STRATEGY RESEARCH PROJECT

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# TRANSNATIONAL CRIME: LEGAL AND POLICY IMPLICATIONS OF DIRECT U.S. MILITARY ACTION AGAINST NON-STATE ACTORS

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## ABSTRACT

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Transnational crime, to include terrorism, drug trafficking, alien smuggling, etc., constitutes one of the most serious threats to U.S. security interests at home and abroad. To a great extent, transnational crimes are committed by non-state actors. The U.S. response to the terrorist attacks on 11 September 2001 has included direct action by military forces against the non-state actors believed to be responsible for the attacks. The President has stated that once we have dealt with those directly responsible for the 11 September attacks, our "war" on terrorism will continue against other terrorist organizations with a global reach.

This paper will examine the legal aspects of U.S. military action conducted outside the U.S. against non-state actors involved in transnational crime. It will analyze the international law framework to determine the authority for, and limitations of, U.S. military action in this context and then assess the implications for U.S. national security strategy.

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# TRANSNATIONAL CRIME: LEGAL AND POLICY IMPLICATIONS OF DIRECT U.S. MILITARY ACTION AGAINST NON-STATE ACTORS

Transnational crime, to include terrorism, drug trafficking, money laundering, alien smuggling, etc., constitutes one of the most serious threats to U.S. security interests at home and abroad.[1] Threats from transnational crime can be grouped into three broad categories: threats to U.S. citizens and their communities, threats to U.S. businesses and financial institutions, and threats to global security and stability.[2]

The tragic events of September 11, 2001 offer the most frightening and illustrative examples of direct threats to U.S. citizens and their communities. However, these were certainly not isolated incidents. Terrorist attacks against Americans at home and abroad are on the rise, increasing from 111 in 1998 to 169 in 1999.[3] Perhaps an even greater threat to U.S. citizens and their communities comes from illegal international drug trafficking. In 1999, there were approximately 3.3 million hard-core cocaine users in the U.S. and nearly 1 million hard-core heroin users. In 1998, over 66% of all adult males arrested tested positive for at least one illegal drug. Among the most dangerous drugs, the use of cocaine in the U.S. has decreased slightly from its high point in the late 1980s, but consumption of heroin, methamphetamines and ecstasy has increased dramatically in the last 5-10 years.[4] Other direct threats from international crime include kidnapping, smuggling of firearms and other contraband, and fraud.

The threats to U.S. businesses and financial institutions also come from many fronts. According to a 1998 report by the U.S. National Institute for Drug Abuse, drug use cost U.S. businesses approximately $77 billion a year in decreased productivity and lost earnings.[5] Incidents of international piracy have more than doubled since 1994, resulting in direct financial losses of nearly $450 million per year, an amount that seems relatively insignificant when compared to losses from foreign economic espionage against U.S. businesses (estimated to be $300 billion in 2000), and financial fraud against U.S. businesses (estimated at over $200 billion per year).[6]

Transnational criminal organizations pose a threat to global security and stability by engaging in activities such as the transfer of sensitive U.S. technology, weapons of mass destruction, conventional weapons, and other dangerous contraband to state and non-state actors with interests inimical to those of the U.S. Especially in states encountering economic difficulties or political transformations, the tremendous wealth and power of certain organizations has allowed them to corrupt and/or intimidate elected officials, judges, military and

law enforcement officers, and businessmen, thus undermining stability, economic development, and the rule of law.[7]

## CURRENT POLICY

The current National Security Strategy (NSS) states that international law enforcement is one of the preferred tools to use in the fight against transnational crime.[8] However, the NSS makes it clear that international law enforcement efforts alone will not be sufficient to overcome the threat. To do so, it will take a coordinated effort utilizing diplomatic, economic, and possibly even military means of power.[9]

The International Crime Control Strategy (ICCS), issued in May 1998, prescribes the role of international law enforcement in the national security arena. It is an action plan that establishes "the framework for integrating all facets of the federal response to international crime."[10] The ICCS sets forth 8 overarching goals:

- ◊ extend the first line of defense beyond U.S. Borders,
- ◊ protect U.S. borders by attacking smuggling and smuggling-related crimes,
- ◊ deny safe haven to international criminals,
- ◊ counter international financial crime,
- ◊ prevent criminal exploitation of international trade,
- ◊ respond to emerging international crime threats,
- ◊ foster international cooperation and the rule of law, and
- ◊ optimize the full range of U.S. efforts.[11]

Each of the eight major goals has three to five associated implementing objectives. The common theme among the major goals and implementing objectives with respect to international law enforcement is the need for increased cooperation among the various law enforcement agencies, between law enforcement agencies and intelligence organizations, and between U.S. and international law enforcement agencies. The ICCS, like the NSS, also recognizes the need for an interagency approach to the problem. For example, to facilitate international law enforcement efforts, diplomatic support will be needed to negotiate more favorable international agreements in areas such as extradition, access to financial records and assets, and anti-money laundering standards. Congressional support will also be needed to implement new laws that impose stiffer penalties for international crimes, expand extraterritorial jurisdiction, and strengthen immigration laws.[12]

Major federal agencies with international law enforcement functions supplement the ICCS with their own strategic plans that further define their efforts in combating the threats from transnational crime. For example, the Department of Justice (DOJ) has a very comprehensive plan that sets forth specific international law enforcement objectives, and strategies for achieving them, for its subordinate agencies such as the Federal Bureau of Investigation, Immigration and Naturalization Service, Drug Enforcement Agency, U.S. Marshals Service, etc. DOJ's plan is entirely consistent with the ICCS in its emphasis on interagency and international cooperation.[13]

With respect specifically to terrorism, the NSS reiterates a preference to combat the threat with law enforcement, diplomatic, and economic tools.[14] However, the NSS also clearly recognizes that the need for military force may arise, stating that "As long as terrorists continue to target American citizens, we reserve the right to act in self-defense by striking at their bases and those who sponsor, assist, or actively support them, as we have done over the years in different countries."[15] Examples of how the U.S. has exercised this right of self-defense in response to previous terrorist-related activities include the 1998 missile attacks against pharmaceutical plants in the Sudan suspected of manufacturing chemical/biological weapons materials and against the suspected headquarters of Osama bin Laden in Afghanistan in 2001.[16]

There are three Presidential Decision Directives (PDD) that further define U.S. national policy on counterterrorism. The document most relevant to this paper is PDD-39, U.S. Policy on Counterterrorism, which was issued in 1995 and is a mostly classified document. It stresses the threat to national security posed by terrorism and the need to deter and defeat the threat from wherever it emanates. Presidential Decision Directive 39 is mirrored by the current NSS in its framing of terrorism as primarily a criminal act for which the apprehension and prosecution are the preferred remedies. However, the language "arrest or defeat the perpetrators, respond with all appropriate instruments against the sponsoring organizations and governments...as permitted by law," clearly provides for the possibility of a military response in certain circumstances.[17] Presidential Decision Directive 62, Combating Terrorism, established the Office of the National Coordinator for Security, Infrastructure Protection, and Counter-Terrorism to integrate the efforts of the many federal agencies involved in fighting the terrorist threat.[18] Presidential Decision Directive 63, Critical Infrastructure Protection, established a new structure for reducing the vulnerability of critical U.S. cyber and physical infrastructure assets and for responding to attacks against these assets.[19]

## U.S. RESPONSE TO 9/11 ATTACKS

The 11 September 2001 terrorists attacks against the World Trade Towers and the Pentagon, and the thwarted attack which resulted in the crash of an airliner in Pennsylvania, brought the issue of whether terrorism is a criminal act to be handled by law enforcement or an act of war warranting a military response, to a head. The initial reaction was to treat the incidents as criminal activities. On the evening of 11 September, Attorney General John Ashcroft, leading a press briefing from the White House, announced that crime scenes had been established at relevant locations and that the full resources of the Department of Justice would be "...deployed to investigate these crimes (emphasis added)" and "to bring the people responsible for these acts, these crimes (emphasis added) to justice."[20] The Secretaries of Transportation and Health and Human Services and the Director of the Federal Emergency Management Agency also participated in the briefing. The Secretary of Defense did not participate.

On 12 September 2001, President George W. Bush gave the first indication that the U.S. would treat the previous day's attacks as more than just crimes. After meeting with his national security team and reviewing available intelligence, he announced that "The deliberate and deadly attacks which were carried out yesterday against our country were more than acts of terror. They were acts of war (emphasis added)."[21] Throughout his address, President Bush referred to the perpetrators as the "enemy," not as "criminals," and indicated that America would use all of its resources to defeat this enemy.[22]

On 14 September, President Bush formally declared a National Emergency based on the terrorist attacks.[23] On 18 September, Congress passed a Joint Resolution authorizing the President to use military force against those "nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorists attacks September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States (emphasis added) by such nations, organizations or persons." [24] Language in the preamble to the resolution referred to the necessity for "the United States to exercise its rights to self-defense (emphasis added) and to protect United States citizens both at home and abroad."[25] As will be explained in more detail below, the language highlighted above appears to have been carefully crafted to establish legitimacy for a military response under international law.

On 20 September 2001, after reiterating that the terrorist acts of 11 September were acts of war, President Bush elaborated on the scope and nature of the war to come. He stated that the war on terror would begin with the al Qaeda, but would not end until "every terrorist group of global reach has been found, stopped and defeated."[26] President Bush further defined the enemy as any nation that provided aid or safe haven to terrorists. He noted that the war would be fought using all elements of national power and all resources available. Finally, President Bush issued specific, non-negotiable demands which Afghanistan's ruling regime, the Taliban, had to meet in order to avoid being classified as our enemy: turn over all al Qaeda leaders in Afghanistan, immediately close all terrorist training camps in Afghanistan and grant the U.S. access to ensure they are closed, release all unjustly imprisoned foreign nationals, and protect foreign journalists, diplomats and aid workers in Afghanistan.[27]

It is doubtful that the U.S. expected the Taliban to comply with these demands, some of which appear to be at most tangentially related to the terrorist incidents at issue. In fact, it is questionable whether the Taliban could have complied even if they had wanted to. However, the warning served as another important step in legitimizing any military response that the U.S. might undertake.

Finally, on 7 October 2001, the U.S. began combat actions against al Qaeda and Taliban forces in Afghanistan. In a letter informing Congress of the action, President Bush justified the military action as "necessary in the exercise of our right to self-defense and to protect U.S. citizens and interests," virtually the exact same language used in Congress's Joint Resolution authorizing the use of military force.[28] What is the significance of this "right to self-defense" language? Simply stated, legitimacy under international law. This is brought to light in a letter from the U.S. Permanent Representative to the United Nations to the United Nations Security Council announcing that the U.S., along with other nations, in accordance with Article 51 of the UN Charter, had initiated actions in the exercise of its inherent right to self-defense in response to the armed attacks of 11 September 2001.[29]

## LEGAL FRAMEWORK

Was the United States really justified in invoking its inherent right to self-defense as reflected in Article 51 of the UN Charter based on the circumstances of 11 September 2001? If so, does this right apply equally to U.S. actions against traditional state actors such as the Taliban and to non-state actors such as al Qaeda? Is the U.S. led war on terrorism an international armed conflict, an armed conflict not of an international character, or something else; and what are the ramifications of this distinction on the applicability of the law of war to this

conflict? These and other relevant questions will be addressed by providing the legal framework for the law of war and applying it to the current situation.

There are two main prongs to the law of war. The first prong, referred to as Jus ad Bellum, addresses the circumstances under which a nation may legally and morally resort to the use of military force to resolve its disputes. The second prong, Jus in Bello, deals with the legal and moral restraints with respect to the conduct of warfare.

## JUS AD BELLUM CONSIDERATIONS

The concept of Jus ad Bellum dates back to the ancient Greeks in the years before Christ. We will fast forward, however, to the Kellogg-Briand Pact of 1928, officially referred to as the Treaty for the Renunciation of War, which was the first international treaty to categorically ban aggressive war. This treaty remains in force today and its provisions banning aggressive war are almost universally accepted as customary international law. These provisions serve as a model for the current conventional international law of war norms for the use of force set forth in the United Nations Charter.

The primary provision restricting the use of force among states is Article 2(4) of the UN Charter. This article requires all nations to "refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."[30]

Article 33 reinforces this concept by requiring nations to attempt to settle their disputes by peaceful means.[31] The UN Security Council is charged with primary responsibility for the maintenance of international peace and security.[32] Per Article 39, the Security council decides whether a breach of peace, a threat to the breach of peace, or an act of aggression has occurred and either recommends or mandates what measures shall be taken under Articles 41 (measures short of armed force) and/or 42 (use of armed force) to maintain or restore international peace and security.[33]

The only legal basis for the use of force without prior sanctioning from the United Nations is when a nation is acting in self-defense. Article 51 of the UN Charter provides that:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security

Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.[34]

While Article 51 specifically permits self-defense only in the event of an armed attack, most nations, including the Unites States, take a more expansive view of the right to self-defense. The right to use force in response to the threat of attack is commonly referred to as anticipatory self-defense. Justification for this expanded interpretation of the right to self-defense can be gleaned from the language in Article 2(4) of the UN Charter noted above which bans both the actual use of force and the threat of the use of force. Additionally, nations supporting this view would argue that the right to self-defense espoused in Article 51 supplements, not overrides, the inherent right to self-defense that already exists under customary international law.[35]

The United Nations Security Council has issued several resolutions in response to the terrorist attacks of 11 September 2001. On 12 September, the Security Council issued Resolution 1368 unequivocally condemning the attacks and characterizing them as a threat to international peace and security; recognizing the inherent right of individual or collective self-defense; calling upon nations of the world to cooperate in bringing the perpetrators, organizers, and sponsors to justice and deterring future terrorist attacks; and expressing its readiness to take all necessary steps to respond to the attacks.[36]

Security Council Resolution 1373, issued on 28 September, imposes several affirmative duties upon nations to more effectively prevent and suppress terrorism and punish terrorists. More relevant to this discussion, however, Resolution 1373 reaffirms several concepts recognized in Resolution 1368: the inherent right to individual and collective self-defense, that acts such as those of 11 September are threats to international peace and security, and the need to combat threats to international peace and security caused by terrorist activities by all means.[37]

Security Council Resolution 1378, adopted on 14 November 2001, after U.S. and coalition forces began military action in Afghanistan, noted Security Council support for the on-going international efforts to root out terrorism and reaffirmed Resolution 1368 and 1373.[38] Finally, Security Council Resolution 1390, issued 17 January 2002, reiterated Security Council support for international actions against terrorism and reaffirmed Resolutions 1368, 1373, and 1378.[39]

None of the resolutions specifically state that the actions of the 9/11 terrorists in forcibly hijacking airliners loaded with fuel and using them as flying bombs constitute an "armed attack" within the context of Article 51. Nor do any of the resolutions specifically authorize the United

States and its coalition partners to use "all necessary means" – the phrase used by the Security Council in Resolutions 678 and 816 to authorize the use of armed force against Iraq and in Bosnia-Herzegovina, respectively. Some would argue that the Security Council can use any language it wants to authorize the use of military force and the phase "all necessary means" is not required. Thus, the language in Resolution 1373 reaffirming the need to combat threats to international peace and security caused by terrorist activities by all means could be construed as specific authorization for the use of force.[40] Others argue that in view of the overwhelming support against terrorism following the incidents of 11 September, the Unites States could have convinced the Security Council to include "all necessary means" language in a resolution but refrained from doing so because the inherent right to respond in self-defense may provide more operational flexibility.[41] It is unclear why the two pre-response Resolutions were ambiguous with respect to authorization for the use of force. Nevertheless, when these resolutions are viewed in conjunction with the post-response resolutions that specifically support the "international efforts to root out terrorism...," it seems clear that the use of force in Afghanistan by the United States and its coalition partners so far is justified under international law.

The issue becomes much more contentious and complex if/when the United States should choose to expand the global war on terrorism outside Afghanistan. In the case of Afghanistan, it is clear that the country's de facto governing body, the Taliban, was intimately tied to al Qaeda and was allowing the organization to continue to operate with impunity within its borders. The Taliban ignored the explicit warnings from the United States and the mandates from the United Nations Security Council for all nations to deny safe haven to terrorists, take steps to prevent the commission of terrorist attacks, and ensure that those who participate in the conduct, financing, planning, or support of terrorism are brought to justice.[42]

International support for a military response in Afghanistan has been overwhelming. As of early January 2002, one hundred thirty-six countries have offered various types of military assistance in support of the global war on terrorism in one way or another, with seventeen nations providing troops to the area of operations.[43] Eighty-nine nations had granted over-flight authority for U.S. military aircraft and seventy-six had provided landing rights.[44] This unprecedented support has been indispensable to the success of the operations thus far. For various reasons, many of these same nations, however, have already expressed reservations or disagreement with potential follow-on military actions in other countries such as Iraq. It is unlikely that the United Nations would continue to even ambiguously sanction U.S. military action in other countries in the absence of explicit information demonstrating a particular country's support for terrorist operations.

This leads to the question of how far the United States can legally proceed with military action in the war on terrorism under the umbrella of self-defense. The answer is that there is no clear answer. In 1985, Israel bombed the headquarters of the Palestine Liberation Organization in Tunisia. Israel claimed this action was justified because Tunisia was knowingly harboring terrorists who had attacked Israel. In pleading Israel's case to the United Nations, Benjamin Netanyahu argued the following:

> A country cannot claim the protection of sovereignty when it knowingly offers a piece of its territory for terrorist activity against other nations, and that is precisely what happened here. Tunisia knew very well what was going on in this extraterritorial base, the planning that took place there, the missions that were launched from it, and the purposes of those missions: repeated armed attacks against my country and against innocent civilians around the world. Tunisia, then, actually provided a base for murderous activity against another State and, in fact, the nationals of many States who are the objects and victims of this terrorist organization. The protection of sovereignty cannot be claimed by any Government when it makes available such facilities, especially against the State that must protect itself. [45]

The UN Security Council rejected this argument by a vote of 14-0 (with the U.S. abstaining) and condemned Israel's action as an act of armed aggression in flagrant violation of the UN Charter and international law. [46] Yet Mr. Netanyahu's argument sounds remarkably similar to the justification provided by the United States for our August 1998 cruise missile attacks against suspected terrorist training camps in Afghanistan and suspected chemical weapons plant in Sudan, as well as for our current military actions in Afghanistan and potential follow-on actions in other countries. There was some degree of consternation in the international community regarding the lawfulness of the 1998 cruise missile strikes, but no clear condemnation. As noted above, the current military action in Afghanistan has been overwhelmingly supported. Thus, while conventional international law in this arena, i.e., the UN Charter, has remained constant, the boundaries within which the right to exercise to anticipatory self-defense is justified under customary international law clearly appear to be expanding.

The rationale for this broadening of the right to self-defense against non-state actors is not clearly defined. One could reasonably argue, however, that it is based in large part on a combination of the following three concepts. First is the recognition within the world community of the growing threat posed by non-state actors. This recognition applies not only to threat from

terrorists, but from other transnational criminals as well. There is a growing convergence between transnational crime organizations and terrorist organizations. While their motivations may ultimately be financial rather than ideological or political, transnational criminal organizations are resorting more and more to terrorist type activities such as bombings, murder, and kidnapping to promote their criminal dealings. Likewise, terrorist organizations are becoming more and more involved in criminal activities such as drug and arms trafficking to resource their political/ideological agendas.[47] In fact, UN Security Council Resolution 1373 specifically noted with concern the growing connection between international terrorism and transnational organized crime and emphasized the need to strengthen the global response to this serious threat to international security.[48] The resolution did not explicitly authorize the use of armed force in this connection with the global response. However, the specific reference to the international threat posed by transnational criminal organizations in a resolution reaffirming a nation's right to self-defense lends credence to the argument that such right could in fact be exercised against transnational criminal organizations.

A second factor contributing to the acceptance of an expanded right to self-defense involves geopolitical considerations. Citizens from more than eighty nations lost their lives in the 11 September attacks. [49] The unifying nature of over eighty nations directly sharing in the consequences of such a tragedy cannot be overlooked. The number of nations that suffered economic losses from the attacks is unknown, but clearly it is high. It is reasonable to assume that the leaders of the nations that suffered losses would feel more pressure from their respective citizenry to undertake a more drastic response than they would if the casualties had all been U.S. citizens.

The third factor contributing to the acceptance of an expanded right to self-defense involves the ability and commitment to achieving proportionality and discrimination in an armed response. As legal principles, proportionality and discrimination are limiting factors on a nation's actions in exercising its right to self-defense. Proportionality requires that a nation's response be limited in intensity and magnitude to what is reasonable necessary to achieve the objectives of self-defense.[50] Discrimination requires that proper military targets be distinguished from protected persons, property, and places.[51] The ramifications of strictly adhering to these principles, however, extend beyond the issue of whether any particular engagement is in compliance with the law of war. The more a nation demonstrates its resolve to limiting the scope of its armed engagements to that which is reasonably necessary to achieve a rational objective and limiting the effects of its armed engagements to the intended targets, the more

likely the world community will be to support future actions by that nation which may arguably exceed the range of permissible activity under conventional international law.

## JUS IN BELLO CONSIDERATIONS

The analysis thus far has focused on the legal basis for the use of armed force. Assuming that we have a legitimate basis to use armed force, there are still many legal issues associated with the actual conduct of the hostilities. These issues become extremely complex when trying to apply law of war principles to actions involving non-state sponsored terrorists or transnational criminals. Operations such as these, which generally fall outside the scope of traditional armed conflict, are commonly referred to as military operations other than war (MOOTW). As such, traditional law of war principles do not apply.

The law of war consists of both customary international law, the body of unwritten rules that nations implicitly adopted over time through state practice, and conventional international law, the body of written rules that nations have expressly adopted, such as treaties, protocol, and conventions. Many principles embodied in conventional international law are also considered to be customary international law, meaning they are binding on all nations, not just the nations that have adopted the particular treaty.[52]

The primary treaties governing the lawful conduct of hostilities are the Hague Conventions of 1907, the four Geneva Conventions of 1949, and the 1977 Protocols to the 1949 Geneva Conventions. The Hague Conventions govern the "methods and means" of warfare, i.e., decisions regarding targeting, tactics, weapons, etc. The four Geneva Conventions protect different categories of potential victims of hostilities – civilians, prisoners of war, the wounded and sick, and those shipwrecked at sea.[53] The 1977 Geneva Protocols were intended to supplement the four Geneva Conventions. Protocol I supplements rules governing international armed conflicts, whereas Protocol II extends the protections of the Geneva Conventions to internal armed conflicts.[54] The United States has not yet ratified either of the Protocols. However, since approximately 150 nations have ratified them, many of the provisions in the Protocols are considered customary international law.

The laws of war regulating the conduct of hostilities apply almost exclusively to international armed conflicts, that is, conflicts between states. Among the Geneva Conventions, only the minimum protections of "Common Article 3" provisions apply to conflicts "not of an international character." Conflicts "not of an international character" are conflicts internal to a country between the forces of the country's government and rebel forces under responsible command, operating within a discrete area, and showing general respect for the

laws of war.[55] This could be a significant issue with respect to military actions against non-state sponsored terrorists and/or transnational criminals since the laws of war regulating the conduct of warfare may not apply to these situations. How is this problem addressed?

It is U.S. policy to "comply with the law of war in all armed conflicts, however such conflicts are characterized, and with the principles and spirit of the law of war during all other situations."[56] The U.S. handling of al-Qaeda and Taliban forces captured during operations in Afghanistan is illustrative of how this policy plays out. First, President Bush determined that even though the Taliban was never recognized as the legitimate government of Afghanistan, the Geneva Convention dealing with the treatment of prisoners of war applies to the Taliban because Afghanistan is a party to the convention. However, under the terms of the Convention, the Taliban detainees do not qualify for POW status because they do not meet two or the four conditions necessary for such status; namely, they did not wear uniforms or distinctive insignia visible at a distance and they did not conduct their military operations in accordance with the laws and customs or war.[57] President Bush further determined that the Geneva Convention did not apply to al-Qaeda since it is not a state party to the Convention. Thus, al-Qaeda detainees were not entitled to prisoner of war status either.

Even though neither Taliban nor al-Qaeda detainees were entitled to prisoner of war status as a matter of law, they were provided most prisoner of war privileges as a matter of policy.[58] As such, they were provided adequate food, water, shelter, clothing, medical care, personal hygiene facilities, the opportunity to worship, etc. Among the privileges the detainees did not receive, that they would have been entitled to as prisoner of war privileges, were the ability to access personal financial accounts, the ability to receive scientific equipment, and the ability to purchase food, soap, and tobacco products. Privileges were denied partly for security reasons and partly due to a lack of resources.[59]

Since the law of war generally applies only to international armed conflicts, what laws would apply to military operations against non-state actors? The answer is situationally dependent. In situations where the armed forces of one country enter another country by truly voluntary invitation, host nation law would normally apply. U.S. practice in such situations, if at all possible, is to enter into some type of status of forces agreement to protect the rights of our forces.[60] The most complex situation is where the armed forces of one country enter another country under a "coerced" invitation, e.g., a United Nations peacekeeping mission. In such a case, there is no clear answer as to what laws would apply. Possibilities would include international human rights law, specific treaties that may apply, host nation law, or even domestic law of the non-host nation.[61] Finally, there are situations such as we currently have in

Afghanistan, where the U.S.-led coalition forces are engaged in armed conflict against a non-state actor, al-Qaeda, and at least de facto state actors, the Taliban. Since there is armed conflict between two or more state actors, the law of war applies to the conflict as a whole. It would not, however, apply with respect to al-Qaeda.

Clearly, the law of war framework was not designed to address the use of armed force by a state against non-state actors. The main policy implication is that using military forces for such actions potentially deprives these forces of protections that they would normally be entitled to. One of the biggest concerns in any operation short of international armed conflict is that combatant immunity does not apply. This is normally not a problem when the operation is successful. There could be major consequences, however, if things go awry. While this should not preclude the conduct of such operations, it should certainly be a planning consideration.

## FUTURE OUTLOOK

The International Crime Threat Assessment (ICTA), which was prepared in 2000 by an interagency working group with representatives from the Central Intelligence Agency, Federal Bureau of Investigation, Drug Enforcement Agency, National Security Council, and the Departments of Justice, Treasury, and Transportation, among others, presents a grim outlook for 2010. The ICTA states that in 2010, "the international criminal threat to US interests is most likely to be more diversified and impact even more directly on US strategic interests."[62] The reason for this outlook is that the global political and economic conditions that have facilitated the rise of transnational criminal organizations, i.e., increased economic, fiscal, and informational interdependence among nations; rapid access to advances in technology; the existence of failed or failing states to serve as safehavens, etc., are likely to continue.[63]

Despite recent U.S. actions in the wake of the terrorist incidents of 11 September 2001, the ICTA's prediction seems reasonable. The significant additional resources being allocated to enhance law enforcement, intelligence, security, and other assets in the fight against terrorism should eventually help in the battle against other elements of transnational crime. For the next several years, however, the significantly increased focus on terrorism will likely divert assets and attention away from the other aspects of transnational crime and allow them to flourish even more in the coming years. The unprecedented level of interagency and international cooperation we are currently enjoying in the fight against terrorism, cooperation that is at the heart of U.S. policy against transnational crime in general, is simply not likely to carry over so easily to our efforts against other aspects of transnational crime.

It is unlikely that direct military action will play a significant role in U.S. policy to combat non-terrorist related transnational crime anytime in the near future. However, it is not out of the question. Three factors were previously proposed as rationale for the broadening of the right to self-defense against non-state actors: recognition within the world community of the growing threat posed by non-state actors, the unifying nature of sharing in the consequences of tragedy, and the ability and commitment to achieving proportionality and discrimination in an armed response. If non-military efforts to curb the growing threat from transnational crime are unsuccessful, these same three factors could sway the U.S. and other nations to consider a military response. While terrorist attacks such as those of 11 September are tragic and certainly spectacular, it is likely that the overall global costs of terrorism, in terms of lives and dollars, pale in comparison to the global costs of other transnational crimes such as drug trafficking. Limited, proportional, discriminate military responses may yet come to play an essential role in the form of self-defense, or anticipatory self-defense, against the devastating impacts of transnational crime.

Ultimately, U.S. policy must maintain a balance between ends, ways, and means. It is clear that transnational crime in general, and terrorism in particular, cannot be controlled though a unilateral approach. These are global phenomena that can only be successfully countered by building and maintaining a global coalition. When or if the time comes that direct military intervention is the most appropriate means to counter the threat from transnational crime, support from the global coalition will help ensure that armed force is employed in accordance with the rule of law.

## CONCLUSION

Current U.S. policy is basically sound. The only way to make progress in our efforts to counter the growth of transnational crime is through sustained interagency cooperation at home and international cooperation abroad. Thus, we should stay the course in this regard. However, we will likely need to become somewhat more flexible in our dealings with potential international partners in order to facilitate the requisite cooperation. For example, while we certainly have some legitimate concerns with the current wording of the treaty for the International Criminal Court, we may need to subordinate these concerns to the arguably greater good that could come from ratification of the treaty, both in the form of direct benefits to the international law enforcement effort and indirect benefits from other countries seeing the U.S. truly cooperate rather than dominate in this area.

We have seen that the current international law framework was not designed to address the use of military force against non-state actors. Efforts must be undertaken to address these shortcomings in the realm of conventional international law. In the meantime, customary international law is slowly, but constantly, undergoing change through the ongoing practices of nations. Maintaining coalition support for U.S. actions during this evolutionary process will ensure that the United States maintains its role as a world leader that maintains the highest regard for, and acts in accordance with, the rule of law.

WORD COUNT = 6,059

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