

Bush Chose War
(short version)
© Miles Townes 2004

I. Introduction

On the morning of 11 September 2001, President George W. Bush was at a Florida elementary school. When told that a plane had struck the World Trade Center, he dismissed the news as a possible accident. Some minutes later, he was told a second airplane had struck the World Trade Center. He took his leave of the students, and at 9:30 AM addressed the nation, announcing that "two airplanes have crashed into the World Trade Center in an apparent terrorist attack against our country" and vowing that "terrorism against our nation will not stand".¹ That same morning, a third plane hit the Pentagon and a fourth crashed in Pennsylvania.

That evening, President Bush again addressed the nation, describing the events as "evil, despicable acts of terror" and "acts of mass murder intended to frighten our nation into chaos and retreat".² In this address he also asserted that "America and our friends and allies... stand together to win the war against terrorism",³ but this last phrase was a minor part of a speech otherwise focused on bringing the perpetrators to justice. So far, terrorism was still terrorism.

When he spoke at a photo opportunity the morning of 12 September, the situation had worsened: "The deliberate and deadly attacks which were carried out yesterday against our country were more than acts of terror. They were acts of war".⁴ Overnight, the attacks had attained the status of war, and this became the dominant theme in the Administration's response to 11 September. This response solidified into "War on Terrorism", as formulated in an address by the President to a joint session of Congress on 20 September. Many Americans eagerly assented to this definition, and Bush enjoyed approval and acclaim for his leadership in the face of adversity.

But not all agreed that war was a necessary or even appropriate response to terrorism. Some observers raised concerns about the logic and consequences of declaring war on terrorism; Hendrik Hertzberg, writing in the *New Yorker*, called the decision a "category mistake":

The metaphor of war—and it is more metaphor than description—ascribes to the perpetrators a dignity they do not merit, a status they cannot claim, and a strength they do not possess. Worse, it points toward a set of responses that could prove futile or counterproductive.⁵

¹ Office of the Press Secretary. "Remarks by the President After Two Planes Crash Into World Trade Center". www.whitehouse.gov; September 11, 2001. 9:31 AM.

² Office of the Press Secretary. "Statement by the President in His Address to the Nation". www.whitehouse.gov; September 11, 2001. 8:30 PM.

³ *Ibid.*

⁴ Office of the Press Secretary. "Remarks by the President in Photo Opportunity with the National Security Team". www.whitehouse.gov; September 12, 2001. 10:53 AM.

⁵ Hertzberg, Hendrik. "Tuesday, and after". *New Yorker*, 24 Sep 2001. www.newyorker.com/talk/content/?010924ta_talk_comment

Hertzberg's argument was echoed in October 2001 by Sir Michael Howard⁶, and much later by Philip Heymann.⁷ The criticism of these observers suggested a need for debate over the response to 11 September, a suggestion that went unheard in the rush to invade Afghanistan. The American public accepted the 'War on Terrorism' largely unquestioned, and marched along with little concern for alternative responses.

There were alternatives, and war was not necessarily the most appropriate nor the most effective. Now, nearly three years after those events, I want to resurrect that debate, and introduce an alternative response—grounded in international law—to the events of 11 September. This begins in Chapter II with an examination of the Bush response, particularly as it developed from 11 September up to the address to Congress on 20 September. What is important to this essay is how the decision was justified in public, what it looked like in practice, and whether its stated goals were appropriate and attainable. Regardless of ulterior motives or bureaucratic machinations, the War on Terrorism will be seen by most people through its public manifestations—what the Administration, especially the President, says and does.

I must here acknowledge the limitations of my sources, in that I do not have access to any classified or confidential materials, nor the historical distance that would permit thorough analysis. Especially where the Administration's case for war is concerned, I rely on official speeches, public record, and other open sources, many of which are inevitably inflected with bias. This would be a severe disadvantage if my goal was objective dissection of the Administration's response, but I am more interested in the response as it was presented to Americans and the world; there is little disadvantage from my sources. Furthermore, where the theoretical literature on war, terrorism, and international law are concerned, I draw most heavily from sources available prior to 11 September—to avoid the criticism that my argument only makes sense in hindsight.

Chapter III introduces the literature on war, to evaluate the Bush response against traditional and modern notions of war. As Sir Michael Howard said, "to use, or rather to misuse the term 'war' is not simply a matter of legality, or pedantic semantics. It has deeper and more dangerous consequences".⁸ In declaring war on terrorism, the Administration has arrived at a specific interpretation and understanding of such acts in international politics. It is important to ascertain whether that interpretation concurs with received notions of war and military action.

Chapter IV covers the literature on terrorism, and explores the significance of 11 September. Terrorism must be understood as both the fact of violence and the effort at communication, and a response to any given terrorist activity must be mindful of those two aspects. From there, the chapter deals with possible counterterrorism responses and assesses the War on Terrorism.

Chapter V explores one alternate response in particular, to approach the events of 11 September as crime against humanity—in which the laws offended by the attacks are international, and the response is likewise. This will entail a discussion of possible means of enforcement and prosecution of the terrorists, and how such a response compares to the present. Chapter VI presents conclusions drawn from the preceding chapters.

The question at hand is whether the Administration had options after 11 September. Why the Administration made the decision—and whether it believes the decision correct—is mostly beyond the scope of this paper; it is not my intent to offer policy recommendations to

⁶ Howard, Sir Michael. "War on Terrorism". talk given at RUSI, 30 Oct 2001.
<http://website.lineone.net/~ccadd/howard.htm>

⁷ Heymann, Philip. *Terrorism, Security, and Democracy: Winning without war*. MIT Press; Cambridge, MA, 2003.

⁸ Howard, Sir Michael. "War on Terrorism".

current or future administrations. However, that decision has had profound consequences for global security, and has set a precedent for how the U.S. and other nations respond to terrorism. As such, critical evaluation of the Administration's response is absolutely necessary. My goal is to encourage the debate that was lost in the march to Afghanistan, to spur discussion and examination of the conventional wisdom concerning the War on Terrorism. War was a choice, made by President Bush and his colleagues, and we can and should ask whether that choice was correct.

II. The Administration's Case for War

In the days following 11 September, President Bush's rhetoric and practice solidified into what is now the "War on Terrorism". War, of course, can be used as a rhetorical device; for now it is assumed that the Administration meant it literally, reflecting the desire of the Administration and many in the US for substantive military action.

President Bush recalls thinking in the moments after he was informed of the second aircraft strike: "They had declared war on us, and I made up my mind that we were going to war".⁹ He did not yet know, however, who "they" were; not until later that day would he learn that terrorists from the Al Qaeda network had been responsible.¹⁰ In his brief statement delivered from the school that morning, he made no mention of this decision to go to war; he did label the attacks "terrorism". Nor did his decision to go to war arise in his remarks that evening, aside from passing mention of 'war against terrorism'. In private, however, Bush had made up his mind. That evening he told his advisors, "I want you all to understand that we are at war and we will stay at war until this is done. Nothing else matters".¹¹

By the next morning, his Administration was fairly certain that Al Qaeda had been behind the attacks. He did not share this with the press and public when describing the previous day's events as "acts of war", instead describing only a nameless "enemy". Asked to explain the escalating rhetoric in a press conference later that day, White House Spokesman Ari Fleischer answered that "the President will share his thoughts with you as his thoughts develop as a result of the conversations he has with the security team, and as he thinks this matter through in his mind".¹² Pressed to explain the significance of "acts of war", Fleischer responded:

I think the American people know that when the United States is attacked in the manner it was attacked, this is an act of war. And I think there is no other way to describe it. And I think that's what the American people expect from their President, is a President who will talk with them straight and direct about it.¹³

According to Fleischer, it was the "manner" in which the attacks were conducted that justified the "acts of war" categorization—not the identity of the attackers. Of course, President Bush had not been entirely "straight and direct" with the American people; he had yet to reveal that Al Qaeda was behind the attacks.

⁹ Woodward, Bob. *Bush At War*. Simon & Schuster; NY, 2003. p15.

¹⁰ Ibid.

¹¹ Clarke, Richard. *Against All Enemies*. Free Press; NY, 2003. p24.

¹² Office of the Press Secretary. "Press Briefing by Ari Fleischer". www.whitehouse.gov; September 12, 2001. 4:05 PM.

¹³ Ibid.

On 16 September, President Bush did describe Usama Bin Ladin as "the prime suspect".¹⁴ The following day, when asked what the war on terror would look like, he responded:

I believe, I know that an act of war was declared against America. But this will be a different type of war than we are used to.... this is a different type of enemy than we're used to.... and we're adjusting our thinking to the new type of enemy, These are terrorists who have no borders.... It's going to require a new thought process.... it's a new type of war, it's going to take a long time to win this war.¹⁵

Here the President seems to be acknowledging at least some meaningful difference between 11 September and traditional ideas of war, but he offered little further elaboration.

On 18 September, President Bush signed into law a bill which authorized him to use force against

...those nations, organizations, or persons he deemed 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.¹⁶

The bill had passed the Senate unanimously, and passed the House of Representatives by 420-1. In floor statements prior to her lone "nay" vote, Congresswoman Barbara Lee stated that the President already had the authority to launch reprisals, and she urged her colleagues to "think through the implications" of the vote.¹⁷ In a later op-ed, Lee called the bill "a blank check to attack anyone involved in the Sept. 11 attacks".¹⁸

Note, however, that the bill authorizes the use of force with the specific aim "to prevent future acts of international terrorism". Thus, the mandatory goal of the Bush response is prevention of terrorism—by law. The language is also limited only to such "nations, organizations, or persons" involved in the "terrorist attacks that occurred on September 11". This is an important limitation, because the next day Bush told reporters that "this is not a war against a specific individual, nor will it be a war against solely one organization. It is a war against terrorist activities".¹⁹ This decision was based on a desire within the Administration to avoid "elevating" Bin Ladin and Al Qaeda,²⁰ but as policy it exceeds the scope of the Resolution.

In describing the war and its objectives at the same press conference, President Bush asserted that "the mind-set of war must change. It is a different type of battle. It's a

¹⁴ Office of the Press Secretary. "Remarks by the President Upon Arrival". www.whitehouse.gov; September 16, 2001. 3:23 PM.

¹⁵ Office of the Press Secretary. "Guard and Reserves 'Define Spirit of America'; Remarks by the President to Employees of the Pentagon". www.whitehouse.gov; September 17, 2001. 11:45 AM.

¹⁶ U.S. Government Printing Office. "Public Law 107-40: To authorize the use of United States Armed Forces against those responsible for the recent attacks launched against the United States". September 18, 2001. http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_cong_public_laws&docid=f:publ040.107

¹⁷ Lee, Barbara. "Authorizing Use of United States Armed Force Against Those Responsible for Recent Attacks Against the United States". *Congressional Record*, p H5642-5643 14 Sept. 2001.

¹⁸ Lee, Barbara. "Why I opposed the resolution to authorize force". *SF Chronicle*; Sunday, Sept. 23, 2001. pD-7. <http://sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2001/09/23/ED228685.DTL>

¹⁹ *Ibid.*

²⁰ Woodward, Bob. *Bush at War*. 81, 105. Specifically, Rumsfeld worried that "vilification of Bin Laden could rob the United States of its ability to frame this as a *larger* war" [emphasis mine]. p 81.

different type of battlefield. It's a different type of war".²¹ He did not elaborate on specific differences between this and traditional concepts of war, but on the morning of 20 September, Secretary of Defense Donald Rumsfeld stated

What we're engaged in is something that is very, very different from World War II, Korea, Vietnam, the Gulf War, Kosovo, Bosnia, and the kinds of things that people think of when they use the word "war" or "campaign" or "conflict".... It is very different than embarking on a specific campaign against a specific country within a specific time frame for a specific purpose. There's no question but that the full resources of the United States government across the entire spectrum—from the political, diplomatic, the economic, financial, as well as other areas, plus military—are all going to have to be engaged.²²

Given the vast difference between popular perception and the Administration's plan, one is left to wonder why they used the word 'war' at all.

In any event, the Administration's response reached its definitive formulation in the President's address to a joint session of Congress on 20 September, 2001.²³ In the speech, he again asserted that "On September the 11th, enemies of freedom committed an act of war against our country". These enemies he identified as "a collection of loosely affiliated terrorist organizations known as al Qaeda", and he said that "our war on terror begins with Al Qaeda, but it does not end there. It will not end until every terrorist groups of global reach has been found, stopped, and defeated". The war would include "every means of diplomacy, every tool of intelligence, every instrument of law enforcement, every financial influence, and every necessary weapon of war".

This was, in effect, an official declaration of war by the United States government against terrorism. While not satisfying the Constitutional requirement that Congress authorize a declaration of war, it sufficed under principles of international law and had the same external effect as a Congressional declaration.²⁴ For all intents and purposes, the attacks of 11 September had become acts of war, and the United States would respond in kind. The War on Terrorism would include a broad range of policy instruments, but it was foremost a war, whose objectives were nothing less than the eradication of global terrorism.

This was Bush's choice, and not necessarily warranted or even justified by the facts. Although he repeatedly insisted that the events of 11 September were in fact acts of war, neither he nor his subordinates spelled out the case for such an interpretation. They did not draw on the extensive literature on war to justify that decision, but it is to that literature I now turn.

III. War

By describing the events of 11 September as "more than acts of terror", President Bush suggested that those acts somehow transcended accepted notions of 'terrorism' to become, in fact, 'acts of war'. The term 'war' has a long history both as poetic license and legal

²¹ Office of the Press Secretary. "President Building Worldwide Campaign Against Terrorism". www.whitehouse.gov; September 19, 2001. 11:22 AM.

²² US Department of Defense. "DoD News Briefing – Secretary Rumsfeld". Pentagon; Thursday, 20 Sept 2001. http://www.dod.gov/transcripts/2001/t09202001_t920ruma.html

²³ Office of the Press Secretary. "Address to a Joint Session of Congress and the American People". www.whitehouse.gov; September 20, 2001. 9:00 PM.

²⁴ for a discussion of declarations of war, see Dinstein, Yoram. *War, Aggression, and Self-Defense* (3rd Ed.). Cambridge U. Press; Cambridge, UK, 2001. p29-32

parlance;²⁵ Americans have already fought a War on Poverty, a War on Drugs, and occasionally a War on Crime, but these are obviously wars in word only. The War on Terrorism may also be such a war, but for now President Bush's statements stand as more than mere rhetoric. Of course, many people caught up in the events of that day also felt that they somehow registered as 'war', sentiment probably driven by the astonishing destruction of that day, for which war seemed the only close analogy. Whether something—be it government policy or act of terrorism—attains the status of war depends on the standard used to measure and define war, and there are many; but, as Michael Walzer notes, "What is war and what is not-war is in fact something that people decide".²⁶

War as a modern phenomenon was codified by Clausewitz, who defined it as a violent contest between two states, the ends of which were not justice or punishment but 'state interest'.²⁷ This is the dominant view in contemporary thought on war, as the notion of 'state interest' is a central concern of international relations. If it was as simple as state interest, this essay would have little more to say. In this regard, the Clausewitzian concept of war presents the first—and enduring—problem for the Bush Administration's decision: Al Qaeda is not a state. Non-statehood is problematic within other frameworks, too, but where Clausewitz is concerned it is a contra-indicator.

Without Clausewitz, the most obvious standard for defining war is the wide body of contemporary international law, including the Geneva Conventions and the U.N. Charter, which incorporate understandings of war into the fabric of international politics. International law is perhaps the most formal of measurements against which we can judge 11 September and the subsequent US response, but many observers have also looked to the deep tradition of Just War theory to explain and justify the US response. This tradition is less formal than codified international law but no less significant. Both, however, depend on historic notions of war. Lastly, there is also a body of literature on new wars and the transformation of warfare.

The problem with deciding that terrorism equates to war is that it does not, at least not inherently. Claims to the contrary require an interpretation of the facts and a decision to deal with them in that particular manner. All of the aforementioned perspectives can provide context for understanding that decision, and while there is support for the Bush decision among them, none demands such a decision.

International Law

War, in the Clausewitz version, "carries with it... the idea of limitlessness."²⁸ To counter the appalling possibilities of "limitlessness", nations and organizations have sought to restrict the use of force. These rules are codified into international law, and although it often wants for enforcement, such law provides a context against which to judge the War on Terrorism.

Despite the attention paid by statesmen, diplomats, and legal scholars, there is no widely accepted definition of war in international law.²⁹ As the laws on war are to some extent reaction to Clausewitz, it is perhaps implicit that his definition of war underlies all subsequent legal theory. In that regard, definitions via international law tend to echo Clausewitz; for example, Yoram Dinstein offers a definition that begins, "War is a hostile interaction between

²⁵ Dinstein, Yoram. *War, Aggression, and Self Defense*. p3

²⁶ Walzer, Michael. *Just and Unjust Wars*. Basic; NY, 1977. p24

²⁷ Kaldor, Mary. *New and Old Wars*. Polity; Cambridge, UK, 2001. p15

²⁸ Walzer, *Just and Unjust Wars*. p23

²⁹ Dinstein, Yoram. *War, Aggression, and Self Defense*. p4

two or more States...".³⁰ The immediate problem for the Bush administration is again obvious: Al Qaeda cannot in any way be considered a state. Dinstein's definition necessarily excludes intrastate warfare, as well, but Al Qaeda cannot be considered an intrastate actor, as any Al Qaeda presence in the U.S. follows on the intent to commit violence. The attacks of 11 September, therefore, were neither act of international war nor intrastate war, as such wars have been understood in international law. That does not entirely preclude treating them as acts of war.

There is also no consensus on what constitutes an act of war. As Dinstein writes, "the classification of a military action as either war or a closed incident (short of war) depends on the way in which the two antagonists appraise the situation".³¹ By this standard, 11 September was an act of war simply because both the Bush Administration and Al Qaeda say as much. In a stricter sense, however, "acts of war" must rise to the level of whatever definition of war is being used—in this case that of Dinstein cited above, which continues:

War in the technical sense is a formal status produced by a declaration of war. War in the material sense is generated by the actual use of armed force, which must be comprehensive on the part of at least one party to the conflict.³²

Leaving aside the question of status, Al Qaeda does meet the technical and material senses of Dinstein's definition. In its many statements, Al Qaeda has made clear that it considers itself at war with the United States; this satisfies the technical requirement of declaration of war. Where the material sense is concerned, Al Qaeda has arguably used "comprehensive" armed force—that is, violence directed towards nothing less than the defeat of its enemy. In this respect the decision for war seems justifiable, but only if Al Qaeda's statelessness is overlooked.

Actual international law is of more practical significance than textbook definitions, and in this realm the U.N. Charter is widely considered the controlling authority. Article 2.3 of the Charter states that "All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered"; 2.4 that members refrain "from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations".³³ Together these articles constitute a prohibition on the use of force—including war—in international relations. The sole allowable exception to this rule comes in Article 51 of the Charter: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations...".³⁴

If the events of 11 September can be viewed as "armed attacks" under this clause, the U.S. would be free to invoke war as its response to such attacks. In 1974, the U.N. General Assembly adopted the following definition of aggression: "Aggression is the use of armed force by a state against the sovereignty, territorial integrity, or political independence of another state...".³⁵ Although General Assembly resolutions are not binding, this is the only applicable definition—and again, Al Qaeda's non-statehood would seem to deny the acts of 11

³⁰ Ibid. p15

³¹ Ibid. p11

³² Ibid. p11

³³ U.N. "Charter of the United Nations". Article 2.

³⁴ U.N. "Charter of the United Nations". Article 51.

³⁵ U.N. "Definition of Aggression". Resolution 3319, 29th General Assembly.

<http://ods-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/739/16/IMG/NR073916.pdf?OpenElement>
also in Brownlie, Ian. Principles of Public International Law (6th ed.). Oxford U Press. 2003. p 703.

September the status of aggression. However, the definition subsequently includes among manifestations of aggression "the sending by or on behalf of a state of armed bands, groups, irregulars, or mercenaries, which carry out acts of armed force against another state of such gravity as to amount to the acts listed above, or its substantial involvement therein".³⁶ While Al Qaeda was not sent by Afghanistan, the latter's harboring and abetting of Al Qaeda may rise to the level of substantial involvement. The object of the rule, however, is still presumably a state—Afghanistan—and not Al Qaeda, nor terrorism writ large. The Administration does not describe its activity as a war against Afghanistan; it is a War on Terrorism. The invasion of Afghanistan has been only the most obvious use of military force in the War. Because the two entities are not coterminous, it becomes necessary to ask whether Afghanistan is a legitimate target in the War on Terrorism.

Established precedent suggests not; a series of prior court decisions offer tests as to what constitutes aggression. These include cases from the International Court of Justice (ICJ), the International Criminal Tribunal for Former Yugoslavia (ICTY) and elsewhere. In *Nicaragua v. United States*, as one scholar notes, the International Court of Justice "famously rejected the notion that mere assistance was an armed attack triggering the right of self defense".³⁷ Commenting on the case, Cassese notes that

...numerous states now give arms and money to terrorists without this being considered by other states so unlawful as to be treated as the equivalent of an 'armed attack' legitimizing a military response.³⁸

Even in light of the *Nicaragua* test, some scholars argue that Afghanistan was nonetheless a legitimate target. Rowe, for example, writes that "the responsibility for the September 11 attacks had to be laid partly at the door of the Taliban government".³⁹ For Rowe, this is in part due to complicity, but also because the Taliban had ignored prior requests to surrender Bin Laden and other Al Qaeda members for prosecution.⁴⁰ This might also meet the criteria forwarded by the International Legal Commission (ILC), under Article 2(b): "There is an internationally wrongful act of a State when conduct consisting of an action or omission... (b) constitutes a breach of an international obligation of the State".⁴¹ At least one scholar, however, believes that the Bush administration's policy fails to meet criteria of the ICJ, ICTY, or ILC tests.⁴²

Article 4 of the 1974 definitions appears to offer an escape clause in this case: "The acts enumerated above are not exhaustive and the Security Council may determine that other acts constitute aggression under the provisions of the Charter".⁴³ The Security Council did just this on 12 September, issuing Resolution 1368 which declares that the Council is "determined to combat by all means threats to international peace and security caused by terrorist acts"

³⁶ Brownlie, Ian. *Principles of Public International Law* (6th ed.). p704

³⁷ Ratner, Steven R. "Jus ad Bellum and Jus in Bello after September 11". *American Journal of International Law* 96:4 Oct 2002. 905-921. p907

³⁸ Cassese. *Terrorism, Politics, and the Law*. Princeton U. Press; NJ, 1989. p13

³⁹ Rowe, Peter. "Responses to terror: the new 'war'". p301.

⁴⁰ *Ibid.*

⁴¹ U.N. International Legal Commission. "Draft articles on Responsibility of States for internationally wrongful acts"; 53rd Session, November 2001. (extract from the Report of the International Law Commission on the work of its Fifty-third session, *Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10 (A/56/10), chp.IV.E.1*) [http://www.un.org/law/ilc/texts/State_responsibility/responsibility_articles\(e\).pdf](http://www.un.org/law/ilc/texts/State_responsibility/responsibility_articles(e).pdf)

⁴² Ratner, Steven R. "Jus ad Bellum and Jus in Bello after September 11". p908

⁴³ Brownlie, Ian. *Principles of Public International Law* (6th ed.). p704

and "recognizing the inherent right of individual or collective self-defense in accordance with the Charter",⁴⁴ the latter being an allusion to the provisions of Article 51. The resolution further states the Council's "readiness to take all necessary steps to respond to the terrorist attacks of 11 September 2001".⁴⁵ This phrasing—"all necessary steps"—is U.N.-speak for armed force on a large scale,⁴⁶ thus permitting war as a possible response to the attacks. It should be noted that at this point the United States had not publicly identified the perpetrators; not until September 16th did President Bush point to Usama Bin Ladin as the prime suspect. It may be that Security Council members were informed in private or already knew from their own intelligence; in any case, Resolution 1373, dated 28 September 2001, reaffirmed the "inherent right... of self-defence as recognized by the Charter of the United Nations as reiterated in Resolution 1368".⁴⁷ This is particularly notable because the U.N. offered no affirmation on previous occasions when the U.S. invoked Article 51 to justify force against terrorism. The 1993 attacks on Iraq and the 1998 attacks on Afghanistan and Sudan received no support from the U.N.; the 1986 raid on Libya was actually condemned by resolution of the General Assembly.⁴⁸ Thus, at least in the view of the Security Council, the events of 11 September rose to the level of armed attack, and the Administration's decision to use force was allowable.

Other treaty bodies came to similar conclusions. For the first time in its history, NATO invoked Article V of the Washington Treaty, which states that an "armed attack against one... shall be considered an attack against them all".⁴⁹ On September 21st, the Organization of American States likewise invoked its security clauses.⁵⁰ Though neither organization commands the authority of the U.N. in international law, their responses signal a willingness to accept the events of 11 September on the Bush administration's terms. Many states have also assented to those terms; the website for "Operation Enduring Freedom" claims that some seventy nations are "currently supporting the global war on terrorism".⁵¹

The responses of these organizations and states—especially the U.N.—suggests that the Bush administration was justified under international law in treating 11 September as aggression against which use of force was legitimate. Even if their reaction was based on "empathy and emotion"⁵² rather than solid legal precedent in international law, that reaction has mostly legitimized the Bush administration's claims. Nonetheless, in arriving at said decision these organizations widely ignored Al Qaeda's lack of statehood. Nor can we assume that these organizations have subsequently been comfortable with the breadth of the Administration's response.

Given extant international law, standing precedents, and the reactions of various nations and organizations, the Bush decision seems at least justifiable—but only despite the significance of statehood in that corpus. The United States would be, by these standards, exercising its right to self-defense. International law is not the only standard by which the response can be measured, however. Although much of international law concerning war and

⁴⁴ U.N. Security Council. Resolution 1368. 12 Sept 2001.

⁴⁵ Ibid.

⁴⁶ Cassese, Antonio. International Law. Oxford U. Press; Oxford, 2001. p297

⁴⁷ UN Security Council. Resolution 1373. 28 September 2001.

⁴⁸ Beard, Jack M. "America's new war on terror: the case for self-defense under international law". *Harvard Journal of Law & Public Policy*; 25:2, Spring 2002. p559.

⁴⁹ Robertson, Lord. "An Attack on Us All: NATO's Response to Terrorism". National Press Club. 10 October 2001.

⁵⁰ Organization of American States. "Strengthening Hemispheric Cooperation to Prevent, Eliminate, and Combat Terrorism". RC 23/RES.1/01 21 September 2001. <http://www.oas.org/OASpage/crisis/RC.23e.htm>

⁵¹ U.S. Central Command. "International Contributions to the War on Terrorism". <http://www.centcom.mil/Operations/Coalition/joint.htm>

⁵² Ratner, Steven R. "Jus ad Bellum and Jus in Bello after September 11". p.919

recourse to force draws on the Just War tradition, the acts of 11 September merit a separate examination under that tradition. It is to that tradition I now turn.

Just War

In speeches and official statements, President Bush has frequently asserted that "justice" is a goal of his Administration's response; a notorious locution from his 20 September speech said that "whether we bring our enemies to justice, or bring justice to our enemies, justice will be done. (Applause)".⁵³ In her book, *Just War on Terror*—a defense of Bush's decision—Jean Bethke Elshtain notes that "when citizens invoke justice, they tap into the complex Western tradition called 'just war'".⁵⁴ According to Elshtain, this tradition originates with St. Augustine's *The City of God*, wherein the Saint addresses the question, "how can a Christian take up arms?" Although this tradition informs much of contemporary international law and norms regarding war, it differs on the centrality of the state; as it antedates the Treaty of Westphalia, the tradition of Just War theory is necessarily not exclusive to modern notions of statehood. Elshtain distills this tradition into the following criteria:

First, a war must be openly declared or otherwise authorized by a legitimate authority...
Second, a war must be a response to a specific instance of unjust aggression against one's own people or an innocent third party, or fought for a just cause. Third, a war must begin with the right intentions. Fourth, a war must be a last resort after other possibilities... have been explored.⁵⁵

Elshtain includes a fifth criterion as well: "Do not enter a conflict without reflecting on whether the cause has a reasonable chance of success".

The present concern is with the aspect of Just War theory known as *jus ad bellum*—whether a particular war is just. For *jus ad bellum*, these are necessary criteria—not merely sufficient—and so a war must meet all of them in order to be considered just. The War on Terrorism meets the first, in that it was declared by the President and affirmed by Congress. Admittedly, the premise of this paper makes that criterion somewhat tautological, so it defies deep analysis. The second criterion also seems met by the attacks of 11 September; as Elshtain argues, "there can be little doubt in anyone's mind that the attacks of September 11 constituted an act of aggression aimed specifically at killing civilians".⁵⁶ The third—intentions—is also fairly straightforward. Writes Elshtain, "the U.S. military response in Afghanistan clearly meets the just cause criterion of being fought with the right intention—to punish wrongdoers and prevent them from murdering civilians in the future".⁵⁷ This is also the intent of the broader War on Terrorism, at least as expressed officially; insofar as there is agreement that the attacks were unjust and terrorism unjustifiable, eliminating terrorism is a just intention. However, that intention runs afoul of the fifth criterion; there is little chance that terrorism will be eliminated by the Bush administration's efforts. Terrorism might be reduced, yes, and

⁵³ Office of the Press Secretary. "Address to a Joint Session of Congress and the American People". 20 September 2001.

⁵⁴ Elshtain, Jean Bethke. *Just War Against Terror*. Basic; NY, 2003. p50

⁵⁵ Elshtain, Jean Bethke. *Just War Against Terror*. p57-58

⁵⁶ *Ibid.* p59

⁵⁷ *Ibid.* p61

perhaps to negligible levels, but not eliminated. Elshtain argues that the aim is only "interdicting terrorism of global reach"—which she concedes is a "tough war aim indeed".⁵⁸

The fourth criterion presents an even greater difficulty for the Administration. Elshtain argues that the criterion of last resort does not require that the every other possibility be tried before war is settled upon, but that options short of war be at least considered.⁵⁹ Yet based on available evidence, there was no discussion of alternatives. According to Woodward's account, President Bush told Vice President Cheney, "we're at war", some five minutes after Flight 77 was crashed into the Pentagon.⁶⁰ President Bush and his advisors set upon war as their response almost immediately, without a rational rejection of other alternatives. It does not suffice to argue that war was anyway the response they would have settled on had they had a chance to consider other alternatives. Decisions of such gravity demand more of decision-makers; in this respect the war was problematic according to the classic criteria of Just War theory.

The modern incarnation of Just War theory, coming from Michael Walzer's Just and Unjust Wars, provides a different perspective on the question of justness. In reformulating the tradition, Walzer argues that war is only justifiable as a response to aggression, and posits a "theory of aggression" with six key propositions. The three relevant to here are:

3. Any use of force or threat of imminent force by one state against the political sovereignty or territorial integrity of another constitutes aggression and is a criminal act.
4. Aggression justifies two kinds of violent response: a war of self-defense by the victim and a war of law enforcement by the victim and any other member of international society....
6. Once the aggressor state has been militarily repulsed, it can also be punished.⁶¹

Walzer's reformulation presents a familiar problem; again we are confronted with the centrality of statehood in questions of war and peace. Walzer himself was aware of the problem in the context of 11 September, writing in the *New York Times*

So is it war? The word is unobjectionable so long as those who use it understand what a metaphor is. There is, right now, no enemy state, no obvious battlefield. "War" may serve well, however, as a metaphor to signify struggle, commitment, endurance.⁶²

For Walzer, the questions of just war theory became operational only when we could identify "legitimate targets —people who actually engaged in organizing, supporting, or carrying out terrorist activities".⁶³ He subsequently defended the war in Afghanistan on grounds that it was a defensive war against a regime that "was an active partner" of Al-Qaeda.⁶⁴ However, Afghanistan is not "terrorism", so the War on Terrorism must remain a metaphor for Walzer's read of the Just War tradition.

Again putting aside the question of statehood, Walzer's criteria provide another cut by which to evaluate the rationale behind the Bush administration's decision. The acts of 11

⁵⁸ Ibid. p62

⁵⁹ Ibid. p61

⁶⁰ One might dismiss this as adrenaline-fueled hyperbole, except that there is no indication that any other possible category was considered once the immediate crisis had passed. Woodward, Bob. Bush at War. p17

⁶¹ Walzer, Michael. Just and Unjust Wars. p62

⁶² Walzer, Michael. "First Define the Battlefield". *New York Times*; Sept 21, 2001, pA35.

⁶³ Ibid.

⁶⁴ Walzer, Michael. "The United States in the World—Just Wars and Just Societies: an Interview with Michael Walzer". *Imprints*; 7:1, 2003. <http://eis.bris.ac.uk/~plcdib/imprints/michaelwalzerinterview.html>

September were dire enough to count as aggression, and therefore a criminal act—criminal in the sense of violating international law and convention—which would justify a war of self-defense. Although Walzer sees the war in Afghanistan as being self-defense, it could also be described as a war of law enforcement, as could broader efforts against terrorism. Under Walzer's 6th criterion, that war need not be limited to what is necessary for defense—it can also be used to punish, which provides some flexibility in interpretation.

As context for the Bush administration's decision, Just War theory provides some support but is by no means conclusive. War was not last resort, and the question of statehood is left unresolved.

New War

Just War and international law depend very much on traditional definitions of war, yet President Bush insists that this a "different type of war". Without explicitly mentioning it, the President echoes a current thread in scholarship focused on 'new war'—that is, conflicts that depart from the idea of war as a contest between two states and the rules and norms associated with that idea. As Mary Kaldor writes in Old Wars, New Wars,

What we tend to perceive as war, what policy-makers and military leaders define as war, is, in fact, a specific phenomenon which took shape in Europe somewhere between the fifteenth and eighteenth centuries.⁶⁵

Martin Van Creveld, another important theorist of 'new war', argues that "the Clausewitzian Universe is rapidly becoming out of date and can no longer provide us with the proper framework for understanding war".⁶⁶ For Van Creveld, this change is due to the dampening effects of nuclear weapons, which make traditional wars nearly impossible.⁶⁷ For Kaldor, it is the processes of globalization which have begun to erode the traditional monopoly held by states on the legitimate use of force.⁶⁸ This has given rise to 'new wars', which differ from old wars in their goals, methods, and finance.⁶⁹ The goals of the new wars are based in identity politics, which she describes as "the claim to power on the basis of a particular identity—be it national, clan, religious, or linguistic.... the claim to power on the basis of labels".⁷⁰

Kaldor is writing generally of the kinds of intrastate wars that typified the 1990s—such as in Rwanda, East Timor, and former Yugoslavia; she uses Bosnia-Herzegovina as a case study of 'new war', and barely mentions terrorism in her book. That Kaldor did not locate Al Qaeda in her scheme does not necessarily undercut the Bush Administration's argument that this is a "different kind of war". Kaldor offers a description of a particular kind of 'new war', but that does not exclude other possible types of new war. In fact, in a post-11 September article, she writes that "President Bush is perhaps right to call what happened a 'new kind of war'".⁷¹

'New war' does provide the Bush response with legitimacy in one key area; it permits wars fought by non-states. As Van Creveld writes

⁶⁵ Kaldor, Mary. New and Old Wars. p13

⁶⁶ Van Creveld, Martin. Transformation of War. Free Press; NY, 1991. p58

⁶⁷ *Ibid*, p14

⁶⁸ Kaldor, Mary. New and Old Wars. p4

⁶⁹ *Ibid*, p6

⁷⁰ *Ibid*, p6

⁷¹ Kaldor, Mary. "Wanted: Global Politics –new types of violence are on the rise, and the only exit route is political". *The Nation*; 273:14, Nov 5, 2001. p15.

in North America and Western Europe, future warmaking entities will probably resemble the Assassins, the group which, motivated by religious [sic] and allegedly supporting itself on drugs, terrorized the medieval Middle East for two centuries...⁷²

and that "in the future, war will not be waged by armies but by groups whom we today call terrorists, guerillas, bandits, robbers, but who will undoubtedly hit on more formal titles to describe themselves".⁷³ This would certainly seem to describe Al Qaeda.

Further support for the 'different war' argument comes from the terrorists themselves. In an explanation of Al Qaeda combat doctrine, "one of bin Laden's closest aides" specifically cites this scholarship: "In 1989, some American military experts predicted a fundamental change in the future form of warfare... a kind of warfare they called 'the fourth generation of wars'".⁷⁴ The paper he is citing appeared in the *Marine Corps Gazette* in October 1989, under the title "The Changing Face of War: Into the Fourth Generation".⁷⁵ The authors—Lind, et al—note that for several centuries, "the West has defined warfare" through three "generations", and that the "catalysts" for successive generations have been "technology and ideas". While technology may spur a fourth generation, they suggest that ideas—and particularly non-Western ideas—may be more important:

The fact the some non-Western areas, such as the Islamic world, are not strong in technology may lead them to develop a fourth generation through ideas rather than technology

The genesis of an idea-based fourth generation of warfare may be visible in terrorism. This is not to say that terrorism is fourth generation warfare, but rather that elements of it may be signs pointing toward a fourth generation.⁷⁶

The authors end their article with the question, "what will the fourth generation be?" Judging from the operative's quote, Al Qaeda believes it answered that question on 11 September. The Al Qaeda pundit even quotes Lind, et al, noting that "television news may become a more powerful operational weapon than armored divisions", and that "the distinction between war and peace will be blurred to the vanishing point".⁷⁷

This raises an important point: 'New War' should not be mistaken for a prescriptive program. The distinction between war and peace is deeply important to what we know as modern civilization. Van Creveld and Kaldor, among others, intend their work as warnings about the decline of state power in a dynamic world. Nor should we look forward to a world in which, as Lind et al suggest, "the distinction between 'civilian' and 'military' may disappear".⁷⁸ Even if President Bush is correct, this is not necessarily a good thing; 'new' does not mean 'better'.

⁷² Van Creveld, Martin. *The Transformation of War*. p197

⁷³ Ibid, p197

⁷⁴ MEMRI. "Bin Laden Lieutenant Admits to September 11 and Explains Al-Qa'ida's Combat Doctrine". Special Dispatch No. 344; Feb 10, 2002. www.memri.org/bin/opener.cgi?Page=archives&ID=SP34402

⁷⁵ Lind, William S., et al. "The Changing Face of War: Into the Fourth Generation". *Marine Corps Gazette*; Oct 1989, p22-26. http://www.d-n-i.net/fcs/4th_gen_war_gazette.htm

⁷⁶ Ibid

⁷⁷ MEMRI. "Bin Laden Lieutenant Admits to September 11 and Explains Al-Qa'ida's Combat Doctrine". Special Dispatch No. 344

(quoting from Lind, William S., et al. "The Changing Face of War: Into the Fourth Generation")

⁷⁸ Lind, William S., et al. "The Changing Face of War: Into the Fourth Generation".

International law, Just War theory, and 'new war' literature all provide varying degrees of support for the Bush Administration's decision to declare "War on Terrorism". Still, many have criticized the war as illegal, unjust, and all too familiar, and such criticism will no doubt continue. But neither case for nor criticism of the war decision is conclusive; it is still open to debate, even through events may have rendered it moot. Furthermore, it is an important debate, one worth pursuing if only to discern the value of the precedent set by the Administration.

However, this debate ignores what is arguably a more important question: will the War on Terrorism be effective? So far I have only proven that War on Terrorism is at least a marginally acceptable response. On the question of effectiveness, international law and Just War theory are silent. To further the debate, to consider the efficacy of war against terrorism, I turn to the literature on terrorism and counter-terrorism.

IV. Terrorism

War as a response to terrorism receives mixed reviews from the specialist literature. As Paul Wilkinson warns, "terrorism is undoubtedly a great evil, but war a far greater evil involving greater numbers of deaths and far greater destruction, with the attendant dangers of other states being drawn into the conflict".⁷⁹ More ominously, Paul Pillar writes, "if there is a 'war' against terrorism, it is a war that cannot be won".⁸⁰ Context for these comments—and evaluation of the effectiveness of the War on Terrorism—requires an understanding of terrorism as a phenomenon. This chapter will begin with definitions, but also present a descriptive account of terrorism, and 11 September in particular. After outlining possible responses, I will assess the War on Terrorism as counterterrorism policy.

Definitions

Writes R. Thackrah, "the question of the definition of terrorism is central to an understanding of the phenomenon and to the success of any rational matters directed against it".⁸¹ As this essay is concerned with the response—"the success of rational matters"—directed against terrorism, so definition would seem important. The problem, according to Thackrah, is that terrorism has "neither a precise definition, nor one which is widely acceptable".⁸² To some, this hinders discussion of the phenomenon and possible responses. Nonetheless, common elements emerge from the definitions offered by a range of writers.

Alex Schmid, in a survey of 109 separate definitions of terrorism, identified the frequency with which various elements occur; the only three elements which appeared in more than fifty percent of definitions are "Violence", "Political", "Fear, terror emphasized".⁸³ Other high scorers were "Threat", "Psychological effects and reactions", "Victim-target differentiation", and "purposive, planned, systematic, strategic action". Schmid attempted to

⁷⁹ Wilkinson, Paul. *Terrorism versus Democracy: The Liberal State Response*. Frank Cass; London, 2001. p104.

⁸⁰ Pillar, Paul. *Terrorism and US Foreign Policy*. Brookings; Washington, DC, 2001. p217

⁸¹ Thackrah, R. "Terrorism as a Definitional Problem". in Wilkinson and Stewart (ed.s). *Contemporary Research on Terrorism*. Aberdeen U. Press; UK, 1989. p24-41.

⁸² Ibid

⁸³ Schmid, Alex P. and Jongmann, Albert. *Political Terrorism: A new guide to actors, authors, concepts...*. Transaction, 1988. Quoted in Hoffmann, Bruce. *Inside Terrorism*. Cassell; London, 1998. p40.

synthesize these elements into a comprehensive definition of terrorism; the result is a thorough but unwieldy definition,⁸⁴ unsuited for succinct analysis of potential responses.

Other, more concise definitions capture the essential elements of the concept of terrorism. For example, Paul Wilkinson defines terrorism as "the systematic use of coercive intimidation, usually to service political ends... it usually involves the death or injury of innocents".⁸⁵ Bruce Hoffman defines terrorism as "violence—or equally important, the threat of violence—used and directed in pursuit of, or in service of, a political aim".⁸⁶ Both—and many others like them—at least imply the violence, politics, and fear which Schmid identified as essential elements of terrorism.

The United States government has its own definitions for purposes of tracking and responding to terrorism. The State Department's definition, by legislation, states that "the term 'terrorism' means premeditated, politically-motivated violence perpetrated against noncombatant targets by sub-national groups or clandestine agents";⁸⁷ the State Department adds the caveat that terrorism is "usually intended to influence a target audience".⁸⁸ The Defense Department and FBI also have definitions of terrorism, each suited to its organizational purposes. The Defense Department defines terrorism as

The unlawful use of—or threatened use of—force or violence against individuals or property to coerce or intimidate governments or societies, often to achieve political, religious, or ideological objectives.⁸⁹

For this essay, the Defense definition is suitable, both for its content and its ontology. However, the variety of 'terrorisms' used by the United States government illustrate an important consideration: definitions are not the same as descriptions. Definitions depend a great deal on the intent of the definers; as Thackrah writes, "definitions serve as agreements on the way concepts should be used".⁹⁰ Thus I can employ a definition of terrorism that may omit ancillary elements—not because I am insensitive to those elements, but because that definition is wholly satisfactory for our limited purposes. A proper understanding of the role of definitions permits more flexibility in analyzing conceptual and ideational matters. This understanding allows the intellectual space in which this essay operates; it allows me to wonder why the Bush Administration chose to define 11 September as war, rather than returning to more accepted definitions of terrorism.

⁸⁴ "Terrorism is an anxiety-inspiring method of repeated violent action, employed by (semi-) clandestine individual, group, or state actors, for idiosyncratic, criminal, or political reasons, whereby—in contrast to assassination—the direct targets of the violence are not the main targets. The immediate human victims of violence are generally chosen randomly (targets of opportunity) or selectively (representative or symbolic targets) from a target population, and serve as message generators. Threat- and violence-based communication processes between terrorist (organization), (imperiled) victims, and main targets are used to manipulate the main target (audience(s)), turning it into a target of terror, a target of demands, or a target of attention, depending primarily on whether intimidation, coercion, or propaganda is primarily sought."

Schmid, Alex P. "The Response Problem as a Definition Problem". p8. in Schmid, Alex P. and Ronald D. Crelinsten (ed.s). *Western Responses to Terrorism*. Frank Cass; London, 1993.

⁸⁵ Wilkinson, Paul. *Terrorism vs Democracy*. p12-13

⁸⁶ Hoffmann, Bruce. *Inside Terrorism*. p15

⁸⁷ 22 USC 2656f (d): <http://www4.law.cornell.edu/uscode/22/2656f.html>

⁸⁸ Stern, Jessica. *The Ultimate Terrorists*. Harvard U. Press; Cambridge, MA, 2000. p13

⁸⁹ Hoffmann, Bruce. *Inside Terrorism*. p38

⁹⁰ Thackrah, "Terrorism: A definitional problem". in *Contemporary Research on Terrorism*. p 38.

Description

In actually evaluating that decision as a response to terrorism, it may be more useful to develop a description that tells us what terrorism does, rather than what it is. The Defense definition is some help, but requires further elaboration. Per the definition, the most immediate problem of terrorism is "force or violence", also most easily grasped by academic and public audiences alike.

On 11 September, this violence was most obvious. Nearly 3,000 people were killed that day, and the United States suffered billions of dollars of direct and indirect damage. The fatality count made it the most deadly terrorist incident in history, and also the most deadly attack on U.S. soil since the Civil War. However, other comparisons suggest the casualties were fairly modest, at least by acts of war standards. More people died in the slaughter at Srebrenica; hundreds of thousands died in Rwanda during that country's genocides.⁹¹ Even compared to other causes of violent death in the United States, 11 September was fairly modest; in that year, there were some 30,000 suicides and 17,000 homicides, not counting those from terrorism.⁹² Homicides from firearms alone accounted for more than 11,000 deaths that year, more than three times the deaths caused by terrorism.⁹³

The point is not that the terrorist acts were unremarkable; rather, they were remarkable for reasons other than bare violence. This introduces another element in the descriptive account of terrorism—"to coerce or intimidate"—and here the definition might fall short. To similar definitions, many scholars have added the caveat that "terrorism is a method", or something similar;⁹⁴ however stated, these scholars have felt it important to recognize the instrumental nature of terrorism, that it is not a movement or an agenda or a political philosophy. The instrumental value of terrorism and the primary threat it poses comes from its communicative effect. As R.D. Crelinsten writes, "terrorism is a tactic of communication which combines the use and threat of violence to compel allegiance and compliance in a variety of target groups".⁹⁵ In fact, it is this communicative function, this political content that distinguishes terrorism from what would otherwise be easily recognized as ordinary crime.

An important study of terrorism and communication comes from Alexander Schmid and Janny de Graaf, who write, "without communication there can be no terrorism".⁹⁶ Schmid and de Graaf present a model; "In the triangle Terrorist-Victim-Target, the victim, who is usually but not always associated in some way with the target, serves as instrument to communicate a message to the target which is meant to traumatize, demoralize, or otherwise influence him".⁹⁷ I would amend this model only by adding the word "audience" to the third leg, thus drawing a clearer distinction between "victims" and "target audience". The terrorist and victims of 11 September are recognizable enough; Al Qaeda and the nearly 3000 people who died that day,

⁹¹ Roberston, Geoffrey. *Crimes Against Humanity*. Penguin; London. 2002. p76-84

⁹² Arias E, et al. "Deaths: Final data for 2001". National vital statistics reports; vol 52 no 3. Hyattsville, Maryland: National Center for Health Statistics. 2003. p.71 (table 18)

⁹³ Ibid.

⁹⁴ Pillar, Paul. *Terrorism and U.S. Foreign Policy*. p18. Also note that "Method of combat, strategy, tactic" is eighth on Schmid's list of definitional elements, appearing in 30.5% the 109 definitions he surveyed.

⁹⁵ Crelinsten, RD. "Terrorism As Political Communication; the relationship between the controlled and the controller." in Wilkinson and Stewart (ed.s). *Contemporary Research on Terrorism*. Aberdeen U. Press; UK, 1989. p3-23. p8.

⁹⁶ Schmid, Alexander P. and Janny de Graaf. *Violence as Communication: insurgent terrorism and the Western news media*. Sage; London, 1982. p9

⁹⁷ Schmid and de Graaf. *Violence as Communication*. p176.

respectively. The target audience, however, is not as obvious. As Crelinsten suggests, there can be many audiences—"a variety of target groups"—to a particular terrorist act.⁹⁸ It follows that any response needs to be at least mindful of, if not addressed to, the correct target audience. Heymann identifies four potential audiences for terrorist acts: moderates in the society, the government, potential supporters of the group, and members of the group.⁹⁹ As seen in, for example, the Defense Department definition, the presumption is that terrorism is always employed "to coerce or intimidate" the first and second audiences. This ignores the third and fourth target audiences; a terrorist act whose communicative effect was meant for those audiences would not necessarily be designed to coerce or intimidate. As Heymann writes, acts focused on potential supporters

can show these people that the government is not as powerful as it portrays itself, but rather it is weak and vulnerable. Or terrorist acts may generate a response by the government that is repressive enough to make allies of those who would otherwise be neutral.¹⁰⁰

In a similar vein, Schmid and de Graaf write that "the [terrorists'] enemy is usually personified; but it can also be the public's apathy to the aspirations of grievances of the terrorists".¹⁰¹ They offer a list of possible goals of terrorist communication, which begins with the obvious—"communication of (fear--) messages to mass audience"—but continues to include "making converts, attracting new members to terrorist movements", "advertising terrorist movement and cause represented", "boosting one's own morale", and other non-intuitive uses.¹⁰² Sederberg writes that "terrorist acts may aim to demonstrate capabilities.... By demonstrating the inability of the regime to protect its citizens or itself from terrorist attack, dissidents may be able to 'demystify' the image of the state while improving their position as a plausible alternative".¹⁰³

In Al Qaeda's case, the primary audience for 11 September was not the United States. Many of Usama Bin Ladin's speeches, pronouncements, and videotapes relevant to that day are addressed to fellow Muslims—not to Americans. His "Fatwah for Jihad on the Jews and Crusaders" was issued to "all Muslims"; it calls "on every Muslim who believes in God and wishes to be rewarded to comply with God's order to kill the Americans...."¹⁰⁴ In speeches after 11 September, reporting on the progress of "jihad", he is clearly addressing fellow Muslims; in one case Bin Ladin says, "I urge myself, as I urge my Muslim brethren, to set their faces towards Jihad, for the sake of Allah".¹⁰⁵ Bin Ladin is also said to have thought that the attacks would "reap al Qaeda a recruiting and fundraising bonanza".¹⁰⁶ Clearly, this bonanza was not to have come from the U.S. government nor its citizens. Instead, per Heymann's suggestion, the attack was aimed at a third target audience—other Muslims.

That it was not the primary audience does not mean that the United States was irrelevant as a target audience; many prior Al Qaeda acts were most likely directed towards the U.S. government; the bombings of Khobar Towers, the embassies in Dar-es-Salaam and

⁹⁸ Crelinsten, RD. "Terrorism As Political Communication". in Contemporary Research on Terrorism. p8.

⁹⁹ Heymann, Philip. Terrorism and America. MIT Press; Cambridge, MA, 2000. p11.

¹⁰⁰ *Ibid*, p11.

¹⁰¹ Schmid and de Graaf. Violence as Communication. p15.

¹⁰² *Ibid*. p53.

¹⁰³ Sederberg, Peter C. Terrorist Myths: Illusions, rhetoric, and reality. Prentice-Hall; New Jersey, 1989. p94

¹⁰⁴ Kronenwetter, Michael. Terrorism: a guide to events and documents. Greenwood; Westport, CT, 2004. p231-232

¹⁰⁵ MEMRI. "Bin Laden's Sermon for the Feast of the Sacrifice". March 5, 2003. Special Dispatch No. 476.

<http://www.memri.org/bin/opener.cgi?Page=archives&ID=SP47603>. p15.

¹⁰⁶ Ragavan, Chitra. "Unraveling the plot". *U.S. News*; 28 June, 2004.

Nairobi, and the attack on the *USS Cole*¹⁰⁷ all seem designed to drive Americans out of the Middle East. However, on 11 September the United States was a secondary audience, a fact which may well have been overlooked by the Administration and many others. This is not surprising; as Schmid and de Graaf note, "when violence is used to communicate, the means often deflect public attention from the ends so that the message often does not get through".¹⁰⁸

Had the United States recognized the importance of the Muslim world as the target audience for 11 September, that would have been a critical concern in developing its response to those events. Any response must acknowledge and address the dual nature of terrorism—both the fact of violence and the instrument of communication.

Counterterrorism

There is a wide range of responses and strategies available to counter terrorism—and here I draw a distinction here between strategy and response, where separate strategies are elements of a single response. There is no single strategy, no silver bullet, that will be effective against all types of terrorist threats—especially given the range of terrorist organizations and ideologies operating in the modern world. There are as many menus of response as there are definitions of terrorism; for example, Wilkinson discusses political, law-enforcement, and military responses in his work on terrorism and democracy;¹⁰⁹ Paul Pillar offers a number of counterterrorism "instruments", including diplomacy, criminal law, financial controls, intelligence and covert action, and military force.¹¹⁰ The two lists largely overlap, as is true of many such lists. The War on Terrorism is, in fact, an amalgam of such strategies; the 2003 *Patterns of Global Terrorism* report, issued by the U.S. State Department, cites diplomacy, law enforcement, intelligence, finance, and military aspects.¹¹¹ Of course, these strategies are not entirely mutually exclusive; an effective response often demands a range of strategies, even to the extent that these strategies may appear to be working at cross-purposes. Hence governments often present a tough-line approach in public while working behind the scenes at more conciliatory strategies. Unfortunately, the distinction between a nuanced and complex response to terrorism versus a confused, ad-hoc response is often blurry.

Crelinsten and Schmid, in their survey of responses, offer a series of typologies by which strategies and responses can be classified. For example, they differentiate between hard and soft responses—conciliatory policies addressing root causes and repressive, retribution-oriented strategies. They also draw a distinction on strategies which focus on coercive capabilities of the terrorists versus those dealing with political capabilities; the former aims the stop to fact of violence, the second to deny the objective of coercion.¹¹² Crelinsten and Schmid make other distinctions in their survey of responses, including short-term versus long-term, reactive versus proactive, and international versus domestic—all of which are

¹⁰⁷ Let me here assert that the attack on the U.S.S. Cole was not terrorism by any standard. The Cole was a combat vessel and all the casualties were uniformed sailors in an area known for hostility towards Americans.

¹⁰⁸ Schmid and de Graaf. *Violence as Communication*. p217 .

¹⁰⁹ Wilkinson, Paul. *Terrorism vs. Democracy*. chapter 4, 5, and 6.

¹¹⁰ Pillar, Paul. *Terrorism and U.S. Foreign Policy*. see chapter "Counterterrorism Instruments"

¹¹¹ U.S. State Department. *Patterns of Global Terrorism 2003*. Washington, DC, 2004.

¹¹² Crelinsten, R.D. and Alex P. Schmid. "A twenty-five year balance sheet". in Crelinsten and Schmid. *Western Responses to Terrorism*. p310

important to understanding a given response to terrorism—but this essay is most concerned with two repressive strategies, Crelinsten's "criminal justice model" and "war model".¹¹³

Crelinsten writes that the war model "treats individual acts of terrorism as tactics in a guerilla or revolutionary war, and makes use of military personnel and weaponry to deal with the perpetrators... the 'rules of combat' prevail, and the distinction between combatant and non-combatant, usually defined by the use of distinctive uniforms, POW status and specified combat zones, becomes important".¹¹⁴ Crelinsten means, of course, that the state needs to respect the 'rules of combat'; that the terrorists do not respect such rules is given, and adhering to the 'rules of combat' is an important means of demonstrating the commitment of the state to rule-of-law and human rights.

Pillar suggests four possible benefits from the 'war model': that it most dramatically demonstrates US resolve against terrorism; that it may diminish terrorist capabilities; that the implicit threat of further military response may deter the target terrorist group; and that the implicit threat may deter other would-be terrorists.¹¹⁵ But, he cautions, "the nonphysical effects of a military strike may serve some of the political and organizational purposes of terrorist leaders, and for that reason they may tacitly welcome such an attack".¹¹⁶ An American response with force to terrorist attack may also incur "broadly based resentment against the world's only superpower using its military muscle offensively".¹¹⁷

President Bush is not the first of that office to respond to international terrorism with force. President Ronald Reagan believed that terrorist acts were acts of war, and that force was a legitimate response.¹¹⁸ Seven days into his first term, Reagan announced: "Let terrorists be aware that... our policy will be one of *swift and effective retribution*".¹¹⁹ Yet in 126 significant incidents of international terrorism during his administration, Reagan responded with force only twice; to the *Achille Lauro* hijacking in 1985 and the La Belle Disco bombing in 1986.¹²⁰ The latter incident provoked air strikes on Libya, considered by some counterterrorism experts as an example of military response at its worst.¹²¹ At the very least, it was ineffective at reducing Libyan-sponsored terrorism;¹²² just two years later, Pan Am 103 was destroyed over Lockerbie, Scotland, by Libyan agents. More remarkable, perhaps, is that so many major terrorist incidents were met with no response or even concessions. For example, in response to the bombings of the U.S. Embassy and Marine barracks in Lebanon in 1983—far more deadly than either the *Achille Lauro* or La Belle incidents—President Reagan ultimately withdrew the American presence from Lebanon.¹²³

The Clinton Administration also used force to respond to terrorism. Its policy by 1995 identified terrorism as a "national security problem, not just a law enforcement issue".¹²⁴

¹¹³ Crelinsten, RD. "Terrorism as Political Communication". in Contemporary Research on Terrorism. p9

¹¹⁴ Ibid, p9

¹¹⁵ Pillar, Paul. Terrorism and US Foreign Policy. p102

¹¹⁶ Ibid, p105

¹¹⁷ Ibid, p106

¹¹⁸ Wills, David C. First War on Terrorism. Rowman and Littlefield; p24

¹¹⁹ quoted in Turner, Stansfield. Terrorism and Democracy. Houghton Mifflin; Boston, MA, 1991. p155

¹²⁰ Wills, David C. First War on Terrorism. Rowman and Littlefield; NY, 2004. p9-10

¹²¹ Crelinsten and Schmid use the episode as a case study in what can go wrong with military force as a counterterrorism strategy. Crelinsten and Schmid. "A twenty-five year balance sheet". in Western Responses to Terrorism. p316-317

¹²² Pillar, Paul. Terrorism and US Foreign Policy. p102

¹²³ Turner, Stansfield. Terrorism and Democracy. p169

¹²⁴ Kean, Thomas et al. The 9/11 Commission Report; Final Report of the National Commission on Terrorist Attacks upon the United States. Norton; NY, 2004. p108

Clinton twice used overt force in response to terrorism; first, in attacking Iraq after an attempt on former President George H.W. Bush's life, and second in launching cruise missile attacks against targets in the Sudan and Afghanistan following the bombings of American embassies in 1998.¹²⁵ In the latter case, that Bin Ladin survived the attacks "gave him greater confidence and enhanced his reputation for invincibility among his followers".¹²⁶ However, this was not the only military action considered—contrary to popular post-11 September criticisms that the Clinton Administration was too focused on law enforcement.¹²⁷ Although the Clinton administration developed plans for covert use of force against Al Qaeda, many of these were rejected as too risky, unlikely to succeed, or were hamstrung by insufficient intelligence; the 9/11 Commission report states that "Military measures failed or were not applied".¹²⁸

The basic assumption of the criminal justice model (or, simply, the crime model) is that terrorism is criminal behavior. In fact, the Defense definition suggests as much from the very outset: "the unlawful use...." Were such acts devoid of political meaning, they would obviously be crimes. Yet terrorism is saturated with political meaning; the crime model affords no privilege to the political context of the acts. As Crelinsten describes it, the model "treats individual acts of insurgent terrorism as crime and makes use of criminal codes, traditional policing, criminal prosecutions, and penal procedures to deal with those who commit these acts".¹²⁹ In this, writes Wilkinson, "the main burden of containing and defeating terrorism...is carried by the police services".¹³⁰ However, jurists and legislators also share this burden; trials are necessary, and an effective response may require legislation specific to the terrorist threat—especially those providing law enforcement with the tools necessary to interdict and apprehend terrorists.¹³¹

Law enforcement provides the core of what Wilkinson terms the 'hard-line' approach; his version is perhaps not nearly as hard-line as others, but he uses the term to differentiate from more conciliatory responses. There are obvious advantages to a law enforcement-based approach; the incarceration of terrorists, the deterrent effect of criminal justice, and the sense of finality associated with successful prosecution.¹³² The advantages of the crime model in addressing the communicative aspect are perhaps less obvious, but no less important. As discussed above, terrorism would not be terrorism without political content; thus, the decision to treat it as crime can be a direct political statement, a refusal to acknowledge the political statement. A government response in which "the 'rule of law' prevails, and the agents of social control follow specific procedures of due process in the control of the terrorist"¹³³ can provide a powerful affirmation of the rule of law in a society.

The crime model does have its risks. It can be slow to bring terrorists to justice. When it comes to actual prosecution, Paul Pillar cautions that the worst possible outcome is a

¹²⁵ U.S. State Department. "History of the Department of State During the Clinton Presidency (1993-2001)". Washington, DC. <http://www.state.gov/r/pa/ho/pubs/8519pf.htm>

¹²⁶ Amanat, Abbas. "Empowered through violence". in Talbot, Strobe and Nayan Chanda (ed.s.) The Age of Terror: America and the world after September 11. Basic; NY, 2001. p42.

¹²⁷ e.g. Sofaer, Abraham. "Stop Playing Games With Terrorists". *SF Chronicle*, 16 September 2001. (op-ed): "An anti-terrorism policy based on criminal prosecution has also created the misleading impression that the U.S. government is providing the American people with meaningful protection. It is not."

¹²⁸ Kean, et al. 9/11 Commission Report. p114-143; p349

¹²⁹ Crelinsten, RD. "Terrorism as Political Communication". in Contemporary Research on Terrorism. p9

¹³⁰ Wilkinson, Paul. Terrorism vs. Democracy. p110

¹³¹ *Ibid.* p113.

¹³² Pillar, Paul. Terrorism and U.S. Foreign Policy. p81

¹³³ Crelinsten, RD. "Terrorism as Political Communication". in Contemporary Research. p9

terrorist trial leading to acquittal.¹³⁴ He probably overstates the danger here; first, it might be compatible with liberal democratic values to conduct trials of terrorists, especially international terrorists, with looser evidentiary rules than would be permissible for typical criminal trials. Second, there is no more powerful example of adherence to democratic principles than the acceptance of an acquittal of someone widely thought to be a terrorist. The risk that such a person, once acquitted, would engage in further terrorism is comparatively slim; he would be a marked man.

In discussions of response, scholars have argued that both crime and war models bear risks. Indeed, any combination of strategies bears risks. Counterterrorism can not only fail simply to stop terrorism; it can encourage further terrorism and even destroy the society it purports to defend. Sederberg warns that "dissidents may pursue a more 'positive' objective: to provoke a regime into an ill-conceived program of repression".¹³⁵ As N.O. Berry points out, successful terrorism depends on the actions of the target, not the terrorist. Berry identified five ways in which targets can weaken themselves, in effect giving the terrorists their objectives: "(a) overreaction, (b) power deflation, (c) failed repression of moderates, (d) appeasement of moderates, (e) massive intimidation".¹³⁶ In the overreaction and power deflation, the target loses support by either acting too forcefully or insufficiently against the terrorists. In the former the target shows itself to be too brutal to claim legitimate authority, and in the later too ineffective. In (c) and (d), the "moderates" are non-violent opposition to the target government; failed repression either enervates and strengthens the moderates, or appeasement gives the moderates (and hence the terrorists) the goals they seek. In massive intimidation, the target fails to act and terror becomes pervasive in the society.

One benefit of a clear understanding of uses and goals of terrorism is that it provides more depth for understanding the requirements of an effective response. Use of "force or violence" is central to any terrorist act, so—obviously—a response to terrorism must prevent further violence or threats thereof. Any government worthy of its sovereignty must ensure the security of its citizens. Efforts to "coerce and intimidate" are also essential to our definition of terrorism, and so the response must also protect the government and society threatened by those efforts. Protecting government and society means protecting the principles and values that serve as their basis, particularly in liberal democracies; as Paul Wilkinson warns, "it must be a cardinal principle of a liberal democracy in dealing with the problems of terrorism, however serious these may be, never to be tempted into using methods which are incompatible with the liberal values of humanity, liberty, and justice... the liberal democracy must remain true to itself".¹³⁷ Thus, as Alex Schmid writes, the "the main dilemma posed when democracies are confronted by terrorism is the one between ACCEPTABILITY and EFFECTIVENESS".¹³⁸

Effectiveness asked whether the response stops further terrorism, but this does not mean simply stopping the violence. As the above discussion of the instrumental value of terrorism suggests, an effective response will also address the communicative aspect of Al Qaeda's campaign.

¹³⁴ Pillar, Paul. *Terrorism and U.S. Foreign Policy*. p83

¹³⁵ Sederberg, Peter C. *Terrorist Myths: Illusions, rhetoric, and reality*. p95.

¹³⁶ Berry, N.O. "Theories on the Efficacy of Terrorism" in *Contemporary Research on Terrorism*. p293-306. p293-294

¹³⁷ Wilkinson, Paul. *Terrorism vs Democracy*. p115

¹³⁸ Schmid. "Terrorism and Democracy" in *Western Responses to Terrorism*. p15

Assessing the War on Terrorism

The Bush administration is quick to provide anecdotal evidence of success in the War on Terrorism; its FY2004 budget included a chapter, "Winning the War on Terrorism".¹³⁹ The report cites capture of Ramzi Binalshibh, the arrest of suspected terrorists in New York, and the assassination of Abu Ali and other Al Qaeda members in Yemen. While many of the accomplishments in the report are laudable—increased humanitarian aid, international law enforcement cooperation, and emergency response preparedness—there is nothing to suggest empirical progress in reducing or ending terrorist attacks. The Administration does cite data from the U.S. State Department's Patterns of Global Terrorism 2003,¹⁴⁰ trumpeting the decrease in terror from 355 such incidents in 2001 to 208 incidents in 2003. Alas, this is too superficial an analysis—lacking in statistical rigor—to demonstrate real effectiveness. Furthermore, these numbers are deeply problematic: the tallies in Patterns include "significant" and "insignificant" acts of terrorism. Counting only significant acts—and I had to literally count them, because there is no separate statistical data apart from the narrative chronologies appended to each year's report—there has in fact been an increase from 124 in 2001 to 139 in 2002 and 168 in 2003.

Granted, there are problems with using this kind of data to track counterterrorist efforts, much as body counts were a poor way of charting progress in Vietnam. First, the sporadic nature of terrorism makes it hard to discern any kind of trend. Al Qaeda's mass casualty attacks do not occur regularly, so a year or two gone by without such an attack can look like progress against their organization. Second, because there is no quantifiable value for the psychological effect of these attacks, it is hard to tell what their real impact might be. Accurate, comprehensive data on the raw violence of terrorism would be helpful—more so than anecdotal evidence—but still cannot address the communicative and psychological aspects of terrorism.

Another measure of effectiveness comes from Paul Pillar (currently the National Intelligence Officer for Near East and South Asia), who writes that "besides such measures as plots foiled and fugitives caught, the success of any administration's counterterrorist policy should also be measured according to how more—or less—effective it makes that administration's overall foreign policy".¹⁴¹ L. Paul Bremer III writes akin that in counterterrorism the "strategic objective is to reduce terrorism to a point where it no longer diverts attention from other important foreign policy goals".¹⁴² In that counterterrorism is now the primary goal of U.S. foreign policy, the War on Terror is either a failure of policy, or it obviates such criteria entirely.

A third standard for effectiveness comes from the U.S. Government itself. According to Patterns 2003, the first principle President Bush has enumerated in the War on Terrorism is, "make no concessions to terrorists and strike no deals".¹⁴³ Bin Ladin consistently cites the presence of infidel soldiers in the Middle East as justification for violence; moving more troops into that region in some ways reinforces his claims. Moreover, Bin Ladin made no secret of the fact that he sought war with the United States, or that his goal was to spur fellow Muslims into

¹³⁹ Office of Management and Budget. "Winning the War on Terrorism". Washington, DC, 2003.

<http://www.whitehouse.gov/omb/budget/fy2004/pdf/budget/winning.pdf>

¹⁴⁰ U.S. Department of State. Patterns of Global Terrorism 2003. Washington, DC. 2004.

¹⁴¹ Pillar, Paul. Terrorism and U.S. Foreign Policy. p220

¹⁴² Bremer, L. Paul III. "The West's Counter-Terrorist Strategy" in Crelinsten and Schmid. Western Responses to Terrorism. p. 257.

¹⁴³ U.S. Department of State. Patterns of Global Terrorism 2003. p(ix)

action against the infidels; he is even reported to have "complained frequently" that the United States did not attack him after the *USS Cole* bombing.¹⁴⁴ In this regard, the War on Terror was a perverse concession to Al Qaeda; it was perhaps the overreaction—per N.O. Berry—that Al Qaeda sought to provoke. Even if the scale of violence is proportionate to 11 September—a contestable supposition—the War on Terror nonetheless serves the communicative efforts of Al Qaeda, and this is another measure of its effectiveness.

Indeed, a major flaw in the War on Terrorism is that it has done little to counter the Al Qaeda message—the communicative effect of 11 September. In declaring war, the Administration ignored the fact the legitimacy this would confer on Al Qaeda; as Crelinsten and Schmid write, "the existence of two armed parties confronting each other creates a symmetry in the perception of the onlooker, permitting the terrorists to portray themselves as soldiers rather than as criminals or terrorists".¹⁴⁵ This legitimating effect of the War on Terrorism is not lost on Al Qaeda, which certainly prefers to portray itself as an army of holy warriors, rather than a band of thugs and terrorists. Bin Ladin and other Al Qaeda members frequently employ language that sounds much like an Islamic version of Just War theory to defend their actions. In his 1998 declaration of jihad, Bin Ladin argued that

...all these crimes and sin committed by the Americans are a clear declaration of war on Allah, his messenger, and Muslims. And ulema have throughout Islamic history unanimously agreed that the jihad is an individual duty if the enemy destroys the Muslim countries.¹⁴⁶

In an interview with Al Jazeera in mid-October 2001, Bin Ladin further defended his actions by arguing tit-for-tat: "We kill the kings of infidels, kings of the crusaders, and civilian infidels in exchange for those of our children they kill. This is permissible in law and intellectually".¹⁴⁷ When the Taliban was defeated, that too became justification for Al Qaeda's war. In an article posted on the Internet, an Al Qaeda spokesman claimed that

In its war against the Taliban and Al-Qa'ida in Afghanistan, America has killed 12,000 civilians and 350 Arab Jihad fighters, among them women and children. It annihilated entire families from among the Arab Jihad fighters while they were in their cars, when the American Air Force bombed [them] with helicopters and anti-tank missiles, until nothing remained of some of the except scattered body parts.¹⁴⁸

A 2003 speech from Bin Ladin claimed that the U.S. sought to "put an end to Islam", but that governments in the Middle East "nonetheless... emphasize in their notes and speeches their support for Bush in his war against terrorism, which is [in fact] a war on Islam and Muslims...".¹⁴⁹ That Bin Ladin and his coterie are still making these statements is itself demonstrative of the U.S.'s inability to interdict the Al Qaeda communicative apparatus. Worse is that so little has been done to discredit the message.

¹⁴⁴ Kean, et al. *9/11 Commission Report*. p191

¹⁴⁵ Crelinsten, RD and Alex Schmid. "A Twenty-Five Year Balance Sheet". in Crelinsten and Schmid. *Western Responses to Terrorism*. p317

¹⁴⁶ Bin Laden, Usama et al. "Declaration of Jihad against Jews and Crusaders". in Laqueur, Walter (ed.). *Voices of Terror*. Reed Press; NY, 2004. p412

¹⁴⁷ Bergen, Peter L. *Holy War, Inc.* Touchstone; NY, 2002. p227

¹⁴⁸ MEMRI. "Why We Fight America: Al-Qa'ida Spokesman Explains September 11 and Declares Intentions to Kill 4 Million Americans with Weapons of Mass Destruction". Special Dispatch No. 388, 12 June 2002. memri.org/bin/opener.cgi?Page=archives&ID=SP38802

¹⁴⁹ MEMRI. "Bin Laden's Sermon for the Feast of the Sacrifice". Special Dispatch No. 476

The Bush administration did not completely ignore the importance of communication in its plans for the War on Terrorism; efforts in this regard included the hiring of a well-regarded public relations expert, Charlotte Beers, as undersecretary of State for public diplomacy.¹⁵⁰ Despite extensive experience, her results were disappointing: "by any measure, the Beers strategy was an abject failure.... The main problem, Arabs would tell you, was not how Charlotte Beers handled her task but the product she was selling".¹⁵¹ U.S. policy—specifically the War on Terrorism—was a very tough sell.

Of course, anecdotal evidence of discontent with the War on Terrorism is not hard to find. MEMRI notes that although "Iranian reformist leaders and press hastened to condemn the [11 September] attacks", "the Iranian leadership [reformists and conservatives] is unanimous in its unwavering opposition to the US attack in Afghanistan, and to the coalition currently being put together by the U.S."¹⁵² There are perhaps hundreds of websites denouncing the Bush Administration for its efforts in Afghanistan and around the world. Clerics in Egypt have denounced the war, too: one argues that "entering into Alliance with the Americans against Afghanistan constitutes *Ridah* [that is, turning away from belief in Islam, for which the punishment is death...]"¹⁵³

Research from the Pew Global Attitudes Project echoes the anecdotal evidence. The first sentence in its report, "What the World Thinks in 2002", states that "Despite an initial outpouring of public sympathy for America following the September 11, 2001 terrorist attacks, discontent with the United States has grown over the past two years... most dramatically, in Muslim societies".¹⁵⁴ The report further states that "the war on terrorism is opposed by majorities in nearly every predominantly Muslim country surveyed. This includes countries outside the Middle East/Conflict Area, such as Indonesia and Senegal".¹⁵⁵ Within the conflict area, "majorities in Egypt, Lebanon, and Turkey and a plurality in Pakistan, a key U.S. ally in the region, also oppose the war on terror".¹⁵⁶ A similar (and widely-cited) Gallup poll suggests high levels of discontent, but that poll has serious methodological flaws and is not useful here.¹⁵⁷

There is no strict correlation between discontent and terrorism, no formula for divining terrorist activity from survey data. Yet the broad unpopularity of the War on Terrorism suggests that it is not an effective hearts-and-minds strategy, at least not for the critical audience in the Middle East.

Despite its global unpopularity, the War on Terrorism has been popular in the United States. At about the same time the Pew research was being conducted—summer of 2002—polls in the U.S. showed that 81% of Americans approved of President Bush's "handling of the U.S. campaign against terrorism".¹⁵⁸ Less than a month after the 20 September 2001 speech,

¹⁵⁰ Rampton, Sheldon and John Stauber. *Weapons of Mass Deception*. Penguin; NY, 2003. p12

¹⁵¹ *Ibid*, p34-35

¹⁵² MEMRI. "Terror in America (17): Conservatives and Reformists in Iran: Divided in condemning the attack; United in opposition to the American response". Special Dispatch No. 286; Oct 12, 2001. www.memri.org/bin/opener.cgi?Page=archives&ID=SP28601

¹⁵³ MEMRI. "Terror in America (22): Egypt's Al-Azhar Clerics: We declare war on America". Special Dispatch No. 296. November 2, 2001. www.memri.org/bin/opener.cgi?page=archives&ID=SP29601

¹⁵⁴ Pew Global Attitudes Project. "What the World Thinks in 2002". Pew Research Center for the People and the Press; Washington, DC. 2002. p1

¹⁵⁵ *Ibid*, p5

¹⁵⁶ *Ibid*, p59 P

¹⁵⁷ Morin, Richard and Claudia Deane. "The Poll That Didn't Add Up". *Washington Post*; Saturday, March 23, 2003. pC01.

that percentage was 92%, and it remained above 70% until nearly two years later.¹⁵⁹ These figures support the idea, argued above, that the Administration misidentified the target audience for 11 September and crafted a response directed towards the American public. As Mary Kaldor notes, "the 'war on terror' seems to be less about defeating terrorism than about staging a performance to meet the requirements of American democracy".¹⁶⁰

Schmid's second criteria, "acceptability", means that the response must be balanced against the character of the government and its nation; often what seems most effective in stopping terrorism is least acceptable to liberal democracies. Thus the question of response becomes what Schmid called a "cruel choice": "do we want to sacrifice some democratic substance in order to be effective against terrorism or do we have to tolerate a certain level of terrorism for the sake of maintaining the civil liberties and political rights which we cherish?"¹⁶¹ The answer to that question sets the basic principles from which a government develops its response to terrorism.

This is a much more abstract question than effectiveness, but support for the War on Terrorism seems to signal its acceptability, at least initially. This is true of both the polling data cited above and the discussion in the third chapter of this essay on international law and Just War theory. In the sense that it enjoyed popular support, it was acceptable—although admittedly this support wanted for a robust debate along the lines of Schmid's question.

None of this suggests that the U.S. has lost or will lose its War on Terror, but simply that there is no clear indication that it is winning. As one observer notes, "it has become impossible to tell even if 'our side' is winning".¹⁶² It is possible, however, to discern that the U.S. response has aroused a great deal of discontent around the world, which presents a serious problem: "The world's loss of confidence in the benign purview of American power might well turn out to be the principal legacy of the war on terror. It could turn out to be a very high price to pay for victory".¹⁶³

V. Options Other Than War (the international law enforcement response)

Most of the literature on terrorism presumes a domestic focus, or at least cases in which the victim is a specific nation, in which the relevant legal structure is domestic law. So, too, has much of this essay thus far presumed that the United States was the victim on 11 September, and thus any response was its prerogative; this is necessarily so if 11 September is understood as war.

There is, however, another approach to the events of 11 September: to view them as crimes against humanity. Mary Robinson, U.N. Commissioner for Human Rights was among the first to argue that the attack "crosses a line and fits the definition... of a crime against humanity"; in her view, this "passes an immediate responsibility on all governments of the world to help to bring the perpetrators to justice".¹⁶⁴ As President Bush noted in his 20 September address to the nation, citizens of more than 80 nations died alongside Americans

¹⁵⁸ "Washington Post-ABC News Poll: Bush, Iraq, and the War on Terror". *Washington Post*; Monday, June 21, 2004. http://www.washingtonpost.com/wp-srv/politics/polls/trend_062104.html

¹⁵⁹ *Ibid*

¹⁶⁰ Kaldor, Mary. "American Power: from 'compellence' to cosmopolitanism?". *International Affairs*, 79, 1(2003). p1

¹⁶¹ Schmid, Alex. "Terrorism and Democracy". in Crelinsten and Schmid. *Western Responses to Terrorism*. p15

¹⁶² Hirsh, Michael. "Bush and the World". *Foreign Affairs*. September/October 2002.

¹⁶³ Tucker, Robert W. "The End of a Contradiction" in "One Year On: A September 11 Anniversary Symposium". *National Interest*. Fall 2002.

¹⁶⁴ U.N. "Terror attacks must be seen as crimes against humanity: Robinson".

on September 11;¹⁶⁵ he also alleged that "there are thousands of these terrorists in more than 60 countries".¹⁶⁶ From this, President Bush suggested that the War on Terrorism was not America's alone, that it was the "world's fight".¹⁶⁷ If it could be the "world's fight", can it also be the world's crime? There are many reasons to think so.

Some—perhaps many—observers consider the lack of interstate cooperation a major obstacle to law-enforcement-based responses to international terrorism, and a reason that terrorism is still so prevalent.¹⁶⁸ However, 11 September galvanized the international community to respond to terrorism; witness the seventy nations supporting the War on Terrorism, as noted in Chapter III. Much as that war had its justifications, so an international legal response would need to meet certain criteria to be effective. With reference to domestic law enforcement, Philip Heymann writes, "The trial of a terrorist must bring four things together in one place: an applicable statutory prohibition, a willingness to prosecute, the necessary evidence, and the suspect".¹⁶⁹ Applying these criteria at the level of international relations suggests that a response grounded in the criminal justice model was at least feasible.

Statutory Prohibitions

One of the reasons terrorism so often lends itself to a law-enforcement response is that terrorism is so often a violation of the law. In the case of 11 September, one can safely assume that the murder of civilians would be illegal in each of the eighty or so nations whose citizens died that day. This alone, however, does not mean that the events attain the status of crimes against humanity. Nor does the existence of international covenants against terrorism; these tend to presume that such acts will be prosecuted in domestic courts. The "line" Mary Robinson alludes to means more than that the act is against international law.

The first trials of crimes against humanity, the Nuremberg Tribunals, created formal statutory prohibitions in the Charter establishing the court.¹⁷⁰ Although such an *ex post facto* law would be rejected in U.S. jurisprudence, the Tribunal justified the exercise by noting Germany's "unconditional surrender".¹⁷¹ The next two such Tribunals, for Yugoslavia and Rwanda, drew on the Geneva Conventions and other international law formed in the wake of Nuremberg. Although the Geneva Conventions only apply to international armed conflict, the Hague Tribunal wrote that "armed conflict" includes "protracted armed violence between governmental authorities and organized armed groups".¹⁷² As this describes the struggle between Al Qaeda and the U.S. government, Al Qaeda could be brought to trial for grave breaches of the Geneva Conventions.

One of the most recent and most clear codification of international law comes from the Rome Statute of the International Criminal Court, and as Geoffrey Robertson writes, the history of Al Qaeda—including 11 September attacks—"precisely satisfies the definition of 'crimes against humanity' in Article 7 of the ICC Statute".¹⁷³ If those attacks were indeed acts of

¹⁶⁵ Perhaps as many as 91 nations? Hirschorn, Phil. "New York reduces 9/11 death toll by 40". CNN, New York, 29 Oct 2003. www.cnn.com/2003/US/Northeast/10/29/wtc.deaths

¹⁶⁶ Office of the Press Secretary. "Address to a Joint Session of Congress and the American People".

¹⁶⁷ Ibid.

¹⁶⁸ Wilkinson, Paul. Terrorism vs. Democracy. p97

¹⁶⁹ Heymann, Philip. Terrorism and America. p47

¹⁷⁰ Robertson, Geoffrey. Crimes Against Humanity. Penguin; London, 2002. p218

¹⁷¹ Ibid, p234

¹⁷² quoted in Robertson, Geoffrey. Crimes Against Humanity. p312

¹⁷³ Ibid, p427

war, they would also satisfy the Statute's definition of "war crimes" under Article 8, which includes among other things "intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities".¹⁷⁴

Prosecution

Jean Bethke Elsthain asks whether, "independent of the enforcing powers of individual states, however, does anyone seriously believe that the ICC will hold terrorists accountable for their actions?"¹⁷⁵ Her argument suffers somewhat for being wholly irrelevant; the Rome Statute did not enter into force until 1 July 2002, and Article 11 of the Rome Statute provides that "the Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute".¹⁷⁶ If any prosecution were to occur, the members of the ICC would be the first to acknowledge that it cannot, as matter of law, prosecute the crimes of 11 September. That does not mean, however, that definitions codified in 1998 cannot be applied to the crimes committed in 2001; Article 11 speaks only to the Court's jurisdiction.

Another court could have used the Rome Statute definitions to prosecute the crimes of 11 September. It need not necessarily be an existing court, either; as Robertson suggests, "President Bush did have the option of requesting the Security Council to use its Chapter VII power to establish an *ad hoc* tribunal, as it had in The Hague for Yugoslavia and in Arusha for Rwanda".¹⁷⁷ Such a court would avoid American temerity concerning the reach of the ICC, as "its mandate would be to prosecute, judge, and punish those who bear criminal responsibility in international law for the crime against humanity committed on 11 September".¹⁷⁸ In the development and formulation of such a tribunal, the United States could certainly play a leading—if not defining role, to ensure that the proceedings were conducted to the satisfaction of its standards of justice. In fact, such a court could feasibly have less strict standards than a U.S. domestic court would, making it easier to obtain convictions for those charged in the case.

Evidence

Although its record in preventing terrorism is weak, the FBI has shown a particular aptitude for forensic investigation of terrorist attacks, leading to successful prosecutions for the 1993 World Trade Center bombing, the Oklahoma City bombing, and the Unabomber attacks.¹⁷⁹ The FBI is also authorized, as of 1986, to investigate terrorist attacks outside the United States; its investigation of the Pan Am 103 bombing led Libya to admit responsibility.¹⁸⁰

This prowess has also been demonstrated in U.S. efforts against Al Qaeda. In part because of FBI investigations and CIA intelligence, Bin Ladin has been under U.S. indictment since June of 1998.¹⁸¹ When the U.S. embassies in Kenya and Tanzania were bombed in

¹⁷⁴ International Criminal Court. "Rome Statute of the International Criminal Court". The Hague, Netherlands. Article 8.2(b)(i)

¹⁷⁵ Elsthain, Jean Bethke. *Just War Against Terror*. p165

¹⁷⁶ Rome Statute, Article 11.

¹⁷⁷ Robertson, Geoffrey. *Crimes Against Humanity*. p507

¹⁷⁸ *Ibid*, p508

¹⁷⁹ Heymann, Philip. *Terrorism and America*. p106

¹⁸⁰ Kean, et al. *9/11 Commission Report*. p75-76

¹⁸¹ *Ibid*, p110.

August of that year, evidence quickly pointed to Al Qaeda. Working in cooperation with Kenyan and Pakistani authorities, the FBI was able to connect the attacks to Al Qaeda within weeks.¹⁸² The evidence was compelling enough that the Clinton Administration felt justified in launching cruise missiles against Afghanistan and Sudan within a month. Unfortunately, the FBI and other U.S. agencies were unable to definitively attribute the *USS Cole* attack to Al Qaeda, and this lack of evidence discouraged a military response to the attack.¹⁸³ This raises an important point: if there is not enough evidence to bring Bin Ladin and Al Qaeda to trial, is there enough evidence to justify a war? It would seem only fair that war, as the more destructive and risky of ventures, might demand more conclusive proof than an indictment.

In the case of 11 September, U.S. intelligence and law enforcement were able conclusively attribute the attacks to Al Qaeda by the morning of 12 September; from its monitoring of Al Qaeda, the United States had enough information on hand to make that determination.¹⁸⁴ Granted that much of the information was gathered for intelligence, not evidence, and so might be inadmissible in a court. However, as demonstrated in the previous chapter, Bin Ladin has repeatedly issued self-incriminating statements since the 11 September attacks and even after the war in Afghanistan began. These statements would be admissible in any court. Regardless, even before 11 September evidence has not been the main obstacle in law enforcement efforts against Al Qaeda; instead, the difficulty has come in arresting suspects.

Suspects

Apprehending suspects is the critical challenge to a law enforcement approach to international terrorism. Writes Paul Wilkinson, "I know of no example in the world where the hardline counter-terrorism policy... succeeded without having brought the terrorist leaders to justice".¹⁸⁵ The Security Council resolutions concerning 11 September seem to demand cooperation in apprehending the perpetrators, and the United States has already demonstrated the ability to get to terrorists around the world with cooperation from allies. For example, neither Mir Amal Kansi nor Ramsi Yousef, both wanted for terrorist attacks in the U.S., were able to escape the reach of U.S. law enforcement.¹⁸⁶

Overt, active cooperation may not be entirely necessary; Richard Clarke describes in his memoir "extraordinary rendition"—that is, operations to catch terrorists in other countries, without those countries cooperating or even knowing of the operation. Writes Clarke, "by the mid-1990s, these snatches were becoming routine CSG activity".¹⁸⁷ Renditions have been official U.S. policy since at least 1995, when a memo on U.S. counter-terrorism policy stated that "return of suspects by force may be effected without the cooperation of the host government...".¹⁸⁸ According to news reports, some 70 renditions of terrorists occurred before 11 September, and many more since then.¹⁸⁹

¹⁸² Bergen, Peter L. *Holy War, Inc.* p121

¹⁸³ Kean, et al. *9/11 Commission Report*. p202

¹⁸⁴ Woodward, Bob. *Bush at War*. p40

¹⁸⁵ Wilkinson, Paul. *Terrorism vs. Democracy*. p101

¹⁸⁶ Perl, Ralph F. "Terrorism, the Future, and U.S. Foreign Policy". *CRS Issue Brief for Congress*. Library of Congress; Washington, DC. (updated 13 Sept. 2001).

¹⁸⁷ Clarke, Richard. *Against All Enemies*. p143

¹⁸⁸ "U.S. Policy on Counter-terrorism". Presidential Decision Directive 39. June 21, 1995.

<http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB55/pdd39.pdf>

¹⁸⁹ Whitlock, Craig. "A Secret Deportation of Terror Suspects". *Washington Post*. Sunday, July 25, 2004. Page A01.

"Extraordinary rendition"—more commonly known as kidnapping—is, in most cases, a violation of international law. A famous case involved the abduction of Adolf Eichmann from Argentina by Israeli agents. Writes Louis Henkin, "the abduction was an offense against Argentina since its territorial sovereignty was violated".¹⁹⁰ However, Argentina sought no more than an apology from the Israelis, and not Eichmann's return, which is probably an indication that the Argentine government did not feel seriously offended.¹⁹¹ In many cases, terrorist renditions probably meet similar indifference; if what Clarke and others say is true, there has been a remarkable lack of outcry against this practice.

The potential for offenses against Afghanistan's sovereignty can probably be dismissed, however, because the Taliban was not widely recognized as the legitimate government and therefore had no claim to international legal sovereignty.¹⁹² Nonetheless, the Taliban would have resisted renditions, much as it resisted turning over bin Laden and company for years. This does not put Bin Ladin beyond the reach of American jurisdiction. Yoram Dinstein argues that a nation in circumstances such as those of 11 September might indeed have the legal authority to attack, based on his read of international law on "extra-territorial law-enforcement" and in particular the precedent set by the *Caroline* incident. If the Taliban were afforded recognition, the United States could only attack Al Qaeda units and not the Taliban itself, unless the Taliban offered armed resistance to U.S. efforts.¹⁹³ As such resistance would have been highly likely, war with Afghanistan was probably inevitable. However, the war itself would not have been the dominant theme of American policy.

It is a fair criticism to note that for many years prior to 2001 the United States had attempted to capture or otherwise neutralize Bin Ladin and his cohort. However, the War on Terrorism has proven only nominally more successful, and Bin Ladin remains at large as of this writing. Richard Clarke has criticized the effort in Afghanistan for being more about "regime change rather than a search-and-destroy against terrorists"; he complains that U.S. troops only began to directly target possible Bin Ladin redoubts some seven weeks into the Afghanistan operation, more than two months after the 11 September attacks.¹⁹⁴ Of major Al Qaeda suspects captured thus far, at least three—Ramzi Binalshibh, Khalid Sheikh Mohammed, and Abu Zubaydah—were arrested in Pakistan, by or with cooperation from Pakistani authorities.¹⁹⁵

Communicative Value

All this suggests that the criminal justice model was at least a feasible response to 11 September. However, such a response also offers potential advantages over the War on Terrorism. As discussed in Chapter IV, there are material benefits to the criminal model, such removing terrorists from circulation, possibly deterring attacks, and avoiding overreaction and further escalation. There are also less tangible benefits, including affirmation of the 'rule of

¹⁹⁰ Henkin, Louis. *How Nations Behave (2nd Ed.)*. Columbia U. Press; NY, 1979. p273.

¹⁹¹ *Ibid.* p273.

¹⁹² Krasner, Stephen. *Sovereignty: Organized Hypocrisy*. Princeton U. Press; NJ, 1999. p14-20.

¹⁹³ Dinstein, Yoram. *War, Aggression, and Self-Defence*. p220.

¹⁹⁴ Clarke, Richard C. *Against All Enemies*. p274-275

¹⁹⁵ BBC News. "Top al-Qaeda suspect captured". Saturday, 14 September 2002; http://news.bbc.co.uk/2/hi/south_asia/2261136.stm; BBC News. "How Al-Qaeda Chief Was Caught". Tuesday, 4 March 2003, http://news.bbc.co.uk/go/pr/fr/-/1/hi/world/south_asia/2818245.stm; Bokhari, Farhan, et al. "Capture of top bin Laden man boosts US anti-terror campaign: Coup is a big victory in the war against al-Qaeda write FT reporters". *Financial Times*, April 3, 2002. p22.

law'. More importantly, a response based in international law would be much more powerful against the communicative aspect of Al Qaeda's terrorism. As Geoffrey Robertson writes,

'Heroic' terrorist leaders like bin Laden would be subject to a demystifying process which confronts them with evidence of the moral and physical squalor in which they have operated, with their hypocrisies and theology.... Their promises to credulous followers of triumph, or of a martyr's glorious death, will be refuted by the simple fact that these leaders are now neither in power nor in paradise, but in the dock.¹⁹⁶

Unlike the War on Terrorism, this model would do much more to address the Muslim audience, without necessarily alienating domestic support; polling of Americans in the wake of 11 September showed "a strong majority supported using international judicial bodies for terrorist trials with a plurality favoring trying bin Laden before an International Criminal Tribunal rather than a New York federal Court".¹⁹⁷

VI. Conclusions

It would be overreach to place responsibility for the First World War fully on the shoulders of Gavrilo Princip; between his fatal shots and the butchery of Verdun stands a long line of questionable decisions.¹⁹⁸ Conversely, President Kennedy's decision to treat the import of ballistic missiles into Cuba as something short of an act of war probably kept the world from disintegrating into nuclear holocaust.¹⁹⁹ Despite serious pressure from his military commanders to launch airstrikes against Cuba, Kennedy chose a blockade as the least violent of coercive responses. In both cases, as in much of international security, leaders' decisions mattered.

The Bush Administration chose war; this response was not demanded by the facts of 11 September. The Administration interpreted those facts as war and developed its response accordingly. As war, the Administration's response can be justified from international law, Just War theory, and 'new war' scholarship—a fact seen in the assent of many nations. The War on Terrorism now stands as precedent for responses to international terrorism.

As counterterrorism policy, the War is of dubious value. At least, it has not proven effective, especially where the communicative aspects of the terrorist attacks are concerned. In that regard, the Administration has mostly heightened discontent against the U.S. among Arab and Muslim publics. Nor can the Administration demonstrate a satisfactory decrease in terrorist attacks since the War began.

Among the possible alternatives that the Administration did not consider was a response based in international law. In enforcing international law, efforts against Al Qaeda would have a much better chance of discrediting Al Qaeda's message and alleviating tensions in the Muslim world. There should have been more debate—in the Administration, in America, and in the world—as to the relative merits of possible responses.

¹⁹⁶ Robertson, Geoffrey. *Crimes Against Humanity*. p509

¹⁹⁷ Singh, Robert. "Superpower response: the USA". in Buckley, Mary and Rick Fawn, eds. *Global Responses to Terrorism*. Routledge; London, 2003. p55

¹⁹⁸ Williamson, Samuel Jr. "The Origins of World War I". in Rotberg, Robert I and Theodore K. Rabb (ed.s). *The Origins and Prevention of Major Wars*. Cambridge; Cambridge, 1989. p236.

¹⁹⁹ Krasner, Stephen D. "Are Bureaucracies Important? (Or Allison Wonderland)". in Ikenberry, G. John (ed.). *American Foreign Policy: theoretical essays*. HarperCollins College; New York, 1996.

I can only guess at the long-term consequences of the War on Terrorism; it is too early and there is too much unknown to make an airtight case for or against the War. There is a chance that, as the U.S. fights its increasingly unpopular War on Terrorism, other nations may look to authentically multilateral projects instead. I think it would be fascinating to see the Bush administration's response should—for example—Spain ask the ICC to indict Bin Ladin and associates for the attacks in Madrid in 2003, which occurred after the Rome Statute's entry into force; such a request would demand a debate on war versus crime. At present, that debate is moot.

This much is nearly certain: it will not be moot forever. At some point, there will be another mass casualty terrorist attack that approaches or exceeds the impact of 11 September. Once again, someone—and it may not be the Bush administration or even the United States—will have to choose a response to that act. Those facing that decision should think vigorously about the possible options, and weigh their relative efficacy and appropriateness. Those affected should also have this debate, to make sure that any response is in their best interests. The wrong response could be worse than the attacks, especially if CBRN weapons are involved; debate will then be crucial. My contention in this essay is that this debate always was crucial, and should have been engaged from the very beginning.