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Sovereign Rights and Sovereign Responsibilities: Self Defense in an Age of Apocalyptic Terrorism

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Fighting Terrorism and the International Legal Context

The terrorist threat the world faces in the new century is decidedly different from that it faced in the last. The radical Islamist terrorists who presently constitute the gravest danger operate from profoundly different motivations than the terrorists who afflicted Italy and other Western European countries some 20 or 30 years ago. Terrorism inspired by extreme religious doctrines, as the eminent scholar of terrorism, Bruce Hoffman, wrote several years before the attacks of September 11, 2001, "assumes a transcendental dimension, and its perpetrators are consequently unconstrained by the political, moral or practical constraints that may affect other terrorists." This is not confined to Islamic terrorists; Hoffman specifically mentioned the Japanese group Aum Shinrikyo, and he could also have described the Sikh terrorists of the Indian Punjab in the 1980s in the same terms. However, as we have learned in the past several years, his characterization of religiously oriented terrorists as unconstrained by the standards that have limited the acts of previous generations of secular terrorists is particularly true of apocalyptic groups like Al Qaida and its ideological allies. No longer can we assume, as was said some years ago, that terrorists want "a few people dead and a lot of people watching." Moreover, the fruits of globalization have enabled terrorists to achieve a lot of people dead and to do so almost anywhere in the world.

Facing a different threat obviously implies developing a different strategy than those adopted to deal with the threats of the 1970s and 80s.

- In the past, one approach has been to harden high value targets, increasing the risks of an attack so that terrorists would be deterred from attempting to strike them. How can we expect that to work when dealing with people for whom the loss of their own lives is an integral element of the attack? As the Egyptian-American scholar Mamoun Fandy put it, for many Islamist radicals, the act of terrorism becomes an act of worship. It is carried out according to a different calculus than that under which leftwing terrorists in previous decades operated.

- In any case, even the best defenses can't provide a guarantee against terrorist successes. In the past, the damage from any single terrorist attack was usually small enough that governments could take the chance of occasional failures. That is no longer the case given the destructive potential of today's terrorists.

- Much of the traditional analysis on how to deal with terrorism says that one should focus on the grievances that terrorists exploit for popular support. If you can solve the underlying problem, support will dry up and terrorism itself will wither away. "Addressing root causes" is still necessary in dealing with 21 st century terrorism, but there is still a lot of disagreement over what those root causes are, and in any case addressing them will take decades. We can't keep taking catastrophic losses while waiting for root causes to be addressed.

- In the past, countries have tended to fight terrorists using the tools of the criminal justice system. But 9/11 as well as other attacks by groups like Al Qaida demonstrate that this approach is inadequate.

In short, the present day terrorist challenge cannot be addressed by the usual means, especially by defensive means. It requires a combination of defense and offense. By offense, I do not mean only the use of military force. All capabilities must be brought to bear, and pacific means such as intelligence and police cooperation, improved financial controls, and the like are to be preferred when they can be effective.

Nevertheless, given the modern threat, there will be situations that arise when the use of force is necessary. Sometimes that will mean taking military action without the consent of the government of the country where the terrorists are located. There are several reasons why such cases may arise:

- The host nation may not have full control over parts of its own territory. This is the case today in Somalia, which for all practical purposes has no government, but also in remote areas of Yemen, Pakistan, and other countries.

- The host nation may be wittingly allowing terrorists sanctuary on its turf, perhaps in exchange for promises from terrorists to conduct their actual operations elsewhere.

- The host nation may be actively in league with terrorists or even sponsoring them as an element of its own national strategy.

- The threat may be so pressing or the intelligence about the terrorist presence so sensitive and perishable as not to admit the delays or risks of compromise that would be entailed in asking the host government for its agreement to joint action.

For all these reasons, it is a virtual certainty that the United States—and perhaps other countries—will use force against terrorists on foreign soil at some point. The question at hand is how that fact can be reconciled with the rules of international law?

Some may question why we should we worry about what the rules of international law say on the subject. Won't raison d'état simply trump any formal rules that may get in the way of whatever the United States thinks it needs to do? There are three reasons why we cannot dismiss so lightly the question of the international legal justification for such uses of force.

First, from the perspective of those who are committed to international law as a matter of principle, it is important to recognize that international law is credible only to the extent that it corresponds to actual state practice. Clinging to extreme theoretical interpretations of what one thinks the law ought to be, in the face of the inevitable reality that states are going to behave otherwise, risks making international law an irrelevant joke and losing whatever moderating effects it can have on how international relations are conducted. That is in no one's interest, except possibly the terrorists'.

Secondly, from the opposite perspective, even those who see international law simply as a tool for the pursuit of state interests must recognize that not everyone shares that view. The United States and others involved in the fight against terrorism need support from other governments in their efforts. Those other governments are more likely to provide such support if they are satisfied that the legal basis for prosecuting the war against terrorists is sound.

Finally, as President Bush has said many times, it is an essential element of the U. S. strategy against terrorism to build a global grassroots consensus that "all acts of terrorism are illegitimate, so that terrorism will be viewed in the same light as slavery, piracy, or genocide: behavior that no respectable government can condone or support and all must oppose." Building such a consensus, particularly in areas such as Europe where the public places a great emphasis on formal international legal norms, depends on our ability to articulate a compelling case that the way we are fighting the war is consistent with those norms. I believe it is possible to articulate such a case derived from three classic concepts in international law:

- That of the hostis humani generis—the common enemy of humankind.
- The doctrine that possessing the rights of a sovereign state carries with it the responsibility of executing the duties of a sovereign state.
- The logic of the inherent right of self defense as it applies to the realities of dealing with 21st century terrorism.

As I examine each of these concepts, I should emphasize that I do so not from the perspective on an international lawyer—which I am not—but from that of the policy maker. The issue is not to craft legal rules of procedure for argument in a court of law, but to define the limits and possibilities of practical state action in the real world. That is my objective here.

The Common Enemy of Humankind

The expression hostis humani generis, “the common enemy of humankind,” was apparently coined by Cicero in the first century B.C. to describe the “pirate” states of the eastern Mediterranean with which Rome was almost constantly in a state of war. The legal implications that Cicero intended from his formulation are quite different than those it implies today, but the modern understanding of what it means to be hostis humani generis has been pretty firmly established since the eighteenth century. That was the period when the great English jurist Sir William Blackstone wrote that as a pirate “has renounced all the benefits of society and government, and has reduced himself afresh to the savage state of nature, by declaring war against all mankind…all mankind must declare war against him…by the rule of self-defence.”
The general acceptance among European states that pirates were common enemies of humankind had ramifications not only for courtroom trials of accused pirates but for military action as well. Western navies, especially those of Great Britain and the United States, were deeply engaged in anti-pirate operations well into the nineteenth century, and the officers of both navies understood themselves to have not only a right but an obligation to take offensive action against pirates wherever on the high seas they found them. In fact, on a number of occasions, naval forces landed in other countries—including territory under the sovereignty of other European rulers—to clean out pirate sanctuaries.

The concept of “common enemy of humankind” was later applied by various governments or scholars to slave traders, war criminals, and torturers. The designation was not always as widely accepted as for pirates. But if we come forward to the 21st century and think about what the term means, we can see that it is a precise definition of terrorists even more than it was of pirates. In fact, without using the actual phrase hostis humani generis, the UN Security Council resolutions passed after 9/11 imply that that is how terrorists should be viewed:
l Resolution 1368, adopted the day after the attacks on New York and Washington, said that international terrorism is “a threat to international peace and security.”

l Resolution 1377, passed two months later, went further : “acts of international terrorism constitute a challenge to all States and to all of humanity;” “acts of terrorism endanger innocent lives and the dignity and security of human beings everywhere, threaten the social and economic development of all States and undermine global stability and prosperity.”

Moreover, the methods used by terrorists place them in utter defiance of the law of nations. While agreement on a definition of terrorism has been elusive, it is generally accepted that the intentional targeting of civilian noncombatants is the core characteristic of terrorist tactics. This practice, as well as the taking and killing of hostages and other key elements of terrorist practice are in flagrant defiance of both treaty and customary international law, as codified in a host of treaties--such as the Hague and Geneva Conventions--and contrary to the teachings of all major religions.

Finally, Al Qaida-style apocalyptic terrorism, which seeks to undermine any state that is not based on an idealized conception of the 7th century caliphate established by the companions of Muhammad, represents a direct challenge to the legitimacy of the international state system, just as the anarchist terrorists of the 19th century did, but with greater destructive effect.

From a purely legal perspective, defining terrorists as common enemies of humankind would create universal jurisdiction over them—all states could act juridically against all terrorists, not just those who harmed their own citizens. This concept of universal jurisdiction is commonly seen as something new, but it dates back at least to the time of Hugo Grotius, known as the father of international law, who wrote:

It must also be known that kings, and any who have rights equal to the rights of kings, may demand that punishment be imposed not only for wrongs committed against them or their subjects, but also for all such wrongs as do not specifically concern them, but violate in extreme form in relation to any persons, the law of nature or the law of nations.

This "universal principle" has previously been applied to piracy, slavery, genocide, and hijacking, and many contend it should also apply to egregious human rights violations. It seems apparent to me that terrorism should clearly be included.
Sovereign Rights, Sovereign Responsibilities

For my purposes here, however, I am less concerned about the grounds for prosecution of terrorists in a court of law than about how the use of military force to combat them can be justified.

This justification is implicit in the way that Blackstone described the implications of the concept of hostis humani generis: since common enemies have declared war "against all mankind, all mankind must declare war" against them. Note that Blackstone does not say all mankind—in other words, all governments— may declare war, but that they must declare war.

Although the concept is familiar to specialists, the idea that sovereign states have responsibilities as well as rights may sound odd to most people. Yet the principle of sovereign responsibilities is integral to the entire concept of statehood within the international system. For example, one of the criteria that have traditionally been used for deciding whether a political entity should be recognized as a sovereign state is whether it wields effective power in the territory under its jurisdiction. Actually maintaining control over the national territory is implicitly one of the responsibilities of a sovereign state.

As one of the classic textbooks on international law points out, a core responsibility of an sovereign state is that it is "under a duty to prevent and

suppress such subversive activity against foreign governments as assumes the form of armed hostile expeditions or attempts to commit crimes against life or property." This would clearly seem to cover a duty to suppress terrorist groups operating on your soil.

But specific UN Security Council resolutions make this obligation even clearer. Resolution 1373, which I mentioned a few minutes ago, requires states to

-- suppress terrorist financial and recruiting activities
-- block the supply of arms to them
-- provide warning to other governments of possible terrorist attacks
-- deny the provision of safe haven
-- prevent the movement of terrorists between countries
-- pursue criminal proceedings against them
-- and above all to prevent the use of their territories for terrorism against other countries.

Obviously the best solution to the scourge of terrorism would be for all states to live up to these responsibilities. But, as we saw earlier, some states cannot, while others choose not to. What happens then?

Most scholarship on the international law of state responsibility talks about peaceful means of dealing with the non-fulfillment of obligations. For example, the "Draft Articles on State Responsibility" issued in 2001 by the United Nations' International Law Commission say that the offended state can respond only by suspending performance of some obligation it owes to the wrong-doer. But these articles were not drafted in the context of international terrorism. In fact, the word "terrorism" appears nowhere in them, even though they were published two months after the 9/11 attacks.

The fact is that the obligation to prevent the use of one's territory to attack one's neighbors is of a higher order than the obligation to honor European Union quotas on egg production. As Richard Haass, who was at the time the U.S. Department of State's director of policy planning, said in a speech at Georgetown University last year, a state that can't fulfill such sovereign responsibilities as maintaining control over its territory "risks forfeiting its sovereign privileges including, in extreme cases, its immunity from armed intervention." A state that conducts armed intervention in such extreme cases, I would contend, is merely acting within the scope of its inherent right of self defense.

The Inherent Right of Self Defense

Although the "inherent right of self-defense" is enshrined in Article 51 of the United Nations charter, it obviously precedes the charter both historically and conceptually. Article 51 does not grant this right; it merely guards it against impairment by the rest of the charter. The right of self-defense was specifically

reiterated in connection with terrorism in Security Council Resolution 1373.

Of course, one of the long-standing issues in dealing with terrorism is this: who can an attacked state act against in self defense, and where? Customary international law provides a clear answer in the case of state-sponsored terrorism: "all acts of [administrative officials and military and naval forces] in the exercise of their official functions are prima facie acts of the State." This customary principle is echoed in the International Law Commission's draft articles I mentioned a moment ago.

In addition, again under customary law, the intentional or culpably negligent failure to prevent private groups—such as terrorists—from harming other states is also an act for which the host state bears responsibility.

It therefore seems clear that a victim of an armed attack by state-sponsored or state-tolerated terrorists has the right, under Article 51, to exercise force not only against the terrorist group itself but also against the state that sponsors or hosts the terrorist group, just as if that state's military forces had launched the armed attack. This was the basis for the United States-led action against the Taliban regime in Afghanistan.

I would go further, however. It seems logical, in light of the principle of sovereign responsibilities and especially given the clear language of the Security Council requiring member states of the United Nations to suppress terrorist activity, that an injured party also has the right to take military action on foreign soil if the host government is unable to prevent terrorists from conducting operations from its territory. There is ample historical precedent in the actual practice of states—which, it is important to remember, is one of the principal sources of international law. As I mentioned earlier, a significant portion of the wars on piracy in the 19 th century took the form of destroying pirate bases and sanctuaries on foreign territory. It is well known that in the early 20th century the United States Army sent a sizable expedition into Mexico to pursue bandits that had been raiding farms and villages on the American side of the international border.

But one of the most interesting cases is less well known outside academic circles. In 1837, anti-British militants based in a remote area of New York State began conducting attacks across the Niagara River into British-ruled Canada. When the local American authorities failed to control the situation, British forces crossed the river, attacked the militant sanctuaries, and destroyed a boat, known as the Caroline, that had been used in the cross-border attacks.

Needless to say, the American authorities were not happy with this armed incursion into US territory by foreign troops, but the British government insisted that it had a right to act in self defense. What is interesting about this case—and what makes it especially relevant to the issue at hand—is that the American government ultimately accepted the British argument, at least in principle. In

1841, as part of a general resolution of a number of outstanding issues affecting U.S.-British relations, Secretary of State Daniel Webster acknowledged that, under certain circumstances, one country did indeed have the right to act in self defense on the territory of another—even if it was American territory that was involved.

Now, many—and perhaps most—scholars and lawyers contend that this kind of discussion of 19th century precedents is all very interesting but outdated, because resort to force to deal with this kind of situation is banned the United Nations Charter. A country that is threatened by armed bands coming from abroad must take its problem to the United Nations, it is argued. To act otherwise is to violate the pledge in Article 2 of the charter not to threaten or use force against other UN members.

For two reasons, I think this is a misreading of the charter.

First, what paragraph 4 of Article 2 actually says is that members renounce 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." What does that mean?

What it clearly does not mean is that every use of force other than self defense is against the territorial integrity or political independence of the state where the force is used, and therefore illegal. At least the states that comprise the international system don't understand it that way. For more than ten years, the United States, United Kingdom, and France conducted regular overflights of Iraq—using force against Iraqi ground targets on occasion—in operations known variously as Provide Comfort, Southern Watch, and Northern Watch. For the first part of that period, the same three countries plus Turkey actually maintained military forces on the ground in northern Iraq, and Turkey continued to send sizable forces in pursuit of terrorists into the area throughout the decade. Even as they conducted these operations, all four countries repeatedly avowed their commitment to the territorial integrity of Iraq, and of the four only the United States asserted that the operations were authorized by UN Security Council resolutions.

If the United States was right, then collective action under a Security Council resolution would trump the prohibition on use of force in article 2(4). But if not, were France, the United Kingdom, and Turkey being hypocritical in affirming Iraq's territorial integrity even as they carried out military operations in the territory of Iraq? No—they simply understood that the provision of the UN charter bars attempts to change borders or slice off chunks of another country's territory—or, as Iraq tried to do to Kuwait in 1990, to erase it from the map entirely—by force.

It does not necessarily rule out all other uses of force under all circumstances. It

does not exclude the use of force to suppress terrorist bands that are not being

suppressed by the state in which they are located. And it very definitely does not rule out the use of force by the United States against Al Qaida and its associated groups, who have already carried out armed attacks against not only the United States but against a variety of other countries, including Tanzania, Kenya, Indonesia, Turkey, Saudi Arabia, and Spain. Under any reasonable interpretation, these states have the individual and collective right to defend themselves by force against the groups that attacked them and against those who shelter these groups.

There is a bigger principle at stake, however, and this goes to the central point I've been trying to make today. Robert Jackson, an American Supreme Court justice who was better known internationally as the lead U.S. prosecutor at the Nuremberg war crimes trials, once wrote that the United States "Constitution is not a suicide pact." What he meant, as he explained, was that doctrinaire logic must be tempered with practical wisdom; the right of free speech, for example, should not be used to justify the incitement of a riot.

The same logic applies to the United Nations Charter. It is not a suicide pact, either. When provisions of the Charter apparently conflict, or when one reading might promote conduct that is destructive of the purposes for which the organization was founded, we must interpret the charter by applying practical wisdom in a way that is consistent with the UN's underlying principles. Specifically, we must not interpret the provisions against the use of force or those governing the right of self defense in a way that protects and facilitates terrorism —something which at least three Security Council resolutions have declared to be contrary to the purposes of the United Nations.

The Way toward Consensus

It goes without saying that gaining international consensus on the interpretation of the law and the approach to dealing with terrorism that I've laid out here will be difficult. This is especially true given the existing understanding of the rules of the game. Resistance to the approach I'm proposing will be especially strong among those who will see it as a formula for the reintroduction of Western imperialism—the countries that gained their independence, often at great cost, in the years since World War II.

Because of this skepticism, the obvious approach to developing an agreed international legal basis for the use of force against terrorists—namely the negotiation of a formal universal convention on the subject—would almost certainly be unworkable.

The alternative approach, which I think is the right way to proceed, is for those

countries most affected by the terrorist threat to begin constructing a de facto body of customary international law on this issue through public pronouncements and action. This was how the international community dealt with piracy. Pirates were universally recognized as international outlaws centuries before any formal treaty declared them so. Indeed, by the time any general convention addressing the issue was ever adopted, action by different states all toward a common goal had largely eradicated the problem.

A similar process has taken place at initiative of various European governments in response to the humanitarian crises in the Balkans and Central Africa, through which a general right of humanitarian intervention is increasingly being recognized and accepted. There has been no formal treaty establishing this as a general right under international law. Instead, the continued assertion of such a right, followed by case-by-case exercise and acceptance of it, is progressively codifying it, to the extent that it is now accepted—at least tentatively—by organizations like the African Union, organizations that would ordinarily be expected to bitterly oppose all intervention.

There have already been a number of constructive steps on a parallel path with regard to terrorism. I have already mentioned the resolutions passed by the UN Security Council following 9/11. Equally important were the North Atlantic Treaty Organization's invocation of Article 5 of the North Atlantic Treaty, defining the strikes on the World Trade Center and the Pentagon as "armed attacks" against the United States. The Organization of American States took similar action under the terms of the Rio Treaty. Both of these moves help establish the principle that a major terrorist event is appropriately understood as an "armed attack," which unequivocally puts military operations against terrorists within the context of legitimate self-defense.

In conclusion, I would emphasize that the unilateral use of force against terrorists in other countries is never the first option. Where a state is unable or unwilling to fulfill its sovereign responsibilities to suppress terrorism, the first choice is to strengthen its capabilities and its disposition to take action. When the use of force is required, it is preferable to act in concert with the host country—or at least with its permission. Even under conditions when a state has a right to take unilateral military action without the host's consent, exercising that right is not necessarily prudent in every case.

But there will be times when the preferred options will not be available. There will be times when the danger is sufficiently clear and present as to justify extreme countermeasures, situations in which the use of force meets the standards set forth by Secretary of State Daniel Webster in connection with the Caroline case I mentioned earlier:

It will be for that Government [using force] to show a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for

deliberation … [and that its forces] did nothing unreasonable or excessive; since the act justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it.

In an era when terrorists like Al Qaida have the intention and capabilities of inflicting mass civilian casualties, no government can remain idle if it has the means to prevent an attack on its people. It is important for the international community to recognize that governments are on a solid legal foundation when they do so.

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