BACKGROUND FACTS

[1] On September 11, 2001, four commercial passenger jets began their cross-country flights. They were simultaneously hijacked from cities on the US East Coast. Two of these airliners were intentionally crashed into Towers One and Two of New York City's World Trade Center. Another crashed into the Pentagon in Washington, D.C. The fourth aircraft crashed in a Pennsylvania meadow after being forced to the ground by its passengers.

Approximately 3,000 individuals from eighty-one nations perished in this disaster. Several hundred passengers, of multiple nationalities, were among those killed when their planes were used as flying bombs to destroy US national icons.
The nineteen individuals who hijacked these four aircraft included US residents and foreign citizens, all of whom entered the US legally.¹ Fifteen were from Saudi Arabia. Two were from the United Arab Emirates. One was from Egypt and another from Lebanon.² The so-called “20th hijacker,” is a French citizen of Moroccan descent.

[2] The suicide bombing phenomenon is not new. The planes that were hijacked on September 11th were the next generation of “bomb.” Long before there were bombs, “martyrdom” was employed as an expression of political terrorism.³

The Dwight Stanford Professor of American Foreign Relations at San Diego State University recounts that: "In the 11th Century an Iraqi imam, or religious leader ... established an extremist religious cult that came to be known as the Assassins. The charismatic Hassan [leader] inspired passionate devotion with fiery interpretations of the Koran and a ruthless requirement of obedience. ... As proof of their devotion, novitiates were required to undertake suicide missions to murder the enemies of the imam. Terrorism was a political act and sacred religious duty. ... Angels would carry their broken bodies to Paradise."⁴

In September 1999, a US agency intelligence analysis warned that Usama bin Laden’s terrorists could hijack an airliner and fly it into government buildings. It warned as follows: “Suicide bomber(s) belonging to al-Qaida's Martyrdom Battalion could crash-land an aircraft packed with high explosives (C-4 and semtex) into the Pentagon, the headquarters of the Central Intelligence Agency (CIA), or the White House.”⁵

One must hasten to add that: (1) al-Qaida's end-justifies-the-means approach has been denounced by virtually all Islamic national governments; and (2) "terrorism"—whereby one’s terrorist is another’s hero—was neither initiated by an 11th century Iraqi religious leader nor subsequently attributable to just one ethnic, geographical, or broadly based religious group.

There has been some high level support for this tactic. In April 2002, Yasin Arafat’s wife, Suha al-Tweel Arafat, told an Arabic-language magazine that she endorsed suicide bombings as a legitimate method for resisting Israeli occupation. She said that there would be “no greater honor” than to sacrifice her own son (if she had one) for the Palestinian cause, adding “[w]ould you expect me and my children to be less patriotic

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² For the US indictment of the Algerian pilot accused of training them, see <http://news.findlaw.com/cnn/docs/terrorism/usraissi112701ind.pdf>. He was released from jail in the UK, five months after his arrest (February 2002), claiming that he was unaware of what his students were planning. In March 2002, the INS visas for the two WTC pilots arrived at their Florida flight school. This embarrassment confirmed that even these perpetrators were legally in the US. Reuters, Bush 'Very Displeased' I.N.S. Gave Hijackers Visas, NYT (Mar. 13, 2002).


⁵ AP, 1999 Study: Hijack-Suicides Possible, NYT (May 18, 2002).
and more eager to live than my countrymen and their father and leader who is seeking martyrdom?”

Two of Egypt’s most senior government-appointed religious scholars also endorsed suicide attacks, one of them stating that “martyrdom operations were the highest form of jihad operations.” The other commented that the “Islamic countries, peoples and rulers alike, must support these martyrdom attacks.”

The Saudi ambassador to England praised suicide bombers, while he criticized the US in a poem (The Martyrs) on the front page of a Saudi-owned, Arabic daily publication based in London.6

In June 2002, al-Qaida spokesman Suleiman Abu Ghaith announced: “Our security and military bodies are now monitoring, investigating and observing new American targets, other than the targets that were monitored before, which we will attack shortly in a way that will delight all Muslims. Also our martyr elements are ready and willing to launch attacks against American and Jewish interests both domestically and abroad.” This threat appeared in the midst of the West Bank intifada claiming numerous lives via suicide bombings.7

In October 2002, however, the NGO Human Rights Watch issued its 172-page report on suicide bombings in Israel. It concluded that this campaign constitutes crimes against humanity in violation of the Geneva Conventions.8

[3] The familiar adage, that politics makes strange bedfellows, applied to several dots arguably connected by September 11th.9

The US had assisted Afghanistan’s Mujahadeen (meaning Soldiers of God) resistance group, and thus Usama bin Laden in their struggle against the Soviet Union during its occupation of Afghanistan in the 1980s.

The head of French intelligence, Admiral Pierre Lacoste, then warned the US about the danger of employing the trite diplomatic approach whereby “the enemy's enemy is your friend.” The US provided funds, political support, and arms—including Stinger surface-to-air missiles for the Mujahadeen’s conflict with the occupying Soviets—hoping that Afghanistan would become the Soviet's Viet Nam.

When the Soviets left Afghanistan, so did US CIA operatives. What remained were splintered Afghani factions. They would struggle for supremacy in the early 1990s, resulting in the emergence of the Taliban (meaning Study of Islam) faction in 1996. That was the year that al-Qaida and Usama bin Laden migrated from the Sudan to Afghanistan.

In an expose on the Taliban, the prominent UK newspaper The Guardian10 noted that:

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6 Mrs. Arafat & Egyptian scholars: J. Miller, In Interview, Arafat’s Wife Praises Suicide Bombings, NYT (April 15, 2002). Saudi ambassador: AP, Published Poem Lauds Suicide Bombers, NYT (April 15, 2002).
7 For details, see N. MacFarquhar, Al Qaeda Says Bin Laden Is Well, and It Was Behind Tunis Blast, NYT (June 23, 2002).
Unocal, the US company with a controversial history of investment in Burma [textbook §11.4], has been trying to secure the Afghan route. To be viable Unocal has made it clear that “construction of the pipeline cannot begin until a recognized government is in place in Kabul that has the confidence of governments, lenders, and our company.”

This, it can be argued, is precisely what Washington is now trying to do. “Washington's attitude towards the Taliban has been, in large part, a function of oil,” argues Steve Kretzmann, from the Institute for Policy Studies in the US. “Before 1997, Washington refused to criticize and isolate the Taliban because Kabul seemed to favour Unocal, to build a proposed natural gas pipeline from Turkmenistan through Afghanistan to the Pakistan coast.” In 1997, the Taliban signed an agreement that would allow a proposed 890-mile, $2bn natural gas pipeline project called Centgas led by Unocal to proceed. However by December 1998, Unocal had pulled out citing turmoil in Afghanistan making the project too risky.

To secure stability for the Afghan pipeline route, the US State Department and Pakistan's intelligence service funneled arms to the Taliban, argues Ahmed Rashid in his book: *Taliban: Militant Islam, Oil and Fundamentalism in Central Asia*, the book Tony Blair [England’s Prime Minister] has been reportedly reading since the conflict started. Rashid called the struggle for control of post-Soviet central Asia “the new Great Game”.

In May 2002, after replacement of the Taliban regime resulting from meetings in Bonn, Germany, the World Bank’s president offered financing to any government or private company willing to rekindle the gas pipeline project through Afghanistan. This international lending institution thus reopened its office in Kabul after the two decades that included Soviet occupation in the 1980s and the Taliban’s rise to power in the 1990s.

Because of Pakistan's opposition to the Northern Alliance–an anti-Taliban faction operating in northern Afghanistan–the US did not support the key rebel leader, Ahmed Shah Massood. He was assassinated, while being interviewed for a news story, several days before September 11th.

During the 1980s, the US also aided Iraq in its eight-year war against Iran. This assistance came on the heels of the 1979-1980 US-Iranian hostage crisis. US/Iranian relations again thawed after the Persian Gulf War. In President Bush’s 2002 State of the Union address, however, he would label both countries as members of the then proclaimed terrorist “Axis of Evil” (along with North Korea).


A series of US ultimatums about terrorist bombings preceded and followed 911:

- The 1993 New York World Trade Center bombing killed six people and injured 1,000. President Clinton then promised that those responsible would be hunted and punished. Years later, only some of the perpetrators would be arrested and tried.

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• A 1995 bombing in Saudi Arabia killed five US military personnel. The President again promised that those responsible would be hunted and punished.
• The 1996 Khobar Towers bombing in Saudi Arabia killed 19 and injured 200 US military personnel. For a third time in the 1990s, Clinton again promised that those responsible would be hunted and punished.
• After the 1998 bombing of US embassies in Africa (224 killed and 5,000 injured), the President again promised that those responsible would be hunted and punished. (Four of the perpetrators were finally convicted in New York, and sentenced to life in prison on October 18, 2001.)
• The October 2000 bombing of the USS Cole (in Yeman) killed 17 US sailors and injured 39 more. President Clinton once again pledged that those responsible would be hunted and punished.

Usama bin Laden perceived the US as thus having only limited resolve in its reaction to prior terrorist attacks. Shortly after September 11th he commented that “We believe that the defeat of America is possible, with the help of God, and is even easier for us–God permitting–than the defeat of the Soviet Union was before.”

For many US citizens, personifying a key perpetrator as the devil incarnate would mask the need to understand this “evildoer” and the experiences shaping his actions. For example, in denouncing the West as the evildoer, Afghanistan's Taliban had previously established its dreaded secret police aka the Ministry of Enforcement of Virtue and Suppression of Vice. The initial name of the US war on terrorism was Operation Infinite Justice. This moniker was withdrawn (in favor of Enduring Freedom) because of the clash with a basic tenet of Islam: only Allah can dispense infinite justice.

President Bush also jettisoned the characterization "crusade," which he had initially used to describe as a global campaign against the "evildoers." Many historians equate the medieval "Crusades" with Christian annihilation of Muslims in the Middle East.

Given that staples such as coffee and sugar came initially from that region, one can appreciate how the millennial power shift from East to West might naturally trigger resentment of the now dominant culture.

NON-STATE PERPETRATORS

[5] From the outset, the prime suspect in the September 11th attacks was Usama Bin Laden [UBL].

UBL is the extremely wealthy Saudi who was stripped of his citizenship by Saudi Arabia. He then migrated to Sudan for five years, followed by his 1996 return to Afghanistan as the Taliban was taking power. He had previously assisted Afghanistan’s Mujahadeen in their successful struggle against the former Soviet Union during its occupation of Afghanistan from 1979-1989. UBL operated terrorist training camps in Afghanistan for five years before September 11th (and previously in Sudan). In 1998, the US fired cruise missiles into his supposed hideout in Afghanistan, in retaliation for the 1998 US embassy bombings in Kenya and Tanzania—for which he has been indicted.12

In May 2002, the president's press secretary revealed the pre-911 basis for the Bush Administration making the immediate determination that UBL was behind the

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Trade Center and Pentagon attacks: “It is widely known that we had information that bin Laden wanted to attack the United States or United States interests abroad. The president was also provided information about bin Laden wanting to engage in hijacking in the traditional pre-9/11 sense, [that is] not for the use of suicide bombing, [and] not for the use of an airplane as a missile.” In August 2001, an FBI agent in Phoenix, Arizona, urged FBI headquarters in Washington to investigate Middle Eastern men enrolled in American flight schools. That memorandum cited UBL by name, suggesting that his followers could use the schools to train for terror operations.13

One month after 9/11, a Kuwaiti spokesman for UBL issued a televised directive to kill Westerners indiscriminately. This threat was not limited to their home countries, nor those Muslims residing in or near the Persian Gulf area. He commented that “the storms will not calm down, especially the storm of airplanes, until you see defeat in Afghanistan.” Suleiman Abu Ghaith, an Islamic preacher from Kuwait, warned that “Muslims in the United States and in Britain, and children and others who are against the unjust American policy, not to travel by airplanes and not to live in high buildings or skyscrapers.” He then announced a list of grievances and Muslim causes, including that the Palestinians, Iraqis, and Muslims in Kashmir are victims of American and Jewish aggression. He was apparently frustrated with the decision of Muslim foreign ministers at the Organization of the Islamic Conference in Qatar, because they did not condemn the American bombing campaign in Afghanistan.14

Three months after the 911 attacks, the Pentagon released a government-translated tape containing the following informal discussion between UBL and several of his closest associates—allegedly taped on Nov. 9, 2001 in Kandahar.15 Before airing in the US news media, it was translated by Diplomatic Language Services and the Arabic Language Program Coordinator at John Hopkins University—neither of whom found any inconsistencies with the US Government translation of bin Laden’s tape:

OBL: (…Inaudible…) We calculated in advance the number of casualties from the enemy, who would be killed based on the position of the tower. We calculated that the floors that would be hit would be three or four floors. I was the most optimistic of them all. (…Inaudible…) Due to my experience in this field [engineer], I was thinking that the fire from the gas in the plane would melt the iron structure of the building and collapse the area where the plane hit and all the floors above it only. This is all that we had hoped for. …

We were at (…inaudible…) when the event took place. We had notification since the previous Thursday that the event would take place that day. … At the end of the newscast, they reported that a plane just hit the World Trade Center.

Shaykh: Allah be praised.

OBL: After a little while, they announced that another plane had hit the World Trade Center. The brothers who heard the news were overjoyed by it.

Shaykh: No doubt it is a clear victory. Allah has bestowed on us … honor on us … and he will give us blessing and more victory during this holy month of Ramadan.

13 D. Sanger, Bush Was Warned bin Laden Wanted to Hijack Planes, NYT (May 16, 2002).
UBL and his associates had also hijacked a religion.

On February 1, 2002, CNN obtained a copy of a post-September 11th taped interview of UBL, done in Oct. 2001 by the Arabic-language Al-Jazeera network, (formerly) associated with CNN.¹⁶ This interview occurred shortly after the beginning of US airstrikes, the ensuing collapse of the Taliban, and the flight of the Afghanistan-based Al-Qaida network. UBL therein proclaimed:

I tell you, freedom and human rights in America are doomed. The U.S. government will lead the American people in—and the West in general—into an unbearable hell and a choking life. America has made many accusations against us and many other Muslims around the world. Its charge that we are carrying out acts of terrorism is unwarranted. If inciting people to do that is terrorism, and if killing those who kill our sons is terrorism, then let history be witness that we are terrorists.

[When asked if he was responsible for the post-9-11 anthrax attacks in the United States, UBL responded:] These diseases are a punishment from God and a response to oppressed mothers' prayers in Lebanon and Palestine.

We kill the kings of the infidels, kings of the crusaders and civilian infidels in exchange for those of our children they kill. This is permissible in Islamic law and logically. So we kill their innocents, and I say it is permissible in Islamic law and logic.

[Regarding claims that UBL was using tapes to submit hidden messages to his operatives, UBL responded:] They made hilarious claims. They said that Osama's messages have codes in them to the terrorists. It's as if we were living in the time of mail by carrier pigeon, when there are no phones, no travelers, no Internet, no regular mail, no express mail and no electronic mail. I mean, these are very humorous things. They discount people's intellect.

We believe that the defeat of America is possible, with the help of God, and is even easier for us—God permitting—than the defeat of the Soviet Union was before.

[Regarding Somalia, where the US pulled out after a disastrous military campaign in 1993, depicted by the 2001 movie Black Hawk Down, UBL stated:] Our brothers with Somali mujahedeen and God's power fought the Americans. God granted them victory. America exited dragging its tails in failure, defeat, and ruin.

One could thus surmise that the muted US reaction to its 1993 military disaster in Somalia—depicted by the movie Black Hawk Down)—led UBL to believe that the US would one day itself be a viable target.

In April 2002, the Arab television station, Al-Jazeera, broadcasted a farewell video attributed to a September 11th hijacker who was on board Flight 93 (which crashed in Pennsylvania). In this portion of the videotape, the hijacker stated: “The time of humiliation and subjugation is over. It is time we kill the Americans in their heartland, among their children, and next to their forces and intelligence.” Al-Jazeera elaborated that the tape which it received, entitled “The Last Will and Testament of the New York and Washington Battle Martyrs.”¹⁷ It included photos of the nineteen hijackers.


¹⁷ AP, Sept. 11 Hijacker Farewell Video Found, NYT (Apr. 16, 2002).
Other than UBL, two entities were implicated: the international organization known as “al-Qaida,” and Afghanistan’s de facto government known as the “Taliban.”

On February 23, 1998, the World Islamic Front (al-Qaida) issued its mission statement, entitled “Jihad Against Jews and Crusaders” (signed by five individuals including UBL). It announced:

in compliance with God's order, we issue the following fatwa [command from God] to all Muslims: The ruling to kill the Americans and their allies—both civilian and military—is an individual duty for every Muslim who can do it in any country in which it is possible to do it, in order to liberate the al-Aqsa Mosque [Jerusalem] and the holy mosque [Mecca] from their grip, and in order for their armies to move out of all the lands of Islam, defeated and unable to threaten any Muslim.

Pursuant to the al-Qaida's (apparent) home page mission statement, “Al-Qa’ida's goal, therefore, is to overthrow nearly all Muslim governments, which are viewed as corrupt, to drive Western influence from those countries, and eventually to abolish state boundaries.” Of course UBL was not the first leader to propose violent change and fundamental changes in State status.

In November 1999, a UN Security Council resolution threatened economic sanctions against the Taliban. It condemned “all acts, methods and practices of terrorism as criminal and unjustified, regardless of their motivation.” This language was designed to trump any defenses, including the commonly utilized “political act” treaty exception to exonerate perpetrators from what is otherwise common criminal activity. The Security Council directed Resolution 1333 at the Taliban because it was harboring UBL:

Strongly condemning the continuing use of the areas of Afghanistan under the control of the Afghan faction known as the Taliban . . . , for the sheltering and training of terrorists and planning of terrorist acts, and reaffirming its conviction that the suppression of international terrorism is essential for the maintenance of international peace and security . . . .

Noting that the Taliban benefits directly from the cultivation of illicit opium by imposing a tax on its production and recognizing that these substantial resources strengthen the Taliban's capacity to harbour terrorists,

Deploring the fact that the Taliban continues to provide safe heaven to Usama bin Laden and to allow him and others associated with him to operate a network of terrorist training camps to sponsor international terrorist operations,

Noting the indictment of Usama bin Laden and his associates by the United States of America for, inter alia, the 7 August 1998 bombings of the United States embassies in Nairobi, Kenya and Dar es Salaam, Tanzania and for conspiring to kill American nationals outside of the United States . . . ,

*Reiterating* its deep concerns over the continuing violations of international humanitarian law and of human rights, particularly the discrimination against women and girls, and over the significant rise in the illicit production of opium,

*Stressing* that the capture by the Taliban of the Consulate-General of the Islamic Republic of Iran and the murder of Iranian diplomats and a journalist in Mazar-e-Sharif constituted flagrant violations of established International Law;

*Acting* under Chapter VII of the Charter of the United Nations,

1. *Demands* that the Taliban ... cease the provision of sanctuary and training for international terrorists and their organizations, . . .

8. *Decides* that all States shall take further measures . . .
   (c) To freeze without delay funds and other financial assets of Usama bin Laden and individuals and entities associated with him including those in the Al-Qaida organization,

25. *Expresses* its readiness to consider the implementation of further measures, . . .
26. *Decides* to remain actively seized of the matter.

The Council also requested that States impose countermeasures directed at Al Qaida, the Taliban, and UBL in the following terms:

*Acting* under Chapter VII of the Charter of the United Nations,

[A]ll States shall take the following measures with respect to Usama bin Laden, members of the Al-Qaida organization and the Taliban and other individuals, groups, undertakings and entities associated with them . . .

(a) Freeze without delay the funds and other financial assets or economic resources of these individuals, groups, undertakings and entities, including funds derived from property owned or controlled, directly or indirectly, by them or by persons acting on their behalf or at their direction, and ensure that neither these nor any other funds, financial assets or economic resources are made available, directly or indirectly, for such persons’ benefit, by their nationals or by any persons within their territory;

(b) Prevent the entry into or the transit through their territories of these individuals, provided that nothing in this paragraph shall oblige any State to deny entry into or require the departure from its territories of its own nationals and this paragraph shall not apply where entry or transit is necessary for the fulfillment of a judicial process or the Committee determines on a case by case basis only that entry or transit is justified;

(c) Prevent the direct or indirect supply, sale and transfer . . . to these individuals, groups, undertakings and entities from their territories or by their nationals outside their territories, or using their flag vessels or aircraft, of arms and related materiel of all types including weapons and ammunition, military vehicles and equipment, paramilitary equipment, and spare parts for the aforementioned and technical advice, assistance, or training related to military activities. . . .

A Russian-introduced UN resolution actually imposed sanctions, including an international travel ban to and from Afghanistan. It demanded that the Taliban turn over UBL. The Taliban faction refused. It responded by closing the UN offices in Afghanistan,
and vowed to boycott peace talks. The UN’s subsequent SC Resolution 1390 (January 2002) again implicated UBL and al-Qaida.22

It is not clear whether the Taliban actually “governed” Afghanistan. It was a de facto government, in the sense that it controlled a greater portion of Afghanistan than its rival—the Northern Alliance. Afghanistan’s exiled de jure government continued to occupy the Afghanistan seat at the United Nations without interruption.23 The Taliban might also have been characterized as a mere belligerency; fighting with the Northern Alliance for control of Afghanistan.

The Taliban “government” was recognized by three nations (including Saudi Arabia and the United Arab Emirates). After 911, only Pakistan recognized the Taliban as Afghanistan’s rightful government—to facilitate diplomatic exchanges. So the acts of the Taliban or al-Qaida were not necessarily acts of a State (i.e., representing “Afghanistan”).24 On the other hand, the various UN resolutions directly addressed the Taliban and al-Qaida. They suggested that at least the UN considered the Taliban to be the government of Afghanistan—and that al-Qaida was a related entity akin to a military arm of the State. In either circumstance, the many faces of non-State actor conduct can violate International Law—and are therefore subject to both criminal and civil sanctions in varied international and domestic forums.25

A series of post-September 11th diplomatic incidents impacted Afghanistan’s ability to engage in foreign relations. Ambassador Mullah Abdul Salam Zaeef was the Taliban’s most visible face. He held regular news conferences in Afghanistan’s embassy in Islamabad. These were televised throughout the world, shortly after 911. Pakistan responded to American pressures by ordering Mullah Zaeef to halt the news conferences, because of his litany of claims about civilian casualties from American bombing. These proved—in most cases—to be exaggerated or untrue. At this point, no nation recognized the Taliban as the de jure government of Afghanistan. Zaeef then sought asylum from Pakistan.26 In November 2001, Pakistan terminated its diplomatic relations with the Taliban. In December 2001, Pakistani officials arrested Zaeef.27 He was questioned by

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23 One could readily observe that the UN has grown too large and bureaucratic. A classic illustration is that, while the UN was responding to September 11th, the right hand knew not what the left was doing. In January 2002, Afghanistan lost its General Assembly vote because of $4,600.00 in unpaid dues. Four other countries were permitted to continue voting, despite large unpaid dues bills, because their failure to pay was deemed due to conditions beyond their control. For story, see <http://ca.news.yahoo.com/020131/5/i6zc.html>.


27 D. Frantz, A Nation Challenged: the Embassy; Pakistan Closes Down Taliban’s Last Link to Outside World, NYT (Nov. 23, 2001).
Pakistani and American intelligence officials, who sought information on the location of UBL (and other al-Qaida members).

“The TERRORISM”

[7] Prior to September 11th, there were a number of applicable UN resolutions and treaties in place. They provided a rather incomplete prescription for curing international terrorism.

The 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft [text §6.4], for example, would not trigger even US jurisdiction. An aircraft must either take off or land outside of the territory of the State of registration. In this instance, the four hijacked aircraft began and ended their ill-fated flights within the US. There are other relevant treaties, such as the 1963 Tokyo Convention on Offenses and Certain Other Acts Committed On Board Aircraft, and the 1971 Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation [text §6.4]. However, these treaties were premised upon acts occurring onboard or to the aircraft—as opposed to the plane itself being used as a weapon of destruction.

The most relevant treaty was the 1998 International Convention for the Suppression of Terrorist Bombings, which the US had not ratified. It provides as follows:

The States Parties to this Convention,

. . .

Noting that terrorist attacks by means of explosives or other lethal devices have become increasingly widespread,
Noting also that existing multilateral legal provisions do not adequately address these attacks,

Have agreed as follows:

. . .

Article 2

1. Any person commits an offence within the meaning of this Convention if that person unlawfully and intentionally delivers, places, discharges or detonates an explosive or other lethal device in, into or against a place of public use, a State or government facility, a public transportation system or an infrastructure facility....

2. Any person also commits an offence if that person attempts to commit an offence as set forth in paragraph 1 of the present article.

3. Any person also commits an offence if that person:

(a) Participates as an accomplice in an offence as set forth in paragraph 1 or 2 of the present article; or


(b) Organizes or directs others to commit an offence as set forth in paragraph 1 or 2 of the present article; or

(c) In any other way contributes to the commission of one or more offences as set forth in paragraph 1 or 2 of the present article by a group of persons acting with a common purpose; such contribution shall be intentional and either be made with the aim of furthering the general criminal activity or purpose of the group or be made in the knowledge of the intention of the group to commit the offence or offences concerned. . . .

Article 5

Each State Party shall adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of this Convention, in particular where they are intended or calculated to provoke a state of terror in the general public or in a group of persons or particular persons, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature and are punished by penalties consistent with their grave nature [italics added].

[8] The term “terrorism” means different things to different people.

The term terrorism is typically used in event-specific resolutions and treaties, without defining the specific elements of the term. Presidents, diplomats, journalists, and treaty makers do not necessarily operate from a common set of presumptions when using this term. The International Law debate is typically cast as follows. **Point:** State action is not “terrorism,” even when one could logically characterize particular State conduct as a terrorist act. Terrorism is a term applied to the violent acts of non-state actors (i.e., the NGO al-Qaida) in the pursuit of political objectives. **Counter-point:** many “G-77” nations [text §4.4 & §13.4] frequently employ the term “State terrorism.” They use it when referring to the obstruction of judicial activity by an internal executive body; or to the attempt by a foreign government to topple another government. The US government has labeled seven nations (Cuba, Iran, Iraq, Libya, North Korea, the Sudan, and Syria) as “terrorist States” for a variety of purposes—before and after September 11th. The following is a good starting point for approaching the threshold triggering application of the Laws of War:

No consensus exists on the proper definition of terrorism. In part this is because “terrorism” is not simply a denotative label but also a label of reprobation so that partisans of a given party or political tendency will hesitate to apply it to those groups they champion, while applying it quite freely to groups of whose politics they disapprove, even when the actions being committed by the two sets of groups are substantially comparable. The other difficulty is that nearly all conventional [i.e., State] military or insurgent forces will occasionally engage in actions, whether by design or by accident, that may be plausibly described as terrorist. At what point, then, should a combatant group cease to be counted merely as a belligerent and begin to be counted as a terrorist group?31

One might profit from next proceeding to read the scholarship interpreting UN resolutions on “terrorism” as evidence that it is an international crime, no matter what the

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status of the perpetrator, no matter what the motive. However, these analyses tend to focus on eradicating the “political crime” exception to extraditable crimes as a basis for avoiding a treaty obligation to try or extradite an individual whose violent acts are clandestinely supported by the custodial nation.

In addition to Article 5 of the above 1998 Unlawful Seizure of Aircraft Convention, the UN General Assembly passed the following resolution in 1994—without any vote, and thus no issue-sharpening debate. It “defines” terrorism as follows:

**Declaration on Measures to Eliminate International Terrorism**

*The General Assembly,*

*Guided by the purposes and principles of the Charter of the United Nations,*

*Recalling* the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, the Declaration on the Strengthening of International Security, the Definition of Aggression, the Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations, the Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights,

*Deeply disturbed* by the world-wide persistence of acts of international terrorism in all its forms and manifestations, including those in which States are directly or indirectly involved, which endanger or take innocent lives, have a deleterious effect on international relations and may jeopardize the security of States,

*Solemnly declares the following:*

3. *Criminal acts intended or calculated to provoke a state of terror in the general public,* a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them [can not be tolerated] ... [italics added].

The acts of September 11, 2001 are not necessarily “terrorism,” as that term is employed in many treaties. They require “coercion” or “intimidation” as an element of terrorism. The perpetrators did not indicate their purpose. No one claimed responsibility. No demands were made. For example, Pakistani rebels kidnapped a Wall Street Journal reporter in February 2002. In exchange for his life, they demanded the release of Pakistani detainees at the US Naval Base in Guantanamo, Cuba. When the US refused, they executed their hostage. Unlike past treaty practice, one might seize upon the above UN Declaration or other treaty definitions of acts “calculated to provoke a state of terror” as a fresh and expanded basis for future treaties. One might also reason that after

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September 11th, there would be no further need to make any demands—given the global attention to subsequent (and possibly prior) death threats against westerners and their culture. UBL’s 1998 directive to all Muslims to kill Americans is one example.

A somewhat related definition of terrorism was long ago formulated by Lloyds of London. It has since been used by many insurance companies to exclude coverage in terrorism cases: “An act of terrorism means an act, including but not limited to the use of force or violence and/or the threat thereof, of any person or group(s) of persons, whether acting alone or on behalf of or in connection with any organisation(s) or government(s), committed for political, religious, ideological or similar purposes including the intention to influence any government and/or to put the public, or any section of the public, to fear.”

Article 2 of the International Convention for the Suppression of the Financing of Terrorism (which entered into force April 10, 2002) provides fresh corroboration of the *opinio juris* about the standard definition of terrorism. That is any “act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.”

In the April 2002 Organization of Islamic Conference (OIC) Declaration, Islamic nations meeting in Kuala Lumpur reacted to Israel’s surrounding of Yasir Arafat’s complex in the West Bank, after a wave of suicide bombings (especially the first by an eighteen year old female Palestinian). The OIC foreign ministers rejected external pressure to have them characterize the Palestinians’ fight with Israel as “terrorism.” They thus declared as follows:

> We reject any attempt to link terrorism to the struggle of the Palestinian people in the exercise of their inalienable right to establish their independent state with Al-Quds Al-Shrif (Jerusalem) as its capital. We reject any unilateral action taken against any Islamic country under the pretext of combating international terrorism. We will work toward the early convening of an international conference under the auspices of the United Nations to formulate a joint organized response of the international community to terrorism in all its forms and manifestations.

The United States Antiterrorism Act applies to “[w]hoever kills a national of the United States … while such national is outside the United States.”

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36 18 USC §2332(a) (italics added). This would apply, for example, to the prosecution of those responsible for the death of Americans who died in the 1998 embassy bombings in Kenya and Tanzania or in the USS Cole in Yemen. However, § 2332(b) applies to such terrorism “transcending national boundaries,” which could apply to any planning of September 11th which occurred outside of the US but targeted the World Trade Center and the Pentagon.
The UN’s post-Cold War activism resurfaced in its response to the September 11th attacks on the US.

On September 12th, 2001, the UN General Assembly (UNGA) enacted a resolution which urgently “calls for international cooperation to prevent and eradicate acts of terrorism, and stresses that those responsible for aiding, supporting, or harbouring the perpetrators, organizers and sponsors of such acts will be held accountable.” On the same day, the UN Security Council (UNSC) reacted with its own unequivocal statement—Resolution 1368, which:

1. Unequivocally condemns in the strongest terms the horrifying terrorist attacks which took place on 11 September 2001 in New York, Washington, D.C. and Pennsylvania and regards such acts, like any act of international terrorism, as a threat to international peace and security; ....

3. Calls on all States to work together urgently to bring to justice the perpetrators, organizers and sponsors of these terrorist attacks and stresses that those responsible for aiding, supporting or harbouring the perpetrators, organizers and sponsors of these acts will be held accountable; ...

5. Expresses its readiness to take all necessary steps to respond to the terrorist attacks of 11 September 2001, and to combat all forms of terrorism, in accordance with its responsibilities under the Charter of the United Nations;

6. Decides to remain seized of the matter.

The UNSC therein referred to “its” readiness to act to combat terrorism per “its” responsibilities under the Charter, and to “remain seized” to retain legal control (anticipating that the US would take immediate measures in the name of self-defense. On November 14, 2001, the UNSC passed Resolution 1377 On Threats to International Peace and Security Caused by Terrorist Acts, wherein the Council:

Declares that acts of international terrorism constitute one of the most serious threats to international peace and security in the twenty-first century,

Further declares that acts of international terrorism constitute a challenge to all States and to all of humanity,

Affirms that a sustained, comprehensive approach involving the active participation and collaboration of all Member States of the United Nations, and in accordance with the Charter of the United Nations and international law, is essential to combat the scourge of international terrorism,

Stresses that continuing international efforts to broaden the understanding among civilizations and to address regional conflicts and the full range of global issues, including development issues, will contribute to international cooperation and collaboration, which themselves are necessary to sustain the broadest possible fight against international terrorism,

Calls on all States to intensify their efforts to eliminate the scourge of international terrorism.

UNSC Resolution 1373 (September 2001) previously reaffirmed “the principle established by the General Assembly in its declaration of October 1970 (resolution 2625

(XXV)) and reiterated by the Security Council in its resolution 1189 ..., namely that every State has the duty to refrain from organizing, instigating, assisting or participating in terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts....”

39. The Council therein:

2. Decides also that all States shall: . . .
   (b) Take the necessary steps to prevent the commission of terrorist acts, including by provision of early warning to other States by exchange of information;
   (c) Deny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens; . . .
   (e) Ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts; . . .
   (g) Prevent the movement of terrorists or terrorist groups by effective border controls and controls on issuance of identity papers and travel documents, and through measures for preventing counterfeiting, forgery or fraudulent use of identity papers and travel. . . .

5. Declares that acts, methods, and practices of terrorism are contrary to the purposes and principles of the United Nations and that knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the United Nations;

6. Decides to establish . . . a Committee of the Security Council, consisting of all the members of the Council, to monitor implementation of this resolution, with the assistance of appropriate expertise, and calls upon all States to report to the Committee, no later than 90 days from the date of adoption of this resolution and thereafter according to a timetable to be proposed by the Committee, on the steps they have taken to implement this resolution; . . .

9. Decides to remain seized of this matter.”

This September 2001 Resolution is comparable to Resolution 678,40 which provided express legal authority for the first Persian Gulf War. The UNSC therein authorized States to “use all necessary means” to restore international peace and security, after Iraq invaded Kuwait in 1990. But no contemporary resolution authorizes States to take all necessary steps to implement it. Those prior resolutions arguably serve as warnings that the Council stands ready to implement them with future action. None of them authorized the use of force beyond that necessary for the US to exercise its pre-existing, inherent right of self-defense (until the Security Council could act). Even the November 2002 UNSC Resolution 1441, regarding Iraq’s weapons of mass destruction, requires further action in the event of a material breach by Iraq.41

UBL broadcasted his reaction to this UN activism in a taped statement from an undisclosed location. He also chastised the contemporary Muslim governments of a number of UN countries as “infidels.” Thus:

Those who want to solve our tragedies through the U.N. are hypocrites, deceiving God, the prophet and deceiving all believers.

41. See <http://home.att.net/~slomansonb/UNSC1441.html>.
Who issued the resolution on the division of Palestine in 1947 which gave the Muslim country to the Jews? It was the U.N. Those who pretend they are leaders of the Arab world and remain members of the U.N. are infidels.  

[10] As part of the US comprehensive anti-terrorist regime, the President issued an executive order—giving the US Treasury Secretary broad powers to sanction banks in other countries that did not fully co-operate with the US war on terrorism.

This executive order froze the assets of a number of individuals and organizations suspected of providing financial backing for terrorists, at home and abroad. The President sought—in the strongest of terms—the cooperation of governments and banks in all four corners of the globe.

In 1998, former President Clinton issued an executive order which sought to freeze the assets of UBL and al-Qaida. It did not include many of the other organizations linked to al-Qaida, which were on the list promulgated by President Bush in his September 24, 2001 order. Unlike President Bush's executive order, President Clinton's order did not openly threaten sanctions against countries and overseas financial institutions—who did not then choose to join the US in this counter assault on the clandestine financing of terrorism. President Bush acknowledged that his order was much more sweeping. He specifically targeted groups operating in Egypt, the Philippines, Somalia, and Yemen.

These groups should anticipate that any legal reaction—in which they seek judicial review of a US Department of State's (DOS) decision characterizing them as “terrorist organizations”—would have to trump the following counter-arguments:

it is beyond the judicial function for a court to review foreign policy decisions of the Executive Branch. These are political judgments, ‘decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry’ [and a] foreign entity without property or presence in this country has no constitutional rights, under the due process clause or otherwise.  

Nor could such DOS designations be attacked on First Amendment freedom of expression grounds.  

Seven months before the September 11th attack, US National Security Agency Director General Mike Hayden lamented that:

Osama bin Laden has at his disposal the wealth of a $3 trillion dollar a year telecommunications industry that he can rely on. We (the United States) are behind the curve in ... the global telecommunications revolution.

In the previous world order, our primary adversary was the Soviet Union. Technologically, we [merely] had to keep pace with an oligarchic, resource-poor, technologically inferior, over-bureaucratized, slow-moving nation-state.  

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44 First Amendment expression: Humanitarian Law Project v. Reno, 205 F.3d 1130 (9th Cir., 2000).
If a defendants' assets were thereby frozen in the US, they could be the object of a resulting money judgment. In the first civil lawsuit involving the September 11th attack on the World Trade Center, a widow sued UBL, the Islamic Emirate of Afghanistan, and its Taliban leadership. The plaintiff's attorney said he had no doubt that he will recover money for the family of the victim from this available fund.46

[11] A prior UN resolution was the obvious model for the US “9-11” terror financing legislation. The UN version resolved that all nations should ratify its draft international treaty prohibiting the financing of terror. It was opened for signature in January 2000 and entered into force in April 2002 (four months after the interim US legislation).

In Resolution 1373, the UN Security Council resolved as follows:47

Acting under Chapter VII of the Charter of the United Nations,
1. Decides that all States shall:
   (a) Prevent and suppress the financing of terrorist acts;
   (b) Criminalize the willful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts;
   (c) Freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled directly or indirectly by such persons. . .

Because of comparatively lax banking laws, countries like the Cayman Islands and Switzerland have had to change their laws to require more financial disclosure, as a condition of doing business with the US. The US Treasury Secretary thus has the power to shut out foreign banks from the American market. President Bush remarked that:

[w]e're putting banks and financial institutions around the world on notice. We will work with their governments, ask them to freeze or block terrorists' ability to access funds in foreign accounts. If they fail to help us by sharing information or freezing accounts, the Treasury Department now has the authority to freeze their banks' assets and transactions in the United States. ... Money is the lifeblood of terrorist operations ... [and] today we're asking the world to stop payment. If you do business with terrorists, if you support or sponsor them, you will not do business with the United States of America.48

Switzerland, although not a member of the UN until a year after 911, would be expected to comply with both the US and UN financial tracking programs—both to combat terrorism and also to remain in business, notwithstanding its long history of bank secrecy. In December 2002, for example, Switzerland's highest court rejected an attempt

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to prevent US investigators from getting information about a Zurich bank account that allegedly funneled money to an Islamic charity with alleged links to al-Qaida. The US Treasury Department froze the assets of Benevolence International Foundation (BIF) a year earlier when its leader, a Syrian-born US citizen, was accused of siphoning off some charity-held money to help Usama bin Laden and other terrorists. The Swiss State Secretariat for Economic Affairs said that it had ordered a freeze of any assets held in Switzerland by this international foundation. The Secretariat was responding to a similar order by the United Nations sanctions committee. This ruling also applies to the Canadian and Bosnian affiliates of BIF. Anyone handling money for these organizations must immediately report the funds to Swiss authorities. 49

On April 10, 2002, the International Convention for the Suppression of the Financing of Terrorism entered into force. 50 It obligates States Parties either to prosecute or extradite persons accused of funding terrorist activities. It further requires banks to enact measures to identify suspicious transactions as follows:

Article 2
1. Any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and willfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out:
   (a) An act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex; or
   (b) Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.

Article 3
This Convention shall not apply where the offence is committed within a single State, the alleged offender is a national of that State and is present in the territory of that State and no other State has a basis . . . to exercise jurisdiction. . . .

Article 7
1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences set forth in article 2 when:
   (a) The offence is committed in the territory of that State;
   (b) The offence is committed on board a vessel flying the flag of that State or an aircraft registered under the laws of that State at the time the offence is committed;
   (c) The offence is committed by a national of that State.

Annex

50 For text, visit <http://untreaty.un.org/English/Terrorism.asp>, click on Text.


The interim US terror finance legislation required essentially the same response by nations wishing to deal with US banks. This subsequent treaty, its comprehensive applicability to all treaties of listed in its Annex, and ratification by enough nations to enter into force, appear to acquiesce in the US demands that financial institutions react to any suspicious transaction.

[12] Various post-911 scenarios suggested that much needs to be done to protect against environmental terrorism.

In July 2002, a Japanese ship began its 18,000 mile voyage from Japan to the UK, carrying more than 550 pounds of nearly weapons-grade plutonium. This was the first shipment of its kind, anywhere in the world, since 911. The Pacific Pintail relied for protection on several deck-mounted 30-millimeter machine guns. A shipping company spokesman said that “These ships are among the safest that travel on the seas, with double hulls, buoyancy tanks, satellite navigation systems and double the crew they [normally] need.”

The first shipments of reprocessed fuels between Europe and Japan, in the mid-1980's, were made under official naval escort provided by the US, the UK, and France. Guam's delegate to the US House of Representatives thus commented: “The [US] State Department sent some people over who are responsible for nuclear safety, and said they have looked into the possibility of the ship leaking. Our bigger concern, though, is security, given the state of the world we are [now] in. This is nuclear weapons grade fuel, and we would like to know, what will happen if there is a threat?” Environmental activists fear that today's shipment will set a standard for the security of what could be dozens of similar shipments of reprocessed fuels from Britain to Japan, which would create a huge temptation to international terrorist groups. They have already used small, high-speed boats to attack Western naval vessels.

The potential threats were addressed in a critique of flaws in maritime security involving plutonium shipments. It was written six years ago by experts from Sandia National Laboratories, in conjunction with the Los Alamos and Lawrence Livermore laboratories—the three premier weapons laboratories in the US. Their report warned against risks from the seizure of the plutonium cargo aboard a lightly armed ship, to a
devastating attack using high explosives. That could create the equivalent of a huge “dirty bomb” at sea.\textsuperscript{51}

The US federal government’s plan—announced in December 2003, to ship a nuclear reactor from California around the tip of South America—to South Carolina presents another opportunity for environmental terrorism. While no departure date was set, the US Department of Transportation announced that it would ship a 770-ton retired reactor that is too large to navigate the Panama Canal. Although its spent fuel was removed, the US State Department expressed concern about this shipment.\textsuperscript{52}

The widely reported biological and chemical weapons program in Iraq could be unleashed, should the US attack Iraq in its continuing war on terrorism.

\section*{FOREIGN RESPONSES}

\textsuperscript{13} A February 2002 Gallup poll taken in nine Muslim nations revealed that: (a) eighteen percent of those polled believed that Arabs carried out the attacks; and (b) only nine percent believed that the US presence in Afghanistan was morally justified.

Many blamed Israel or the US for the September 11\textsuperscript{th} attacks. Commenting on this poll, President Bush said that “[t]here is no question that we must do a better job of telling the compassionate side of the American story.”\textsuperscript{53}

One could readily observe that as of 911, the US had a number of enemies with something to gain if global terrorism were to remain unchecked. One historian laments the irony that terrorists can resent the US without regard to blameworthy conduct. Thus:

\begin{quote}
“I think the American people need to know that we live in a world where by virtue of America’s leadership … we will be targeted,” declared National Security Adviser Sandy Berger after the bombings of two US African embassies on August 7, 1998.

When asked “What is it that these terrorist want from the United States?,” … [then] head of the foreign policy department at the Brookings Institution (Washington think tank) replied: “Well, the answer is it’s not anything we’re simply doing. It is who we are. It’s the fact that we’re the most powerful country in the world. It’s the fact that we’re a secular country. … It is simply who we are and it is our existence that really bothers them.”

Thomas Friedman of the New York Times would say amen. Terrorists, he wrote, “have no specific ideological program or demands. Rather, they are driven by a generalized hatred of the U.S., Israel and other supposed enemies of Islam.”\textsuperscript{54}
\end{quote}

\textsuperscript{14} The immediate State and organizational support for the US was extraordinary.

NATO’s public reaction was that “[t]he facts are clear and compelling. The information presented points conclusively to an al-Qaida role, in the 11 September

\begin{footnotesize}
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\item[\textsuperscript{51}] See details in H. French, Japanese Shipment of Nuclear Fuel Raises Security Fears, NYT (July 5, 2002).
\item[\textsuperscript{52}] For story, see Matthew T. Hall, Federal Government Clears Way for Nuclear Reactor to be Moved, San Diego Union Tribune (Dec. 2, 2003). See <www.signonsandiego.com>, then use Search function).
\item[\textsuperscript{53}] Associated Press, Polls: Islamic Nations Resent U.S., NYT (Feb. 27, 2002). The President’s response was carried in the Reuters version of this newspaper account.
\item[\textsuperscript{54}] Why Do Terrorists Keep Picking on the United States?, Ch.1, in W. Blum, ROGUE STATE: A GUIDE TO THE WORLD’S ONLY SUPERPOWER 29 (Monroe, ME: Common Courage Press, 2000).
\end{itemize}
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attacks. We know that the individuals who carried out these attacks were part of the world-wide terrorist network of al-Qaida, headed by Usama bin Laden and his key lieutenants and protected by the Taleban.\textsuperscript{55}

A host of European entities followed suit in their September 14th Joint Declaration:\textsuperscript{56}

We call on all countries to redouble their efforts in the fight against terrorism. This is essential for security of our citizens and the stability of our societies. International organisations, and the United Nations in particular, must make this an absolute priority.

International law makes it possible to hunt the perpetrators, organizers and instigators of terrorism wherever they are. It is not tolerable for any country to harbour terrorists.

The European Union will accelerate the implementation of a genuine European judicial area, which will entail, among other things, the creation of a European warrant for arrest and extradition ... and the mutual recognition of legal decisions and verdicts.

By the third week after September 11th, various heads of foreign governments were planning their responses and issuing ultimatums. British Prime Minister Tony Blair said: “I say to the Taliban: Surrender the terrorists or surrender power. It's your choice.” US President George Bush said: “And they must do so, otherwise there will be consequences.”\textsuperscript{57} In response, the Afghan Ambassador to Pakistan, Abdul Salam Zaeef, said: "Only Allah changes the regime. And only Allah brings others instead of us.” On September 21, 2001, the European Council stated that “On the basis of Security Council Resolution 1368, a riposte [by the US] is legitimate.”\textsuperscript{58}

On October 16, 2001, the US and Pakistan agreed to work urgently for the installation of a new, broad-based government in Afghanistan. It would include moderate elements of the Taliban movement, whose leadership became the literal target for the American-led military campaign. US Secretary of State Powell praised Pakistan by lauding the achievements of General Pervez Musharraf—the Pakistani military general who seized power in a military coup. In a public forum, Musharraf said that “[w]e agreed that durable peace in Afghanistan would only be possible through the establishment of a broad-based, multiethnic government representing the demographic contours of Afghanistan, freely chosen by the Afghans without outside interference.”

Those who would play a role in the formation of such a government met in December 2001, at the UN-sponsored meeting in Bonn, Germany. Four Afghan factions

\textsuperscript{55} \textit{NATO charge}: Statement by NATO Secretary General Lord Robertson, 2 October 2001: <http://www.nato.int/docu/speech/2001/s011002a.htm> (includes audio file).

\textsuperscript{56} Joint Declaration By the Heads of State and Government of the European Union, The President of the European Parliament, The President of the European Commission, And the High Representative for the Common Foreign and Security Policy: Visit <http://ue.eu.int/newsroom/>, click on External Relations, then click on \textit{USA-Terrorist Attack} (#8).

\textsuperscript{57} \textit{British ultimatum}: See NYT (Oct. 1-3, 2001), especially, D. Frantz, A Nation Challenged: The Afghans' Taliban Say They Want to Negotiate With the U.S. Over bin Laden, NYT (Oct. 3, 2001).

attended this round of negotiations. A six-month interim administration was thus initiated on December 22, 2001, and led by Hamid Karzai—a Pashtun leader who was then fighting the Taliban in his home territory of Kandahar. US Secretary of State Colin Powell stated that the new government should also include the former Afghan king Mohammad Zahir Shah and “political leaders, moderate Taliban leaders, elements from the Northern Alliance, tribal elders ... [and] Afghans living outside their country. The political process needs to be placed on a fast track in order to forestall the possibility of a political vacuum. It should not lag behind the fast moving events in the military field, nor should any attempt be made by any warring faction to impose itself on Afghanistan in the wake of the military strikes against the Taliban.”

In February 2002, Afghanistan’s new interim leader came to the US, the UK, and a few other nations to seek assistance with rebuilding Afghanistan.

In June 2002, this obscure, western-educated businessman was chosen by eighty-five percent of the 1,500 delegates to become Afghanistan’s first-ever elected president. As a Pashtun from the south, Karzai enjoyed the backing of the former king (who was exiled for almost three decades), the minority-dominated Northern Alliance, the United States, and the United Nations.

Afghanistan’s Taliban issued its reaction to the various ultimatums from abroad. The Taliban curtailed activities of UN relief workers, threatening to kill them unless they stopped using their communications and transportation equipment; claimed not to know UBL’s whereabouts, thus being unable to turn him over to the US; and warned Americans that, should the US forces attack, they would be “igniting a fire that will burn them.” Two of the three nations which had previously recognized the Taliban, withdrew their recognition (Saudi Arabia and the United Arab Emirates). Pakistan became the only country to recognize the Taliban. This recognition provided the lone medium for diplomatic communication between the rest of the world and the Taliban.

By December 2001, the US military operation in Afghanistan induced the fall of the Taliban and the installation of the new foreign-supported government. A UN Security Council resolution authorized the deployment of an international peacekeeping force, after several weeks of negotiation and only hours before the arrival of the initial British component of this force. In February 2002, President Karzai’s interim government of Afghanistan requested an augmentation of peace-keeping forces to facilitate its stability. At this juncture, it appeared that the international community would not, once again, forsake Afghanistan.

**US MILITARY RESPONSE**

**[15] The US began a massive military buildup.**

On the day after the September 11th attacks, the foreign press (first in China) widely reported that US special forces were introduced into Afghanistan. The US did not declare war on Afghanistan. Holding an entire nation responsible for the acts of some


60 P. Tyler, Islamabad: Powell Suggests Role for Taliban, NYT (Oct. 17, 2001).

61 Reuters, Afghan Loya Jirga Enters Critical Stage for Karzai, NYT (June 14, 2002).
non-State actors would appear to be a collective form of punishment against innocent civilians—which would not be condoned under International Law.

President Bush, in a nationally televised speech, stated that all other nations were either with or against the US in its response to terrorism. Pakistan, which borders Afghanistan, decided to help the US by allowing US forces to use its air space and authorizing US ground troops to enter Pakistan—for the purpose of invading Afghanistan to facilitate the arrest of UBL and members of the al-Qaida network. Ironically, there were reports that thousands of Pakistani military and intelligence advisers, who were supporting the Taliban, were secretly flown out of Afghanistan with US approval.62

A joint resolution of the US Congress, enacted pursuant to its 1973 War Powers Act (WPA),63 added that “the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons” (italics added).64 By authorizing this use of force, Congress stopped short of declaring war. One reason is that no known nation attacked the US. The Taliban was never expressly accused of wrong-doing, other than its failure to surrender UBL—which it claimed to be rooted in the Islamic custom which precludes forcing out one’s guests.

Under the 1973 War Powers Act—which every President has virtually ignored via conciliatory lip service—the Commander in Chief has 60 to 90 days to inject armed forces into a conflict without congressional consultation. This September 2001 joint resolution requires congressional approval to continue with this particular use of force after passage of eight months from its issuance (i.e., May 14, 2002).

Iran, previously branded as a terrorist State by the US, is one nation that was opposed to the US-led international coalition. The others include Egypt. Instead, such countries assert that the United Nations should exclusively lead the drive against international terrorism.


The US deployed multiple cruise missiles and bombs in various locations. This opening volley was carefully described as being launched against a terrorist network, rather than the people of Afghanistan. This was the first time that a military strike was accompanied by humanitarian aid, in the form of US $320,000,000.00 worth of food and other necessities dropped by coalition aircraft into this military theater. Almost two weeks later, the US injected more ground troop units into Afghanistan via paratroop drop (after the earlier arrival of special forces). Shortly thereafter, the US began to employ carpet bombing—claiming that it did not do so in densely populated areas.

Iraq characterized this strike as “treacherous aggression.” Saddam Hussein called it “aggression perpetrated outside International Law.” Usama bin Laden responded that “[n]either America nor the people who live in it will dream of security before we live it in Palestine.”

A number of protesters (especially in Indonesia, Iran, Iraq, Italy, and Japan) swarmed the US embassies in their respective countries. Local troops were deployed to protect the embassy premises. No embassies were occupied by protesters, as had occurred during the 1979 Iranian Hostage Crisis.


References were made to Saddam Hussein’s connection with September 11, 2001—which subsided with the passage of time and lack of proof. The primary basis for the US starting the Iraq War was, instead, the supposed presence of weapons of mass destruction. This claim was never established.

Two things were established: (1) the world had one less totalitarian despot; and (2) the Iraqi people generally welcomed the US toppling of arguably the world’s most appalling cutthroat—who had used chemical weapons of mass destruction against his own population in 1988 (killing 5,000 Kurds).

The US would nevertheless have some primal issues with which to deal, as a result of its occupation of Iraq, and its general conduct of the global war on terror—as addressed in the remainder of §10.7.

END GAME

[18] The “end game” was not the conclusion of the military campaigns in Afghanistan and Iraq. Nor would the capture and prosecution of Saddam Hussein—and of UBL, which is unlikely to occur—be the final objective. Such events would actually be just small cogs in the long-term “war on terrorism.”

As stated in the Joint Statement on Counterterrorism by the President of the United States and the President of Russia at Shanghai, October 21, 2001:

The two Presidents are resolved to advance cooperation in combating new terrorist threats: nuclear, chemical and biological, as well as those in cyberspace. They agreed to enhance bilateral and multilateral action to stem the export and proliferation of nuclear, chemical and biological materials, related technologies, and delivery systems as a critical component of the battle to defeat international terrorism.65

But the US would soon lose much of the global sympathy and support foisted upon it in the period shortly after September 11, 2001. A number of traditional allies would not support the war in Iraq. There would also be fallout from non-traditional applications of the Laws of War, as discussed in the remainder of this final section on the use of force.

Should the current phase of the war on terror wind down—after the exit of the US military and its bases from Iraq—there will have to be more coalition building, to

legitimate future uses of military power. The US will also prepare for new threats, from the many faces of terrorism.66

But the US can never return to the pre-9-11 status quo ante. It must continue to dissect and evaluate the complex cultural, diplomatic, legal, and military issues lingering in the slipstream of September 11, 2001.