WHAT IS WAR? TERRORISM AS WAR AFTER 9/11

Jane Gilliland Dalton[*]

This paper addresses the topic of terrorism as war after September 11th, 2001. Historically, "war" has generally been considered to be a state of hostilities between nations characterized by the use of military force. A declaration of war provided the formal and official announcement that a state of hostilities existed between two nations—although a state of hostilities characterized by the use of armed force could exist without a formal declaration.

In the post-United Nations Charter world, however, what matters is not whether one nation has declared "war" on another, but rather whether a nation has been the victim of an armed attack such that it is entitled to respond with armed force in self-defense. The United Nations Charter, by its terms, does not require that the armed attack emanate from another nation state. Article 51 provides solely that "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."[1] As will be discussed below, on September 11th, 2001 the United States was the victim of a horrific armed attack. The United Nations Security Council, the North Atlantic Treaty Organization (NATO), and the Organization of American States (OAS) all recognized that the United States was entitled to use force in self-defense in response to that attack. To provide a more comprehensive analysis of the legal issues involved, however, it is necessary to begin substantially prior to September 11th, 2001.

Under the traditional nation-state system, a state of hostilities could exist between two countries merely upon a declaration of war by one of them, whether or not armed engagements had actually begun. Consistent with that practice, one could argue that a state of hostilities existed between the United States and al Qaeda as early as 1992, when al Qaeda leadership issued a "fatwa" for jihad against United States forces located in Islamic territory.[2] In

---

* Jane Gilliland Dalton is the Charles H. Stockton Professor of International Law at the United States Naval War College, Newport, R.I. The views expressed herein are those of Professor Dalton and are not necessarily those of the Naval War College, the U.S. Navy, or the Department of Defense. This article is a revised reproduction of oral remarks presented at the International Law Weekend 2005, held at the House of the Association of the Bar of the City of New York, from October 20 to 22, 2005.

1. U.N. CHARTER art. 51.

2. NATIONAL COMMISSION ON TERRORIST ATTACKS ON THE UNITED STATES, FINAL REPORT: THE

August 1996, Osama bin Laden issued another fatwa declaring war on the United States. Certainly by 1998, when Osama bin Laden issued his public Declaration of Jihad against Saudi Arabia and the United States, calling for the murder of "any American, anywhere on earth" as the "individual duty for every Muslim,"[3] American leadership would have had grounds to believe that the country was at "war," based solely on those issued pronouncements.

Particularly when analyzing the 1998 fatwa, one is struck by how truly monumental is the vision and expansive the goals it espouses. Osama bin Laden called on Muslims to kill Americans and their allies, civilian and military, in order to liberate the al Aqsa Mosque and the holy mosque in Mecca. The al Aqsa Mosque is located on the Temple Mount in Jerusalem. Despite the unprecedented withdrawal of Israel from Gaza in the fall of 2005, it is inconceivable that Israel would peacefully give up the Temple Mount without a struggle. Thus, bin Laden must have in mind an armed struggle if he intends to accomplish the objectives of the 1998 fatwa. In fact, the strategic scope of that fatwa has been compared with the strategic scope of the Russian revolutionaries or Mao Tse Tung's guerrilla warfare campaigns.[4] Accordingly, it would not have been unrealistic for the United States to acknowledge that war in the literal sense had in fact been declared on the country based solely on the statements by Osama bin Laden and the al Qaeda leadership, beginning in 1992.

This author believes, however, that when dealing with a non-state actor more than mere declarations of war are required for a state to be authorized to respond with military force under the law of armed conflict (as opposed to dealing with the threat under domestic law enforcement authorities). Accordingly, one must look not only at the words of the al Qaeda network, but at its actions as well. Those actions since 1993 leave no doubt that, not only has war been declared on the United States by words, but the country has been the victim of an on-going series of attacks that have cost thousands of American and foreign national lives.

In 1993, Afghan-trained Arab militants attacked the World Trade Center in New York, killing six and injuring 1000 people. In addition, al Qaeda has attacked American embassies (Tanzania and Kenya in 1998), warships (USS THE SULLIVANS and USS COLE in 2000); financial centers (the World Trade Center in 2001), military headquarters (the Pentagon in 2001), and has attempted to decapitate the government (by the failed attacks on the White House and the Capitol in 2001).[5] Almost 3000 people from over fifty nations

---

9/11 COMMISSION REPORT 59 (2005) [hereinafter 9/11 REPORT].

3. *Id.* at 47.

4. Stephen Gale, *Terrorism 2005: Overcoming the Failure of Imagination*, THE FOREIGN POLICY INSTITUTE, Aug. 16, 2005.

5. *Id.*

died in the attacks of September 11th—more than were killed in the Japanese attack on Pearl Harbor on seven December 1941. There is some evidence al Qaeda was involved in or inspired the attacks on the Saudi National Guard facility in Riyadh in 1995, killing five Americans, and in the attack on Khobar Towers in 1996 that killed nineteen Americans and wounded 372.[6] Al Qaeda is a multi-national enterprise with operations in sixty countries.[7] In light of this continuing series of attacks, the letter seized in Iraq from Ayman al-Zawahiri to Abu Musab al-Zarqawi, reiterates the strategic nature of the terrorists' campaign and reminds the world that this armed conflict is continuous and ongoing.[8]

Misconstruing the scale of terrorism is dangerous and has cost the United States dearly. The 9/11 Commission Report concluded that "an unfortunate consequence" of the superb criminal investigative and prosecutorial efforts in the aftermath of the first World Trade Center bombing, "was that it created an impression that the law enforcement system was well-equipped to cope with terrorism."[9]

One of the major debates in the post-United Nations Charter world has been what constitutes an "armed attack"—because under the United Nations Charter, the question is not whether war has been declared, but whether the nation has been subject to an armed attack that entitles a response with armed force in self-defense. In some situations, the answer to that question has not been clear-cut—as was the case with the *Caroline* incident during the Mackenzie Rebellion in Canada in 1839. The diplomatic exchange surrounding that incident, though it preceded the United Nations Charter, is often cited as the classic description of an appropriate application of anticipatory self-defense, in a situation that was not completely clear-cut at the time it occurred.[10]

---

6. 9/11 REPORT, *supra* note 2, at 60.

7. Jeffrey De Laurentis, Economic and Social Council, Commission on Human Rights, *Civil and Political Rights, Including the Questions of: Disappearances and Summary Executions*, U.N. Doc. E/CN.4/2003/G/80, Apr. 22, 2003, at 4 [hereinafter *Civil and Political Rights*].

8. *See, e.g.*, Douglas Jehl and Thom Shanker, *Al Qaeda Tells Ally In Iraq To Strive For Global Goals*, N.Y. TIMES, Oct. 7, 2005; Susan B. Glasser and Walter Pincus, *Seized Letter Outlines Al Qaeda Goals in Iraq*, WASH. POST, Oct. 12, 2005, p. 13.

9. 9/11 REPORT, *supra* note 2, at 72. *See also Civil and Political Rights*, *supra* note 7, at 3 ("Al Qaida and related terrorist networks are at war against the United States. They have trained, equipped, and supported armed forces and have planned and executed attacks around the world against the United States on a scale that far exceeds criminal activity.")

10. To prevent American sympathizers from using the steamboat Caroline to transport men and materiel to the Canadian insurgents, British forces boarded the vessel, set it afire, and sent it over Niagara Falls, killing and injuring several American citizens in the process. When the United States protested the violation of its sovereignty, the British Government invoked the right of self-defense. Secretary of State Daniel Webster, in a series of diplomatic notes during 1841–1842, maintained that for the claim of self-defense to be valid, Great Britain was required to show "a necessity of self-defense, instant, overwhelming,

But if the United States was unsure prior to September 11th, 2001 whether it had been the victim of an armed attack, there was absolutely no doubt after that date. NATO invoked Article 5 of the North Atlantic Treaty, and the Organization of American States invoked the equivalent provision, Article 3(1), of the Rio Treaty, providing that an armed attack against one or more of the parties shall be considered an attack against them all.[11] United Nations Security Council Resolution 1368 invoked the inherent right of self-defense.[12] And President Bush decided that it was time to break with the practice of treating terrorism as exclusively a criminal offense, and that the United States would respond with its armed forces and with every instrument of United States national power.[13] Recall that President Clinton also took military action against al Qaeda training camps in Afghanistan and a chemical facility in Sudan in

---

leaving no choice of means, and no moment for deliberation." YORAM DINSTEIN, WAR, AGGRESSION, & SELF-DEFENSE 218–19 (2003). Though the Caroline incident stands for the proposition that the right of anticipatory self-defense has long been recognized as an inherent right, the particular articulation of the standard (instant, overwhelming, no choice, no moment) has been criticized as too restrictive. *Id.*

11. NATO invoked Article 5 on September 12, 2001 but only provisionally, pending verification that the attacks had been directed from abroad. U.S. Ambassador Frank Taylor briefed the North Atlantic Council on October 2 on the results of investigations into the attacks. As a result of that information, the Council determined that the attacks had been carried out by the world-wide terrorist network of al Qaeda, headed by Osama bin Laden and protected by the Taliban regime in Afghanistan. *NATO Update: Invocation of Article 5 Confirmed—Oct. 2, 2001*, *available at* www.nato.int/docu/update/2001; *Convocation of the Twenty-Third Meeting of Consultation of Ministers of Foreign Affairs*, OEA/Ser G, CP/RES. 796 (1293/01), Sept. 19, 2001; *Convocation of the Twenty-Fourth Meeting of Consultation of Ministers of Foreign Affairs to Serve as Organ of Consultation in Application of the Inter-American Treaty of Reciprocal Assistance*, OEA/Ser G, CP/RES. 797 (1293/01), Sept. 19, 2001.

12. S.C. Res. 1368, U.N. Doc. S/RES/508/1368 (Sept. 12, 2001). It could be argued that the resolution's recognition of "the inherent right of individual or collective self-defense" proves that the Security Council recognizes the war on terrorism as an international armed conflict. This author does not find that analysis dispositive.

13. Undersecretary of Defense for Policy, Douglas J. Feith, Remarks to the Policy Union, University of Chicago (Apr. 14, 2004), *available at* www.defenselink.mil/speeches/2004/sp20040414-0261.html (last visited Mar. 10, 2006) ("The President's most basic decision after 9/11 was how to think about the attack. Keep in mind that for years Americans were hit by terrorists. There were hijackings, murders and bombings. In the 1990s, Americans died and were injured in the first World Trade Center bombing, the bombing of Khobar Towers in Saudi Arabia, the destruction of our East Africa embassies and the bombing of the USS Cole in Yemen. The U.S. Government's response in those cases was to use the FBI to investigate. Our government was looking for individuals to arrest, extradite and prosecute in criminal courts. President Bush broke with that practice—and with that frame of mind—when he decided that 9/11 meant that we are at war. He decided that the US would respond not with the FBI and U.S. attorneys, but with our armed forces and every instrument of U.S. national power.").

1998,[14] though he did not launch an all-out war against terrorism as did President Bush.

Traditionally, international law was concerned primarily with relations between states.[15] A review of the history of conflict during the twentieth century, however, reveals that states, the entities that create international law, have adopted a decidedly more flexible stance. Some rules governing international armed conflicts have been extended to non-international conflicts—as in Additional Protocol II to the Geneva Conventions.[16] And it has become more and more difficult to distinguish international armed conflicts, internal armed conflicts and acts of violence committed by private individuals or groups.[17] It is those latter acts of violence that are generally considered to be subject to national laws or specific treaties governing the specified conduct, like terrorism. But that distinction is based on the assumption that the acts of violence are, as Article 2(2) of Additional Protocol II provides: "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature."[18] Since September 11th, 2001, there have been further brutal terrorist attacks in Bali (twice), Madrid, London, and Jordan. It is quite clear that the conflict with al Qaeda is not an internal disturbance, nor is it isolated or sporadic. As the Department of State advised the United Nations Commission on Human Rights, "To conclude otherwise is

14. On August 21, 1998, President Clinton informed Congressional leaders that he had ordered attacks on facilities in Afghanistan and Sudan connected with Osama bin Laden. The attacks were launched in exercise of the inherent right of self-defense as a "necessary and proportionate response to the imminent threat of further terrorist attacks against U.S. personnel and facilities," after receiving "convincing information from a variety of reliable sources" that the bin Laden organization was responsible for the August 7, 1998 attacks on United States embassies in Nairobi, Kenya and Dar es Salaam, Tanzania that killed over 250 people. *Letter to Congressional Leaders Reporting on Military Action Against Terrorist Sites in Afghanistan and Sudan, Aug. 21, 1998, in* PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES—WILLIAM J. CLINTON, BOOK II 1464 (2000).

15. The Case of the S.S. "Lotus," (Fr. v. Turk.) 1927, P.C.I.J. (Ser. A) No. 10, at 18 (Sept. 7) ("International law governs relations between independent states.")

16. *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict (Protocol I), and Protocol;24005;24005 Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II),* Dec. 12, 1977, U.N. Doc. A/32/144, Annexes I &;24040;24040 II, reprinted in 16 I.L.M. 1391 (Protocol I), 1442 (Protocol II) (1977) [hereinafter Additional Protocol II].

17. *See, e.g.*, International Tribunal for the Former Yugoslavia, Prosecutor v. Tadic, Case No. IT-94-1-AR72, Appeals Chamber, Oct. 2, 1995, ¶ 97.

18. Additional Protocol II, *supra* note 16, art. 2(2). For more information on the development of international law as it relates to non-international armed conflict, *see* L.C. GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT 54–57 (2000); *see also Prosecutor v. Tadic*, *supra* note 18, ¶¶ 96–127.

to permit an armed group with strategic designs to wage war unlawfully against a sovereign state while precluding that state from defending itself."[19]

One of the concerns raised by some about the use of the "war" construct is that it purportedly permits killing suspected terrorists without warning and detaining suspected terrorists without end. That characterization is only half correct. Certainly the law of armed conflict does not require that notice be given to an enemy combatant before he is attacked. Concerning detention, however, detention is lawful only until the end of hostilities, not until the end of all time. The war on terrorism is no different than any other war in that its end cannot be predicted with any certainty. It is unlikely that the prisoners of war in detention on both sides in 1942, 1943 and 1944—when things were looking dark for the Allies – had any hopes of being repatriated by 1945, as ultimately occurred.

Department of State Legal Adviser John B. Bellinger, III, recently spoke to the International Institute of Humanitarian Law in San Remo, Italy.[20] He emphasized there that the nation is in a war in every sense, citing the statements of one of the July 2005 London bombers—that "we are at war and I am a soldier in that war."[21] The one very critical distinction is that al Qaeda is not a nation-state and the terrorists do not form the military forces of a nation-state that is a party to the Geneva Conventions. But that distinction makes all the difference. In accordance with common Article 2, the Geneva Conventions apply to armed conflicts which arise between two or more parties to the Conventions and to the occupation of the territory of a party to the Conventions. Further, non-party powers engaged in an armed conflict may agree to accept and apply the provisions of the Conventions.[22] Assuming al Qaeda is a competent "power" to agree to accept and apply the Conventions, it has not

---

19. *Civil and Political Rights, supra* note 7, at 4. *See also* Nathaniel Berman, *Privileging Combat? Contemporary Conflict and the Legal Construction of War*, 43 COLUM. J. TRANSNAT'L L. 1, 32–33 ("... the worldwide conflict between Al-Qaeda and the United States ... would seem to fit the far-reaching definition of armed conflict given by the International Criminal Tribunal for Yugoslavia ... provided that the word 'protracted' includes a conflict that is both spatially dispersed and temporally discontinuous ...").

20. U.S. Dept. of State Legal Advisor, John B. Bellinger, III, Remarks to the International Institute of Humanitarian Law in San Remo, Italy (Sept. 9, 2005) (on file with author).

21. *London Bomber Video Aired on T.V.*, BBC NEWS, Sept. 2, 2005, *available at* http://news.bbc.co.uk/1/hi/uk/4206708.stm (last visited Mar. 10, 2006).

22. Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, art. 2, 6 U.S.T. 3114, 75 U.N.T.S. 31, 32 [hereinafter Geneva I]; Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, art. 2, 6 U.S.T. 3217, 75 U.N.T.S. 85, 86 [hereinafter Geneva II]; Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 2, 6 U.S.T. 3316, 75 U.N.T.S. 135, 136 [hereinafter Geneva III]; Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 2, 6 U.S.T. 3516, 75 U.N.T.S. 287, 288 [hereinafter Geneva IV] [collectively Common Article 2 to the Geneva Conventions].

done so. Because of this expectation of reciprocal obligations and benefits, the Conventions create an incentive to states parties to follow the rules. Providing the benefits of the Conventions to those who violate every tenet of the law of armed conflict simply undermines the Conventions and provides a disincentive to abide by them.

Further, it is an affront to the men and women of the armed forces of all nations who do comply with the laws of war to treat unlawful combatants as if they are covered by the Geneva Conventions, particularly when such combatants are grossly in violation of the laws of war and the principles of international law that underlie those laws and customs.

This approach is consistent with long-standing practice dating centuries before the Geneva Conventions came into effect. Both ancient Greece and Rome actually followed basic rules and principles of war. But tellingly, those rules and principles were applicable only to "civilized sovereign states properly organized, and enjoying a regular constitution . . . governed with a view to the general good, by a properly constructed system of law. . . . Hence barbarians, savage tribes, bands of robbers and pirates and the like were debarred from the benefits and relaxations established by international law and custom . . . ," particularly with respect to the laws of war. [23]

Likewise, in the Middle Ages, international law scholars opined that "the laws of war are not observed toward one who does not observe them."[24] During the American Civil War, the Code written by Dr. Francis Lieber and promulgated by President Lincoln as General Orders 100 contained the following provision:

> Men . . . who commit hostilities . . . without commission, without being part and portion of the organized hostile army, and without sharing continuously in the war, but who do so with intermitting returns to their homes and avocations, or with the occasional assumption of the semblance of peaceful pursuits, divesting themselves of the character and appearance of soldiers—such men . . . are not entitled to the privileges of prisoners of war, but shall be treated summarily as highway robbers or pirates.[25]

---

23. Leslie Green, *What Is—Why Is There—the Law of War? in* NAVAL WAR COLLEGE INTERNATIONAL LAW STUDIES VOL. 71, 141, 149–150 (1998) (quoting 2 PHILLIPSON, THE INTERNATIONAL LAW AND CUSTOM OF ANCIENT GREECE AND ROME 195, 207–12, 221–23 (1911).

24. *Id.*, at 155 (quoting GENTILI, DE JURE BELLI lib. II, cap. III, VI, XXIII, at 142–4, 159, 272 (1612) (Carnegie trans., 1933).

25. Instructions for the Government of Armies of the United States in the Field (Prepared by Francis Lieber, promulgated as General Orders No. 100 by President Abraham Lincoln, 24 April 1863), art. 82, *reprinted in* THE LAWS OF ARMED CONFLICTS 3, 13 (Dietrich Schindler & Jiri Toman, eds., 2004) [hereinafter Instructions for the Government of Armies].

As to the concept of "detention without end," the International Military Tribunal at Nuremberg made clear that since the Eighteenth Century captivity during time of war "is neither revenge nor punishment, but rather is solely protective custody, the only purpose of which is to prevent the prisoners of war from further participation in the war."[26]

As John Bellinger so aptly asked the San Remo audience, "What would you have us do? Let them go?" The fact is that the United States has detained and screened over 83,000 individuals in Afghanistan, Iraq and elsewhere. The vast majority are freed shortly after initial questioning.[27] There remain about 14,500 still in custody, primarily in Iraq, consistent with the Fourth Geneva Convention provisions concerning security detainees.[28] Less than 700 individuals have been transferred to and detained in Guantanamo Bay, Cuba. The government has already released 245 Guantanamo detainees to twelve countries—and, unfortunately, the government has been wrong about ten percent of the time.[29] It hardly seems to be in the interests of humanity at large to release individuals who intend to return immediately to the fight and kill more innocent men, women and children.

It has also been asserted that the detainees are held "incommunicado." That statement is simply incorrect. Over 14,000 pieces of mail were processed for the detainees in mid-2005. The International Committee of the Red Cross has access to the detainees, over 1000 journalists have visited, over 100 Congressional staff members and over forty members of Congress have observed the Guantanamo operations.[30] Further, there are two processes in place to review every detainee's case to determine if there is a continued need to detain him.[31]

---

26. Green, *supra* note 23, at 167 (quoting The Nuremberg Judgment, 1945, HMSO, Cmd. 6964, 65, 48 (1946)).

27. *U.S. Has Held 83,000 In War On Terror*, BALTIMORE SUN, Nov. 17, 2005.

28. Geneva IV, *supra* note 22, art. 5, 27, 41–43.

29. Bellinger, *supra* note 20. U.S. Department of Defense, Office of the Asst. Sec'y of Defense (Public Affairs), *News Transcript—Defense Department Special Briefing on Administrative Review Boards for Detainees at Guantanomo Bay, Cuba*, July 8, 2005, *available at* http://www.defenselink.mil/transcripts/2005 (last visited Mar. 10, 2006). Official Department of Defense sources report that the Department has detained and screened over 70,000 individuals. *Id.* Only a very small percentage, about 700 total, were transferred to Guantanamo Bay, Cuba. *Id.* About 234 of those have been released. *Id.* There is evidence that perhaps a dozen or so have returned to the battlefield and continue to wage terrorism against the United States. *Id.*

30. *Bellinger*, supra note 20.

31. The Department of Defense has established two processes to review the case of each detainee. As of September, 2005, all detainees had been reviewed by a Combatant Status Review Tribunal to determine whether they continue to meet the criteria to be designated as an enemy combatant. Over 160 detainees had been reviewed by an Administrative Review Board, which determines whether the detainee continues to pose

One also hears the argument that the detainees should be given access to the United States federal court system. Yet it defies logic to give to these detainees—whose goal is to kill innocent men, women and children in contravention of all the most basic values of human civilization—greater rights than are afforded by the law of armed conflict to legitimate combatants who become enemy prisoners of war. Even some critics recognize that would be "a perverse legal result."[32]

The United States has long been the leader in humane treatment of detainees, reaching back to the aforementioned Lieber Code,[33] which became the forerunner of the Hague Conventions on Land Warfare. Though they are not entitled to prisoner of war, or greater, benefits, the detainees held by United States armed forces are being treated humanely and "to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of the Geneva conventions."[34] Despite the shrill cries of torture and abuse, the detainees are afforded, in practice, in this author's opinion, essentially the basic protections found in common Article 3 of the Geneva Conventions (though the official position of the United States government does not invite comparisons to common Article 3). They are given three meals a day that meet Muslim dietary laws, state-of-the-art medical care, the opportunity to worship, clothing, shoes, shelter, soap and toilet articles and much more.[35] Alleged abuses or mistreatment of detainees are investigated and appropriate action is taken against the offenders.[36]

Certainly in the aftermath of September 11th, in the Pentagon and the White House and the Department of State, there were debates whether the "War

---

a threat to the United States or its allies. Each detainee's case is to be reviewed annually by an Administrative Review Board. *See* U.S. DEPARTMENT OF DEFENSE, DETAINEES AT GUANTANAMO BAY, CUBA, http://www.defenselink.mil/news/detainees.html (last visited Mar. 10, 2006) (providing additional information on processes).

32. Berman, *supra* note 19, at 57 ("It would seem to be a perverse legal result if those who engaged in combat without complying with the relevant international rules were entitled to criminal trials, with their requirements of proof of individual acts, the presumption of innocence, and so on—before being detained for mere participation in hostilities, while their more scrupulous fellow combatants were consigned to POW camps without such requirements.").

33. Instructions for the Government of Armies, *supra* note 25.

34. THE WHITE HOUSE, FACT SHEET—STATUS OF DETAINEES AT GUANTANAMO (Feb. 7, 2002,) *available at* http://www.whitehouse.gov/news/releases/2002/20020207 (last visited Mar. 10, 2006).

35. *Id.*

36. As of February 2006, over 25 officers and enlisted personnel had been held accountable for the abuses at Abu Ghraib. One individual was sentenced to ten years in prison, another to eight years and another to three. In all, more than 100 individuals have been held accountable for alleged detainee abuse through court-martials, non-judicial punishments, reprimands and/or separation from the service. U.S. DEPT. OF STATE, U.S. HAS PROSECUTED ABUSES SHOWN IN NEWLY PUBLISHED PHOTOS, *available at* http://usinfo.state.gov/dhr/Archive/2006/Feb/17-831358.html (last visited Mar. 12, 2006).

on Terror" was the most appropriate way to label this particular armed conflict. One concern by those who recommended a different label was, no doubt, that use of the word "war" implies the military has the major, primary role. That is certainly one aspect of the war on terror that is misunderstood—it requires not just a military response, but a response by all facets of the United States and coalition governments—diplomatic, economic, law enforcement as well as military. This requirement for interagency and multinational cooperation in this war is a major theme of several significant policy documents that have been promulgated since September 11th, 2001—The National Security Strategy,[37] the National Defense Strategy,[38] the National Military Strategy,[39] and the National Strategy for Maritime Security.[40]

Domestically, the concept of a "war" on terror raises additional issues. There is no clear agreement between the Department of Defense and the Department of Homeland Security on where to draw the line between homeland defense (the responsibility of the Department of Defense) and homeland security (the responsibility of the Department of Homeland Security). Additionally, the government is working to define the proper role of the military in homeland security—will the military always have a supporting role to civil authorities, or could it conceivably take a lead role in major incidents that overwhelm the capabilities of the civilian first-responders?

Admiral Timothy J. Keating, the Commander of United States Northern Command, has prepared war plans to guard against and respond to terrorist attacks in the United States, including multiple simultaneous attacks. Admiral Keating says the Department of Defense is "best positioned" of the eight Federal agencies that could be involved, to take the lead. Though touted as the "first ever" such war plans, that represent a "historic shift" for the Pentagon,[41] as recently as June 2005 the Pentagon's official position was that domestic security is primarily a law enforcement function.[42]

---

37. THE WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (2002), *available at* http://www.whitehouse.gov/nsc/nss.pdf (last visited Mar. 10, 2006).

38. U.S. DEPT. OF DEFENSE, THE NATIONAL DEFENSE STRATEGY OF THE UNITED STATES OF AMERICA (2005), *available at* http://www.defenselink.mil/news/Mar2005/d20050318nds1.pdf (last visited Mar. 10, 2006).

39. THE JOINT CHIEFS OF STAFF, THE NATIONAL MILITARY STRATEGY OF THE UNITED STATES OF AMERICA—A STRATEGY FOR TODAY; A VISION FOR TOMORROW (2004), *available at* http://www.defenselink.mil/news/Mar2005/d20050318nms.pdf (last visited Mar. 10, 2006).

40. U.S. DEPT. OF HOMELAND SECURITY & U.S. DEPT. OF DEFENSE, THE NATIONAL STRATEGY FOR MARITIME SECURITY (2005), *available at* http://www.whitehouse.gov/homeland/4844-nsms.pdf (last visited Mar. 10, 2006).

41. Bradley Graham, *War Plans Drafted to Counter Terror Attacks in U.S.*, WASH. POST, Aug. 8, 2005, p. A01.

42. *Id.* ("The Pentagon's new homeland defense strategy, issued in June, emphasized in boldface

Secretary of Homeland Security Michael Chertoff clearly agrees. The day after the report was released on Northern Command's war plans, Secretary Chertoff noted that his office, not the Pentagon, would be in charge if the military is deployed inside the United States to respond to a terrorist attack. "The Department of Homeland Security has the responsibility under the President's directives to coordinate the entirety of the response to a terrorist act here in the United States," Chertoff said.[43]

This recent reporting simply reflects the very complex issues that are related to terrorism in the post-9/11 world. The issues don't turn simply on how the struggle is characterized. Just because the military has the people, the equipment, the plan or even the authority does not mean that the military is necessarily the first choice responder. Domestically, it is not. Overseas, it depends on the situation. In both cases, though, a cooperative inter-agency approach to the issues is required—law enforcement, economic, diplomatic—also seeking support from coalition partners and allies around the world.

Considering the United States "at war" is one approach that assists in keeping the proper perspective on the scope of the problem and ensuring options that are available and may be the most appropriate in a given situation are not unnecessarily precluded. In every sense of the word, including under the United Nations Charter, the United States was attacked by a vicious, global, networked, organization committed to its ultimate destruction. Criminal law tools have failed to eliminate the threat. The President is entitled, more importantly, he has a duty, to respond with all instruments of United States national power, including the armed forces. To do otherwise could jeopardize the national security of the United States.

---

type that 'domestic security is primarily a civilian law enforcement function.' Still, it noted the possibility that ground troops might be sent into action on U.S. soil to counter security threats and deal with major emergencies.").

43. Nicole Gaouette, *Chertoff Differs With The Military*, L.A. TIMES, Aug. 9, 2005.