supra* note 34, at 42.

39. *Id.*; See Yehuda Blum, *The Beirut Raid and the International Double Standard: A Reply to Professor Richard A. Falk*, 64 AM. J. INT'L. L. 80 (1970).

40. Baker, *supra* note 34, at 43.

41. Walter Gary Sharp, Sr., *The Use of Armed Force Against Terrorism: American Hegemony or Impotence?*, 1 CHI. J. INT'L L. 37, 44 (2000). Osama Bin Laden has been either indicted or been linked to a number of terrorist attacks against the United States, including the bombing of the United States embassies in Kenya and Tanzania in 1998, the bombings of United States military facilities in Saudi Arabia in 1995 and 1996.

42. Beard, *supra* note 11, at 574; Antonio Cassese, *The International Community's Legal Response to Terrorism*, 38 INT'L & COMP. L.Q. 589, 596 (1989).

43. Beard, *supra* note 11, at 587-588; Nora Boustany, *Arab Newspapers Focus on Taliban's Fall*, WASH. POST., Nov. 16, 2001 at A38 ("The Taliban's leader, Mullah Mohammed Omar, is quoted as saying he had 'a grand plan to destroy America', which will begin shortly."); *Responsibility for the Terrorist Atrocities in the United States, 11 September 2001*: Executive Summary, 10 DOWNING STREET NEWSROOM, Nov. 14, 2001, at <http://www.number-10.gov.uk/output/page384.asp> (Omar is also quoted in a videotaped interview on al-Jazeera TV news broadcast saying "Here is America struck by God Almighty...I swear to God that America will not live in peace before peace reigns in Palestine.").

44. Beard, *supra* note 11, at 575.

has on many occasions expressed its concern and condemnation in regards to the Taliban's support of Al Qaeda.<sup>45</sup> For example, in resolution 1333, the Security Council "condemned the Taliban Regime for its support of international terrorism, deplored its continuing provision of a safe haven to Osama Bin Laden and his associates, and demanded that the Taliban swiftly close all terrorist training camps on its territories."<sup>46</sup> Thus, the motives of the Taliban government, and their strong ties with the Al Qaeda terrorist organization, help support the belief that an "armed attack" occurred on September 11, 2001.

#### D. International Support

Responses from international world organizations also support the notion that the September 11 attacks signaled an "armed attack" against the United States.<sup>47</sup> According to a statement made by NATO Secretary General Lord Robertson, the NATO parties had "determined that the attack against the U.S. on September 11th was directed from abroad and shall therefore be regarded as an action covered by Article 5 of the Washington Treaty."<sup>48</sup> Article 5 makes direct reference to the term "armed attack" stating that an "armed attack against one or more of them"... "shall be considered an attack against them all," and that "if such an armed attack occurs, each of them, in exercise of the rights of individual and collective self defence recognized by Article 51 of the charter of the United Nations will assist the Party or Parties so attacked by taking forthwith"... "such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area."<sup>49</sup>

Although nations from around the world have given their condolences and support to the United States, the United Nations Security Council has yet to declare that the September 11 attacks were an "armed attack" under Article 51.<sup>50</sup> This could take to mean by many that the United Nations Security Council believes that the September 11 attacks did not constitute an "armed attack" on the United States and is allowing an illegal war to continue indefinitely. However, this interpretation is not correct. The United Nations Security

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45. *Id.* at 583.

46. *Id.*; See S.C. Res. 1333, U.N. SCOR., 55th Sess., 4251st mtg. ¶ 8, U.N. Doc. S/Res/1333 (2000).

47. Beard, *supra* note 11, at 568.

48. NATO: Statement by NATO Secretary General, Lord Robertson (October 2, 2001), <http://www.nato.int/docu/speech/2001/s011002a.htm>.

49. North Atlantic Treaty, April 4, 1959, art. 5, 63 Stat. 2241, 2244, 34 U.N.T.S. 243, 246, <http://www.nato.int/docu/basicxt/treaty.htm>.

50. Beard, *supra* note 11, at 569; See also *Actions Taken Around the World as Coalition Begins Air Strikes in Afghanistan*, ASSOCIATED PRESS NEWSWIRES, Oct. 14, 2001, WL APWIRES File (The European Union, Pacific Allies, and numerous states throughout Eastern Europe, Africa, and Asia express their support for the United States military response to the September 11th terrorist attacks).

Council has issued two resolutions that reaffirm the United State's right to self-defense.<sup>51</sup> By reaffirming this right, the United Nations Security Council is implying that there was an armed attack on the United States and therefore is recognizing the United States's inherent right of self-defense.

#### IV. SELF-DEFENSE

##### A. *The Caroline Case*

Like other expressions and terms stated throughout article 51, the United Nations Security Council makes no reference as to what constitutes reasonable and proper self-defense under the charter. Due to this lack of authority, deference has customarily been given to traditional international law when determining what constitutes reasonable and proper self-defense.<sup>52</sup>

International law and the concept of self-defense have been primarily shaped by the infamous Caroline case, which occurred during the Canadian rebellion of 1837.<sup>53</sup> In that case, a British officer, believing that an American ship named the *Caroline* was operating as an ammunition supply vessel for Canadian vessels, gave orders to destroy the ship when it was docked at Fort Schlosser in New York.<sup>54</sup> Consequently, British soldiers boarded the ship, assaulted the men on board, and set the ship on fire, killing two American that were on board.<sup>55</sup> While the United States condemned the attack as an illegal use of force against the United States, British officials argued that the destruction of the *Caroline* was legal and justified by the necessity of self-defense.<sup>56</sup> In response to the British contention that the incident was a justifiable act of self-defense, United States Secretary of State Daniel Webster sent a letter addressed to Henry Fox, the British Minister at Washington D.C. in which he defined the

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51. Beard, *supra* note 11, at 568; S.C. Res. 1368, U.N. SCOR, 56th Sess., 4370th mtg. at 1., U.N. Doc. S/RES/1368, 12 September 2001 ("recognizing the inherent right of individual or collective self-defence in accordance with the charter"); S.C. Res. 1373, U.N. SCOR, 56th Sess. 4385th mtg., U.N. Doc. S/RES/1373, 28 September 2001 ("reaffirming the inherent right of individual or collective self-defense as recognized by the Charter of the United Nations as reiterated in Resolution 1368 (2001).")

52. Martin A. Rogoff & Edward Collins Jr., *The Caroline Incident and the Development of International Law*, 16 BROOK. J. INT'L. L. 493, 504 (1990) [hereinafter Rogoff & Collins Jr.] ("The great significance of the Caroline doctrine in modern international law results from a radical transformation of norms relating to resort to force, and from an acceptance of Webster's formulation on resort to force in self-defense as authoritative customary law.").

53. Leah H. Campbell, *Defending Against Terrorism: A Legal Analysis of the Decision to Strike Sudan and Afghanistan*, 74 TUL. L. REV. 1067, 1076 (2000) [hereinafter Campbell]; See Byard Q. Clemmons & Gary D. Brown, *Rethinking International Self-Defense: The United Nations Emerging Rule*, 45 NAVAL L. REV. 217, 220 (1998).

54. Campbell, *supra* note 52, at 1077.

55. *Id.*

56. Rogoff & Collins Jr., *supra* note 51 at 496.

circumstances and conditions upon which a state can properly use force in self-defense.<sup>57</sup> In his letter, Webster stated that in order for the British to exercise self-defense, the British government would have to show a necessity of self-defense which is “instant, overwhelming, leaving no choice of means, and no moment for deliberation.”<sup>58</sup> In addition, Webster also defined proportionality as actions that are not unreasonable or excessive.<sup>59</sup> British official Lord Ashburton later agreed with the limitations on self-defense that Webster outlined in his letter.<sup>60</sup> As a result, this case essentially gave rise to the law of self-defense.<sup>61</sup>

It is now accepted that self-defense is permissible only if the use of force meets the elements of necessity and proportionality.<sup>62</sup> The use of force by one state against another satisfies the element of necessity only if it can be shown that there was no other alternative means by which to remedy the situation.<sup>63</sup> The condition of proportionality is met if the use of force in self-defense does not exceed the severity of the attack that triggered the use of force in the first place.<sup>64</sup>

### B. Necessity

There are some scholars who believe that the United States has not met its burden of proof with regards to the element of necessity, as recognized under the Caroline doctrine, customary international law, and ultimately under Article 51 of the United Nations Charter. First, these commentators have argued that the doctrine of necessity requires “immediacy” or a close-in-time response to the original attack that precipitated the use of force.<sup>65</sup> This could be inferred

57. *Id.* at 497.

58. *Id.* at 497-98.

59. Sage R. Knauff, *Proposed Guidelines for Measuring the Propriety of Armed State Responses to Terrorist Attacks*, 19 HASTINGS INT'L. & COMP. L. REV. 763, 774 (1996) [hereinafter Knauff]; Robert J. Beck & Anthony C. Arend, *Don't Tread on Us: International Law and Forcible State Responses to Terrorism*, 12 WIS. INT'L. L.J. 153, 193 (1994).

60. Rogoff & Collins Jr., *supra* note 51, at 498.

61. *Nicar. v. U.S.*, *supra* note 11, at 103. The international court of justice specifically recognized necessity and proportionality as elements of self-defense under customary international law. According to the courts opinion, “[s]ince the existence of the right of collective self-defense is established in customary international law, the Court must define the specific conditions which may have to be met for its exercise, in addition to the conditions of necessity and proportionality to which the Parties have referred.”

62. Rogoff & Collins Jr., *supra* note 51, at 498.

63. *Id.*

64. *Id.*

65. Beard, *supra* note 11 at 585; Francis A Boyle, *Military Responses to Terrorism*, 81 AM. SOC'Y INT'L L. PROC. 288, 294 (1987) (“This provision of the Charter [Article 51] made it quite clear that self-defense could only be exercised in the event of an actual or perhaps at least imminent ‘armed attack’ against the state itself.”); Baker, *supra* note 34, at 34 (arguing that the “temporal element” of the requirement of

from the expression used in Webster's letter where he states that necessity occurs when there is "no moment of deliberation."<sup>66</sup> Without such a need for immediacy, it would be very easy for States to use the doctrine of self-defense as a vehicle to retaliate for prior acts of violence and conquest.<sup>67</sup> However, this restrictive view, which requires an immediate threat, presents a problem in modern warfare. When the Caroline doctrine was formulated in 1837, acts of aggression took place on a larger scale with customary procedures that allowed enemies to have the knowledge and time to prepare for battles.<sup>68</sup> Today's landscape regarding warfare is quite different. Present day weapons such as nuclear bombs and computer missile systems may not give a state time to determine whether an attack is imminent.<sup>69</sup> Therefore, such a restrictive view might eliminate any chance for justifiable self-defensive measures.<sup>70</sup>

As the problem of "immediacy" persists, there are many scholars who argue that the right of anticipatory self-defense exists in Article 51 on the premise that pre-charter rights inherently survive the adoption of the charter if they are not prohibited by or inconsistent with it.<sup>71</sup> According to this liberal view, "because anticipatory action taken in defense of a state's territory" ... "does not by definition involve a threat or use of force against" ... "another state, and it is not inconsistent with the overarching purpose of the United Nations to maintain international peace and security, it is permissible under Article 51."<sup>72</sup>

It appears to be more reasonable that the right to self-defense is not limited to instances of actual attacks against the victim state, but rather extended to

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necessity means that a response must be made close in time to the actual attack.").

66. Rogoff & Collins Jr., *supra* note 51, at 497-98.

67. Gregory Francis Intoccia, *American Bombing of Libya: An International Legal Analysis*, 19 CASE W. RES. J. INT'L L. 177, 202 (1987) [hereinafter Intoccia].

68. Knauff, *supra* note 58, at 777. "Given the ongoing nature of many terrorist attacks, the circumstances are vastly different than a singular incident along the U.S.-Canadian border in 1837"; William O' Brien, *Reprisals, Deterrence, and Self-Defense in Counter-Terror Operations*, 30 VA. J. INT'L L. 421, 471 (1990); *See also* Baker, *supra* note 34, at 34. Arguing for a more realistic view of necessity and proportionality, Baker contends that the necessity requirement as applied to states affords a longer period between attack and response because of the inherent difference between a state and an individual.

69. Intoccia, *supra* note 66; *See* Samuel R. Maizel, *Intervention in Granada*, 35 NAVAL L. REV. 47, 72-73 (1986).

70. *Id.*

71. John Alex Ramano, *Combating Terrorism and Weapons of Mass Destruction: Reviving the Doctrine of a State of Necessity*, 87 GEO. L.R. 1023, 1035 (1999) [hereinafter Ramano]; *See* D.W. BOWETT, SELF-DEFENSE IN INTERNATIONAL LAW 184-85 (1958); Myres McDougale, *The Soviet-Cuban Quarantine and Self-Defense*, 57 AM. J. INT'L L. 597, 599-600 (1963); *See also* ANTHONY CLARK AREND & ROBERT J. BECK, INTERNATIONAL LAW AND THE USE OF FORCE 73 (1993) (citing additional advocates of the counter-restrictionist position).

72. Ramano, *supra* note 71, at 1035-36.

anticipatory responses to such attacks as well.<sup>73</sup> Such a view would seem to be more appropriate when considering the present day weapons of mass destruction, which essentially phase out the distinction between actual and imminent attacks.<sup>74</sup> The United States certainly agrees with this position. In a statement to the nation, President Bush announced that new threats to the United States have required the United States to adopt a new policy of pre-emptive actions, breaking from doctrines that have governed US foreign and military policy for more than 50 years.<sup>75</sup> Keeping with this new policy, the United States response to the September 11 attacks was made nearly a month after the September 11 attacks took place.<sup>76</sup>

Under the restrictionist view, this response clearly did not meet the element of necessity, as the counterattack did not occur until weeks after four planes were hijacked and propelled into the World Trade Center and Pentagon.<sup>77</sup> However, there are many in the international community who are rethinking the need of “immediacy” as an element of necessity. When the United States invoked anticipatory self-defense to justify missile attacks against Sudan and Afghanistan in 1998, the majority of the international community gave little opposition to the preemptive use of force.<sup>78</sup> This emerging thought seems to allow for more responsible military actions. By not “jumping to the gun” and waiting, a state would have time to gather all the information and intelligence needed to prepare a well-thought-out military campaign against the “true” opposition that is responsible for the attacks.

Although there has been a shift from a restrictionist view to a more liberal view by many in the international community, significant challenges have still been made concerning the legality of the United States military strikes in Afghanistan and ultimately on the doctrine of anticipatory self-defense. In response to these challenges, the United States has argued that the September 11 attacks were not isolated attacks but rather part of an on-going terrorist attack by Al Qaeda and Taliban leaders.<sup>79</sup> This could be easily proved by the intelligence organizations in numerous states having produced significant evidence that Al Qaeda cells around the world have continued and will continue

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73. *Id.* at 1034.

74. *Id.* at 1036.

75. *New Bush Doctrine*, STRAITS TIMES (Singapore), June 28, 2002, at Opinion.

76. *A Nation Challenged; Bush's Remarks on U.S Military Strikes in Afghanistan* *supra* note 5 (military operations began on October 7, 2001, nearly a month away from the terrorist attacks on September 11, 2001).

77. *Id.*

78. Ramano, *supra* note 70 at 1040; See Douglas Jehl, *U.S. Raids Provoke Fury in Muslim World*, N.Y. TIMES, Aug. 22, 1998, at A6. Europe and Israel endorse the strikes as a means for preventing planned terrorist attacks.

79. Beard, *supra* note 11, at 587-88.

to plan future attacks against the United States.<sup>80</sup> Consequently, these realistic and serious threats made against the United States must allow for the use of preemptive force to defend against future tragedies.

### C. Proportionality

Assuming the element of necessity is met, the use of force in response to an “armed attack” still must be proportionate to the original attack.<sup>81</sup> If taken literally, this would mean that it would be perfectly legal to bomb the most populous city in Afghanistan with the purpose of killing thousands of innocent civilians. This, of course, is not the way in which proportionality should be interpreted. Today, proportionality refers more to the balance between a military objective and its cost in terms of lives lost or the military actions needed to control the enemy.<sup>82</sup> The international community will only usually condemn defensive military actions if the actions were overly excessive as compared to the original attack in terms of civilian casualties or scale of weaponry.<sup>83</sup>

There are many opponents of the war who believe that the United States military strikes in Afghanistan have not met the element of proportionality as required by customary international law. Strong speculation has been circulating among many scholars that the strikes against Afghanistan are not military in nature, but rather political, with the intent to remove the Taliban from power and establish a new government in Afghanistan.<sup>84</sup> Assuming this proclamation has merit, the Taliban is not simply an army but a political entity, and its members are largely civilians, not military combatants.<sup>85</sup> Therefore, many of the targets hit, such as the Taliban headquarters and other buildings in Kabul and Kanda-har, would probably qualify as civilian targets.<sup>86</sup> Reports from the media that targets in Afghanistan have included airports,

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80. *Id.* at 588.

81. Rogoff & Collins Jr., *supra* note 52, at 498.

82. Judith Gail Gardam, *Proportionality and Force in International Law*, 87 AM. J. INT'L. L. 391 (1993); *See also* MYRES M. MCDUGLE & FLORENTINO P. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER 241-44 (1961) (for their definition of proportionality in the *ius ad bellum*); WILLIAM V. O'BRIEN, THE CONDUCT OF JUST AND LIMITED WAR 27-31 (1981); *See also* JAMES TURNER JOHNSON, JUST WAR TRADITION AND THE RESTRAINT OF WAR 203 (1981), (defines proportionality in the *ius ad bellum* sense as “where the total evil of war is compared to its total good”; or “in contemporary language, the costs of the war must not outweigh the benefits. In the *ius in bello* sense, proportionality has “to do with calculations of force necessary to subdue the enemy.”).

83. Schachter, *supra* note 8, at 1637.

84. Arnold J. Chien, *Why the War Against Afghanistan is Illegal*, October 11, 2001, at <http://www.zmag.org/civilian.htm>.

85. *Id.*

86. *Id.*

communication facilities, electrical plants, and government buildings, has added to the speculation of excessive civilian casualties.<sup>87</sup> Additionally, many Afghan civilians have reported that the United States military has not been bombing just military targets, but rather, residential neighborhoods.<sup>88</sup> If these proclamations have merit, then the United States bombings in Afghanistan could essentially be considered to be overly excessive in terms of civilian casualties.

On the other hand, the United States government strongly denies that its military targets Afghan civilians.<sup>89</sup> Rather, it has been argued by United States officials that all military strikes taken in Afghanistan have been strategic.<sup>90</sup> According to Col. Ray Shepard, “we painstakingly assess the potential for injuring civilians or damaging injuring civilians, and positively identify targets before striking.”<sup>91</sup> However, the United States has undoubtedly made mistakes. An on-site review conducted by the New York Times has revealed that over four hundred civilians have been killed in eleven locations where there have been United States led air strikes.<sup>92</sup> These mistakes evidently have come from mistaken information given by local Afghans and reluctance by the United States to commit itself to a much riskier ground attack.<sup>93</sup>

Whether the United States has been using excessive force in its war on terror is clearly subjective in its analysis. Although it can be argued that the loss of hundreds of Afghan civilians outweigh any legitimate military objective of the United States, it can be just as effectively argued that civilian casualties are casualties of war and, although tragic, cannot possibly measure up to the lives that will be saved by the United States military strikes. Either way, the United States has recognized the need to reduce civilian casualties caused by bombing mistakes. The United States military strategy has evolved away from the use of air strikes as the primary weapon and more to the use of ground forces.<sup>94</sup> This trend will likely result in fewer innocent civilians being killed; thus, reiterating

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87. *Id.*

88. *Id.* The following are testimonials reported by the Boston Globe and New York Times: According to Neseebullah Khan, “[i]t is not true that the Americans have only been bombing military targets. Many bombs are dropping on residential neighborhoods.” According to Mohammad Zahir, “Everyone wants to eliminate terrorism from the face of the earth, but the way adopted by the U.S. is not fair because masses of ordinary people also live in Afghanistan. The attack was not just on terrorist camps...I know these are residential areas.”

89. PAUL W. LOVINGER & HARRY SCOTT, *Why Bush's War is Illegal*, at <http://www.warandlaw.homestead.com/files/bushwar.htm> (In his briefing on 10-11-01, Secretary of Defense Brumsfield said the military “does not target civilians”).

90. *Id.*

91. Dexter Filkins, *Flaws in U.S. Air War Left Hundreds of Civilians Dead*, N.Y. TIMES, July 21, 2001 at 1A.

92. *Id.*

93. *Id.*

94. *Id.*

the use of military force that is proportionate to the United States objective of eliminating international terrorism.

#### IV. CONCLUSION

Today, the increasing emergence of transnational terrorism has changed the way in which international law is used and interpreted. The threat of unimaginable attacks, such as the one witnessed by the world on September 11, 2001, has promulgated the need for a broad view of Article 51 and the circumstances in which a state may use force to defend itself from future attacks. The framer's intent when drafting the United Nations Charter, although primarily to promote peace and restrain rampant exercises of power, also included the longstanding notion that a state inherently has the right to defend itself when under attack by another state. That being said, the United States has been the target of ongoing and consistent attacks by a state sponsored terrorist organization, determined to continue in its efforts to destroy the United States. Therefore, the United States must be able to legally defend itself as an independent sovereign state.

There are many who say that Article 51 does not apply to terrorist attacks. However, this view has become outdated and obsolete due to the modern threats of warfare that face the international community. Terrorism has become a vehicle for states to wage war against their enemies and, as such, states must be given the authority to use state sponsored force to deter such attacks. Otherwise, states that allow or use terrorism as a mechanism to accomplish military goals will become easily shielded under the United Nations Charter although essentially violating international law in the first place.

This view does not mean to say that all international terrorist attacks are severe enough to invoke Article 51. Factors such as the severity of the attack, the amount of state involvement with the terrorist attack or terrorist organization, and the capability of repetition all should be seriously considered when assessing whether a terrorist attack rises to the level of an "armed attack" under Article 51. Taking these factors into consideration, the evidence is clear that the terrorist attacks on September 11 were armed attacks under Article 51.

The evolution of modern weapons and nature of terrorism warfare also stresses the need for anticipatory self-defense under Article 51. However, before a state can attack another state, there should be undeniable evidence that leads to the conclusion that an attack is needed to protect that state. Otherwise, states would be able to invoke Article 51 and claim anticipatory self-defense even though the attack was clearly retaliatory. The United States certainly had evidence that Al Qaeda carried out the attacks on September 11 and had plans of continual attacks on the United States. Therefore, the United States military

actions following September 11 were warranted to prevent future attacks on the United States.

Lastly, the United States has been strategic in its application of military operations, making it a point to assess civilian casualty. Even though mistakes have been made, as in any war, the United States has made it a mission to reduce civilian casualties by changing strategies. As such, the United States attacks have not been overly excessive and disproportionate when compared to its ultimate objectives.

The United Nations needs to understand that a new type of war has developed and, consequently, must provide new flexible guidelines for the legal invocation of Article 51 in the aftermath of a terrorist attack. Until that time comes, forcible state responses, such as those actions taken by the United States, need to be considered legitimate under a broad interpretation of Article 51.

# THE IMPACT OF SEPTEMBER 11 ON TERRORISM INSURANCE: COMPARING SENATE BILL 2600, HOUSE OF REPRESENTATIVES BILL 3210, AND THE UNITED KINGDOM’S POOL RE.

*Andrew S. Neuwelt\**

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## I. INTRODUCTION

“If insurance is a small world that reflects the purposes of the larger world outside it,”<sup>1</sup> then the events of September 11 have dealt a devastating blow to both worlds. In the larger world, even as images of the now infamous terrorist attacks at the World Trade Center (hereinafter WTC) linger in our minds, the rubble is being cleared away, and life has slowly returned to a familiar normalcy. However, in the smaller world of insurance, there is an ongoing struggle between factions, each striving to find the best solution to a problem whose consequences may be as dire as the events that created the controversy.

The impact of September 11 is without peer. The terrorist attacks that on that fateful day dealt the world’s insurance community its hardest blow ever. The shock that such an event could happen was only made worse by the

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1. Spencer Kimball, *The Purpose of Insurance Regulation: A Preliminary Inquiry in the Theory of Insurance Law*, 45 MINN. L. REV. 471, 524 (1961), cited in Neil H. Wyland & Jonathan I. Katz, *As the Dust Settles: Emerging Issues in the Wake of September 11*, 12 NO. 17 ANDREWS INS. COVERAGE LITIG. REP. 11, 1, 5 (2002).

realization that the insurance industry's estimates for such an event fell so short.<sup>2</sup> The previous largest worldwide-insured loss was from Hurricane Andrew in 1992.<sup>3</sup> Damages in Florida resulting from the natural disaster are now estimated to have caused \$20 billion in insured losses.<sup>4</sup> Estimates of losses in the WTC attacks by the insurance industry ranges between \$30 and \$60 billion. The National Association of Independent Insurers (hereinafter NAI) spokesperson said, "[L]osses from the attacks are estimated at \$50 billion."<sup>5</sup> One independent financial-counseling firm estimated that on a combined basis for property, casualty, life, and health insurance, the WTC property losses might reach \$58 billion.<sup>6</sup> Although no one yet knows the total losses from September 11, if the losses reach \$60 billion the attacks will have caused insured losses three times greater than any previous event.<sup>7</sup>

Prior to the attacks on the WTC, the United States insurance industry treated terrorism as little more than a footnote<sup>8</sup>, while other countries, such as Great Britain, have repeatedly been forced to deal with the issue. Repeated bombings and terrorist attacks by the Irish Republican Armies (hereinafter IRA) resulted in British insurance agencies re-evaluating their insurance policies.<sup>9</sup> While many United States insurers will not use their war exclusions (discussed below) to avoid paying for September 11 losses, many are looking for ways to avert payment on future losses from terrorist attacks.<sup>10</sup>

2. Dr. Gordon Woo, *Quantifying Insurance Terrorism Risk*, 2 (prepared for the National Bureau of Economic Research meeting, Cambridge, Massachusetts, Feb. 1, 2002).

3. TILLINGHAST-TOWERS PERRIN, IMPLICATIONS FOR THE INSURANCE INDUSTRY 9 (2001). (Tillinghast-Towers Perrin is one of the world's largest global management consulting firms, assisting organizations in managing people, performance and risk; HR consultants help organizations manage their investment in people to achieve measurable performance improvements, focusing on human resource strategy and service delivery, benefit and compensation design and implementation (including retirement, health and welfare and executive compensation), employee and organizational communication, HR technology and outsourced HR administration, providing actuarial and management consulting to financial services companies worldwide; and providing reinsurance intermediary services and consulting expertise that focus on the creative blending of traditional and nontraditional risk-transfer vehicles.).

4. TILLINGHAST-TOWERS PERRIN, WHY DO WE NEED FEDERAL REINSURANCE FOR TERRORISM? 1 (2001).

5. Martha Neil, *Terrorism Insurance Bailouts Stall In Congress*, 2002 ABA J. E-REPORT 3, 2. (Joseph Annotti is the spokesman for the NAI, a Chicago based Association of Insurers.).

6. TILLINGHAST-TOWERS PERRIN, *supra* note 3, at 4. (These estimates were based on information available approximately one week following the event.).

7. TILLINGHAST-TOWERS PERRIN, *supra* note 4.

8. Bernard Wasow, *The Debate Over Federal Insurance Against Terrorism*, THE CENTURY FOUNDATION HOMELAND SECURITY PROJECT 2 (2002).

9. Alan J. Fleming, *Terrorism Coverage in the United Kingdom*, 1 (1999), available at [http://www.drj.com/special/wtc/w3\\_065.htm](http://www.drj.com/special/wtc/w3_065.htm) (last visited Mar. 12, 2003).

10. JAMES G. RIZZO, TRAGEDY'S AFTERMATH: THE IMPACT OF 9/11 ON THE INSURANCE INDUSTRY, 46 FEB B. B.J. 10 (2002).

The insurance industry, which incurred billions in losses, may not be able to afford another enormous payout without aid. Even with federal help, another terrorist attack would be a tremendous blow to the insurance industry.<sup>11</sup> The idea that total losses from the WTC attacks will not be known for months, if not years, and the uncertainty of future attacks, have increased certain fears; can reinsurers cover losses that insurance companies are now struggling to meet, and if not, then should the federal government get involved? “While new security measures and the war against terrorism will hopefully diminish the risk, it is nearly impossible to quantify the probabilities of what might happen over the next few months or years.”<sup>12</sup>

The United States insurance industry must choose a course that allows insurance rates to remain stable, while ensuring that insurers can handle the payouts that will follow another terrorist attack. Either insurers will have to honor terrorism insurance claims or the Federal Government will have to get involved.

## II. THE INSURANCE INDUSTRY PRE-SEPTEMBER 11

Currently, there is no Federal insurance system.<sup>13</sup> All fifty states have their own rules,<sup>14</sup> and the National Association of Insurance Commissioners guides state-by-state coverage.<sup>15</sup> Since September 11, there have been deep concerns regarding the insurance industry’s ability to provide coverage for future terrorist attacks.<sup>16</sup> Without aid, many primary insurance companies will

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11. *Id.*

12. Stephen P. Lowe, *A Federal Role for Terrorism Risk The Last Word*, TILLINGHAST-TOWERS PERRIN 1 (2001). (While new security measures and the war against terrorism will hopefully diminish the risk, it is nearly impossible to quantify the probabilities of what might happen over the next few months or years.).

13. As of June 2002, proposals are being considered by Congress to create Federal Reinsurance as a backstop for future terrorist attacks. As of August 5, 2002, neither Chamber has passed the others proposal.

14. Heidi A. Lawson, *Insurance Regulation: The Effects of September 11th*, 673 PL/LIT 53, 58 2002.

In 1868 the United States Supreme Court heard *Paul v. State of Virginia*, and held that insurance was a contract that was delivered locally and was, therefore, not interstate commerce. The court held that insurance regulation by the states was constitutional. *Paul v. State of Virginia*, 75 U.S. 168 (1868), *see also United States v. South-Eastern Underwriters Association, et al.*, 322 U.S. 533 (1944), (To the surprise of many in the industry, the United States Supreme Court ruled that federal antitrust laws applied to insurance.). In response to the South-Eastern ruling, Congress passed the McCarran-Ferguson Act which, subject to certain restrictions, allowed state regulation to preempt federal law when it came to the “business of insurance.”

15. The NAIC works with the states to create uniformity between insurance providers.

16. GFOA Issue Brief, *Insurance Liability*, 2 (Jan. 1, 2002), available at <http://www.gfoa.org/flc/briefs/062702/insurance.06.02.pdf> (last visited Mar. 12, 2003).

pull terrorism coverage, as will the reinsurance companies. Speaking on the effects of going without terrorism insurance, President George W. Bush stated that, "If people can't buy insurance on a ... project, they're not going to build the project. And if they don't build the project, somebody's not working."<sup>17</sup> While this may be a simplification, it is accurate. To get insurance, businesses and individuals will have to pay high premiums, or go ahead without insurance and pray that nothing bad happens. Neither option is favorable, and both put the buyer at a disadvantage.

Insurance "represents the delicate balance between the uncertainty and the predictability of future events associated with unfavorable consequences."<sup>18</sup> Basically, "insurance is the sharing of risk by many parties so as not to create a financial hardship should loss affect one of the parties."<sup>19</sup> Insurance creates a pool that allows many participants to share the risk of an event with other purchasers. Each purchaser receives protection against substantial but uncertain losses in exchange for making regular payments called premiums. The system is based upon the "Law of Large Numbers" and uses statistical models based on data gathered from past experiences.<sup>20</sup> By gathering this information, the insurance industry can forecast future losses and create resources to pay claims.

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17. Press Release, Remarks by the President to Business Leaders (Apr. 8, 2002), available at <http://www.whitehouse.gov/news/releases/2002/04/20020408-17.html> (last visited Mar. 12, 2003).

18. Jane Kendall, *The Incalculable Risk: How the World Trade Center Disaster Accelerated The Evolution of Insurance Terrorism Exclusions* 36 U. RICH. L. REV. 569, 572 (2002).

19. James E. Branigan, *Insurance and Risk Management In Commercial Real Estate Transaction, 2002: A New World of Concerns*, 478 PLI/REAL 495, 501 (2002).

20. Kendall, *supra* note 18, at 572-73.

The 'Law of Large Numbers' is the statistical proposition that the more opportunities exist for an event to occur, the closer the actual relationship of occurrences to opportunities will be to the true probability. Lewis C. Workman, *The Mathematical Foundations of Life Insurance* 121 (1982). Once the true probability is estimated by observing a large sample of events, it must then be applied to a large number of exposures before the actual occurrences will approximate the true probability. Emmett J. Vaughan & Therese M. Vaughan, *Fundamentals of Risk and Insurance* 25 (7th ed. 1996). Extremely catastrophic events are generally considered to be uninsurable in part because by nature they fail to conform to models based on the Law of Large Numbers. Riegel et al., *supra* note 10, at 20-21. Past experience with events of such great magnitude is usually too sparse to accurately predict how often a similar event can be expected to occur. *Id.* Further, where a particular loss is grossly disproportionate to other losses that can be anticipated to occur within the pool of policyholders, the catastrophic loss invalidates the calculation of rates and has the potential to create insolvency for the insurer. *Id.*"

While primary insurers deal with businesses and individuals,<sup>21</sup> reinsurers deal with primary insurers. Reinsurance companies are the “wholesalers in risk,”<sup>22</sup> dealing only with other insurance companies. As a result, they are not very visible, but they are vital to the industry, since without them, primary insurers would not be able to diversify their risks properly.<sup>23</sup> They provide insurance between the primary insurance company and another party, usually when the primary insurer assumes a policy too large to handle alone.<sup>24</sup>

“A ‘reinsurance’ contract is an agreement where one insurance company, the reinsurer, agrees to indemnify another insurance company, the reinsured, either in whole or in part against loss or liability the latter may incur under a separate and original contract of insurance with a third party, the original insured.”<sup>25</sup> Reinsurers, like primary insurers, look to the past to set their rates.<sup>26</sup> Resulting losses from the September 11 WTC attack, the 1993 WTC attack, and the destruction of the Alfred J. Murrah Federal Building in Oklahoma City, have proven that the insurance industry is unable accurately measure the costs of future attacks.<sup>27</sup> These past attacks gave little predictability in what manner future attacks would take, and gave even less insight into losses in life, property, and business.<sup>28</sup>

The problem with what happened on September 11 is that it presented a risk that no one could conceive would happen. When the buildings were built, loss scenarios did contemplate the impact of one Boeing 707 (the largest commercial aircraft at the time), however the idea of two, fully fueled 767s hitting both towers was unimaginable.<sup>29</sup>

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21. Wasow, *supra* note 8, at 3.

Primary insurers essential activities are risk assessment, estimation of expected losses (underwriting), claims settlement, financial management of reserves against expected future losses, and management of insured risks. Both risk management and financial management involve the creation of a diversified portfolio of assets, liabilities, and expected liabilities that produces good returns at low risk for the insurance companies.

22. *Id.* at 1.

23. *Id.*

24. *Id.*

25. Sandra Mulay Casey, J.D., Lisa Della Rocca Gregory, J.D., et al., *Insurance Contracts and Coverage*, 46 TEX. JUR. 3d. *Insurance Contracts and Coverage* § 1155, 1 (2002).

26. Kendall, *supra* note 18, at 573.

27. Honorable Paul H. O’Neill, Testimony Before the Committee on Banking, Housing and Urban Affairs, United States Senate (Oct. 24, 2001).

28. *Terror Insurance Availability: Hearing on Terrorism Insurance Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 107th Cong. (2001) [hereinafter Senate Hearing] (statement of John T. Sinnott, Chairman and CEO, Marsh, Inc.), 2001 WL 26187268. See also *Blackest Day as Insurers Fear for Staff*, *Ins. Day* (London), Sept. 12, 2001, at 1. (“The unprecedented events of yesterday are generally not even found in the ‘worst case scenarios’ run by some firms”, cited in Kendall, *supra* note 18, note 38).

29. Statement of John T. Sinnott, *supra* note 28.

Certain situations known as clash events result in a breakdown of the reinsurance system. "In a clash event, an occurrence, often unanticipated or unpredictable but of catastrophic proportions, concentrates significant losses across multiple lines of insurance simultaneously."<sup>30</sup> The WTC disaster created massive insurance claims in aviation, property, liability, life, workers' compensation, and business interruption.<sup>31</sup> When the primary insurers turned to the reinsurance companies, many found them to be spread too thin to adequately cover the tremendous losses.

If the WTC attacks are the worst known terrorist attack in the history of the insurance industry,<sup>32</sup> then the potential that reinsurers and primary insurers may not be able to cover their policy holder's claims may be the insurance industry's greatest failure. To combat this real possibility, many in the industry are looking to avoid this situation when reinsurance policies come up for renewal. When reinsurance companies who provide insurance to primary insurers began to renew their contracts in January 2002 (reinsurance policies are annual, and renegotiated every year), many reinsurers refused to provide coverage for losses relating to terrorist acts.<sup>33</sup>

### III. EXCLUSIONS – WAR V. TERRORISM

Following the terrorist attacks, primary insurers "assured their policy holders that they would not invoke the 'war' exclusion to deny coverage."<sup>34</sup> On its face, this appeared to be a magnanimous gesture, but in actuality, these insurance carriers had no alternative. As presently written, the standard war exclusion does not explicitly extend to acts of terrorism."<sup>35</sup> Congress also made its position crystal clear when it stated that any attempts by insurance agencies to side-step their contractual obligations would "not only be unsupportable, it would be unpatriotic."<sup>36</sup>

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30. Kendall, *supra* note 18, at 580.

31. TILLINGHAST-TOWERS PERRIN, *supra* note 3, at 4.

32. *Id.* at 2.

33. Nicole Belson Goluboff, *Passing Terrorism Insurance Legislation: How Telework and Flextime Work Arrangements Can Help*, FINDLAW CORPORATE COUNSEL CENTER, (May 6, 2002), available at [http://writ.corporate.findlaw.com/commentary/20020506\\_goluboff.html](http://writ.corporate.findlaw.com/commentary/20020506_goluboff.html) (last visited Mar. 12, 2003).

34. Rizzo, *supra* note 10, at 10.

35. 'Act of War' Exclusion Doesn't Apply to Attacks, *Insurers Say*, L.A. TIMES, (Sept. 17, 2001), at Business, 3.

36. Letter from the House Committee on Financial Services to the National Association of Insurance Commissioners 1 (Sept. 17, 2001). ("Any attempt to evade coverage obligations by either primary insurers or reinsurers based on such legal maneuvering would not only be unsupportable and unpatriotic - it would tear at the faith of the American people in the insurance industry.")

This has left many primary carries in an unpleasant situation. Primary insurers were left with a very simple, yet unpleasant decision; cover the risk and hope that the losses do not exceed the ability to pay.<sup>37</sup> However, this is an almost impossible task, considering that the market is based on predictable losses for a certain event and there are no possible ways to accurately predict damages from acts of terrorism.<sup>38</sup> Some primary insurers can try to limit or exclude terrorism coverage completely. Many primary insurers who cannot find reinsurance companies to cover acts of terrorism are doing just that.<sup>39</sup>

A major issue that reinsures and primary insurers face is ambiguous policy language. The distance between “war” and “terrorism”, may not seem great, but it could be the difference in billions of dollars to insurance providers. Most insurance policies exclude losses from declared war or losses from invasion by a sovereign power, but lack language that would address coverage in the face of a terrorist attack.<sup>40</sup>

“Exclusions for losses arising from acts of terrorism, although rare, are not completely unknown in existing United States policies.”<sup>41</sup> The United States Court of Appeals for the Second Circuit noted that war risk insurers already had circulated various versions of exclusions for terrorist activities, stating,

Any of these ... clauses, if employed by the appellant all risk insurers might well have excluded the present loss... When the all risk insurers failed to exclude political acts in words descriptive of today's world events, they acted at their own peril. The clear implication of this is that it is possible to exclude coverage for damages and injuries caused by terrorist acts with the proper policy language.<sup>42</sup>

President Bush said, “The deliberate and deadly attacks, which were carried out yesterday against our country, were more than acts of terror. They were acts of war.”<sup>43</sup> Yet, the tragic events of September 11 are not covered under existing “war” insurance exclusions. Therefore, insurance agencies cannot claim the September 11 attacks were those of “war.” A terrorist group, other than a de facto government or entity acting on behalf of a government,

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37. Marjorie Segale, *The Event That Changed The World of Insurance*, TERRORISM REPORT, IBA WEST, VOL. 1, NO. 1, 2, (2002).

38. Rizzo, *supra* note 10, at 12.

39. Segale, *supra* note 37, at 2.

40. Rizzo, *supra* note 10, at 12.

41. *Sherman-Williams Co. v. Ins. Co. of the State of Pa.*, 863 F. Supp. 542 (N.D. Ohio 1994) (“[T]errorist” exclusion was in standard form policy at issue and coverage for losses due to terrorist acts was restored by endorsement, for which insured paid additional premium.”).

42. Carl J. Pernicone & James T.H. Deaver, *Insurance Implications of the World Trade Center Disaster*, 31-SPG BRIEF 23, 26 (2002).

43. Quoted in Kendall, *supra* note 18, at 569.

cannot commit an act of war.<sup>44</sup> For a terrorism exclusions to apply, the contractual language should stipulate that a terrorist act may, but need not, be committed by or on behalf of a group that comprises a de facto government or a recognized government. Without this clause, small factions will not apply to the terms of the war exclusion.<sup>45</sup>

“The actions of a ‘tiny non-governmental entity’ fighting the United States do not constitute ‘war’ between the United States and that entity.”<sup>46</sup> If the insurance industry is going to exclude terrorism coverage, insurers should make it clear that the size of a terrorist organization is not relevant to the determination as to whether or not its act is excluded.<sup>47</sup> “Words describing violent events commonly used in war-risk exclusions are construed as having ‘dimensions besides the level of violence,’ which may include requirements that multiple actors be involved.”<sup>48</sup> Hence, while the terrorist acts of the Al Queda organization may demand an answer, they were not acts borne from a recognized war.

In the days following September 11, many observed that this attack was so well planned, so meticulously masterminded, that it had to have been the work of an extremely well funded and organized terrorist network.<sup>49</sup> Osama bin Laden’s terrorist network, Al Queda, is a non-governmental entity, and a self-proclaimed terrorism organization. A “war,” whether declared or undeclared, can exist only where sovereign or quasi-sovereign entities engage in hostilities.<sup>50</sup> Terrorism exclusions should clearly specify that terrorist acts may be committed on behalf of or sponsored by any sovereign or quasi-sovereign entity.<sup>51</sup> While some reports claim that bin Laden was a Taliban Defense Minister, the use of extremists, rather than soldiers, to hijack and crash airplanes into the WTC barely constitutes a foreign states involvement.<sup>52</sup> Therefore, contrary to President Bush’s statements, the horrible attacks on the WTC cannot be considered acts of “war”.<sup>53</sup>

Acts of terrorism are not included in standard insurance policies, where similar acts of destruction are expressly excluded from coverage in acts of war,

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44. *Pan American World Airways, Inc., v. Aetna Casualty & Surety Co.*, 505 F.2d 989 at 1012; see also *Welts v. Conn. Mut. Life Ins. Co.*, 48 N.Y. 34, 40 (1871), cited in *supra* note 16, at 577-78.

45. Branigan, *supra* note 19, at 532.

46. Kendall, *supra* note 18, at 592.

47. *Id.*

48. Kendall, *supra* note 18, at 592-93.

49. Woo, *supra* note 2, at 4.

50. *Pan American World Airways, Inc.*, 505 F.2d at 1005; see also *New York Life Ins. Co. v. Bennion*, 158 F.2d 260, 264 (10th Cir. 1946); *Vanderbilt v. Travelers' Ins. Co.*, 184 N.Y.S. 54, 55 (1920), cited in 36 U. RICH. L. REV. 569, 592.

51. *Pan American*, 505 F.2d at 1005.

52. Pernicone, *supra* note 42.

53. Wasow, *supra* note 8, at 5.

hence the “war exclusion.” “Few insurance policies underwritten for domestic risks contained exclusionary language for acts of terrorism. All, however, excluded coverage for damages to persons or property that were the result of an act of war.”<sup>54</sup> War, is a “hostile contention by means of armed forces, carried on between nations, states or rulers, or between citizens in the same nation or state.”<sup>55</sup>

Terrorism, however, is defined as “the unlawful use of force and violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives.”<sup>56</sup> Should the United States be subjected to future acts of terrorism as a result of its military activities, insurance carriers may be able to invoke the war exclusion and terrorism exclusion, or the insurance agency may select to combine war and terrorism into one exclusion policy, to preclude coverage for resulting personal injury or property damage losses.<sup>57</sup>

#### IV. THE PROBLEM DEFINING “OCCURRENCE”

In the aftermath of the WTC attacks, many questions have been raised regarding the ability of insurance companies to compensate policy holders for losses caused by the terrorist’s acts. The most costly risk facing the insurance industry is the difference between one occurrence and multiple occurrences. One attack may result in fifty billion dollars in insured losses. But if the events of September 11 were defined as two attacks, the amount that can be collected under the WTC policy would double.<sup>58</sup> The problem stems from an interpretation of the term “occurrence.”

“Insurers and reinsurers are familiar with disputes over situations in which a determination as to the number of occurrences can have major financial significance.”<sup>59</sup> Determining the number of occurrences has drastic impacts on

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54. Rizzo, *supra* note 10, at 12.

55. BLACK’S LAW DICTIONARY 1093 (6th ed. 1991).

56. 28 C.F.R. § 0.85 (2001), *cited in* Rizzo, *supra* note 10, at 12.

57. *Id.*

58. Neil H. Wyland & Jonathan I. Katz, *As the Dust Settles: Emerging Issues in the Wake of September 11*, 12 No. 17 ANDREWS INS. COVERAGE LITIG. REP. 11, 1 (2002).

The largest insured losses from the events of September 11 arise from the attacks on the World Trade Center. An issue that could literally double the size of WTC-related property losses is whether the attacks on the WTC constitute one occurrence/event or two under the involved direct insurance policies. The issue will also arise under the reinsurance agreements that protect those policies. Lawsuits have already been filed on that issue in the direct insurance context.

59. John W. Stamper, *Looking at the Events of September 11: Some Effects and Implications, While the Impact on Insurers is Large and Apparent, there are Many Other Possibilities, Even Probabilities, of Contentions and Litigation*, 69 DEF. COUNS. J. 152, 159 (2002). (Environmental policies are familiar insurance claims.)

the ability of policyholders to collect, and affects both primary insurers and reinsurers.<sup>60</sup> The question that will beg this analysis is: was the occurrence multiple hijacked aircrafts that crashed into multiple buildings, or was the occurrence a single and unified terrorist plot that destroyed the three buildings? "If the cause or occurrence is deemed the terrorist plot then the case in the federal courts may call the destroyed buildings one occurrence. If each plain crash is a separate incident then the incidents may be ruled separate occurrences."<sup>61</sup>

"Given their close coordination, were all four attacks one occurrence? Were they all separate? Were the attacks on the World Trade Center one occurrence regardless of the others?"<sup>62</sup> "If the decision is one loss, the insurers will be liable for the occurrence limit in the policy."<sup>63</sup> Larry A. Silverstein, the WTC leaseholder, says each airplane crash involved in the disaster constitutes a separate "occurrence."<sup>64</sup> If this were true, then a finding of two "occurrences" would double the \$3.6 billion Silverstein would collect to \$7.2 billion.<sup>65</sup>

Several insurance companies that cover other property damaged in the WTC attacks believe "that because the attacks were coordinated, they qualify as a single occurrence."<sup>66</sup> The New York Court of Appeals answered the question of how to determining the "number of occurrences" of an event.<sup>67</sup> The

60. *Id.*

61. Branigan, *supra* note 19, at 532.

62. Stamper, *supra* note 59, at 152.

63. Branigan, *supra* note 19, at 532.

64. Pernicone, *supra* note 42, at 27.

65. *Id.*

66. *Id.*

67. *Id.* at 27-8.

On October 16, 2001, the court firmly rejected a ceding company's attempt in two separate cases to characterize underlying environmental claims arising from numerous different sites across the country into one "disaster and/or casualty" per insured. The two cases were resolved by the court in a single opinion, *Travelers Casualty & Surety Co. v. Certain Underwriters of Lloyd's of London*, cases 123 and 124. The cases stemmed from pollution-related claims against two separate industrial insureds, E.I. du Pont de Nemours & Co. and Koppers Company (n/k/a Beazer East, Inc.). Both insureds submitted insurance claims to Travelers after incurring substantial expenses associated with different sites across the country, where they had been held responsible for the release of hazardous substances into the environment. Travelers ultimately settled with each company for substantial sums. Travelers had reinsurance treaties with Lloyd's that obligated Travelers reinsurers to cover "each and every loss" exceeding a retention level. Travelers argued in both cases that it could aggregate the losses from multiple environmentally contaminated sites owned by the respective insureds as one "disaster and/or casualty" per insured under the wording of the reinsurance contracts at issue. Under the facts of each case, that position, if upheld, would mean that Travelers could surmount the retention limits in the treaties and thus be entitled to a recovery. Travelers based its argument primarily on a 1996 decision by the English House of Lords, *Axa*

court looked at the acts necessitating coverage, and the policy language, which said, "... all loss[es] resulting from a series of accidents, occurrences and/or causative incidents having a common origin and/or being traceable to the same act, omission, error and/or mistake shall be considered as having resulted from a single accident, occurrence and/or causative event."<sup>68</sup> The court said "the phrase 'series of' created a requirement of a temporal and spatial relationship among any accidents to be aggregated under the wording. ... Thus, [an] attempt to treat the ... claims ... as one 'disaster and/or casualty' for ... allocating related costs ... was barred by the policy language."<sup>69</sup>

In October of 2001, SR International Business Insurance (Swiss Re), filed a declaratory judgment action in the Southern District of New York in order to resolve the question: How many occurrences took place on September 11, 2001?<sup>70</sup> Swiss Re provided the World Trade Center policyholders coverage in excess of a \$10 million. Swiss Re asserts that the policy drafted by the WTC leaseholders' insurance broker, Willis Ltd. States that the term "occurrence," is defined as: "[A]ll losses or damages that are attributable directly or indirectly to one cause or one series of similar causes. All such losses will be added together ... will be treated as one occurrence irrespective of the period of time

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Reinsurance v. Field, 5 Re LR 184.

68. *Travelers Cas. and Sur. Co. v. Certain Underwriters at Lloyd's of London*, 734 N.Y.S.2d 531, 535 (N.Y. 2001).

69. Pernicone, *supra* note 42, at 28.

70. *SR International Business Insurance Co., Ltd. v. World Trade Center Properties LLC*, 2002 WL 1163577 (S.D.N.Y. 2002).

In that action, 'Plaintiff Swiss Re' seeks, *inter alia*, declaratory relief regarding the insurance entitlements of Defendants. In response to the *SR Int'l* Complaint, the Silverstein Properties asserted counterclaims against numerous other insurers seeking monetary and declaratory relief in the *SR Int'l* action. (World Trade Center Properties LLC, et al. Am. Answer & Countercls., filed on February 6, 2002). The extent of the liability of the insurance carriers may ultimately depend upon resolution of the question: Which of the two following statements best describes what caused the destruction of the World Trade Center on September 11, 2001) In a single coordinated attack, terrorists flew hijacked planes into the twin towers of the World Trade Center.2) At 8:46 A.M. on the morning of September 11th, a hijacked airliner crashed into the North Tower of the World Trade Center, and 16 minutes later a second hijacked plane struck the South Tower. Since most property damage insurance is written on a 'per occurrence' basis—the maximum insured amount will be paid for each covered occurrence—the Court would normally expect to find the answer to the question whether the events of September 11th constituted one or two "occurrences" by looking at how the parties to the insurance contract defined that term in the policy they negotiated. In the case of the World Trade Center, however, with minor exceptions, there were no insurance policies in place on September 11th, although each of the insurers had signed binders setting forth in summary form their agreement to provide property damage coverage. Some of these binders expressly stated that the precise language was 'to be agreed upon.

or the area over which such losses occur.”<sup>71</sup> The WTC policyholders claim, “that Swiss Re agreed to a policy form underwritten by The Travelers Indemnity Company and the definition of occurrence would be scrutinized under New York law.”<sup>72</sup> Under New York law, an “occurrence” is defined as an “event of an unfortunate character that takes place without one’s foresight or expectation.”<sup>73</sup> The Second Circuit has interpreted this to mean that “although a single ‘occurrence’ may give rise to multiple claims ... courts should look to the event for which the insured is held liable, not some point further back in the causal chain.”<sup>74</sup>

Many courts have created two rules for determining how to treat multiple instances of damage stemming from more than one occurrence. “The ... most broadly accepted rule is the so-called ‘cause’ test ... wherein all losses arising from the same ‘cause’ are treated as one occurrence.”<sup>75</sup> The effect test, an earlier but now largely discredited approach, looked to the “effect of causes in determining whether there were multiple ‘occurrences.’” While many courts have adopted the cause approach, in practice, however, ‘cause’ may have many different meanings.<sup>76</sup> However the courts decide to fall on this matter may likely be the difference between insurers covering their policies or falling short.

## V. OTHER OPTIONS: GREAT BRITAIN’S POOL RE

“A basic principle of insurance is the reduction of overall risk by pooling or spreading individual, independent risks.”<sup>77</sup> An insurers’ inability to accurately estimate potential losses can be detrimental, to say the least. Insurers gauge the risk associated with an activity, and then assign an amount that they will cover (reimburse) on the chance that the event will occur. The attacks on the WTC shed light on the major problem the insurance agency is now facing:

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71. Swiss Re Complaint ¶ 31.

72. WTC Leaseholders’ Answer and Counterclaim ¶ 75, cited in Rizzo, *supra* note 10, at 15. (“New York subscribes to the “unfortunate event” test to determine the number of ‘occurrences’ that have taken place.”).

73. *Arthur A. Johnson Corp. v. Indemnity Ins. Co. of North America*, 164 N.E. 2d 704, 707 (N.Y. 1959).

74. *Stonewall Ins. Co. v. Asbestos Claims Mgmt. Corp.*, 73 F.3d 1178, 1213 (2d Cir. 1995).

75. Michael F. Aylward, *Twin Towers: The \$3.6 Billion Question Arising from the World Trade Center Attacks, 9/11 and its Aftermath, Was it One “Occurrence” or More Than One? There are Complexities Galore that are Bound to Arise in the Insurance Context*, 69 DEF. COUNS. J. 169, 172 (2002).

76. *Id.* at 172-73. (“For the most part, ...where two losses occur close to each other in time and space as the result of a continuous physical cause, most courts have ruled that they should be treated as arising out of the same occurrence.”).

77. Lowe, *supra* note 12, at 1. (“But this principle can break down if a single event affects many insureds simultaneously. Geographic concentration or concentration of coverage within an industry (e.g., asbestos manufacturers) creates the potential for *contagion*.”).

either no one predicted how much damage could be caused, or at the very least, no one accurately predicted the possible scope of damage.

If the private insurance industry cannot underwrite the new risk of terrorism, then a strong rationale exists for a federal role. In the United States, such precedents include the federal flood insurance program and federal riot reinsurance. A more recent example is Pool Re, the U.K. reinsurance program covering terrorist acts.<sup>78</sup>

#### A. *The Evolution of Britain's Pool Re*

As in the United States, British losses stemming from acts of terrorism were covered under standard insurance policies. Like the United States, Great Britain's insurance industry assumed that insured losses from acts of terrorism would be minimal.<sup>79</sup> However, the United Kingdom suffered several terrorist attacks, which culminated in the 1992 bombing of St. Mary Axe, London, where the Irish Republican Army (IRA) caused damages in excess of £350 million in commercial property damages.<sup>80</sup> After this, the British "realized that the unlimited coverage of claims due to terrorism might turn out to be quite expensive."<sup>81</sup>

After the St. Mary Axe attack, the insurance and reinsurance industry recognized that they were not able to estimate an accurate determination of damages resulting from further terrorist attacks.<sup>82</sup> Without having the ability to cover losses, or to come close to predicting damages, reinsurers canceled terrorism coverage, and the primary insurance companies followed. "The situation soon became highly political, and enormous pressure was put on both the insurance market and the British government to find some solution to the problem."<sup>83</sup>

The Association of Insurance and Risk Managers in Industry and Commerce (AIRMIC), the risk management community, the U.K. broker community, the British Insurance and Investment Brokers Association (BIIBA), and the Association of British Insurers gathered to answer the dilemma they now faced: how to insure an uninsurable act? Risks that are considered

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78. *Id.*

79. Thomas von Ungern-Sternberg, *Property Insurance in Britain*, University of Lausanne, at 7 (1998).

80. Fleming, *supra* note 9, at 2.

81. von Ungern-Sternberg, *supra* note 79, at 7.

82. Fleming, *supra* note 9, at 2.

83. *Id.* (Many policies, both in the United Kingdom and the United States renew on or by the first day of the new year. "Since the time scale was so short for those who had renewals on January 1, 1993, there was a horrified outcry from the Association of Insurance and Risk Managers in Industry and Commerce and the risk management community.")

uninsurable have the following characteristics: there are no “objective probabilities that can be used to calculate premium levels; even individual claims can cost large absolute amounts; and geographically the claims are concentrated on a few regions.”<sup>84</sup> Ultimately a scheme was devised that was hoped “would maximize the traditional insurance market capacity while requiring government backing.”<sup>85</sup> This scheme became Pool Re.

Pool Re is “a government-backed insurance facility in which the Department of Trade acts as a reinsurer of last resort to the insurance market.”<sup>86</sup> “Pool Re’s reinsurance contract provides coverage only against acts of terrorism as defined in the Reinsurance (Acts of Terrorism) Act [of] 1993.”<sup>87</sup> Pool Re, which was created by “an amalgam of local British Insurers, Lloyd’s syndicates, overseas insurers and captives,”<sup>88</sup> is a “mutual insurance company, established and regulated in the same manner as any normal insurance company.”<sup>89</sup> Each company that agrees to take part in Pool Re agrees not to provide terrorism coverage themselves; thereby removing competition from other privately backed insurance companies.<sup>90</sup>

“Pool Re is unique to the commercial property insurance market. Pool Re does not provide reinsurance for the homes, personal property or cars of private individuals, or ... reinsurance for terrorist losses on other policies.”<sup>91</sup>

The pool is reinsured by the British government, meaning that insurers’ liability is capped, giving them a ten percent profit or loss-making potential. If the scheme runs badly then everyone who has put premium into the system is obligated to fund another ten percent of premium before the government reinsurance applies.<sup>92</sup>

“The primary insurer is responsible for the first £100,000 (about \$150,000) under each section of the policy (building, contents, business interruption, etc.),

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84. von Ungern-Sternberg, *supra* note 79, at 8. (“The St. Mary Axe bombing is a good illustration of how high the claims for one individual event can be. As regards the geographic distribution, it was assumed the IRA would concentrate its ‘efforts’ on the City and perhaps the business centers of other large towns.”)

85. Fleming, *supra* note 9, at 2.

86. *Id.* at 3.

87. TILLINGHAST-TOWERS PERRIN, UPDATE 2 (2001), available at [http://www.tillinghast.com/tillinghast/publications/publications/till\\_update\\_uk/Uk\\_Pool\\_Re\\_and\\_Terrorism/2002052111.pdf](http://www.tillinghast.com/tillinghast/publications/publications/till_update_uk/Uk_Pool_Re_and_Terrorism/2002052111.pdf) (last visited Mar. 12, 2003).

88. Fleming, *supra* note 9, at 3.

89. TILLINGHAST-TOWERS PERRIN, *supra* note 87, at 1.

90. Fleming, *supra* note 9, at 3.

91. TILLINGHAST-TOWERS PERRIN, *supra* note 87, at 2. ([S]uch as liability, aviation, workers’ compensation and accidental death.).

92. Fleming, *supra* note 9, at 3.

with Pool Re covering the excess up to the limits of primary coverage.”<sup>93</sup> Any insurer in Great Britain offering commercial property insurance can be a Pool Re member, but is not obliged to join.<sup>94</sup> Insurers who want to refrain from joining Pool Re, but want to continue offering terrorism insurance, “may offer cover[age] without protection against terrorism, may try to find terrorism reinsurance cover[age] in the private market, or may operate without reinsurance protection.”<sup>95</sup> Insurers who want join Pool Re enter into a membership agreement, essentially purchasing reinsurance from the Pool Re.<sup>96</sup> Once a member, primary insurers must exclude acts of terrorism in their standard commercial property policies, charge separate premiums for terrorism coverage, and yield 100 percent of the premium charged for Pool Re.<sup>97</sup>

“According to its annual returns to the Financial Services Authority, at the end of December 2000, the accumulated surplus amounted to £665 million.”<sup>98</sup> Pool Re pays its claims by accumulated underwriting profits. If there are no profits, Pool Re can “call for an assessment on its members of up to 10 percent of their current-year ceded premiums. If this is still insufficient, then Pool Re may draw on any investment income it has accumulated to pay claims.”<sup>99</sup> If there are outstanding claims that cannot be covered by Pool Re, the government will act as a last resort measure, to which there is no limit.<sup>100</sup> However, if the

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93. TILLINGHAST-TOWERS PERRIN, *supra* note 87, at 2.

The standard commercial property policy specifically excludes coverage for such defined acts of terrorism above the deductible and then restores cover-age for them via a standard endorsement. The insured can purchase coverage under this endorsement for an earmarked additional premium. In effect, Pool Re provides an automatic facultative excess of loss cover with retention of £100,000 per coverage section. On the excess, Pool Re provides 100 percent quota share coverage.

94. von Ungern-Sternberg, *supra* note 79, at 9.

95. *Id.*

96. *Id.* at 3.

97. *Id.* at 1.

Pool Re sets its premium rates using nor-mal commercial considerations, and uses risk factors of its own choosing — including the location of the insured property. Discounts are available if the insured engages in prescribed risk management programs. Pool Re reviews its premium rates on a regular basis with the assistance of independent consulting actuaries.

98. *Id.* at 3.

Pool Re’s capital is its own, and is built up entirely from its accumulated profits. According to its annual returns to the Financial Services Authority, at the end of December 2000 the accumulated surplus amounted to £665 million. Pool Re may borrow, and the government guarantees any loans or other lines of credit, but it has never made use of this ability.

99. TILLINGHAST-TOWERS PERRIN, *supra* note 87, at 3.

100. *Id.* at 4.

proceeds from member's premiums exceed £1 billion, then Pool Re must pay a premium to the government.<sup>101</sup>

The United Kingdom's Pool Re system was created so that the taxpayer is insulated from immediately being hit with heightened premiums, or worse, not being able to recoup their losses. Pool Re is actually a five-tiered program, where different layers are set in place to meet the losses that policyholders may receive following a terrorist attack.<sup>102</sup> "Following an attack, the insurance company pays the first £100,000 per coverage type, with no government reimbursement. Insurers contribute premiums to fully capitalize and maintain a national pool, paying out all claims directly from the pool once the deductible is met."<sup>103</sup>

In the instance where the losses exceed the pool, the insurance agency must pay up to an additional ten percent of that year's premium. If the damages or claims exceed that amount, then the investment income earned by the pool is used to cover the difference.<sup>104</sup> If these contingencies fail, then the Government will help to cover the expenses. However, since Pool Re's inception, the United Kingdom's government has not been forced to step in to bail out the system.<sup>105</sup>

Pool Re has curtailed governmental involvement to simply being there to cover Pool Re when its coffers are too low to cover claims.<sup>106</sup> The system works by giving the customer insurance while allowing the provider to make some profit. This is accomplished when the primary insurance companies collect premiums from policyholders, of which the insurance company is paid five percent.<sup>107</sup> While Pool Re pays coverage from its collection of premiums

101. *Id.*

In that case, the total premium payable by Pool Re over the lifetime of its agreement with the government will be equal to the greater of: 10 percent of the sum of the net premiums plus compound interest it has received, or the sum of the losses plus compound interest the government has paid to Pool Re.

102. Lesley Hensell, *Should the Feds Underwrite Terrorism Insurance?*, Reality Times, 3, Nov. 15, 2001, available at [http://realtimes.lycos.com/renews/20011115\\_insurance.htm](http://realtimes.lycos.com/renews/20011115_insurance.htm) (last visited Mar. 12, 2003).

103. *Id.*

104. *Id.*

105. *Id.*

The first line of responsibility must be in place on the insured company. Once that is firmly in place, it's fair to spread the risk as widely as possible, with the insurance industry acting as the second buffer, and the government acting strictly as an insurer of last resort" Weiss Ratings, an independent provider of ratings of the insurance industry.

106. von Ungern-Sternberg, *supra* note 79, at 10.

Pool Re is clearly a distortion of competition, since the Government provides one of the suppliers with a stop-loss guarantee at zero cost. The Government apparently believed that this was the best way to ensure that businesses could continue having low cost insurance coverage against damages which could potentially be very high.

107. *Id.* ("If there is a broker between the insurance company and the customer, they get 2.5 percent

and profits from investments, if it's resources exceed £1 billion the Government has the right to recover any funds it may have provided.<sup>108</sup>

### B. Pool Re's Flaws

Increased premiums have dogged Pool Re since its inception. "There is no degree of price stability in the arrangements since the British government is determined to ultimately pass costs on to the public. ... [I]f another big loss occurs, there will be yet another public furor over the effectiveness of Pool Re."<sup>109</sup> While the government is borrowing money to pay for existing losses, the debt increases and the burden is placed on the taxpayer.

Because one factor used in determining Pool Re coverage was location, where one owned commercial property could significantly increase policyholder's premiums. The areas found in the highest concentration of terrorist activity originally had the highest rates. "Some property owners experienced a three-fold increase in their total insurance premium. However, as the funds in Pool Re have grown and the terrorist problem has subsided, rates have been reduced."<sup>110</sup>

The definition of terrorism loss causes yet another concern. For example, the Bishopsgate and St. Mary's Axe incidents were considered terrorism losses, but the subsequent looting and thefts fell under the category of traditional market losses.<sup>111</sup> Insurers are also having a difficult time with Pool Re.<sup>112</sup> While they are able to provide a degree of continued coverage where necessary (with government support), they "have a very diversified client base and an enormous administrative burden for which there is no reward unless they are able to obtain specific fee increases from clients for these services."<sup>113</sup>

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each.").

108. *Id.* (As of yet, the Government has not needed to intervene, so no monies have been provided or returned.).

109. TILLINGHAST-TOWERS PERRIN, *supra* note 87, at 4.

110. *Id.*

Pool Re discounted rates by 40 percent in 1995 and substantially reduced them in 1999. Gross premiums reached a high point in 1994, at £369 million. Since then they have fallen substantially, particularly as rates have been cut. In 2000, Pool Re's gross written premium was £39 million. Despite the claims that have been paid, Pool Re's surplus has grown significantly. As mentioned earlier, at the end of 2000, surplus was approximately £665 million.

111. Fleming, *supra* note 9, at 4. ("Problems with the definition of terrorism could also arise in other ways. For example, consider the London Flood Barrier. Does terrorism occur if extremist destroy this barrier and London is damaged by flood?")

112. *Id.* at 5.

113. *Id.* ("One company, for example, has 30 full-time employees working solely on Pool Re issues. When one extrapolates this burden to the many composite insurers and other firms throughout the United Kingdom, one can appreciate the significant administration costs created by this system.")

Another Pool Re problem lies with the policyholder's ability to get the coverage they desire.<sup>114</sup> Policyholders must decide whether they require terrorism insurance or to continue until the inevitable happens and hope their losses are not great. It is a whole or nothing proposal where a firm that only is interested in covering one portion of its business, but not the others, cannot participate.<sup>115</sup>

The government could also fund its contingent liability to the pool in a variety of ways. It could charge the pool a premium ..., accumulating a fund it could use to pay for losses. ... [T]he government could fund its losses out of tax revenues, either with or without repayment requirements.<sup>116</sup> The greatest problem is simply this: If the event that is being insured against happens before the Pool has collected enough premiums, or the premium rate was estimated too low, the Pool's reserves would be insufficient to adequately cover the act.<sup>117</sup> If this were to occur, the insurers would be obligated to pay all legitimate claims regardless of whether they recovered funds from the Pool.<sup>118</sup>

"The ... Pool Re system is not working. [T]he system is failing because it is committed to a reinsurance obligation for which there is insufficient premium in the system to pay claims."<sup>119</sup> The government, which has proceeded to borrow money to meet existing claims, is only adding to its debt. There is no exit strategy that will satisfy the insurance industry, and indicators show that the government's "objective is to pass the risk back to the commercial market at the first opportunity."<sup>120</sup>

## VI. THE UNITED STATES ROLE IN BACKING INSURERS

Prior to September 11, states regulate insurance companies, however, after the WTC attacks; the federal government has taken an increased interest in the insurance industry.<sup>121</sup> Each state has a guaranty fund that kicks in when an act

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114. *Id.* at 4.

115. *Id.* ("Unless there were totally separate policies and structures in force prior to the beginning of 1993.").

116. *Alternative Programs for Protecting Insurance Consumers, Terrorism Insurance, Before the Senate Committee on Banking, Housing and Urban Affairs, United States Senate*, (2001) [hereinafter McCool] (testimony of Thomas J. McCool, Managing Director, Financial Markets and Community Investment) p. 10.

117. *Id.*

118. *Id.*

119. Fleming, *supra* note 9, at 4.

120. *Id.*

121. Lawson, *supra* note 14, at 62.

creates losses that the insurance companies cannot cover.<sup>122</sup> “Guaranty funds are not operated by state governments, nor are they funded by public money (i.e., there is no explicit subsidy). [T]he funds were created by statute and operate as part of the insurance regulatory system.”<sup>123</sup> But if the system fails, the policyholder is left without options? Who will step in and ensure business owners that they will be reimbursed for their losses?

Many insurance industry executives have supported various recommendations that would rope in the Federal Government as a last resort.<sup>124</sup> Many have suggested the creation of a Pool system similar to the UK’s Pool Re. However, Treasury Department officials have had concerns about the government creating and regulating the system.<sup>125</sup> Even if the pool was chartered by an individual state, and federal funds were deposited, there is a concern that at the very least, there would be some federal oversight involved.<sup>126</sup>

President Bush has pushed forward his own plan, and has requested that Congress pass legislation that would support federalizing terrorism insurance.<sup>127</sup>

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122. McCool, *supra* note 116, at 14.

123. *Id.* at 11.

124. Tom Hamburger & Christopher Oster, *Insurance Industry Backs US Terrorism Fund*, p. 1, available at <http://www.hobbsgroup.com/newfiles/newscenter/data/terrorismarticle.doc>.

125. *Id.*

126. *Id.*

127. Bill Sammon, *Bush Says Senate Should Federalize Terror Insurance*, THE WASH. TIMES, 1 (Apr. 9, 2002), available at <http://www.washtimes.com/national/20020409-2383974.htm> (last visited Mar. 12, 2003). See also *supra* note 15.

And we need to do something on terrorism insurance, as well. This is an issue that I don't think a lot of Americans understand very well, and we're going to use this opportunity to explain it. I'm going to do my best to explain it. Tom Ridge and Larry Lindsey will follow up. ... [A]nd we have a lack of insurance coverage now as a result of the enemy attack. I don't think they actually sat down and said, gosh, if we attack, we'll affect the insurance industry of America. I think that was an unintended consequence of theirs. But, nevertheless, it was a consequence. And we in Washington must deal with it, and must deal with it in a hurry, because the pace of new construction is dropping dramatically in America. Banks and investors, and others, will not finance construction projects that do not have terrorism insurance. In order to build a project, in order to employ people, you've got to borrow money, and you can't borrow money unless there's adequate terrorism insurance. And that's not being provided today. ... And I expect the Congress to act. ... The Hyatt Corporation has acquired a new site for a 1.5 million square foot office building in downtown Chicago. That ought to be encouraging news. It ought to be encouraging news for my friend, the mayor. It ought to be encouraging news for people who wear the hard hat and work, the ironworkers and the construction workers. But they've got a problem finding terrorism coverage, and so they're not getting financing for the project. Somebody wants to build it; they can't get the money to do it because the insurance isn't available. This project is valued at \$400 million; will lead to the creation of 2,500 jobs, if the Hyatt Corporation could get insurance. ... We're worried about charities that may be forced to cut back on services to the needy because of the high cost of insurance. Pension

Without some decision, many policy-holders will feel the bite of not having the proper coverage. Many customers have already faced this problem, including the Miami Dolphins and the New York Giants (two professional football teams in the National Football League) who lost terrorism coverage, and the Mall of America in Minneapolis, "whose premiums have increased tenfold."<sup>128</sup>

A December letter from the National Association of Insurance Commissioners (NAIC) President, Terri Vaughan, to Senate leaders Thomas Daschle, D-S.D., and Trent Lott, R-Miss., expressed the concerns of the organization if legislative action is not quickly taken.

The terrorist attacks on our country have created enormous uncertainty in our nation's commercial property and casualty insurance markets. We continue to believe the federal government can and should play a critical, limited role in helping this marketplace adjust to these new market realities. We are aware of the efforts the Senate and the House of Representatives are putting forward to

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funds for teachers and other workers that hold real estate assets may experience lower rates of return because of higher terrorism insurance costs. That affects someone's retirement system. ... The transportation industry will face strains from the lack of affordable terrorism insurance. Secondly, while we're doing everything we can to stop terrorist attacks, the economy must be prepared to handle an attack if they do occur. We spend a lot of time here in Washington sniffing down every lead, looking for every opportunity to run down a clue — somebody might be trying to get us. And I am confident — I know we're doing everything we can, but I can't predict with 100 percent accuracy whether or not another attack won't occur. And, therefore, we better find terrorism insurance because, without it, it would be a catastrophic problem if there is another attack. It would make it really hard for our economy to recover a second time if there's an attack without adequate terrorism insurance. I mean, on the one hand we're talking about jobs, and on the other hand we're talking about recovery if there's an attack. Now, we passed a bill in the House that basically put the federal government as a stopgap for terrorism insurance. Above a certain level of claim, the federal government would step in. And that's important. And now it's in the Senate, and the Senate needs to respond and act. The Senate needs to get this bill done quickly. All they've got to do is talk to people in this room, Republicans and Democrats alike. This isn't a bill that says, gosh, if it passes it'll help somebody's political party. That's not what this is all about. This is a bill that helps workers and helps strengthen our economy. This is an important piece of legislation. I've heard some talk in Capitol Hill that the facts don't justify this type of legislation, the facts don't justify the federal government stepping in as a stopgap. They're not looking at the right set of facts, as far as I'm concerned. And so I expect, for the good of our economy, and for the good of the country, that the Senate act. And I want to thank you all for your interest in this bill, and I ask you to contact members of the United States Senate. We believe there is bipartisan support for this bill. We believe that if it ever makes it to the floor, it passes. And I know that we can work with the House version, if it's somewhat different, to get something done quickly.

128. *Id.* at 3.

advance this legislation. However, further delay will have a negative impact on insurers and insurance consumers who in this instance are predominantly the nation's business community.

Absent federal assistance, many businesses will be without coverage for future losses related to acts of terrorism. In the event insurance is still available, the costs may be unaffordable for many. Anticipating this possibility, many insurers have asked state regulators to grant terrorism exclusions against future losses. Some carriers are indicating that beginning Jan. 1 they will not renew workers' compensation coverage, a business necessity if an employer is to retain employees. These steps will leave consumers without protection. State insurance regulators must act on these requests in the coming days, and we will be hard-pressed to deny many of these specific requests in the absence of a federal 'backstop.' Otherwise, we would be exposing the industry to potentially unmanageable financial risks that would have consequences industry-wide and among all insurance consumers. For these reasons, we urge action on terrorism insurance legislation this year.<sup>129</sup>

Diane Koken, NAIC Northeast Chair and Pennsylvania Insurance Commissioner, testified before the United State Senate's Committee on Commerce, Science, and Transportation a month after the WTC attacks.<sup>130</sup> She said that the NAIC believed that the federal government should work with the states to create a federal backstop that would be limited in scope and duration in the event of another catastrophic attack.<sup>131</sup> While multiple plans are currently being passed between Congressional committees, the NAIC recommendations did not single out any one proposed plan.<sup>132</sup> However, it did provide guidelines that the NAIC hoped would be an essential element of any plan ultimately accepted and passed by Congress.<sup>133</sup>

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129. Letter from Terri Vaughan, National Association of Insurance Commissioners President to Congressional Members Thomas Daschle, D-S.D., and Trent Lott, R-Miss (Dec. 17, 2001), available at [http://www.naic.org/pressroom/releases/re101/121701\\_terrorism.htm](http://www.naic.org/pressroom/releases/re101/121701_terrorism.htm) (last visited Mar. 12, 2003).

130. *Regarding: The Role of the Federal Government in Assuring that Insurance for Terrorist Acts Remains Available to American Consumers*, [hereinafter Koken] (October 30, 2001) (Testimony of Diane Koken before the US Senate's Committee on Commerce, Science, and Transportation), p. 2.

131. *Id.*

132. *Id.*

133. *Id.* (Diane Koken listed 19 criteria that the NAIC wished to be taken into consideration before the federal government made a final conclusion to the federal backstop recommendation. They are:

1. Federal legislation in this area should "sunset" at a date certain of limited duration after enactment in order to allow a reevaluation of the need for and design of the program.
2. To take advantage of the substantial experience of state-based insurance regulation, the expertise of the NAIC should be made available to any federal program in this area and consideration should be given to including representatives of the NAIC

Koken said that the insurance industry is well suited to cover the losses incurred from the WTC attacks,<sup>134</sup> stating that the “industry is a \$1 trillion business with assets of more than \$3 trillion.”<sup>135</sup> Two examples of the insurance industry’s ability to react to disasters and reimburse policyholders who have incurred losses are Hurricane Andrew and the California Northridge Earthquake. In 1992 Andrew caused \$19.7 billion in damages, and in 1994 an

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as members of the governing body of such a program. 3. Federal legislation should supplement but not replace other private and public insurance mechanisms where those mechanisms can provide coverage more efficiently. 4. Federal legislation should include clear and non-ambiguous definitions of terrorism to be applied to all policies nationwide. 5. Rates should consider all reasonable factors that can be feasibly measured and supported by theoretical and empirical analysis, including relative risk. 6. Federal legislation should encourage loss reduction and hazard mitigation efforts. 7. State residual market mechanisms and other pooling mechanisms providing coverage should be allowed to participate in any program established by federal legislation but in such a way as to not create incentives for business to be placed in those residual markets. 8. Federal legislation should recognize that terrorism exposures subject insurers to potential “adverse selection,” *i.e.*, entities with lower risk are less likely to voluntarily purchase coverage, while those with greater risk are more likely to purchase coverage. If possible, the federal program should encourage the inclusion of both low-risk and high-risk entities to promote greater risk spreading in a way that does not subject risk-bearing entities, including the federal government, to adverse selection. 9. Federal legislation should address coverage and cost for all risks exposed to terrorism, regardless of geographic, demographic or other classification, such as “more-at-risk” or “less-at-risk.” 10. There should be a safety net protection, within reasonable limits, for any private program created by federal legislation in the event of the insolvency of the program or its participants. 11. Tax law changes should be encouraged to avoid penalties on and encourage the accumulation of reserves for the portion of terrorism losses insurable in the private marketplace. 12. Federal legislation should not unnecessarily preempt state authority. 13. Federal legislation should encourage individuals and businesses to maintain private coverage for terrorism exposure. 14. Federal legislation should promote or encourage awareness that coverage is available for any property and/or casualty risk that meets reasonable standards of insurability. 15. Federal legislation should encourage or mandate that eligible entities participate in the program or run the risk of losing access to federal disaster assistance. 16. There should be an appropriate balance of the different private and public interests in the governance of regulatory oversight over the program. 17. Federal legislation should recognize the expertise of the states in insurance regulation with respect to such areas as licensing insurers, solvency surveillance, oversight of rates and forms in most jurisdictions, licensing producers, assisting policyholders and consumers during the claim settlement process and performing market conduct examinations. 18. To more efficiently achieve the objectives of any federal terrorism program, there should be coordination of state and federal regulatory responsibilities. 19. Jurisdiction over insurer claim settlement practices should remain with the states.

134. *Id.* at 3.

135. Koken, *supra* note 130, at 3. (“Preliminary loss estimates of \$30 billion to \$40 billion represent just 3 to 4 percent of the premiums written in 2000.”).

earthquake cost \$16.3 billion in insured losses. Insurers were able to respond to the tragedy, and customers were reimbursed.<sup>136</sup>

The insurance industry and federal government need to work together to create a system that will honor all claims in the event of another terrorist attack. However, as a result of the WTC attacks, many in the industry are concerned about their ability to one, set an appropriate price for future terrorist acts, and two, be able to compensate losses if the act is worse than estimated. "However, even if we conclude that insurers cannot price and, therefore, cannot sell this kind of insurance, defining the nature of the problem facing both the economy and the insurance industry is a critical first step."<sup>137</sup>

Recommendations for improving some of the problems insurers are facing after the WTC attacks include establishing a uniform definition of terrorism and creating a temporary federal financial backstop for terrorism insurance.<sup>138</sup> The need to make these changes isn't one that results from the insurance industry not being able to pay for the losses suffered in the September 11 attacks. "The industry is going to pay its loss in the World Trade Center events, [but] if terrorist attacks continue, this is an industry with finite capital."<sup>139</sup>

## VII. EMERGING PLANS FOR FEDERAL INVOLVEMENT

Several plans emerged to cover losses in the event of another terrorist attack. President Bush's administration has recommended the creation of a pool system similar to Britain's Pool Re.<sup>140</sup> Costs, divided between the federal

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136. *Id.*

Following the tremendous losses from Hurricane Andrew, "commercial reinsurers restricted their coverage for windstorms and raised prices. This caused a corresponding reaction from primary insurers, who moved to raise prices, cancel coverage for coastal properties, and increase deductible amounts for consumers having significant hurricane exposure. Within a couple of years, normalcy returned to the reinsurance market, and then to the primary market. The Florida Insurance Department assisted with the recovery of the industry by introducing a moratorium on policy cancellations and beginning the discussion of the need for a state catastrophe pool. The Florida legislature later adopted a Hurricane Catastrophe Insurance Pool that provides a state-based backstop for catastrophic windstorms in Florida. These collective actions have resulted in a robust and competitive market for homeowners insurance in the State of Florida.

137. McCool, *supra* note 116, at 1, 3.

138. *Id.* See also Koken, *supra*, note 130, at 2-3.

139. Hamburger, *supra* note 124. (Statements of Maurice Greenberg, Chairman and Chief Executive Officer, American International Group, Inc.) (However, this statement seems to contradict the statements made by NAIC N.E. Chair, Diane Koken.)

140. *Federal Government, Insurers Debate Plan to Cover Future Terrorist Acts, Will Reinsurance Rebound?* 79 INSURANCE JOURNAL WEST, [hereinafter Insurers Debate] (October 29, 2001), 10, available at <http://www.insurancejournal.com/magazines/west/2001/10/29/coverstory/18300.htm> (last visited Mar. 12, 2003). See also Peter van Aartrijk, Jr., *Can Terrorism Reinsurance Pool Calm Insurers' Fears?*,

government and insurers, would be an alternative to the industry's initial proposal. The White House's plan would require the federal government to pay 80 percent of the first \$20 billion of insured losses resulting from a terrorist. Private insurers and reinsurers would cover the remaining 20 percent. If losses from a terrorist event amassed more than \$20 billion in insured losses, the government would pay 90 percent, and insurers would pay 10 percent.<sup>141</sup>

Several of the nation's largest insurers told the state insurance commissions that this plan would hurt smaller companies... Insurers are ... pushing for some sort of safety net, a terrorism pool to provide reinsurance. The White House rejected this original proposal as 'anticompetitive' and 'too complex' for the limited time frame.<sup>142</sup>

Two prevailing bills are in Congress, each passed in their respective chambers. The House of Representatives passed the Terrorism Risk Protection Act (H. R. 3210) in November. House Financial Services Committee Chairman Michael G. Oxley said, "the bill establishes a temporary risk-spreading program to shore up the insurance market and provide it with needed confidence and certainty. The legislation requires little government regulation and would only kick in if a terrorist event occurred."<sup>143</sup>

Passed in the House in November 2001, H.R. 3210 would provide for the federal government to cover casualty and property damages resulting from terrorist attacks.<sup>144</sup> The government, over two years, would cover 90 percent of any losses resulting from a terrorist act, and private insurers would cover the last 10 percent.<sup>145</sup>

Federal aid would be triggered by industry-wide losses of at least \$1 billion or 10 percent of the capital and surplus of any individual company. The aid would be ... a loan to be repaid by the industry

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*What Independent Agents Can Expect with the Hard Market, available at <http://www.aartrijk.com/resources/articles/terrorism.reinsurance.htm>. ("A week after the suicide hijackings, insurance carrier executives and IIAA CEO Bob Rusbuldt reassured President Bush at an Oval Office meeting that the estimated ... claims would be paid." ... "The CEO suggested a government-backed reinsurance pool similar to that found in Great Britain.").*

141. Federal Government, *Insurers Debate Plan to Cover Future Terrorist Acts*, *supra* note 140. ("After three years, the government would withdraw, allowing private insurers to take over.").

142. *Id.*

143. Press Release, House Committee on Financial, Oxley Commends AFL-CIO, Financial Services Roundtable for Letter Urging Action on Terrorism Insurance (February 22, 2002), *available at* <http://financialservices.house.gov/news.asp?FormMode=release&id=77> (last visited Mar. 12, 2003).

144. 144. *Insurance Liability*, *supra* note 16.

145. *Id.*

through assessments spread across the companies over an extended period of time.<sup>146</sup>

The Terrorism Risk Insurance Act (S. 2600), the rival bill to H.R. 3210, was passed on the Senate floor on June 18, 2002.<sup>147</sup> The bill, sponsored by Sen. Chris Dodd (D-Conn.) and cosponsors Senate Majority Whip Harry Reid (D-Nev.), Senate Banking Committee Chairman Paul Sarbanes (D-Nev.) and Sen. Charles Schumer (D-N.Y.), would “trigger if a terrorist attack caused at least \$5 million in damages. The federal government would then pay 80 percent of losses above each individual company’s deductible for losses of up to \$10 billion.”<sup>148</sup> The Act requires insurance companies to cover terrorist acts if the resulting damage is up to \$10 billion. “The federal government would cover 90 percent of losses greater than that amount during the first year of the possible two-year program. If the Treasury secretary approves the program for a second year, the threshold would rise to \$15 billion.”<sup>149</sup>

These two bills are very different. The House bill is a “loan” program.<sup>150</sup> In the aftermath of a terrorist attack, the federal government would loan insurers up to \$100 billion, but only after private insurance companies paid the first \$1 billion.<sup>151</sup> The insurers who received the federal loan monies would be required to repay the federal government, most likely pulling from earnings and premium increases. This will likely cause customers to pay higher premiums.<sup>152</sup>

Senate 2600 is a federally funded, short-term federal backstop program,<sup>153</sup> that

[s]ubstantially increases ... deductibles ... the industry ... pay[s]  
before tax dollars are used to pay for losses ... [thereby] ensur[ing]

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146. *Id.*

147. Press Release, IIABA Hails Senate Terrorism Insurance Vote; Calls Enactment “Necessary For Consumers And The Economy”, Senate Approves S. 2600 on 84-14 Vote, Independent Insurance Agents & Brokers of America, Inc., [hereinafter IIABA] (June 18, 2002), 1, available at <http://na.iiaba.org/Legislative/SenateTerrorismBillPR.pdf> (last visited Mar. 12, 2003).

148. Press Release, Senate Overwhelmingly Passes Terrorism Risk Insurance, Johnson Says the Legislation Would Ensure the Availability and Affordability of Insurance Policies Throughout South Dakota (June 18, 2002), available at <http://johnson.senate.gov/~johnson/releases/200206/2002619A31.html> (last visited Mar. 12, 2003).

149. IIABA, *supra* note 147, at 2. (“The bill also includes a per-company market share retention formula that would enable companies to be eligible for the federal backstop even if losses do not surpass the yearly, per-event thresholds.”).

150. *Id.*

151. *Id.*

152. *Id.*

153. *Senate Passes Terrorism Insurance Bill* (June 19 2002), available at [http://shoppingcenterworld.com/ar/retail\\_senate\\_passes\\_terrorism](http://shoppingcenterworld.com/ar/retail_senate_passes_terrorism) (last visited Mar. 12, 2003) (last visited Mar. 12, 2003).

that insurance companies will do all ... they can to protect ... taxpayers ... through careful assessment of the risks involved with each policy and the promotion of risk mitigation by their customers.<sup>154</sup>

“Among other differences, S. 2600 leaves property owners susceptible to punitive damages resulting from a terrorist attack. The ICSC and President Bush himself have voiced opposition to placing limits on punitive damage coverage for property owners, and Bush must sign the final bill.”<sup>155</sup> President Bush will veto any terrorism insurance bill that “allows punitive damages to be assessed against United States businesses.”<sup>156</sup>

H.R. 3210 and S 2600 both require losses, either aggregate industry losses or from individual company losses, to reach a trigger level before federal monies will be disbursed, both of which are capped at \$100 billion.<sup>157</sup> H.R. 3210 has two triggers; the primary trigger starts when annual insured losses resulting from terrorist attacks reach \$1 billion.

When this occurs, all participating insurers can receive disbursements. If terrorist attacks cause damages exceeding \$100 million “and losses for at least one insurer exceed both 10 percent of surplus and 10 percent of commercial lines net written premium, then those specific insurers who are so affected are eligible for payments”<sup>158</sup> under the bill’s second trigger.

Once the main trigger of \$1 billion is reached, insurers are reimbursed for 90 percent of their losses above a \$5 million deductible. In the case of the secondary trigger, eligible insurers are reimbursed for 90 percent of their losses in excess of 10 percent of their net written commercial lines premiums.<sup>159</sup>

Under S. 2600, insurers are limited to what they can recover. Insurers are limited to collecting losses, resulting from terrorist attacks, that exceed a deductible equal to their commercial insurance market share times \$10 billion,

154. Statement of United States Rep. John J. LaFalce, Ranking Member, House Financial Services Committee, Regarding Senate Passage of S. 2600, the Terrorism Risk Insurance Act of 2002 (June 18, 2002), available at [http://www.house.gov/banking\\_democrats/pr\\_061802.htm](http://www.house.gov/banking_democrats/pr_061802.htm) (last visited Mar. 12, 2003).

155. *Senate Passes Terrorism Insurance Bill*, *supra* note 153.

156. *United States Senate Passes Terrorism Risk Insurance Bill; Conference Committee To Iron Out Partisan Differences*, Professional Insurance Agents Ohio, available at [http://www.ohiopia.com/Legislation/bulletins/senate\\_passes\\_terrorism\\_bill.htm](http://www.ohiopia.com/Legislation/bulletins/senate_passes_terrorism_bill.htm) (last visited Mar. 12, 2003).

157. Stephen P. Lowe, *Estimating the Budgetary Impacts of the Proposed Federal Terrorism Risk Insurance Program: HR 3210 and S 2600*, TILLINGHAST-TOWERS PERRIN, 5 (2002).

158. *Id.*

159. *Id.*

which is limited to \$15 billion in the second year.<sup>160</sup> “In the case of S 2600, the federal share of losses is 80 percent of losses in excess of the individual company deductible, until losses reach \$10 billion. Thereafter, the federal share is 90 percent.”<sup>161</sup>

Under H.R. 3210, insurers would be reimbursed \$3.81 billion a year. Under S 2600, insurers would receive \$1.76 billion for the first year, program and \$1.44 billion the second year. If these plans began July 1, 2002, the expected disbursements over five years under H.R. 3210 would be \$6.6 billion versus \$2.8 billion for S 2600.<sup>162</sup>

H.R. 3210 requires ... disbursements ... be recovered via assessments and surcharges, while S. 2600 does not. Under H.R. 3210, the first \$20 billion ... are to be recovered via assessments on commercial insurers; ... disbursements in excess of \$20 billion ... to be recouped via earmarked surcharges on commercial insurance policies.<sup>163</sup>

“In theory, the federal government should ultimately be able to recoup the majority of any disbursements under H.R. 3210. Over an extended period the only limitation on recoupment would be due to unrecoverable assessments on insolvent insurers.”<sup>164</sup> Overcoming the differences between H.R. 3210 and S. 2600 will be a major hurdle that both the House and Senate may have difficulty negotiating as the one-year anniversary of the WTC attack draws closer.

### VIII. CONCLUSION

While Great Britain’s Pool Re is a valuable system to assist the insurance industry in the event of massive damages resulting from terrorism, it is not the best program for America.

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160. *Id.*

161. *Id.*

162. Lowe, *supra* note 157, at 3.

163. *Id.* at 6.

164. *Id.*

Except for the first \$5 billion of disbursements, assessments and surcharges in any calendar year are limited to 3 percent of commercial lines net written premium, which translates to an industry-wide overall annual dollar cap on recoveries of roughly \$3.6 billion, based on our estimate of commercial lines direct written premium of \$120 billion. In addition, H.R. 3210 provides the Secretary of the Treasury with considerable latitude regarding the timing and administration of any assessments or surcharges. For example, the Secretary may defer assessments on individual insurers to the extent that the Secretary determines that a deferral is necessary to avoid insolvency. Similarly, before imposing any surcharges, the Secretary is required to assess commercial insurance market conditions and consider the impact of the surcharges on affordability of commercial insurance.

The United States insurance industry will survive the short-term effects of September 11. It does not, however, have the capacity to protect against another terrorist act of similar magnitude. ... [U]ntil terrorism risk is eliminated or greatly reduced, United States businesses ... will need [the federal] government to ... ensure ... effective commerce ... continues.<sup>165</sup>

It will ultimately be a compromise of three principles; the willingness of the federal government to come to the aid of the insurance industry under H.R. 3210, the guarantee of a federal backstop that will be the cornerstone of terrorism insurance under S. 2600, and the willingness of our elected officials to overcome political maneuvering that will ultimately decide the fate of terrorism insurance. Between these, the ability of insurers and reinsurers to meet the losses of their policyholders will be met. As the fall session of Congress looms, attention from the insurance industry, policyholders, and the media will be directed at lawmakers who struggle to find a compromise that will ensure federal involvement and provide consumer confidence.

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165. Lowe, *supra* note 12, at 1.