Coping with 9/11: Alternatives to the War Paradigm

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States and societies have faced the threat of terrorism for centuries, but only sometimes have they resorted to war to deal with it. Even among the armed conflicts that states declare "wars against terrorism," many are something quite different: wars against secessionist, anticolonial, or insurgent forces opposing a military occupation. The tactics employed by such forces may include terrorism, sometimes provoked by the military actions and war crimes of their state adversaries. But the tactics are part of a broader strategy that includes combat among armed fighters on each side. Such wars should be considered distinct from the random murder of innocent civilians that constitutes the most common definition of terrorism as a form of politically motivated violence.[1] If states have a choice to address terrorist threats without resorting to war, they are likely to be more successful, because they avoid the backlash that can breed further terrorism.

In the wake of the attacks of 11 September 2001, the administration of George W. Bush adopted what has become known as the war paradigm to respond to al Qaeda's use of commercial airlines to murder mainly civilians. The day after the attacks, President Bush declared them "more than acts of terror. They were acts of war."[2] Returning from the site of the destruction of the Twin Towers a few days later, Bush referred to the "wreckage of New York City, the signs of the first battle of the war.[3] At that point, however, there was no war in the sense of an armed conflict of sufficient intensity and duration to merit the designation according to international legal definitions.[4]   There were three attempts, of which two (against the World Trade Towers and the Pentagon) succeeded, with a death toll of some 3,000 people, including the first responders who perished in New York and the civilian passengers and crew who died in a field in Pennsylvania. Despite the high number of victims, these attacks did not meet the legal definition of an "international armed conflict," because only one of the parties, the United States, was a state. Nor did it fit the definition of an armed conflict of a "non-international character," the category reserved for non-state armed groups. The International Committee of the Red Cross, the organization charged with authoritative interpretation of the laws of war, defines that type of conflict as:

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[1] On definitions of terrorism, see Thomas Weigend, "The Universal Terrorist: The International Community Grappling with a Definition," *Journal of International Criminal Justice*, vol. 4 (November 2006); and Matthew Evangelista, *Law, Ethics, and the War on Terror* (Cambridge, UK: Polity, 2008), Ch. 2.

[2] White House Office of the Press Secretary, "Remarks by the President In Photo Opportunity with the National Security Team," 12 September 2001, http://www.whitehouse.gov/news/releases/2001/09/20010912-4.html.

[3] White House Office of the Press Secretary, "President Urges Readiness and Patience," 15 September 2001, http://www.whitehouse.gov/news/releases/2001/09/20010915-4.html.

[4] International Committee of the Red Cross (ICRC), "How is the Term 'Armed Conflict' Defined in International Humanitarian Law?" Opinion Paper, March 2008, p. 3.

> *Protracted armed confrontations* occurring between governmental armed forces and the forces of one or more armed groups, or between such groups arising on the territory of a State [party to the Geneva Conventions]. The armed confrontation must reach *a minimum level of intensity* and the parties involved in the conflict must show *a minimum of organization* and have the capacity to sustain military operations.[5]

As David Wippman has pointed out, even if they did not technically correspond to the legal definition of war:

> To many, the magnitude of the September 11 attacks on the World Trade Center and the Pentagon demonstrated that non-state terrorist groups now possess the ability and intent to wreak harm on a scale previously reserved to states with organized military forces. For the U.S. government, the appropriate response was to acknowledge the transformed nature of the threat and to shift from a criminal justice approach to terrorism to a war-fighting model.[6]

To others, however, the term "war" should remain only a metaphor, as in the "war on drugs," or "war on poverty." According to Wippman,

> In their view, acts of terrorism are ordinarily criminal acts calling for law enforcement responses. They argue that the Bush Administration's move to a war paradigm obscures important differences between armed conflicts covered by the laws of war (and terrorist acts committed in the course of those conflicts) and terrorist acts committed independently of an armed conflict. The global effort to combat transnational terrorism "should be governed by ordinary criminal law and human rights norms.[7]

The choice of paradigm is relevant not only to lawyers and legal scholars. The costs of confronting terrorism by military means–launching a Global War on Terror and particular wars in Afghanistan and Iraq–has been enormous, in human and material terms. If other methods are likely to be equally or more effective, and less damaging to innocents, they should be preferred.

Both the United States government and the al Qaeda terrorist network responsible for the 9/11 attacks preferred the war paradigm to the criminal justice or law-enforcement paradigm. In 1996, Osama Bin Laden, the al Qaeda leader, issued a "Declaration of War against the Americans Occupying the Land of the Two Holy Places."[8] As the US

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[5] Ibid. (original emphasis).

[6] David Wippman, "Introduction: Do New Wars Call for New Laws?" in David Wippman and Matthew Evangelista, Eds. *New Wars, New Laws? Applying the Laws of War in 21st Century Conflicts* (Ardsley, NY: Transnational Publishers, 2005), 3-4.

[7] Ibid.

[8] Osama bin Laden, Bin Laden's 1996 *Fatwa*, (August 1996), http://www.pbs.org/newshour/terrorism/international/fatwa_1996.html (originally published in Al Quds Al Arabi)

government's 9/11 Commission Report pointed out, "both President Clinton and President Bush chose not to seek a declaration of war on Bin Ladin after he had declared and begun to wage war on us, a declaration that they did not acknowledge publicly."[9] In international law, only states have the authority to declare war anyhow, and only against other states. Despite its lack of formal grounding in law or practice, the struggle between al Qaeda and the United States came to be characterized by both sides as a war within days of the 9/11 attacks. Legally, however, the real war (protracted and intense armed confrontations between organized military forces) commenced only on 7 October 2001, when US forces attacked Afghanistan, whose Taliban government had provided safe haven for al Qaeda. Seventeen months later, the United States invaded Iraq, justifying its action as part of the Global War on Terror.

If the United States had not launched the wars against Afghanistan and Iraq, might it still have been possible to cope with the threat of terrorism, perhaps even better than by adopting the war paradigm? Is a "paradigm shift" still possible, if the US reduces its emphasis on war in favor of non-military means to cope with terrorism? Some insight into these questions comes from (1) examining the experience of other countries that have faced terrorist threats; (2) reviewing the path which led the Bush administration to adopt the war paradigm and its successor to continue it; and (3) the structure of international rules and institutions that could contribute to successful non-military efforts to confront the threat of terrorism.

Comparative Perspectives

Although some countries have adopted the military approach to terrorist challenges, usually in the context of ongoing wars of secession or national liberation, others have dealt effectively with terrorism over the years without resort to war.

Among the countries that have sought military solutions to terrorism was France when it faced anticolonial opposition in Algeria from 1954 until 1962, the year Algeria achieved its independence. French forces destroyed Algerian villages with napalm bombs and tortured women and men suspected of membership in urban terrorist networks. Ironically, the post-independence Algerian government adopted similar tactics in the early 1990s when it confronted an armed Islamist movement that resorted to terrorist methods. Russia fought a devastating and unsuccessful war against the secessionist republic of Chechnya starting in 1994. It withdrew its forces in defeat in1996, but resumed the war in 1999 in the wake of terrorist bombings of apartment buildings in several Russian cities that killed hundreds of civilians. Continued terrorist violence, including suicide bombings (something previously unknown in Chechnya's centuries-old secessionist struggle) reinforced Russia's characterization of the war as an "anti-terrorist operation." In fact, as in the Algerian war of independence, much of the terrorist violence constituted a response to rather than a cause of the state's military violence, including indiscriminate killing of civilians. A more successful use of the war paradigm, but perhaps closer to the war metaphor, came in the less-known case of Canada in October 1970. A spate of bombings, kidnappings, and murder by the Front de Liberation

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[9] *9/11 Commission Report* (New York: W.W. Norton, n.d. [2004]), 102.

du Québec led Prime Minister Pierre Elliot Trudeau to invoke the War Measures Act, bring tanks into the streets of Montréal, and arrest nearly 500 suspected terrorists and sympathizers. Although much criticized by peaceful proponents of Québec's independence from Canada, the action put an end to the violent secession movement. Henceforth Québec's status would be decided by peaceful means: negotiations and popular referenda.[10]

Other countries have dealt with terrorism without resorting to military means or the war paradigm. Consider these statistics: In the first six months of a certain year, there were 1400 episodes of political violence, including 925 bombings and shootings. Some 22 terrorist "groups organized on a permanent basis" were responsible for half of the incidents, but there were more than a hundred groups whose names were known to the authorities during that same period. About a thousand militants had gone underground and were involved in what were called "urban guerrilla activities." An estimated 3000-8000 "part-time guerrillas" lived ordinary legal lives, but participated in some way in the terrorist acts. Sympathizers to those engaged in political violence were estimated to number between two and three hundred thousand. This was not Iraq in 2005, but Italy in 1978.[11] Italy still occasionally suffers isolated terrorist bombings and assassinations, but the broad-based terrorist movement on the 1970s and 1980s was eradicated without resort to war.

One might argue that the threat posed by home-grown terrorists such as Italy's *Brigate Rosse* is not comparable to that of al Qaeda, a transnational terrorist network with branches and safe havens throughout the world. It may be possible to defeat domestic terrorism with police powers, this argument holds, but fighting foreign terrorists requires military means. In fact, however, the terrorist organizations in Europe and Japan in the 1970s did benefit from international contacts, including training centers and safe havens. As Peter Katzenstein has argued, in the 1970s members of Germany's Red Army Faction "received training in Palestine Liberation Organization (PLO) camps that operated under the auspices of the Syrian government in Lebanon's Bekaa Valley."[12] The communist regime in the German Democratic Republic (GDR) also provided support for West German terrorists: "In the 1970s the GDR appears to have been an important transit country for RAF members as they traveled abroad to elude the investigations of the West German police." Japan's Red Army also received considerable support from abroad for its terrorist activities. Under close supervision at home,

> Left-wing radicals moved to North Korea or the Middle East. From these foreign locations the JRA staged daring operations, such as the attacks on the Tel-Aviv airport in 1972, a Singapore oil refinery in 1974, on the French embassy in The

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[10] Details on all of the cases mentioned in this paragraph are found in Matthew Evangelista, *Gender, Nationalism, and War: Conflicts on the Movie Screen* (Cambridge, UK: Cambridge University Press, 2011).

[11] Alessandro Silj, "Case Study II: Italy," in David Carlton and Carlo Schaerf, eds., *Contemporary Terror: Studies in Substate Violence* (London: Macmillan, 1981).

[12] Peter J. Katzenstein, "Same War—Different Views: Germany, Japan, and Counterterrorism," *International Organization*, vol. 57, no. 4 (2003), 731-760, at 742.

Hague in 1974, and on the U.S. and Swedish embassies in Kuala Lumpur in 1975. In the 1980s the JRA had about thirty core cadres operating abroad.[13]

Both Germany and Japan dealt with their transnational terrorist challenges mainly through police work, including extensive surveillance that many Americans might find threatening to civil liberties. Japan's efforts, more successful than Germany's, had the paradoxical effect of driving the terrorists to seek foreign sanctuaries. Ultimately, Katzenstein argues, the factors that most contributed to the defeat of the terrorist threat to these countries were luck and time, especially time for the international environment to change and become less hospitable to terrorists. Nevertheless, the international changes themselves were the result of efforts to deal with some of the underlying issues that allowed for terrorist movements to make common cause across borders, particularly the Israeli-Palestinian conflict. As Katzenstein points out, the Oslo Agreement of 1993 accelerated the JRA's "withdrawal from the Middle East." The weakening of the Popular Front for the Liberation of Palestine and "a change in Syrian policy in the mid-1990s left the JRA no choice but to withdraw completely. Within a few years, with the exception of seven JRA members believed to be living in Lebanon, all of the senior JRA cadres had been apprehended and were in jail."[14] The international dimension of Germany's antiterrorist policy focused on cooperation with law enforcement agencies in the European Union, whereas Japan "relied on economic aid, its preferred policy instrument, to further its antiterrorist policies." Japan appears to have rewarded Syria with economic assistance, "presumably as a *quid pro quo* for Syria's restricting the geographic mobility of the JRA."[15]

Italy dealt with the threat of leftwing terrorism in a number of ways, none of which entailed warfare. Many Italian terrorists seem to have emerged from student and labor movements when pathways for peaceful participation and ways to address their demands were blocked. Activists who turned to violence had often been victims of state violence and repression themselves. As one observer mentioned in regard to the French war in Algeria and the troubles in Northern Ireland, prisons turn out to be "a marvelous recruiting and training centre."[16] Many other cases support this generalization. Especially when the prison experience includes torture, friends and family members of the victims often seek revenge by engaging in terrorist activities.

How did the urban terrorism of 1970s Europe end? Here the generalization that seems most convincing is that political systems and social and political organizations became more inclusive and more open to the concerns that had earlier found expression only in political violence. By addressing the main grievances that underlay the violence, the authorities could isolate the relatively small number of terrorists from the much larger population of potential sympathizers. The point is not that every terrorist is motivated by a legitimate political grievance that should be addressed. The point is rather that for

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[13] Ibid., 745.

[14] Ibid.

[15] Peter J. Katzenstein, "September 11 in Comparative Perspective: The Antiterrorism Campaigns of Germany and Japan," *Dialog-IO* (Spring 2002), 45–56, at 49.

[16] Alistair Horne, *A Savage War of Peace* (New York: Viking, 1978), 111.

terrorism to persist on any meaningful scale it has to have some at least passive support from a broader group of individuals who themselves might not consider engaging in violence. If those individuals find their concerns addressed by the government and society, they are more likely to withhold their support from the terrorists who remain committed to violence and even endorse state efforts to maintain order.[17]

The US Experience after 9/11

In the wake of the September 2001 attacks, the United States launched a war against Afghanistan. The Taliban regime running the country had offered safe haven to Osama bin Laden and members of his al Qaeda network, and had refused, both before and after the attacks, to turn them over to the United States for prosecution. Bin Laden had been living in Afghanistan and operating terrorist training camps there since 1996. As the US intention to attack Afghanistan became clear, the Taliban government made a number of steps towards accommodation, but they were never enough to satisfy the United States, and in retrospect they appear unlikely to have led to bin Laden's conviction or even apprehension. If the number-one antiterrorist goal of the United States after 9/11 was to capture or kill bin Laden, it was unlikely to be achieved with any assistance from the Taliban. The Bush administration believed it could not be achieved without warfare. In fact, the administration had other goals and did not give priority to catching bin Laden. This observation is relevant to the question of whether war was the best means for protecting against further terrorism following the 9/11 attacks.

Immediately following the attacks, the United States obtained international support for both the goal of apprehending bin Laden and of attacking Afghanistan. Thus, any discussion of alternatives to the war paradigm must acknowledge that it received a pretty substantial endorsement right from the outset. The United Nations Security Council, for example, issued two resolutions, 1368 and 1373, on 12 and 28 September 2001 respectively, which seemed to bless the US use of force. Both resolutions invoked "the inherent right of individual or collective self-defense as recognized by the Charter of the United Nations." The earlier resolution calls "on all States to work together urgently to bring to justice the perpetrators, organizers and sponsors of these terrorist attacks and stresses that those responsible for aiding, supporting or harboring the perpetrators, organizers and sponsors of these acts will be held accountable." The later one reaffirms "the need to combat by all means, in accordance with the Charter of the United Nations, threats to international peace and security caused by terrorist acts." The explicit reference to an inherent right of self-defense, invocation of the UN Charter, and the

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[17] For more details, see Donatella Della Porta and Sidney Tarrow, "Unwanted Children: Political Violence and the Cycle of Protest in Italy, 1966-1973," *European Journal of Political Research* 14 (1986); Sidney Tarrow, *Democracy and Disorder: Protest and Politics in Italy 1965-1975* (Oxford: Oxford University Press, 1989). For a good summary and application of this literature to current concerns, see Anne Marie Baylouny, "Democratic Inclusion: A Solution to Militancy in Islamist Movements?" *Strategic Insights,* vol. 3, issue 4 (April 2004), http://www.ccc.nps.navy.mil/si/2004/apr/baylounyApr04.asp.

expression "combat by all means" gave the green light to the US invasion. The call to bring the perpetrators to justice constituted an implicit rebuke to the Taliban regime and a commitment that it would "be held accountable." Resolution 1373 also calls upon "all States" to "cooperate, particularly through bilateral and multilateral arrangements and agreements, to prevent and suppress terrorist attacks and take action against perpetrators of such acts."[18]

As early as 1999 the Security Council had issued Resolution 1269, calling upon all states to "deny those who plan, finance or commit terrorist acts safe havens by ensuring their apprehension and prosecution or extradition."[19] This provision in effect required the Taliban to extradite Osama bin Laden to the United States (a US court had indicted him the year before for attacks against US embassies in Africa) or to a third country that would send him to the United States or prosecute him. Both resolutions of September 2001 invoked this earlier resolution and called for its full implementation. There is no doubt that even before the attacks of 9/11 the Taliban was legally obliged to extradite bin Laden and that its unwillingness to do so constituted defiance not only of the United States but of the United Nations.

As the US intention to attack Afghanistan became clear in the weeks following 9/11, the Taliban government sought to deter US military action by creating the appearance of willingness to deal with bin Laden. On 20 September, the Grand Council of Ulema issued a recommendation to the Taliban government to encourage bin Laden to leave the country. In its declaration, the Ulema members "voice their sadness over deaths in America and hope that America does not attack Afghanistan." It proposed to the government "to persuade Osama bin Laden to leave Afghanistan whenever possible...and choose another place for himself." It criticized George Bush for using the language of "crusade" against terrorism, and threatened in the event of a US attack to wage holy war, during which "any Muslim, whether an Afghan or non-Afghan, [who] cooperates with infidels, becomes an accomplice or a spy, [and] that person is also punishable with death like the foreign invaders."[20]

As the threat of US invasion loomed, the Taliban become more forthcoming, at least rhetorically. Mullah Abdul Salam Zaeff, the Afghan ambassador to Pakistan, said "we are prepared to try him, if America provides solid evidence of Osama bin Laden's involvement in attacks in New York and Washington." He added that "if America is not satisfied with our trial of Osama, we are also ready to find another Islamic way of trying him." Asked about whether the Taliban would extradite bin Laden, he said "this is a later

[18] United Nations, "UN Security Council Resolution 1368," (2001), ny.un.org/doc/UNDOC/GEN/N01/533/82/PDF/N0153382.pdf?OpenElement; United Nations, "UN Security Council Resolution 1373, (2001), http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N01/557/43/PDF/N0155743.pdf?OpenElement.

[19] United Nations, "UN Security Council Resolution 1269 (1999), http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N99/303/92/PDF/N9930392.pdf?OpenElement.

[20] "'Osama bin Laden should choose another place,'" The Guardian (London), 21 September 2001.

thing, we cannot take any step that hurts our Islamic or Afghan dignity." The United States refused to provide any evidence or to open negotiations with the Taliban.[21]

A week into the US bombing campaign, Taliban officials seemed to offer as a concession to consider turning over bin Laden to a third country. It would have to be a neutral country that would never "come under pressure from the United States," in the deputy foreign minister's words. The Taliban would still require evidence of bin Laden's guilt, and the US would have to cease its bombing before any negotiations could commence. The United States refused all conditions, and the war continued. "There's no need to discuss innocence or guilt. We know he's guilty," declared President Bush.[22]

The Taliban's concessions were too few and too late for the United States. There is no doubt that the Bush administration was determined to launch a war–more than one, in fact–regardless of the Taliban's position. One must acknowledge, however, that the Taliban consciously put its "Islamic or Afghan dignity" above adherence to international law (in the form of the Security Council resolutions and the many UN conventions against terrorism), and should not have been surprised that its position commanded insufficient global sympathy to prevent the war.

If we draw from this evidence that war was the only means to achieve the US goal of bringing Osama bin Laden to justice, we must wonder why the most powerful armed forces the world has ever known failed to do so. The reason, as far as one can tell from the fairly extensive record now available, is that the Bush administration harbored goals it considered more important than capturing bin Laden: invading Iraq and overthrowing Saddam Hussein.

There are many plausible and overlapping explanations for the Bush administration's decision to invade Iraq, a goal that many of its members harbored since long before the 9/11 attacks. Ron Suskind, among others, links the Iraq War to a near panic within the Bush administration about the prospect of terrorists armed with nuclear or biological weapons.[23] Only a week after the 9/11 attacks, four letters containing anthrax had been sent to US news organizations, followed by similar letters to two US senators. Five people died and a further 23 were infected with the anthrax virus. The residents of a tense metropolitan Washington DC saw their government agencies and post offices closed. Although an al Qaeda plot was immediately suspected, the FBI soon honed in on a domestic perpetrator…

Nevertheless, the following month materials turned up in a bombed al Qaeda site in Afghanistan documenting the group's interest in using anthrax as a weapon. In the meantime, US intelligence sources were gathering information about a Pakistani organization, known as Islamic Revival, one of whose members was a scientist with connections to Pakistan's nuclear-weapons program. From a Libyan source, the CIA

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[21] "Taliban 'will try Bin Laden if US provides evidence,'" *The Guardian*, 5 October 2001.

[22] "Bush rejects Taliban offer to hand Bin Laden over," *The Guardian,* 14 October 2001.

[23] Ron Suskind, *The One Percent Doctrine: Deep Inside America's Pursuit of its Enemies since 9/11* (New York: Simon and Schuster, 2006), Ch. 2.

learned that the organization had offered to help Libya develop a nuclear bomb.[24] Even though non-state actors were responsible for the 9/11 attacks and the anthrax murders, Bush administration officials focused their attention on states. Officials were particularly concerned about the risk of weapons of mass destruction provided by a state to terrorists. In the view of Secretary of Defense Donald Rumsfeld, as his deputy Douglas Feith summarizes it:

> [Although] some terrorist groups might be capable of producing such weapons themselves, a more likely source would be a state supporter. And we knew that the list of leading state supporters of terrorism coincided with the list of so-called rogue states who were notorious for pursuing (and, in the case of Iraq, using) weapons of mass destruction.[25]

George Tenet, the Director of Central Intelligence, was particularly keen not to be taken by surprise again, as he was on September 11. In Suskind's account he leaned far in the other direction, expecting the worst. Osama bin Laden "either has a bomb now or won't rest until he has one," he reportedly told a colleague, "You see, all our failures are because we failed to anticipate. Intelligence failures follow a failure of anticipation. They come from only following the information you know and not worrying about what you don't know. You need to be passionate—passionate *about what you don't know*."[26] Tenet's preoccupation with what he did not know (namely, that al Qaeda possessed weapons of mass destruction) played well into the Bush administration's desire to do something "proactive." In late November 2001, Tenet briefed Vice President Richard Cheney on the Pakistani group's offer to Libya. "If there's a one percent chance that Pakistani scientists are helping al Qaeda build or develop a nuclear weapon, we have to treat it as a certainty in terms of our response," Cheney replied. "It's not about our analysis, or finding a preponderance of evidence. It's about our response." As Suskind comments, as far as the *evidence* was concerned, "the bar was set so low that the word itself almost didn't apply. If there was even a one percent chance of terrorists getting a weapon of mass destruction—and there had been a small probability of such an occurrence for some time—the United States must now act as if it were a certainty. This was a mandate of extraordinary breadth."[27]

Within that broad mandate, Cheney and the rest of the Bush administration claimed the right to attack Iraq, to uncover secret programs to develop weapons of mass destruction that could, in turn, be handed over to terrorists who might use them against the United States. There were several leaps of faith necessary to accept this justification for war. First was that Iraq's efforts to develop such weapons had not suffered irreparably from the previous war in 1991, from the UN inspections that uncovered and destroyed many of the relevant facilities, or from the regime of economic sanctions that aimed to deny Iraq any material even plausibly linked to the production of weapons. Second was that

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[24] Ibid.

[25] Douglas J. Feith, *War and Decision: Inside the Pentagon at the Dawn of the War on Terrorism* (New York: Harper, 2008), 19.

[26] Suskind, *One Percent Doctrine*, Ch. 2, esp. 50-51.

[27] Ibid., 61-62.

secular Iraq would share whatever weapons it had developed with the religiously motivated al Qaeda.

How does the Iraq invasion help us understand why the Bush administration failed to pursue military action in Afghanistan to the point of capturing Osama bin Laden, even after making the Taliban's refusal to turn him over effectively a *casus belli*? Some useful insights into this question are provided by Feith's account of the Pentagon's planning for how to cope with the threat of terrorism revealed by the September 11th attacks. Rumsfeld, in particular, insisted that invading Afghanistan in pursuit of al Qaeda would be an inadequate response. There simply were not enough targets to create the proper reaction of shock and awe. "Destroying the scant infrastructure in Afghanistan," writes Feith, "would not cause the kind of pain that was likely to change behavior throughout the terrorists' network, especially by the state supporters," such as Iraq. "A less-than-impressive response to 9/11 might embolden the terrorists to strike again. The United States had to find a way to demonstrate a break with past practice and establish that we were willing to go to war to protect ourselves and our freedom." Iraq, observed Rumsfeld, "was a state that supported terrorism, and that might someday offer terrorists weapons of mass destruction to use against us." In Iraq, moreover, "we could inflict the kind of costly damage that could cause terrorist-supporting regimes around the world to rethink their policies." As Feith summarized the prevailing view, "we wanted to shock state supporters of terrorism into reconsidering any pending operations."[28]

President Bush seemed drawn to the "bandwagoning" logic of attracting third parties by demonstrably inflicting pain on an adversary. The United States, he argued, "needed an option that would bring others in the region along with us" and he was encouraged that the Pentagon "had some prepackaged strike options for Iraqi targets."

> Terrorism could become a bigger problem if you went with a "one-shot wonder," the President mused, referring to the firing of a single U.S. cruise missile. He continued: We'll go after not only bin Laden, but the places giving him haven. We may have to hurt Afghanistan so severely that everyone takes notice, and we start smoking these guys out of holes.[29]

Bush was pleased to get reassurance from the Pentagon that simultaneous wars against Afghanistan and Iraq would be feasible. Iraq was an appealing target not because it was strong and menacing, but rather because it was weak. As late as February 2001, Secretary of State Colin Powell had argued that Saddam Hussein posed no serious threat to the United States or to the region: "He has not developed any significant capability with respect to weapons of mass destruction. He is unable to project conventional power against his neighbors."[30] Pentagon officials settled on Iraq for its long-term potential threat and its present *weakness*–the classic prescription for preventive war. They saw Iraq as an ideal opportunity to demonstrate their preferred strategy of relying on

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[28] Feith, *War and Decision*, 6, 15, 123.
[29] Ibid., 15-16.
[30] Thomas E. Ricks, *Fiasco: The American Military Adventure in Iraq* (New York: Penguin Press, 2006), 27.

technology to limit the need for massive numbers of soldiers.[31] They would make an example of Saddam Hussein *pour encourager les autres*.

The wars in Afghanistan and Iraq have cost the United States hundreds of billions of dollars and thousands of casualties among its soldiers. The toll on civilian victims in the two countries has been much higher: hundreds of thousands dead, millions turned into refugees and displaced persons, with no end in sight. Americans do not seem safer from the threat of terrorism than they were before these wars began, yet the war paradigm still dominates the official imagination.

The Obama Administration's War Paradigm

Barack Obama, in his presidential campaign, criticized the Iraq War as a distraction from the real source of the terrorist threat, which he located in Afghanistan and neighboring Pakistan. As he promised, his administration escalated the war in Afghanistan and expanded it into Pakistan. It has pursued military operations in Yemen, Somalia, and elsewhere. Although periodic reports have surfaced that the administration rejects its predecessor's language of a "global war on terror," the preponderance of evidence indicates that the war paradigm is firmly entrenched in the Obama White House. Attorney General Eric Holder, during his confirmation hearing in January 2009, offered his view that "I don't think there's any question but that we are at war," ever since al Qaeda began its terrorist activities in the 1990s. He indicated, in response to a question, his agreement that someone arrested in the Philippines and accused of financing al Qaeda could be considered "part of the battlefield" of the war on terror.[32] In March 2010, Harold Hongju Koh, an Obama appointee as legal adviser to Department of State, defended the administration's policies of indefinite detention of detainees without trial and targeted killings in Pakistan and elsewhere within the framework of the war paradigm. As he explained in a speech to the annual meeting of the American Society of International Law, "as a matter of international law, the United States is in an armed conflict with al-Qaeda, as well as the Taliban and associated forces, in response to the horrific 9/11 attacks, and may use force consistent with its inherent right to self-defense under international law."[33] As we saw in considering the ICRC definition of "armed conflict," it is doubtful that the attacks of 9/11, however horrific, automatically put the

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[31] Michael R. Gordon and Bernard E. Trainor, *Cobra II: The Inside Story of the Invasion and Occupation of Iraq* (New York: Pantheon Books, 2006); Ricks, *Fiasco.*

[32] Joanne Mariner, "Obama's War on Terror," *FindLaw*, 25 February 2009, http://writ.news.findlaw.com/mariner/20090225.html.

[33] Harold Hongju Koh, "The Obama Administration and International Law," address to the annual meeting of the American Society of International Law, Washington, DC, 25 March 2010 http://anthonyclarkarend.com/humanrights/the-obama-administration-and-international-law-address-by-state-depatment-legal-adviser-harold-koh-march-25-2010-video-and-text/. For a contrary view on the legality of the drone attacks and the war paradigm in general, see Mary Ellen O'Connell, "Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004-2009," University of Notre Dame Law School Legal Studies Research Paper No 09-43 (November 2009).

United States in armed conflict with al Qaeda. The United States is involved in such an armed conflict now in Afghanistan, precisely because its military forces are fighting there. Yet the US government claims that there are fewer than a hundred al Qaeda operatives left in Afghanistan. Moreover, as the editors of *The Nation* pointed out, the Afghan Taliban is "largely a local movement with little interest in global jihad."[34] The war paradigm remains the primary US method of confronting terrorism.

The war paradigm has become counterproductive. An authoritative study by the RAND Corporation has found that few terrorist organizations ended as a result of military campaigns directed against them. The study of 268 groups covered the period 1968 to 2006. It found that 10 percent of the groups ceased their activity because they had achieved their objectives ("victory") by violence; 40 percent were eliminated through intelligence and policing methods; 43 percent ended their violence as a result of peaceful political accommodation; and only 7 percent were defeated militarily. The authors related their findings to the struggle against al Qaeda and conclude that military force is an inappropriate means to cope with the threat.[35] Experts disagree on whether the al Qaeda network is stronger or weaker than when the United States launched its "war against terror" in 2001, reflecting in part disagreements about how to define the network and whether to include the many "free-lance" affiliates that are not strictly subordinated to Osama bin Laden. But no one argues that it constitutes an effective military force, capable of achieving its goals through armed combat. Scott Altran and his associates are among many who argue that the war paradigm is disproportionate to the threat of some few thousands of terrorists, mainly dispersed outside their countries of origin, and surely counterproductive: "Don't use missiles and tanks to swat mosquitoes or you may wind up just creating more swamp holes for breeding grounds."[36]

Alternatives to the War Paradigm

The examples of Japan and the European countries that faced major terrorist movements in the 1970s suggested that non-military means to deal with the threat (police methods, surveillance, economic instruments, international cooperation) could be effective. Employing the law-enforcement paradigm worked when the United States has tried it as well, both before and after 9/11. Before the 2001 attacks, the United States had dealt with Islamist terrorists through the criminal justice system. The Federal Bureau of Investigation, for example, identified Sheikh Omar Abdel Rahman and Ramzi Ahmed Yousef as key figures behind the 1993 bombing of the World Trade Center and gathered enough evidence to convict them in a civilian court and imprison them and all their

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[34] "Military Madness," *The Nation*, 3 January 2011, 3.

[35] Seth G. Jones and Martin C. Libicki, *How Terrorist Groups End: Lessons for Countering al Qa'ida* (Santa Monica, CA: RAND Corporation, 2008), http://www.rand.org/pubs/monographs/MG741/.

[36] Scott Altran (with Jeremy Ginges, Douglas Medin, Khalil Shikaki), "Global Network Terrorism," slides from a briefing of the US National Security Council, 28 April 2006, http://www.au.af.mil/au/awc/awcgate/whitehouse/atrannsc-042806.pdf, quotation on slide #44.

accomplices. In order to capture them, US authorities used legal methods to infiltrate their organization, such as informants wearing listening devices to record incriminating evidence. To convict them, US courts relied on domestic law with all its protections for the defendants.

According to Ron Suskind, a major breakthrough in understanding the al Qaeda network following the 2001 attacks came in interrogation of Abu Zubaydah in April 2002 *before* he was submitted to torture on George Bush's authorization. Suskind reported that the best information that came out of the captive may have resulted from nonviolent methods of interrogation, such as discussions about the Qur'an and predestination by a knowledgeable CIA interrogator. In another case, Suskind described how the CIA peacefully infiltrated a bank in Pakistan that was laundering money for al Qaeda and managed to get the names and addresses of hundreds of operatives.[37]

The legal basis for prosecuting terrorist crimes is well established, and countries are increasingly cooperating in sharing information and especially hindering the financing of terrorist organizations. Since the height of the terrorist movements of the 1970s, the United Nations has adopted some twenty conventions on international terrorism. The UN Security Council resolutions adopted in September 2001, especially Resolution 1373, are remarkably specific in the provisions they prescribe, the reporting schedule states must maintain, and the consequences for lack of adherence to the resolutions' terms. In the wake of the 9/11 attacks, the UN Security Council has effectively begun dictating legislative changes that states must adopt in the interest of combating terrorism.

Some observers have become alarmed at the constitutional implications of what Kim Lane Scheppele has termed "public law globalization." Scheppele points out that the new laws adopted at the behest of the Security Council "have constitutional implications-- centralizing power in the hands of executives within systems of otherwise divided government, increasing ease of surveillance of publics, truncating due process guarantees, changing the role of the military in civic life, and restricting individual rights of liberty, speech, association and privacy." Scheppele describes Resolution 1373 as "a far-reaching and essentially legislative resolution that, for the first time in the Security Council's history, used binding authority under Chapter VII of the UN Charter to require all member states to change their domestic laws in very specific ways" or face sanctions.[38] The Security Council established a Counter-Terrorism Committee mandated to monitor the resolution's implementation.

From the US standpoint, ideal implementation of the Security Council's mandates would mimic US legislation and institutions, such as the PATRIOT Act, the Department of Homeland Security, the Military Commissions Act, and the Antiterrorism and Effective Death Penalty Act, which includes a sweeping definition of "material support" for

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[37] Suskind, *One Percent Doctrine,* 99, 100, 115.

[38] Kim Lane Scheppele, "The migration of anti-constitutional ideas: the post-9/11 globalization of public law and the international state of emergency," Ch. 13 in Sujit Choudhry, ed., *The Migration of Constitutional Ideas* (Cambridge, UK: Cambridge University Press, 2007).

terrorism. The US system is extensive. As Dana Priest and William Arkin have reported, "the United States is assembling a vast domestic intelligence apparatus to collect information about Americans, using the FBI, local police, state homeland security offices and military criminal investigators." It includes "a web of 4,058 federal, state and local organizations, each with its own counterterrorism responsibilities and jurisdictions. At least 935 of these organizations have been created since the 2001 attacks or became involved in counterterrorism for the first time after 9/11."[39] Critics have raised concerns about the implications such domestic antiterrorist measures pose to civil liberties. The potential for abuse is rife and there are indeed many examples: of infiltration and surveillance of pacifist organizations as possible terrorist threats, for example. With little rhyme or reason, many of these infringements on US liberties occasion little outrage, while others (airport security scans or national identification cards, for example) become *causes célèbres.* Many security-conscious states undertake considerable efforts to counter terrorism, but may not necessarily want to adopt the US methods as best practice.

In any event, if the United States seeks cooperation from other states in combating international terrorism, it will need to demonstrate its own commitment in a consistent way. In May 2007 the US government refused to extradite Luis Posada Carriles, who had escaped from Venezuela in 1985 following indictment for his role in the 1976 bombing of a Cuban airliner. In addition to that attack, which killed 73 people, Posada was implicated in four other bombings, including of the Guyanese Embassy in Trinidad. Posada was a longtime CIA agent who was actively involved in illegal covert operations in Central America in the 1980s. His strong anti-communist views and his particular animus against the regime of Fidel Castro in Cuba apparently won Posada some sympathy in US government circles, even though his methods fit most definitions of terrorist. Presumably, the United States should be bound no less than the Taliban to adhere to UN Security Council resolutions directing that terrorists be extradited for trial. Ironically, in the crime for which he was indicted in Venezuela, Posada evidently smuggled explosives onto the Cubana 455 flight by disguising them in a tube of toothpaste, a technique that caused particular alarm in the United States and Britain in August 2006 when evidence emerged of an alleged plot to bomb airlines by hiding explosive gels in hand luggage.[40]

Some domestic US cases of political violence also raise the question of double standards. In April 2007, for example, US federal authorities broke up a plot by a group called the Alabama Free Militia to attack some Mexican immigrants living in a small town north of Birmingham. According to the federal district attorney, police "recovered 130 grenades, a grenade launcher, a machine gun, a short barreled shot-gun, two silencers, numerous other firearms, 2500 rounds of ammunition, explosive components, approximately 70

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[39] Dana Priest and William Arkin, "Monitoring America," *The Washington Post*, 20 December 2010.

[40] "Documents Linked to Cuban Exile Luis Posada Highlighted Targets for Terrorism," National Security Archive Update, 3 May 2007, http://www.nsarchive.org; "'Airlines terror plot' disrupted," BBC News, 10 August 2006, http://news.bbc.co.uk/1/hi/uk/4778575.stm.

improvised explosive devices (IED), and commercial fireworks." The press release announcing the members' guilty pleas makes no mention of the presumed target of their planned attack and none of the members was accused of conspiracy to commit terrorism. Instead they faced charges of conspiring to make firearms and other destructive devices.[41] As one commentator suggested, "if these characters in Alabama were Arab Muslims, they would be on their way to some secret prison in Eastern Europe wearing diapers in a Learjet, ready to get waterboarded," a reference to the "extraordinary renditions" that have so discredited US antiterrorist policies by their blatant illegality.[42] Again, if the US seeks international cooperation in a legal regime intended to address the threat of terrorism, it will need to adhere to that regime consistently itself.

The biggest contribution the United States can make to combating terrorism worldwide is to abandon the war paradigm and extricate itself from the wars that have served as such an effective recruiting device for new terrorists.

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[41] Department of Justice, United States Attorney Alice H. Martin Northern District of Alabama, "Alabama Free Militia Members Plead Guilty in US District Court," 25 June 2007, http://www.atf.gov/press/2007press/field/062607nash_militiamembers-guiltyplea.htm.

[42] "A Look at the Forces behind the Anti-Immigrant Movement," transcript of a radio broadcast, Democracy Now, 2 May 2007, http://www.democracynow.org/article.pl?sid=07/05/02/1427217.