

THE BEARDED BANDIT, THE OUTLAW COP, AND THE NAKED EMPEROR: TOWARDS A NORTH- SOUTH (DE)CONSTRUCTION OF THE TEXTS AND CONTEXTS OF INTERNATIONAL LAW'S (DIS)ENGAGEMENT WITH TERRORISM[©]

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For over one hundred years, the definition of the term “terrorism” has been subjected to political propaganda. In addition, dubious self-righteous indignation or outrage, often expressed by various states or prominent politicians at the occurrence of acts of terror have often masked the participation of those same states in international terrorism.

In this endless cycle of finger pointing, accusations, denials, and counter-accusations, the problematic of what constitutes terror in legal parlance has degenerated into an exercise in name-calling. This sad spectacle frustrates objective and sincere attempts at fashioning out legal and policy framework to deal with the scourge of terrorism.

In this paper, I evaluate contemporary attempts at international law to deal with the problem of terrorism. In my analysis, I conclude that unless powerful states eschew their hypocritical support of terror and also seek to understand why weak entities and marginalized groups resort to “terrorism,” the current outbreak of “wars on terrorism” is an exercise in futility.

Pendant plus de cent ans, la définition du terme « terrorisme » a été soumise à la propagande politique. De plus, l'indignation ou la réprobation bien-pensante et douteuse, qu'expriment souvent divers États ou politiciens dominants lorsque surviennent des actes de terrorisme, a souvent masqué la participation de ces mêmes États au terrorisme international.

Dans cette spirale interminable d'incriminations, d'accusations, de démentis et de contre-attaques, la question de savoir ce qui constitue du terrorisme en langage juridique a dégénéré pour se transformer en une foire aux injures. Ce triste spectacle lèse les tentatives objectives et sincères de modeler notre cadre juridique et de politiques pour s'attaquer au fléau du terrorisme.

Dans cet article, j'évalue les tentatives contemporaines que fait le droit international pour affronter le problème du terrorisme. Dans mon analyse, j'en arrive à conclure que, si que les États puissants ne s'abstiennent pas d'appuyer hypocritement le terrorisme et, par ailleurs, ne cherchent pas à comprendre pour quelles raisons les entités faibles et les groupes marginaux recourent au « terrorisme », le déclenchement actuel de « guerres contre le terrorisme » constituera une entreprise futile.

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Few issues in our times have produced as much heated rhetoric as terrorism. Ironically, while terrorism has become a familiar word, its meaning is among the least understood. While it would be tolerable if the ideological or propagandistic use of the word “terrorism” were solely a pastime of ordinary people doing ordinary things, it is intolerable that top policymakers entrusted with the duty of securing the populace are unwilling to engage in serious thinking about this concept. An apparent consequence of the propagandistic use of terrorism is the displacement of rational discourse on the concept and juridical meaning of terrorism.¹ How can the “war on terror” be successful in achieving its objectives if we understand neither the core elements of what constitutes terrorism nor its legal character?

In this article, I argue that the war on terror, as presently pursued, is a reproach to both international law and domestic constitutional governance. The word terrorism has become a populist domestic political strategy. In my argument, I posit that by refusing to have an intelligent and rational understanding of what terrorism is and what we seek to achieve through its elimination, international law reinforces its reputation as a discipline of crisis.² Further, I argue that international law is biased in its construction and resolution of global issues. There is a strong tendency for powerful states and vested interest groups to use the substance and forum of international law to protect their narrow self-interests, which threatens the legitimacy, coherence, and fairness of the global legal order.

The war on terror, I argue, demonstrates how international law facilitates the metamorphosis of first-world interest and convenience from discourse into juridical fact, simultaneously banishing third-world issues to the periphery. Thus, it is an abiding feature of the structure and process of international law that when powerful states experience fears, concerns, and inconveniences that weaker states and marginalized groups are forced to

¹ Julie Merton, “Terrorism as Ideology: Implications for Intervention” (1999) 93 Am. Soc. Int’l L. Rev. 78 at 78-79.

² Hilary Charlesworth, “International Law: A Discipline of Crisis” (2002) 65 Mod. L. Rev. 377.

accept as “normal,” the institutions, norms, and processes of international law are quickly deployed to assist these states and vested interest groups. Powerful states create and remake juridical reality by reconfiguring legal narratives.

Since the terrorist attacks on the United States on 11 September 2001 (“9/11”), common refrains from the Bush administration include “September 11 changed the world” and in turn “we (the United States) have changed the World.” This mindset and narrative constructs the United States as a saintly victim of global terrorism. Of course, the United States was a victim of terrorism on 9/11, but the mainstream narrative on terrorism pretends that prior to 9/11, or even afterwards, the United States has not engaged in the practice of terror. Such a narrative contradicts well-documented facts and perpetuates the fiction that the United States itself has not been a supporter, instigator, and facilitator of state-sponsored terrorism, particularly in the Cold War era.³ Indeed, even amidst the heated rhetoric on terrorism and terrorists who seek to acquire weapons of mass destruction from Saddam Hussein, very few scholars and policymakers have deemed it fit to remind all that the United States and other Western states were instrumental in building the intricate arsenal of the “weapons of mass destruction” possessed and deployed by the defunct regime of Saddam Hussein.⁴

In short, the legal historiography of terrorism and the roles that states play in promoting terror have largely become a nauseating exercise of delusion, self-induced amnesia, and the denial of self-evident truths. On a normative scale, it is a narrative that threatens the global consensus that terrorism, regardless of its source, is unacceptable. The ideological posturing, tough talk, and intellectual laziness inherent in a propagandistic use of terrorism make it difficult to separate reality from rhetoric. This narrative has the potential to make the war on terrorism permanent, with no parameters for assessing victory and measuring costs.⁵ Indeed, as presently conceived and prosecuted, the war on terror is no real war; there are no fixed enemies and no boundaries of conflict. It is a politically

³ Christopher H. Pyle, “Defining Terrorism” (1986) 64 *Foreign Policy* 63.

⁴ Disease-producing organisms and poisonous materials were exported from the United States to Iraq under U.S. government license between 1985-1988. The pathogens included botulinum toxin and anthrax. Over seventy shipments of *bacillus anthracis* from the United States were made to Iraq in three years. These micro-organisms were identical to those the United Nations inspectors found and recovered from the Iraqi biological warfare program. See Ikechi Mgbeoji, “Prophylactic Use of Force: The Illegitimacy of Canada’s Participation in ‘Coalitions of the Willing’ Without United Nations Authorization and Parliamentary Sanction” (2003) 8:2 *Rev. Const. Stud.* 169.

⁵ W. Wesley Pue, “The War on Terror: Constitutional Governance in a State of Permanent Warfare” (2003) 41 *Osgoode Hall L. J.* 267.

expedient slogan without substance. Its main purpose is to scare the populace into uncritical and unquestioning faith in the government. Its recurring message is one of fear and more fear. It neither enlightens us about terror nor offers any coherent and defensible process for dealing with it.

This article examines, from a third-world perspective,⁶ how international law has lent its formidable weight and faltering legitimacy to a famished narrative and discourse that ignores the role of various governments of the United States in lending material and moral support to global terrorists across the globe. While many commentators rightly condemn the perversion of Islam by Al-Qaeda and like-minded desperate groups, it must be remembered that for many decades various U.S. governments have sabotaged and undermined the governments of its perceived ideological opponents by supporting various “rebel” movements whose activities are legally and morally within the same orbit as those of Al-Qaeda.⁷

I argue that if the struggle against global terrorism is to succeed, international law must be coherent and even-handed in its conceptualization of terrorism. This article is divided into four parts. Part I briefly introduces the subject of terrorism, critiques the definitional crisis that has afflicted it, and explores the impact of that definitional crisis on the legal regulation of terror in international law. Part II examines how the structure and process of international law has, since 1945, treated Western terrorism against the Third World as a non-issue or, at best, as a side story. Terrorism, so constructed under the mainstream narrative, was until 9/11 a problem of “other” peoples existing outside the “civilized” moral, spatial, and ideological orbits of the United States and the remainder of the West. As the feeling grew that terrorism was a peculiar problem of the “uncivilized” peoples of the Third World, the gap in threat perception became increasingly wider and international law was ill-prepared to deal with the causes, nature, and ramifications of terrorism on a global level.⁸ More importantly, Part II will question and critique the assumption that the

⁶ For a brief but rich insight on the Third World Approach to International Law (TWAAIL) see Makau Mutua, “What is TWAAIL?” (2000) 94 Am. Soc. Int’l L. Proc. 31; Anthony Anghie, “What is TWAAIL: Comment” (2000) 94 Am. Soc. Int’l L. Proc. 39.

⁷ Formed in the late 1980s by Osama bin Laden, Al-Qaeda, meaning “The Foundation,” was intended to serve as a foundation upon which to build a global Islamic army. See U.S., National Commission on Terrorist Attacks Upon the United States, *Staff Statement* (No. 15) at 2. For a brief account of U.S. support for terrorist groups see Kenneth Sharpe, “The Real Cause of Irangate” (1987) 68 Foreign Policy 19.

⁸ Benjamin Fordham, “The Politics of Threat Perception and the Use of Force: A Political Economy Model for U.S. Uses of Force” (1998) 42:3 Int’l Stud. Q. 567 at 567, 584.

major practitioners of terrorism are people from the Third World.⁹ To the contrary, powerful states, especially the United States, are some of the leading proponents of terrorism.¹⁰

Part III considers the West's response to 9/11 and examines some of the implications of the West's response to that event with respect to international law and global security. Part IV concludes with a prognosis of the emerging global regime that governs terrorism and concludes the analysis arguing that the narrative on global terrorism, since the events of 9/11, has been conditioned to assuage the wounded feelings of the United States at an enormous cost to international law and international human rights law.

I. TERRORISM AND THE GLOBALIZATION OF FEAR

What is terrorism?¹¹ The word terrorism is European in origin and has been in use for just over two hundred years, stemming from the regime *de la terreur* in revolutionary France in the late eighteenth century. However, its philosophy and objectives are probably universal and have existed for several millennia. Sun Tzu, the famous Chinese tactician and philosopher, summarized the goal of terrorism when he wrote: "Kill one—frighten ten thousand."¹² Neither Osama bin Laden, nor Hamas, nor Prime Minister Ariel Sharon invented terrorism. Although they have all practised terrorism across international borders, the international dimensions of terrorism were identified prior to World War II.¹³

Although most states in the pre-World War II era had notions of what they thought constituted terrorism, crafting a generally acceptable definition of terrorism in international law proved extremely difficult. For example, the 1937 *Convention on the Prevention and Punishment of Terrorism*,¹⁴ adopted by the League of Nations, was only ratified by a single country. The issue of a generally accepted definition of terrorism surfaced again in the 1950s when a rash of incidents endangering civil aircraft became the vogue for desperate groups and individuals based in Palestine.

⁹ Zachary Karabell, "Fundamental Misconceptions: Islamic Foreign Policy" (1997) 105 *Foreign Policy* 76; Ghassan Salame, "Islam and the West" (1993) 90 *Foreign Policy* 144.

¹⁰ Charles Maechling, Jr., "Washington's Illegal Invasion" (1990) 79 *Foreign Policy* 113.

¹¹ Louis Rene Beres, "Meaning of Terrorism: Jurisprudential and Definitional Clarifications" (1995) 28 *Vand. J. Transnat'l L.* 239.

¹² Richard Clutterbuck, *Terrorism in an Unstable World* (New York: Routledge, 1994) at 3.

¹³ Ilias Bantekas, "The International Law of Terrorist Financing" (2003) 97 *A.J.I.L.* 315 at 315.

¹⁴ 16 November 1937, Doc. C.546.M.383.1937.V, 19 *League of Nations Official Journal* 23 (1938).

Three conventions, namely, the 1963 *Tokyo Convention on Offenses and Certain Other Acts Committed on Board Aircraft*,¹⁵ the 1970 *Hague Convention for the Suppression of Unlawful Seizure of Aircraft* (Hijacking),¹⁶ and the 1971 *Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation* (Sabotage),¹⁷ marked the dominance of a thematic and *ad hoc* treatment of aspects of what states considered to be terrorism in international law. Thus, rather than deal with a generic concept of terrorism, international law began a case-by-case approach to the manifestations of terrorism. As such, there are numerous treaties and conventions on kidnappings, protection of nuclear materials, bombing of civilians, killing of diplomats, the financing of terrorism, hostage taking, et cetera, rather than a single treaty or convention with a generic definition of terrorism.¹⁸

Most of the treaties reflected international law's preoccupation with the fears of the West. For example, the 1963 *Tokyo Convention* and the 1970 *Hague Convention* were direct global responses to air piracy by the Palestinians. Similarly, the 1979 United Nations agreement¹⁹ was a direct response to Palestinian terrorist activities. By contrast, no similar global response was developed with respect to acts of terror perpetrated by Western regimes and their client states in the Third World.²⁰ Thus, while international law seemed to grapple with terrorism that affected the interests of the West, it closed its eyes to various acts of terrorism committed by proxies of the superpowers and their allies in their gladiatorial struggle for ideological and geopolitical dominance in the Third World. In the European continent, the *European Convention on the Suppression of Terrorism*²¹ and the *Dublin Agreement*²² were developed in response to the terrorist activities of the Baader-Meinhof group in the

¹⁵ 14 September 1963, 704 U.N.T.S. 219, 20 U.S.T. 2941.

¹⁶ 16 December 1970, 860 U.N.T.S. 105, 22 U.S.T. 1641.

¹⁷ 23 September 1971, 974 U.N.T.S. 177, 24 U.S.T. 564.

¹⁸ Thomas M. Franck & Bert B. Lockwood Jr., "Preliminary Thoughts Towards an International Convention on Terrorism" (1974) 68 Am. J. Int'l L. 69.

¹⁹ *International Convention Against the Taking of Hostages*, 18 December 1979, 1316 U.N.T.S. 205.

²⁰ Susanne Jonas, "Dangerous Liaisons: The U.S. in Guatemala" 103 Foreign Policy 144; Brian K. Landsberg, "United States in Vietnam: A Case Study in the Law of Intervention" (1962) 50 Cal. L. Rev. 515; Ole R. Holsti, "The Three-Headed Eagle: The United States and System Change" (1979) 23:3 Int'l Stud. Q. 339.

²¹ 27 January 1977, 15 I.L.M. 1272 (adopted by the Council of Europe 10 November 1976).

²² *Agreement on the Application of the European Convention for the Suppression of Terrorism*, 4 December 1979, 19 I.L.M. 325.

Federal Republic of Germany.

In regard to defining terrorism, there are about twenty-two categories of international crimes of terrorism, representing over three hundred international instruments enacted between 1815 and 1992. Yet, none of the international instruments offer a generic definition. Ironically, states strongly disagree on how to define the term and who should be identified as a terrorist.²³ It would seem that terrorism is whatever its “hunter” thinks it is. Ten recent United Nations conventions and protocols on various aspects of terrorism failed to offer a generic definition of terrorism. Defining terrorism has remained a major hurdle to reaching international consensus on how to deal with it. Only through a rigorous and dispassionate examination of what constitutes terror can modern international lawyers and international institutions escape the blinding rhetoric and righteous nationalistic indignation which has historically made their role in the struggle against terrorism difficult.

Although some scholars have dismissed the utility of a generic definition of terrorism,²⁴ it is submitted that the absence of a coherent, universal concept of terrorism and a common structure for its eradication has ultimately created a propagandistic narrative of terrorism. In the absence of a generic definition, it is impossible to have the rudimentary elements for establishing guilt in terrorism. Without capturing the social and legal wrong that terrorism represents, the current rhetoric on terrorism degenerates into name-calling,²⁵ validating the aphorism that one person’s terrorist is another’s freedom fighter.²⁶

²³ Roberta Smith, “America Tries to Come to Terms With Terrorism: The United States Anti-Terrorism and Effective Death Penalty Act of 1996 v. British Anti-Terrorism Law and International Response” (1997) 5 *Cardozo J. Int’l. & Comp. L.* 249.

²⁴ John Murphy, *State Support of International Terrorism: Legal, Political, and Economic Dimensions* (Boulder, Colorado: Westview Press, 1989).

²⁵ As Sornarajah has argued, “The example of Osama bin Laden and the August 1998 bombing of Sudan by the United States show the inutility of the concept. If bin Laden is a terrorist, as indeed he is, should not the same application be used to describe those who bombed a non-existent chemical factory in Sudan?” Muthu-Cumuraswamy Sornarajah, “Terrorism not Useful for Analyzing Random Violence” (1999) 93 *Am. Soc. Int’l L. Proc.* 79 at 79.

²⁶ For example, the pre-state Zionist Movement carried out extensive terror against Arab civilians, the British, and Jews. UN Mediator Folke Bernadotte, was murdered by Zionist terrorists. On the other hand, former Prime Minister Menachem Begin and former Prime Minister Yitzhak Shamir of Israel were all Zionist “terrorists” in the eyes of the British government in Palestine. In his article entitled “Terror,” written for *Hazit*, the journal run by Lehi, the terrorist organization to which he belonged, Yitzhak Shamir declared that “[n]either Jewish morality nor Jewish tradition can be used to disallow terror as a means of war We are very far from any moral hesitations when concerned with the national struggle. First and foremost, terror is for us part of the political war appropriate for the circumstances of today” Furthermore, it is often said by some commentators that militant

More importantly, the sanctions imposed against “terrorists” may represent an exercise in inductive application of our prejudices and political preferences. A person or entity becomes labeled and treated as a “terrorist” simply because state officials have said they are. In such a paradigm, our prejudices and biases against the “other” supplant a reasoned, consistent, and qualitative assessment of acts that constitute terror regardless of the perpetrator. Operating within this mindset, for example, Caleb Pilgram defined terrorism as “membership in a clandestine or expatriate organization aiming to coerce an established government by an act of violence against it or its subjects.”²⁷ This definition presupposes that states do not engage in terrorism and that only individuals and foreigners belonging to “clandestine” organizations practice terror. Both assumptions are wrong.

It is therefore of utmost importance that international lawyers and policymakers frontally deal with the concept of terrorism and come to grips with its underlying concept. Anything short of that exposes the idea of

Palestinians who execute fellow Palestinians suspected of “collaborating” with Israel are terrorists. Yet,

[t]he archives of the Mainstream Zionist resistance group, Haganah, contain the names of 40 Jews killed by Menachem Begin’s Irgun and Lehi. Yitzhak Shamir’s personal assassination of a Lehi associate is a famous incident. The official Irgun history, while recalling with admiration many acts of terror against Arab civilians, also cites the murder of a Jewish member who, it was feared, would give information to the police if captured. Suspected collaborators were a particular target. The Haganah Special Actions Squads carried out “punitive actions” against Jewish informers. A Haganah prison in Haifa contained a torture chamber for interrogation of Jews suspected of collaboration with the British.

As cited in Noam Chomsky, “International Terrorism: Image and Reality” in Alexander George, ed., *Western State Terrorism* (New York: Routledge, 1991) at 28 [Chomsky]. Similarly, those who excoriated Yassir Arafat for not condemning Palestinian terrorism in a loud voice quickly forget that Chaim Weizmann, first President of Israel and considered one of the saintly figures of the national movement

did not think it morally decent to denounce either the acts [of Jewish terrorism] or their perpetrators in public ... he did not propose to speak out against acts, criminal as he thought them, which sprang from the tormented minds of men driven to desperation, and ready to give up their lives to save their brothers from what, he and they were equally convinced, was a betrayal and a destruction cynically prepared for them by the foreign offices of the western powers.

Eric Marsden, “US Plans a ‘Cordon’”, *Sunday Times* (10 October 1982), cited in Chomsky at 28. See also Jonathan Stevenson, “Northern Ireland: Treating Terrorists As Statesmen” (1997) 105 *Foreign Policy* 125; Isaiah Berlin, *Personal Impressions* (New York: Viking Press, 1981) at 50; Lawrence Harke, “The Anti-Terrorism Act of 1987 and American Freedoms: A Critical Review” (1989) 43 *U. Miami L. Rev.* 667.

²⁷ Caleb Pilgram, “Terrorism in National and International Law” (1990) 8 *Dick. J. Int’l. L.* 147.

terrorism to excessive political manipulation and propaganda. As Christopher Blakesley has rightly observed,

[t]o say that a conduct is punishable because it is proscribed, and that it is proscribed because states agree that it is terrorism, obviously begs the analytical question. The problem with the inductive approach by itself is that unless we distill the essential principles of the conduct that has been condemned by international and domestic law to see what makes it terrorist, we gain no conceptual insight and have no standards. We have a system like that of ancient common law England, without principles, policy, coherence or conceptual integrity. Analysts must discern principles behind the simple agreements or decisions. Otherwise, we agree that international law is nothing more than the “will of the sovereign(s),” giving in to the tendency evident among some political scientists and manifest in the rhetoric of the so-called war against terrorism (or drugs). Law becomes nothing more than a propagandistic exercise, in or by which the greatest power almost always wins.²⁸

An acceptable definition in international law of what constitutes terrorism is integral to the rule of law itself. It contradicts all known norms of basic justice to punish an individual or a group of persons for vague, undefined conduct. International law must determine the concrete *actus reus*, *mens rea*, and proscribed social harm if it hopes to deal with terror in a coherent, lawful, and consistent manner.²⁹ An inductive approach fails to deal with terrorism from a conceptual basis.

Another reason why the inductive approach to global terrorism must be rejected is that it focuses on political violence directed against industrialized states while ignoring the West’s support of terrorism against Third World peoples and governments.³⁰ More importantly, this approach fosters the erroneous impression that democracies do not partake in or practise terrorism.³¹ Further, an absence of international consensus on what constitutes terrorism facilitates the construction of terror as an established mode of surrogate warfare or a legitimate mode of conflict. Given that most acts of terrorism actually occur at the level of surrogate warfare, international law would do well to achieve consensus on the concept of terrorism.

²⁸ Christopher Blakesley, *Book Review of State Support of International Terrorism: Legal, Political, and Economic Dimensions* by John Murphy (1992) 86 A.J.I.L. 428 at 429-30.

²⁹ C. Blakesley, *Terrorism, Drugs, International Law and the Protection of Human Liberty* (Ardsley-on-Hudson, New York: Transnational, 1991).

³⁰ For a current application of the thematic and inductive approach, see Geoffrey Levitt, *Democracies Against Terror: The Western Response to State-Supported Terrorism*, (New York: Prager, 1988). For a contrary perspective, see Richard Falk, *Revolutionaries and Functionaries: The Dual Face of Terror*, written under the auspices of the Center of International Studies, Princeton University (New York: Dutton, 1988).

³¹ Allison Taylor, “Another Front in the War on Terrorism? Problems With Recent Changes to the Foreign Sovereign Immunities Act” (2003) 45 Ariz. L. Rev. 533.

At the domestic level, states have achieved relatively greater clarity in articulating the core elements of terrorism. For example, the official United States Code defines terrorism as:

[A]n activity that (A) involves a violent act or an act dangerous to human life that is a violation of the criminal laws of the United States or any State, or that would be a criminal violation if committed within the jurisdiction of the United States or any State; and (B) appears 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) affect the conduct of a government by assassination or kidnapping.³²

Similarly, a U.S. Army manual on countering terrorism defines terrorism as “the calculated use of violence or threat of violence to attain goals that are political, religious or ideological in nature. This is done through intimidation, coercion, or instilling fear.”³³ Executive Order No. 13224 issued by the Bush administration retains the same definition of terrorism as the U.S. Code. It would seem that endangerment to life and public safety for the purposes of advancing politics, religion, or ideology is at the heart of domestic laws on terrorism. Given that ordinary acts of picketing or public non-violent demonstrations could intimidate or coerce a civilian population, it is debatable whether domestic laws on terrorism are, in fact, an improvement on international inertia in defining terrorism.

It is generally understood that there are limited circumstances under which the use of force is permitted in international relations.³⁴ Indeed, violent measures undertaken by persons or entities fighting for liberation or engaged in anti-colonial domination may be considered to be terrorism. UN General Assembly Resolution 42/159 of 7 December 1987 clearly provides that:

Nothing in the present resolution could in any way prejudice the right to self-determination, freedom and independence as derived from the Charter of the United Nations, of peoples forcibly deprived of that right, particularly peoples under colonial and racist regimes and foreign occupation or other forms of colonial domination, nor the ... right of these peoples to struggle to this end and to seek and receive support [in accordance with the Charter and other principles of international law.]³⁵

³² U.S., *United States Code Congressional and Administrative News*, 98th Cong. (West Publishing Co., 1984) at vol. 2, para. 3077.

³³ *US Army Operational Concept for Terrorism Counteraction* (TRADOC Pamphlet No. 525-37, 1984).

³⁴ This is a problematic qualifier. In the cycle of violent interaction, it is often the case that each side perceives its own acts as retaliation for the terrorism of the adversary. The cycle of violence in the Israel/Palestinian conflict is the classic example.

³⁵ Interestingly, while this provision was passed with near-unanimous approval by all states, only the United States, Israel, and South Africa opposed. Honduras abstained.

We are thus left with numerous and specific legislation by states on what constitutes terrorism. Whether this patchwork of domestic laws grounds global consensus on what constitutes an act of terrorism at the international level is highly questionable. Assuming but not conceding that it does, such a backdoor approach engenders what Noam Chomsky has aptly described as the two paradigms of terrorism. The first is what he refers to as the “propagandist” narrative and the other is the “literal” narrative.

While the former construes terrorism “as a weapon to be exploited in the service of some system of power,” the latter takes terrorism as a serious issue to be rigorously studied and properly understood.³⁶ Within the propagandist narrative, the illicit use of force is considered legitimate and a species of military war. This narrative locates terrorism, especially when practised by states, as a form of strategic deterrence. Thus, states may engage in terrorism without recognizing it as such or being held legally liable if the objectives are to neutralize perceived ideological, political, and geo-political opponents. It is for this reason that acts committed or orchestrated by some powerful states that qualitatively constitute terrorism are generally not construed as being terroristic by definition as long as such acts fall within a state’s perceived strategic domain. In this paradigm, powerful states such as the United States are permitted to engage in terrorism while marginal entities like Hamas get portrayed in the media as terrorists.

This attitudinal bias in the evaluation of what constitutes terrorism is practically a convention and lies at the root of the West’s denial of the manifold consequences of state terrorism perpetrated by powerful states like the United States. As Michael Stohl observes, “[w]e must recognize that by convention—and it must be emphasized *only* by convention—great power use and the threat of the use of force is normally described as coercive diplomacy and not as a form of terrorism.”³⁷

In effect, acts which qualitatively fall within the ambit of most domestic legal definitions of terrorism, when performed or orchestrated by great powers, are more likely to be euphemistically described as “coercive diplomacy” or “low intensity warfare.” On the other hand, when similar activities are performed or orchestrated by Al-Qaeda or Hamas or the Islamic Jihad, a swift denunciation of such terrorist acts follow. If international law must be a credible tool in the war against terror, it must

³⁶ Chomsky, *supra* note 26 at 12.

³⁷ Michael Stohl, “States, Terrorism and State Terrorism” in Robert O. Slater & Michael Stohl, *Current Perspectives on International Terrorism* (New York: St. Martin’s Press, 1988) 155 at 171 as cited in Chomsky, *supra* note 26 at 12.

eschew the propagandist approach, which has plagued even scholarly treatments of the issue in the post-9/11 era.³⁸

Terrorism became a global issue of discourse in the 1980s. The Reagan administration, as Noam Chomsky observes, “took office announcing its dedication to stamping out what the president called ‘the evil scourge of terrorism,’ a plague spread by depraved opponents of civilization itself.”³⁹ It was not a coincidence that at the height of the Cold War, the generally accepted narrative in the West attributed responsibility for international terrorism to a “Soviet-based worldwide terror network aimed at the destabilization of Western democratic society.”⁴⁰ By the mid-1980s, concern over international terrorism reached the level of virtual frenzy. As Chomsky recalls, Middle Eastern/Mediterranean terrorism was selected by editors as the lead story of 1985 in an AP poll and a year later, the tourism industry in Europe was badly hit as Americans stayed away in fear of Arab terrorists infesting European cities.⁴¹

In virtually the same apocalyptic language, Islamic “terrorists” have replaced communist “terrorists” as the villains and enemies of “our civilization.” Yet, it is undeniable that various Western states have at one time or another perpetrated or supported the perpetration of acts that are qualitatively terroristic. In spite of that, the list of states involved in terrorism is a rerun of the usual suspects: Libya,⁴² Sudan,⁴³ Syria, the defunct Soviet Union, Iraq, and Iran. The shrill rehash of this list by the Western media and lazy academics perpetuates the myth that the only terrorists in business are those who commit atrocities *against* western governments and their allies.⁴⁴ While much has been said and continues to

³⁸ See e.g. Edward S. Herman, *The Real Terror Network: Terrorism in fact and propaganda* (Boston: South End Press, 1982); Edward S. Herman & Frank Brodhead, *The Rise and Fall of the Bulgarian Connection* (New York: Sheridan Square Publications, 1986); Noam Chomsky, *Pirates and Emperors: International Terrorism in the Real World* (New York: Claremont Research and Publications, 1986); Walter Laquer, “The Age of Terrorism” in Noam Chomsky, ed., *Necessary Illusions: Thought Control in Democratic Societies* (Montreal: CBC Enterprises, 1989).

³⁹ Chomsky, *supra* note 26 at 13.

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² For example, the Lockerbie bombing. See *Libyan Arab Jamahiriya*, SC Res. 748, UN SCOR, 1992.

⁴³ In 1996, the UN Security Council called on the Sudanese government to desist from supporting or assisting those terrorists that had attempted to assassinate the Egyptian president while he was in Ethiopia.

⁴⁴ Walter Gary Sharp, Sr., “The Use of Armed Force Against Terrorism: American Hegemony or Impotence?” (2000) 1 *Chicago J. Int'l L.* 37.

be said about some of the aforementioned states “nothing is said about the ways in which the West has directly and indirectly supported state terrorism in client states.”⁴⁵

II. THE NORTH-SOUTH (DIS)ENGAGEMENT WITH STATE-SPONSORED TERRORISM

The dominant narrative on international terrorism has largely focused on *who* allegedly is an international terrorist rather than a qualitative assessment of *what* acts constitute terrorism. The major problem with an identity-focused assessment of terrorism is that it has a tendency of excusing or ignoring western terrorism while excoriating and condemning acts of terror by less privileged persons or entities. In this paradigm, marginal but well publicized terrorists assume global significance far beyond the actual human suffering and property damage they cause. More importantly, the dominant narrative on terrorism fosters the erroneous impression that international terrorism is an invention of Islamic extremist groups. Indeed, the signal characteristic of 9/11 and its global ramifications is that it was plotted and executed by Islamic extremists. In other words, it was not “the ocean of rubble cascading from the heavens”⁴⁶ nor the bright, spirited people killed that marked out the sad events of that day. The crucial factor was not the quality of the acts of terror, but the persons or actors behind the tragedy.

Contrary to popular perceptions, the terrorist attacks against the United States on U.S. soil did not start with Osama bin Laden or any of the extreme Islamic groups. Terrorism is hardly a new issue for U.S. policymakers.⁴⁷ In the late 1960s for example, student movements and protests in the United States against the Vietnam War often degenerated into acts that qualitatively fell within the definition of terrorism under pertinent U.S. laws.⁴⁸ Similarly, on 19 April 1995, an American terrorist

⁴⁵ Kevin Ryan, Book Review of *Terrorism and Political Violence: Limits & Possibilities of Legal Control* by Henry Han, ed. (1994) 88 Am. J. Int'l L. 201 at 202.

⁴⁶ *Supra* note 5 at 268.

⁴⁷ See generally L. Donohue, “In the Name of National Security: US Counterterrorist Measures, 1960-2000” (2001) 13:3 *Terrorism and Political Violence* 15.

⁴⁸ Their activities were largely dealt with as domestic “subversive activity.” The FBI developed over a million files on the protesting students engaged in covert actions against some of the other students. But the public condemnation was unequivocal. In fact, the U.S. Senate Select Committee to Study Governmental Operations with Regard to Intelligence, chaired by Senator Frank Church, found that the U.S. government had overstepped their authority and threatened Americans’ civil liberties in its treatment of the subversive elements. For a detailed account see Donna M. Schlagheck, *International Terrorism: An Introduction to the Concepts and Actors* (Toronto: Lexington Books, 1988) at 97.

bombed the Oklahoma City Federal Building killing 168 people, including small children and infants. As a result, on 17 April 1996, the U.S. Congress passed an anti-terrorism bill.⁴⁹ In addition, the House of Representatives proposed two anti-militia bills, the *Domestic Insurgency Act of 1995*,⁵⁰ and the *Domestic Counter Terrorism Act of 1995*.⁵¹ Similarly, even religious terrorism is also not the sole preserve of “Islamic extremists.”⁵² David Koresh, leader of the Branch Davidians, a Christian sect, orchestrated acts of Christian terrorism in Waco, Texas.⁵³ Neither is racist-inspired terrorism the sole preserve of Muslim fanatics.⁵⁴ The important point here is that although the responses made by the United States to the Oklahoma and other domestic terrorist incidents were sweeping, they all pale into insignificance beside the response to 9/11. More worrisome is the inherent tendency of an identity-based approach to terrorism to treat state-sponsored terror by the West as a form of clandestine warfare⁵⁵ while excoriating extremist groups such as Al-Qaeda.

For example, during the Soviet invasion and occupation of Afghanistan, the United States supported, funded, and armed the

⁴⁹ U.S., Bill H.R. 2703, *Effective Death Penalty and Public Safety Act*, 104th Cong., 1996.

⁵⁰ U.S., Bill H.R. 1544, *Domestic Insurgency Act of 1995*, 104th Cong., 1995.

⁵¹ U.S., Bill H.R. 1899, *Domestic Counter Terrorism Act of 1995*, 104th Cong., 1995.

⁵² The question has been raised whether the current struggle is against terrorism or Islamic insurgency. A book authored by a senior Central Intelligence Agency officer argues that “we are fighting a worldwide Islamic insurgency—not criminality or terrorism—and our policy and procedures have failed to make more than a dent in enemy forces.” See Anonymous, *Imperial Hubris: Why the West is Losing the War on Terror* (Washington, D.C.: Brassey’s, 2004). See also Anonymous, *Through Our Enemies’ Eyes: Osama bin Laden, Radical Islam, and the Future of America* (Washington, D.C.: Brassey’s, 2002). For an enlightening narrative of the internal discord in Islamic theology and the struggle for the soul of Islam, see Stephen Schwartz, *The Two Faces of Islam: The House of Sa’ud From Tradition to Terror* (New York: Doubleday, 2002).

⁵³ On 28 February 1993, in Waco, Texas, over one hundred agents of the Bureau of Alcohol, Tobacco and Firearms (ATF) unsuccessfully raided a religious compound in search of an illegal stockpile of firearms and explosives. The compound was occupied by the Branch Davidians, a religious sect led by David Koresh. The raid failed when the Davidians opened fire on the ATF agents. Six sect members and four agents were killed, and sixteen people were wounded. The botched raid led to a fifty-one day standoff that ended on 19 April 1993, when the FBI led a tank and gas assault on the compound. Koresh and more than eighty Davidians died in the inferno. Robert McCurry, “Waco, Texas: Where A Part of America’s Heart and Soul Died”, online: <<http://www.islandone.org/Politics/Waco.McCurry.html>>.

⁵⁴ *Brandenburg v. Ohio*, 395 U.S. 444 (1969). The appellant, a Ku Klux Klan leader, was convicted under the Ohio Criminal Syndicalism for advocating racial violence.

⁵⁵ Robert Rhodes, “On Clandestine Warfare” (1982) 39 Wash. & Lee L. Rev. 333.

mujahedin guerrillas.⁵⁶ Osama bin Laden was a mujahedin in the Afghan conflict. While he did the bidding of the U.S. government, he was, like other members of the mujahedin, valorized as a “freedom fighter.”⁵⁷ In the stagecraft that surrounded the funeral of late President Ronald Reagan, it was very easy to forget the heinous activities against Third World states and peoples perpetrated by U.S. client states and U.S. proxy armies during the Reagan years. During the Cold War, President Reagan provided extremist and terrorist groups with funds and equipment to destabilize various states and regimes ideologically opposed to the United States. The dissidents in Poland, for example, working in solidarity, transformed the Warsaw Pact from an asset into a liability for the Soviets.

Further examples of American complicity in acts that qualitatively pass for terrorism under U.S. laws abound. In the Americas, notwithstanding various treaties and declarations outlawing the subversion of one state by another, the United States variously sponsored, armed, and encouraged rebel groups engaged in terrorist activities against their governments and peoples. For example, the Declaration of Lima by the Eighth International Conference of American States, 24 December 1938 declares that:

[I]n case the peace, security, or territorial integrity of any American republic is thus threatened by acts of any nature that may impair them, they proclaim their common concern and their determination to make effective their solidarity, coordinating their respective sovereign wills by means of the procedure of consultation, established by the conventions in force and by declarations of the inter-American conferences, using the measures which in each case the circumstances may make advisable. It is understood that the Governments of the American Republics will act independently in their individual capacity, recognizing fully their juridical equality as sovereign states.⁵⁸

Notwithstanding this declaration, U.S. governments, on the ideological crusade to export freedom, democracy, and free market economy have often justified various acts of terrorism against opposing

⁵⁶ M. Hasan Kakar, *Afghanistan: The Soviet Invasion and the Afghan Response, 1979—1982*. (Berkeley: University of California Press, 1997).

⁵⁷ “Profile: Osama bin Laden”, online: Foreign Policy Association <http://www.fpa.org/newsletter_info2478/newsletter_info_sub_list.htm?section=Profile%3AOsama%20bin%20Laden>. “Osama bin Laden”, online: Encyclopaedia of the Orient <http://lexicorient.com/e.o/osama_b_laden.htm>.

⁵⁸ Reproduced in U.S., State Department, *Peace and War: United States Foreign Policy 1931-1941* (Washington, D.C.: U.S. Government Printing Office, 1943) at 440. See also, *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance With the Charter of the United Nations*, GA Res. 2625(XXV), UN GAOR, 25th Sess., Supp. No. 28, UN Doc. A/8082 (1970) 121.

states and peoples.⁵⁹ As Stohl has rightly observed, “in terms of terrorist coercive diplomacy the USA has been far more active in the Third World than has the (defunct) Soviet Union.”⁶⁰ Writing in the same vein, Ruth Sivard’s studies conclude that since World War II, 95 per cent of all military conflicts have occurred in the Third World and of that number, 79 per cent have involved Western powers engaged in one form of “coercive military diplomacy” or another.⁶¹ Although Iran, Libya, Iraq, Syria, Sudan, et cetera, are surely terrorist states, the United States is unparalleled in its commitment to state-sponsored international terrorism (euphemistically described as “coercive military diplomacy”) as a strategic instrument. During the Reagan administration, for example, the United States not only constructed semi-private international terrorist networks, it also employed an array of mercenary states and clients—Taiwan, South Korea, Israel, Saudi Arabia and others—to finance and implement its terrorist operations, especially in Latin America⁶² and the Middle East. Yet, it is virtually anathema to most scholars, save for scholars such as Chomsky, Falk, and Blakesley, to lump the United States with Libya, Iran, Sudan, and the other usual suspects in the narrative on terrorism.

Interestingly, save for the celebrated litigation at the International Court of Justice between Nicaragua and the United States,⁶³ U.S. support of international terrorism against third world countries is rarely subjected to judicial scrutiny or analysis. In the events leading up to that case, U.S. proxy forces attacked Nicaragua, hitting the so-called “soft targets” (a euphemism for barely defended civilian targets), especially agricultural cooperatives.⁶⁴ Even liberals often defended these atrocities as sensible policy provided that, in their views, there was a prospect that “democracy [would] emerge at the other end.”⁶⁵ In October 1986, a Contra supply plane was shot down with an American mercenary on board.

The Nicaragua-U.S. hearings ensued and after the hearings it was

⁵⁹ Anthony D’Amato, “The Invasion of Panama Was a Lawful Response to Tyranny” (1990) 84 A.J.I.L. 516.

⁶⁰ Stohl, *supra* note 37, as cited in Chomsky *supra* note 26 at 35.

⁶¹ Ruth Sivard, *World Military and Social Expenditures 1981* (Leesburg, Va.: World Priorities, 1981).

⁶² *Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua v. U.S.), Merits, 1986 I.C.J. Rep.14 [*Nicaragua case*].

⁶³ *Ibid.*

⁶⁴ For an apologia of the U.S. position see John Moore, “The Secret War in Central America and the Future of World Order” (1986) 80 A.J.I.L. 43.

⁶⁵ Michael Kinsley, as cited in Noam Chomsky, *The Culture of Terrorism* (Boston: South End, 1988) at 78.

clear that the United States was deep into its commitment to terrorism.⁶⁶ The United States, recalls Richard Falk, “signaled its bitter opposition in advance to any recourse to judicial procedures, refused to appear during the merits phase of the proceedings, and scornfully repudiated the authority of the Court to pronounce upon the issues in controversy.”⁶⁷ Nevertheless, by an overwhelming majority, the judges of the International Court of Justice found that the United States trained, financed, and supported the Contra terrorists.⁶⁸ Although the judgment fell short of attributing the violations of international humanitarian law to the U.S. government, it was clear that acts of terrorism perpetrated by the Contras were a natural and logical result of U.S. support and finance.

Interestingly, after the International Court of Justice handed down its decision in June 1986 condemning the United States for the unlawful use of force in Nicaragua and other acts that qualitatively constitute terrorism,⁶⁹ the United States dismissed the court’s decision as an irrelevant pronouncement by a hostile forum. Scoffing at international law, the United States proceeded to veto a Security Council resolution calling on all states to observe international law. It has never been disputed by the United States that its commitment to the Contras was motivated by ideological and political aims.⁷⁰ Clearly, the Contra war involved numerous acts of violence designed to effect a policy change by a government. It was a classic case of state-sponsored terrorism. At a normative level, the *Nicaragua case* emphatically rejected the imperial attitude to terrorism, a narrative that characterizes state-sponsored terrorism by powerful states as “defensive” or “strategic” measures while reserving its venom and condemnation for similar actions by extremist groups such as Hamas. State-sponsored terrorism is not exempt from legal accountability.

In addition to the infamous Contra wars in which the United States

⁶⁶ Chomsky, *supra* note 26 at 7.

⁶⁷ *Supra* note 30 at 2.

⁶⁸ *Supra* note 62.

⁶⁹ Richard Falk, “Appraisals of the ICJ’s Decision: Nicaragua v. United States (Merits) (1987) 81 A.J.I.L. 106.

⁷⁰ As top administration officials explained, the goal of the attack was to force the Sandinistas to divert “scarce resources to the war and away from social programs and to provoke cross-border attacks by Nicaraguan forces and thus serve to demonstrate Nicaragua’s aggressive behaviour.” *Ibid.* The U.S. attitude to the *Nicaragua case*—a decision which has been described by knowledgeable legal scholars as “exemplary in striking a balance between fairness to a sovereign state accused of serious violations of international law and a diligent effort to interpret the relevant rules and principles in a constructive manner”—undermines its current commitment to deal with the problem of global terrorism with honesty and coherence. *Ibid.* at 106.

directly trained and supported its proxy armies engaged in terrorist activities, in a second category of cases it provided moral and material support to its client states to intimidate or coerce a civilian population. Under current U.S. laws, such acts would qualify as terrorism if perpetrated by other states against U.S. interests. In El Salvador, thousands were raped, murdered, and mutilated by the Salvadorean army with the connivance of the U.S. government. Other mercenary states, including Guatemala witnessed large-scale episodes of civilian deaths, intimidation, and extermination perpetrated by the Guatemalan army with the full support and connivance of the United States. Were Guatemala and El Salvador engaged in similar activities today with Al-Qaeda or any other Islamic terrorist entity, they would be prime candidates for membership in the “Axis of Evil.”

It would be factually incorrect to hold that President Reagan was the first U.S. President to preside over large scale U.S. support of global terror. Nor would it be tenable to hold that the political ideology of the occupant of the White House makes any real difference to the notorious support which various U.S. governments have offered terrorist organizations fighting its proxy wars, especially during the Cold War. Both Republican and Democratic U.S. governments have adopted the same policy of supporting terrorist entities and sympathetic client states as long as those entities and client states are thought to be doing the bidding of the U.S. government.

In the 1960s and 1970s, the United States supported various entities and client states that engaged in acts of terrorism. The two prime examples remain the anti-Cuba groups and the U.S.-backed militias in Lebanon. On anti-Cuban terrorism, it is worth noting that in 1961, the United States established a special group under the code name “Mongoose,” involving at least four hundred Americans and two thousand Cubans. With an estimated annual budget of 50 million U.S. dollars, this group was run in part by a Miami CIA station. The activities of this group—bombing of hotels and industrial installations, sinking of fishing boats, contamination of sugar exports, et cetera, fell squarely within most definitions of terrorism. Although the CIA itself did not specifically authorize all the various acts of violence perpetrated by this group, there was little doubt that those terrorist operations were done with the financial, moral, and infrastructural support of the CIA during the Cuban missile crisis of October/November 1962.⁷¹ In fact, on November 8, a terrorist team dispatched from the United States blew up a Cuban industrial facility, allegedly killing four hundred

⁷¹ For a detailed account of this and other incidents during the Cuban missile crisis see Raymond Garthoff, *Reflections of the Cuban Missile Crisis* (Washington: Brookings Institution, 1987)

workers.

These activities were undertaken when President Kennedy, a Democrat, was in office. In addition to these terrorist acts, it is common knowledge that various U.S. governments have tried at various times to assassinate President Fidel Castro⁷²—again, an act of terrorism. Similarly, President Nixon, a Republican, presided over terrorist activities against Cuba. Of course, it cannot be denied that Cuba has been accused of perpetrating terrorist acts, but the point here is that the narrative on global terrorism has been conducted in a manner that pretends that the United States and other major powers are innocent victims of terrorism. It is a fallacious narrative that creates the impression and indeed juridical reality, that weak, “non-democratic,” “communist,” or “uncivilized” states and peoples are the sole practitioners of international terrorism. Given their long history of support for terrorist groups ostensibly committed to democracy and free market economies, the United States and other major powers are indeed the champions of terrorism.

On many occasions, the United States has launched terrorist attacks or supported terrorist entities as long as the preferred ideology of the U.S. government is being propagated. Save perhaps for Afghanistan, Nicaragua, and presently, Iraq, no other state has suffered as much terrorism in the hands of the United States as Cuba. In October 1976, CIA-trained Cuban exiles bombed a Cuban civilian airliner, killing all seventy-three on board. Neither this nor the Bay of Pigs fiasco has dampened the enthusiasm of the United States to support terrorist entities and terrorist activities aimed at changing the ideological direction of Cuba.

Cuba was not the sole victim of U.S. terrorism. Southern Lebanon was once the epicentre of U.S.-sponsored terrorism.⁷³ Terrorist entities supported by the U.S. government killed thousands and drove away hundreds of thousands. Members of the Shin Beth, the Israeli Secret Police, terrorized the southern Lebanese with impunity. With U.S. approval, Syria entered Lebanon in 1976 to orchestrate the massacre of thousands at the Palestinian refugee camp of Tel Al-Zaater. While these atrocities went on, the media spotlight was on the equally barbaric activities of members of the Palestinian Liberation Organization. The terrorist activities of the United States and Israel and their proxies received no serious scrutiny. Indeed, it was only after 241 U.S. marines were blown up in the suicide bombing on

⁷² See *ibid*; Bradley Ayers, *The War that Never Was: An Insider's Account of CIA Covert Operations Against Cuba* (Indianapolis: Bobbs-Merrill, 1976); William Blum, *The CIA: Forgotten History* (London: Zed Books, 1986).

⁷³ Jerusalem Post (16 August 1981); Noam Chomsky, *The Fateful Triangle: the United States, Israel and the Palestinian*, (Boston: South End, 1983) at 6-35.

23 October 1983 that some scholars began to pay serious attention to the war of attrition in southern Lebanon.

Further evidence of great power complicity in terrorism exists. In 1985, an Air India flight was blown up, killing 329 passengers on board. The terrorists, as Noam Chomsky observes,

had been trained in paramilitary camp in Alabama run by Frank Camper, where mercenaries were trained for terrorist acts in Central America and elsewhere. According to ex-mercenaries, Camper had close ties to U.S. intelligence and was personally involved in the Air India bombing, allegedly, a sting operation that got out of control. On a visit to India, Attorney General Edwin Meese conceded in a backhanded way that the terrorist operations originated in a U.S. terrorist training camp.⁷⁴

Though the United States required that the Taliban hand over Osama bin Laden, Frank Camper was not handed over to India. In March 1985, William Casey, the Director of the CIA, specifically authorized a car bombing in Beirut killing eighty people and wounding 256.⁷⁵ The target of that terrorist attack was Sheikh Fadlallah, the Shi'ite leader accused by Washington of complicity in "terrorism." One can also mention the U.S. bombing of Tripoli in 1986 that was justified by unproven allegations of Libyan complicity in the Berlin discotheque bombing.

Beyond the issue of U.S. foreign policy and its capacity to stir anti-American feelings and thus catalyze the recruitment of potential terrorists from the Muslim world, it must be stressed that the Muslim terrorist apparatus, against which the West now wages a war, was in many respects created by U.S. intelligence as a geopolitical weapon. It is this phenomenon and its impact on 9/11 that the article addresses in the next section.

III. THE CHICKEN COMES HOME TO ROOST? AL-QAEDA AND THE MORNING AFTER 9/11

The 9/11 plot has been traced to a veteran jihadist named Khalid Sheikh Mohammed. A Kuwaiti from the Baluchistan region of Pakistan, Khalid Sheikh Mohammed graduated from a U.S. college before honing his skills in terrorism in the U.S.-sponsored anti-Soviet insurgency in Afghanistan in the 1980s.⁷⁶ The Commission on the Terrorist Attacks

⁷⁴ Chomsky, *supra* note 26 at 15; Leslie Cockburn, *Out of Control* (New York: Atlantic Monthly Press, 1987) at 27.

⁷⁵ Bob Woodward, *Veil: The Secret Wars of the CIA, 1981-1987* (New York: Simon & Schuster, 1987) at 396.

⁷⁶ U.S., National Commission on Terrorist Attacks Upon the United States, *Staff Statement* (No. 16) at 1.

confirms that it was Mohammed who sold the idea of the 9/11 attacks to Bin Laden. For an attack that cost “somewhere between \$400,000 and \$500,000 to execute,” its impact has been one of the most profound in modern history.⁷⁷ What has escaped more rigorous examination is the role of the United States in training Mohammed, Bin Laden, and other architects of the horrendous events of 9/11. A significant number of the Al-Qaeda leadership are graduates of U.S.-trained insurgency movements.

Zbigniew Brzezinski, President Carter’s National Security Adviser, recently confirmed in an interview that President Carter gave billions of dollars to the mujahedin in the 1970s, even before the Soviet Union invaded Afghanistan. Arguably, the U.S. policy paid some dividends. It induced the Soviets to invade Afghanistan. The subsequent debacle in Afghanistan bled the Soviet Union to death and led to its ultimate disintegration. Brzezinski and his protégé, Zalmay Khalilzad,⁷⁸ set up a corporation in the mid-1980s, funded by the U.S. Congress to train the mujahedin to sell reporters the lie that the mujahedin were freedom fighters and victims of aggression.⁷⁹ The hypocrisy should not escape attention. While the United States denounced “Muslim extremism,” they knowingly fomented the emergence of an “Islamic insurgency” as a weapon of policy against the Soviets. It was acceptable to the United States for the mujahedin to “terrorize” the Soviet occupiers but it is not acceptable for the mujahedin to terrorize American targets. The hypocrisy is staggering.

Such a hypocritical construction of terrorism brings international law to ridicule and disrepute. How can international law be a vehicle or instrument in the war against terror when its canons are inconsistently applied in a brazenly cynical manner? If the U.S. foreign policy establishment used Muslim extremism as a weapon once, is there any guarantee, in principle, that the United States would not use it again? It is remarkable that as long as the Afghan mujahedin, including Osama bin Laden and other criminals who took part in the 9/11 plot, were implacably opposed to the government in Kabul and fought the Soviet occupiers, they were considered friends and allies of the United States. But as soon as they

⁷⁷ Chomsky, *supra* note 30 at 11.

⁷⁸ Interestingly, from May 2001 until 27 November 2003, Dr. Khalilzad was “Special Assistant to the President and Senior Director for Gulf, Southwest Asia, and Other Regional Issues, National Security Council.” See “Statement by the Press Secretary on the Appointment of Dr. Zalmay Khalilzad” (23 May 2001), online: <<http://www.whitehouse.gov/news/releases/2001/05/20010523-7.html>>. Note that Southwest Asia covers the area from Pakistan to Saudi Arabia, including Iraq and Iran; it includes most of the Middle East and extends to Georgia. On 27 November 2003, Dr. Khalilzad was appointed Ambassador and Special Envoy to Afghanistan.

⁷⁹ Joan Mower “Rebel Journalists to be Trained in Program; U.S. Will Aid Afghans in Telling Their Story” *The Los Angeles Times* (27 October 1985) 1.

opposed the United States with the same weapons they used against the Soviets, they became terrorists.

Within this context, one questions the religious indignation which the Bush administration has used to address the events of 9/11 and global terrorism.⁸⁰ In his address to the United Nations on 23 September 2003, President Bush declared that:

[E]vents during the past two years have set before us the clearest of divides: between those who seek order and those who spread chaos; between those who work for peaceful change and those who adopt the methods of gangsters; between those who honour the rights of man and those who deliberately take the lives of men and women and children without mercy or shame. Between these alternatives there is no neutral ground. All governments that support terror are complicit in a war against civilization.⁸¹

It therefore seems that groups like Al-Qaeda are “retail”⁸² terrorists. The terrorism perpetrated by small and marginalized third-world entities is often small-scale terrorism compared to that sponsored by the West. Much of the terrorism discussed in the West is retail in stature. Although the Bush administration has spent much of the past few years waging a war against terrorism, a war that “will not end until every terrorist group has been found, stopped, and defeated,”⁸³ it is increasingly becoming evident that Washington has no real intention of liquidating all known terrorist entities. That is, assuming the definition of terrorism encompasses all forms of state-sponsored terrorism.

To the contrary, the White House is still arming a right-wing paramilitary group in Colombia, the AUC, responsible for 70 per cent of human rights abuses in Colombia. Many of Colombia’s soldiers involved in numerous massacres in Colombia were trained at the U.S. Army’s notorious School of the Americas (SOA) Watch in Benning, Georgia. Human Rights Watch and other human rights activists have repeatedly linked U.S.-trained Colombian army and paramilitary groups with massacres in Colombia. Indeed, some of Latin America’s most notorious dictators are SOA graduates. The long list includes Manuel Noriega of Panama, Leopoldo Galtieri and Roberto Viola of Argentina, and Hugo

⁸⁰ Steven R. Ratner, “*Jus ad Bellum* and *Jus in Bello* After September 11” (2002) 96 Am. J. Int’l L. 905.

⁸¹ “The Struggle For Iraq; In Bush’s Words: ‘Advance of Democratic Institutions in Iraq Is Setting an Example’” *The New York Times* (24 September 2003) A12.

⁸² Chomsky, *supra* note 26 at 14.

⁸³ George W. Bush, “President Declares Freedom at War With Fear” (20 September 2001), online: <<http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html>>.

Banzer Suarez of Bolivia.⁸⁴ Were the SOA an Islamic school in the Middle East, it is likely that it would have been obliterated by cruise missiles launched from U.S. warships.

A more important observation is the relative indifference of international law to U.S.-sponsored terrorism in contrast to its willingness to act when international terrorists hurt U.S. interests. Thus, while the international legal community folded its hands as the West engaged in its acts of terror, it is significant that since 9/11, the United Nations framework has been roused to take up the issue of terrorism. Upon signing Executive Order 13224⁸⁵ (Executive Order), President Bush stated specifically: “[I]f you do business with the terrorists, if you support them, you will not do business with the United States of America.”⁸⁶ Shortly thereafter, and as a direct result of the Executive Order, the United Nations passed Resolution 1373.⁸⁷ Worded more broadly than the Executive Order, the UN Resolution dictates that all member states shall: (i) prevent and suppress the financing of terrorist acts; (ii) criminalize the wilful provision or collection of funds with the intention or knowledge that the funds should be used to carry out terrorist acts; (iii) immediately freeze all economic resources of persons who commit, or attempt to commit, acts of terrorism; and (iv) prohibit any persons or entities within their territories from making any financial assets or services available to terrorists.⁸⁸

In addition, the UN Resolution requires all member states to refrain from providing any form of support—including providing safe haven—to entities or persons involved in terrorist acts and to ensure that any person who participates in the financing, planning, preparation, or perpetration of terrorist acts is brought to justice and administered a punishment that duly reflects the gravity of such a crime. Member states also have an affirmative duty to provide early warning of suspected terrorist activity through the exchange of information.⁸⁹ A careful review of Resolution 1373 and similar international instruments fashioned in the aftermath of 9/11 clearly shows

⁸⁴ Garry Leech, “Protesting U.S.-Sponsored Terrorism in Colombia” *Colombia Report* (15 April 2002), online: Colombia Journal Online <www.colombiajournal.org/colombia109.htm>.

⁸⁵ *Executive Order No. 13224 of September 23, 2001: Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten to Commit, or Support Terrorism*, 66 Fed. Reg. 49,079 (2001).

⁸⁶ George W. Bush, “President Freezes Terrorists’ Assets” (24 September 2001), online: <<http://www.whitehouse.gov/news/releases/2001/09/20010924-4.html>>.

⁸⁷ See *Threats to International Peace and Security Caused by Terrorist Acts*, SC Res. 1373, UN SCOR, 56th Sess., UN Doc. S/RES/1373 (2001) at 2.

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*

a lack of understanding at the highest levels of international law and foreign relations that the practice of terrorism is not restricted to actions by fanatical Muslims or desperate third-world groups against western civilization. The current discourse on legal regulation of international terrorism is conducted on the misleading template that only the usual suspects—Iran, Iraq, PLO, Hamas, Syria, Sudan, Cuba, Al-Qaeda—are the practitioners of international terror.⁹⁰ The West also practises state-sponsored terrorism, perhaps to a greater extent than both Al-Qaeda and allied groups.

Apart from responding to the concerns of the West rather than those of the Third World, international law and many scholars have a propensity to dilute international norms to serve the interests of the West. An important issue that arises in this context is the *Nicaragua case* jurisprudence regarding state responsibility for terrorist acts of proxy armies. In the *Nicaragua case*, the Court held that in a strict application of the norms of state responsibility, the U.S. government did not have direct responsibility for the terrorist acts of the Contras. This was based on the fact that, leaving aside U.S. strategic support and financing, the United States did not exercise direction and control over the activities of the Contras. In the words of the Court, the Contra rebels were not de facto agents of the United States because their

participation, even if preponderant or decisive, in the financing, organizing, training, supplying and equipping of the *contras*, the selection of ... targets, and the planning of the whole of its operation, is still insufficient in itself ... for the purpose of attributing to the United States the acts committed by the Contras ... For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.⁹¹

Thus, the *Nicaragua case* reinforced a rigid and traditional rule in international law that the conduct of private persons or entities is not attributable to the state unless of course, the actor is a formal or de facto agent of the state.⁹² The traditional rule was softened by the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia

⁹⁰ Hale E. Sheppard, "U.S. Actions to Freeze Assets of Terrorism: Manifest and Latent Implications for Latin America" (2002) 17 Am. U. Int'l L. Rev. 625.

⁹¹ *Supra* note 62 at 115.

⁹² *Report of the International Law Commission on the Work of Its Fifty-third Session*, UN GAOR, 56th Sess., UN Doc. A/56/10 (2001); *Responsibility of States for Internationally Wrongful Acts*, GA Res. 56/83, UN GAOR, 56th Sess., Supp. No. 49, UN Doc A/RES/56/83 (2001) 3; Robert Jennings & Arthur Watts, eds., *Oppenheim's International Law*, 9th ed. (Harlow, Essex: Longman, 1996) at 502-03.

(ICTY) in *Prosecutor v. Tadic*.⁹³ The Appeals Chamber held that the lower court's reliance on the ICJ's "effective control" test was contrary to the very logic of state responsibility and inconsistent with state and judicial practice. In place of the "effective control" test, the Chamber substituted an "overall control" test. The ICTY concluded that for it to attribute to the state responsibility for any unlawful acts, states need only exercise "overall control" over private armed groups. However, since 9/11, international law on state responsibility has abandoned traditional jurisprudence on state responsibility as it was articulated in the *Nicaragua case* and more softly in the *Tadic case*.⁹⁴

Various UN Resolutions have, however, imputed the defunct Taliban regime with responsibility for the terrorist attacks launched by Al-Qaeda. Yet, it is obvious that the Taliban neither controlled nor directed the 9/11 attacks. Al-Qaeda did. Of course, it is an ally of the Taliban just as the U.S. government was to the Contras in Nicaragua. As President George W. Bush reminded the world, "the allies of terror are equally guilty of murder and equally accountable to justice."⁹⁵ It may be argued that responsibility may be imputed to the Taliban on the basis that having learned of the role of Al-Qaeda in the 9/11 attack, and having harboured and supported Al-Qaeda, it had appropriated the terrorist activities of Al-Qaeda as its own.

Judicial support for this line of argument may be found in *United States Diplomatic and Consular Staff in Tehran (Iran v. US)*⁹⁶ where the student takeover of the U.S. embassy in Tehran was held not to be an official act of the government of Iran. However, after the takeover and when Ayatollah Khomeini expressed his approval of the occupation of the U.S. embassy, the acts of the students were imputed to the Iranian government. The entire legal foundation of Operation Enduring Freedom is premised on this new but fundamentally expansive narrative of international law on state responsibility.⁹⁷ As Derek Jinks observes, "this expansion of liability was achieved not by refashioning any 'primary rules'

⁹³ (1999) Case No IT-94-1-A (International Criminal Tribunal for the Former Yugoslavia Appeals Chamber) [*Tadic case*].

⁹⁴ Jonathan Charney, "The Use of Force Against Terrorism and International Law" (2001) 95 A.J.I.L. 835.

⁹⁵ Office of the Press Secretary, "President Bush Speaks to United Nations: Remarks by the President to United Nations General Assembly" (10 November 2001), online: The White House <<http://www.whitehouse.gov/news/releases/2001/11/20011110-3.html>>.

⁹⁶ (24 May 1980), I.C.J. Pleadings 3.

⁹⁷ Derek Jinks, "State Responsibility for Sponsorship of Terrorist and Insurgent Groups: State Responsibility for the Acts of Private Armed Groups" (2003) 4 Chicago J. Int'l L. 83.

defining the content of state obligations, but rather by relaxing the 'secondary rules' defining state responsibility for breaches of any such obligation."⁹⁸

In international law, primary rules define the legal obligations while secondary rules of state responsibility define the general conditions under which state are to be considered responsible for internationally wrongful acts or omissions. This distinction can be problematic in practice. As the International Law Commission has observed, "it is one thing to define a rule and the content of the obligation it imposes, and another to determine whether that obligation has been violated and what should be the consequences of the violation."⁹⁹

As suggested above, this distinction makes it easier for powerful states to substantially rewrite international rules unilaterally without apparently seeming to do so. It is remarkable that the United Nations,¹⁰⁰ the North Atlantic Treaty Organization (NATO),¹⁰¹ and the Organization of American States (OAS) all endorsed the U.S. approach. In sharp contrast, when terrorists bombed civilians in Kenya and Tanzania in 1998, the Security Council did not attribute the attacks to any state. Neither did it authorize the use of force as is implied in its resolutions on the Taliban/Afghanistan case. Obviously, what is sauce for the goose is not sauce for the gander. Sustained reflection on this point also confirms the view that the response to Al-Qaeda marks a subtle but significant shift from the doctrine of "effective control" of terrorists to "harbouring" of terrorists as the threshold for attributing responsibility to states for terrorist acts committed by terrorists operating from their jurisdictions.

The new "harbouring" rule represents a significant relaxation of the traditional attribution regime. The new rule has a huge capacity to recast private actions as state action. Apart from producing a remarkable number of dubious "allies" (since the bombardment of the Taliban, there is no state in the world that overtly claims to be anything but an "ally" to the United States),¹⁰² weak states with porous borders are unfairly exposed to American recriminations, cruise missiles, and bombs. No fair-minded

⁹⁸ *Ibid.* at 83.

⁹⁹ International Law Commission, "Report of the Commission to the General Assembly," 2 *Yearbook of International Law Commission*, UN Doc. No. A/CN.4/SER.A/1970/Add.1 (1970) 271 at 306.

¹⁰⁰ See *Threats to International Peace and Security Caused by Terrorist Acts*, *supra* note 87.

¹⁰¹ Speech delivered by NATO Secretary-General Lord Robertson (2 October 2001), online: Nato Official Homepage <<http://www.nato.int/docu/speech/2001/s011002a.htm>>.

¹⁰² Greg Tavalio & John Altenburg, "State Responsibility for Sponsorship of Terrorist and Insurgent Groups: Terrorism, State Responsibility, and the Use of Military Force" (2003) 4 *Chicago J. Int'l L.* 97.

person would dispute the fact that the old regime was a fiction¹⁰³ and that the new regime has its own merits but the point here is that we must recognize the signal shift that has taken place in international law on state responsibility. The attacks of 9/11 and the shift in our application of international law underscores the privileged status of certain states in the use of international law for the articulation and resolution of pressing problems.

Similar changes in human rights law and the law of war are apparent to the careful observer. Since 9/11, various western governments have enacted a variety of legislation to “secure” their states. In the process, many guaranteed freedoms have been significantly qualified. The phenomenon harkens back to Roman tyrants who justified their tyranny through the maxim, *salus populi est suprema lex* (the safety of the republic is the supreme law). Needless to say, this Napoleonic conception of law and state security (it was Napoleon who once said that “he who saves the nation does not break any law”) has almost always been a ready excuse for tyranny and totalitarianism.¹⁰⁴ The feeling of moral rectitude, uncritical belief in a higher good of national security, and teary-eyed embrace of nationalism and national flags served as the basis for human rights violations by various regimes throughout Africa, Latin America, and Asia. Today, that same sense of moral certainty, fanatical belief in “national security” or “homeland security,” and ultra-nationalism lies at the root of current assaults on human rights and international law by many western democracies. Similarly, the war on terror has raised issues regarding the capture, detention, and treatment of prisoners of war in the Afghan conflict.¹⁰⁵ As the Taliban fighters and other detainees in the war on terrorism await their fate, significant questions about the legality of the treatment of the Taliban fighters remain to be resolved.¹⁰⁶

Since 9/11, there has been a clamour to change and rethink

¹⁰³ See for example, Marie Ann Slaughter & William Burke-White, “An International Constitutional Moment” (2002) 43 Harv. Int’l L.J. 1 (arguing that the traditional “effective control” test for attributing an act to a state is insufficient to address the threats posed by global criminals and the states that harbor them).

¹⁰⁴ Roseann Latore, “Coming Out of the Dark: Achieving Justice for Victims of Human Rights Violations by South American Military Regimes” (2002) 25 B.C. Int’l & Comp. L. Rev. 419.

¹⁰⁵ See *Geneva Convention Relative to the Treatment of Prisoners of War*, 75 U.N. T.S. 135 (1950).

¹⁰⁶ For an examination of how Afghan mujahedin captured by the defunct Soviet Union were treated see, Mary Ellen O’Connell, “Soviet Prisoners in the Afghan Conflict” (1984) 23 Colum. J. Transnat’l L. 497.

international law and its doctrines on the use of force.¹⁰⁷ Some scholars have in the heat of the moment called for pre-emptive strikes against terrorists.¹⁰⁸ While conceding that such steps may amount to an abuse of the right to use of force, the hysteria surrounding the war on terrorism hardly affords room for sober consideration of the manifold ways in which such radical reconfiguration of established rules would impact global security.¹⁰⁹ The impact of 9/11 on international law has been enormous. Without question, the events of 9/11 have been used to remake the world; the question is whether our world is being remade in the way and form that we want.

IV. CONCLUSION

Since the terrible attacks of 9/11, there is increasing evidence of the global reach and grasp of Al-Qaeda and its affiliates. The panic and hysteria surrounding the war on terrorism has been remarkable. In this war, it would seem that law has become the first casualty. Yet, lawlessness hampers the war on terror.¹¹⁰ Recalling how similar lawlessness and hypocrisy hampered the Israeli war on Palestinian terrorism, Robert Fisk writes:

[I] remember the revolting prison of Khiam where Israel locked up its Lebanese adversaries—real and presumed, none tried by a court—and where prisoners were brought, shackled, hooded, sedated, for questioning. Their interrogation included electric torture—electrified metal attached to a penis and nipples (there were women prisoners, too)—which could never happen at Guantanamo Bay, as America’s Israeli allies taught their Lebanese militiamen in 1980. They in turn taught it to their Lebanese Shia militia enemies who use electricity on their captives. America, Israel’s friend, could have closed down this sick, disgusting prison if it had insisted. But Washington remained silent ... the nation that would later declare a war of good against evil didn’t see much wrong at Khiam.”¹¹¹

¹⁰⁷ Frank Biggio, *Neutralizing the Threat: Reconsidering Existing Doctrines in the Emerging War on Terrorism* (2002) 34 *Case W. Res. J. Int’l L.* 1.

¹⁰⁸ See e.g. Abraham Sofaer, “On the Necessity of Pre-emption” (2003) 14:2 *E.J.I.L.* 209, online: <<http://www.ejil.org/journal/Vol14/No2/art1.pdf>>.

¹⁰⁹ See especially Christine Gray, “The Use and Abuse of the International Court of Justice after Nicaragua” (2003) 14:5 *E.J.I.L.* 867, online: <<http://www.ejil.org/journal/Vol14/No5/140867.pdf>>.

¹¹⁰ Douglas Jehl, “US is Losing, CIA Author Warns” *International Herald Tribune* (23 June 2004) A10, online: <<http://www.ihf.com/articles/526195.html>>; See also Robert Fisk, “Congratulations, America. You Have Made Bin Laden a Happy Man” *The Independent* (22 January 2002) 4.

¹¹¹ Robert Fisk, *ibid.* The Israeli policy of applying what it euphemistically termed “moderate physical pressure,” was struck down by the Israeli High Court of Justice in 1999. According to Justice Barak, “the maxim that ‘When the canons roar, the muses are silent’ is not correct. Cicero’s aphorism that laws are silent during war does not reflect modern reality ... [As I have said before,] even when the cannons roar, the Military Commander must uphold the law. The strength of society to withstand

Lawlessness, including torture,¹¹² cannot be the price to pay for the war on terrorism. As American intelligence agents torture terrorist suspects or send terrorist suspects to countries where it is obvious that they will be tortured,¹¹³ the consequences of this on international law must not be overlooked. As Lee Dembart has pointed out, “if Americans want the protections of the Geneva conventions in the future, they must recognize and apply those protections now.”¹¹⁴

Similarly, a trigger-happy attitude is hardly useful to the war on terror. As it has now become apparent, the invasion of Iraq has not served its intended purpose. According to Steve Coll,

the invasion of Iraq is an avaricious, premeditated unprovoked war against a foe who posed no immediate threat. There is nothing that bin Laden could have hoped for more than the American invasion and occupation of Iraq. We have waged two failed half-wars and, in doing so, left Afghanistan and Iraq seething with anti-US sentiment, fertile grounds for the expansion of Al-Qaeda and kindred groups.¹¹⁵

The first prognosis is that the recentering of global terrorism as a peculiarly American problem has induced America to overreach itself. This imperial overreach, a potentially fatal characteristic of most empires of the past, holds significant challenges for global stability. The overbearing approach to America’s role in the world adopted by the Bush administration along with its excessive reliance upon military might and

its enemies is based upon its recognition that it is fighting for values worthy of defense. The rule of law is one of those values.” *Almandi v. Minster of Defence*, online: <http://62.90.71.124/eng/verdict/Search_ENG/verdict_by_case_rslt.asp?case_nbr_html=HCJ+3451%2F02> cited in Catherine Powell, “The Role of Transnational Norm Entrepreneurs in the U.S. ‘War on Terrorism’” (2004) 5 *Theor. Inq. L.* 47 at 69.

¹¹² I am aware that a few misguided lawyers such as Alan Dershowitz have argued that in some cases such as “ticking bomb” emergencies, torture is permissible.

¹¹³ “Special Report: Ends, Means and Barbarity” *The Economist* 366:8306 (11 January 2003) 22. The latter tactic is also clearly forbidden in both domestic and international law. See *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1465 U.N.T.S. 85.

¹¹⁴ Lee Dembart, “A Law-abiding America is Safer” *International Herald Tribune* (30 January 2002) online: International Herald Tribune <<http://www.iht.com/articles/46369.html>>.

¹¹⁵ Steve Coll, *Ghost Wars: The Secret History of the CIA, Afghanistan, and bin Laden, From the Soviet Invasion to September 10, 2001* (New York: Penguin Press, 2004) at 7. When five U.S. soldiers captured by the defunct Iraqi regime of Saddam Hussein were paraded on Iraqi television in March 2003, U.S. Defence Secretary Donald Rumsfeld immediately complained that “it is against the Geneva Convention to show photographs of prisoners of war in a manner that humiliates them.” George Monbiot, “One Rule for Them: Five PoWs are Mistreated in Iraq and the US Cries Foul. What About Guantanamo Bay?” (25 March 2003) *Leader Pages* 21, online: The Guardian <<http://www.guardian.co.uk/comment/story/0,,921192,00.html>>.

self-righteousness portend grave dangers for global security.¹¹⁶ As Regis DeBray observes,

the United States compensates for its shortsightedness and its tendency to improvise, with an altogether biblical self-assurance in its transcendent destiny. Puritan America is hostage to a sacred morality; it regards itself as the predestined repository of Good. With a mission to strike down Evil, Trusting in Providence, it pursues a politics that is at bottom as theological and as old as Pope Gregory VIII.¹¹⁷

Second, global terrorism cannot be eradicated solely by military might, cynical manipulation of international law, and righteous indignation. Unless powerful states drain the swamp of injustice in which the fanatical mosquitoes of terrorism breed, and unless global poverty and desperation are contained, those who wage war on terrorism labour in vain. Religious exhortations and name-calling will not win the war on terror. There is no genetic code for terrorism. While it is now morally fashionable to condemn the militant wings of the Palestinian struggle as terrorists, it is only fair to remember that pre-state Israel was hammered out on the anvil of activities that are qualitatively similar to current Palestinian terrorism. While states respond forcefully to terrorists, they would do well to examine the grievances of the terrorists.

The hypocrisy of powerful states on the issue of terror leaves so much to be desired. As Noam Chomsky recalls,

the New York Times called upon an expert on terrorism to offer his thoughts on how to counter the plague. His advice, based upon long experience, was straightforward: ‘the terrorists, and especially their commanders, must be eliminated. He gave three examples of successful counterterrorist actions: the US bombing of Libya, the Israeli bombing of Tunis, and Israel’s invasion of Lebanon. ... [The name of the expert] is Ariel Sharon. His terrorist career, dating back to the early 1950s, includes the slaughter of 69 villagers in Qibya and 20 at the al-Bureig refugee camp in 1953; terrorist operations in the Gaza region and north-eastern Sinai in the early 1970s including the expulsion of some ten thousand farmers into the desert, their homes bulldozed and farmlands destroyed in preparation for Jewish settlement; the invasion of Lebanon ... ; the subsequent massacre at Sabra and Shatilla; and others. Some might feel that the choice of Ariel Sharon to provide the “civilized world” with lessons on how to “stop the slaughter of innocents” may be a little odd, perhaps perverse, possibly even hypocritical. ... In a moral and intellectual climate such as this, it may well be appropriate for the world’s greatest newspaper to select Ariel Sharon as our tutor on the evils of terrorism and how to combat it.’¹¹⁸

¹¹⁶ Diplomats and Military Commanders for Change, Statement (17 June 2004), online: Diplomats and Military Commanders for Change <<http://www.diplomatsforchange.com/project/project.html>>.

¹¹⁷ Regis DeBray, “The French Lesson” *New York Times* (23 February 2003) A10.

¹¹⁸ Chomsky, *supra* note 26 at 24.

In sum, the martial and lawless response to international terrorism is doomed to failure if there is no coherent concept of terrorism. It is probable that the sheer psychology of power makes it increasingly likely that the United States will continue to pursue terrorism in a near paranoid way. International terrorism is complex, shifting, and often elusive. No state, no matter how powerful, can fight terror alone.¹¹⁹ As Americans and America demand blood in a post-9/11 world, the problem is not whether America has the means to maintain its strong military might or the will to use it. The real question is whether it has the moral capacity to fight and defeat terror. States that purport to be at war with terror would do well to wean themselves from excessive reliance on brute force and disregard for the rule of law.¹²⁰

¹¹⁹ Janice Gross Stein, "Alone At The Table: Hyperpower Nightmare" *The Globe and Mail* (26 March 2003) A17.

¹²⁰ Robert Kagan, "Power and Weakness" (2002) 113 *Policy Review* 1.