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NOTES

NEUTRALIZING THE THREAT: RECONSIDERING EXISTING DOCTRINES IN THE EMERGING WAR ON TERRORISM

Frank A. Biggio*

INTRODUCTION

A. A Day Unlike Any Other...

NAIROBI, Kenya – August 7, 1998 began as a routine business day for Francis Opeola.¹ As the president of a major bank, he often found himself visiting the businesses of clients to confirm administrative details, negotiate new deals, or just socialize. But as he turned onto Haile Selassie Avenue on the way back to his office after one of these meetings, the morning became anything but normal. While reaching for his car phone, Francis suddenly felt “a heavy blanket of heat” slam into him followed immediately by a deafening roar. His first thoughts were that he had been blindsided by another vehicle, but once he gathered his wits, he saw an enormous cloud of smoke about one mile down the avenue where the U.S. embassy was located. An explosive-rigged car that was parked behind the embassy detonated its cargo, reducing it and several nearby buildings to rubble. While Francis was not injured, others were not so fortunate. Scores of people inside the buildings and on the streets outside, including a busload of school children, were killed instantly and thousands more were wounded.

Moments earlier, and 400 miles to the south, an equally destructive scene occurred as a gasoline tanker exploded in front of the U.S. embassy in Dar es Salaam, Tanzania. Amid the horror of these events, hundreds of bystanders at both sites made frantic efforts to treat the wounded, recover

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¹ B.A., Dennison University; J.D., M.B.A., Case Western Reserve University, January 2002. This Note is dedicated to the Chindits, past, present and future, and especially those of IOC 4-94, who are on the front lines of the war against terrorism everyday.

** The final draft of this note was completed in March, 2001. Although since that time many of the facts and names herein have become common knowledge, the editorial decision was made to publish the Note substantially as originally written.

¹ The events recounted here are based on a discussion the author had with Mr. Opeola, a close family friend.
bodies from the buildings and rescue people trapped in the rubble.\(^2\) In all, the two attacks killed 301 people and injured over 5000.\(^3\)

The coordination and magnitude of the bombings strongly suggested that amateurs were not responsible. As F.B.I. agents and other U.S. officials, assisted by Kenyan and Tanzanian police, began to inspect the rubble, collect evidence, and interview witnesses, fingers began to point toward one suspect as the most likely culprit behind the acts of terror, and results from the investigations strengthened those suspicions.\(^4\)

Less than two weeks after the bombings at the embassies, in what was the most "formidable American military assault . . . against a private sponsor of terrorism,"\(^5\) the United States launched dozens of cruise missiles on two sites, one in Afghanistan and one in Sudan, suspected of having close links with the mastermind of the bombings. These events brought to the forefront of the world's consciousness the identity of a new face of international terrorism—Osama bin Laden.\(^6\)

Bin Laden again emerged as headline news on October 12, 2000. As the **USS COLE**, a Navy destroyer, pulled into a refueling port in Aden, Yemen, a small boat loaded with explosives rammed its side. Seventeen U.S. sailors were killed and dozens more were injured in the apparent suicide attack.\(^7\) Despite some initial speculation by the Yemeni government that the blast was an accident, they later acknowledged that it was indeed a terrorist attack.\(^8\) Not surprisingly, at the top of the list of suspects was the U.S.'s chief bogeyman Osama bin Laden.\(^9\) Fears that


\(^3\) See **Office of the Coordinator for Counterterrorism, U.S. Dept. of State, Patterns Of Global Terrorism: 1998**, at 6-7 (1999) [hereinafter **Patterns Of Global Terrorism 1998**].


\(^6\) Several spelling variations of Osama bin Laden's name exist. For purposes of consistency, this note will use "bin Laden" even in instances when sources have different spellings or use an elongated form of his name, except in titles of cited sources.


\(^9\) See, e.g., Neil King, Jr. & Christopher Cooper, **Saudi Exile Seen Poised to Attack**, WALL ST. J., Oct. 25, 2000, at A17; see also Greg Jaffe & Christopher Cooper, **Former
follow-up attacks were imminent put U.S. forces at a high state of alert in the Gulf region and throughout the world.\textsuperscript{10}

The U.S. has made many efforts and pleas to Afghanistan’s Taliban\textsuperscript{11} (where bin Laden is presumed to be living) to turn bin Laden over to law


\textsuperscript{10} See, e.g., King & Cooper, supra note 9.

\textsuperscript{11} The Taliban controls about 90\% of Afghanistan; see Unban the Taliban, ECONOMIST, July 24, 1999, at 19. Having come into power in 1996, the Taliban is the predominant government faction in Afghanistan, however it is only recognized as a legitimate government by three other COUNTRIES – Pakistan, Saudi Arabia and the United Arab Emirates; see Justin Marozzi, Dogs of War Fall Silent, FIN. TIMES, Feb. 3-4, 2001. Afghanistan has become isolated from the rest of the world, economically and politically, since the Taliban came into power. When Russian forces ended their war in Afghanistan and left the country in the early 1980s, a fierce civil war began between militias loyal to the Taliban and rebel Mujahidin fighters. The Taliban has directed what little money it has toward the war effort rather than to more socially productive efforts.

When considering the likelihood of having a rational negotiating session with the Taliban, consider how the Taliban’s Ministry of Vice and Promotion of Virtue handles some “criminal” offenses: shaving of one’s beard is a criminal offense; see The Taliban Dilemma, ECONOMIST, Dec. 16, 2000, at 44. Suspected homosexuals are buried under a mud wall – survival proves one’s innocence; see Where’s the World’s Worst?, ECONOMIST: The World in 2001, at 56. A visiting Pakistani soccer team had their heads shaved as punishment for wearing shorts. \textit{Id. See also What’s News – Worldwide, “Afghanistan’s Taliban rulers jailed...” WALL ST. J., Jan. 26, 2001, at A1. (Barbers who gave “Leonardo DiCaprio” haircuts were jailed because the hair fell in the men’s eyes when they prayed). Women’s rights are virtually non-existent. Women in Afghanistan are prohibited from leaving their homes unless accompanied by a brother or husband. They are denied access to public education. A woman who commits adultery can expect to be stoned to death, yet no such fate will await her accomplice; see, e.g., Thomas M. Franck, Are Human Rights Universal?, 80 FOREIGN AFF. 191 (Jan./Feb. 2001).

As further evidence of the fanaticism of the Taliban, a recently issued edict would require non-Muslims to wear distinguishing clothing – eerily reminiscent of Nazi Germany’s rules for its Jewish citizens at the outset of World War II; see What’s News—Worldwide, “Non-Muslims would be required to wear...,” WALL ST. J., May 22, 2001, at A1. Another edict declared that anyone converting to Christianity would be executed; see The Monster, ECONOMIST, May 26, 2001, at 12.

The dispute between the United States and Afghanistan takes on added flavor when it is noted that, although the United States does not formally recognize the Taliban as the government of Afghanistan, it is making serious demands on the Taliban and is spearheading the imposition of sanctions on it. Whether the Taliban, as successor to a signatory government of a number of extradition treaties, is yet bound thereby is a topic worthy of another research article. For a superb overview of the history of the Taliban, life under its regime, and policy implications for the U.N. and the United States in formally recognizing the Taliban, see Christopher L. Gadoury, \textit{Should the United States Officially Recognize the Taliban? The International Legal and Political Considerations}, 23 HOUS. J. INT’L L. 385 (2001).
enforcement officials. Unfortunately, these diplomatic attempts have been thwarted by a lack of cooperation by Afghanistan. Because Afghanistan is an economically and politically isolated country, multilateral efforts such as trade embargoes and other sanctions have enjoyed little success in convincing the Taliban to cooperate with the U.S. by extraditing bin Laden or trying him under acceptable international law for the crimes for which he has been indicted. In fact, it is apparent that the Taliban is actually affording bin Laden considerable protection in Afghanistan.

This lack of cooperation has left the U.S. on the horns of a considerable dilemma: whether to continue to negotiate an agreement with Afghanistan or to take a less diplomatic approach such as military action against bin Laden’s headquarters in Afghanistan. Diplomatic efforts such as negotiations, easing of economic sanctions or promises of aid to Afghanistan would be preferable. Unfortunately, such efforts could take years and ultimately fail to achieve a favorable outcome. In the meantime, bin Laden would have the opportunity to continue his deadly actions. Aggressive military action, on the other hand, could result in an immediate end to the threat posed by bin Laden. This option, however, is also not without its potential drawbacks. Concerns such as establishing sufficient evidence to justify action, the appropriate proportionality of responses, accuracy of the identity of proposed targets, and territorial integrity arise when military action is considered in such a situation. Unfortunately, there is not much room for a “middle ground” in the solutions to this dilemma and the U.S. will likely be forced to choose the latter option.

B. Toward a New Paradigm of International Law

This Note will advance two novel claims. First, acts of terrorism against a country by non-state sponsored organizations or individuals need to be considered more than just criminal acts. Instead, they should be considered acts of war against the victim nation. Accordingly, the

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13 See, e.g., Bokhari & Fidler, supra note 12.
14 See id.
15 See id.
16 This Note will focus on international terrorism, meaning acts that are generally considered terrorist in nature, which are conducted across international borders. Acts such as the Oklahoma City bombing and those of the Una-Bomber, although clearly having terrorist characteristics, should remain classified as crimes and handled within the judicial system of the country in which they were committed.
traditional notions of war should be expanded to include rogue terrorists\textsuperscript{17} and their organizations as potential adversaries. Second, if a nation \textit{can} declare war against a non-state sponsored organization, international laws must make concessions that will allow a country to prosecute such a war by conducting \textit{limited} intrusions into the sovereign territory of another nation if that nation is unable or unwilling to cooperate with efforts to prevent further terrorist acts by groups or individuals operating within their boundaries.

The first claim will be supported by an analysis of the changing nature of the threats the world faces today. Just as the drug trade has emerged as a critical foreign policy concern, resulting in "The War on Drugs," terrorism is also a primary threat to the safety of the world's citizens. Whereas the War on Drugs seems to be more of a chest-thumping exercise in rhetorical speech,\textsuperscript{18} however, the potential threat posed by terrorism is more wide-ranging and immediate to the world community. The need for a "war on terrorism" will be established by considering the unique nature of terrorist organizations as adversaries unwilling to engage in rational negotiations (which essentially precludes non-violent resolution of disputes), a historical look at "Just War" theory, and demonstrating that terrorism is a universal threat.

The second claim of this note, that violations of another nation's sovereignty are justified in the war against terrorism, is much more controversial. This claim will be supported through an analysis of historical treatises such as the Caroline Doctrine and United Nations Charter Article 51. The argument will focus on the need for existing doctrines to be interpreted more broadly in light of the increased emergence of terrorism, a threat not fully contemplated at the time these instruments were drafted.

I. THE THREAT OF TERRORISM

A. \textit{Historical and Current Perspectives}

Terrorism has been likened to a "cancer" of the modern world.\textsuperscript{19} Although the word 'terrorism' has been in use for just over two centuries, stemming from the \textit{regime de la terreur} in revolutionary France in the late

\textsuperscript{17} The term "rogue terrorists" will be used extensively throughout this Note and is intended to imply individual terrorists or groups of terrorists who are not operating under the authority of any nation's government.

\textsuperscript{18} This is not intended to downplay the threat of drug traffic into the United States and the many dangers it poses. By all recent accounts, however, the U.S. government does not appear to be achieving many significant victories in the War on Drugs at the expense of the taxpayer.

\textsuperscript{19} Paul Johnson, \textit{The Cancer of Terrorism, in} \textit{TERRORISM: HOW THE WEST CAN WIN} 31 (Benjamin Netanyahu ed., 1986).
18th century, its philosophy and aims have existed for thousands of years. The famous Chinese tactician/philosopher Sun Tzu summarized the goal of terrorism when he wrote: “Kill one – frighten ten thousand.”

Former U.S. Secretary of State Madeleine Albright has stated that terrorism “is the biggest threat to our country and the world as we enter the 21st Century,” a threat that is even more frightening in light of its unpredictable nature and the potential for widespread casualties. U.S. policy tenets have traditionally taken a hard-line stance against terrorism, individual terrorists, and state sponsors of terrorism, and combating terrorism is one of the seven fundamental interests in the U.S. strategic plan for foreign affairs. Recognizing the growing threat terrorism poses, many state and federal agencies in the United States have made contingency planning for terrorist attacks a top priority.

Although the United States has been the victim of many of the most visible and devastating terrorist attacks in recent years, the threat of terrorism is a universal problem that potentially affects all nations. As evidenced by the bombings in Kenya and Tanzania, terrorism can occur in unpredictable places, even those that have relatively benign relations with the rest of the world. Of the 301 deaths in those two bombings, only twelve were Americans, despite the obvious anti-American message intended. The frightening randomness of the bombings in Africa put the world on alert that similar acts could occur in any country, regardless of location or alliances.

B. The Conundrum

Despite the clear threat posed by terrorism throughout the world, the term terrorism remains clouded in definitional opaqueness, situational

[25] See, e.g., Queena Sook Kim, Preparing for the Worst at the 2002 Winter Games, WALL ST. J., Sept. 29, 2000, at B1 (discussing preparations being taken by Utah law enforcement and medical workers for the possibility of a terrorist attack at the upcoming Olympic Games in Salt Lake City).
[26] See PATTERNS OF GLOBAL TERRORISM 1998, supra note 3, at 1. Additionally, of the more than 5,000 who were wounded in the two embassy bombings, only seven were Americans.
dependency, and moral ambiguity. Many books and lengthy articles discuss in detail the definitional quagmire posed by terrorism. Images of terrorists can range from an indiscriminately murderous psychopath, to a highly articulate leader of an oppressed people who reluctantly turns to violence as the last means available to fight a just cause. Some definitions of terrorists could even include organizations that carry actions that amount to little more than elaborate fraternity pranks (such as the Garden Gnome Liberation Front).

Further confounding the issue is the fact that some militant groups that have conducted terrorist activity in the past are now looked to as essential players in negotiating peace accords. The African National Congress, Irish Republican Army, and Palestine Liberation Organization are just a few organizations whose current or former members now hold seats as respected heads of government or legitimate bargaining agents despite years of conducting terrorist campaigns. Nelson Mandela and Yasser Arafat, both recipients of the Nobel Peace Prize, were at one time labeled as terrorists. Some have argued that the U.S. strikes on suspected terrorist sites in Sudan and Afghanistan or the bombing of Libya in 1986 were terrorist acts despite their intended anti-terrorist message.

The definitional debate will certainly continue well into the future and its slipperiness may hamper working international conventions that would attempt to combat terrorism. When faced with the perplexing task of developing a universally acceptable definition of terrorism, it may be easier to paraphrase Justice Potter Stewart’s response when asked to define pornography; “I know it when I see it.”

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27 See, e.g., Paul Johnson, supra note 19; CONNOR, supra note 20, at 2; ALONA E. EVANS & JOHN F. MURPHY, LEGAL ASPECTS OF INTERNATIONAL TERRORISM 1 (1978).

28 See John-Thor Dahlburg, France's Littlest Victims: Stolen Garden Gnomes, L.A. TIMES, Apr. 15, 2000, at A2. This “terrorist group” conducted a covert raid on an exhibition of small ceramic garden decorations. In their statement to Paris authorities, they demanded the “immediate closing of this odious exhibit, as well as the unconditional liberation of the garden gnomes still detained.” Whether the GGLF decides to resort to violence as a means of achieving its goals remains to be seen, but seems unlikely. For a condensed version of this article, see Cheery Garden Gnomes Disappearing in France, THE PLAIN DEALER, Apr. 16, 2000, at 13A.


30 Id.

31 See, e.g., Leah M. Campbell, Defending Against Terrorism: A Legal Analysis of the Decision to Strike Sudan and Afghanistan, 74 TUL. L. REV. 1067, 1071 (2000).

32 See, e.g., The New Terrorism, Coming to a city near you, ECONOMIST, Aug. 15, 1998, at 19 (quoting Martin von Creveld, an Israeli expert on terrorism and warfare, who stated that “when you fight terrorism, you become a terrorist”).

issue, however, may only result in further confusion and lack of cooperation among countries trying to combat terrorism.

The United States has broadly, but sufficiently, defined terrorism as the "unlawful use of violence against the United States, citizens of the United States or any other nation, outside the boundaries of the United States, apparently intended to intimidate or coerce a civilian population, influence government policy, or to affect the conduct of a government for political or social objectives."  

It is important to note the inclusion of "outside the boundaries of the United States." This indicates that the drafters fully understood the increasing global American presence and believed that terrorism against U.S. citizens needed to be addressed beyond just domestic boundaries. Whether using the U.S. definition or Justice Stewart's "test," the sections to follow will clearly demonstrate that Osama bin Laden is indeed a terrorist.

C. Terrorists as Hostes Humani Generis

Hostes Humani Generis means "enemy of the human race." This doctrine, which came into prominence near the end of the 18th century as sea piracy was becoming more widespread, considers some acts as so egregious that they are "universally culpable."

Two factors must be considered in order for a person or act to be considered an "enemy of the human race:" the magnitude of the threat posed by the acts, and the universal condemnation of the acts. The doctrine's purpose was to prevent those who perpetrated violations of the law of nations from avoiding their civil and criminal liability by fleeing the locus of the crime; in essence, "their liability followed them everywhere." The significance of hostes humani generis is that all nations have a duty to enforce international laws, regardless of whether the perpetrator's acts had anything to do with the forum state. In the example of piracy, the threat posed by pirates was considered as such a threat to the welfare and commerce of all nations that any nation who apprehended them had the right to apply their laws to the crimes committed by pirates.

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37 See id. at 61.
38 See id.
39 See id.
40 See id.
Terrorists, through activities such as torture, hostage-taking, and indiscriminate murder, are also common enemies of humankind, and should enjoy no safe harbor from justice. As terrorists "direct their disastrous attacks against all nations by destroying the foundation of common safety," they "may be exterminated wherever they are caught." Regardless of the specific focus of their ire, rogue bands of terrorists with an agenda of wreaking havoc and death on citizens of a country whose foreign policy position they disagree with are a threat to the security of mankind in general. These terrorists should operate with the understanding that their activities may be countered with force as devastating as that which they are wrongfully inflicting on others. The shield of sovereignty by a complicit or hapless host nation should not be a sufficient barrier to conduct necessary acts of self-defense.

Applying the "enemy of mankind" moniker to terrorism raises the question of whether it meets the requirements of this category. Since the general guidelines for an individual or act to qualify as hostes humani generis may be broadly construed, this may be another example of definitional ambiguity hampering effective resolutions. While there can be no doubt that large-scale acts of genocide such as those that occurred in Rwanda and the Balkans in recent years are universally condemnable acts and would meet the hostes humani generis definition, are the deaths of a handful of individuals in a few isolated incidents sufficient to be categorized as such? Excluding the African embassy bombings, the total number of deaths resulting from terrorist attacks in 1998 was just 440. While this is a relatively small number, it still does not exempt terrorists from being classified as enemies of mankind. The nature of the crime of terrorism is to strike fear into millions by killing only a handful. The violent attempts to change another nation's foreign policy position combined with the simple fact that many acts of terrorism result in multiple murder should be enough to label those engaging in its practice as enemies of mankind.

II. UNDERSTANDING OSAMA BIN LADEN

Although this Note argues for the development of a new general international norm, it will rely on the example of Osama bin Laden and the Afghanistan Taliban government as a pressing illustration of why this new norm must be adopted. The following section will provide a brief biography of bin Laden, a description of the fatwa (Holy War) he has declared against the United States, his links to other terrorist attacks, and

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42 Id.
the attempts to achieve a diplomatic resolution with the Taliban to extradite him.

A. A Brief Biography of Osama Bin Laden

Born in the 1950s in Saudi Arabia, Osama bin Laden was the seventeenth son of the construction mogul Muhammad bin Laden. Muhammad had close ties to the Saudi king who issued a decree that all government construction contracts must go to the bin Laden company. This decree occurred just as heavy oil production began in the country and the rapid large-scale building spree that followed led to Muhammad quickly amassing a fortune.

Soon after the Soviet invasion of Afghanistan in 1979, Osama bin Laden joined the Afghan resistance movement, serving as a financier, recruiter and trainer to Arab nationals who volunteered to fight the Soviets. For bin Laden, volunteering in the fight against the Russians was an opportunity to fulfill his *jihad* (religious duty) and fight the enemies of Islam. During the war, he established *al-Qaida* ("The Base") in Afghanistan, which served as a headquarters for other Islamic extremists.

After the Russo-Afghan war, bin Laden returned to Saudi Arabia but felt that the country was abandoning its Islamic ideals. As U.S. troops began pouring into Saudi Arabia prior to the Gulf War in 1990 and 1991, bin Laden was appalled that the Saudi government could allow these troops (which included Jewish and female soldiers) into the sacred lands of Mecca and Medina. He moved to Sudan in 1991 but traveled extensively between several Islamic nations, developing stronger links to militant Islamic groups and individuals.

In 1994, after several years of harshly criticizing the ruling al-Saud family, bin Laden was stripped of his Saudi citizenship and disowned by his family, but not before inheriting a fortune from his father. Under intense

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47 See PBS Broadcast, supra note 45.
49 See PBS Transcript, supra note 45.
50 See id.
51 See id.
52 See id. See also Today's New Cult Hero, ECONOMIST, Aug. 29, 1998, at 44 [hereinafter Today's New Cult Hero].
international pressure, Sudan was forced to expel him in 1996 and he found refuge in Afghanistan at al-Qaida.\textsuperscript{53} 

B. Bin Laden’s Links to Other Acts of Terrorism

Although the embassy bombings and the attack on the \textit{USS COLE} are two of the most well known incidents attributed to bin Laden, he has also been linked to many other acts of violence directed at the United States. The C.I.A. has named him as the provider of financial backing for the bombing of the World Trade Center in New York City in 1993, in which six people were killed and many wounded.\textsuperscript{54} U.S. Intelligence officials suspect that bin Laden may have trained the troops and provided some of the weapons used in shooting down two U.S. helicopters in Mogadishu, Somalia in October 1993, resulting in the deaths of eighteen U.S. Army Rangers.\textsuperscript{55} Additionally, he has been implicated in the 1996 bombing of the Khobar Towers in Saudi Arabia that left nineteen U.S. servicemen dead.\textsuperscript{56} There are suspicions that bin Laden is linked to the kidnapping of sixteen tourists in Yemen in December 1998.\textsuperscript{57} A potentially devastating attack on thousands of civilians visiting Jordan on the eve of the new millennium has recently been revealed.\textsuperscript{58}Bin Laden has even been linked to a foiled plan to assassinate Pope John Paul II.\textsuperscript{59} 

Although bin Laden has denied involvement in these incidents, he has praised the perpetrators as “heroes”\textsuperscript{60} and admitted to “instigating”\textsuperscript{61} many attacks against American targets around the world. When the United States was successful in obtaining the extradition of Mir Aimal Kansi for his connection with the World Trade Center bombing, bin Laden encouraged Muslims to retaliate against the U.S. prosecutor assigned to the case.\textsuperscript{62} He has proudly congratulated other militant groups on their formal designations by the United States as terrorist organizations.\textsuperscript{63} As the trial of

\textsuperscript{53} \textit{Today’s New Cult Hero}, supra note 52.

\textsuperscript{54} See id.


\textsuperscript{56} See, e.g., \textit{Today’s New Cult Hero}, supra note 52.

\textsuperscript{57} \textit{See generally Plots and Super Plots}, ECONOMIST, Jan. 9, 1999, at 43.


\textsuperscript{60} See id.

\textsuperscript{61} \textit{Patterns of Global Terrorism} 1999, supra note 23, at 31.


\textsuperscript{63} See id.
several of his alleged followers indicted for the African embassy bombings gets underway in New York, bin Laden's association with many other acts of terror throughout the world may be unraveled.

C. Bin Laden's Declaration of War Against the United States

On February 23, 1998, Al-Quds al-Arabi, a London-based Arabic newspaper published the "Declaration of the World Islamic Front for Jihad Against the Jews and Crusaders." At the top of the list of signatures on the document was Osama bin Laden's, followed by those of leaders of several other militant Islamic groups. The document criticizes the U.S. role in the Gulf War and its continued presence in the region, accusing it of "occupying the lands of Islam in the holiest of its territories, plundering its riches, overwhelming its rulers, humiliating its people, threatening its neighbors, and using its bases in the peninsula as a spearhead to fight against the neighboring Islamic peoples."

It further declares that the continued presence of American forces in Arabia is "a clear declaration of war by the Americans against God, his Prophet, and the Muslims," and that according to the ulema (authorities on theology and Islamic law, called shari'a), it is the duty of all Muslims to fight the invaders of Muslim lands. The document concludes with a fatwa (final ruling or declaration of holy war) imploring Muslims to engage in jihad against Americans. It states that:

To kill Americans and their allies, both civil and military, is an individual duty of every Muslim who is able, in any country where this is possible, until the [holy sites] are freed from their grip and until their armies, shattered and broken-winged, depart from all lands of Islam, incapable of threatening any Muslim.

By God's leave, we call on every Muslim who believes in God and hopes for reward to obey God's command to kill the Americans and plunder their possessions wherever he finds them and whenever he can. Likewise we call on the Muslim ulema and leaders and youth and soldiers to launch attacks against the armies of the American devils and against those who are allied with them from among the helpers of Satan.

66 See id.
67 See id. at 15.
68 See id.
69 See id.
This is a clear declaration of war against the United States. As many Muslims have pointed out, the nature of Islam speaks more about peace than war and none of the Islamic texts advocate terrorism or murder.\(^7\) Osama bin Laden’s pronouncement is an embarrassment to the majority of Muslims throughout the world and largely ignored as the senseless recitations of a lunatic. Yet, as the many events bin Laden’s followers have committed clearly indicate, it only takes a few zealots to carry out such an order, and the results have been deadly.

D. The Indictment Against bin Laden

In 1998, federal court in Manhattan has charged bin Laden, his top lieutenant, Muhammed Atef, and several others in a 238-count indictment.\(^7\) The U.S. government has also offered a $5 million reward for information leading to his apprehension.\(^7\) Although this indictment was released after the bombings in Africa, it was submitted several months before and was made public with the addition of further charges after the embassy bombings.\(^7\) Some of those indicted have been apprehended in Germany and Britain and have been extradited or are awaiting extradition to the United States.\(^7\) But bin Laden remains at large, and he will continue to spread his wave of terror until he is stopped.

E. Failed Diplomatic Efforts

After the bombings in Africa, the U.S. demanded that the Taliban hand bin Laden over to law enforcement officials. Despite a unanimous vote by the U.N. Security Council to impose sanctions on Afghanistan\(^7\) and an Executive Order by President Clinton barring business activity between U.S. and Afghani businesses,\(^7\) the Taliban still scoffed at cooperation. The Taliban leader Mullah Omar seems to have enjoyed antagonizing the

\(^7\) See id. at 19.


\(^7\) See, e.g., Weiser, supra note 71, at A8.

\(^7\) See, e.g., David Johnston & Steven Lee Myers, Investigation of Attack on U.S. Destroyer Moving Slowly, N.Y. TIMES, Oct. 30, 2000, at A10; see also Markon, supra note 64.


United States by harboring bin Laden. According to some sources, he feels that extraditing bin Laden, who enjoys hero status in Afghanistan because of his contributions in the fight against the Soviets in the 1980s, would be “tantamount to leaving a pillar of our religion,” and that acquiescence to U.S. pressure could damage the Taliban’s credentials among some Muslim extremists. After the attack on the USS COLE, and amid further pressure to turn bin Laden over, the Taliban instead increased the security around bin Laden, further frustrating the United States and making it clearer that drastic measures may be the only remedy to prevent further action by him. While the Taliban has recently hinted that it may be open to turning bin Laden over to authorities, it has qualified this statement by insisting that it would do so only to a Muslim country where he would be tried by Islamic judges. This “concession” is unlikely to gain U.S. approval.

With his inherited wealth estimated at well over $300 million, bin Laden has had little trouble recruiting followers from a variety of nationalities and backgrounds. Some of the suspects named or apprehended after the African embassy bombings have included Egyptians, Palestinians, Saudis, and even a former American serviceman. Bin laden has sent his followers to conduct training in such diverse locations as Central Asia, Bosnia, Northeast Africa, the Arabian Peninsula, and the Philippines. His wide-ranging web of followers and organizations that are trained or funded by him has left the world with a sense of vulnerability rarely felt before. To further add to this frightening potential, bin Laden has hinted at a desire to develop and employ weapons of mass destruction. With such a looming threat, backed by sufficient funding, the need to take extreme measures against bin Laden is apparent.

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77 See, e.g., Rory McCarthy, The Guardian: Afghan Leader Refuses to Give up bin Laden to U.S., at http://www.guardian.co.uk/Archive/Article/0,4273,4045076,00.html.
78 See id.
79 See, e.g., In Charge Again, ECONOMIST, Aug. 29, 1998, at 42.
80 See, e.g., Bokhari & Fidler, supra note 12.
81 See, e.g., Afghans May Hand Over bin Laden, FIN. TIMES, Feb. 9, 2001, at 5.
82 PATTERNS OF GLOBAL TERRORISM 1999, supra note 23, at 31; see also Bokhari & Fidler, supra note 12.
84 See id.
85 See id.
86 The recent trial in New York somewhat weakens this argument, however. It appears that bin Laden has some miserly characteristics when it comes to distributing his wealth to his followers, prompting several of them to become disenchanted with the organization — apparently radical behavior does not always come cheap. See, e.g., Benjamin Weiser, Trial Poked Holes in Image of bin Laden’s Terror Group, N.Y. TIMES, May 31, 2001, at A1.
NEUTRALIZING THE THREAT

III. FOUNDATIONS FOR A NEW INTERNATIONAL NORM

A. The U.S. Cruise Missile Strikes in Sudan and Afghanistan

The U.S. strikes against a terrorist camp in Afghanistan and a pharmaceutical plant suspected of producing VX gas in Sudan drew both praise and ire from the world community, sparking widespread debate in many circles. In order to lend credence to the first claim of this Note, the argument that terrorism is an act of war, it is necessary to evaluate the reasoning behind the critics and supporters of the strikes, the legal support for both sides of the argument, and the historical context of the doctrines and other legal theories relied upon by them.

Many U.S. allies, such as Germany, Great Britain, France, Italy, Japan, Australia, and Israel, issued statements of support following the U.S. strikes in Afghanistan and Sudan. Other countries, such as Russia, China, and Pakistan, condemned the attacks as "unilateral and unwarranted." Kofi Annan, the Secretary-General of the United Nations, issued a statement recognizing the "global menace" of terrorism but criticizing "individual actions by member states" against state and non-state sponsored terrorism. Although Annan's statement was not explicitly directed at the United States, it was certainly an implicit condemnation of the U.S. actions.

Several Arab states felt that the strikes and the apparently cavalier approach by which they were conducted were "arrogant" acts of hegemony by the United States. As expected, the governments of Sudan and Afghanistan issued statements protesting the strikes. In the words of the Sudanese representative to the United Nations, they were "[an] iniquitous act of

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87 Pakistan may at first seem like an unlikely voice in the throng of critics. However, the crux of their concern was that the United States violated their airspace when launching the cruise missile strikes against Afghanistan and not only did not seek or gain permission from the Pakistani government to do so, but did not even inform them that their airspace would be used. This occurred at a time when tensions between Pakistan and India were particularly tense and unidentified cruise missiles streaming through the air would certainly be a cause for concern. This issue, although not to be taken lightly, is beyond the scope of this Note.


aggression which is a clear and blatant violation of the sovereignty and territorial integrity of a Member State of the United Nations . . . .

The United States, on the other hand, staunchly defended its actions on moral and legal grounds. Secretary of State Madeleine Albright proclaimed that the United States "cannot allow such cowardly acts to go unpunished." Despite the retaliatory tone in Secretary Albright's statement, the United States emphasized that the strikes were conducted primarily as a pre-emptive measure against future acts being contemplated by bin Laden's organization, and that "inaction would be an invitation to further horror." Some have argued that the attacks were conveniently conducted at a time when the White House was embroiled by the Lewinsky scandal, but the strong support President Clinton received from prominent Congressional Republicans quieted those claims.

Arguments based solely on moral opinion backed by military strength, however, are insufficient. The United States does indeed enjoy the comforts of having a strong, technically superior military, but relying on that fact alone portrays the United States as a thoughtless bully inconsiderate of the boundaries of international law. The following sections will discuss the applicable norms and how interpretations of these norms must be adjusted in the present age due to the changing threats the world faces.

B. Terrorism as an Act of War

Traditional notions of war bring to mind images of planes, tanks, battleships, and uniformed troops acting under a unified, state-sponsored command. Terrorism, on the other hand, does not operate through such visible means. Terrorism employs many tactics that are illicit in nature,

91 Letter Dated 21 August 1998 from the Minister of State at the Ministry of Foreign Affairs of the Sudan Addressed to the President of the Security Council, UNSCOR, Annex, at 2, U.N. Doc. S/1998/786 (1998). It is important to note that condemnation against the bombing in Sudan was more vocal than the bombing in Afghanistan. Afghanistan's Taliban government was not recognized as a legitimate government by the U.N. at the time and as such, protests by the Taliban may have fallen on unsympathetic ears. In retrospect, the bombing in Sudan may have in fact been a tactical and strategic blunder by the United States. There was no clear evidence that the plant was manufacturing a VX precursor. See, e.g., A Case of Mistaken Identity?, ECONOMIST, Aug. 29, 1998. Although the United States has not admitted that it made a mistake, it has unfrozen the assets of the plant's owner and has reached a confidential settlement with him after he filed a $50 million lawsuit against the United States. See, e.g., A Bit of Collateral Damage, ECONOMIST, Aug. 26, 2000, at 35.


93 See id.

such as hijacking, murder, kidnapping, weapons smuggling, and drug trafficking. Additionally, terrorist groups often operate in highly fragmented clusters whose leadership and hierarchical structure is difficult to discern.

Waging war against a non-state sponsored enemy is counter-intuitive to most conceptions of war. Wars are typically fought between states, not between a state and an individual or rogue band of terrorists. Yet with the threat to many nations shifting from that posed by nuclear superpowers to the threat of terrorist activity, it is necessary to consider the fight against terrorism as a war rather than simply a law enforcement issue. Although several countries, including the United States, have criminal statutes addressing terrorism, and there exist several international conventions that have established a framework for criminalization of terrorist acts, these statutes alone are ineffective in addressing the problem. Criminalizing terrorism is an effective method of identifying specific acts that are punishable, yet this does little to thwart terrorist activities and limits law enforcement activity to operating in a reactive mode once a terrorist act has taken place. Cooperation conflicts, different rules of evidence, search and seizure standards and varying pre-trial procedures are just a few of the obstacles that may stand in the way of effectively combating terrorism from the viewpoint that it is just a crime, rather than an act of war.

Some authors support the suggestion that acts of terrorism should be characterized as acts of war due to their destructive consequences and the threat they pose to national security and regional stability. Accordingly, the process of combating terrorism should be viewed not as a law enforcement activity, but as an ongoing war. Although the concept of engaging in a war against non-state sponsored persons and organizations admittedly confounds the historical understanding of a wartime adversary, considering it as such may release victimized nations from certain constraints that exist when treating terrorism simply as a crime. In addition, this concept could allow for the exercise of more forceful measures that might not be permissible under the rubric of law enforcement.

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97 See, e.g., Tim Butcher & Hugh Davies, U.S. Strike was 'First Blow in the War of the Future,' WASH. POST, Aug. 22, 1998, at A1 [hereinafter First Blow].
For instance, although bin Laden is a key suspect in the Khobar Towers bombings and the attack on the USS COLE, legal squabbling and a lack of full cooperation from the Saudi and Yemeni governments have hindered both investigations.\(^9\) Enough evidence existed to indict bin Laden under U.S. law for the African embassy bombings and many other acts.\(^9\) While it may be easy to get a criminal indictment against someone in the United States (especially when terrorism is involved), the indictment against bin Laden was the result of several years of intense investigation by U.S. and foreign intelligence agencies. The trial of bin Laden's followers begun in February 2001 in New York is lending further credence to the evidence relied upon for the indictment.\(^10\) The preliminary evidence that supported the indictment of bin Laden should justify using force to rout him out of the hills of Afghanistan.

The United States has defined its fight against terrorism as a war.\(^10\) Sara Scheideman has argued that the scope of this statement is too broad because the recent attacks directed at the United States threatened "neither [its] territorial integrity nor [its] political independence."\(^10\) This view, however, relies on antiquated interpretations of legal norms and fails to comprehend the changing nature of the world with respect to the multinational presence of many nations' citizens, corporations, and government representatives. In other words, the "presence" of any particular nation can extend beyond its borders, and this presence needs to be protected wherever it exists. To be confined to the standard noted above would hobble the United States' (or any other country pursuing a war against terrorism) efforts at preventing further acts of terror when faced with uncooperative or unwitting countries that may be hosting terrorists.


\(^9\) See Indictment, United States v. Osama bin Laden, S(2) 98 Cr. 1023 (LBS), (S.D.N.Y. 1998).


\(^10\) Jeffrey D. Simon, The Terrorist Trap: America's Experience with Terrorism 166 (1st ed. 1994) (discussing a 1984 National Security Decision Directive enacted into law under the Reagan administration that began a new policy of suppressing terrorism by using forceful measures against terrorist targets even when they are outside the territorial boundaries of the United States because they are considered a threat to national security). See also First Blow, supra note 97 (quoting U.S. Secretary of State Madeleine Albright's statement that terrorism is "the war of the future").

\(^10\) See, e.g., Sara N. Scheideman, Standards of Proof in Forcible Responses to Terrorism, 50 Syracuse L. Rev. 249, 273 (2000).
C. Distinctions Between State Sponsored and Non-State Sponsored Terrorist Groups

When terrorist organizations are state-sponsored, their activities can be hampered through sanctions against the sponsoring state and other methods ratified by international organizations such as the United Nations. But economic sanctions against a host nation rarely have a direct effect on non-state sponsored terrorist organizations operating in that nation’s territory. The diplomacy and law enforcement options become moot when a nation is faced with dealing with non-state sponsored terrorists. Accordingly, a country that has fallen victim to such terrorism must adopt more extreme measures in order to defend the rights of its citizens and its international interests. The danger of failing to take such action is that a nation’s citizens, victimized by terrorism, may cower at the prospect of any international presence and withdraw to the confines of their national borders. The eventual (albeit dramatic) result could be that a nation whose citizens retreat to their own boundaries may become economically and politically isolated from the rest of the world – an unfortunate victory for terrorism. Law enforcement options are usually initiated only after a terrorist act has taken place. While it is certainly desirable to bring terrorists to justice in an internationally recognized criminal forum, the escalation of terrorist activity throughout the world sounds an urgent call for nations to take action that would thwart terrorist acts and organizations before they are committed.

There is evidence suggesting bin Laden has made efforts to develop and use weapons of mass destruction such as chemical or biological weapons. This frightening realization requires an internationally recognized standard that would allow pre-emptive actions by states who are threatened with terrorist acts, regardless of whether those threats will be carried out within their sovereign territory or against their citizens abroad.

Even the United States has had difficulty codifying a satisfactory response to terrorism, and instead often tends to act in an “ad hoc and fragmented” manner. Many of the nations who condemned the U.S. bombings in Sudan and Afghanistan were fortunate enough to not have lost any of their citizens in the African embassy bombings. But even though the United States was the obvious target of those attacks, a relatively small percentage of the victims were Americans; most in fact were Kenyan and Tanzanian nationals. It should be apparent then, that while the aim of

105 See PATTERNS OF GLOBAL TERRORISM 1998, supra note 3.
terrorism may be specific, it does not discriminate against its collateral victims, essentially making its practice a universal threat. As a U.S. Justice Department official stated, "In a greater sense, all of the citizens of the world are victims whenever and wherever...acts of international terrorism strike...it is up to the authorities of the world to respond vigorously and unrelentingly to such terrorist acts."106

D. "Just War" Theory as Applied to the Fight Against Terrorism

Scholars have debated what constitutes a "just war" for thousands of years, dating at least as far back as the time of ancient Greece.107 The Romans, for instance, justified the use of force against their enemies abroad as part of the "divine will."108 The Roman theory relied on the premise that order is a deterrent to force (presumably against the Roman state) and that force threatens order; therefore, force must be quashed before disorder occurs.109 St. Augustine is another oft-cited just war theorist, whose philosophy taught that wars for the purpose of aggression are unjust.110

Several hundred years passed before the Dutch lawyer Hugo Grotius introduced a new discourse on just war. Grotius' theory incorporated the notion of self-defense as permissible when protecting property and to punish wrongs suffered by the citizens of a nation.111 This theory eventually gave way to the Treaty of Westphalia in 1648, which attempted to develop a cohesive understanding for the appropriate use of force, with stronger consideration given to state sovereignty.112

Not unexpectedly, disagreements persisted, as evidenced by the numerous religious wars throughout Europe, events in the early 19th century and hostilities in 1914 that led to World War I. In 1920, as the world was still trying to come to grips with the effects of the Great War, the League of Nations was established, with the hope of binding states to a requirement to resolve disputes through every available peaceful means rather than by force.113 Nine years later, forty-six nations ratified the Kellogg-Briand Pact

106 Larry Neumeister, U.S. Indicts bin Laden in Bombings, DALLAS MORNING NEWS, Nov. 5, 1998, at 1A.
109 See id.
110 See id.
in an effort to prohibit aggressive wars. The Kellogg-Briand Pact did acknowledge self-defense as a justification for resorting to war, but its drafters probably did not anticipate the severity of the current threat posed by non-state sponsored terrorist organizations.

The Just War Doctrine is not a well-defined collection of laws relating to war. Instead, it is a constantly changing tradition of norms, ideas, and customs that have emerged over time to deal with the persistent phenomenon of war. Debates about what constitutes an unjust war have confounded countless scholars throughout the years and continue to do so today. Noble earlier efforts, such as those of the League of Nations and the Kellogg-Briand Pact, attempted to curb aggression as a means of resolving disputes between nations. The basic tenets of the Kellogg-Briand Pact have been incorporated into U.N. Article 33, which requires nations to attempt resolution of disputes that may threaten international peace by exhausting peaceful means such as “negotiation, mediation, conciliation, arbitration or judicial settlement,” rather than resorting to armed conflict.

All of these treaties and pacts were drafted with the purpose of quelling violence between nations. There remain some important distinctions between the conflicts that arise between states and those that arise between states and rogue terrorist organizations. Sovereign nations have the opportunity to resolve their disputes through a variety of resolution venues, ranging from the United Nations to privately sponsored panels. As to conflicts between states and terrorist organizations, however, there are no such bodies to address disputes, and, even if they existed, it is likely that members of the terrorist organizations would scoff at the concept of resolving differences civilly. Terrorist groups are simply not structured in a manner that would make peaceful dispute resolution a feasible option. The aim of many terrorist organizations is to force a change in policy through violence rather than through civil dispute resolution procedures. As such, aggressive use of force by a state victimized by terrorism is necessary to bring such disputes to closure.

Under United States law, a President declaring war against another nation was required to follow procedures set forth in the Constitution.

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114 See id. at 219.

115 See id.

116 The author acknowledges that the term “changing tradition” is an oxymoron. But in the context that it is used in this Note, it seems appropriate.

117 U.N. CHARTER art. 33, reprinted in IAN BROWNIE, BASIC DOCUMENTS IN INTERNATIONAL LAW 12 (1967) [hereinafter BASIC DOCUMENTS].

118 See War Powers Resolution of 1973, Pub. L. No. 93-148, H.R.J. Res. 542, 93rd Cong. (1973). This resolution gives the President authority to deploy troops at his discretion for a period of up to 90 days, without the approval of Congress or a formal declaration of war. If the United States were to formally declare an ongoing war against terrorism, the President could effectively act against terrorism immediately. Of course, that is what has actually
Waging a war against a non-state sponsored terrorist organization is different. Currently, no “specific statutory authorization is necessary for the President to take action against a terrorist or terrorist group unless the strategy involves launching a large-scale aggressive war against another sovereign state.” The theory this Note proposes does not advocate prolonged military activity in the territory of another nation. Rather, it argues only for limited operations with the specific purpose of fighting terrorists. Furthermore, it does not contemplate action against the armed forces of the country in which the activity is taking place. Viewing terrorism as an act of war rather than just a crime, and allowing aggressive measures to prevent further acts would be a significant step toward fostering such a vigorous response and would be in the best interests of the world community.

E. The Necessity of Unilateral Action in the War Against Terrorism

One of the criticisms of the U.S. strikes in Afghanistan and Sudan was that not only was no approval sought, but that there was no notice given to any other nation or international body before the strikes were carried out. The potential consequences of this tight-lipped operation could have resulted in misinterpretation by nearby countries that would escalate into a situation more dire than that posed by terrorism alone. Even after years of valiant efforts by the international community to reach an agreement on the appropriate measures needed to combat terrorism successfully, we are still left with a collection of feeble institutions and conventions that prevent an effective multilateral approach to combating the problem. As such, and despite the aforementioned criticisms, the fight against terrorism will very likely be a unilateral fight by victimized nations for several years to come.

Unilateral action has the potential to alienate other nations. For instance, strikes against bin Laden’s camp in Afghanistan (an Islamic country) could be viewed as an expression of contempt toward Muslim nations in general, potentially weakening key alliances in the Persian Gulf. In addition, states that have had the fortune not to be direct victims of

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119 See Robert F. Turner, Legal Responses to International Terrorism: Constitutional Constraints on Presidential Power, 22 Hous. J. INT’L L. 77, 84 (1999). Professor Turner defends a broad authority for the President to formulate and conduct foreign policy and international affairs as he sees fit in circumstances in which the Constitution does not otherwise clearly specify. Engaging in a war against terrorism would be one such example of exercise of such broad authority.

120 See Allies Back U.S. Strikes, supra note 88.

121 See supra text accompanying note 87.
terrorism or suffer collaterally as a result of anti-western sentiment have little reason (or in many cases, capability) for joining in the fray.

Even organizations such as NATO are not a viable multilateral weapon in the fight against terrorism. Article Five of NATO’s Founding Charter addresses multilateral action against an aggressing adversary, but this provision was developed with the threat of the Soviet Union lingering over Europe’s consciousness. In the post-Cold War era, with the Soviet threat essentially eliminated, there is little rationale or incentive for NATO to expand its anti-terrorism activity outside its scope. Although NATO has expanded its role to address humanitarian intervention and peacekeeping operations, it has still limited itself to doing so in the European theatre. While the issue of fighting terrorism may eventually surface on NATO’s agenda, it will probably only be willing to address terrorism within its territory. As France has argued, such “out-of-area operations” could weaken NATO’s “strategic doctrine and organizational structure.”

Because “terrorist networks lie outside the web of civil responsibility that constrains” the rest of the world, efforts such as international sanctions against terrorist organizations are a futile gesture as well. Although bin Laden’s wealth is surely a key facilitator in his activities and freezing his access to that wealth may inhibit future acts, he has most likely hidden it in ways that are difficult, if not impossible, to reach. Additionally, terrorists are not a legitimate part of an economic flow of goods, capital, or resources, so sanctions in the usual sense serve only a symbolic purpose.

International terrorism poses a greater threat to some countries than to others. The countries that have been the primary targets of international terrorism (such as the United States, Israel, and the United Kingdom) also have the best available means to fight terrorism. Despite the overwhelming

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124 See Dov Waxman, Terrorism: The War of the Future, 23 FLETCHER F. WORLD AFF. 201, 205 (Fall 1999).
125 See id.
127 On Aug. 20, 1998, President Clinton issued an Executive Order freezing the assets of bin Laden and forbidding any transactions between U.S. companies and bin Laden’s entities. Although this was a wise policy choice by President Clinton, the effectiveness of this order is debatable in light of the fact that bin Laden has surely concealed many of his assets through various means. See Exec. Order No. 13,099, 3 C.F.R. 208 (1981), reprinted in 50 U.S.C. § 1701 (1998); see also Continuation of Emergency Regarding Terrorists Who Threaten to Disrupt the Middle East Peace Process, 64 Fed. Reg. 3,393 (1999).
number of Kenyan and Tanzanian citizens who were killed in the embassy bombings, neither has the means nor the incentive\textsuperscript{128} to tackle the terrorist threat across the globe. On the other hand, as the last remaining military ‘superpower,’ the United States does have the means to fight terrorism on a global scale. Further, the declaration of war against the United States and its citizens provides a clear incentive to take action. Because of widespread anti-American sentiment, often combined with violent activity, terrorism poses a disproportionate threat to the United States and its citizens. This threat can be countered, however, by the disproportionate military advantage the United States can employ in fighting terrorism.

Finally, unilateral action is the most feasible course of action due to the sensitivity and timeliness of such measures. Waiting for Security Council approval or the permission of other nations for fly-through authority could negate the effectiveness of a mission and jeopardize the welfare of those conducting it. Although future strikes against terrorist targets may continue to be unilateral actions or actions with only limited assistance from other nations, other nations may begin to understand the necessity of such action and support those nations who do take such unilateral action.

\textbf{F. Circumventing the Rule Against Assassination}

This Note has argued that the concept of war should be expanded to allow for engagements against non-state sponsored terrorists and their organizations. But it has not addressed one of the unfortunate realities of any war – the fact that people will die. Although the discussion thus far has emphasized the need to prevent further terrorist activity, it has not specifically stated how this will be accomplished. Quite simply, it means that the most effective way to prevent terrorists such as bin Laden from committing further acts is to kill them. Several months after the strikes in Afghanistan and Sudan, the Clinton Administration acknowledged that one of the “clear but unstated objectives” of the mission was to “kill Osama bin Laden and as many of his lieutenants as possible.”\textsuperscript{129} The discussion of assassination invokes strong opinions from both supporters and opponents on legal, evidentiary, and moral grounds. Jeffrey Smith, a former general counsel at the Central Intelligence Agency has noted the dilemma of

\textsuperscript{128} This is not to say that Kenya and Tanzania have \textit{no} incentive to see an end to the bin Laden terrorist network. As mentioned earlier, the majority of the victims of the bombings were Kenyan and Tanzanian citizens. Both countries certainly have an interest in seeing bin Laden and his followers brought to justice for the crimes they committed in August 1998. The term “incentive” is used in this context to imply that Kenya and Tanzania are not specific primary targets for international terrorism; therefore, they would likely not involve themselves in a widespread fight against it.

fighting terrorism with questionably terrorist methods. Doing such could potentially “undermine[] our role as a leader in respect for the rule of law and respect for human rights.” Yet the killing of Osama bin Laden may in fact be a necessary act in the global fight against terrorism.

In 1981, President Reagan issued Executive Order 12,333, which states that “[n]o person employed or acting on behalf of the United States Government shall engage in, or conspire to engage in assassination.” The underlying theory behind the issuance of the Order was that assassination is a term of art for the crime of murder, and no government should sanction murder as an official foreign policy practice. Assassination “is incompatible with American principle, international order, and morality.” The Executive Order was intended, however, to apply in situations where plots were being devised to kill foreign heads of state or other high government officials of states hostile to the United States.

The Senate committee investigating the issue of assassination stopped short of addressing the issue outside the context of peacetime operations, leaving the debate open to consideration for actions during wartime. The Senate committee’s avoidance of this issue provides a clear solution to the terrorism problem. Declaring a legitimate war against individual terrorists is the logical way around the assassination restriction. Bin laden is certainly not a head of state; if anything, he is more akin to a field marshal in a paramilitary organization. In a time of war, activities that may otherwise be viewed as assassination are permissible because the “victim” is actually a combatant.

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134 See Zengel, supra note 132, at 633.

135 See W. Hays Parks, Memorandum of Law: Executive Order 12,333 and Assassination, ARMY LAW., Dec. 1989, at 4. Parks notes that the Reagan Administration specifically chose to exclude punitive raids against terrorists from the ban on assassinations, thus leaving that avenue open for action.
The plots that led to the assassination prohibition were motivated more for political purposes than for purposes such as self-defense. After thorough consideration, the Clinton Administration supported an interpretation of Executive Order 12,333 that would allow for an exception to the perplexing situation posed by terrorists such as bin Laden: “The clandestine...or overt use of force against legitimate targets in time of war, or against similar targets in time of peace, where such individuals or groups pose an immediate threat...does not constitute assassination.”

Assassination may be the only realistic possibility to prevent the threat posed by terrorists. Although some may argue that such acts would only further inflame the hatred of terrorists who would in turn retaliate more viciously, this possibility must be weighed against the disruption the killing of its leader would cause to a terrorist group. Such disruption might lead to decreased activity, or even a complete end to such acts by more reasonably minded members.

Since bin Laden is not a head of state, the ban against assassination should not be interpreted to apply to him. Viewing bin Laden as a combatant, which necessarily entails accepting the notion that the United States is engaged in an ongoing war against him, loosens the restrictions on how to deal with him if just considered in a criminal context. There is no indication that bin Laden intends to curtail his attacks on the United States wherever he can do so. The lives of a select few who choose to mock global peace and wreak terror around the world, killing thousands in the process, should not be protected under any provision of law that inhibits or prevents an international terrorist from being brought before an appropriate tribunal.

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138 See, e.g., The Consequences of Selective Killing, ECONOMIST, Aug. 4, 2001, at 40. See also Milt Bearden, Death Penalty Would Hinder Anti-Terrorism, WALL ST. J., June 4, 2001, at A22 (elaborating further, in the wake of the New York trial of bin Laden’s lieutenants, the dilemma of whether to administer the death penalty to convicted terrorists and suggesting that the death penalty will be a deterrent to anti-terrorist efforts, and would exacerbate the ire of terrorists).

139 The status of “combatant” recognizes no rank hierarchy. For example, during World War II, the United States attacked a Japanese plane knowing that one of its passengers was Admiral Yamamoto. See Sofaer, supra note 133, at 121.
IV. BREAKING THE SHACKLES: EXPANDING INTERPRETATIONS OF EXISTING DOCTRINES

When the United States conducted the strikes in Afghanistan and Sudan, it did not do so with the "ad hoc and fragmented" approach it had been accused of in the past when dealing with terrorist acts. Instead, it carefully reviewed existing legal authorities, including the U.N. charter, as well as the potential repercussions and the feasibility of such actions. Much of the criticism directed toward the United States after their cruise missile strikes was based on differing interpretations of the same authorities. Since the threat of international terrorism still looms heavily over the world, it is inevitable that more catastrophic acts will occur in the future and responses similar to the U.S.' in 1998 will be contemplated by the victims of those terrorist acts. Understanding the current interpretations of some of the authorities as well as the need to expand their applicability in light of situations not anticipated when they were developed is necessary in order to justify the concept of engaging in war against terrorists within another nation's territory.

A. The Caroline Doctrine

The crux of the U.S.'s argument defending its actions in Afghanistan and Sudan was that it was acting in self-defense against imminent (albeit unspecified) future attacks by bin Laden's organization. The foundation of the self-defense argument can be found in what is known as "The Caroline Doctrine," embodied in an 1837 statement by then U.S. Secretary of State Daniel Webster. Webster stated that self-defense should only be exercised in extraordinary circumstances where the "necessity of self-defense is instant, overwhelming, leaving no choice of means, and no

140 See Albright/Berger Briefing, supra note 92.
141 See id.
142 In 1837, Canada was in the midst of rebellions against British rule. The U.S. government adopted a neutral position in the matter, but some U.S. citizens actively supported the Canadian cause. In December 1837, a privately owned U.S. steamboat, The Caroline, departed from Buffalo, New York loaded with supplies to be delivered to the Canadian rebels. Although the first shipment reached its destination, the British military commander ordered his naval forces to destroy the Caroline to prevent further deliveries to the Canadians. Carrying out this order, British forces entered American territory, sending the Caroline plunging over Niagara Falls. Two crewmembers of the Caroline were killed in the assault. The British Ambassador, Henry Fox, justified the destruction of the Caroline on the grounds of self-defense. Daniel Webster opposed this argument and set forth his interpretation of a legitimate exercise of self-defense, now known as "The Caroline Doctrine." Ironically enough, the United States now finds itself deviating from Webster's definition and adopting an approach more similar to that, which the British adopted. See, e.g., Alberto R. Coll, The Legal and Moral Adequacy of Military Responses to Terrorism, 81 AM. SOC'Y INT'L L. PROC. 297, 307 (1987).
moment for deliberation."\textsuperscript{143} The Caroline Doctrine has come to stand as the foundation for the customary law of self-defense, establishing three essential requirements: necessity, proportionality, and immediacy.\textsuperscript{144} Critics claim that terrorist acts do not meet the Webster standard\textsuperscript{145} that actions like the U.S.'s were simply retaliatory, and that the Caroline Doctrine does not allow for acts of anticipatory self-defense.\textsuperscript{146}

Critics who assert such claims fail to consider the significant changes in military capability and terrorist activity that have occurred in the 160 years since the Caroline Doctrine was established. To rely on the doctrine simply as it was enunciated in 1837 would be to take on a myopic interpretation that is ungrounded in the reality the world faces today. The fact that Afghanistan has been uncooperative and that it is already subject to numerous sanctions by individual nations and international organizations has rendered any alternative to using military efforts against bin Laden ineffective, thus satisfying the "necessity" requirement of the Caroline Doctrine.

The unconventional methods of destruction used in terrorism make the proportionality requirement difficult to quantify. In traditional warfare, proportionality would be defined along the lines of fighting an adversary with similar weapons systems. For example, fighting tanks with tanks and supporting airfare or artillery would be proportionally adequate whereas fighting tanks with nuclear warheads would clearly be disproportionate. A completely literal interpretation of proportionality is unrealistic in the terrorism context since it is unlikely that the United States will park an explosive-rigged truck outside bin Laden's headquarters. The Caroline Doctrine’s proportionality requirement when fighting terrorism can best be met when considering the overall intent of each party. For terrorists, the goal is the radical transformation of their target's foreign policy or simply the death of the target’s citizens, while for the victim nation it is the end of terrorist activity. The ‘proportionality’ used by a nation fighting terrorism should be that activity which is sufficient to destroy terrorist facilities (which a few well targeted cruise missiles should accomplish).

Finally, the notion of immediacy needs to be more broadly interpreted. Under some standards of immediacy, the United States would have to wait until it had \textit{concrete} proof of an \textit{imminent} attack on a \textit{specific} target before taking action. Terrorism’s unpredictability and the secrecy with which


\textsuperscript{144} See generally Yoram Dinstein, War, Aggression, and Self-Defense 230 (1988).


many terrorists conduct their pre-attack operations make it virtually impossible to pinpoint and prevent specific attacks. Bin Laden's general declaration of war against the United States and its citizens and facilities overseas before the African embassy bombings and the subsequent acts he is connected to are reasonable grounds to assume that there are ongoing efforts to commit further attacks. This should be sufficient to meet the immediacy requirement. Otherwise, the United States and other victims of terrorism will be forced to wring their hands in anticipation of pending attacks. Victim nations may find themselves on the brink of complete destruction at the hands of terrorists before they can justifiably act under a strict interpretation of "immediacy." Such limitations are not only perilous to the welfare of the international community, but also give terrorists the freedom to operate behind an unreasonable and excessively restrictive legal norm.

B. United Nations Charter Article 51

While the Caroline Doctrine is an effective springboard from which to form a basis of defense for adopting a hard-line stance against terrorism, it has not formally been codified into any national or international standards. Article 51 of the United Nations Charter, however, does incorporate theories similar to the Caroline Doctrine. Unfortunately, narrow interpretations and failure to address situations unanticipated at the time of its inception have rendered Article 51 an obstacle rather than a catalyst in the fight against terrorism. The primary question regarding Article 51 in the context of the situation presented here is whether the self-defense doctrine should be more broadly construed to include acts of anticipatory self-defense against non-state sponsored terrorists operating within the sovereign territory of a third-party country. Because of the changing dynamics of warfare and terrorism—situations that may not have been anticipated at the time Article 51 was drafted—it is necessary that the doctrine allow for this broader interpretation.\footnote{A broader interpretation may only be the beginning, however. Article 51 should in fact be formally amended to address the new dynamic posed by terrorism and incorporate some of the arguments set forth in this Note.}

The United Nations appears to have contradicted itself when confronting the issue of combating international terrorism. The Security
Council has stated that "suppression of acts of international terrorism" is "essential for the maintenance of international peace and security" and has asked its member nations to "adopt...effective and practical measures for security cooperation, for the prevention of such acts of terrorism, and for the prosecution and punishment of their perpetrators." This language in itself would appear to justify actions such as the U.S. has taken in the past. Surprisingly, that has not been the case.

Article 51 recognizes a nation's inherent right to use self-defense "if an armed attack occurs against a Member." Additionally, Article 51 permits unilateral action by a victimized nation. The United Nations is rightfully wary of potential abuses of the rights inherent under Article 51 and has established four standards to prevent nations from abusing those rights. These standards, however, are overly inhibitive and appear not to have anticipated the current threat posed by terrorism. The narrowness of these standards actually may have the effect of enabling terrorists to hide behind a wall of unreasonably binding international laws.

First, Article 51 only allows actions taken in self-defense. The strikes in Afghanistan and Sudan were viewed by many as retaliatory acts. Armed reprisals by victimized states are not looked upon favorably by the United Nations. Some would argue that they are "more punitive than protective" and that, in the case of the African embassy bombings, the threat subsided once the smoke settled and the United States response was therefore unwarranted.

Under this view, in order for a nation to defend itself, it would have to be under attack at the moment it was exercising its right of self-defense. Reactions to attacks committed in the past would not be permitted, no

151 Id.
153 See Crossette, supra note 89 (enumerating Kofi Annan's diplomatically veiled yet plainly condemnatory criticism of the United States' unilateral action).
154 U.N. CHARTER art. 2(3), reprinted in BASIC DOCUMENTS, supra note 117, at 4. This Article states: "All members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered." The text of this article makes it clear that it was written with the expectation that conflicts would arise only between legitimate states, not between one U.N. member state and a rogue terrorist organization. Additionally, it makes the assumption that tactful negotiations can occur between two conflicted parties. Osama bin Laden has not shown any indication that he is willing to arbitrate any resolution with the United States, and even in the unlikely event that he did, the enormity of his crimes would negate any bargaining power he may have.
155 See, e.g., Scheideman, supra note 102, at 273.
matter how recently they occurred. Considering that terrorist attacks, despite potentially lengthy planning, last but for a few moments, adhering to this standard is nearly impossible. Additionally, terrorism occurs in a wide variety of locales. In order to adequately meet the U.N. standard of self-defense, forces would have to be assembled in close proximity to a terrorist headquarters in one location, patiently waiting for a terrorist act to occur somewhere else before getting the green light to exercise the self-defense right. Such stringent requirements are unfeasible and dangerously prohibitive, and have the effect of giving terrorists a 'head start' in conducting their activities.

Second, the self-defense doctrine is limited to "substantial military attacks," while "isolated armed incidents" do not meet the threshold required for action.\textsuperscript{156} This too is an overly restrictive interpretation. Terrorism, by its sheer nature, depends on such "isolated" incidents to achieve its goals. The fragmented nature of most terrorist organizations makes it virtually impossible for the organizations to conduct anything other than small-scale acts. When viewed individually, many of the incidents to which Bin laden is linked do appear to be isolated armed incidents. When viewed cumulatively, however, as a broader view of the self-defense doctrine should allow, the danger of the overall threat posed by terrorism becomes increasingly more apparent.

The third inhibiting standard of Article 51 relates to the complicity of a nation hosting terrorist organizations. This standard allows for an attacked state to strike at terrorist camps located in another state only if the terrorists were state agents or sponsored in some other way by the host state government. Although there is no evidence that Afghanistan has such control over bin Laden or directly sponsors him in any other way, its complicit attitude has certainly enabled him to continue with his agenda. This essentially amounts to Afghanistan mocking the security of the world community while bin Laden enjoys the relative security this standard grants him.

Finally, the Charter requires that acts of self-defense be committed only when threats are widespread and imminent,\textsuperscript{157} which would preclude acts of anticipatory self-defense without further proof of imminence. As stated earlier, this standard would unreasonably confine nations to narrow and unpredictable windows of opportunity that could seldom be exploited.

\textsuperscript{156} Nicaragua v. United States, 1986 I.C.J. 1, 93-99. In this case, the International Court of Justice asserted a restrictive view of self-defense. The Court acknowledged that Nicaragua had supplied arms and training to El Salvadoran rebels over the course of several years but the justices determined that this activity did not rise to the level of "aggression" and "assistance to rebels in the form of the provision of weapons or logistical or other support" and thus were not actions that would trigger the self-defense right.

A former State Department legal advisor has argued against such a restrictive theory, stating that “self-defense allows a proportionate response to every use of force, not just armed attacks.”\textsuperscript{158} It has been suggested that the drafters of Article 51 may have only contemplated large scale, massive attacks when they developed the requirement of ‘armed attack.’\textsuperscript{159}

Although the United States received support from many of its allies after the bombings in Afghanistan and Sudan, the significant number of critics puts the United States on the defensive when justifying its actions. As a signatory to the U.N. Charter, the United States has bound itself to the U.N.’s laws. Yet the U.S. interpretation of the U.N. Charter, specifically Article 51, varies from that of other member states. The U.S. interpretation of Article 51 allows for three types of self-defense: (1) self-defense against an actual use of force or hostile act; (2) preemptive self-defense against an imminent use of force; and (3) self-defense against a continuing threat.\textsuperscript{160} Osama bin Laden and his henchmen have certainly committed hostile acts against the United States. His continued at-large status combined with his declaration to commit further acts of violence are a continuing threat that the United States can justifiably defend against. U.N. member states opposed to this broader interpretation should be mindful that actions by bin Laden could occur within their territory, embroiling them in this ugly battle against terrorism.

Continuing to look at strikes against terrorist targets simply as retaliatory actions or unjustly preemptive is to turn a blind eye to the new mode of terrorism. Such a philosophy is a hindrance to the effort of saving innocent lives that may otherwise fall victim to terrorism. In an address following the African embassy bombings, U.S. Secretary of Defense William Cohen stated that “[w]e have a choice: fight or fold in pathetic cowardice....”\textsuperscript{161} One week after that statement, the United States made it clear that it would choose the former of the two options. This choice is not only morally sound, but legally supportable under what should be a universally recognized interpretation of the Caroline Doctrine and Article 51 that takes into consideration the changing dynamics of the world today.

\textsuperscript{158} See Sofaer, supra note 133, at 93-94.


C. The "Active Defense" and "Accumulation of Events" Constructions of Article 51

Former Secretary of State George Schultz has provided a logical and sound expanded construction of Article 51 in what is described as an "active defense." Arguing that the "passive defense" permitted in Article 51 is an insufficient deterrent to terrorism, Schultz stated that:

...our responses should go beyond passive defense to consider means of active prevention, preemption, and retaliation. Our goal must be to prevent and deter future terrorist attacks, and...one of the best deterents to terrorism is the certainty that swift and sure measures will be taken against those who engage in it...Our aim is not to seek revenge but to put an end to violent attacks against innocent people...Clearly the democracies have a moral right, indeed a duty, to defend themselves.163

Another view that should be considered in allowing for a broader interpretation of Article 51 is the "accumulation of events" theory adopted by Israel. This theory was first proposed in 1985 after Israel bombed a Palestinian Liberation Organization camp in Tunisia.164 Israel's argument was that repeated and unpredictable terrorist attacks were sufficient to establish a self-defense claim under Article 51. The United Nations Security Council rejected this theory and condemned the attack, claiming that it appeared to be more of a reprisal against the murder of several Israeli citizens in Syria one week prior and that Israel did not provide any evidence that the PLO was responsible for those killings.165 The United States abstained from the Security Council vote, but the U.S. Ambassador to the United Nations issued a statement of support for Israel in the debates prior to the vote.166 The situation the United States faces with bin Laden can be distinguished from the Israeli bombing in Tunisia in that the United States has provided a plethora of evidence linking bin Laden to many terrorist attacks against it. Whether or not there is a retaliatory intent, the thorough

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165 See id. at 67-68.
166 See id. at 49-50. Ambassador Vernon Walter stated that the U.S. "strongly supports the principle that a State subjected to continuing terrorist attacks may respond with appropriate use of force to defend itself against further attacks."
evidence provides a sufficient foundation for responding to such an accumulation of events.

Anti-western and anti-Semitic sentiments have made the United States and Israel prime targets for terrorist acts. Both nations have traditionally responded quickly and forcefully to such acts, despite criticism from other nations, most of who have enjoyed the luxury of not being constant victims of terrorist attacks. As more countries find themselves caught up (directly or indirectly) in the hateful sentiments of terrorists, it is likely that the aggressive military responses will be looked to as the accepted norm rather than a scorned deviation from international principles of justice.

Article 2(4) of the U.N. Charter emphasizes that using force as a self-defense measure should only apply to situations where a State’s “territorial integrity or political independence” is threatened. This ignores the obligation a country has to protect its overseas embassies, military facilities and vessels, and citizens abroad. An attack on such targets should be treated just as if it were committed within a nation’s boundaries and should be responded to with equal vigor. The right to protect these targets should also include an allowance for limited military action in the territory of another nation.

V. JUSTIFYING TERRITORIAL INTRUSIONS

The preceding sections have laid the foundation for the following controversial claim advanced in this Note: in order to conduct the war against terrorism, limited violations of another nation’s sovereignty should be allowed. The conflict becomes apparent when one considers that terrorism in its many forms is doubtless a violation of the rule of law, but that one of the most feasible ways to combat it, namely, violating another state’s sovereignty, is also a violation of the rule of law. It then becomes a matter of fighting fire with fire. Just as any Forestry Service employee can attest, a controlled burning is sometimes the best way to prevent accidental forest fires. In this instance, limited violations of sovereignty will be the ‘controlled burning’ that will prevent the spread of terrorism.

Assuming that the concepts of self-defense proposed above are generally accepted, there is still a concern that carrying out the act of self-defense against a non-state sponsored terrorist organization must ultimately occur within the territory of another nation, a prima facie violation of principles of sovereignty. This section will argue that pre-emptive self-

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167 See U.N. CHARTER art. 2(3), reprinted in BASIC DOCUMENTS, supra note 117, at 4. See infra Section VI.

168 See, e.g., God, Man, and the Fires, ECONOMIST, Aug. 12, 2000, at 24-25. Of course, based on the ‘controlled burnings’ initiated by the Forestry Service in the southwest United States in the fall of 2000 which got out of hand, resulting in millions of dollars of property damage, this may not be the best analogy. For the sake of the argument presented here, however, it adequately illustrates the point, notwithstanding the Forestry Service’s blunder.
defense is a legitimate reason for entering another nation's territory and that sovereignty of a third party country should not be an effective shield for a terrorist to hide behind when confronted with the possibility of military action; or as Abraham Sofaer put it, “territorial integrity is not entitled to absolute deference in international law.”

Regardless of the support or control exercised over a terrorist organization, “countries that persistently host terrorists have no right to be safe havens.”

A. The Necessity of Preemptive Self-Defense

With the threat to world stability shifting from large-scale assaults contemplated under a cold-war scenario to sporadic and unpredictable terrorist activity, the conception of appropriate methods of self-defense must be broadened to include pre-emptive self-defense. F.B.I. Director Louis Freeh has stated that bin Laden and his followers pose “about as serious and imminent a threat as I can imagine.” As discussed above, the current prevailing interpretation of the self-defense doctrine under Article 51 is dangerously restrictive in that it serves to prevent pre-emptive strikes against terrorists. It should be enough to assume that further strikes are imminent based on the clear language of bin Laden’s fatwa. Requiring victimized states to wait for an unfortunate reminder every so often will only result in further lives lost and is in fact an indication of irresponsible and cowardly leadership on behalf of the nations who condemn action such as the type the United States took in August 1998.

The fact that terrorist organizations are amassing weapons and other tools of destruction should be reason enough for striking against them, even before they specify a target. While there are obvious legitimate reasons for states to acquire weaponry, terrorist organizations have no such legitimacy. The simple attempt by terrorists to acquire weapons should be a prima facie indication of their hostile intent and should be responded to swiftly.

\[169\] See Sofaer, supra note 133, at 106.

\[170\] Presidential Address to the Nation on Military Action Against Terrorist Sites in Afghanistan and Sudan, 34 WEEKLY COMP. PRES. DOC. 1643, 1644, available at http://www.access.government/nara/nara003.html (Aug. 20, 1998) (Remarks by President Clinton) [hereinafter Address to the Nation].

\[171\] Senators Ask Legality of Assassinating Suspected Terrorists, DALLAS MORNING NEWS, Sept. 4, 1998, at 13A.

\[172\] The issue of which weapons constitute a significant threat can be hotly debated; witness the ongoing arguments in the United States regarding proposals to ban handguns or assault weapons. In regard to international terrorists, there is a broad range between weapons that are not a significant threat (at least in a grander scale) such as knives or small arms, and those that are clearly a major threat such as chemical and biological weapons. So, in determining whether a particular weapon system in the hands of a terrorist is of such a threat that immediate military action is necessary to suppress its use, perhaps it may be appropriate to resort to Justice Stewart’s fall back, “I'll know it when I see it.”
and violently. Allowing for a pre-emptive right of self-defense will send the message to terrorists that they have no safe havens and that they will be held culpable for the acts they have committed or are contemplating.

There is a possibility that, in some cases, pre-emptive strikes may be ineffective. The evidentiary requirements that would trigger a pre-emptive strike may not be as rigorous as would be required for a criminal conviction, but that should not be a complete bar to allowing such strikes. To require a level of evidence commensurate with that found in typical criminal cases would unrealistically burden the intelligence agencies that collect valuable information. While a typical criminal investigation occurs after a crime has been committed and the perpetrators have fled, leaving the crime scene a relatively benign location, the collection of information pinpointing terrorist activity is usually done covertly, with the lives of those gathering it constantly in peril. As such, evidence is gathered on a "best effort" basis and the credibility of such evidence usually needs to be taken at face value.

Some writers have argued that allowing lesser degrees of proof for the type of action proposed than that required for a criminal prosecution is foolhardy.\(^{173}\) Nonetheless, the United States did have "reasonable certainty and direct evidence"\(^{174}\) of bin Laden's involvement in the embassy bombings. The critics who argue that the missile strikes that followed were a "swift" response\(^{175}\) ignore the fact that bin Laden had secretly been indicted prior to the embassy bombings based on a thorough investigation of several years.\(^{176}\) President Clinton diplomatically addressed the unrealistic expectation suggested above that exacting standards of proof are necessary and that swift responses are imprudent:

[T]here have been and will be times when law enforcement and diplomatic tools are simply not enough, when our very national security is challenged, and when we must take extraordinary steps to protect the safety of our citizens. With compelling evidence that the bin Laden network of terrorist groups was planning to mount further attacks against Americans and other freedom-loving people, I decided America must act.\(^{177}\)

Sara Scheideman suggests two questions that policy makers should ask when considering a forcible response to terrorism. First, "[w]hat evidence is there that the suspects committed the act or acts of terrorism in issue?"\(^{178}\) The secret indictment combined with evidence gained through the

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\(^{173}\) See Lobel, supra note 152, at 551.

\(^{174}\) See id.

\(^{175}\) See id. at 552.

\(^{176}\) See, e.g., Indictment, U.S. v. Osama bin Laden, supra note 99.

\(^{177}\) Address to the Nation, supra note 170, at 1643.

\(^{178}\) See Scheideman, supra note 102, at 282.
cooperation of Kenyan and Nigerian law enforcement officials pointed the finger at bin Laden. Second, "[w]hat evidence is there that the national security will be put in jeopardy if force is not used?" Although bin Laden has not been linked to any terrorist acts committed within the United States, inaction in the face of attacks against U.S. overseas facilities and citizens erodes the credibility of the United States among its international counterparts. Concepts of national security should not be confined to the territorial boundaries of a nation but should instead encompass the idea of international security and credibility. For instance, if U.S. forces were driven from the Persian Gulf region because of the threat of terrorism, our allies there would be left with little protection from hostile neighbors and such a conflict could have serious global ramifications.

The bombings in Sudan and Afghanistan may at first glance have appeared to be retaliatory, but when giving consideration to the overall spectrum of events, it should be clear that they were in fact a part of the long-term battle against the unpredictable but imminent threat of terrorism.

B. Validating Intrusions on Sovereignty

Failing to allow a victimized nation to pursue terrorists operating within the territory of another country "would render a victim state powerless to preempt planned attacks before damage is sustained." Three assumptions are necessary to support the argument in favor of allowing intrusions into the territory of another nation. First, the host nation must not be an actual sponsor of the terrorist or organization but instead must be a complicit actor. International law provisions make it a crime for a state to tolerate terrorist activity conducted within its borders, even when not actively sponsoring it, so Afghanistan is not completely faultless in the current scenario. Nor are they without liability. The 1951

See id.


See Scheideman, supra note 102, at 251.

Active sponsorship by the host nation would make them culpable for acts committed by the terrorist organization and would essentially qualify as an act of war by that nation. The use of the term "host" should not be construed to mean that that country is actively supporting terrorism.

Draft Code of Offenses Against the Peace and Security of Mankind, drawn up by the International Law Commission, determined that the harboring or direct sponsoring of terrorism can be interpreted as an act of "indirect aggression."184 Second, the country that will conduct the limited incursion into the host country must have exhausted the possible legal solutions such as cooperation with extradition treaties or having the host nation try the terrorist under their laws. Essentially, no option other than the use of force must exist. Third, the victimized state must have sufficient evidence that the proposed target is a legitimate military target and that collateral damage to property and citizens of the host nation will be minimal or non-existent. Adhering to these principles would prevent "the potential for abuse of the right of self-defense and for the indiscriminate violation of state sovereignty."185

Alberto Coll presents a potential paradox between the issues of security and sovereignty: "A world in which terrorists refrain from threatening innocent human beings with destruction...is as important an objective of international law and as conducive to genuine international legal order as one in which states scrupulously respect each other's formal sovereignty."186 Although acts such as military strikes against terrorist camps, kidnapping terrorist leaders,187 or assassinating terrorist leaders may be illegal under current international laws, moral justification could make them tolerable and allow for an emergence into customary international law.188

There are other principles of international law that deserve protection as much as the principle of sovereignty of an independent nation. When faced with the threat of continuing acts of terrorism against their overseas

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186 Coll, supra note 142, at 306.

187 The U.S. Supreme Court has actually legalized the practice of extra-territorial abduction. See Michael G. McKinnon, United States v. Alvarez-Machain: Kidnapping in the War on Drugs – A Matter of Executive Discretion or Lawlessness?, 20 PEPP. L. REV. 1503 (1993), for an analysis of the 1990 kidnapping of Dr. Humberto Alvarez-Machain by U.S. DEA agents. While the possibility of abducting bin Laden should not be completely dismissed, the success of such an operation must be weighed against the possible results of a failed mission (e.g., Desert One; the failed attempt at rescuing the U.S. hostages in Iran in 1980).

188 See Coll, supra note 142.
facilities and citizens abroad, potential victim nations must consider their responsibilities to those who would be harmed by such acts of terrorism. Nations such as the United States, Israel, or the United Kingdom, which have more sophisticated means to combat terrorism, may in fact owe a duty to the international community, not just their own citizens, in combating terrorism. Failing to allow limited violations of sovereignty would serve "as a means of undercutting the capacity of free nations to act against [terrorists]."\(^{189}\) For the sake of international security, the current barriers that prevent violations of sovereignty must be taken down.

The issue of limited rights of sovereignty has most recently been tested in the realm of human rights violations in the Kosovo conflict of 1999. In that situation, it was asserted that "a government that engages in substantial violations of human rights betrays the very purpose for which it exists and so forfeits not only its domestic legitimacy, but its international legitimacy as well."\(^{190}\) Along the same line then, nations who disregard the laws of other nations while turning a blind eye to terrorists operating within their boundaries should not be able to claim immunity under the privilege of the law of nations.

At first glance, it might appear that the United States is imposing its will over a weaker country if it conducted a war against bin Laden's forces in Afghanistan. There are, however, several important considerations this argument ignores. First, the United States is a signatory to many antiterrorist treaties that oblige signatories to extradite terrorists or prosecute them under their own laws.\(^ {191}\) Second, absent extradition, the United States could try persons who commit acts of international terror abroad within the U.S. court system based on the fact that terrorism can be considered a universal crime, punishable under the laws of any state that apprehends a terrorist.\(^ {192}\) Afghanistan's only attempt at cooperation with the United States has been a shallow statement that it would consult with its

\(^{189}\) See Sofaer, supra note 133, at 89.

\(^{190}\) Merriam, supra note 123, at 116 (citing FERNANDO R. TESON, HUMANITARIAN INTERVENTION: AN INQUIRY INTO THE LAW AND MORALITY 15-16 (2nd ed., 1997)).


\(^{192}\) See generally Blum & Steinhardt, supra note 36.
ulema as to whether bin Laden has violated any Islamic law. The United States should not expect any productive results to come from this “review.” Afghanistan’s inaction thus leaves no other option but to use force to go after bin Laden within Afghanistan’s territory.

VI. CONCLUSIONS

A. Universal Justice or American Bullying?

Abraham Sofaer has argued that violations of territorial integrity, even when conducted with the intent of preventing further terrorist acts, are “synonymous with imperialism.” This argument may be especially strong when considering that the countries most able to carry out such violations of sovereignty are limited to a handful having the most high-tech weaponry at their disposal. The nations whose sovereignty is often violated, on the other hand, are often those who are least able to defend themselves against such an act. Imagine a reversal of the present situation, in which Afghanistan launched cruise missiles against a site in the United States suspected of harboring terrorists who had perpetrated acts against Afghani citizens abroad. Fortunately, Afghanistan lacks the military capability to carry out such an act, but if an attempt were made, the United States would surely respond against Afghanistan with military action, regardless of the justification for Afghanistan’s actions.

Afghanistan is not the only country that is at odds with the United States, however. Consider the following hypothetical, but possibly more realistic scenario, involving the U.S.’s closest hostile neighbor. Suppose the two Czech nationals who were recently detained in Cuba for allegedly stirring anti-Castro/Communist sentiments had escaped to Miami, but not before they were able to finance and inspire enough Cuban citizens to attempt an overthrow of Castro’s regime. Suppose further that Cuban forces had been able to quell this violence, but that several soldiers had been killed in the process. Cuba angrily demands the extradition of the two, but their demands are ignored by the United States. The U.S.’s only response to Cuba is that it will consider whether the Czechs actually violated any laws and, if so, will try them under U.S. law. Realizing that a solution in its favor is unlikely, Cuba sends a hit squad into Little Havana in Miami to kill the Czechs. The hit squad succeeds in accomplishing its mission, but in the process, one American citizen is killed and an American owned store is destroyed. Cuba acknowledges that the hit squad was acting under its authority. What result for Cuba?

193 See, e.g., Afghans May Hand Over bin Laden, supra note 81.
194 See Sofaer, supra note 133, at 106.
B. Guidelines for Allowing Intrusions into Another Nation’s Territory

Even if these new norms are accepted, a victimized nation that does intrude onto another nation’s sovereignty will be thoroughly scrutinized by the world community. In order to address the potential weaknesses in the arguments advanced throughout this Note and justifiably withstand the criticisms of the world community, the following four-part test should be applied by a nation contemplating taking its war against terrorism to the level suggested in this Note.196

First, the violation of another nation’s sovereignty should not be the automatic response to terrorist attacks. Instead, it should be a last-resort option, conducted only when direct diplomatic negotiations and arbitration efforts have been exhausted. As long as a possibility of bringing terrorists before an appropriate criminal tribunal exists, the use of force should be delayed. It is important to remember that the primary dispute in such a situation is between the victimized nation and the terrorist organization, not the ‘host’ nation. The host nation does, however, make itself a party to the conflict through its complicity or inability to adequately handle the situation, and therefore incurs some responsibility to attempt a peaceful and mutually acceptable outcome.

Second, there must be sufficient evidence that the terrorist group is linked to the act or acts the victimized nation is responding to. As a proper measure of self-defense, this includes acts that are being planned, not just acts that have already occurred. The standard of evidence for this test need not be in the realm of “beyond a reasonable doubt” as required in a criminal trial – this test is within the spectrum of war, not a criminal prosecution, and exact levels of proof may be difficult or impossible to obtain.

Third, the acts of terrorism must be of a “condemnable and shocking” nature to the world community. Bombing a foreign embassy or military facility, hijacking or blowing up a civilian passenger plane, or murdering a high-ranking government official are all acts that would meet this standard. On the other hand, if bin Laden’s only activity was recruiting young hooligans to throw rocks at U.S. embassies around the world, this element of the test would not be met.

Fourth, collateral damage must be minimal and the likelihood of engagement with the armed forces of the nation whose sovereignty is intruded upon must be avoided at all costs. Some critics of this proposal may have images of General Pershing’s 1916 drive into Mexico with 10,000 soldiers behind him in hot pursuit of Pancho Villa. That is not the type of action envisioned with this new norm. While the possibility of a small number of ground troops carrying out the war on terrorism should not

196 This test draws heavily on the assumptions asserted in Section VI(B), infra, under the sub-heading “Validating Intrusions on Sovereignty.”
be entirely dismissed, the more likely scenario would involve high-tech weaponry such as cruise missiles and other laser-guided munitions. If a situation arises where the mission cannot be accomplished without damage to non-terrorist related property, the government that initiated the attack must be willing to make reparations. This requirement further reinforces the point that the primary dispute in such a situation is not between the two nations.

A final point for consideration, but not necessarily a requirement for an internationally accepted norm, is a cost-benefit analysis of the planned mission. Even if the Taliban agrees to cooperate with the United States and turn bin Laden over, he may still elude any potential captors in the rugged hills of Afghanistan. As any Russian soldier who fought there in the 1980’s will confirm, conventional military operations in the Afghan terrain were difficult and casualty intensive. Additionally, it is possible that a successful attack on bin Laden and his headquarters could actually have the opposite effect of destabilizing his organization and instead make him a martyr whose death must be avenged. The bombing of Pan Am flight 103 is an example of how such action could escalate into greater tragedy.

C. Summary: Pax Regis

While the argument presented herein is for a universally accepted norm, it cannot be denied that it has decidedly American-centric overtones. This is no accident. No one can deny that, while many historical threats to world peace and stability have subsided in recent years, new threats have emerged to take their place. Chief among those new threats has been the

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197 See, e.g., RAMBO III (Artisan 1988). This is, admittedly, an overly dramatic example, but is illustrative of the success the guerrilla-style tactics the Afghans employed had over the technologically superior Russian forces.

198 See The Long Trail Twisting From Lockerbie, ECONOMIST, Feb. 3, 2001, at 45 (suggesting that the bombing of Pan Am flight 103 that left 270 people dead, was committed by Libyan agents in retaliation for the 1986 bombing of Muammar Qaddafi’s headquarters in Libya, which was a response to Libya’s alleged role in the bombing of a discotheque in Berlin that killed two American soldiers).

199 "The peace of the king; the peace, good order and security for life and property which it is one of the objects of government to maintain, and...is supposed to guaranty to all persons within the protection of the law." BLACK’S LAW DICTIONARY 1128 (6th ed. 1990) (emphasis added).

200 See, e.g., George Melloan, Assessing Security Threats Isn’t Just a War Game, WALL ST. J., Feb. 20, 2001, at A23 (quoting U.S. Secretary of Defense, Donald Rumsfeld, speaking to European diplomats in Munich, Germany: “Today we are safer from the threat of massive nuclear war...but we are more vulnerable now to the...raw and random violence of an outlaw regime....This so-called post-Cold War world is a more integrated world and, as a result, weapons and technologies...are proliferating and becoming pervasive...not just to nations but to non-state entities.”).
emergence of deadly and unpredictable bands of fanatical terrorists. The United States has largely become the default target of many of these rogue groups, yet it is one of a few nations who have the means to fight back effectively. While the current Bush Administration has adopted a quieter approach to dealing with bin Laden, there can be no doubt that he and others like him are still a threat that is in the forefront of the administration’s foreign policy concerns. The violence bin Laden has randomly inflicted reinforces the notion that the war against terrorism is one “that cannot be won by gentlemen’s tactics.” While the rest of the world may be slow to accept this radical new conception of how wars may be fought in the future, the United States cannot stand by as more terrorist acts against it are contemplated. Taking the lead in establishing this new norm will surely draw the scornful eye of other nations, but the United States should not allow that to discourage its efforts. Norms such as the one proposed in this Note “are almost entirely derived from the responses of key actors to a critical event.” Because of its unique position and capabilities, the United States can expect to be the key actor in leading the fight against terrorism.

Radical transformations from long-standing practices are bound to draw harsh criticism. This should not, however, thwart the efforts of the United States to set the standard for protecting not only its own citizens, but also those of the rest of the world. As the events in August 1998 in Africa demonstrate, the citizens of any nation can become the unwitting victims of international terrorism. The concept of pax regis obligates a government to provide security to its citizens. By engaging in an aggressive war to eradicate terrorism, the United States would be fulfilling that obligation not only to its own citizens but to those of the international community as well.

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201 See, e.g., Bin Laden Poses ‘Main Threat,’ FIN. TIMES, Feb. 8, 2001, at 6 (noting comments by CIA director George Tenet that “Terrorists are also becoming more operationally adept and technically sophisticated...”).


204 Merriam, supra note 123, at 125 (citing Andrew R. Willard, Incidents: An Essay in Method, in INTERNATIONAL INCIDENTS: THE LAW THAT COUNTS IN WORLD POLITICS 5 (W. Michael Reisman & Andrew R. Willard eds., 1988)).