

[W]hen understood with all its commitments and procedures law offers . . . a continuous formulation and reformulation of policies and constitutes an integral part of the world power process.

Myers McDougal, "Law and Power," American Journal of International Law¹

Introduction

The United States launched tomahawk cruise missiles against suspected terrorist camps in Afghanistan and a terrorist affiliated chemical plant in the Sudan.² Suspects in the bombing of the U.S. embassy in Kenya are to stand trial in New York.³ Reputed terrorist leader Osama bin Laden reportedly had a sealed indictment returned by a New York grand jury.⁴ These actions reflect some of the recent developments of the U.S. response against international terrorists. Although it may be a reliable assumption that significant diplomatic coordination transpired with other nations regarding these incidents, all the above affairs of state appear predominantly unilateral actions on the part of the United States. The question presented is twofold. First, what, if any, international rules exist to deal with terrorists and other new and dangerous non-state actors on the world scene? Second, is the United States pursuing the most prudent policy to respond to the conundrum of terrorism and similar transnational threats?

International law resembles a Gordian knot⁵ in how the interrelated and complex assemblage of principal participants and principles interact in a dynamic, although, often-piecemeal process to form a system that resembles some semblance of a recognizable legal order. In the seemingly visceral reflexive responses to international terrorism, the sword of the United States may be cutting the Gordian knot of international law without sufficient deliberation on optimizing the use of indirect or co-optive power. It would be untenable to challenge the proposition that the United States must lead the global effort against the threat of terrorists.⁶ Nonetheless, an enhanced U.S. strategy should intensify efforts on the creation of a comprehensive international legal framework for addressing terrorism and threats from other transnational actors. Skillful development of the role of international law would be consistent with McDougal's sagacious quotation that law is "an integral part of the world power process." A new international legal framework for terrorism would serve to protect and promote global order in the next millennium more appropriately than the continuation of the policy of unilateral counterterrorism efforts on the part of United States.

Is it important that America take the lead in challenging international terrorism? The National Defense Panel (NDP) answers this question in the affirmative. "Political decisions of the twentieth century may define the environments of the twenty-first century."⁷ The NDP describes a potential hypothetical world of Chronic Crisis.⁸ A world of Chronic Crisis offers the greatest threat and

challenge from transnational actors to strike at America at home and abroad. "Experts largely agree that international terrorism is likely to increase and become bloodier."⁹ Other experts further agree that terrorism and other nontraditional transnational threats like organized crime and drug trafficking are rising.¹⁰ The chilling nature of the terrorist threat alone could one day rival the Cold War threat. Unfortunately, America may be relying too heavily on unilateral action to respond to terrorism.

The character in the *Lone Ranger*¹¹ represented the quintessential American peace officer. However, except for the outcome, the Lone Ranger operated outside the normal legal system and reflected much of the outward indicia of the outlaws he fought. He wore a mask typically associated with banditry. Not being duly deputized as a law enforcement agent, the Ranger used what was often initially perceived as unlawful force and violence in achieving his ends. As a result, the Lone Ranger was always explaining that he was not the bad person and that his intentions were virtuous. The Ranger would be characterized on this evidence as a vigilante. Fortunately, the Lone Ranger always turned the villains over to the appropriate authorities as his saving grace. The Lone Ranger mentality may be a part of the American psychology. Our attitude coupled with United States hegemony may lead us to reprising the role of the Lone Ranger in the war against terrorism without fully weighing the potential long-term consequences to the rule of law.

International promotion of the rule of law is not a new problem. President Theodore Roosevelt stated, "More and more the increasing interdependence and complexity of international political and economic relations render it incumbent on all civilized and orderly powers to insist on the proper policing of the world."¹² Yet, Roosevelt was not one to place his faith in the efficacy of international law.¹³ The U.S. was his police force. The cumulative events of today may portray the nation as returning to the expediency of the "big stick" and becoming the world's policeman. However, our nation's unilateral action against terrorism ignores the essentiality of establishing a more coherent international legal solution for dealing with nontraditional nonstate actors. The danger of a potential international rejection of our present policy is readily apparent. In rejecting the U.S. policy of isolation toward Libya for supporting terrorism, Nelson Mandela, stated, "We cannot accept a state that assumes the role of the world's policeman."¹⁴ Although the United States response to terrorism may be legitimate within the international legal framework, the policy may sacrifice enhanced prospects of a long-term solution for more instant gratification. This policy could eventually lead to a diminution of national power.

The General International Legal Framework

International law is a collection of customs, principles, rules and a dispute resolution mechanism for ordering the affairs of states in the international arena¹⁵ A Department of State publication described international law thusly:

International law is, more or less, in a continual state of change and development. In certain aspects the evolution is gradual; in others it is avulsive. International law is based largely on custom, e.g., on practice, and whereas certain customs are recognized as obligatory, others are in retrogression and are recognized as nonobligatory, depending upon the subject matter and its status at a particular time.¹⁶

International law is an intricate system of often-nebulous rules. There is no single book or set of books articulating the standards comprising the international legal code. The sources of international law are international conventions and treaties, international customs and practices, general principles of law recognized by civilized nations, and international judicial decisions and the writings of international legal scholars. These strands in the Gordian knot of international law have to be applied to a given set of facts

An intelligible way to explain how the various strands create a system of international law is by briefly reviewing law of the sea and America's confrontation with Libya concerning the Gulf of Sidra. In 1981, Libya unilaterally proclaimed that the Gulf of Sidra was included within that nation's territorial sea, although it was not within the 12-mile limit commonly accepted by the international community. The United States challenged this claim on the basis of protecting the high seas and the continued right of innocent passage. The dispute eventually resulted in an aerial engagement between America and Libya. The U.S. position was that its action was legal under international law.¹⁷ Ap-

proximately a year later, after 14 years of work with 150 countries, an agreement was reached on most of the basic issues involving use of the seas in The United Nations Law of the Sea Convention (LOSC) of 1982.¹⁸ The Law of the Sea Convention is illustrative of many of the strengths and the weaknesses of international law. The LOSC also has some lessons for consideration in addressing international terrorism through international law.

Strengths and Weaknesses of International Law

The negotiation surrounding codification of any international law can be a long and laborious process. As an example of this lengthy process, the LOSC was over 30 years in the formation. This process involved hundreds of nations trying to reach a consensus. As an end result, the LOSC produced compromises in balancing the security concerns and economic considerations, the interests of maritime states versus claims of landlocked nations, and the interests of industrial nations versus the needs of developing countries. Consequently, the resultant international law is not necessarily always a correct or rational compromise. Most importantly, there is no clear enforcement mechanism for the LOSC or many other international laws. "Without mechanisms to bring transgressors into line, international law will be 'law' in name only."¹⁹ Arguably, any international law without a means for ensuring compliance is weak and ineffective for addressing those matters affecting vital state interests. Given the weaknesses, what benefit is international law to the world community?

I would submit that even in the embryonic stage that international law delineates a set of norms as a starting point for the potential discussion between states. Regardless of the extent of the disagreement, international law provides a theoretical framework for addressing a controversy beyond simple power relationships. It does not preclude states from resorting to sanctions or even force; however, international law provides an objective standard as a starting point for scrutinizing behavior.²⁰ As in the case of the LOSC, a treaty and the process to accomplish the agreement can eventually result in a more comprehensive system. More significantly, a position enforcing international law has a greater legitimacy and moral suasion supporting it. Admittedly, the full efficacy of international law in obtaining conforming behavior is achieved only when used in conjunction with another instrument of power. International law must be properly integrated with other instruments of statecraft such as diplomacy and sanctions, together with resort to the threat of force or actual use of military force to create a synergistic effect for an effective foreign policy.

The U.S. Response to Terrorism under International Law

International law recognizes the concept of self-defense "A state like an individual may protect itself against an attack, actual or threatened."²¹ The principle of self-defense is clear. It is the application to specific facts that creates difficulty.²² Article 51 of the United Nations (UN) Charter allows for self-defense.²³ It is customarily acknowledged under international law that a state can use force to protect the lives and property of their nationals abroad subject

to necessity and proportionality.²⁴ The concept of a state's criminal jurisdiction for crimes against its nationals committed by foreigners outside the territory of that state is more problematic under international law. The U.S. has reversed its position with regard to extraterritorial jurisdiction over acts committed aboard.²⁵ The domestic law of the United States now provides for jurisdiction over crimes committed against U.S. citizens overseas.²⁶ There is a paucity of international law dealing with international terrorism. Only a limited number of treaties and conventions address international terrorism.²⁷ There is no international legal institution to submit questions involving terrorism outside the general fora of the United Nations either in the General Assembly or the Security Council

The United States relied on Article 51 of the UN Charter that allows for self-defense as the international legal support for the missile strikes on suspected terrorist locations in Afghanistan and the Sudan.²⁸ Extradited captured terrorists are brought before the criminal jurisdiction of this nation's courts pursuant to the provisions of U.S. domestic law. In the international legal vacuum, the U.S. response to terrorism meets the lawfulness standard

In answering the first question posed by this essay, I would acknowledge that the United States acted legally within the constraints of international law in response to the terrorist acts cited. Notwithstanding, America's response is characteristic of a Lone Ranger. For example, when the necessity to resort to force arose, the country did not act in a coalition with other states in responding to the terrorists. The first response of the U.S. has been to rely on own military

power or domestic criminal courts. Like the Lone Ranger, America will constantly find itself justifying the legitimacy of its action to the world community. This raises the second question whether the strategy is a prudent one given the strengths and weaknesses of international law. I would proffer that the United States may be better served to take a different tack in the battle against international terrorism and other transnational threats.

The U.S. presupposes our legal system personifies justice. Further, the American system of justice is superior to any other in the world. The nation assumes that the U.S. use of military force is not subject to challenge by countervailing force or valid legal opposition. A perspective implicit in these assumptions is that the rest of the world should understand, if not appreciate, our actions. The nation asserts a position not unlike the Lone Ranger of a good fellow out to do the right thing. The eventual results of U.S. actions to combat terrorism will convince the world of the virtue of the position. The possible American idiosyncrasy concerning the legal system is unimportant. As the predominant world military power, the U.S. has all options including the use of force at its unfettered discretion. Secretary of Defense William Cohen recently articulated the U.S. terrorism policy. "Terrorists should know that we will not simply play passive defense. America will defend itself and its interests through active measures such as the strikes last Thursday. As always, we will work with our friends around the world where we can, but we are also ready to act unilaterally when circumstances require."²⁹ The use of unilateral means in this fashion may

not secure the ends desired. If the objective is global stability, unilateral U.S. action may not be an effective response to achieve this goal.

There are a number of risks in the current strategy. The potential cost of the current policy may be too high. The resort to force is usually the more expensive option. "The direct use of military force no longer calls up the specter of escalation to global nuclear holocaust, but it remains a costly and dangerous activity."³⁰ The continued legitimacy of unilateral resort to force will be more and more difficult to justify. "One thing is striking: in cases of use of force to protect nationals, the intervening State is invariably a Western Power, and the State on whose territory the military action is carried out is a Third World country."³¹ An unavoidable consequence is that the U.S. unilateral use of force allows other countries to resort to force. Iran now appears posed for a military confrontation with the Taliban in Afghanistan to protect Iranian citizens. "Tens of thousands of Iranian troops backed by tanks, artillery and aircraft have massed on the border between Iran and Afghanistan."³² The United States use of force against terrorism has provided a justification that may increase world instability. Unilateral U.S. action can hurt our associates as much as it assists them without an international legal framework for countering terrorism. The government of Pakistan struggles with the domestic outrage over acquiescence to American missile strikes.³³ Kenyan officials were satisfied to extradite the suspected terrorists to the U.S. However, they can articulate no justification for their action.³⁴ Further, ad hoc extradition of all terrorists to America reduces the world community's

stake in the battle against terrorism. In the absence of an international law, Egypt can just as easily look for a way to allow suspected terrorist Abu Nidal quietly to go on his way.³⁵ The United States reduces the stake of other states in the war against terrorism by taking unilateral action. In addition, unilateral action is unlikely to secure the goal against terrorism effectively in many instances. The United States seeks to freeze the assets owned by bin Laden in this country.³⁶ It would be more effective to have an efficient international process to freeze his assets worldwide in response to his terrorist activities. The NDP recommended the development and adaptation of legal procedures and a multi-partner response to transnational challenges. "In short, the increasing erosion of the sanctity of international borders as barriers to the challenges . . . will force us away from our existing paradigms; in response, international cooperative agreements, intelligence systems, consequence management structures, and a variety of intergovernmental jurisdictional and legal procedures will have to be developed and adapted."³⁷

A coherent policy addressing international terrorism requires new initiatives. First, the U.S. must recognize that like the LOSC, a coherent set of rules will take time. The United States should avoid losing ground by too readily resorting to expedient methods. The current initiative to address the bombing of Pan Am Flight 103 is an excellent example of an alternative international legal response. "The plan would apparently create an international legal precedent by moving an entire court system and code of laws from one country to another."³⁸

The problem of terrorism needs new international rules. In fact, there is no present international agreement on the definition of terrorism.³⁹ I would suggest that the United States should sponsor a world convention on terrorism as a start in the endeavor. The purpose would be to establish an international framework to suppress terrorism.⁴⁰ A previous effort through the United Nations in the early 1970s was unsuccessful.⁴¹ Also, more bilateral and multilateral agreements concerning terrorism should be negotiated. The cost of this initiative would be far cheaper than the millions of dollars for tomahawk missiles. The International Criminal Court (ICC) is also an initiative worthy of additional effort to bring some coherence to the law regarding nonstate actors like terrorist.⁴² "The community of nations increasingly accepts that such supranational entities are demanded by the exigencies of the times; with that acceptance also comes a recognition that the principal symbol of national identity—namely sovereignty—must be partially ceded to those entities."⁴³ Information is the key to U.S. leadership of the effort against terrorism. The Federal Bureau of Investigation used 300 employees to investigate the terrorist bombings in Africa.⁴⁴ "America will increasingly be viewed as the natural coalition leader, not just because it happens to be the strongest but because it can provide the most important input for good decisions and effective action for other coalition members."⁴⁵

I would maintain that international law must be an integral part of the U.S. strategy against terrorism. Recourse to international law as a solution relies on co-optive or soft power. Joseph Nye defines co-optive power as, "The ability of a

nation to structure a situation so that other nations develop preferences or define their interests in ways consistent with one's own nation."⁴⁶ This is the indirect way to exercise power. The effective use of soft power as an instrument of statecraft will be required in the future. The application of military force or threat of force will not be a consistently available as a decisive factor in the next millennium. "Given both the political fragmentation of the post-Cold War world and the inexorable progress of global economic integration, it is clear that for the foreseeable future American leadership in the world will be as dependent on the power to persuade as the power to coerce."⁴⁷ The solution is for the U.S. to "reach out to other nations and find ways to leverage our limited resources with those of other nations who share a common stake in preserving the global order."⁴⁸ Although far from a perfect system, international law offers a superior means of persuading other nations to adopt a coherent strategy to respond to world terrorism

¹McDougal, *Law and Power*, 46 AM J INT'L L 102, 111 (1952) quoted in Frederic S. Tipson, "National Security and the Role of Law," John Norton Moore, Frederic S. Tipson, and Robert F. Turner, *National Security Law*, (Durham: Carolina Academic Press, 1990), 26

²Eugene Robinson and Dana Priest, "Reports of U.S. Strikes' Destruction Vary; Afghanistan Damage 'Moderate to Heavy' Sudan Plant Leveled," *Washington Post*, 22 August 1998, A1

³Michael Grunwald, "U.S. Complaint Links Bin Laden to Bombing," *Washington Post*, 29 August 1998, A1

⁴Vernon Loeb, "U.S. Jury Indicts Bin Laden on Terrorism Charges," *Washington Post*, 25 August 1998, A11

⁵A knot tied by Gordius, king of Phrygia, held to be capable of being untied by the future ruler of Asia, and cut by Alexander the Great. *Merriam Webster's Collegiate Dictionary*, 10th Ed. 1993

⁶*But see*, Benjamin Schwarz, "Why America Thinks It Has to Run the World," *Atlantic Monthly* (June 1996): 92

⁷U.S. Department of Defense, National Defense Panel, *Transforming Defense National Security in the 21st Century*, report (December 1997), 5

⁸*Ibid.*, 9-10

⁹John F. Murphy, "The Control of International Terrorism," Moore, Tipson, & Turner, *National Security Law*, 445

¹⁰Jessica T Mathews, "Power Shift," *Foreign Affairs* vol 76 (January/February 1997): 50

¹¹A serialized radio, television, and movie hero Part of the Ranger's Creed was "In being physically, mentally, and morally to fight when necessary for that which is right "

¹²Henry Kissinger, *Diplomacy*, (New York. Simon and Schuster, 1994), 39

¹³Ibid , 40

¹⁴William Drozdiak, "Even Allies Resent U.S. Dominance," *Washington Post*, 11 November 1997, A1

¹⁵Paul L Williams, "International Law," (lecture at the National War College, Washington, D C , on 4 September 1998).

¹⁶Burns H Weston, Richard A. Falk, Anthony A D'Amato, *International Law and World Order*, (St Paul: West Publishing Company, 1980), 9

¹⁷See Steven P. Ratner, "The Gulf of Sidra Incident of 1981 A Study of the Lawfulness of Peacetime Aerial Engagements," 10 YALE J INT'L L. 1 (Fall 1984).

¹⁸"Convention on the Law of the Sea," [article on line] (Division for Ocean Affairs and Law of the Sea, Office of Legal Affairs, United Nations); available from <http://www.un.org/Depts/los/losconv1.htm>. Internet, accessed on 10 September 1998 The LOSC recognizes a 12 nautical mile territorial sea with a right of innocent passage and a 200 nautical mile economic exclusive zone Although a basic agreement was reached in 1982, the convention was not entered into force with the requisite numbers of signatories until November 16, 1994 because of unresolved difficulties with seabed mining provisions on the part of industrialized countries The U S Senate has not ratified the treaty Frederick H Hartman, "International Law and its Limitations," James A Hursch, *Theories of International Relations*, (New York St. Martin's Press 1990) 275-301 John M Collins, *Military Geography for Professionals and the Public*, (Washington: National Defense University Press, 1998), 286-287

¹⁹Steven R. Ratner, "International Law The Trials of Global Norms" *Foreign Policy* vol 110 (Spring 1998) 69

²⁰Ibid , 66

²¹T L Brierly, *The Law of Nations an Introduction to the International Law of Peace*, (Oxford Clarendon Press 1955), 315

²²Ibid

²³Article 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 Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security

²⁴John Norton Moore, "The Use of Force in International Relations Norms Concerning the Initiation of Coercion," Moore, Tipson, & Turner, *National Security Law*, 147

²⁵T L Brierly, *The Law of Nations an Introduction to the International Law of Peace*, 232

²⁶18 U S Code §§ 1203, 2331

²⁷Agreements to which the U.S is a party include Convention to Prevent and Punish Acts of Terrorism taking the form of Crimes Against Persons and Related Extortion 20 October 1976 TIAS no 8413 Convention on Offenses and Certain Other Acts Committed on Board Aircraft 14 September 1963 TIAS no 6768. Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons Including Diplomatic Agents 14 December 1973 TIAS no 8532 Convention for the Suppression of Unlawful Seizure of Aircraft 16 December 1970 TIAS no 7192 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation 26 January 1973 TIAS no 7570. International Convention against the Taking of Hostages 6 January 1985. TIAS no 11081. See U S Department of State 1997 Treaties in Force A List of

Treaties and Other International Agreements of the United States in Force International Law Association, "Fourth Interim Report of the Committee on International Terrorism," Moore, Tipson, & Turner, *National Security Law*, 455

²⁸Eugene Robinson and Dana Priest, *Washington Post*, 22 August 1998, A1

²⁹"The Policy: We are Ready to Act Again," *Washington Post*, 23 August 1998, C1

³⁰Joseph S. Nye and William A. Owens, "America's Information Edge," *Foreign Affairs*, vol. 75 (March/April 1996): 21-22.

³¹Antonio Cassese, *International Law in a Divided World*, (Oxford: Clarendon Press, 1986), 237

³²Kamran Khan, "Iran Plans Move Against Taliban," *Washington Post*, 6 September 1998, A27.

³³Pamela Constable, "U.S. Strike is Blow to Pakistan's Rulers, Islamic Ire Upsets Shaky Balance," *Washington Post*, 26 August 1998, A15

³⁴Karl Vick, "Kenya Welcomes Suspects' Extradition," *Washington Post*, 29 August 1998, A11

³⁵Nora Eoustany and Thomas W. Lippman, "Egypt Seizes Terrorist: Abu Nidal," *Washington Post*, 26 August 1998, A1

³⁶John F. Harris, "President Freezes Bin Laden Assets," *Washington Post*, 23 August 1998, A1

³⁷National Defense Panel report, 15-17

³⁸Thomas W. Lippman, "U.S. Britain Announce Plan for Pan Am Trial Libya Challenged to Deliver Bomb Suspects," *Washington Post*, 25 August 1998, A1

³⁹John F. Murphy, "The Control of International Terrorism," Moore, Tipson, & Turner, *National Security Law*, 443-474

⁴⁰Ibid

⁴¹Ibid, 460

⁴²Report of the Preparatory Committee on the Establishment of an International Criminal Court, (Codification Division, Office of Legal Affairs, United Nations), available from <http://www.un.org/law/precco.htm>, Internet, accessed on 28 August 1998

⁴³David Rothkopf, "In Praise of Cultural Imperialism?" *Foreign Policy*, vol. 107 (Summer 1997) 45

⁴⁴"Already Two Suspects," *Washington Post*, 30 August 1998, C6

⁴⁵Joseph S. Nye, Jr. and William A. Owens, "America's Information Edge," 23

⁴⁶Joseph S. Nye, Jr. *Bound to Lead: The Changing Nature of American Power*, (New York: Basic Books 1990), 191

⁴⁷Laurence D. Wohlers, "America's Public Diplomacy Deficit," (National War College 1997), 1

⁴⁸Ibid, 2

