

### *Symposium on Operation Enduring Freedom and the War on Terrorism*

## The Lawfulness of Operation Enduring Freedom's Self-Defense Responses

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## Articles

### THE LAWFULNESS OF OPERATION ENDURING FREEDOM'S SELF-DEFENSE RESPONSES

George K. Walker\*

The September 11, 2001, terrorist attacks were the first significant assaults against the territory of the United States since the War of 1812 or the Mexican War. The U.S.-led alliance and coalition responses to them, referred to as Enduring Freedom, were lawful under international law.

#### I. INTRODUCTION

At 8:48 a.m., September 11, 2001, a hijacked American Airlines Boeing 767 with ninety-two persons aboard, Los Angeles-bound from Boston, slammed into the 110-story north tower of New York City's World Trade Center ("Center"). Fifteen minutes later, a hijacked United Airlines 767 with sixty-five people aboard, also a Boston-Los Angeles flight, hit the Center's south tower. At 9:40 a.m., a hijacked American 757 with sixty-four people aboard, bound from Washington's Dulles International Airport to Los Angeles, cartwheeled into the Pentagon in Arlington, Virginia. At 10:10, a hijacked United 757 with forty-five people aboard on a Newark, New Jersey-San Francisco flight crashed near Shanksville, Pennsylvania, reportedly after passengers struggled

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with hijackers to gain control of the 757. This 757 was reportedly headed for the U.S. Capitol, the White House, or Camp David.<sup>1</sup>

The south tower collapsed at about 10:00 a.m., killing survivors of the initial attack and about 420 emergency service workers who rushed into the building. The north tower collapsed at about 10:30 a.m. At 5:20 p.m., Center Building Number 7, a forty-seven-story structure, collapsed due to damage from the falling towers. Over 40,000 people had worked in the towers, the second-tallest buildings in North America, and another 24,000 people in the Pentagon, the largest office building in the world and the seat of the U.S. Department of Defense. First casualty estimates ranged up to 6500 people of thirty-nine nationalities; later counts reduced this to about 2800 for New York, 184 at the Pentagon including many in the U.S. military, and 45 in Pennsylvania. While some office workers died in the collapse along with rescue personnel who entered or reentered the towers to try to save them, others jumped to their deaths. An enormous dust and smoke cloud enveloped lower Manhattan; many who worked on the island were already at work and could see the events from office windows. Trapped workers and aircraft passengers called families on cell phones before the lines went dead. Many fled up Manhattan streets and avenues and over the Brooklyn Bridge. Although fires at the Pentagon and in Pennsylvania were soon put out, the Center site, soon named Ground Zero, burned for weeks; air travelers to New York could see a dust and smoke plume from miles away.

At 9:50 a.m. on September 11, a caller using White House code words had telephoned to threaten that "Air Force One [the U.S. President's plane,] is next."<sup>2</sup> President George Bush, in Sarasota, Florida,

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<sup>1</sup> This account is an amalgam of printed media sources, e.g., 47-48 KEESING'S RECORD OF WORLD EVENTS (2001-02) [hereinafter KEESING'S], *The New York Times*, *The Wall Street Journal*, *The Washington Post*, and local newspapers; Internet sources; television and radio broadcasts; and personal recollections. Books on 9-11, beginning with photographic narratives of the horror in New York City and at the Pentagon, have begun to appear. BOB WOODWARD, *BUSH AT WAR* (2002), chronicles the first 100 days of the U.S. government's reactions and actions. Stephen Biddle, *Afghanistan and the Future of Warfare*, 82 FOREIGN AFF. 31 (2003), is an account of air and ground operations in and against Afghanistan in response to 9-11 through March 2002, approximately the end date for this analysis. With few exceptions, there are no specific note references to facts; I do, however, refer to law sources critical to the factual account. Television reported the New York crashes; apparently no one photographed the Pentagon or Pennsylvania crashes. A passing motorist reported seeing the 757 cartwheel into the Pentagon, which may have reduced casualties in and damage to the building.

<sup>2</sup> R. W. Apple, Jr., *After The Attacks: The Trip Back; Aides Say Bush Was One Target Of Hijacked Jet*, N.Y. TIMES, Sept. 13, 2001, at A1. But see Elisabeth Bumiller, *A Nation*

was advised of the attacks while attending an elementary school class in connection with promoting education. The U.S. Secret Service moved him from Florida to secure Louisiana and Nebraska military bunkers; he returned to Washington at 7:00 p.m. Senior government officials, including Vice President Dick Cheney and members of Congress, went to underground bunkers. Contingency plans in place since the Eisenhower Administration for continuing government went into effect.<sup>3</sup> For some time after September 11, the Secret Service kept the Vice President away from the President to protect the presidential succession.<sup>4</sup>

The preceding paragraphs restate the opening events of September 11, 2001, now known to the world as 9-11.<sup>5</sup> People in the United States will remember the tragic events of September 11, as previous generations recalled Pearl Harbor, the death of President Franklin Roosevelt, the assassinations of President John F. Kennedy, Senator Robert F. Kennedy, or Rev. Dr. Martin Luther King, Jr.

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*Challenged: Flow Of Information; The New Slogan In Washington: Start Watching What You Say, id.*, Oct. 7, 2001, at B1 (stating that the threat was never received by the White House and was misreported by a senior official on September 11).

<sup>3</sup> In March 2002, these became permanent. Later the media discussed the "shadow government," i.e., persons designated to act in place of high elected or appointed officials from secure bunkers outside Washington to preserve continuity of government. There have been these kinds of contingency plans since World War II and perhaps earlier. Tunnels have been underneath major buildings in Washington for years. Until recently, a West Virginia resort hotel had been a designated emergency headquarters for Congress in the event of nuclear attack. There have been sites for presidential use outside Washington, including Navy ships and military aircraft, for years. For the first time in memory, not all members of Congress or the Supreme Court of the United States attended the President's addresses to congressional joint sessions. One cabinet member, who would succeed to the presidency after a catastrophe at the Capitol, always stays away. 3 U.S.C. § 19 (2000). Enough members of Congress remained away to restart government. The Constitution also requires state governors to call elections to fill House of Representatives vacancies. U.S. CONST. art. I, § 2, cl. 4. The Seventeenth Amendment requires them to call Senatorial elections for vacancies or to appoint a Senator until the next election if state statutes so provide. U.S. CONST. amend. XVII. There is no similar appointment authority for House members. *Id.* A quorum of six is necessary for the Court to conduct business; cases may be remitted to the courts of appeals from which they came if there is no quorum. 28 U.S.C. §§ 1, 2109 (2000). There might be a problem, however, if there are not enough surviving Court members to make decisions and issue orders. Legislation says nothing about cases coming from the states' highest courts. There have been calls for a constitutional amendment to close the gap for reconstituting the House.

<sup>4</sup> U.S. CONST. art. II, § 1, cl. 1, 5; *id.* amend. XXV.

<sup>5</sup> 911 is also an emergency phone number throughout much of the United States.

Although the 9-11 attacks' history continues to unfold, there are two phases of events and reactions within the United States and around the world. Part II discusses events and reactions within the United States and around the world from the time of the attacks to October 7, 2001, when U.K.-U.S. military action began in and around Afghanistan.<sup>6</sup> Part III discusses events and reactions within the United States and around the world from October 7 to Hamid Karzai's installation as Afghanistan's interim president in December 2001.<sup>7</sup> Part IV addresses "home front" issues with an emphasis on events within the United States.<sup>8</sup> Part V offers a snapshot of possible projections for a future phase in the War on Terrorism, as the conflict has come to be called.<sup>9</sup> Part VI demonstrates that the U.K.-U.S. responses in Afghanistan were lawful and comments on possible future issues in the War and the law that may apply in new phases of the War.<sup>10</sup>

## II. REACTIONS AND EVENTS WITHIN THE UNITED STATES AND AROUND THE WORLD, SEPTEMBER 11 - OCTOBER 7, 2001 AND BEYOND

Reactions among people within the United States and around the globe varied. The same was true for states' individual and collective responses and the response of international organizations.

### A. *Reactions Within the United States; Individual Reactions Around the World*

On the afternoon of September 11, at Louisiana's Barksdale Air Force Base, the President said: "Freedom itself was attacked this morning by a faceless coward, and freedom will be defended. . . . Make no mistake, the United States will hunt down and punish those responsible for these cowardly acts."<sup>11</sup> In the Oval Office that evening, the President addressed the Nation on television, saying the United States would hunt down and punish not only those responsible, but also those who harbored or supported the perpetrators. The United States would make "no distinction between the terrorists who committed the attacks and

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<sup>6</sup> See *infra* Part II.

<sup>7</sup> See *infra* Part III.

<sup>8</sup> Parts II-IV may seem overly long to lead to Part V's analysis, but recall Justice Oliver Wendell Holmes' aphorism: "[A] page of history is worth a volume of logic." N.Y. Trust Co. v. Eisner, 256 U.S. 345, 349 (1921).

<sup>9</sup> See *infra* Part V.

<sup>10</sup> See *infra* Part VI.

<sup>11</sup> Remarks on the Terrorist Attacks At Barksdale Air Force Base, Louisiana, 37 WEEKLY COMP. PRES. DOC. 1300 (Sept. 11, 2001).

those who harbor them.”<sup>12</sup> The next day he described the attacks as “more than acts of terror. They were acts of war.”<sup>13</sup> In a September 13 conference call with New York City’s Mayor and New York’s Governor, he pledged, “[N]ow that war has been declared on us, we will lead the world to victory [in the] first war of the 21st century.”<sup>14</sup> Two days later, the President told radio listeners the war would “not be short, would not be easy,” asking patience from the American people.<sup>15</sup>

In speeches the President delivered on September 16 and 17, he referred to the War as a “crusade,” recalling for some, the wars between Christian and Muslim armies during the Middle Ages; he declared: “I want justice. There’s an old poster out west that said ‘Wanted, dead or alive.’”<sup>16</sup> These kinds of remarks became muted, although perhaps not forgotten in some quarters, in later addresses.

On September 20, the President addressed a congressional joint session: The war on terror “will not end until every terrorist group of global reach has been found, stopped, and defeated.”<sup>17</sup> The word “global” raised concerns within the Administration and among U.S. friends and allies that the first U.S. promises to “eradicate” terrorism had been unrealistic and could lead the United States to support governments ready to use 9-11 as an excuse to use disproportionate force against relatively minor terrorist threats.

The initial U.S. military reaction was intense. U.S. fighter aircraft scrambled but could not intercept the 757 that crashed in Pennsylvania; it had been in flight the longest. U.S. aircraft were ordered to shoot down airliners that did not respond to instructions to divert or land. U.S. armed forces around the world went on maximum alert. U.S. military aircraft, primarily Air National Guard planes, began flying

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<sup>12</sup> Address to the Nation on the Terrorist Attacks, *id.* 1301 (Sept. 11, 2001).

<sup>13</sup> Remarks Following a Meeting with the National Security Team, *id.* 1302 (Sept. 12, 2001).

<sup>14</sup> Remarks in a Telephone Conversation with New York City Mayor Rudolph Giuliani and New York Governor George Pataki and an Exchange with Reporters, *id.* 1304, 1307 (Sept. 13, 2001).

<sup>15</sup> The President’s Radio Address, *id.* 1321 (Sept. 15, 2001).

<sup>16</sup> Remarks to Employees at the Pentagon and an Exchange With Reporters in Arlington, Virginia, *id.* 1324, 1327 (Sept. 17, 2001); Remarks on Arrival at the White House and an Exchange With Reporters, *id.* 1322, 1323 (Sept. 16, 2001) (“This crusade, this war on terrorism[,] is going to take a while, and the American people must be patient.”).

<sup>17</sup> Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11, *id.* 1347, 1348 (Sept. 20, 2001).

combat air patrols ("CAP") over U.S. cities; although this precaution has been relaxed, they still fly CAP on a random basis to this day. For the first time in its history, the United States closed its borders; all aircraft flying over the United States were ordered to land immediately. U.S.-bound aircraft were diverted for landing outside the United States. The U.S. Navy moved the aircraft carrier *U.S.S. George Washington* and a hospital ship to New York to care for casualties that never came. The Navy and the U.S. Coast Guard were called to protect U.S. ports and bridges near them.<sup>18</sup> Military installations assumed heavy security precautions; the familiar "open gate" at many bases was no more.

On September 12, U.S. Secretary of State Colin Powell announced that the United States had begun discussions with foreign leaders to build "a strong coalition to go after these perpetrators, but more broadly, to go after terrorism wherever we find it in the world.... Muslim nations have just as much to fear from terrorism that strikes at innocent civilians."<sup>19</sup>

The President declared a national emergency, mobilizing 50,000 reservists and National Guard members for "homeland defense," e.g., guarding airports and other public facilities.<sup>20</sup> After airports reopened, the sight of the Guard became familiar to travelers. Air National Guard fliers took over CAP duties above U.S. cities and other places from the U.S. Air Force.<sup>21</sup>

On September 14, a congressional joint resolution, which incorporated by reference the War Powers Resolution, authorized the President to "use all necessary and appropriate force" against those

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<sup>18</sup> When my shuttle to a conference in Manhattan six weeks after 9-11 left the bridge over the East River, I noticed a military tent with a Navy logo on it on a traffic island near the bridge. Undoubtedly, it was for Navy divers, cooperating with the Coast Guard, to watch for those who would bomb the bridge or drop bombs on passing vessels from the bridge.

<sup>19</sup> Secretary Colin L. Powell, Remarks to the Press (Sept. 12, 2001), <http://www.state.gov/secretary/rm/2001/4880.htm> (last visited Mar. 3, 2003); see Jane Perlez, *After The Attacks: The Diplomacy; Powell Says It Clearly: No Middle Ground on Terrorism*, N.Y. TIMES, Sept. 13, 2001, at A17.

<sup>20</sup> Proclamation No. 7463, 66 Fed. Reg. 48,199 (Sept. 18, 2001); Exec. Order No. 13,223, 66 *id.* (Sept. 18, 2001).

<sup>21</sup> See *supra* note 18 and accompanying text.

behind the attacks and those who "harbored such organizations and persons."<sup>22</sup>

On September 24, a presidential Executive Order froze U.S.-based assets of twenty-seven groups and individuals the Administration considered associated with the al-Qaida network,<sup>23</sup> which was, by then, suspected of being behind the 9-11 attacks.<sup>24</sup> The President threatened that the United States would not "do business" with countries not adopting similar measures against these organizations and individuals, which included Islamic charities and businesses the Administration suspected of fronting resources for al-Qaida. It was not until January 20, 2002, that the U.N. Security Council, acting pursuant to Article 42 of the Charter, imposed sanctions on Afghanistan's Taliban Government of Afghanistan. This included freezing assets, prohibiting travel, and enacting an arms embargo.<sup>25</sup>

The U.S. Administration began debating whether the United States should launch military action against states thought to harbor terrorists, e.g., Iraq or Syria. There was also a question of whether U.S. war aims in Afghanistan should include removing the Taliban Government.

Individual reactions to the worst attacks on U.S. territory since Pearl Harbor varied.<sup>26</sup> I ended my first morning class early when my secretary

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<sup>22</sup> Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (incorporating by reference, *inter alia*, 50 U.S.C. §§ 1541-48 (2000)).

<sup>23</sup> Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 24, 2001).

<sup>24</sup> See *infra* note 35 and accompanying text; see also *infra* text accompanying note 72.

<sup>25</sup> S.C. Res. 1390, U.N. SCOR, 57th Sess., 4452nd mtg., U.N. Doc. S/RES/1390 (2002). Although Taliban is the name of the fundamentalist Islamic group, the name was associated with the government in control of most of Afghanistan's territory during events leading up to and immediately after September 11. This analysis uses the name to refer to the Afghan government until a new one was installed after October 7.

<sup>26</sup> Arguably, the Pearl Harbor attacks were at least as grievous, in terms of lives lost; the over 2300 lost out of a 1941 U.S. population of 130 million represented a higher percentage than the ratio of those lost on 9-11 (over 3000) to today's population of over 260 million. In 1941, Hawaii was not a state but a territory and was soon placed under military rule. If this factor is taken into consideration, 9-11 was the first attack involving fatalities on the soil of a State of the Union since the Mexican War or the War of 1812. Pancho Villa invaded New Mexico Territory and inflicted casualties before U.S. entry into World War I; enemy spies and saboteurs landed on U.S. soil during both world wars, with no casualties. Japan floated incendiary balloons over the Pacific Northwest during World War II, with no damage except soon-extinguished forest fires. Germany reportedly had a four-engine bomber capable of reaching the United States, maybe on a one-way trip, that reportedly flew out over the Atlantic Ocean late in World War II, but the Normandy landings deprived Germany of landing fields to launch them.



burst into the classroom with the first news of the Center attacks; I tried to address the next class on the issues.<sup>27</sup> The law school set up televisions to follow events. People began calling to find out about family and friends; although there was positive (if often sad) news for some, others had to wait days to receive news because of confusion at the crash sites. Many went home to follow developments on television; if they did, they heard of phoned-in threats to New York's Grand Central Station and Empire State Building, which were evacuated. There were local rumors of attacks. My University's President movingly addressed students in Wait Chapel.<sup>28</sup> Across the nation people lined up to give blood, nearly all of which was not needed because of the few survivors. Massive financial donations began to flow to New York and to the American Red Cross. President Bush proclaimed September 14 as a national day of prayer and remembrance within the United States. Victims' funerals and memorial services continued for months; *The New York Times* carried daily pages honoring the victims. New York fire stations, street corners, and churches near the towers became shrines. Messages of encouragement flew everywhere.<sup>29</sup> The national ensign flew from homes and businesses and was affixed to vehicles for months afterward. Stores' U.S. flag stocks were soon exhausted.

An enraged few sought revenge; around the world, those who looked like they were from the Middle East or Asia suffered racist remarks and verbal abuse. Attacks on mosques were reported. There were a few murders; prompt arrests followed. Rev. Jerry Falwell recanted a September 13 radio remark that "God continues to lift the curtain and allows the enemies of America to give us probably what we deserve."<sup>30</sup> A few other clergy were critical of Muslims; most urged tolerance.<sup>31</sup> President Bush's September 13 statement, and that of Muhammed Ali, former world heavyweight champion and a Muslim, repeated the tolerance theme. On September 27, U.S.-based Islamic

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<sup>27</sup> My teachers at Vanderbilt University's School of Law did the same the morning after Lee Harvey Oswald shot President Kennedy.

<sup>28</sup> Thomas K. Hearn, Jr., *Memorial Service*, Wait Chapel, Wake Forest University, Winston-Salem, N.C., Sept. 11, 2001 (copy on file with author).

<sup>29</sup> Within hours I received a supportive e-mail from an Australian academic colleague.

<sup>30</sup> Laurie Goodstein, *After The Attacks: Finding Fault; Falwell's Finger-Pointing Inappropriate, Bush Says*, N.Y. TIMES, Sept. 15, 2001, at A15 (quoting Falwell's Sept. 14 apology that "[d]espite the impression some may have from news reports today, I hold no one other than the terrorists and the people and nations who have enabled and harbored them responsible for Tuesday's attacks on this nation").

<sup>31</sup> For the Holy See's reaction, see *infra* note 75 and accompanying text.

scholars issued a fatwa, saying Muslims serving in the U.S. armed forces had a duty to serve their country, even in armed conflict with fellow Muslims. There was some apparent nonchalance; some routine professional or business meetings were not postponed and proceeded as scheduled. In most other cases, those presiding canceled gatherings, ordering security precautions for businesses or institutions for which they were responsible.<sup>32</sup>

Within the Arab world, some Palestinian refugees in Lebanon and Israel-occupied territories received news of the attacks with jubilation. By contrast, Palestinian President Yassir Arafat denounced them, offering the Palestinian people's condolences. He donated blood because of fear that U.S. blood stocks would be exhausted by demands after the attacks.

The New York Stock and Mercantile Exchanges closed after the attacks; the Stock Exchange remained closed longer than at any time since World War I's outbreak in 1914. When it reopened, the plunge was 7.02%, the largest drop ever. On September 11, central banks announced that they would ensure sufficient liquidity for global economic transactions. During the next two days, the Federal Reserve, the European Central Bank, the Bank of Japan, and others injected \$120 billion into money markets.<sup>33</sup> Because its flight patterns are close to key U.S. Government buildings, the Reagan Washington National Airport closed and remained closed for much longer than other U.S. airports, which began to reopen a few days after 9-11. Nevertheless, besides a complete stoppage of passenger traffic, U.S. manufacturers were deprived of airlifted raw materials and components, causing some suspended production for several days. Travelers were stranded in airports for up to a week afterward. The U.S. airline and related industries lost heavily and have yet to recover.<sup>34</sup> The international insurance industry may have lost between \$40 and \$70 billion by first estimates, a greater loss than 1992's Hurricane Andrew. One estimate said twenty percent of Manhattan's office space was destroyed or rendered unusable, approximately the entire office space available in Baltimore, Maryland. Extracting rubble to a landfill took months; the

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<sup>32</sup> The attacks caused cancellation of a judicial conference in the capital; chief judges of all the federal circuits had been meeting with the Chief Justice of the United States that day. *Tragic Events Alter Course of Judicial Conference*, 33 THIRD BRANCH 1 (No. 9, 2001).

<sup>33</sup> The New York City branch of the Federal Reserve Bank is the conduit for overseas money transactions with \$1 trillion changing hands worldwide every business day.

<sup>34</sup> USAirways and United Airlines have been in bankruptcy reorganization.

operation was complicated by meticulous searching for human remains. Valuable works of art were lost, as were historic buildings near the Center.

At first no organization or individual claimed responsibility for 9-11. However, the sophisticated nature of the attacks led to speculation that those associated with al-Qaida ("the Base"), led by Osama bin Laden, an Islamic militant born in Saudi Arabia but then living in Afghanistan, had been responsible, in connection with the Taliban Government.<sup>35</sup> Al-Qaida was suspected of having financed and organized other terrorist attacks against the United States. These included a bomb attempt on the Center in 1993, bombing U.S. embassies in Africa in 1998, and a 2000 boat bomb attack on the *U.S.S. Cole*, a Navy destroyer moored in a Yemeni harbor. Al-Qaida operated in more than sixty countries in 2001. However, involvement of foreign intelligence services in planning the attacks was not ruled out.

*B. International Organizations' and Governments' Initial Responses*

On September 12, the U.N. Security Council unanimously approved Resolution 1368, which recognized terrorism as a "threat to international peace and security." The Resolution said that "those responsible for aiding, supporting, or harboring the perpetrators, organizers and sponsors of these acts will be held accountable."<sup>36</sup> Council Resolution

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<sup>35</sup> Saudi Arabia had revoked his citizenship. Bin Laden, a civil engineer, had been an Afghan Mujaheddin volunteer in 1979. The Mujaheddin, partly financed by the U.S. Central Intelligence Agency, had been instrumental in driving USSR forces out of Afghanistan. Bin Laden inherited at least \$250 million from his father's estate; this and funds collected, sometimes through businesses or charities around the world, financed al-Qaida operations. In 1996, bin Laden, fleeing Sudan to Afghanistan, issued a fatwa instructing Muslims to kill U.S. military personnel in Somalia and Saudi Arabia. U.S. troops had been in Somalia pursuant to U.N. resolutions; they had been in Saudi Arabia, site of some of Islam's holiest places (Mecca and Medina) since the 1990-91 Gulf War to oust Iraq from Kuwait. In 1998, the fatwa's scope was extended "[t]o kill Americans and their allies—civilian and military—[as] an individual duty for every Muslim who can do it in any country in which it is possible to do it." See Reuters, *U.S. Reports Threats by Muslim Militants*, N.Y. TIMES, Feb. 25, 1998, at A11. In 1998, a U.S. District Court for the Southern District of New York indicted him for his role in terrorist attacks on the U.S. African embassies. The U.S. Government offered a \$5 million reward for information leading to his capture, which increased to \$25 million after 9-11. U.S. Tomahawk cruise missiles, overflying Pakistan, failed to hit bin Laden or other major al-Qaida personnel in Afghanistan in August 1998.

<sup>36</sup> S.C. Res. 1368, U.N. SCOR, 56th Sess., 4370th mtg., U.N. Doc. S/RES/1368 (2001), reprinted in 40 I.L.M. 1277 (2001).

1373 condemned terrorism and was otherwise in the same vein.<sup>37</sup> Both Resolutions recognized the inherent right of individual and collective self-defense. The U.N. General Assembly voted Resolution 56/1 on September 18, condemning terrorism and calling for international cooperation in bringing the perpetrators, organizers, and sponsors of "the outrages of 11 September 2001" to justice.<sup>38</sup> On December 20, terrorism was again condemned in Resolution 1386.<sup>39</sup>

For the first time in its history, the North Atlantic Treaty Organization ("NATO") invoked its basic Agreement, Article 5, by which an attack on a state among NATO members is considered an attack on all.<sup>40</sup> The NATO-Russia Permanent Joint Council condemned the attacks and promised intensified cooperation "to defeat this scourge." On September 15, Australia invoked the Australia-New Zealand-United States Pact,<sup>41</sup> instructing Australian personnel attached to U.S. forces to deploy with U.S. counterparts inside and outside the United States. Still later, the Organization of American States ("OAS") invoked the Rio Treaty;<sup>42</sup> its members include thirty-five Western Hemisphere countries besides the United States.<sup>43</sup> (President Fidel

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<sup>37</sup> S.C. Res. 1373, U.N. SCOR, 56th Sess., 4385th mtg., U.N. Doc. S/RES/1373 (2001), reprinted in 40 I.L.M. 1278 (2001).

<sup>38</sup> G.A. Res. 56/1, U.N. GAOR, 56th Sess., U.N. Doc. A/RES/56/1 (2001), reprinted in 40 I.L.M. 1276 (2001).

<sup>39</sup> S.C. Res. 1386, U.N. SCOR, 56th Sess., 4443d mtg., U.N. Doc. S/RES/1386 (2001).

<sup>40</sup> *Statement by the North Atlantic Council*, Sept. 12, 2001, NATO Press Release 124 (2001), reprinted in 40 I.L.M. 1267 (2001); see also Protocol, Accession of Czech Republic, Dec. 16, 1997, T.I.A.S. No.\_\_\_\_; Protocol, Accession of Hungary, Dec. 16, 1997, T.I.A.S. No.\_\_\_\_; Protocol, Accession of Poland, Dec. 16, 1997, T.I.A.S. No.\_\_\_\_, reprinted in S. Treaty Doc. No. 105-36 (1997); Protocol, Accession of Spain, Dec. 10, 1981, 34 U.S.T. 3510; Protocol, Accession of Federal Republic of Germany, Oct. 23, 1954, 3 U.S.T. 5707, 243 U.N.T.S. 308; Protocol, Accession of Greece & Turkey, Oct. 17, 1951, 3 U.S.T. 43, 126 U.N.T.S. 350; North Atlantic Treaty, Apr. 4, 1949, art. 5, 63 Stat. 2241, 2244, 34 U.N.T.S. 243, 246; *Statement by NATO Secretary General*, Oct. 2, 2001, reprinted in 40 I.L.M. 1268 (2001).

<sup>41</sup> Security Treaty, Sept. 1, 1951, Australia-U.S.-N.Z., art. 6, 3 U.S.T. 3420, 3422, 131 U.N.T.S. 83, 84 [hereinafter ANZUS Pact].

<sup>42</sup> Terrorist Threat to the Americas, OAS Resolution, OAS Doc. OEA/Ser.F/II.24, RC.24/RES.1/01 (2001), reprinted in 40 I.L.M. 1273 (2001); see also Charter of the Organization of American States, Apr. 30, 1948, art. 28, 2 U.S.T. 2394, 2422, 119 U.N.T.S. 3, 58, amended by Protocol of Buenos Aires, Feb. 27, 1967, 21 U.S.T. 607; Inter-American Treaty of Reciprocal Assistance (Rio Treaty), Sept. 2, 1947, art. 3, 62 Stat. 1681, 1682-83, 21 U.N.T.S. 77, 81-82; *Declaration of Solidarity from the House of the Americas*, OAS Doc. OEA/Ser.F/II.23, RC.23/DEC.1/01 (2001); *Strengthening Hemispheric Cooperation to Prevent, Combat, and Eliminate Terrorism*, OAS Doc. OEA/Ser.F/II.23, RC.23/RES.1/01 (2001), reprinted in 40 I.L.M. 1269-72 (2001).

<sup>43</sup> Canada is a NATO and OAS member; OAS states stretch from Canada to South America's southern tip. U.S. DEP'T OF STATE, TREATIES IN FORCE: A LIST OF TREATIES AND

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Castro of Cuba, a Treaty party, condemned 9-11 but cautioned the United States to “act calmly.”) Junichiro Koizumi, Prime Minister of Japan, with whom the United States has been a partner in self-defense since 1954,<sup>44</sup> said on September 19 that Japan’s self-defense forces, departing from post-World War II practice, would play active roles supporting U.S. forces, although limited to intelligence, medical, and logistic support.<sup>45</sup>

During the last week of September, NATO defense ministers had been provided evidence about bin Laden’s links to the perpetrators of the September 11 attacks. On October 2, the Alliance formally stated it had received, as had U.N. officials, “clear and compelling” evidence from the United States confirming bin Laden’s culpability. On October 4, the U.K. Government released a twenty-one page document that the United Kingdom said led to a “clear conclusion” that al-Qaida had made the attacks possible.<sup>46</sup> Prime Minister Tony Blair told the U.K. House of Commons that bin Laden had warned associates that a major operation in the United States was imminent and that they should return to Afghanistan before September 11.<sup>47</sup>

After the European Union (“EU”) had declared September 14 as a day of mourning, its Commission President, Romano Prodi, declared at an emergency meeting that the EU would help the United States “with every means at its disposal.”<sup>48</sup> The Organization for Economic

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OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES IN FORCE ON JANUARY 2, 2002, at 429, 437 (2002) [hereinafter TIF].

<sup>44</sup> Mutual Defense Assistance Agreement, Mar. 8, 1954, U.S.-Japan, art. 5, U.S.T. 661, 232 U.N.T.S. 169 (modified and supplemented in various subsidiary agreements); see TIF, *supra* note 43, at 154-56.

<sup>45</sup> Legislation amending Japan’s constitution to allow military cooperation outside Japanese territory would be introduced in parliament later in September 2001.

<sup>46</sup> U.K. Prime Minister Tony Blair, *Responsibility For The Terrorist Atrocities in the United States*, 11 September 2001 (Oct. 4, 2001), <http://www.pm.gov.uk/output/Page1812.asp> (last visited Mar. 3, 2003).

<sup>47</sup> See U.K. Prime Minister Tony Blair, *Statement to Parliament on the September 11 Attacks* (Oct. 4, 2001), <http://www.pm.gov.uk/output/Page1606.asp> (last visited Mar. 3, 2003).

<sup>48</sup> *Statement by [European Commission] President [Romano] Prodi on the Attacks Against the United States*, Sept. 12, 2001, reprinted in 40 I.L.M. 1254 (2001); see also European Union Council, *Conclusions and Plan of Action of the Extraordinary European Council Meeting*, Sept. 21, 2001, reprinted in 40 I.L.M. 1264 (2001); Eur.Union-U.S., *Joint Ministerial Statement on Combatting Terrorism*, Sept. 20, 2001, reprinted in 40 I.L.M. 1263 (2001); European Union Council (Justice & Home Affairs), *Conclusion*, Sept. 20, 2001, reprinted in 40 I.L.M. 1257 (2001); Heads of State and Government of the European Union, President of the European Parliament, President of the European Commission, & the High Representative for the

Cooperation and Development also weighed in with support.<sup>49</sup> Two weeks later, however, an EU communiqué warned that a “riposte” to the attacks must be “targeted” and proportional.<sup>50</sup>

Most individual foreign leaders at first denounced the attacks, including Blair, EU states’ prime ministers and Russian President Vladimir Putin, all of whose governments imposed emergency measures in their countries.<sup>51</sup> Blair said on September 12: “This was not an attack on America alone. This was an attack on the free and democratic world,” pledging that the United Kingdom would stand “shoulder to shoulder” with the U.S. response.<sup>52</sup> “[W]e are at war with terrorism,” however war and acts of war might be defined, he said.<sup>53</sup> On September 30, Blair said he had seen “incontrovertible evidence” from U.S. sources implicating al-Qaida.<sup>54</sup> German Foreign Minister Rudolf Scharping said, however, that “[w]e do not face a war,” which German Chancellor Gerhard Schröder echoed on September 19.<sup>55</sup> He also said that there was no state of war with a particular country and that “we are not in a war against the Islamic world either.”<sup>56</sup> However, the Bundestag approved a resolution to make available military facilities to NATO and the United

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Common Foreign & Security Policy, *Joint Declaration*, Sept. 14, 2001, reprinted in 40 I.L.M. 1255 (2001).

<sup>49</sup> Organization for Economic Co-Operation & Development Secretary-General, *Statement on Fighting International Terrorism*, Oct. 1, 2001, reprinted in 40 I.L.M. 1275 (2001).

<sup>50</sup> European Council, *Conclusions And Plan Of Action of the Extraordinary European Council Meeting on 21 September 2001*, [http://europa.eu.int/comm/external\\_relations/cfsp/doc/concl\\_21\\_09\\_01.htm](http://europa.eu.int/comm/external_relations/cfsp/doc/concl_21_09_01.htm) (last visited Mar. 3, 2003); see Stephen Castle & Andrew Grice, *War on Terrorism: EU Leaders Give Their Backing To Strikes; Summit*, INDEP. (London), Sept. 22, 2001, at A2.

<sup>51</sup> See *International Response*, 47 KESING’S, *supra* note 1, at 44,335 (2001).

<sup>52</sup> U.K. Prime Minister Tony Blair, *September 11 Attacks: Prime Minister's Statement Including Question and Answer Session-12 September 2001*, <http://www.pm.gov.uk/output/Page1597.asp> (last visited Mar. 3, 2003).

<sup>53</sup> U.K. Prime Minister Tony Blair, *Prime Minister's Interview with CNN: 'We Are At War With Terrorism'-16 September 2001*, <http://www.pm.gov.uk/output/Page1599.asp> (last visited Mar. 3, 2003).

<sup>54</sup> See Alan Cowell, *A Nation Challenged: The British; Blair Says He's Seen Proof of bin Laden Role*, N.Y. TIMES, Oct. 1, 2001, at B4; Paul Waugh et al., *Blair Turns Up The Heat on the Taliban; Afghan Regime Admits It Is Protecting Bin Laden Proof of Involvement Is 'Incontrovertible', Says PM Campaign Will Be Funded From Public Borrowing*, INDEP. (London), Oct. 1, 2001, A1.

<sup>55</sup> See Harry de Quetteville & Toby Helm, *France Calls for American 'Reason'*, DAILY TELEGRAPH (London), Sept. 14, 2001, at 4.

<sup>56</sup> German Federal Chancellor Gerhard Schröder, *Policy Statement Made by Federal Chancellor Gerhard Schröder to the German Bundestag*, N.R. 61-1 from 2001/09/19, [http://eng.bundesregierung.de/dokumente/Rede/ix\\_56718\\_5459.htm](http://eng.bundesregierung.de/dokumente/Rede/ix_56718_5459.htm) (last visited Mar. 3, 2003).

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States. French Prime Minister Lionel Jospin cautioned a "reasonable" U.S. response on September 13; Defense Minister Alain Richard said the attacks were not acts of war but "a terrorist attack of a particular gravity."<sup>57</sup> However, on September 16, French Foreign Minister Hubert Vedrine conceded, "Even if it's a war that resembles no other, and isn't declared by anyone, I don't see what other word you can use."<sup>58</sup> On September 18, France said it would participate in military action but, following NATO protocols, reserved the right "to weigh the means and the nature" of its military contribution.<sup>59</sup>

Russia, at first keen to link bin Laden with Islamic militants in its Chechnya republic, sent conflicting signals on whether it would participate in military action against the Taliban, rulers of much of Afghanistan, or al-Qaida targets in Afghanistan.<sup>60</sup> On September 13, Russian Foreign Minister Igor Ivanov implied Russian military participation.<sup>61</sup> Two days later, the Defense Minister ruled this out even "hypothetical[ly]," including U.S. use of Russian bases.<sup>62</sup> On September 24, Putin said Russia would support the United States by arming the Northern Alliance,<sup>63</sup> considered by most states as Afghanistan's legitimate government, which had only a sliver of northeast Afghanistan under its control. Russia would also share intelligence and open Russian airspace to humanitarian aid shipments.

Countries bordering or nearest Afghanistan responded differently. China's President Jiang Zemin condemned the attacks and reportedly offered to support the developing coalition against international terrorism. Later, China offered intelligence assistance but cautioned

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<sup>57</sup> See Quetteville & Helm, *supra* note 55.

<sup>58</sup> John Vinocur, *Crisis Gives Chirac and Schroeder a Political Lift*, INT'L HERALD TRIB., Sept. 19, 2001, at 1.

<sup>59</sup> John Vinocur, *Schroeder Urges Europe to Stand Against Foes; Chancellor Assures the Bundestag That U.S. Won't Enmesh Allies in Military 'Adventures'; Terror Strikes America/Political Strategies*, *id.*, Sept. 20, 2001, at 7.

<sup>60</sup> See *Formation of Military Coalition-Calls for "Proportionate" Response*, 47 KEESING'S, *supra* note 1, at 44,335 (2001).

<sup>61</sup> Susan B. Glasser & Peter Baker, *Putin, Bush Weigh New Unity Against A 'Common Foe'*, WASH. POST, Sept. 13, 2001, at A25 (quoting Minister Ivanov as saying that "[w]e are both victims already, both the United States and Russia; what we need is closer ties and efforts in fighting terrorism").

<sup>62</sup> See Michael Wines, *After The Attacks: In Moscow; Russia Takes Stand Against Terrorism, But The Stance Wavers Quickly*, N.Y. TIMES, Sept. 16, 2001, at A20.

<sup>63</sup> The Alliance was officially United Islamic Front for Salvation of Afghanistan (UIFSA); "Northern Alliance" was commonly used in media and other reports and is used in this analysis.

against military action that might lead to civilian casualties, urging the United States to present evidence of bin Laden's guilt before launching military action.<sup>64</sup>

President Seyyed Mohammed Khatami of Iran, a largely Muslim state, condemned the attacks with some language indicating cooperation with the United States in a war on terrorism. However, Iran's Supreme Clerical Leader, Ayatollah Ali Khamenei, ruled out cooperation on September 26. On October 5, President Khatami privately assured Western diplomats that Iran accepted the evidence against bin Laden, but, as a Muslim state, it felt constrained to denounce publicly U.S.-led attacks against Afghanistan and would not allow U.S. forces to use Iranian airspace.

On September 13, Pakistan, also a predominantly Muslim state, pledged its "fullest cooperation," including shared intelligence and use of Pakistan airspace and bases, with the United States in military action against bin Laden and al-Qaida.<sup>65</sup> Pakistan also embarked on an urgent diplomatic initiative to persuade Afghanistan to surrender bin Laden and his closest associates to the United States for trial there.<sup>66</sup> The initiative failed. Predominantly Hindu India, then engaged in a conflict with Taliban-backed militants in Kashmir, also announced its "fullest cooperation" with U.S.-led forces.<sup>67</sup> On September 23, President Bush revoked 1998 sanctions imposed on India and Pakistan after their nuclear tests.<sup>68</sup> The United States also agreed to reschedule \$379 million in debt that Pakistan owed the United States and to review separate economic sanctions imposed in 1999.<sup>69</sup> On October 4, Pakistan announced that, in its view, the United States had produced enough

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<sup>64</sup> China has had its troubles with Islamic militants in its western provinces bordering, inter alia, Afghanistan.

<sup>65</sup> Ahmed Rashid, *Pakistan Faces Dilemma After Backing Bush*, DAILY TELEGRAPH (London), Sept. 14, 2001, at 10.

<sup>66</sup> See John Daniszewski et al., *Response To Terror; Pakistan Presses to Get a Surrender; Diplomacy: A Delegation Sets Out to Try Again to Persuade Taliban to Hand Over Bin Laden*, L.A. TIMES, Sept. 28, 2001, at A1.

<sup>67</sup> See Barry James, *Some Governments Temper Support for U.S. Retaliation; It's Time for 'Cool Heads, Calm Nerves,' Blair Advises*, INT'L HERALD TRIB., Sept. 19, 2001, at 1.

<sup>68</sup> See Mike Allen, *Bush Talks With Putin, Key Security Advisers*, WASH. POST, Sept. 23, 2001, at A29; *A Nation Challenged; President Lifts Sanctions*, N.Y. TIMES, Sept. 23, 2001, at B3.

<sup>69</sup> See Pamela Constable, *Pakistan Hopes Aid Can Spark Economy; Sanctions Have Compounded Poverty*, WASH. POST, Sept. 27, 2001, at A16.



evidence to indict bin Laden in a court of law.<sup>70</sup> Among the predominantly Muslim former USSR republics bordering Afghanistan to the north, Kazakhstan said it would make airspace and bases available for U.S.-led military action. Tajikistan and Uzbekistan made airspace available but would not allow bases.

Saudi Arabia condemned the attacks as contrary to Islamic principles and indicated it would support a U.S.-led coalition. Within a week of the attacks, Crown Prince Abdullah bin Abdul Aziz said his country was “fully prepared” to cooperate with the United States and its allies “in every way that may help identify and pursue the perpetrators of this criminal incident.”<sup>71</sup> Saudi Arabia severed diplomatic relations with the Taliban government of Afghanistan that day; it had been one of three states recognizing the Taliban as the legitimate Afghan government. The others, Pakistan and the United Arab Emirates (“UAE”), later followed suit. Saudi Arabia agreed to allow U.S. forces based there to participate in operations against bin Laden and the Taliban. Besides being a site of U.S. and coalition bases during and after the 1990-91 Gulf War, Saudi Arabia is the site of major Islamic shrines and had experienced terror attacks within its borders. It was bin Laden’s birthplace, although his Saudi citizenship had been revoked and he had been expelled from the country.<sup>72</sup> Most of the 9-11 hijackers were from Saudi Arabia. Saudi Arabia may have been on Iraq’s invasion list when it attacked Kuwait in 1990. It had generally supported Iraq against Iran during those predominantly Islamic countries’ eight-year war.<sup>73</sup> UAE businesses were financial conduits for al-Qaida.

The Philippines, where Islamic militants tied to bin Laden operated, pledged “all-out support” to the U.S. military campaign against

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<sup>70</sup> Pakistan and the United States, and also Iran, Turkey, and the United Kingdom, are parties to the defunct Declaration Relating to the Baghdad Pact, July 28, 1958, 9 U.S.T. 1077, 335 U.N.T.S. 205. See also Pact for Mutual Co-Operation, Feb. 24, 1955, 233 U.N.T.S. 199; George K. Walker, *Anticipatory Self-Defense in the Charter Era: What the Treaties Have Said*, 31 CORNELL INT’L L.J. 321, 365 (1998), reprinted in MICHAEL N. SCHMITT, *THE LAW OF NAVAL OPERATIONS: LIBER AMICORUM* PROFESSOR JACK GRUNAWALT 365, 390 (Naval War Coll. Int’l Law Studies, No. 72, 1998).

<sup>71</sup> Neil MacFarquhar, *After The Attacks: The Saudis; Battle Against Terrorism Tests Fragile Relationship Between U.S. and Saudis*, N.Y. TIMES, Sept. 15, 2001, at A17 (quoting Crown Prince Abdullah in a phone conversation with President Bush).

<sup>72</sup> See *supra* note 35.

<sup>73</sup> See generally GEORGE K. WALKER, *THE TANKER WAR, 1980-88 LAW AND POLICY* (Naval War Coll. Int’l Law Studies, No. 74, 2000); George K. Walker, *The Crisis Over Kuwait, August 1990-February 1991*, 1991 DUKE J. COMP. & INT’L L. 25, 29.

international terrorism.<sup>74</sup> The Philippines also drafted an agreement with Indonesia and Malaysia for a common front against terrorism.

The Holy See, through Pope John Paul II, stated on September 24 its recognition of a U.S. right to self-defense. The next day the Pope qualified this, calling for “magnanimity on the part of the strong.”<sup>75</sup>

In sixty countries around the world, there were many arrests. In the United States alone, 350 people were arrested on suspicion of complicity in 9-11 and for immigration violations.

### C. *Reaction in Afghanistan and by al-Qaida*

The United Nations had imposed sanctions on Afghanistan in December 2000 because the Taliban had refused to hand over bin Laden to the “appropriate authorities,” i.e., the United States, which claimed his responsibility for bombings of U.S. embassies in Africa.<sup>76</sup> The United States had attempted to hit bin Laden and al-Qaida sites in Afghanistan in August 1998.<sup>77</sup>

As of September 11, 2001, three states, Pakistan, Saudi Arabia, and the UAE, had recognized the Taliban regime as the legitimate Afghan government. Others recognized a government represented by the Northern Alliance<sup>78</sup> of tribes fighting the Taliban since the USSR left Afghanistan in 1989 after occupying it since 1980. “Journalists” linked to the Taliban and al-Qaida, bearing a bomb in a camera, mortally wounded Alliance commander and former Defense Minister Ahmed Shah Masud on September 10; he died September 15.<sup>79</sup> The assassins had acted on bin Laden’s direct orders.

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<sup>74</sup> See James Gerstenzang & Robin Wright, *After the Attack; Foreign Relations*, L.A. TIMES, Sept. 26, 2001, at A1.

<sup>75</sup> Pope John Paul II, Address at Welcome Ceremony for Apostolic Voyage In Armenia (Sept. 25, 2001), [http://www.vatican.va/holy\\_father/john\\_paul\\_ii/speeches/2001/september/documents/hf\\_jp-ii\\_spe\\_20010925\\_armenia-arrival\\_en.html](http://www.vatican.va/holy_father/john_paul_ii/speeches/2001/september/documents/hf_jp-ii_spe_20010925_armenia-arrival_en.html) (last visited Mar. 7, 2003).

<sup>76</sup> S.C. Res. 1333, U.N. SCOR, 55th Sess., 4251st mtg., U.N. Doc. S/RES/1333 (2000).

<sup>77</sup> See *supra* note 35.

<sup>78</sup> See *supra* note 63.

<sup>79</sup> See *Assassination of Masud*, 47 KEESING’S, *supra* note 1, at 44,342-43; Sandy Gall, *Why War Is the Afghan Way of Life*, DAILY REC. (Glasgow), Sept. 19, 2001, at 9.

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Battles throughout Afghanistan between the Taliban and the Alliance had resulted in no territorial gains for either side.<sup>80</sup> The Taliban had imposed a fundamentalist Islamic regime on Afghanistan, including near-total repression of women, and had destroyed historic artifacts in the Kabul and other museums and two World Cultural Heritage-level standing Buddhas.

The Taliban first appealed to the United States not to attack, denying complicity with bin Laden. Later, the Taliban claimed there was no evidence to prove bin Laden was responsible for the attacks. On September 16, a facsimile, purportedly from bin Laden, congratulated those who had carried out the attacks but denied he had been involved in planning or executing them. That day, Vice President Cheney warned that the “full wrath of the United States” would be unleashed against regimes harboring terrorists.<sup>81</sup> Pakistani diplomats went to Kandahar, Afghanistan to demand that the Taliban hand over bin Laden to the United States or face possible imminent massive military assault. Responding on September 16, Afghan Foreign Minister Wakil Ahmad Mutawwakil threatened that the Taliban would be “forced to retaliate” against any nation offering the United States airspace or land facilities. The Taliban also discussed with religious leaders the possibility of declaring a jihad (holy war) if the United States or other Western states attacked Afghanistan.

On September 18, Pakistan’s diplomats returned home “severely discouraged” and with conditions set by Mullah Mohammed Omar, the Taliban leader, for bin Laden’s extradition to the United States: (1) evidence against him would be provided to the Afghan Supreme Court or to a panel of Muslim judges from three states; (2) his surrender must be approved by the Organization of the Islamic Conference’s (“OIC”) fifty-six member states; and (3) the surrender must be accompanied by the diplomatic recognition of the Taliban as Afghanistan’s legitimate government and the lifting of U.N. sanctions against Afghanistan for failure to turn over bin Laden. The United States refused to negotiate conditions with the Taliban, arguing that releasing evidence against him and al-Qaida would compromise U.S. intelligence sources.

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<sup>80</sup> Just before his death, Masud admitted that the Alliance could never defeat the Taliban.

<sup>81</sup> Todd S. Purdum, *After the Attacks: The White House; Bush Warns of a Wrathful, Shadowy and Inventive War*, N.Y. TIMES, Sept. 17, 2001, at A2.

That same day, Mullah Omar announced that an Afghan council of Islamic clerics had been called to rule on the U.S. demand and to consider whether requiring a "guest" to leave under the circumstances would betray a tenet of Islam. On September 19, the council ruled that the Taliban could "persuade" but could not force bin Laden to leave voluntarily "in the proper time and of his own free will."<sup>82</sup> The United States rejected the overture.<sup>83</sup> On September 21, the Taliban ambassador to Pakistan said the Taliban did not know bin Laden's whereabouts and, thus, could not inform him of the council's decision that he should be persuaded to leave.<sup>84</sup> On September 24, bin Laden purportedly sent a facsimile to Al-Jazeera, a Qatar-based satellite television station, calling on Pakistani Muslims to fight a holy war against "the new crusade and Jewish campaign led by the big crusader Bush under the flag of the cross."<sup>85</sup> On September 28, the council decision was served on bin Laden. On September 30, the Taliban confirmed that it knew his location: "[H]e is at an unknown place for his safety and security."<sup>86</sup>

By the end of September, the Taliban government had dispersed military equipment and evacuated senior leaders from Afghan cities. Iran, Tajikistan, Turkmenistan, Uzbekistan, and Pakistan, which ended its diplomatic representation with Afghanistan on September 24, closed their borders. The United Nations World Food Programme ("WFP"), which had suspended shipments to Afghanistan to feed refugees fleeing the Taliban on September 12, and other aid agencies and organizations moved its foreign workers out of the country on September 13. On September 25, the Taliban decreed summary execution for relief or aid workers caught using satellite phones. The growing crisis among refugees, 2.5 million in Pakistan and 1.5 million more on the road, caused the WFP to resume limited operations on September 30. There was speculation that many refugees would not survive the winter, which

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<sup>82</sup> *Afghanistan Clerics Urge Terror Chief to Leave But Set No Deadline*, DAILY REC. (Glasgow), Sept. 21, 2001, at 6; see also Tyler Marshall, *After the Attack*, L.A. TIMES, Sept. 21, 2001, at A3.

<sup>83</sup> See Marshall, *supra* note 82.

<sup>84</sup> See Raymond Whitaker, *War On Terrorism: Civil War-Uzbeks Seek Their Own Vengeance for Killing Of Massood*, THE INDEP. (London), Sept. 22, 2001, at 7.

<sup>85</sup> Rajiv Chandrasekaran, *Taliban Deploys Its Fighters to Borders; Offices of Aid Agencies Are Taken Over; Pakistan Pulls Diplomats Out of Afghanistan*, WASH. POST, Sept. 25, 2001, at A14. Just after the attacks, President Bush had called for a "crusade." See *supra* note 16 and accompanying text; see also *supra* text accompanying notes 14-17. Although there was some doubt as to the facsimile's authenticity, bin Laden had communicated through Al-Jazeera in the past.

<sup>86</sup> Brian Knowlton, *Taliban Say They Are Hiding bin Laden; Saudi Must Be 'Purged,' U.S. Warns*, INT'L HERALD TRIB., Oct. 1, 2001, at 1.

begins in Afghanistan in mid-November. On September 27, fifteen donor nations had agreed, in an emergency session, to provide more aid. On October 4, President Bush announced that the United States would spend \$320 million for food aid besides the \$184 million already pledged for the 2001 fiscal year. The EU and other Western countries, among them Germany, Italy, Sweden, and the United Kingdom, pledged the largest increases.<sup>87</sup>

The trial of eight foreign aid workers for promoting Christianity that had begun September 4 in Kabul, the capital, continued. On October 7, the Taliban Information Minister offered to release the eight if the United States promised to postpone attacks on Afghanistan.<sup>88</sup> The United States, which had characterized the eight as hostages, dismissed the offer.<sup>89</sup>

There were late-September reports of U.K. and U.S. forces in Afghanistan as reconnaissance for military action. On October 5, 1000 U.S. 10th Mountain Division soldiers flew into Uzbekistan, officially there to use an air base for search and rescue ("SAR") missions, i.e., sorties to pick up downed pilots, but not to launch ground attacks from Uzbekistan. On October 10, Tajikistan, having signed an agreement with the United States for use of an air base, sealed its Afghanistan borders. On October 11, it was reported that several hundred U.S. troops would be deployed at Pakistani bases for SAR-related missions. Saudi Arabia, after conflicting statements, said the United States could not conduct operations against Afghanistan from Saudi bases, although U.S. personnel could direct attacks from the Prince Sultan Air Base near Riyadh, the capital.

The Taliban had about 40,000 fighters, and al-Qaida had another 10,000 in Afghanistan; many were dispersed to residential and remote areas. The Northern Alliance, now supplied with more Russian equipment, was ready in the north.

In early October, an Alliance delegation visited former Afghanistan King Mohammed Zahir Shah in Rome, where he had lived in exile since

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<sup>87</sup> The United States, Germany, Italy, and the United Kingdom were NATO Members. See TIF, *supra* note 43, at 429.

<sup>88</sup> See John F. Burns, *A Nation Challenged: Kabul; Taliban Link Fate of Aid Workers to U.S. Action*, N.Y. TIMES, Oct. 7, 2001, at A1.

<sup>89</sup> See Elisabeth Bumiller, *A Nation Challenged: The President; President Rejects Offer By Taliban For Negotiations*, *id.*, Oct. 15, 2001, at A1.

being deposed in 1973. Zahir had expressed an interest in returning to head an interim government in a figurehead role.

### III. MILITARY OPERATIONS IN AFGHANISTAN AND ELSEWHERE BEGINNING OCTOBER 7, 2001

Military operations in Afghanistan and in the skies over Afghanistan dominated the War on Terrorism on October 7, 2001, and afterward. There were other important developments around the world and within individual countries, however. By October, eighty countries had made offers of help in the War on Terrorism. While many were U.S. self-defense treaty partners, about half were not.

Responding to the Taliban regime's refusal to surrender bin Laden and senior al-Qaida associates unconditionally to the United States, U.K. and U.S. armed forces began a military operation, Enduring Freedom, against Taliban military targets and suspected al-Qaida camps in Afghanistan. At 9:00 p.m. local time on October 7, a U.K. submarine and U.S. warships and submarines fired about fifty cruise missiles at targets near Kabul and Taliban facilities and forces in Kandahar in the south, Jalalabad in the northeast, and Mazar-i-Sharif in the north, including Kabul airport and air defense facilities. Besides missile attacks, U.S. long-range bombers, flying from Missouri and Diego Garcia, a U.K. Indian Ocean dependency, hit targets. Over twenty F-14 and F/A-18 aircraft flew from U.S.S. *Enterprise* and U.S.S. *Carl Vinson* battle groups in the Arabian Sea to attack targets. The U.S.S. *Theodore Roosevelt* battle group was in the Mediterranean Sea, and a fourth carrier, U.S.S. *Kitty Hawk*, left the Yokosuka, Japan, naval base October 1 to serve as a helicopter launch platform for U.S. troops. Besides cruise missiles, ordnance dropped included "smart bombs," i.e., precision guided munitions ("PGM"), conventional gravity bombs including the multi-ton "daisy cutter" rolled out of a bomber on a slide, and smaller antipersonnel weapons, e.g., cluster bombs. U.S. C-17 cargo planes dropped medical and food aid to Afghan refugees near the Pakistan border, and leaflets promising to "protect and reward" those prepared to share information on bin Laden's and his lieutenants' whereabouts. On October 7, the U.S. U.N. Permanent Representative advised the Security

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Council of the U.S. action, citing Article 51 of the U.N. Charter. The United Kingdom sent a similar letter.<sup>90</sup>

President Bush addressed the Nation on October 7:

This military action is a part of our campaign against terrorism, another front in a war that has already been joined through diplomacy, intelligence, . . . freezing . . . assets, and the arrest of terrorists by law enforcement . . . in 38 countries. . . . [W]e are supported by the collective will of the world . . . [but g]iven the nature and reach of our enemies, we will win this conflict by the patient accumulation of successes, . . . [rather than by quick military victory].<sup>91</sup>

Although "many Americans feel fear today," now "the Taliban will pay a price" for sheltering bin Laden.<sup>92</sup> He warned: "If any government sponsors the outlaws and killers of innocents, they have become outlaws and murderers, themselves[, and] they will take that lonely path at their own peril."<sup>93</sup>

Responding to the bombing, bin Laden released a prerecorded videotape on an October 7 broadcast by Al-Jazeera. He said the United States was "full of fear" after 9-11, an observation many saw as a tacit admission of al-Qaida complicity.<sup>94</sup> Although not claiming responsibility for them, he said, "God has blessed . . . vanguard Muslims to destroy America, may God bless them and allot them a place in heaven."<sup>95</sup> He denounced President Bush as "head of the infidels" and threatened that U.S. citizens would not live in peace "until the infidels' armies leave the land of Mohammed," i.e., Saudi Arabia.<sup>96</sup> To attract

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<sup>90</sup> Letter Dated 7 October 2001 from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2001/946 (2001), *reprinted* in 40 I.L.M. 1281 (2001). The Council had recognized the right of individual and collective self-defense in its resolutions shortly after 9-11. *See supra* text accompanying notes 36-37.

<sup>91</sup> Address to the Nation Announcing Strikes Against Al Qaida Training Camps and Taliban Military Installations in Afghanistan, 37 WEEKLY COMP. PRES. DOC. 1432 (Oct. 7, 2001).

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *See* Michael Dobbs, *Bin Laden Hails Attacks on U.S.*, WASH. POST, Oct. 8, 2001, at A12.

<sup>95</sup> *See* Sami Aboudi, *Bin Laden to US: Palestinian Suffering Means You Suffer, Too*, JERUSALEM POST, Oct. 8, 2001, at 1.

<sup>96</sup> *See* Dobbs, *supra* note 94; *supra* note 35.

support, he said: "I swear to God that America will not live in peace before peace reigns in Palestine."<sup>97</sup> He urged Muslims in countries offering the United States aid to rise against their leaders, "hypocrites" destined for the "lowest depths of the fire."<sup>98</sup> Referring to eighty years of "humiliation" for Islamic people, i.e., Western colonial domination, he said, "What America is tasting now is only a copy of what we have tasted."<sup>99</sup> He and his deputy often invoked Muslim triumphs, including the crusaders' expulsion from Jerusalem in 1187.<sup>100</sup> Events of 9-11 had "'divided the world into two sides, . . . believers and . . . infidels . . .'" Every Muslim has to rush to make his religion victorious. The winds of faith have come."<sup>101</sup> Two days later, a bin Laden senior aide broadcast a warning that further terrorist attacks could be expected.<sup>102</sup>

On October 10, Mullah Omar called on the world's Muslims to help Afghanistan resist the attack. Several thousand students in religious schools in Pakistan and Arab countries heeded his call, crossing into Afghanistan in October.

On October 14, however, a senior Taliban official, reportedly Mullah Omar's second in command, offered to surrender bin Laden to a third country if the bombing stopped and if the United States provided further evidence of his guilt. President Bush rejected the offer; handing over him and his closest associates directly to the United States was "non-negotiable."<sup>103</sup>

By October 9, the United States was confident it had destroyed most Taliban air defenses and that daylight raids could begin against targets in Kandahar and near Kabul. More than eighty percent of intended

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<sup>97</sup> See Patrick E. Tyler, *A Nation Challenged: The Attack; U.S. and Britain Strike Afghanistan, Aiming at Bases and Terrorist Camps; Bush Warns 'Taliban Will Pay a Price,'* N.Y. TIMES, Oct. 8, 2001, at A1.

<sup>98</sup> See Susan Sachs, *A Nation Challenged: The Videotape; Bin Laden Images Mesmerize Muslims,* id., Oct. 9, 2001, at B6 (citing to bin Laden's invocation of the Koran's "lowest depths of fire" language).

<sup>99</sup> See John F. Burns, *A Nation Challenged: The Wanted Man; Bin Laden Taunts U.S. and Praises Hijackers,* id., Oct. 8, 2001, at A1.

<sup>100</sup> See Larry Kaplow, *Background: The Crusades: West's 'Holy Wars' Bred Distrust in Islamic World; Centuries Later, Hard Feelings Endure,* ATLANTA J. & CONST., Oct. 8, 2001, at 15A.

<sup>101</sup> See Jay Bookman, *Americans Now Face a Long War,* id., Oct. 8, 2001, at 15A.

<sup>102</sup> Lorna Martin & Catherine MacLeod, *Al Qaeda Threat of Suicide Onslaught,* HERALD (Glasgow), Oct. 10, 2001, at 1.

<sup>103</sup> Exchange With Reporters on Returning From Camp David, Maryland, 37 WEEKLY COMP. PRES. DOC. 1477 (Oct. 14, 2001).



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targets had been destroyed; the United States had complete air superiority. U.S. forces began widening attacks from fixed to mobile targets like troop convoys. Bombing was halted on October 12 and 13 because of Friday, the Muslim prayer day and the start of Miraj Un Nabi, which celebrates the Prophet Mohammed's ascent into heaven. On later Fridays, attacks were scaled down but not stopped. On October 20 and 21, U.S. Special Forces went in-country to attack a Taliban compound in Kandahar and a nearby airport. Errant bombs hit a U.N. mine clearance facility in Afghanistan and an International Committee of the Red Cross center in Kabul, killing civilians.

The United States invoked Security Council Resolutions 1368 and 1373 and the U.N. Charter, Article 51, to justify its attacks on Afghanistan.<sup>104</sup> Some critics argued that the attacks were not legitimate self-defense. European States, including France and Germany, forcefully supported the U.S. response. However, European leftist and Green parties claimed the attacks were not proportional. Indonesian, Pakistani, and Palestinian Muslim fundamentalists and militants reacted with deadly violence. Although the OIC warned the United States against extending the war beyond Afghanistan, it did not criticize the bombing campaign itself. An OIC official statement noted the 9-11 attacks were "opposed to the tolerant and divine message of Islam."<sup>105</sup>

Within Afghanistan during October, food supply continued to be critical. The United States allocated \$320 million beyond the \$184 million already pledged; other Western States also increased commitments. The foreign aid workers' trial continued.<sup>106</sup>

In November, the Northern Alliance, coordinating its campaign with U.S. air attacks and U.K. and U.S. special forces operations, drove the Taliban out of Jalalabad, Herat, Kabul, and Mazar-i-Sharif. Over 5000 Taliban, including 1000 Arabs and Pakistanis, surrendered at Kunduz. The Alliance executed hundreds of foreign volunteers and al-Qaida serving with the Taliban. On November 23, U.N. officials warned combatants of obligations under international law to prisoners of war.

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<sup>104</sup> They had cited the right of individual and collective self-defense. *See supra* text accompanying notes 36-37, 90.

<sup>105</sup> *See* Daniel Williams, *Islamic Group Offers U.S. Mild Rebuke; Nations at Conference Avoid Criticizing Strikes on Taliban*, WASH. POST, Oct. 11, 2001, at A21.

<sup>106</sup> Also at that time, India-Pakistan tensions over Kashmir flared in the fall, almost to renewed war, but subsided by June 2002. Pakistan began moving against militant groups allegedly perpetrating attacks, e.g., on the Indian Parliament in December 2001.

The Alliance rescued the eight aid workers. After Kandahar fell to the Alliance in December, a provisional government under Hamid Karzai was established on December 23.<sup>107</sup>

On November 14, the Security Council had voted Resolution 1378 into effect, calling for a multinational peacekeeping force for the country.<sup>108</sup> The 5500-member force, the International Security Assistance Force in Afghanistan ("ISAF"), which eventually included troops from eighteen countries, was initially composed of U.K. troops under U.S. Central Commander General Tommy Franks.<sup>109</sup> The U.N. Development Programme ("UNDP") estimated that \$6.5 billion would be needed for the first five years of rebuilding Afghanistan; three international organizations<sup>110</sup> raised the figure to \$15 billion in early 2002. A donor conference of sixty states, meeting in Tokyo in January 2002, pledged \$4.5 billion, mostly from the EU, Iran, Japan, Saudi Arabia, and the United States. In November, the food crisis eased; the WFP and other groups could get food into the country, particularly to an estimated seven million refugees.

Many Taliban reneged on the Kandahar surrender agreement and fled the city in disorganized groups, including Mullah Omar. Al-Qaida melted into the countryside, some going into Pakistan or Iran. A multinational naval force went on station off the Horn of Africa to intercept those fleeing by sea to other countries.<sup>111</sup>

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<sup>107</sup> In June 2002, Karzai, who had survived assassination attempts, won a landslide election in the Afghan Loya Jurga, its council of elders, for an interim presidency. He began forming a government. Vice President Haji Abdul Qadeer was assassinated in July; Karzai escaped assassination in September.

<sup>108</sup> S.C. Res. 1378, U.N. SCOR, 56th Sess., 4415th mtg., U.N. Doc. S/RES/1378 (2001). Resolution 1386 authorized the force (International Security Assistance Force in Afghanistan, "ISAF") for six months. S.C. Res. 1386, U.N. SCOR, 56th Sess., 4443d mtg., U.N. Doc. S/RES/1386 (2001). S.C. Res. 1413, U.N. SCOR, 57th Sess., 4541st mtg., U.N. Doc. S/RES/1413 (2002), extended its mandate for another six months in May 2002.

<sup>109</sup> ISAF command rotated; for example, Turkey assumed command in June 2002.

<sup>110</sup> The organizations were the Asian Development Bank, UNDP, and the World Bank.

<sup>111</sup> See *We Stand by You*, U.S. NAV. INSTITUTE PROC. 46 (April 2002); *We Stand by You*, U.S. NAV. INSTITUTE PROC. 33 (Mar. 2002). World navies may be combatting terrorism at sea in the future if terrorists emulate pirate tactics in attacking shipping. Terrorists might try to rob or commandeer a ship for cash aboard or cargo (perhaps nuclear material), seize a ship like a cruise liner to hold hostages, take over a ship to cause a major environmental disaster, or employ a vessel like a tanker or a liquified natural gas carrier as a seagoing missile aimed at a harbor or another vessel. Terrorist attacks have already occurred, e.g., the 1985 takeover of the liner *Achille Lauro* in the Mediterranean Sea. Pirates have operated out of Somalia, a country in the Horn of Africa, which may be a destination for fleeing terrorists.

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In 2002, U.S.-led forces continued operations against pockets of Taliban resistance, focusing efforts on locating the commanders, Mullah Omar and bin Laden. As air and ground operations continued, concern mounted over civilian injuries and deaths resulting from attacks.

U.S. Marines had been deployed November 25-26 to an airstrip near Kandahar. From November 25-28, U.S. and U.K. special forces helped the Alliance suppress a prisoner-of-war revolt near Mazar-i-Sharif. Bodies of some Taliban prisoners, mostly foreign volunteers and al-Qaida, were found with their hands tied behind their backs.<sup>112</sup> Other U.S.-U.K. ground and air actions resulted in deaths or capture of Taliban and al-Qaida supporters and destruction of their lairs, e.g., the Tora Bora cave complex and elsewhere in eastern Afghanistan. The United States transported some of those captured to a prison being built at U.S. Naval Base, Guantanamo, Cuba. Bin Laden's whereabouts was and is unknown; if he survived the Tora Bora attacks, he was thought to be in eastern Afghanistan or western Pakistan. U.K. and U.S. special forces may have begun hunting Taliban and al-Qaida in northwest Pakistan in early 2002.

In a taped Al-Jazeera television interview from October 20, bin Laden said: "It is what we instigated for a while in self-defense. And it was in revenge for our people in Palestine and Iraq."<sup>113</sup> An unnamed senior al-Qaida commander had privately admitted al-Qaida had been responsible for 9-11. The Cable News Network released a transcript of the tape, in which he said: "If inciting people to do that is terrorism, and if killing those who kill our sons is terrorism, then . . . we are terrorists," a reply widely seen as clear acknowledgment that al-Qaida had

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*See generally* JOHN S. BURNETT, DANGEROUS WATERS: MODERN PIRACY AND TERRORISM ON THE HIGH SEAS (2002). Combatting seagoing terrorists might involve self-defense principles like those this Article discusses or other law, e.g., the law of the sea, discussion of which is beyond this Article's scope.

<sup>112</sup> A U.S. citizen, John Walker Lindh, was taken into custody. Eventually returned to the United States after being in a stockade in Afghanistan and aboard a U.S. warship in the Arabian Sea, Lindh was indicted in the U.S. District Court for the Eastern District of Virginia (Alexandria), pleaded guilty to terrorism-related offenses, received a twenty-year sentence, and is cooperating with U.S. authorities. *See also infra* notes 122-24 and accompanying text.

<sup>113</sup> Liz Sly, *British Cite Videotape Tying Bin Laden to Terror Attacks*, CHI. TRIB., Nov. 15, 2001, at A10.

orchestrated or incited 9-11.<sup>114</sup> Although he did not imply a link between al-Qaida and the anthrax attacks in the United States,<sup>115</sup> he described them as “punishment from God and a response to oppressed mothers’ prayers in Lebanon, Iraq, Palestine and everywhere.”<sup>116</sup> On December 13, the United States released a videotape discovered in Jalalabad, in which bin Laden discussed 9-11 in a way that at the very least showed he had known of them in advance. He predicted a second suicide attack. Observers saw this tape as providing clear evidence that bin Laden was responsible for 9-11. It had been made in October or November 2001. Two weeks later, Al-Jazeera broadcast another undated bin Laden videotape, leading to speculation that he remained alive after Tora Bora. Still another videotape alerted Singapore to the presence of a fifteen-member al-Qaida cell that planned to attack the U.S. embassy and other Western targets. This led to a roundup of suspects in Singapore.

#### IV. ON THE U.S. AND OTHER HOME FRONTS

Congress,<sup>117</sup> the Department of Justice,<sup>118</sup> U.S. investigative agencies,<sup>119</sup> the federal courts,<sup>120</sup> and the President<sup>121</sup> continued actively in the War on Terrorism.

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<sup>114</sup> Cable News Network, *Transcript of Bin Laden's October Interview*, <http://www.cnn.com/2002/WORLD/asiapcf/south/02/05/binladen.transcript/index.html> (last visited Mar. 8, 2003) [hereinafter *CNN Transcript*].

<sup>115</sup> During October, the United States experienced anthrax outbreaks in Florida, New York City, and Washington; most appeared to come from letters in the mail. There were few deaths. Anthrax first appeared at a Florida publishing house. Later, poisoned letters appeared in U.S. Senate and House of Representatives mail and in mail addressed to major media offices in New York City. The House adjourned for a week while its chambers were tested. House and Senate office buildings were closed for months as hazardous materials teams swept buildings. The Supreme Court closed for the first time since 1935; the Court heard cases in the U.S. Court of Appeals for the District of Columbia courthouse. Anthrax-related deaths and illnesses (five deaths, thirteen infections) prompted inoculating 300,000 people. Spores in U.S. mail were found in Lima, Peru, the U.S. embassy in Lithuania, and a U.S. consulate in Yekaterinburg, Russia.

<sup>116</sup> *CNN Transcript*, *supra* note 114.

<sup>117</sup> Late in October, Congress passed the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (“USA PATRIOT Act”), which expanded government authority to wiretap and conduct Internet surveillance, allowed detaining foreign nationals suspected of terrorist activity for up to seven days, increased penalties for terrorism, and expanded government powers to crack down on money laundering through institutions’ recordkeeping and reporting duties. Pub. L. No. 107-56, 115 Stat. 272 (2001). In November, Congress passed airport security legislation. In December, Canada passed stronger antiterrorism legislation.

<sup>118</sup> The Department began questioning males of Middle Eastern origin aged eighteen to thirty-three who had entered the United States on student, tourist, or business visas.

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On November 13, President Bush signed an Executive Order, authorizing establishment of military tribunals to try foreign nationals accused of terrorism involvement.<sup>122</sup> Pursuant to the Order, U.S. Secretary of Defense Donald Rumsfeld published regulations for the trials.<sup>123</sup> As the United States had captured or received custody of al-Qaida and Taliban members,<sup>124</sup> it established a prison at Guantanamo Bay, Cuba, and began transferring them there in January 2002; soon thereafter, a permanent prison was ready.

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<sup>119</sup> By November, 1100 terrorism suspects were in custody.

<sup>120</sup> In May 2002, Abdullah al-Mujahir, also known as Jose Padilla, was arrested in Chicago on arrival from Pakistan on suspicion of coming to the United States to do reconnaissance to further a plot to explode a "dirty" nuclear bomb. Al-Mujahir/Padilla, a U.S. citizen from Puerto Rico, is in the Charleston, S.C., U.S. Naval Weapons Station brig. He has been denied access to counsel. Another U.S. citizen captured in Afghanistan, Yaser Esam Hamdi, is in the Norfolk, Va., Naval Station brig. *Hamdi v. Rumsfeld* held the United States could keep him in custody as a combatant, citing the President's broad executive powers. 316 F.3d 450 (4th Cir. 2003). Among the better known of detained aliens, Zacarias Moussaoui, perhaps the "20th hijacker," represents himself and faces the death penalty in a U.S. district court case in Alexandria, Va. Other litigation has begun, mostly in the federal courts, over detentions in the United States and in Guantanamo. See also *supra* note 112.

<sup>121</sup> The President announced a Homeland Security Council and promoted a Department of Homeland Security, legislation for which passed late in 2002. It will be the largest government reorganization since World War II. On January 10, 2002, the President signed a defense authorization bill increasing expenditures by ten percent, including emergency aid for New York, Pennsylvania, and the District of Columbia and bolstering homeland security funds.

<sup>122</sup> Military Order of Nov. 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 16, 2001).

<sup>123</sup> United States Department of Defense, Military Commission Order No. 1 (Mar. 21, 2002), available at <http://www.defenselink.mil/news/Mar2002/d2002032/ord.pdf> (last visited Mar. 10, 2003).

<sup>124</sup> Detainees were labeled as "unlawful combatants" or "battlefield detainees" and not prisoners of war ("PWs"). They were housed under conditions consistent with those for PWs. The United States claimed that since they were not PWs, interrogation terms and right to trial provisions (i.e., by court martial or civil courts) of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Fourth Convention], did not apply to them. International lawyers argued that the detainees had PW status until an independent "competent tribunal" determined their status. (By contrast, uniformed Afghan army members would be entitled to PW status; they belonged to a recognized army.) On February 7, 2002, President Bush announced that the United States would give Convention protection to Taliban captives, but they would not be given full PW status because they did not meet Convention criteria of being part of an official army (they were irregular militia, did not wear uniforms, or have a command structure). Captured al-Qaida did not rate Convention protections or PW status; they were terrorists, not attached to a government or state, and, therefore, were unlawful combatants. The International Committee of the Red Cross continued to criticize the decision not to use a "competent tribunal" to determine detainees' status.

Canada and the United States agreed to deploy 600 U.S. National Guard troops at twelve border crossings and to use joint teams to intercept illegal immigrants.<sup>125</sup> On December 22, passengers and crew on a Paris-Miami flight overpowered a passenger, Richard Reid, who had tried to detonate explosives in his shoe. The plane diverted to Boston. Reid pleaded guilty to federal court indictments and was sentenced to life imprisonment. He admitted his allegiance to al-Qaida and gave a defiant address in his final remarks to the court.

In his January 29 State of the Union address, broadcast worldwide, President Bush said that "our war against terror is only beginning" and that the United States would act against an "axis of evil,"<sup>126</sup> Iran, Iraq, and the Democratic Peoples Republic of Korea (North Korea). He accused those states of developing weapons of mass destruction ("WMD") and Iraq and Iran of harboring and directing international terrorists. Although he did not explicitly advocate military action against these states, he said he would "not wait on events while dangers gather . . . [because] America is no longer protected by vast oceans."<sup>127</sup> European and Middle Eastern friends and allies of the United States received the speech with considerable alarm by distinguishing between the war against Afghanistan, justified under Article 51, and other action. NATO's Secretary General said on January 31 that if the United States could produce "'convincing evidence that there was a link between other countries and the attack . . . , then I think the allies would be seriously interested in that information,'" but that such evidence "'ha[s]n't been forthcoming up to this moment.'"<sup>128</sup>

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<sup>125</sup> The deployment provision should be considered in the Webster-Ashburton Treaty, Treaty to Settle and Define the Boundaries Between the Territories of the United States and the Possessions of Her Britannic Majesty in North America; for the Final Suppression of the African Slave Trade; and for the Giving Up of Criminals, Fugitive from Justice, in Certain Cases, Aug. 9, 1842, U.S.-Gr. Brit., 8 Stat. 572 (laying the foundation for the world's longest unfortified border, which is between Canada and the United States). See also the Oregon Treaty, In Regard to Limits Westward of the Rocky Mountains, June 15, 1846, 9 Stat. 869, which carried the rule to the Pacific Ocean.

<sup>126</sup> Address Before a Joint Session of the Congress on the State of the Union, 38 WEEKLY COMP. PRES. DOC. 133, 134-35 (Jan. 29, 2002) [hereinafter *State of the Union*]. In World War II, Germany, Italy, Japan, and states allied with them were known as the Axis.

<sup>127</sup> *Id.* at 135-36.

<sup>128</sup> See Patrick Smyth, *US Warns 3 'Rogue States' to Join Allies*, IRISH TIMES, Feb. 2, 2002, at 15. Secretary General Lord Robertson's official comments from that day are available at <http://www.nato.int/docu/speech/2002/s020131a.htm> (last visited Mar. 8, 2003). As of January 2003, there had been no reports of links between al-Qaida or other terrorist groups involved in 9-11 and Iraq or North Korea. There were reports that some al-Qaida had

V. A NEW PHASE IN THE WAR ON TERROR

On March 11, 2002, President Bush declared "a second stage of the war on terror" with two goals: denying al-Qaida an opportunity to regroup outside Afghanistan and preventing rogue states and terrorist organizations from developing WMD or gaining access to them.<sup>129</sup> He cited examples of the Republic of Georgia, Philippines, and Yemen as receiving U.S. aid.

Britain excepted, most states opposed attack on Iraq. The Israel-Palestine confrontation overshadowed Vice President Cheney's March Middle East visit. Possible destabilization in the Middle East concerned many countries there. The President's May 2002 European tour also bore little fruit.

The President repeated his preemptive strike argument at a U.S. Military Academy graduation address on June 1, 2002. Defense Secretary Rumsfeld repeated it at a June 6 NATO meeting, saying NATO should expand its collective self-defense concept to include preemptive strikes against terrorist networks and States with WMD. NATO could no longer await "absolute proof" before executing strikes. The NATO Secretary General warned NATO was primarily a defensive organization: "We do not go out looking for problems to solve."<sup>130</sup>

In September 2002, President Bush published a new *National Security Strategy of the United States of America* ("Strategy"), which said that "thousands of trained terrorists remain[ed] at large with cells in North America, South America, Europe, Africa, the Middle East, and across Asia."<sup>131</sup> The U.S. priority "will be first to disrupt and destroy terrorist organizations of global reach and attack their leadership; command, control, and communications; material support; and finances. This will have a disabling effect upon the terrorists' ability to plan and operate."<sup>132</sup>

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sought refuge in eastern Iran or eastern Iraq. Analyses of the crisis over Iraq's purported WMD possession and production and the crisis over North Korea's restarting its nuclear program are beyond this Article's scope.

<sup>129</sup> Remarks on the Six-Month Anniversary of the September 11th Attacks, 38 WEEKLY COMP. PRES. DOC. 390, 391 (Mar. 11, 2002).

<sup>130</sup> See John Chalmers & Paul Taylor, *Rumsfeld Urges NATO Action to Counter New Threats*, WASH. POST, June 7, 2002, at A21.

<sup>131</sup> PRESIDENT GEORGE W. BUSH, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 5 (Sept. 17, 2002), <http://www.whitehouse.gov/nsc/nss.pdf> (last visited Apr. 15, 2003) [hereinafter BUSH, THE NATIONAL SECURITY STRATEGY].

<sup>132</sup> *Id.*

The *Strategy* includes preemptive strikes among U.S. actions to disrupt and destroy terrorist organizations by

- direct and continuous action using all the elements of national and international power. Our immediate focus will be those terrorist organizations of global reach and any terrorist or state sponsor of terrorism which attempts to gain or use . . . [WMD] or their precursors;<sup>133</sup>
- defending the United States, the American people, and our interests at home and abroad by identifying and destroying the threat before it reaches our borders. While the United States will constantly strive to enlist the support of the international community, we will not hesitate to act alone, if necessary, to exercise our right of self-defense by acting preemptively against such terrorists, to prevent them from doing harm against our people and our country; and<sup>134</sup>
- denying further sponsorship, support, and sanctuary to terrorists by convincing or compelling states to accept their sovereign responsibilities.<sup>135</sup>

The *Strategy* pledges regional cooperation to isolate terrorists and work with allies to disrupt the terrorism financing.<sup>136</sup> A December 2002 presidential policy statement, *National Strategy to Combat Weapons of Mass Destruction*, repeated a theme of responding “to disrupt an imminent

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<sup>133</sup> *Id.* at 6; *see also id.* at 14 (“Other rogue regimes seek nuclear, biological, and chemical weapons as well. These states’ pursuit of, and global trade in, such weapons has become a looming threat to all nations.”).

<sup>134</sup> *Id.* at 6; *see also id.* at 15 (“The United States has long maintained the option of preemptive actions to counter a sufficient threat to our national security. The greater the threat, the greater is the risk of inaction—and the more compelling the case for taking anticipatory action to defend ourselves . . .”).

<sup>135</sup> *Id.* at 6; *see also* Remarks to a Special Session of the German Bundestag, 38 WEEKLY COMP. PRES. DOC. 881, 885 (May 23, 2002) (“We build a world of justice, or we will live in a world of coercion. The magnitude of our shared responsibilities makes our disagreements look so small.”).

<sup>136</sup> *See* BUSH, THE NATIONAL SECURITY STRATEGY, *supra* note 131, at 6.



[WMD] attack or an attack in progress, and eliminate the threat of future attacks," including those by terrorists.<sup>137</sup>

During the rest of 2002, allied ground operations continued in Afghanistan, e.g., Operation Anaconda, against al-Qaida and Taliban forces; security and refugee situations remained perilous as promised; and economic aid was slow in coming.<sup>138</sup> Al-Qaida-related actions began to surface around the globe. Central Commander General Franks said in August that the United States might need to increase antiterrorism efforts in states neighboring Afghanistan. Countries began arresting al-Qaida suspects around the world. In October, reminiscent of the 2000 *Cole* attack,<sup>139</sup> a suicide boat struck a French-flag tanker off Yemen. In November, terrorists connected with al-Qaida killed Israelis in a Kenya hotel truck bomb attack, and surface to air missiles missed an Israel-registered charter airliner taking off for Israel. Israeli fighters escorted it to Tel Aviv.<sup>140</sup> A U.S. remote-piloted drone Predator aircraft destroyed a terrorist carload in Yemen in November. By using a Hellfire air-to-surface missile, the drone destroyed the vehicle and its occupants with little damage to the Yemeni desert. During December, Spanish frigates, part of the multinational force patrolling for escaping terrorists and Taliban,<sup>141</sup> intercepted a North Korean or Cambodian flag merchantman; Yemen-bound Scud missiles were found aboard. After Yemen protested and it had been diverted to Diego Garcia, the United States allowed the ship to go to Yemen.<sup>142</sup>

Within the United States, the 9-11 one-year anniversary was observed at Ground Zero in New York, where a debate on what should

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<sup>137</sup> PRESIDENT GEORGE W. BUSH, NATIONAL STRATEGY TO COMBAT WEAPONS OF MASS DESTRUCTION 1, 3 (Dec. 2002), <http://www.whitehouse.gov/news/releases/2002/12/WMDstrategy.pdf> (last visited Mar. 8, 2003) [hereinafter BUSH, NATIONAL STRATEGY TO COMBAT WMD]. It was distributed to Congress at the time the Yemen-bound merchant ship with Scud missiles aboard was intercepted. Greg Jaffe & Carla Anne Robbins, *Ship Carrying Scud Missiles is Boarded by U.S.*, WALL ST. J., Dec. 11, 2002, at A6; David E. Sanger & Thom Shanker, *Reluctant U.S. Gives Assent for Missiles to Go to Yemen*, N.Y. TIMES, Dec. 12, 2002, at A1; see also BUSH, THE NATIONAL SECURITY STRATEGY, *supra* note 131, at 13-16; *infra* notes 141-42 and accompanying text.

<sup>138</sup> See *supra* notes 87, 106 and accompanying text.

<sup>139</sup> See *supra* text following note 35.

<sup>140</sup> Robert Block, *Israeli Hotel, Jet Attacked in Kenya*, WALL ST. J., Nov. 29, 2002, at A3.

<sup>141</sup> See *supra* note 111 and accompanying text.

<sup>142</sup> The United States had tracked the ship since mid-November; a U.S. explosives experts team investigated. Jaffe & Robbins, *supra* note 137; Sanger & Shanker, *supra* note 137; Thom Shanker, *North Korean Ship, Scud Cargo Seized; Spanish Capture Vessel near Yemen*, CHI. TRIB., Dec. 11, 2002, at 1; Ruth Wedgwood, *A Pirate Is a Pirate*, WALL ST. J., Dec. 16, 2002, at A12.

be built on the site had erupted, and at the Pentagon and Shanksville. The Pentagon was repaired and rededicated with a memorial observance. Although most tower and Pentagon debris remained in scrapyards, beams and stonework began to serve as 9-11 memorial centerpieces around the Nation.<sup>143</sup> For individual citizens, it was also a time of remembering and looking to the future.

## VI. THE LAWFULNESS OF OPERATION ENDURING FREEDOM IN AFGHANISTAN

Operation Enduring Freedom, the U.K.-U.S. response in Afghanistan to the 9-11 attacks, was a lawful exercise of the inherent right of individual and collective self-defense.<sup>144</sup>

### A. Analysis

The basic requirements of any self-defense response are necessity and proportionality. Only in anticipatory self-defense situations is a third requirement, that a situation is immediate and allows no other alternative, imposed. The 9-11 attacks triggered a right of self-defense that was reactive in nature, i.e., responsive to the attacks on the United States.

Anticipatory self-defense is not an issue. In a time of information warfare,<sup>145</sup> threat of missile attacks and threat or use of WMD, debate over whether anticipatory self-defense is<sup>146</sup> or is not<sup>147</sup> permitted under

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<sup>143</sup> See, e.g., Karl Van Deusen, *Remarks: Patriots Memorial Dedication Commemorating September 11, 2001*, 5 NAV. WAR C. FOUND. MEMBERS ONLY NEWSLETTER 9 (Nov. 2002) (at dedication of a memorial, which included an Indiana limestone slab from the Pentagon wall, at U.S. Naval War College, Newport, R.I., Sept. 9, 2002), available at <http://www.nwc.navy.mil/pao/vandeusen.htm> (last visited Jan. 25, 2003). Ten College graduates, including two civil service employees, died at the Pentagon on 9-11.

<sup>144</sup> See, e.g., Thomas M. Franck, *Terrorism and the Right of Self-Defense*, 95 AM. J. INT'L L. 839 (2001); W. Michael Reisman, *In Defense of World Public Order*, id. 833 (2001). Others condemn the U.K.-U.S. response. See, e.g., Jonathan I. Charney, *The Use of Force Against Terrorism and International Law*, id. (2001); Steven R. Ratner, *Jus ad Bellum and Jus in Bello After September 11*, 96 id. 905 (2002) (taking no position); Detlev F. Vagts, *Hegemonic International Law*, 95 id. 843, 843 (2001) (sounding cautionary warnings for the United States "as the hegemonic (or indispensable, dominant, or preeminent) power").

<sup>145</sup> See generally COMPUTER NETWORK ATTACK AND INTERNATIONAL LAW, (Naval War Coll. Int'l Law Studies, No. 76, Michael N. Schmitt & Brian T. O'Donnell eds., 2002) [hereinafter COMPUTER NETWORK ATTACK].

<sup>146</sup> There are numerous sources that say anticipatory self-defense may be lawful in the U.N. Charter era. See, e.g., *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 226, 245 [hereinafter Nuclear Weapons]; *Military & Paramilitary Activities In & Against*

Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 94, 347 (Schwebel, J., dissenting) [hereinafter Nicaragua Case]; STANIMAR A. ALEXANDROV, SELF-DEFENSE AGAINST THE USE OF FORCE IN INTERNATIONAL LAW 296 (1996); D.W. BOWETT, SELF-DEFENCE IN INTERNATIONAL LAW 187-93 (1958); HANS Kelsen, COLLECTIVE SECURITY UNDER INTERNATIONAL LAW (Naval War Coll. Int'l Law Studies, No. 49, 1957); TIMOTHY L.H. MCCORMACK, SELF-DEFENSE IN INTERNATIONAL LAW: THE ISRAELI RAID ON THE IRAQI NUCLEAR REACTOR 122-24, 238-39, 253-84, 302 (1996); MYRES S. MCDUGAL & FLORENTINO P. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER: THE LEGAL RESOLUTION OF INTERNATIONAL COERCION 232-41 (1961); 1 OPPENHEIM'S INTERNATIONAL LAW § 127 (Robert Jennings & Arthur Watts eds., 8th ed. 1992); OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 152-55 (1991); WALTER GARY SHARP, SR., CYBERSPACE AND THE USE OF FORCE 33-48 (1999) (concluding that the real debate is the scope of the anticipatory self-defense right-responses must be proportional); JULIUS STONE, OF LAW AND NATIONS: BETWEEN POWER POLITICS AND HUMAN HOPES 3 (1974); ANN VAN WYNEN THOMAS & A.J. THOMAS, THE CONCEPT OF AGGRESSION IN INTERNATIONAL LAW 127 (1972); Richard W. Aldrich, *How Do You Know You Are At War in the Information Age?*, 22 Hous. J. INT'L L. 223, 231, 248 (2000); Louis Rene Beres, *After the Scud Attacks: Israel, "Palestine," and Anticipatory Self-Defense*, 6 EMORY INT'L L. REV. 71, 75-77 (1992); George Bunn, *International Law and the Use of Force in Peacetime: Do U.S. Ships Have to Take the First Hit?*, 39 NAV. WAR C. REV. 69-70 (May-June 1986); James H. Doyle, Jr., *Computer Networks, Proportionality, and Military Operations*, in COMPUTER NETWORK ATTACK, *supra* note 145, at 109, 127-30; Thomas M. Franck, *When, If Ever, May States Deploy Military Force Without Prior Security Council Authorization?*, 5 WASH. U. J.L. & POL'Y 51, 68 (2001); Christopher Greenwood, *Remarks, Neutrality, The Rights of Shipping and the Use of Force in the Persian Gulf War (Part I)*, in 82 AM. SOC'Y INT'L L. PROC. 146, 160-61 (1988); David K. Linnan, *Self-Defense, Necessity and U.N. Collective Security: United States and Other Views*, 1991 DUKE J. COMP. & INT'L L. 57, 65-84, 122; A.V. Lowe, *The Commander's Handbook on the Law of Naval Operations and the Contemporary Law of the Sea*, in THE LAW OF NAVAL OPERATIONS 109, 127-30 (Naval War Coll. Int'l Law Studies, No. 67, Alberto R. Coll et al. eds., 1952); James McHugh, *Forcible Self-Help in International Law*, 25 NAV. WAR C. REV. 61 (No. 2, 1972); Rein Mullerson & David J. Scheffer, *Legal Regulation of the Use of Force*, in BEYOND CONFRONTATION: INTERNATIONAL LAW FOR THE POST-COLD WAR ERA 93, 109-14 (Lori Fisler Damrosch et al. eds., 1995); John F. Murphy, *Commentary on Intervention to Combat Terrorism and Drug Trafficking*, in LAW AND FORCE IN THE NEW INTERNATIONAL ORDER 241 (Lori Fisler Damrosch & David J. Scheffer eds., 1991); W. Michael Reisman, *Allocating Competences to Use Coercion in the Post-Cold War World: Practices, Conditions, and Prospects*, in LAW AND FORCE IN THE NEW INTERNATIONAL ORDER, *supra*, at 26, 44-47; Horace B. Robertson, Jr., *Self-Defense Against Computer Network Attack Under International Law*, in COMPUTER NETWORK ATTACK, *supra* note 145, at 121, 140; Michael N. Schmitt, *Bellum Americanum: The U.S. View of Twenty-First Century War and Its Possible Implications for the Law of Armed Conflict*, 19 MICH. J. INT'L L. 1051, 1071, 1080-83 (1998); Abraham D. Sofaer, *Sixth Annual Waldemar A. Solf Lecture: in International Law: Terrorism, the Law, and the National Defense*, 126 MIL. L. REV. 89, 95 (1989); Robert F. Turner, *State Sovereignty, International Law, and the Use of Force in Countering Low-Intensity Aggression in the Modern World*, in LEGAL AND MORAL CONSTRAINTS ON LOW-INTENSITY CONFLICT 43, 62-80 (Naval War Coll. Int'l Law Studies, No. 64, Alberto R. Coll et al. eds., 1995); Claude Humphrey Meredith Waldo, *The Regulation of Force by Individual States in International Law*, 81 R.C.A.D.I. 451, 496-99 (1952) (anticipatory self-defense permissible, as long as principles of necessity and proportionality are observed); George K. Walker, *Information Warfare and Neutrality*, 33 VAND. J. TRANSNAT'L L. 1079, 1122-24 (2000); Ruth Wedgwood, *Responding to Terrorism: The Strikes Against bin Laden*, 24 YALE J. INT'L L. 559, 566 (1999).

international law in the Charter era has become largely moot, except among those who may not be familiar with new weapons technology and the WMD threat. States also divide on the issue.<sup>148</sup> Although large land armies with conventional small arms still operate, more often than not today's conflicts are between relatively small forces that may possess great lethality in their weapons, e.g., "dirty" bombs in the hands of a

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<sup>147</sup> There are numerous sources that say anticipatory self-defense is unlawful in the U.N. Charter era. See, e.g., IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 257-61, 275-78, 366-67 (1963); 1 *THE CHARTER OF THE UNITED NATIONS* 803-04 (Bruno Simma ed., 2d ed. 2002) [hereinafter *THE CHARTER*]; ANTHONY D'AMATO, *INTERNATIONAL LAW: PROCESS AND PROSPECT* 32 (1987); YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* 159-85 (3d ed. 2001); LOUIS HENKIN, *INTERNATIONAL LAW: POLITICS AND VALUES* 8-10, 121-22 (1995); PHILIP C. JESSUP, *A MODERN LAW OF NATIONS* 166-67 (reprint 1968) (1948); D.P. O'CONNELL, *THE INFLUENCE OF LAW ON SEA POWER* 83, 171 (1979); 2 LASSA OPPENHEIM, *INTERNATIONAL LAW* § 52aa, at 156 (Hersch Lauterpacht ed., 7th ed. 1952); AHMED M. RIFAAT, *INTERNATIONAL AGGRESSION* 126 (1974); NATALINO RONZITTI, *RESCUING NATIONALS ABROAD THROUGH MILITARY COERCION AND INTERVENTION ON GROUNDS OF HUMANITY* 4 (1985); Tom Farer, *Law and War*, in 3 *THE FUTURE OF THE INTERNATIONAL LEGAL ORDER* CONFLICT MANAGEMENT 30, 36-37 (Cyril E. Black & Richard A. Falk eds., 1971); Yuri M. Kolosov, *Limiting the Use of Force: Self-Defense, Terrorism, and Drug Trafficking*, in *LAW AND FORCE IN THE NEW INTERNATIONAL ORDER*, *supra* note 146, at 232, 234; Josef L. Kunz, *Individual and Collective Self-Defense in Article 51 of the Charter of the United Nations*, 41 *AM. J. INT'L L.* 872, 878 (1947); Rainer Lagoni, *Remarks, Neutrality, the Rights of Shipping and the Use of Force in the Persian Gulf War (Part I)*, in 82 *AM. SOC'Y INT'L L. PROC.* 146, 161-62 (1988); Jules Lobel, *The Use of Force to Terrorist Attacks*, 24 *YALE J. INT'L L.* 537, 541 (1999); Robert W. Tucker, *The Interpretation of War Under Present International Law*, 4 *INT'L L.Q.* 11, 29-30 (1951) [Tucker, *Interpretation*]; see also Robert W. Tucker, *Reprisals and Self-Defense: The Customary Law*, 66 *AM. J. INT'L L.* 586 (1972) [hereinafter Tucker, *Reprisals*] (noting that states may respond only after being attacked).

<sup>148</sup> The Caroline Case (1842) supplies the classic recitation of anticipatory self-defense. Besides observing the necessity and proportionality requirements, states may respond in anticipatory self-defense only when the need is instant, overwhelming, and admitting of no other alternative. Mr. Webster, Secretary of State, to Lord Ashburton (Aug. 6, 1842), reprinted in *Destruction of the "Caroline,"* 2 *MOORE DIGEST* § 217, at 412-13 (1906); Letter from Secretary Webster to British Minister Henry S. Fox (Apr. 24, 1841) in 1 *THE PAPERS OF DANIEL WEBSTER: DIPLOMATIC PAPERS: 1841-43*, at 67 (Kenneth E. Shewmaker et al. eds., 1983); R.Y. Jennings, *The Caroline and McLeod Cases*, 32 *AM. J. INT'L L.* 82, 89 (1938). The former USSR generally subscribed to the restrictive view. Kolosov, *supra* note 147, at 234; Mullerson & Scheffer, *supra* note 146, at 107. U.S. and Israeli policy is that states may respond in anticipatory self-defense, subject to necessity and proportionality principles, and admitting of no other alternative. Beres, *supra* note 146, at 76-77; see also *ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS* ¶¶ 4.3.2-4.3.2.1 (Naval War Coll. Int'l Law Studies, No. 73, A.R. Thomas & James C. Duncan eds., 1999) [hereinafter *NWP* 1-14M *ANNOTATED*]. Other states hold similar views. Nicaragua Case, *supra* note 146 (declining to address the issue); Nuclear Weapons, *supra* note 146, at 266 (citing U.N. CHARTER art. 51 and not deciding whether threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defense, i.e., where a state's survival is at stake).

small terrorist band. Military platforms, e.g., aircraft and ships, are subject to total destruction by guided missiles that do not miss, unlike previous centuries' gunfire or cannon, where the standard was usually one over and one under the target before firing for effect.

Article 25 of the International Law Commission<sup>149</sup> *Articles on State Responsibility* ("Articles"), now before the U.N. General Assembly, supports anticipatory self-defense under the state of necessity doctrine.<sup>150</sup> Although an Assembly resolution approving the *Articles* would not ipso facto elevate the doctrine to a primary source of international law like custom,<sup>151</sup> adopting Article 25 would be a strong factor in favor of recognizing anticipatory self-defense.<sup>152</sup>

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<sup>149</sup> The International Law Commission ("ILC") is an U.N. General Assembly agency of leading international lawyers with general worldwide representation. The Assembly elects its members from government nominees. See generally HERBERT W. BRIGGS, *THE INTERNATIONAL LAW COMMISSION* (1965); IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 30 (5th ed. 1998); 1 OPPENHEIM, *supra* note 146, § 30; SCHACHTER, *supra* note 146, at 66-69, 71-72; IAN M. SINCLAIR, *THE INTERNATIONAL LAW COMMISSION* (1987); 1 ARTHUR WATTS, *THE INTERNATIONAL LAW COMMISSION, 1949-1998*, at 1-20 (1999); Briggs, *Reflections on the Codification of International Law by the International Law Commission and by Other Agencies*, 126 R.C.A.D.I. 233 (1969); R.Y. Jennings, *The Progressive Development of International Law and Its Codification*, 24 BRIT. Y.B. INT'L L. 301, 310-29 (1947); Hersch Lauterpacht, *Codification and Development of International Law*, 49 AM. J. INT'L L. 16 (1955); Shabtai Rosenne, *The International Law Commission*, 30 BRIT. Y.B. INT'L L. 104 (1960).

<sup>150</sup> U.N. International Law Commission, *Report of the International Law Commission*, U.N. GAOR, 56th Sess., Supp. No. 10, at 194-206, U.N. Doc. A/56/10 & Corr. 1 (2001) [hereinafter 2001 ILC Report], reprinted in JAMES CRAWFORD, *THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY* 168-69, 178-86, 281-305 (2002). It is before the U.N. General Assembly as Agenda Item 162, to be debated in the Assembly's 59th session in 2004, G.A. Res. 56/83, U.N. GAOR, 56th Sess., U.N. Doc. A/RES/56/83 (2002). See also *THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY*, *supra*, at 1; Symposium, *The ILC's State Responsibility Articles*, 96 AM. J. INT'L L. 773 (2002) [hereinafter *State Responsibility*].

<sup>151</sup> Cf. I.C.J. STATUTE, art. 38(1); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 102-03 (1987) [hereinafter RESTATEMENT (THIRD)]; BROWNLIE, *supra* note 149, at 4-11, 14-15; 1 OPPENHEIM, *supra* note 146, §§ 10, 16, 30-31; David D. Caron, *The ILC Articles on State Responsibility: The Paradoxical Relationship Between Form and Authority*, in *THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY*, *supra* note 150, at 857, 867; James Crawford, *The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect*, in *THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY*, *supra* note 150, at 874, 882-85, 889-90.

<sup>152</sup> Unlike U.N. Security Council "decisions" pursuant to U.N. CHARTER arts. 25, 48, 103, nearly all Assembly and many Council resolutions voted pursuant to articles 10-11 and 13-14 and Chapters VI-VII are nonmandatory, i.e., nonbinding, although they may strengthen preexisting customary and treaty norms recited in them. RESTATEMENT (THIRD), *supra* note 151, § 103(2)(d), cmt. c, rep. n.2; SYDNEY D. BAILEY & SAM DAWS, *THE PROCEDURE OF THE*

Necessity and proportionality are also limitations on attacks under the law of armed conflict ("LOAC")<sup>153</sup> and perhaps other situations, e.g., state of necessity.<sup>154</sup> What is necessary or proportional in those

UN SECURITY COUNCIL ch. 1.5 (3d ed. 1998); BROWNLIE, *supra* note 149, at 14-15, 694; JORGE CASTENEDA, LEGAL EFFECTS OF UNITED NATIONS RESOLUTIONS ch. 3 (Alba Amoia trans., 1969); 1 THE CHARTER, *supra* note 147, at 268-73, 455-60, 727-29, 734-35, 776-77; 2 THE CHARTER, *supra* note 147, at 1293-1302; LELAND F. GOODRICH ET AL., CHARTER OF THE UNITED NATIONS COMMENTARY & DOCUMENTS 126, 144, 290-314, 614-17 (3d ed. 1969); 1 OPPENHEIM, *supra* note 146, § 16, at 47-49.

<sup>153</sup> Protocol Additional to Geneva Conventions of 12 August 1949, & Relating to Protection of Victims of International Armed Conflicts, June 8, 1977, arts. 51, 57, 1125 U.N.T.S. 3, 26, 29 [hereinafter Protocol I] (stating rules of distinction, necessity and proportionality, with concomitant risk of collateral damage inherent in any attack, generally restate customary norms); see NWP 1-14M ANNOTATED, *supra* note 148, ¶ 5.2; MICHAEL BOTHE ET AL., NEW RULES FOR VICTIMS OF ARMED CONFLICT 309-11 (1982); INTERNATIONAL INSTITUTE OF HUMANITARIAN LAW, SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA ¶¶ 39-42 & cmts. (Louise Doswald-Beck ed., 1995) [hereinafter SAN REMO MANUAL]; FRITS KALSHOVEN, CONSTRAINTS ON THE WAGING OF WAR 99-100 (1987); MCDUGAL & FELICIANO, *supra* note 146, at 525; JULIUS STONE, LEGAL CONTROLS OF INTERNATIONAL CONFLICT 352-53 (1959); W.J. Fenrick, *The Rule of Proportionality and Protocol I in Conventional Warfare*, 98 MIL. L. REV. 91, 125 (1982) (questioning whether proportionality is an accepted customary norm); G.J.F. van Hegelsom, *Methods and Means of Combat in Naval Warfare*, in 8 BOCHUMER SCHRIFTEN ZUR FRIEDENSSICHERUNG UND ZUM HUMANITÄREN VOLKERRECHT 1, 18-19 (1992); Michael J. Matheson, *Session One: The United States' Position on the Relation of Customary International Law to the 1977 Protocols Additional to the Geneva Conventions*, 2 AM. U. J. INT'L L. & POL. 419, 423, 426 (1987); *Results of the First Meeting of the Madrid Plan of Action Held in Bochum, F.R.G., November 1989*, in 7 BOCHUMER SCHRIFTEN ZUR FRIEDENSSICHERUNG UND ZUM HUMANITÄREN VOLKERRECHT 170-71 (1991); William G. Schmidt, *The Protection of Victims of International Armed Conflicts: Protocol I Additional to the Geneva Conventions*, 24 A.F. L. REV. 189, 233-38 (1984); Waldemar A. Solf, *Protection of Civilians Against the Effects of Hostilities Under Customary International Law and Under Protocol I*, 1 AM. U. J. INT'L L. & POL. 117, 131 (1986). Although the United States is likely to ratify Protocol Additional to Geneva Conventions of 12 August 1949, & Relating to Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Protocol II], the Reagan Administration expressed reservations on Protocol I and did not seek Senate advice and consent for it. *Id.* at 609. Letter of Transmittal from President Reagan to U.S. Senate (Jan. 29, 1987); Letter of Submittal from Secretary of State George P. Schultz to President Reagan (Dec. 13, 1986), in Message from the President of the United States Transmitting the Protocol II Additional to the Geneva Conventions of 1949, and Relating to the Protection of Victims of Noninternational Armed Conflicts, Concluded at Geneva on June 10, 1977, S. Treaty Doc. No. 100-2, 100th Cong., 1st Sess. (1987), reprinted in 26 I.L.M. 561 (1987). Although Protocol I is not in force for the United States, 160 states are party to it and 154 are party to Protocol II. International Committee of the Red Cross, Geneva Conventions of August 12, 1949 and Additional Protocols of June 8, 1977: Ratifications, Accessions and Successions, [http://www.icrc.org/eng/party\\_gc](http://www.icrc.org/eng/party_gc) (last visited Mar. 3, 2002) [hereinafter Ratifications].

<sup>154</sup> George K. Walker, *Principles for Collective Humanitarian Intervention to Succor Other Countries' Indigenous Nationals*, 18 AM. U. INT'L L. REV. 35, 91-100 (2002) (advocating

situations may or may not be necessary or proportional in a self-defense scenario.<sup>155</sup>

Necessity has been summarized as involving “[o]nly that degree and kind of force, not otherwise prohibited by the [LOAC], required for the partial or complete submission of the enemy with a minimum expenditure of time, life and physical resources may be applied.”<sup>156</sup> The proportionality principle forbids “employment of any kind or degree of force not required for . . . the partial or complete submission of the enemy with a minimum of time, life, and physical resources.”<sup>157</sup> Media reports on Enduring Freedom strongly suggest that both requirements were met. Only military facilities and personnel attached to the Taliban military forces or al-Qaida were targeted, Operation Anaconda being an example. Although the law of self-defense or the LOAC does not require their use, more and more precise PGM were used than in previous campaigns with which the United States has been associated, such as the 1990-91 Gulf War to liberate Kuwait and NATO’s 1999 Kosovo campaign. There were casualties among civilians and to civilian objects close to proper targets; this has been the case in every conflict. Mistakes were made and there were “friendly fire” casualties where allied troops suffered losses from allied bombing.<sup>158</sup>

There has been no reported intentional attack on forbidden targets or on targets not necessary for prosecuting Operation Enduring Freedom, based on information commanders had at the time. This is the standard for LOAC-governed situations. LOAC rules confirm that the proper time for predicating liability is what decisionmakers knew or reasonably should have known when an operation was authorized. Hindsight can

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necessity and proportionality limits on actions taken in humanitarian intervention situations under state of necessity).

<sup>155</sup> *Id.* at 91.

<sup>156</sup> NWP 1-14M ANNOTATED, *supra* note 148, ¶ 5.2, at 292; *cf.* SAN REMO MANUAL, *supra* note 153, ¶ 4 & cmt. 4.3.

<sup>157</sup> NWP 1-14M ANNOTATED, *supra* note 148, ¶ 5.2, at 294; *cf.* SAN REMO MANUAL, *supra* note 153, ¶ 4 & cmt. 4.3.

<sup>158</sup> *See supra* Part III. During the 1990-91 Gulf War of the coalition campaign against Iraq, precision guided munitions (“PGM”) accounted for seven to eight percent of U.S. weapons used in air attacks. The percentage increased to thirty-five percent in NATO’s 1999 Operation Allied Force operations in former Yugoslavia, and, as of March 2002, fifty-six percent in Enduring Freedom operations in Afghanistan. THOMAS KEANEY, *THE FUTURE OF IRAQ: CONFERENCE PROCEEDINGS* 81, 83 (Lyle Goldstein & Ahmed Haslim eds., 2002).

be 20/20; decisions at the time may be clouded with the fog of war.<sup>159</sup> Declarations of understanding<sup>160</sup> by countries party to Protocol I<sup>161</sup> to the 1949 Geneva Conventions<sup>162</sup> state that for civilians' protection in Article 51,<sup>163</sup> protection of civilian objects in Article 52,<sup>164</sup> and precautions to be

<sup>159</sup> CARL VON CLAUSEWITZ, ON WAR 117-21 (Michael Howard & Peter Paret eds. & trans., 1976).

<sup>160</sup> RESTATEMENT (THIRD), *supra* note 151, § 313 cmt. g analyzes understandings: When signing or adhering to an international agreement, a state may make a unilateral declaration that does not purport to be a reservation. Whatever it is called, it constitutes a reservation in fact if it purports to exclude, limit, or modify the state's legal obligation. Sometimes, however, a declaration purports to be an "understanding," an interpretation of the agreement in a particular respect. Such an interpretive declaration is not a reservation if it reflects the accepted view of the agreement. But another . . . party may challenge the expressed understanding, treating it as a reservation which it is not prepared to accept.

. . . [For] a multilateral agreement, a declaration of understanding may have complex consequences. If it is acceptable to all . . . , they need only acquiesce. If, however, some . . . share or accept the understanding but others do not, there may be a dispute as to what the agreement means, and whether the declaration is in effect a reservation. In the absence of an authoritative means for resolving that dispute, the declaration, even if treated as a reservation, might create an agreement at least between the declaring state and those who agree with that understanding. See Subsection (2)(c), dealing with reservations] . . . . However, some . . . parties may treat it as a reservation and object to it as such, and there will remain a dispute between the two groups as to what the agreement means.

*Id.* See also *Report of the International Law Commission on the Work of the Second Part of Its Seventeenth Session*, U.N. Doc. A/6309/Rev. 1 (1966), reprinted in 1966 Y.B. INT'L L. COMM'N 169, 189-90; D.W. Bowett, *Reservations to Non-Restricted Multilateral Treaties*, 48 BRIT. Y.B. INT'L L. 67, 69 (1976).

<sup>161</sup> Protocol I, *supra* note 153.

<sup>162</sup> Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Convention for the Amelioration of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3219, 75 U.N.T.S. 85; Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3317, 75 U.N.T.S. 135; Fourth Convention, *supra* note 124. Today, 190 states are party to these treaties. Ratifications, *supra* note 153. This suggests that many, if not all, of their provisions represent customary law. RESTATEMENT (THIRD), *supra* note 151, § 102 cmts. f, i; BROWNLIE, *supra* note 149, at 5; 1 OPPENHEIM, *supra* note 146, § 10, at 28, 31.

<sup>163</sup> Protocol I, *supra* note 153, art. 51, 1125 U.N.T.S. at 26. Art. 51(2) and 51(5) contain prohibitions on attacks on civilians, absent other considerations, e.g., civilians who take up arms, restate customary law. NWP 1-14M ANNOTATED, *supra* note 148, ¶¶ 6.2.3.2 (noting Fourth Convention, *supra* note 124, art. 33, 6 U.S.T. at 3538, 75 U.N.T.S. at 310, protections), 11.2 n.3, 11.3; BOTHE ET AL., *supra* note 153, at 299 & n.3; SAN REMO MANUAL, *supra* note 153, ¶ 39; 4 JEAN S. PICTET, THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 224-29 (1958);



taken in attacks in Article 57,<sup>165</sup> a commander should be liable based on that commander's assessment of information available at the relevant time, i.e., when a decision is made.<sup>166</sup> Two 1980 Conventional Weapons Convention<sup>167</sup> protocols have similar terms, i.e., a commander is only

CLAUDE PILLOUD ET AL., COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF AUGUST 12, 1949, at 618, 623-26 (1987); STONE, *supra* note 153, at 684-732; U.S. DEPARTMENT OF THE AIR FORCE, INTERNATIONAL LAW: THE CONDUCT OF ARMED CONFLICT AND AIR OPERATIONS, AFP 110-31 ch. 14 (1976); Matheson, *supra* note 153, at 423, 426; Schmidt, *supra* note 153, at 225-32; Solf, *supra* note 153, at 130-31. Civilians may not be used as human shields, nor may they be the subject of attacks intended to terrorize them, although otherwise legitimate attacks that happen to terrorize them are permissible. 1923 *Hague Rules for Aerial Warfare*, Feb. 9, 1923, art. 22, reprinted in THE LAW OF NAVAL WARFARE: A COLLECTION OF AGREEMENTS AND DOCUMENTS WITH COMMENTARIES 381, 385 (Natalino Ronzitti ed., 1988); NWP 1-14M ANNOTATED, *supra* note 148, ¶¶ 11.2 (noting Fourth Convention, *supra* note 124, arts. 28, 33, 6 U.S.T. at 3538-40, 75 U.N.T.S. at 308-10, protections), 11.3; 4 PICTET, *supra*, at 208-09, 224-29; Hans-Peter Gasser, *Prohibition of Terrorist Attacks in International Humanitarian Law*, 1985 INT'L REV. RED CROSS 200; Matheson, *supra* note 153, at 426; Schmidt, *supra* note 153, at 227.

<sup>164</sup> Protocol I, *supra* note 153, art. 52, 1125 U.N.T.S. at 26. Article 52 states a general customary norm, except its art. 52(1) prohibition on reprisals against civilians, upon which commentators divide. See generally NWP 1-14M ANNOTATED, *supra* note 148, ¶¶ 6.2.3 & n.36, 6.2.3.2 (noting Fourth Convention, *supra* note 124, art. 33, 6 U.S.T. at 3538, 75 U.N.T.S. at 308-10, protections for some civilians from reprisals), 8.1.1 & n.9, 8.1.2 & n.12 (U.S. position that Protocol I, *supra* note 153, art. 52[1], 1125 U.N.T.S. at 27, "creates new law"); BOTHE ET AL., *supra* note 153, at 320-27; C. JOHN COLOMBOS, THE INTERNATIONAL LAW OF THE SEA §§ 510-11, 524-25, 528-29 (6th rev. ed. 1967); 2 D.P. O'CONNELL, THE INTERNATIONAL LAW OF THE SEA 1105-06 (I.A. Shearer ed., 1984); 4 PICTET, *supra* note 163, at 131; PILLOUD ET AL., *supra* note 163, at 630-38; Matheson, *supra* note 153, at 426; Horace B. Robertson, Jr., *The Principle of the Military Objective in the Law of Armed Conflict*, in THE LAW OF MILITARY OPERATIONS ch. 10 (Naval War Coll. Int'l Law Studies, No. 72, Michael N. Schmitt ed., 1998); Frank Russo, Jr., *Targeting Theory in the Law of Naval Warfare*, 30 NAV. L. REV. 1, 17 n.36 (1992) (rejecting Protocol I, *supra* note 153, art. 52(2), 1125 U.N.T.S. at 27, for naval warfare); Solf, *supra* note 153, at 131.

<sup>165</sup> Protocol I, *supra* note 153, art. 57, 1125 U.N.T.S. at 29; see also NWP 1-14M ANNOTATED, *supra* note 148, ¶¶ 8.1-8.1.2.1; BOTHE ET AL., *supra* note 153, at 359-69; PILLOUD ET AL., *supra* note 103, at 678-89.

<sup>166</sup> Declaration of Belgium, May 20, 1986, reprinted in DIETRICH SCHINDLER & JIRI TOMAN, THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS 706, 707 (3d ed. 1988); Declaration of Italy, Feb. 27, 1986, reprinted in THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS, *supra*, at 712; Declaration of the United Kingdom, Dec. 12, 1977, reprinted in THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS, *supra*, at 717; Declaration of the Netherlands, June 26, 1977, reprinted in THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS *supra*, at 713, 714.

<sup>167</sup> Convention on Prohibitions or Restrictions on Use of Certain Conventional Weapons Which May Be Deemed Excessively Injurious or to Have Indiscriminate Effects, Oct. 10, 1980, T.I.A.S. No. \_\_\_\_, 1342 U.N.T.S. 137 [hereinafter Conventional Weapons Convention].

bound by information available when a decision to attack is made.<sup>168</sup> The 1954 Hague Cultural Property Convention's Second Protocol also recites this principle.<sup>169</sup> Protocol I, with its understandings, and the Conventional Weapons Convention protocols are on their way to acceptance among states.<sup>170</sup> These treaties' common statement, in text or declarations, that commanders are accountable based on information they have at the time for determining whether attacks are necessary and proportional has become a nearly universal norm. The *San Remo Manual* recognizes it as the naval warfare standard.<sup>171</sup> It can be said with fair confidence that this is the *jus in bello* customary standard. It should be the standard for *jus ad bellum*, i.e., for self-defense responses. A national leader or military commander directing a self-defense response, whether reactive or anticipatory, should be held to the same standard as a commander in the field deciding on attacks, i.e., being held accountable for what he or she, or those reporting to the leader, knew or reasonably should have known, when a decision is made to respond in self-defense.<sup>172</sup> As in the difference between necessity and proportionality standards for LOAC and self-defense situations,<sup>173</sup> what is sufficient

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<sup>168</sup> Protocol on Prohibitions or Restrictions on Use of Incendiary Weapons (Protocol III), Oct. 10, 1980, art. 1(3), 1342 U.N.T.S. 171, 172; Protocol on Prohibitions or Restrictions on Use of Mines, Booby Traps & Other Devices (Protocol II), Oct. 10, 1980, art. 2(4), 1342 U.N.T.S. 168, as amended, May 3, 1996, art. 2(6), *reprinted in* 35 I.L.M. 1206, 1209 (1996) [hereinafter Amended Protocol II]; Conventional Weapons Convention, *supra* note 167. The United States has ratified the Convention and Protocols I and II; Protocol III is not in force for the United States. TIF, *supra* note 43, at 480. Amended Protocol II, Protocol III, and Protocol IV on Blinding Laser Weapons, May 3, 1995, *reprinted in* 35 I.L.M. 1218 (1996), are now before the U.S. Senate. Marian Nash Leich, *Contemporary Practice of the United States Relating to International Law*, 91 AM. J. INT'L L. 325 (1997). Protocol IV and Protocol on Non-Detectable Fragments (Protocol I), Oct. 10, 1980, 1342 U.N.T.S. 168, do not have these provisions.

<sup>169</sup> Second Protocol to Hague Convention of 1954 for Protection of Cultural Property in Event of Armed Conflict, Mar. 26, 1999, art. 1(f), *reprinted in* 38 I.L.M. 769 (1999) [hereinafter Second Protocol] (referring to Convention for Protection of Cultural Property in Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240). Second Protocol is not in force; nine states are party; 101 have ratified Hague Cultural Property Convention. Ratifications, *supra* note 153.

<sup>170</sup> Nearly all states except the United States are party to Protocol I. *See supra* note 153. Ratifications, *supra* note 153, lists eighty-eight states for Conventional Weapons Convention, *supra* note 167; seventy-nine for Protocol II; sixty-three for Amended Protocol II, *supra* note 168; eighty-one for Protocol III, *supra* note 168.

<sup>171</sup> SAN REMO MANUAL, *supra* note 153, ¶ 46(b) & cmt. 46.3; *see also* BEN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 90 (1983); MCDUGAL & FELICIANO, *supra* note 146, at 220.

<sup>172</sup> *See also* WALKER, *supra* note 73.

<sup>173</sup> *See supra* notes 153-55 and accompanying text.

knowledge depends on each circumstance. What might be sufficient knowledge in an LOAC situation might not be sufficient knowledge in a self-defense situation and vice versa.

This should be the standard for evaluating Enduring Freedom. There is nothing in the record to say that commanders did not act reasonably under the circumstances in choosing proper targets and methods or means of attacking them.

#### 1. The U.N. Charter and Self-Defense

The U.N. Charter, Article 51, provides:

Nothing in the . . . Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the . . . Council and shall not in any way affect the authority and responsibility of the . . . Council under the . . . Charter to take at any time such action as it deems necessary . . . to maintain international peace and security.<sup>174</sup>

The Council may vote resolutions that are binding decisions under Articles 25 and 48 of the Charter, or it may vote nonbinding recommendations or calls for action to deal with a situation.<sup>175</sup>

There is nothing in Article 51's language or practice that limits states to use of armed force in self-defense to situations when there is no time to resort to the Council.<sup>176</sup> States retain the inherent right of individual and collective self-defense as understood before 1945.<sup>177</sup> Under Article 51, states must report after taking action for a particular situation and may continue acting in self-defense unless and until the Council takes "measures necessary to maintain international peace and security"

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<sup>174</sup> U.N. CHARTER art. 51.

<sup>175</sup> U.N. CHARTER arts. 25, 39-42, 48, 103; *see also supra* note 152 and accompanying text.

<sup>176</sup> Even if this is the rule, it did not apply for 9-11; the Council recognized the right of self-defense long before Enduring Freedom began. *See supra* notes 36-37 and accompanying text.

<sup>177</sup> *See generally* Walker, *supra* note 70 (developing this theme in the context of anticipatory collective self-defense).

related to the particular situation. They retain an inherent right of individual and collective self-defense for situations not covered in matters reported to the Council. The principle of state sovereignty underscores a state's right to act.<sup>178</sup>

The Council, sitting in New York City on 9-11, received reports of the attacks and voted decisions<sup>179</sup> that, *inter alia*, recognized the right of individual and collective self-defense. Thus, the Council approved states' proceeding with their inherent rights of individual and collective self-defense. Enduring Freedom may have been the initial U.K.-U.S. response, but before long, countries party to collective self-defense treaties, including the NATO Treaty, the OAS Charter, and the ANZUS

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<sup>178</sup> U.N. CHARTER art. 2(1). National sovereignty, sometimes diminished or eroded, has been a fundamental principle of international law since Treaty of Peace of Munster, Oct. 14/24, 1648, art. 64, 1 Consol. T.S. 271, 319, 337, and the Treaty of Peace of Osnabruck, Oct. 14/24, 1648, art. 9, 1 Consol. T.S. 119, 198, 241-43, collectively known as the Peace of Westphalia, which created the modern state system in declaring this principle. *See also* United Nations Convention on the Law of the Sea, Dec. 10, 1982, art. 157(3), 1833 U.N.T.S. 3, 458 [hereinafter LOS Convention]; Vienna Convention on the Law of Treaties, pmbl., 1155 U.N.T.S. 331, 332; S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A), No. 10, at 4, 18; S.S. Wimbledon (U.K. v. Ger.), 1923 U.N.T.S., No. 1, at 15, 25; *Declaration on Principles of International Law Concerning Friendly Relations & Co-Operation Among States*, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, U.N. Doc. A/8028 (1970), reprinted in 9 I.L.M. 1292 (1970); *Declaration on Inadmissibility of Intervention in Domestic Affairs of States and Protection of Their Independence and Sovereignty*, G.A. Res. 2131, U.N. GAOR, 20th Sess., U.N. Doc. A/RES/2131 (1965), reprinted in DIETRICH RAUSCHNING ET AL., KEY RESOLUTIONS OF THE UNITED NATIONS GENERAL ASSEMBLY 1946-1996, at 26, 28 (1997); U.N. Secretary-General, *An Agenda for Peace: Preventative Diplomacy, Peace Making, and Peace Keeping: Report of the Secretary-General on the Work of the Organization*, U.N. Doc. A/49/277, S/24111 (1992), reprinted in 31 I.L.M. 956, 959 (1992); RESTATEMENT (THIRD), *supra* note 151, Part I, ch. 1, *Introductory Note*, 16 & 17; MICHAEL AKEHURST, A MODERN INTRODUCTION TO INTERNATIONAL LAW 21-23 (Brian Chapman ed., 3d ed. 1977); J.B. BRIERLY, THE LAW OF NATIONS 45-49 (Humphrey Waldock ed., 6th ed. 1963); BROWNLIE, *supra* note 149, at 289-90; 1 THE CHARTER, *supra* note 147, at 70-91; GOODRICH ET AL., *supra* note 152, at 36-40; HENRY KISSINGER, DOES AMERICA NEED A FOREIGN POLICY? 21-22, 235-37 (2001) (stating that it is a concept in trouble); LORD MCNAIR, THE LAW OF TREATIES 754-66 (2d ed. 1961); 1 OPPENHEIM, *supra* note 146, § 37; R.P. Anand, *Sovereign Equality of States in International Law*, 197 R.C.A.D.I. 9, 22-51 (1986); Boutros Boutros-Ghali, *Empowering the United Nations*, FOREIGN AFF. 89, 98-99 (Winter 1992); Jonathan I. Charney, *Universal International Law*, 87 AM. J. INT'L L. 529, 539 (1993); Gerald Fitzmaurice, *The General Principles of International Law Considered from the Standpoint of the Rule of Law*, 92 R.C.A.D.I. 1, 49-50 (1957); Louis Henkin, *International Law: Politics, Values and Functions*, 216 R.C.A.D.I. 9, 46, 130 (1989); Oscar Schachter, *International Law in Theory and Practice*, 178 R.C.A.D.I. 9, 32 (1982); C.H.M. Waldock, *General Course on Public International Law*, 106 R.C.A.D.I. 1, 156-72 (1962). Henkin later denounced the concept. HENKIN, *supra* note 147, at 8-10.

<sup>179</sup> S.C. Res. 1368, *supra* note 36; S.C. Res. 1373, *supra* note 37.

Pact, began to cooperate with U.K.-U.S. Enduring Freedom operations.<sup>180</sup> This widespread, worldwide practice, to which few if any states persistently objected,<sup>181</sup> further vindicated the legality of U.K.-U.S. Enduring Freedom operations.<sup>182</sup>

## 2. Collective Self-Defense and Coalition Self-Defense

The Charter's approval of agreements for the inherent right of collective self-defense resulted in a worldwide network of multilateral and bilateral treaties, among them the NATO Treaty, the OAS Charter, and the ANZUS Pact invoked after 9-11. Two principles embedded in the agreements and observed in practice under them are (1) an attack on one treaty partner is an attack on all and (2) consensus decisionmaking.<sup>183</sup> Like NATO's 1999 Kosovo campaign,<sup>184</sup> these

<sup>180</sup> See *supra* notes 40-47 and accompanying text.

<sup>181</sup> See RESTATEMENT (THIRD), *supra* note 151, § 102, cmts. b, d; BROWNLIE, *supra* note 149, at 10; 1 OPPENHEIM, *supra* note 146, § 10, at 29; Michael Akehurst, *Custom As a Source of Law*, 47 BRIT. Y.B. INT'L L. 1, 23-27; Waldock, *supra* note 178, at 49-52. But see J. ASHLEY ROACH & ROBERT W. SMITH, UNITED STATES RESPONSES TO EXCESSIVE MARITIME CLAIMS (2d ed. 1996) (noting that an exhaustive study of protests to law of the sea claims demonstrates that the persistent objector rule is alive and well, at least for LOS issues); Charney, *supra* note 178, at 538-41 (existence of persistent objector rule open to serious doubt). Undoubtedly, states file thousands of protests annually on many issues in the chancelleries, few of which are published. It cannot be assumed that the persistent objector rule is in disuse. For purposes of this analysis, however, it may be assumed, with more safety than on less newsworthy issues, that significant protests by states would have received media attention. The full story on protests may come only after publication of diplomatic correspondence, e.g., in the *Foreign Relations of the United States* series, which typically occurs twenty years after events or in future digests of practice. Even then, publication may be selective and subject to national security classifications. Not all treaties are published; some related to national security may never be published. RESTATEMENT (THIRD), *supra* note 151, § 312 rep. n.5. U.N. CHARTER art. 102, only requires registration for publication in the *United Nations Treaty Series* if a U.N. Member wishes to invoke a treaty before a U.N. organ. See also 2 THE CHARTER, *supra* note 147, at 1277-92; GOODRICH ET AL., *supra* note 152, at 610-13.

<sup>182</sup> RESTATEMENT (THIRD), *supra* note 151, § 102(2) (state practice coupled with recognizing action as lawful equates to custom); cf. I.C.J. STATUTE art. 38(1); BROWNLIE, *supra* note 149, at 4-11; 1 OPPENHEIM, *supra* note 146, § 10. A similar situation during the Korean War arose after USSR vetoes prompted the General Assembly to vote the *Uniting for Peace Resolution*, G.A. Res. 377, U.N. GAOR, 5th Sess., U.N. Doc. A/1471 (1950), reprinted in 45 AM. J. INT'L L. SUPP. 1 (1951), and later resolutions, calling for states' action during that conflict. See generally 1 THE CHARTER, *supra* note 147, at 266-67 (no later use of UFP); GOODRICH ET AL., *supra* note 152, at 122-25; WALKER, *supra* note 73, at 175-77; Howard J. Taubenfeld, *International Actions and Neutrality*, 47 AM. J. INT'L L. 377, 393-94 (1953) (relative success of arms embargo against the Peoples Republic of China).

<sup>183</sup> Walker, *supra* note 70 (analyzing these and other agreements to demonstrate that anticipatory as well as reactive self-defense may be invoked); see also *supra* notes 40-43 and accompanying text.

requirements appear to have been observed. The record is clearer for the multilateral agreements, e.g., the NATO Treaty, that organs of the defense organizations carefully considered the evidence of an attack before voting and that the vote was unanimous.<sup>185</sup> The U.K.-U.S. Enduring Freedom response was in accordance with self-defense treaty requirements and was, therefore, lawful in that respect, insofar as the record shows.<sup>186</sup>

Other states helping in the response to the 9-11 attacks as coalition partners, as distinguished from states in a defense alliance, could do so under principles of informal self-defense. Although overshadowed during the Charter era by the webs of bilateral and multilateral self-defense agreements, coalition warfare has a long history. The United States fought its wars from the American Revolution until 1939,<sup>187</sup> including two World Wars, as a coalition partner. Although the United States may have negotiated bilateral self-defense agreements with Kuwait, Saudi Arabia, and other Persian Gulf states during the 1990-91 Gulf War, it was a U.S. and Saudi Arabia-led coalition that ousted Iraq from Kuwait.<sup>188</sup>

Although most coalitions seem to follow the pattern of formal self-defense agreements for consensus decisionmaking, that requirement may be subject to agreement among coalition members or customary rules. For example, usually the commander with the most forces becomes the supreme commander of operations. Beyond this, another important rule is notice to states that countries are operating as a coalition. For self-defense agreements, the published treaty is the notice;

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<sup>184</sup> See generally Walker, *supra* note 154, at 85-87.

<sup>185</sup> See *supra* notes 40-47 and accompanying text.

<sup>186</sup> Much of the record may not be available for many years, if then, because of practice in publishing diplomatic correspondence or for national security reasons. See *supra* note 181.

<sup>187</sup> Declaration of Panama, Oct. 3, 1939, ¶ 1, 3 Bevans 609; Treaty of Amity & Commerce, Oct. 8, 1782, U.S.-Neth, art. 5, 8 Stat. 32, 34-36; Treaty of Amity & Commerce, Feb. 6, 1778, U.S.-Fr., arts. 6-7, 8 Stat. 12, 16; Treaty of Alliance, Feb. 6, 1778, U.S.-Fr., arts. 1-4, 8 Stat. 6, 6-8. See generally Walker, *supra* note 70, at 324, 349.

<sup>188</sup> Walker, *supra* note 73, at 30, 46. As it did after the 9-11 attacks, during the 1990 Kuwait crisis, the Security Council affirmed the inherent right of individual or collective self-defense in S.C. Res. 661, U.N. SCOR, 45th Sess., 2933d mtg., Doc. S/RES/661 (1990), reprinted in 29 I.L.M. 1325 (1990). Within a month after the Iraqi invasion, 106 states had imposed sanctions; many besides the Gulf states and the United States (e.g., Egypt, France, Syria) contributed troops or other war materials. *Sanctions: 106 Countries Reply*, 27 U.N. CHRON. 13 (No. 4, 1990). By October 2001, eighty states had offered to help in the War on Terrorism. Although many of these were bound by self-defense treaty obligations, about half were not. See *supra* notes 40-74, 90 and accompanying text.

since coalitions do not operate under these kinds of agreements, notice to third states is important.<sup>189</sup>

From the beginning, states, including Afghanistan and its Taliban government, had notice of the U.S. intent to build a coalition in response to 9-11. They were charged with knowledge of action in the United Nations, the declarations of multilateral self-defense organizations like NATO, and of actions pursuant to bilateral self-defense treaties. State support of action to respond to 9-11 was open and on a world-scale basis. The practice of these treaty partners and the coalition under the circumstances of responses to 9-11 met legal criteria for multilateral, bilateral, and coalition action against al-Qaida, the Taliban, and their supporters. They had notice of the coalition's proposed actions. Afghanistan—a state supporting, protecting, and harboring al-Qaida—its Taliban government forces, and al-Qaida were proper targets for U.K.-U.S. and coalition operations. The Taliban government acknowledged and thereby ratified its role in harboring, supporting, and protecting al-Qaida, a role the same Security Council resolutions that had recognized the right of self-defense condemned. In subsequent battles, al-Qaida and Taliban forces were found fighting side by side, thus further confirming the Taliban government's role and complicity. The coalition response, like responses under the NATO and other self-defense treaties, and individual self-defense responses were, of course, subject to the principles of necessity and proportionality.<sup>190</sup>

### 3. Other Responses: Reprisals and Retorsions

Reprisals are proportional but unlawful responses to an opponent's unlawful action that are designed to bring the initial actor into compliance with the law. Reprisals involving use of force are only allowed during LOAC-governed situations, by the majority view. Retorsions are unfriendly but lawful acts directed toward a wrongdoer to induce compliance with the law.<sup>191</sup> The ILC *Articles*, through Articles

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<sup>189</sup> Some informal self-defense situations since 1945 are recorded in WALKER, *supra* note 73, at 133-34.

<sup>190</sup> See *supra* notes 19, 38 and accompanying text; *supra* Part II.B, C.

<sup>191</sup> A state considering reprisal must first call upon an offending state to mend its ways. Cf. G.A. Res. 2625, *supra* note 178, Principles 1, 3, reprinted in 9 I.L.M. 1294, 1297; *An Agenda for Peace: Preventative Diplomacy, Peace Making, and Peace Keeping: Report of the Secretary-General on the Work of the Organization*, *supra* note 178, at 959; Air Service Agreement of 27 March 1946 (U.S. v. Fr.), 18 R.I.A.A. 417, 443; Gabčíkovo-Nagymaros Project (Hung. v. Slovakia), 1997 I.C.J. 4, 54; Nicaragua Case, *supra* note 146, 1986 I.C.J. at 127; G.A. Res. 2131, *supra* note 178, at 28 (economic reprisal forbidden); Roberto Ago, *Addendum to Eighth Report*

22 and 49-54, covers reprisals not associated with armed conflict as "countermeasures" and does not consider retorsions. Articles 50 and 51 repeat the majority rule that reprisals, i.e., countermeasures, cannot involve use of force and must be proportional in response.<sup>192</sup>

States' early economic sanctions against the Taliban regime,<sup>193</sup> if unlawful but proportional, were permissible reprisals until the Security Council Resolution 1390.<sup>194</sup> Similarly, military demonstrations like the domestic call-up of reservists<sup>195</sup> or the recall of ambassadors, incident perhaps to withdrawing recognition of a government,<sup>196</sup> also were permissible as unfriendly but lawful retorsions.

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on State Responsibility, U.N. Doc. A/CN.4/318 & Add. 104 (1979), reprinted in 2(1) Y.B. INT'L L. COMM'N 13, 39, 42 (1981); NWP 1-14M ANNOTATED, *supra* note 148, ¶ 6.2.3.1; BOWETT, *supra* note 146, at 13; BRIERLY, *supra* note 178, at 401-02; BROWNLIE, *supra* note 147, at 281; 1 THE CHARTER, *supra* note 147, at 110; D'AMATO, *supra* note 147, at 41-43; DINSTEIN, *supra* note 147, at 193-204 ("defensive armed reprisals" admissible in Charter era); GOODRICH ET AL., *supra* note 152, at 340-47; LAWRENCE T. GREENBERG ET AL., INFORMATION WARFARE AND INTERNATIONAL LAW 26-27 (1997) (reprisals using force admissible); ROSALYN HIGGINS, THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS 217 (1963); SEAN D. MURPHY, HUMANITARIAN INTERVENTION: THE UNITED NATIONS IN AN EVOLVING WORLD ORDER 13 (1996); 2 OPPENHEIM, *supra* note 146, §§ 43, 52a, at 152-53; 4 PICTET, *supra* note 163, at 228-29; STONE, LEGAL, *supra* note 153, at 286-87; WALKER, *supra* note 73, at 158-60; Anthony Clark Arend, *International Law and the Recourse to Force: A Shift in Paradigms*, 27 STAN. L. REV. 1, 14 (1990); Roberto Barsotti, *Armed Reprisals*, in ANTHONY CASSESE, THE CURRENT LEGAL REGULATION OF THE USE OF FORCE 79 (1986); D.W. Bowett, *Reprisals Involving Recourse to Armed Force*, 66 AM. J. INT'L L. 20 (1972); Steven F. Day, *Legal Considerations in Noncombat Evacuation Operations*, 40 NAV. L. REV. 45, 50 (1992); Higgins, *The Attitude of Western States Toward Legal Aspects of the Use of Force*, in THE CURRENT LEGAL REGULATION OF THE USE OF FORCE, *supra*, at 435, 444; McHugh, *supra* note 146, at 144-45; Tucker, *Reprisals*, *supra* note 147, at 586-87; see also Lobel, *supra* note 147, at 540 (failing to distinguish clearly between reprisals involving force and those that do not, however, the context seems to indicate he considers only the former). Lobel cites W. Michael Reisman, *Defence or Reprisals? The Raid on Baghdad: Some Reflections on Its Lawfulness and Implications*, 5 EUR. J. INT'L L. 120, 125 (1994), for the proposition that the 1993 U.S. attack on Baghdad, responding to threats against former President George H.W. Bush, might be better characterized as a reprisal. Lobel, *supra* note 143, at 540.

<sup>192</sup> 2001 ILC Report, *supra* note 150, at 180-83, 328-55; see also David J. Bederman, *Counterintuiting Countermeasures*, 96 AM J. INT'L L. 817, 817 (2002); Crawford, *supra* note 151, at 882-85. 1 THE CHARTER, *supra* note 147, at 110, employs a similar approach.

<sup>193</sup> See, e.g., *supra* notes 23-25 and accompanying text.

<sup>194</sup> See *supra* notes 24-25 and accompanying text.

<sup>195</sup> See *supra* note 21 and accompanying text.

<sup>196</sup> See *supra* text accompanying notes 72, 87.



B. *Projections for Future Issues in International Law in the War on Terrorism*

The more interesting issues regarding the War on Terrorism may lie in the future. Part IV sketched what may be a new phase in the War. While we can now only peer into a glass darkly and must await the future to come face to face with the War as it may unfold, Part V.B offers suggestions of what may be coming.

The Bush Administration has announced the possibility of "preemptive" action against terrorists and states harboring or supporting them.<sup>197</sup> Preemptive action seems synonymous with anticipatory self-defense, a lawful response antedating the U.N. Charter and recently given International Law Commission imprimatur for the Charter era.<sup>198</sup> What may be new are the means of response. In this regard, the 1998 Clinton Administration-directed attack on bin Laden<sup>199</sup> may be the first of many claims where missiles, and perhaps manned aircraft as in Israel's 1981 attack on the Iraqi nuclear reactor,<sup>200</sup> cross third states' territory to prosecute necessary and proportional destruction of terrorists where the "host" state is incapable of acting. How does a projected Predator or cruise missile fit into the analysis?

Another issue is action against state-hosted terrorists at large on the seas. The easy case is action against them on the high seas, whether under a claim of self-defense with the support of the Charter's trumping provision,<sup>201</sup> or under the majority view of the "other rules" clauses of the law of the sea ("LOS") conventions, i.e., that in LOAC situations the LOAC rules, and not the law of the sea treaties, apply.<sup>202</sup> The more

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<sup>197</sup> See *supra* notes 131-37 and accompanying text.

<sup>198</sup> See, e.g., Abraham D. Sofaer, *Iraq and International Law*, WALL ST. J., Jan. 31, 2003, at A10. Others criticize the Bush preemption doctrine as violative of U.N. Charter norms. See, e.g., Richard Falk, *Pre-Emptive War Flagrantly Contradicts the UN's Legal Framework: Why International Law Matters*, NATION, Mar. 10, 2003, at 19, 20; see also *supra* notes 145-55 and accompanying text.

<sup>199</sup> See *supra* note 35 and accompanying text.

<sup>200</sup> See generally S.C. Res. 487, U.N. SCOR, 36th Sess., 2288th mtg., U.N. Doc. S/RES/487 (1981), reprinted in RESOLUTIONS AND STATEMENTS OF THE UNITED NATIONS SECURITY COUNCIL (1946-1992): A THEMATIC GUIDE 441-42 (Karel C. Wellens ed., 2d ed. 1993); ALEXANDROV, *supra* note 146, at 296; McCormack, *supra* note 146, at 122-44, 238-39, 253-84, 302.

<sup>201</sup> U.N. CHARTER arts. 51, 103; see also *supra* notes 152, 176-90 and accompanying text.

<sup>202</sup> E.g., LOS Convention, *supra* note 178, art. 87(1), 1833 U.N.T.S. at 432; see also Report of the International Law Commission on the Work of Its Eighteenth Session, U.N. Commission on Int'l Law, 17th Sess., U.N. Doc. A/6309/Rev. 1, reprinted in 1966(2) Y.B. INT'L L. COMM'N 169, 267-68; 2 GEORG SCHWARZENBERGER, A MANUAL OF INTERNATIONAL LAW 376-77 (5th

difficult question occurs where other LOS provisions must be considered with the high seas regime, e.g., waters above the continental shelf, etc. To be sure, special antiterrorism conventions may apply here,<sup>203</sup> but not all states are party to them<sup>204</sup> and not all sea areas and situations are covered. A critical sea area is the territorial sea of a third state that does not have the means to stop a terrorist vessel, e.g., a small boat bent on a Cole-style attack.<sup>205</sup> Besides LOS issues,<sup>206</sup> there is a balance between Charter principles of territorial integrity and the inherent right of self-

ed. 1967); WALKER, *supra* note 73, at 191-92; Boleslaw Boczek, *Peaceful Purposes Provisions of the United Nations Convention on the Law of the Sea*, 20 OCEAN DEVEL. & INT'L L. 359 (1989); Herbert W. Briggs, *Unilateral Denunciation of Treaties: The Vienna Convention and the International Court of Justice*, 68 AM. J. INT'L L. 51 (1974); Carl Q. Christol & C.R. Davis, *Maritime Quarantine: The Naval Interdiction of Offensive Weapons and Associated Material to Cuba*, 1962, 56 AM. J. INT'L L. 525, 539-40 (1963); Scott Davidson, *United States Protection of Reflagged Kuwaiti Vessels in the Gulf War: The Legal Implications*, 4 INT'L J. ESTUARINE & COASTAL L. 173, 178 (1989); W.J. Fenrick, *Legal Aspects of Targeting in the Law of Naval Warfare*, 1991 CAN. Y.B. INT'L L. 238, 245; Lowe, *supra* note 146, at 109, 132; Bernard H. Oxman, *The Regime of Warships Under the United Nations Convention on the Law of the Sea*, 24 VA. J. INT'L L. 809, 811 (1984); Natalino Ronzitti, *The Crisis of the Traditional Law Regulating International Armed Conflicts at Sea and the Need for Its Revision*, in THE LAW OF NAVAL WARFARE: A COLLECTION OF AGREEMENTS AND DOCUMENTS WITH COMMENTARIES, *supra* note 163, at 1, 15; Francis V. Russo, *Neutrality at Sea in Transition: State Practice in the Gulf War as Emerging International Customary Law*, 19 OCEAN DEVEL. & INT'L L. 381, 384 (1988); A.G.Y. Thorpe, *Mine Warfare at Sea—Some Legal Aspects of the Future*, 18 OCEAN DEVEL. & INT'L L. 255, 257 (1987); Rudiger Wolfrum, *Reflagging and Escort Operations in the Persian Gulf: An International Law Perspective*, 30 VA. J. INT'L L. 387, 391-92 (1989). Those suggesting different principles include 2 O'CONNELL, *supra* note 164, at 1112-13 (referring to 1 O'CONNELL, *supra* note 164, at 747-69, in the context of merchant ships); Luan Low & David Hodgkinson, *Compensation for Wartime Environmental Damage: Challenges to International Law After the Gulf War*, 35 VA. J. INT'L L. 405, 421 (1995) (discussing environmental protections in the LOS context but saying nothing about the clauses, although they elliptically seem to recognize the principle); John E. Noyes, *Treaty Interpretation and Definitions in the Law of the Sea Convention: Comments on Defining Terms in the 1982 Law of the Sea Convention*, 32 CAL. W. INT'L L.J. 367, 374-379 (2002) (stating that other rules clauses can include law other than the LOAC, but LOAC could be included); Margaret T. Okorodudu-Fubara, *Oil in the Persian Gulf War: Legal Appraisal of an Environmental Disaster*, 23 ST. MARY'S L.J. 123 195-97 (1991).

<sup>203</sup> Protocol to the Convention for Suppression of Unlawful Acts Against the Safety of Maritime Navigation of Mar. 10, 1988 [T.I.A.S. No. \_\_\_, reprinted in 27 I.L.M. 672 (1988)], for Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, Mar. 10, 1988, T.I.A.S. No. \_\_\_, reprinted in 27 I.L.M. 685 (1988).

<sup>204</sup> Cf. TIF, *supra* note 43, at 424 (listing fifty states party to the Protocol, *supra* note 203).

<sup>205</sup> See *supra* note 35 and accompanying text; *supra* text accompanying note 139.

<sup>206</sup> See LOS Convention, *supra* note 178, arts. 2, 17-32, 1833 U.N.T.S. at 400, 404-09 (providing the territorial sea part of coastal state sovereign territory, right of innocent passage, and rules for innocent passage, jurisdiction).

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defense.<sup>207</sup> How should the balance be struck? Must a warship stand by on the high seas and let the terrorists sail on, perhaps to destroy an innocent merchant ship? Does Professor Robertson's proffered "due regard" formula apply here,<sup>208</sup> at least where the Charter's trumping rule<sup>209</sup> does not? If terrorists are aboard a ship on the high seas, is terrorism (however defined) a universal crime like piracy,<sup>210</sup> so that approach and visit<sup>211</sup> is authorized?

There are similar problems regarding possible attacks on civil aircraft. Although states may give permission for military aircraft to overfly their territory to "ride shotgun" with a civil airliner,<sup>212</sup> suppose a flight must cross a state incapable of providing protection against terrorists, or a state that does not have the means of determining that they are within its borders.<sup>213</sup> Can a military aircraft accompany the liner across dangerous airspace? There are major problems with Charter issues balancing territorial integrity against self-defense, which is also a Charter norm.<sup>214</sup>

Thus far, terrorists have employed visible violence to frighten. Suppose there is a more subtle form of attack, e.g., an Internet hack to bring down a banking system perhaps coupled with a visible demonstration by bombings in a financial district. What are the rules here?<sup>215</sup>

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<sup>207</sup> U.N. CHARTER arts. 2(4), 51, 103; see also *supra* notes 152, 174-90 and accompanying text.

<sup>208</sup> Horace B. Robertson, Jr., *The "New" Law of the Sea and the Law of Armed Conflict at Sea*, READINGS ON INTERNATIONAL LAW FROM THE NAVAL WAR COLLEGE REVIEW 1978-1994, at 263, 302-03 & n.1 (Naval War Coll. Int'l Law Studies, No. 68, John Norton Moore & Robert F. Turner eds., 1995).

<sup>209</sup> U.N. CHARTER art. 103; see also *supra* note 152 and accompanying text.

<sup>210</sup> Cf. RESTATEMENT (THIRD), *supra* note 151, § 404.

<sup>211</sup> Cf. LOS Convention, *supra* note 178, arts. 100-07, 110, 1833 U.N.T.S. at 436-33; NWP 1-14M ANNOTATED, *supra* note 148, ¶¶ 3.4-3.5.3.2.; 2 O'CONNELL, *supra* note 164, at 802-03, 967-83.

<sup>212</sup> Convention on International Civil Aviation, Dec. 7, 1944, arts. 1-3, 61 Stat. 1180-81, 15 U.N.T.S. 295, 296, 298. Nearly all countries are party to it and its protocols and amendments. TIF, *supra* note 43, at 398-400. Its terms, or some of them, may recite custom. RESTATEMENT (THIRD), *supra* note 151, § 102 cmts. f, i; BROWNLIE, *supra* note 149, at 5; 1 OPPENHEIM, *supra* note 146, § 10, at 28, 31.

<sup>213</sup> For example, Kenya may not have known about the terrorists who tried to shoot down a chartered airliner last year. See *supra* note 140 and accompanying text.

<sup>214</sup> U.N. CHARTER arts. 2(4), 51.

<sup>215</sup> In December 2002, Islamic extremist web pages called for "Digital Jihad" against Israeli and Jewish Internet sites, but "J Day," Dec. 5, came and went without a blip. Lee

If terrorists would employ WMD, whether a "dirty" bomb<sup>216</sup> or a nuclear weapon, do the principles for dealing with the problem change?<sup>217</sup> If the Security Council votes a decision that mandates U.N. Members' action<sup>218</sup> involving terrorism,<sup>219</sup> what does this implicate for other rules that might apply, e.g., treaty law governing the LOAC in an antiterrorism situation?

The foregoing are but a sample of the complex questions related to battling terrorism within the law. There may be few, if any, easy answers to them.

## VII. CONCLUSION

In a simpler time, but one that saw the end of the Victorian-Edwardian era when Sir Edward Grey could say that the lights were going out all over Europe, U.S. Senator Hiram Johnson commented in 1917, during World War I, that the first casualty in war is truth.<sup>220</sup> Although the 9-11 terrorist attacks were as visible as Japan's attack on Pearl Harbor in 1941, and the results were as horrific, many crucial details of the War on Terrorism remain shrouded in the fog of war, drowned in factual floods characteristic of the Information Age or hidden in classified sources.<sup>221</sup> Critical diplomatic correspondence may not surface for twenty years, if it ever does.<sup>222</sup> We may never know the full story from inside Afghanistan and its Taliban regime or the terrorist camps. Parts I-IV will be subject to revisionist historical analysis well into this century.

The same may be true about the law that should apply to 9-11. Although subject to a few bright-line rules, e.g., the U.N. Charter

Gomes, *Digital Pearl Harbor Is More Marketing Ploy Than a Real Threat*, WALL ST. J., Dec. 16, 2002, at B1. Gomes concludes that today's systems are more secure. *Id.* However that does not exclude the possibility of successful future attacks. *Id.* Walker, *supra* note 146, suggests law by analogy for analyzing information warfare issues related to neutrality.

<sup>216</sup> The Padilla case may be a harrowing harbinger. See *supra* note 120 and accompanying text.

<sup>217</sup> See BUSH, THE NATIONAL SECURITY STRATEGY, *supra* note 131, at 13-16; BUSH, NATIONAL STRATEGY TO COMBAT WMD, *supra* note 137.

<sup>218</sup> U.N. CHARTER arts. 25, 48, 103; see also *supra* note 152 and accompanying text.

<sup>219</sup> Cf. *supra* notes 36-37 and accompanying text.

<sup>220</sup> PHILLIP KNIGHTLEY, THE FIRST CASUALTY-FROM THE CRIMEA TO VIETNAM: THE WAR CORRESPONDENT AS HERO, PROPAGANDIST, AND MYTH MAKER 17 (1975) (quoting Senator Hiram Johnson).

<sup>221</sup> See *supra* notes 159, 181 and accompanying text.

<sup>222</sup> See *supra* note 181 and accompanying text.

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trumping provision for treaties,<sup>223</sup> international law is subject to a factorial analysis,<sup>224</sup> unlike the U.S. hierarchical system, where the Constitution reigns supreme.<sup>225</sup> How states or commentators weigh and analyze sources when applied to a record can result in widely different results. That may help explain differences between the views of other scholars, such as Professor Quigley, and mine.

However, given the facts as are commonly known, and what seems to have been known by those giving orders, the U.K.-U.S. campaign against the Taliban regime and al-Qaida in Afghanistan was a valid exercise of reactive self-defense in response to the 9-11 terrorist attacks. The response was necessary; it was proportional. Regrettably, there were instances of civilian casualties and property damage. Nevertheless, allied use of PGM lessened casualties and damage that might have occurred if only conventional gravity bombs were dropped.<sup>226</sup> This phase of the War on Terror did not involve anticipatory self-defense issues.

However, the next phase of the War, sketched in Parts IV and hypothesized in Part V.B, may involve anticipatory self-defense issues. The law of the air and the law of the sea may be implicated, perhaps in connection with Charter norms and the LOAC. If that phase of the War comes, and it seems to have begun, factual and legal issues may be much more complex and much more challenging for states, military commanders, and those that advise them on the law. The United States likely will have a special role in these matters.<sup>227</sup>

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<sup>223</sup> U.N. CHARTER art. 103; *see also supra* note 152 and accompanying text.

<sup>224</sup> I.C.J. STATUTE arts. 38, 59; RESTATEMENT (THIRD), *supra* note 151, §§ 102-03.

<sup>225</sup> U.S. CONST. art. VI.

<sup>226</sup> International law does not require use of "smart" bombs; self-defense responses must be necessary and proportional, regardless of weapon(s) chosen. *See supra* notes 90-112, 153-58 and accompanying text.

<sup>227</sup> *Cf. Vagts, supra* note 144.