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Envisioning a Global Rule of Law¹

The authors of this essay question the statist response to the terrorist attacks of September 11 and offer some vision of how the United States and other global actors might have and can still conceive of their possibilities for action under a cosmopolitan vision of political responsibility. They argue that a different response to the attacks, based on the rule of law and international co-operation, could have been equally effective to combat terrorism in the long run, and could have also opened the way to a more just and stable world order.

The attacks on the World Trade Center and the Pentagon in September 2001 can appear in two different frames of interpretation. The first sees them as attacks on the United States as a state and its people. The second views them as crimes against humanity. The difference in interpretation is not technical, but political, and each implies different strategies of reaction. Shortly after the attack some public leaders, such as Mary Robinson, Director of the United Nations Commission on Human Rights, recommended that the United States and the rest of the world adopt the first interpretation. It seemed that there might be some open discussion of how to interpret the attacks as an event in international affairs, and what sort of response was called for. Within a few weeks, however, the United States solidified its interpretation as an attack on a state for which the appropriate response would be war on another state or states.

In this essay we question this statist response to the terrorist attacks and offer some vision of how the United States and other global actors might have and can still conceive of their possibilities for action under a cosmopolitan vision of political responsibility. We argue that a different response to these attacks, based on the rule of law and international co-operation, could have been equally effective to combat terrorism in the long run, and, in our view, could have also opened the way to a more just and stable world order.

The Statist Interpretation

The Bush Administration framed the attacks as an act of war on America, for which military retaliation was judged to be the appropriate response. This frame meant finding a state or states to engage in war, and the U.S. chose Afghanistan on the grounds that the Taliban government harboured and supported Al Qaeda. It has singled out Iraq, Syria, Somalia and other countries as additional states toward which military action may be taken, although they have not been attacked so far. The construction of a response to the attacks as a state-to-state military conflict, however, has been difficult to sustain. Even within a traditional state-centred world politics, the fact that the government of Afghanistan allowed Al Qaeda leaders to run camps in its territory provides an

uncertain justification for making war on the state. Aware of that shakiness, the United States shifted its reasons for the war against the Taliban from a rationale of self-defence to a humanitarian defence of freeing the Afghan people, especially the women, from oppression. We find this rationale cynical and opportunistic, since neither Bush nor before that the Clinton Administration had previously articulated any concern with the plight of the Afghan people. Not surprisingly, this concern has almost disappeared from the agenda for reconstruction in Afghanistan.

Responding to the terrorist attacks through the conduct of a war against a 'state' neither suits the case, nor is likely to be effective in creating a safer world. Although the war has destroyed some Al Qaeda bases and the U.S. has captured some members of that group, there is no direct connection between the casualties and the nineteen suicidal attackers of September 11. Widely circulating estimates of civilian deaths in Afghanistan give a minimum of 1000 and some as many as 3700. Hundreds are likely to die from unexploded bombs.² The number of soldiers and armed men who have been killed is still unknown but some of the information, including the massacre of hundreds of the Taliban prisoners in the Prison of Mazar-i-Sharif, has raised serious concern as to the legality in which the war operations have been conducted.³ The number of refugees suffering hunger and cold because of the war is impossible to calculate. There is no reason to believe that the war has deterred other would-be terrorists around the world. Many months after the beginning of the war, there is little sign of political stability in Afghanistan or of a genuine respect for human rights in the current government. The war may have contributed to destabilising the region of central Asia with unforeseeable consequences.

Although the United States did not act alone in prosecuting the war, it called the shots. The U.S. decided with whom to co-operate and assigned the role of other actors. It is difficult not to interpret U.S. policy in recent months as an effort to consolidate even more firmly its position as sovereign of the world. While many Americans no doubt think that this is a good thing, we believe that the existence of a single world military power that aims to enforce its will both is an anathema to democratic culture and impedes efforts to promote peace.

In the last decade, the U.S. has used its military force in the Persian Gulf, Somalia, Panama, the Balkans and many other places. In every case, the U.S. interventions have had victims, but few have been Americans. The magnitude of U.S. military and economic power and the willingness of the United States to wield it asymmetrically and with only the thinnest veneer of multilateralism elicits hostile reactions all over the world, even from people thought to be allies. A survey conducted by the Pew Research Center and the *International Herald Tribune* in December 2001 found that most of the non-Americans among the 275 political and business leaders polled believed that the United States wrongly uses its power and that some of its policies are responsible for growing global disparities in well being.⁴ In response to such hegemony, it seems to us imperative that leaders and citizens all over the world should envision a global rule of law and should try to shame and to put pressure on the United States to act more in conformity with such a vision.

An Alternative Vision

Aspirations to a global society governed by fair rules should be counted among the casualties of September 11. The fall of the Berlin Wall brought with it hope of constituting a world order founded on international legality and with

strengthened institutions of international co-operation. Recent debates and demonstrations about the policies and procedures of international trade and financial organisations have assumed the emergence of more global level governance. The question has been whether global regulatory regimes will represent solely the interests of the world's most powerful actors, or if they can include the voices and interests of the global majority in transparent and accountable institutions.

We base a vision of an alternative response to terrorism on these aspirations for just and democratic global governance. Hitherto, discussions of an international rule of law and global regulatory systems have paid less attention to the prevention and investigation of crimes and their prosecution in an international system than they have to matters like international trade, investment or environmental protection. We propose two premises for reasoning about what an alternative response to the terrorist attacks of September might have been and still can be. First, the situation should be conceptualised in people to people, not state to state, terms.⁵ The attackers were not representatives of a state, but members of private organisations, and those whom they killed were, for the most part, private individuals from at least 70 different countries. Thus, second, the events should be conceptualised as crimes, not as acts of war, to which the proper response is criminal investigation and prosecution within a rule of law and legally mandated measures for preventing and deterring similar crimes. For this reason, we disagree with those who think that the concept of "just war" can be applied to the U.S. military reaction.⁶

Democratic states do not usually, and ought never, respond arbitrarily and with military power to terrorist attacks committed inside their borders. Spain in response to threats from the Basque separatist group ETA, Italy in dealing with the Red Brigades, the United States in response to the bombing in Oklahoma City, all mobilised the instruments of law and police power. Stepping out of legal bounds, as did the Spanish government for a while when it authorised some state agents to use extra-judicial methods to combat terrorism, seems to have the effect of increasing the risk of attack. The enemies of peace point to illegal actions by states to justify their own illegal actions.

The world ought to respond to international terrorist organisations, we suggest, according to the same principles of the rule of law that these governments use in responding to domestic terrorist organisations. Responding to acts and threats of terrorism and to transnational terrorist networks under a global rule of law need not imply being "softer" on terrorists than a state to state response led by a hegemonic state would be. On the contrary, a genuinely global co-operative law enforcement response would be more effective in identifying and apprehending culprits, as well as preventing future attacks, while at the same time harming fewer people and destroying fewer goods, than has the war against Afghanistan.

We offer five principles to guide international policy to respond to threats and problems of violence. They each point to ideals and institutions of global co-operation that do not now exist. In that sense we intend them as visionary. At the same time, we believe that all five principles can serve to guide action now in the following way. As they consider options for actions now to respond to threats of terrorism, political actors and citizens can and should ask which courses of action have the potential to help realise the ideals the principles express, and which actions are more likely to move the world away from them.

(1) Legitimise and strengthen international institutions

Actions and policies that treat terrorism and threats of terrorism as involving all the world's peoples within a rule of law should utilise international organisations and legal instruments. The United Nations system is most important here. Although there are many flaws in its design and operations, which should be changed, the United Nations is the only transnational institution with representation of nearly all the world's peoples. Institutions, policies and conventions of the United Nations, moreover, cover many of the most urgent world problems.

Currently the UN is in an impossible position. On the one hand, it is called on the scene to restore peace, build governments and infrastructure, aid refugees, conduct health campaigns, and pursue many other activities, in dozens of regions of the world simultaneously. On the other hand, member states routinely deny the UN the means for carrying out such missions, not only by failing to provide funds, but also by limiting its authority. When the UN's efforts prove inadequate to solve problems, as often happens, world leaders regularly heap abuse on the organisation for being unresponsive and inept. The United States and other world powers cannot continue to dump the consequences of its wars and economic decisions on the United Nations while at the same time encouraging people to disdain the organisation.

The present organisation of the UN Security Council, with its five permanent members reflecting global politics in 1945, needs serious reform. That Security Council, however, passed three Resolutions after the attacks of September 11 (Resolutions no. 1368, Sept 12 2001, no. 1373, Sept 28 2001 and no. 1377, Nov 12 2001), which call for transnational co-operation among all member states to deter and investigate terrorist and other transnational criminal activity. If government leaders allied with social movements, the US could be pressed to enter more genuinely multilateral efforts to transnational criminal networks, efforts that would give more decision-making participation to the less developed world. The tragic paralysis of the international community in response to the worst killing in Palestine and Israel in two decades signals even more urgently the need to strengthen and reform the United Nations as a peace-making institution.

(2) Co-ordinate law enforcement and intelligence gathering institutions across the world.

The United States Congress apparently has little interest in investigating how two of the most sophisticated investigative and intelligence organisations in the world, the CIA and the FBI, could have been caught so unawares by a crime of such huge proportions. We suggest that one explanation is the state-centredness of both agencies, along with the investigative and intelligence gathering agencies of most states. The transnational organisation and movement of crime run parallel to the increased transnational organisation and movement of capital, labour, technology and culture. Intelligence and law enforcement institutions, however, lag terribly behind this reality. Intelligence continues to be principally an instrument of individual states against their enemies; in a spy culture the agencies of one state engage in secret activities in relation to other states, explicitly not trusting one another. Domestic law enforcement agencies, furthermore, each have their own systems that make communication and co-operation across borders difficult. The September attacks should serve as a siren call for reversing these structures of intelligence and law enforcement, to enable greater co-operation among agencies to

protect *citizens* of the world, not states.

There are some international instruments on which to build for such a purpose. INTERPOL, the international police organisation with 179 member nations, has worked against terrorism, drug trafficking, money laundering, white collar crime, computer crime, counterfeit money, organised crime, traffic in women and children, for decades. Even though its budget is minuscule compared to the task, it maintains extensive databases of known and suspected terrorists and criminals. It organises data on counterfeit passports and stolen credit card accounts that can be useful to law enforcement agents in nearly any country. Yet state based-intelligence agencies infrequently work with the organisations, who access its data in their work.⁷

At its Millennium meeting in November 2000, the UN General Assembly adopted the Convention Against Transnational Organised Crime, which 140 countries, including the United States, have already signed. This convention requires states to strengthen domestic laws aimed to control organised crime, and encourages states to enhance systems of transnational co-operation in legal expertise, extradition and criminal investigation. It specifically calls for providing technical assistance to less developed countries to upgrade their capacities for dealing with organised crime. Although at the moment this convention may be little more than a piece of paper, like some other UN negotiated treaties and conventions, it can be used by political leaders and social movements to demand institutions and resources that put its principles into action.

The United States, along with any other states, can act to advance international co-operation in law enforcement, both domestic and transnational, as well as work at creating and strengthening global law enforcement agencies. A collective effort to combat terrorism with a greater involvement of the UN will certainly be beneficial to the United States, but this would imply that the United States commit themselves to a greater loyalty towards the organisation. As the President of the United Nations Association of the U.S.A. has rightly stressed, "to sustain the commitment of UN member states in this new war (against terrorism), and to dispel resistance stemming from resentment of American 'double standards', Washington needs to affirm what the American public has long acknowledged – the rule of law applies to the great as well as the small".⁸

A greater collaboration against organised political crime implies breaking down the statist distinction between domestically oriented police and internationally oriented spy agencies. Current policy in the United States and in many Western countries blurs this distinction, however, in just the wrong direction. By allowing the CIA and FBI to co-operate inside the US, the government fosters a more repressive internal state at the same time as it becomes more defensive and suspicious externally. Increased transnational law enforcement co-operation should come with procedures of accountability and transparency in order to protect the rights of individuals.

(3) Increase Financial Regulation

One of the most efficient ways to strike at terrorist networks specifically, and organised crime more generally, is to hit their money. It is surprising that though Osama bin Laden has been known to head and fund terrorist operations for years, Al Qaeda has had the liberty to move the necessary capital. Why has no one until now succeeded at attacking the finances? We believe the answer

lies partly in the fact that world business leaders resist financial regulation. Corporations regularly move their money around the world, for example, in order to avoid paying taxes.

Tracking and regulating the movement of funds can dry up their flow to support criminal activities. A war on the free flow of money does not produce "collateral damage", does not create refugees and does not pollute the air. The United States has indeed enhanced its capacity to investigate and regulate money flows. In this area it is obvious that even the most awesome military power of the world must depend on the co-operation of other governments, especially governments that dislike U.S. foreign policy. Such necessary co-operation is difficult to maintain when the same governments or their allies face military threats or covert intelligence operations from the United States.⁹

(4) Use international courts

The United States has put its response to attacks and threats of terrorism in a state to state frame only for as long as it suits its goals. By refusing to treat those captured in the war against Afghanistan as prisoners of war, the US takes the picture out of the statist frame. The Bush administration argues that the prisoners are illegal combatants not covered by international law as stated in the Geneva Convention. At the same time, it has decreed that it will not apply its domestic principles of due process to non-citizen suspects apprehended in the United States or elsewhere. Thus the US declares before the world that any non-Americans whom it apprehends and claims to connect with terrorism will not be given the protection of the law.¹⁰ This stance is so outrageous that it has fomented dissent even within the Bush Administration and from within its most loyal ally, Britain. In response, the Administration has slightly altered its stated position, but not its treatment of prisoners.

When the United States began putting into place its plan for military tribunals for those captured, Vice President Cheney said, "Terrorists don't deserve the same guarantees and safeguards that would be used for an American citizens going through the normal judicial process".¹¹ This statement reveals that Cheney scorns the most elementary principles of due process: presumably it is up to judicial procedure to determine who is and who is not a criminal.

If the September 11 attacks are seen as crimes against humanity rather than against only the US, an international tribunal instituted by the United Nations, based on the model of those for the ex-Yugoslavia and Rwanda, with the processing judges coming from Western and Islamic countries would be appropriate. This would also have the advantage of not appearing as a conflict between America and Islam, but rather between the entire international community and a limited group of criminals. In the end *ad hoc* tribunals should be handed over to a permanent International Criminal Court, approved by the Treaty of Rome in July 1998, which has started to be implemented on April 12 2002. (The United States has announced its intention to withdraw its signature from this treaty, an unprecedented act.) "Had the International Criminal Court been in existence – noted the international lawyer Greenwood – and had the relevant states been parties to its Statute, the perpetrators of the 11 September atrocities could have been tried by that Court for Crimes against Humanity".¹²

We have heard several arguments against using international courts to prosecute persons suspected of performing or materially contributing to terrorist acts. Its too slow, too expensive and it would wrongly give terrorists a forum in which to air their ideas. We find all these reasons disingenuous. It

should not be any slower to pursue due process on an international level than on a state level; the speed the United States seeks seems to be at the expense of due process. Likewise, it should not be much more expensive to pay for an international trial than a state level trial, if both are fair. Finally, any public court proceeding, at any level, offers opportunities for actors to express their point of view on the alleged crimes; that is what they are for, and that is, of course, why the military tribunals the Bush Administration plans will not be open to public view.

(5) Narrow Global Inequalities

Since September 2001 many commentators have suggested that the vast disparities in wealth and well being between societies of the Northern Hemisphere such as the US, the EU, or Japan on the one hand, and the Middle East and South Asia on the other, be taken into account in understanding what causes and motivates individuals to join or form terrorist groups. We agree with those who respond that these structural injustices neither justify nor excuse criminal acts. Nor do these circumstances even explain terrorist acts, for there are many poor places that do not provide recruits for international terrorist organisations.

Still, a huge portion of the world's population lives in horrible poverty.¹³ We believe, as do many others in both the less developed and the more developed parts of the world, that this poverty persists at least partly because of policies of the rich states, private corporations based in those countries, and international organisations in which those states and corporations have disproportionate power. Even those sceptical of this claim, however, should condemn the apparent unwillingness of the people and government of the United States, Europe and Japan to effect significant transfer of capital, technological capacity and goods to raise the quality of life of the world's poorest people. There is no doubt that such indifference amidst affluence fosters resentment in many corners of the world, and endangers peace and prosperity for many outside the shantytowns.

At another tragic moment of history, with the defeat of Fascism at the end of World War II, the US understood that its security and prosperity depended on the rebirth of Europe. To enable this rebirth, the US dedicated a huge amount of resources to the Marshall Plan to rebuild the infrastructure of devastated European societies. No development aid program since that time has been so large in scale and effective. That this was done once should give hope that having the will opens the way to invest in poor societies to enable them to flourish. For decades, social movements and governments in the less developed world have demanded that the powerful economic actors of the world stop exploiting their resources and workers and start programs of real investment in the infrastructure and human beings of poor countries. The developed world remains largely unresponsive to this calamity. Official development assistance of the OECD countries in 1998 was 0.24 percent of their combined GNPs, and private funding is also paltry. The many attempts made by global civil society to increase the resources devoted to development have so far not been matched by concrete action.¹⁴

Even the Bush Administration cannot avoid acknowledging this moral imperative. It could not stay away from the UN sponsored conference on rebuilding Afghanistan in January 2002, as it walked out on the Conference on Racism in August 2001 and the Climate Change Conference in December. At the January conference the United States pledged a mere \$300 million for the

first year, and Japan and Europe each pledged \$500 million for the first two and a half years. Before the earthquake of March 2002, the World Bank estimated that at least \$4.9 *billion* was required for the two and a half years to help rebuilt Afghanistan at the most minimal level. Even at this moment of crisis, the rich countries of the world remain unbelievably stingy, and the poor people of the world are watching.

The world will not be able to move toward fair, inclusive and effective global governance without major reallocation of economic, technological and organisational capacities to reduce existing global disparities in the quality of life and institutional order. For such ends we need new and strengthened international institutions that better represent the voices and perspectives of all the world's peoples than existing international finance and development institutions – such as the World Bank – do, with more ability to promote global redistribution. Without the global equivalent of the Marshall Plan, even the best designed co-operative efforts to respond to transnational organised crime can only be defensive and intermittent in their effectiveness.

Conclusion

The terrorist attacks of September 11 2001 were a major challenge for the United States, its European allies, and the rest of the world. The Bush administration and its allies decided to retaliate against a country rather than by punishing individually the culprits. Those who opposed to the recourse to war were often asked: What should the US have done? In this chapter we have addressed this question by arguing that there was an alternative way to combat terrorism. We do not argue that all culprits would have been caught and taken to court, we do not believe that the implementation of the policies we have suggested would have been sufficient to destroy transnationally organised networks of killers. Certainly, the war undertaken has achieved neither of these goals. But we are sure that the number of 'collateral casualties' would have been much lower if such an alternative strategy were to have been followed. And, perhaps more importantly, the alternative reaction recommended here would have shown to the peoples of the world that the world's powerful leaders are able to support the rule of law and the instruments of justice also beyond its own borders.

Our suggestions should be conceived for the long term and they have not lost their value after the bloodiest part of the military operations against Afghanistan has passed. They derive from a general perspective on world politics that dates long before the tragic events of September 11. The vision, which we draw upon considers that it is both possible and necessary to develop global democratic institutions.¹⁵ A major new global threat, such as terrorism on the scale of September 11, should provide the chance for democratic countries of the world to nurture a global rule of law rather than a clash of fundamentalisms.

This article will be included in a collection of essays on this topic, to be edited by James Serba and to be published at Cambridge University Press.

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- ² The lower and upper estimations are reported from, respectively, the Project on Defense Alternatives and Marc Herold, University of New Hampshire. The latter report is available at http://www.cursor.org/stories/civilian_deaths.htm
- ³ See Richard Falk, "In Defense of 'Just War' Thinking", *The Nation*, December 24, 2001, pp. 23–25.
- ⁴ Brian Knowlton, "How The World Sees the U.S. and Sept. 11", *International Herald Tribune*, December 20th 2001.
- ⁵ See David Held and Mary Kaldor, "Justice in a Global Age", *Constellations*, Vol. 9, No. 1, March 2002.
- ⁶ It is not surprising that the petition supporting the conflict as a just war and signed by a number of important American intellectuals never mentions Afghanistan. Not even this document could establish a clear link between the action (the terrorist attacks) and the reaction (the war against Afghanistan). *What We're Fighting For*, Institute for American Values, released, February 2002 and available at http://www.propositionsonline.com/Fighting_for.html. Signatories include Amitai Etzioni, Francis Fukuyama, Samuel Huntington, Robert Putnam and Michael Walzer.
- ⁷ See David Zweshimo and Sbastian Rotella, "Interpol Hopes Terror Investigators Keep in Touch," *Los Angeles Times*, Sunday, December 23, 2001.
- ⁸ In William H. Luers (ed.), *Combating Terrorism: Does the U.N. Matter... and How*, UNA–USA, New York, 2002, p. 5.
- ⁹ See Phil Williams, "Crime, Illicit Markets, and Money Laundering", in P.J. Simmons and Chantal de Jonge Oudraat, ed., *Managing Global Issues: Lessons Learned* (Washington, DC: Carnegie Endowment for International Peace, 2001), pp. 106–150.
- ¹⁰ The case is considered in Christopher Greenwood, "International Law and the 'War against Terrorism'", *International Affairs*, Vol. 78, No. 2, 2002, pp. 301–317.
- ¹¹ Reported in the *International Herald Tribune*, November 16, 2001, p. 5.
- ¹² Christopher Greenwood, *op. cit.*, p. 317.
- ¹³ Data on world inequalities are scrutinized in the United Nations Development Program, *Human Development Report 2001*, Oxford University Press, New York, 2002. The ethical implications are addressed in an increasing vast literature, including Thomas Pogge (ed.), *Global Justice*, Blackwell, Oxford 2001.
- ¹⁴ Helmut Anheir, Marlies Glasius, Mary Kaldor (eds), *Global Civil Society 2001*, Oxford University Press, Oxford, 2001.
- ¹⁵ See, for example, David Held, *Democracy and the Global Order*, Polity Press, Cambridge, 1995; Richard Falk, *Law in an Emerging Global Village. A Post–Westphalian Perspective*, Transnational Publishers, Ardsley, 1998.

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