

CHOOSING A MORAL FRAMEWORK  
FOR THE  
WAR ON TERROR

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## **DISCLAIMER**

The conclusions and opinions expressed in this document are those of the author. They do not reflect the official position of the US Government, Department of Defense, the United States Air Force, or Air University.

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## ABSTRACT

This thesis discusses the two moral frameworks within which the United States can fight the war on terror. Since the war on terror is likely to be long, unlike previous conflicts fought over territory, and global in scale, the United States must mobilize and sustain domestic, international, and media support if it is to succeed. Operating within an accepted moral framework is the best way to achieve the necessary support. Criminal justice and just war are the two moral frameworks. The criminal justice framework denies terrorist groups all legitimacy, but has serious drawbacks in that it is designed specifically to protect the rights of those whom the government intends to prosecute. The just war framework allows all instruments of national power to be used against the enemy, but has serious drawbacks in that treating terrorists as legitimate combatants may encourage their behavior and allow them to seek overt support. Comparing terrorist groups to criminal organizations and to states shows that terrorist groups resemble states, in that their motivation is political rather than pecuniary. Further, a look at real-world examples of granting insurgents and terrorists political legitimacy reveals the inherent dangers of the process. It concludes that, when terrorist groups meet certain criteria, fighting the war on terror under the just war framework will not only allow the United States to bring its full resources to bear, but encourage the necessary domestic, international, and media support necessary to fight a protracted war.

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## Chapter 1

### Introduction

*We maintain, on the contrary, that war is simply a continuation of political intercourse with the addition of other means.*

—Carl von Clausewitz, *On War*

The world changed forever on December 7, 1941. A surprise attack from the air shattered America's comfortable illusion of insular safety, inflicting a "disastrous and humiliating defeat, [where] the United States suffered 3435 casualties."<sup>1</sup> Immediate declaration of war was the only possible response.

The world changed forever on September 11, 2001. A surprise attack from the air shattered America's comfortable illusion of insular safety, killing 3194 people.<sup>2</sup> Immediate declaration of war was the only possible response.

Unfortunately for the parallel, however, the air attack in 2001 used civilian airliners as weapons rather than the clearly identifiable military aircraft of the Japanese sixty years earlier. There was no particular state upon whom to declare war. The political imperative to *do something* thus found expression as a war on terror.<sup>3</sup>

A war on terror, however, is a more ambiguous proposition than was a war with Japan. The problems range from simple identification of the enemy, since terrorists tend

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<sup>1</sup> Joint Committee on the Investigation of the Pearl Harbor Attack (1945-46), National Archives and Records Administration Web Site, n.p., on-line, Internet, 12 February 2002, [http://www.nara.gov/nara/legislative/house\\_guide/hgch23cl.html](http://www.nara.gov/nara/legislative/house_guide/hgch23cl.html)

<sup>2</sup> "September 11, 2001 Terrorist Attack/Casualties," *Wikipedia*, n.p., on-line, Internet, 31 May 2002,

[http://www.wikipedia.com/wiki/September\\_11,\\_2001\\_Terrorist\\_Attack/Casualties](http://www.wikipedia.com/wiki/September_11,_2001_Terrorist_Attack/Casualties).

<sup>3</sup> I use President Bush's phrase, "war on terror," throughout to describe the conflict into which the United States has entered. President Bush uses the term consistently in his speeches, although the phrase "war on terrorism" is used by other government officials, and sometimes even in White House documents. Since "war on terror" was both the original phrase, and the President continues to use it, however, I have adopted it for the sake of consistency.

to operate covertly and across national borders, to larger issues like knowing when the war is over, since there are many disparate terrorist organizations worldwide—and more springing up each year.

## **The War on Terror**

Reducing the ambiguity involves answering two questions. First, who is the enemy? Is there a defined enemy upon whom America can wage war, as there was in 1941? Second, what support is necessary? Just as allied and domestic support (admittedly easy to come by after a surprise attack) enabled the American campaign against Japan, they will be necessary in the war on terror. Additionally, in this era of mass media and nearly instant global coverage, favorable media coverage will be an important enabler of success.

**Who is the enemy?** In his “Address to a Joint Session of Congress and the American People” nine days after the attacks on the World Trade Center and Pentagon, President Bush declared, “On September the 11<sup>th</sup>, enemies of freedom committed an act of war against our country.”<sup>4</sup> He said the war on terror would begin with Al Qaeda.<sup>5</sup> Al Qaeda, however, had already been at war with the United States for years.

On 23 August 1996, Osama bin Laden issued “The Declaration of Jihad on the Americans Occupying the Country of the Two Sacred Places” from his Al Qaeda headquarters in the Hindu Kush Mountains of Afghanistan.<sup>6</sup> In it, he urged all Muslims

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<sup>4</sup> George W. Bush, “Address to a Joint Session of Congress and the American People,” 20 September 2001, n.p., on-line, Internet, 20 May 2002, available from <http://www.whitehouse.gov/news/releases/2001/09/print/20010920-8.html>.

<sup>5</sup> Ibid.

<sup>6</sup> Peter L. Bergen, *Holy War, Inc.: Inside the Secret World of Osama bin Laden* (New York: The Free Press, 2001), 93-4.

to cause as much harm as possible to Israelis and Americans.<sup>7</sup> In 1997, during a television interview with CNN at his mountain hideout, he further stated that American civilians were not immune from attack.<sup>8</sup> The next year, in February of 1998, bin Laden formed the World Islamic Front for Jihad against the Jews and the Crusaders, which allied his Al Qaeda group with Egypt's Jihad Group, Egypt's Islamic Group, and Pakistani and Bangladeshi militant groups.<sup>9</sup> The declaration announcing the formation of the World Islamic Front was also bin Laden's clearest and broadest declaration of war upon the United States, claiming that its presence on the Arabian peninsula and sanctions against Iraq represented the oppression of Muslim peoples as well as the intentional killing of women and children, which made it the duty of every Muslim to fight and kill Americans and their allies, including civilians.<sup>10</sup> In October of 2001, he reiterated the basis for his war:

America is the head of criminals by creating Israel—this continuous crime for 50 years. The government, which is besieging the people of Iraq and killing them. Why [is] your government. . . supporting the rotten governments of our countries? What happened in the United States is a natural reaction to the ignorant policy of the United States. If it continues with this policy, the sons of Islam will not stop their struggle. The American people have to know what is happening to them now is the result of their support for this policy.<sup>11</sup>

Osama bin Laden's goals, however, are not limited to ousting Americans and American influence from the Middle East. That is only the first step in an armed attempt

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<sup>7</sup> Ibid, 94.

<sup>8</sup> Ibid.

<sup>9</sup> Ibid, 95.

<sup>10</sup> Ibid, 96.

<sup>11</sup> Osama bin Laden, "Osama Bin Laden's Statement to the 'Infidel' Nations (10-07-01)," Online Speech Bank, n.p., on-line, Internet, 30 May 2002, available from <http://www.americanrhetoric.com/speeches/binladen10-07-01a.htm>.

to re-create seventh-century Arabia. During his interview with CNN, “Bin Laden made no secret of the fact that he was interested in fomenting a revolution in Saudi Arabia, and that his new regime would rule in accordance with the seventh-century precepts of the Prophet Muhammad.”<sup>12</sup> His goals were thus closely aligned with the Taliban government in Afghanistan, and his support for and alliance with them natural. As Mullah Wakil, aide to Taliban leader Mullah Omar, put it, “We want to live a life like the Prophet lived 1,400 years ago and jihad is our right. We want to recreate the time of the Prophet and we are only carrying out what the Afghan people have wanted for the past 14 years.”<sup>13</sup> This is significant, because it places the war on terror in a political, rather than an ideological context. As Bergen points out, bin Laden does not criticize American culture, but rather its policies in the Middle East, nor has he attacked any American cultural icons, but rather symbols of American political power like embassies, warships, the World Trade Center, and the Pentagon.<sup>14</sup>

While Al Qaeda’s agenda may be relatively straightforward, its organization is not. That is to say, its *extended* organization is a veritable Gordian knot of alliance, influence, funding, training, and media, all with global reach. This extended organization, however, is more appropriately considered under the World Islamic Front, representing the cooperation and alliance of many groups with varied specific goals but an overarching vision provided by bin Laden and Al Qaeda. Bergen refers to the relationship as “Holy War, Inc.,” likening bin Laden to a corporate CEO and Al Qaeda

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<sup>12</sup> Bergen, 19.

<sup>13</sup> Ahmed Rashid, *Taliban: Militant Islam, Oil, and Fundamentalism in Central Asia* (New Haven: Yale University Press, 2000), 43.

<sup>14</sup> Bergen, 222.

proper to a board of directors, who provide direction, training, and finance to myriad specific enterprises throughout the world.<sup>15</sup>

That analogy, however, is problematic. It is not inaccurate, but it suggests one particular approach to the problems posed by Al Qaeda, while excluding others.<sup>16</sup> The United States does not normally declare war on multinational corporations, nor do they generally seek to liberate nations or re-create ancient societies. An alternative to the corporate analogy would be that of the ruling council of a political alliance, where the members cooperate for training and finance and share a common vision of Islamic society, though each has various domestic issues to consider. I will return to the issue of competing conceptual frameworks, since choosing the best one from which to fight the war on terror is the question at hand.

Whether we consider it the board of directors of a multinational corporation or the ruling council of a political alliance, Al Qaeda represents the heart and soul of the movement behind the attacks of last September. Headed by Osama bin Laden, Al Qaeda consists of a directing council and four subordinate committees: the military committee, the business committee, the *fatwah* and Islamic study committee, and the media reporting and newspaper committee.<sup>17</sup> It is this core group that provides ideological guidance, it is this core group that managed the terrorist training camps in Afghanistan, and it is this

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<sup>15</sup> Ibid, 30.

<sup>16</sup> For an in-depth discussion of how analogies affect policy decisions, sometimes with catastrophic results, see Yuen Foong Khong, *Analogies at War: Korea, Munich, Dien Bien Phu, and the Vietnam Decisions of 1965* (Princeton: Princeton University Press, 1992).

<sup>17</sup> Jamal Ahmed Mohammed al-Fadl, testimony before the United States District Court, Southern District of New York, *United States of America v. Usama Bin Laden, et al.*, s(7) 98 Cr. 1023, New York, 6 February 2001, 204-210, on-line, Internet, 2 June 2002, available from <http://web.elastic.org/~fche/mirrors/cryptome.org/usa-v-ubl-02.htm>.

core group that disburses funds.<sup>18</sup> It is on this core group, Al Qaeda, rather than the extended network, upon which I will focus in discussing the war on terror.

**What support is necessary?** The political pressure to *do something* in the wake of the September attacks, along with the continuing military operations in Afghanistan and the current restructuring of homeland defense responsibilities, may obscure an important consideration. Standards of conduct for warfighting are reasonably clear: the entire world understood exactly what to expect when America declared war on Japan in 1941. Standards of conduct for investigating, detaining, and prosecuting terrorist criminals are also reasonably clear: all of America knew what to expect as authorities closed in on, and finally captured, Ted Kaczynski, the notorious Unabomber. Although President Bush has adopted many of the metaphors of warfare, however, it remains unclear which set of expectations we should apply to the war on terror.

The question is not purely an academic one. The moral standard by which America defines the war on terror will have profound implications for its ultimate success. Choosing a moral frame of reference for conducting the war on terror will—positively or negatively—impact the depth and duration of domestic political support, the degree of international cooperation, and the tenor of media coverage.

I refer to the alternatives as moral frameworks because their role in guiding expectations is perhaps even more important than that of determining the legality of past actions. The war on terror will be a long one, according to President Bush.<sup>19</sup> As such, it will be important to explain American actions not only in terms of legality, but also in terms of right and wrong. Further, supporters and critics alike will expect America to

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<sup>18</sup> Bergen, 233-4.

<sup>19</sup> Bush.

take certain actions, based upon their perceptions of the framework within which America operates. When Afghani prisoners were taken to Camp X-Ray in Guantanamo Bay, Cuba, for example, some groups called for them to be brought to trial, while others insisted they be treated as prisoners of war.<sup>20</sup> Regardless of the expectation, however, people are likely to perceive failures not only as illegal, but also as *wrong*.

During his address to Congress and the American people, President Bush acknowledged the need for both domestic and international support in the war on terror. To the American people, he said, “I ask for your patience, with the delays and inconveniences that may accompany tighter security; and for your patience in what will be a long struggle.”<sup>21</sup> Clearly, he understands that domestic support is crucial to success in long-term conflicts. While domestic support certainly cannot guarantee victory, its absence can be fatal. Adopting an easily explained, fundamentally moral approach to the war on terror will facilitate gaining and maintaining domestic support for the duration.

President Bush also said, “This is not, however, just America’s fight.”<sup>22</sup> Given the far-flung nature of terrorism and terrorists, international support and cooperation will also be crucial for ultimate success. Not only will America require global access in its fight against terrorism, it will have to rely, to a certain extent, upon other states to participate. Not only did President Bush ask for help from other nations, he laid out a stark choice: “Every nation, in every region, now has a decision to make. Either you are with us, or you are with the terrorists.”<sup>23</sup> Adopting a traditional, obviously moral

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<sup>20</sup> *The Guardian*, “No 10 Backtracks on Camp X-Ray Britons,” London, 24 January 2002, n.p., on-line, Internet, 30 May 2002, available from <http://politics.guardian.co.uk/Print/0,3858,4342307,00.html>.

<sup>21</sup> Bush.

<sup>22</sup> *Ibid.*

<sup>23</sup> *Ibid.*

approach to its conduct will make that choice easier by providing the necessary framework to understand American actions.

One further support criterion seems warranted. America's experience during Desert Storm, Somalia, Kosovo, and most recently in Afghanistan point to the important role media plays in modern conflict. The only more interesting story than a great military victory, after all, is a great military debacle. The daily press briefings during Desert Storm and Kosovo seem to indicate the Department of Defense, at least, recognizes the key role the media plays in influencing public support. One way to avoid adverse media coverage is to adopt a demonstrably moral approach to American operations in the war on terror.

### **Alternative Moral Frameworks**

The question, then, is what moral framework America should adopt in its conduct of a war on terror. Since popular perception is that the world is a different place in the aftermath of September 11, 2001—just as it was after December 7, 1941—one approach would be to create a framework to address the unique aspects of the situation, allowing America maximum leeway to act in conducting the war on terror. Another approach would be to adopt criminal justice standards with which to combat terror, along the lines of the “war on drugs.” A third approach would be for America to adopt existing standards with respect to warfighting, following just war principles in a true war on terror.

While arguably the least restrictive course of action with regard to America's options when fighting terror, creating a unique moral framework would be a liability in

the kind of long-term conflict promised by a war on terror. First, the media would feel professionally obligated to explore, in depth, the ramifications of any creative endeavor with respect to American conduct of a war on terror, with potentially disastrous consequences if pundits line up in opposition. Second, a unique policy would need explanation to the public to gain and maintain domestic support, and explanations are less compelling than slogans—“bring the criminals to justice” and “win the war” are more effective calls for domestic support than the most cogent explanation of a new situation could possibly be. Finally, any attempt to apply a unique moral framework to fighting terrorism would probably polarize the international community, which already looks askance at America’s perceived cowboy history in the international arena. Such an approach, while perhaps most efficient for the conduct of operations, is wholly unsuitable for a long conflict in the real world.

The international reaction to the “detainees” being held by the United States at Camp X-Ray in Guantanamo Bay on Cuba provides an example. They are being held without access to the legal representation to which they would be entitled were they being held on criminal charges, yet they have not been accorded status as prisoners of war. Amnesty International was one of the first groups to object to their treatment in an interview with *Time*, saying, “More troubling [than the detention conditions] is the legal status and the fact that as far as we know these people are being treated as if they’re not legal personages.”<sup>24</sup> Their position is that “the Geneva Convention clearly dictates these people are POW’s[sic]—it’s not up to Donald Rumsfeld to determine otherwise.”<sup>25</sup> A

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<sup>24</sup> Jessica Reaves, “Scrutinizing Camp X-Ray,” *Time.com*, 24 January 2002, n.p., online, Internet, 30 May 2002, available from <http://www.time.com/time/world/article/0,8599,197159,00.html>.

<sup>25</sup> *Ibid.*

spokesman for the British Liberal Democrats had another take, responding to Rumsfeld's announcement that detainees could be repatriated on condition they were not set free, saying "If the British captives are delivered into the custody of government they can only be prosecuted if there is adequate evidence to show that they have committed criminal offenses under our law."<sup>26</sup> Earlier, Rumsfeld had characterized the reaction to US treatment of the detainees as "international hyper-ventilation," and President Bush had decided to apply the Geneva Convention to detainees identified as belonging to the Taliban, but not to those belonging to Al Qaeda, and neither would be classified as prisoners of war.<sup>27</sup> Nor has the confusion either died down or been confined to other countries. In May, a federal court in Norfolk ruled that one of the detainees, Yasser Esam Hamdi, was entitled to counsel, although the government immediately appealed, saying, "The military has determined that he should continue to be detained as an enemy combatant in accordance with the laws and customs of war."<sup>28</sup> Yet the detainees are still not classified as prisoners of war, and the other American citizen captured and detained faces criminal charges in a civilian court.<sup>29</sup>

The choice of moral frameworks, then, is between a warfighting and a criminal justice paradigm. An *ad hoc* approach does not facilitate the long-term domestic support, international cooperation, or favorable media response necessary for successful conduct of the war on terror. The choice of moral framework, however, should not be arbitrary.

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<sup>26</sup> BBC News, "Camp X-Ray Inmates 'May Go Home,'" 24 February 2002, n.p., on-line, Internet, 3 June 2002, available from [http://news.bbc.co.uk/1/hi/english/world/americas/newsid\\_1838000/1838259.stm](http://news.bbc.co.uk/1/hi/english/world/americas/newsid_1838000/1838259.stm).

<sup>27</sup> CBSNews.com, "More Arrivals at Camp X-Ray," 12 February 2002, n.p., on-line, Internet, 3 June 2002, available from <http://www.cbsnews.com/stories/2002/01/30/attack/printable326146.shtml>.

<sup>28</sup> CNN.com Law Center, "U.S. Moves to Stop Hamdi Meeting with Lawyer," 31 May 2002, n.p., on-line, Internet, 1 June 2002, available from <http://www.cnn.com/2002/LAW/05/31/justice.hamdi.appeal/index.html>.

<sup>29</sup> Ibid.

American policy makers should carefully examine the advantages and drawbacks of each, as well as the characteristics of Al Qaeda and other international terrorist groups. They must determine whether terrorists should be treated as combatants or criminals.

## **Method**

Michael Walzer, in concluding *Just and Unjust Wars*, reminds us that “the world of war is not a fully comprehensible, let alone a morally satisfactory place.”<sup>30</sup> The war on terror is certainly no exception, especially given the potential blurring of lines between criminal justice and just war. While I argue that American policy makers should choose one or the other moral framework, I recognize, as Walzer did, that certain situations, both in war and politics, present choices with no wholly satisfactory option. Both the criminal justice and just war approaches to the war on terror present serious practical and ideological downsides. Walzer discusses the tension brought about by the necessity to seek security and the simultaneous obligation to act morally, what he calls “the conflict between collective survival and human rights.”<sup>31</sup> The important question, of course, is when the choice is truly one of that magnitude. Such necessity is less common than it often seems in war.<sup>32</sup> On the other hand, abandoning the current *ad hoc* approach in favor of consistent application of either criminal justice or just war moral guidelines involves accepting appreciable risk.

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<sup>30</sup> Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 3<sup>rd</sup> ed. (New York: Basic Books, 1977), 327.

<sup>31</sup> *Ibid*, 325.

<sup>32</sup> *Ibid*, 324.

**Terrorism defined.** While there are as many ways to define terrorism and terrorist groups as there are people writing on the subject, I will begin with the definition in Title 22 of the United States Code:

The term “terrorism” means premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents, usually intended to influence an audience.

The term “international terrorism” means terrorism involving citizens or territory of more than one country.

The term “terrorist group” means any group practicing, or that has significant subgroups that practice, international terrorism.<sup>33</sup>

It is important to note the inherently unlawful nature of terrorism by this definition. Regardless which moral framework we choose, terrorists are either common criminals or war criminals.

President Bush targeted the war on terror specifically at terrorist groups “of global reach.”<sup>34</sup> Al Qaeda, as the first target of America’s war on terror, seems a reasonable standard by which to judge that global reach. With respect to applying a moral framework in the war on terror, then, “terrorist groups” will include only those exhibiting similar capability to organize and execute violence of international scope, as well as to control people and territory. Groups with significant state sponsorship are also included.

**Roadmap.** In choosing a moral framework, American policy makers must consider the ramifications of adopting a criminal justice versus a just war framework in fighting the war on terror. Will granting terrorists status as combatants be worth the greater freedom allowed under the laws of war? Will the political gain of denying

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<sup>33</sup> US Department of State, *Patterns of Global Terrorism 2001* (Washington, D.C., May 2002), xvi.

<sup>34</sup> Bush.

terrorists legitimacy outweigh restrictions on conduct imposed by a criminal justice model? Chapter 2 will explore these questions.

Additionally, policy makers should examine the difference or similarity of terrorist goals to criminal goals. Do terrorists generally want the same things as criminals? Chapter 3 will compare criminal, terrorist, and military organizations to determine if enough similarity exists to apply just war principles to terrorist groups.

Chapter 4 will look at historical examples where states have seen additional benefits by applying just war principles, as well as examples where benefits failed to materialize. El Salvador was able to end its conflict through successful negotiation after granting the FMLN political legitimacy. Israel was able to reduce the scope of its conflict by entering into a tacit agreement with Hizbollah to abide by the laws of war after that group made overtures by ceasing attacks across Israel's border. Israel's attempt to engage the PLO in legitimate political processes by creating the Palestinian Authority, however, was not as successful, perhaps because it was offered without real concessions by the PLO. Colombia's attempt to engage the FARC in negotiations similar to those that had worked in El Salvador failed, because the FARC had not remained true to their political ideals, becoming a *de facto* criminal organization.

Finally, Chapter 5 will apply the principles from earlier chapters to Al Qaeda. Is Al Qaeda sufficiently like the previous examples to make applying just war principles, and granting the legitimacy that implies, worth the drawbacks? In a long conflict, as the war on terror is likely to be, acting within an accepted moral framework is an important way to maintain the necessary domestic, international, and media support. An *ad hoc* approach runs a high risk of alienating one of those groups. While the implications are

significant, adopting a just war approach when terrorist groups meet specific criteria will allow America to gain and maintain the necessary support at home, abroad, and in the media.

## Chapter 2

### Comparing Moral Frameworks

*For sometimes it is right to try to succeed, and then it must also be right to get one's hands dirty. But one's hands get dirty from doing what it is wrong to do. And how can it be wrong to do what is right? Or, how can we get our hands dirty by doing what we ought to do?*

--Michael Walzer, "Political Action: The Problem of Dirty Hands"

Given the necessity in any long conflict for the United States to maintain domestic support, encourage international cooperation, and avoid negative media coverage, the question becomes, "Which moral framework is appropriate, under the circumstances?" For the reasons already stated, a completely *ad hoc* approach, while perhaps a better fit for what may be the unique nature of a war on terror, falls short in addressing the above three factors essential for success in a long global conflict. As Louis Manzano put it in his discussion of strategic bombing in World War II, "The lesson is that in American society warfighting will be severely hampered if the moral issue is not considered in planning and execution, and if the political and military leaders cannot provide a moral justification for their operations."<sup>35</sup>

What moral frameworks *are* appropriate, then? There are two generally accepted paradigms for addressing international aggression such as terrorism: warfighting and criminal justice. Either approach to the war on terror would provide the American

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<sup>35</sup> Louis Manzano, "Morality in War Fighting and Strategic Bombing in World War II," *Air Power History* 39 (Fall 1992): 35-6.

people, the international community, and the media the necessary understanding of, and appreciation for, the United States' actions as it prosecutes the war on terror.

While the traditional approach to terrorism has been to treat it as criminal activity, some were calling for a different approach as early as the late 1980s. Kenneth Roberts, in an essay entitled “The Legal Implications of Treating Terrorists as Soldiers,” argued that “the five benefits [of treating terrorists as soldiers] that accrue to the West, taken as a whole, have value in that they taint terrorism with the images of the atrocities of World War II, entitle the West to the privileges and obligations of the law of war, and empower the West to act militarily.”<sup>36</sup> He concludes that, “ironically, only by confessing that they are common criminals could terrorists escape the effects of being held accountable as soldiers.”<sup>37</sup>

The criminal justice approach, on the other hand, is appealing to policymakers—indeed, it has dominated the United States' approach to terrorism for the last three decades. The advantage of this approach is that it cedes no legitimacy to terrorists by classifying their acts as crimes and their personnel as criminals. Unfortunately, however, myriad jurisdictional issues as well as stricter burdens of proof complicate matters with this approach.

Additionally, one cannot choose a moral framework for action without considering the role morality plays (or does not play) in international relations. We may legitimately ask whether states are legal entities or moral actors, whether their actions should be informed by simple expediency or consider moral implications in addition. In

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<sup>36</sup> Kenneth Roberts, “The Legal Implications of Treating Terrorists as Soldiers,” *Conflict* 9, no. 4 (1989): 387.

<sup>37</sup> *Ibid.*

context of a war on terror, these concerns are especially relevant. Supporting the moral approach, Manzano asserts that “it seems clearer than ever that an effective strategy has to include ethical considerations, for the moral issues have been become [sic] more prominent in discussion since World War II.”<sup>38</sup>

### **What is a Moral Framework?**

Before discussing specific moral frameworks, of course, we must define the term—the sheer variety of taxonomies available for discussions of morality makes conversations without such definition perilous. One can approach moral theory in several ways, as explained by Secrest, Brunk, and Tamashiro:

Theories of moral obligation embody three principal types of moral reasoning. *Deontological* reasoning focuses on the *nature* of actions in judging their rightness, regardless of situational circumstances and the consequences of the actions. It is associated with the argument that no end justifies certain means, and with advocacy of rule-based precepts such as “Thou shalt not kill,” and “Thou shalt not murder.” *Teleological* reasoning evaluates actions based upon their consequences for the attainment of particular ends, which are defined by an interrelated theory of nonmoral value. This may be for either universal or non-universal others, depending upon whether there is an interrelated theory of *moral* value. Teleological reasoning is an “end justifies the means” approach. Finally, *mixed-deontological* reasoning stresses deontologically derived precepts, but holds that the circumstances and consequences of actions used in achieving valued ends is important in the evaluation of actions.<sup>39</sup>

A purely deontological approach would be quite restrictive, in that it ignores situational factors, and would pose the additional, perhaps insurmountable, problem of choosing a single consistent set of universal rules. A teleological approach would be unacceptable

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<sup>38</sup> Manzano, 49.

<sup>39</sup> Donald Secrest, Gregory G. Brunk, and Howard Tamshiro, “American Elite Views on the Conduct of War,” *Journal of Political and Military Sociology* 19 (Winter 1973): 198.

also, because it admits to no right or wrong, but only success or failure. Since international politics is, at best, an ambiguous process, a mixed-deontological approach seems warranted here: both rules and circumstances matter. Criminal justice and just war are both mixed-deontological approaches, in that they consider both rules and circumstance when evaluating actions.

What is the value of a moral framework, and how does it reap the domestic, international, and media benefits mentioned above? A moral framework, in this context, represents a normative template for evaluating behavior. Its benefits are twofold: the ability to explain and evaluate past action, and the ability to predict and to judge future action. By working openly within an explicit moral framework, for example, America could fix the terms of public debate—to its benefit or detriment, depending upon the behavior in question. Those participating in such a debate inherit the standards by which to evaluate and understand past behaviors, as well as to predict future actions. Depending upon whether America chooses a criminal justice or just war framework, for example, the public will predict (and expect) either trial or internment of captured terrorists.

But to what end? Because the frameworks in question are *moral*, the result of acting within one or the other will be an overall good. Because the frameworks in question are internationally accepted, the result of acting within one or the other will be accepted much more widely than otherwise might be the case. Although Michael Walzer discusses the rare situation in which *no* satisfactory outcome is possible, given the exigencies of international politics and warfare, one must assume that, much more often than not, acting within an accepted moral framework will result in greater good than

otherwise.<sup>40</sup> That is why such frameworks exist in the first place. Additionally, and perhaps more relevant to someone contemplating international political strategy, it stands to reason that actions taken within a traditional decision-making framework will garner greater acceptance than a purely *ad hoc* approach to a given situation, which requires each observer to apply a personal standard when evaluating the resulting actions.

### **Moral Frameworks in International Relations**

Having defined and compared moral frameworks in this manner, one may still wonder whether such concepts apply to international relations. Are states simply legal entities, or are they moral actors? While perhaps philosophically interesting, the question turns out to be moot: there is precedent for treating legal entities as moral actors, ethically and criminally liable for their actions. Certain provisions of civil and criminal law, for example, treat corporations as individuals liable for their actions.<sup>41</sup> Additionally, states are administered by people who are themselves moral actors, in the name of people who expect justice. States, and thus heads of states, who are empowered to act on behalf of them, act without foreknowledge of outcomes, and their actions have moral consequences (freedom or repression, justice or lawlessness), which is the very definition of what it means to be a moral actor. A moral framework is simply the normative template that guides behavior with moral consequences.

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<sup>40</sup> Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 3<sup>rd</sup> ed. (New York: Basic Books, 1977), 326-7.

<sup>41</sup> Jay M. Feinman, *Law 101: Everything You Need to Know About the American Legal System* (New York: Oxford University Press, 2000), 263.

States also have conflicting imperatives, as do individuals. The first of these is between security and freedom, the good of the whole versus the rights of the individual. William J. Perry, in his 1995 remarks to the Foreign Affairs Conference at the United States Naval Academy, summed up the dilemma:

Wise decisions about the use of force have a political, a military, and an ethical element. . . . The ethical element involves a judgment as to whether achieving our goals by military force is in keeping with America's fundamental respect for human life—the lives of our military personnel and the lives of people of other nations.<sup>42</sup>

Here, Perry highlights the inherent tension between collective security and individual rights. Policy makers need an ethical framework within which to approach such decisions.

States also face conflicting imperatives with respect to issues of sovereignty versus intervention, and these are especially relevant in context of a war on terror. The concept of state sovereignty, the international equivalent of individual rights, underpins both the statutory authority at the heart of any criminal justice framework and the *jus ad bellum* provisions of just war theory. Only “competent authorities,” meaning sovereign states, may wage war under the moral framework of just war. Only lawful governments, meaning entities of sovereign states, may create and enforce laws under the moral framework of criminal justice. Yet intervention is sometimes necessary. Stanley Hoffmann, in “The Politics and Ethics of Military Intervention,” asserts that, in many cases, the ethical choice is to intervene in states where crimes against humanity are being

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<sup>42</sup> William J. Perry, “The Ethical Use of Military Force,” *Defense Issues* 10, no. 4 (1995), 1.

committed, or where failed states cannot provide for their citizens.<sup>43</sup> Regardless whether the United States chooses a warfighting or criminal justice framework for acting morally in its war on terror, it must address this tension between sovereignty, which gives it the right and duty to act, and intervention, which seems to undermine the very concept of sovereignty.

### **Criminal Justice as Moral Framework for the War on Terror**

Criminal justice, according to University of New Haven professor Gerald Robin, “is based on the belief that criminal acts are an injury to all citizens of the state or nation because they are detrimental to social and political stability, civilized nationhood, and economic survival.”<sup>44</sup> Further, crimes are specific acts—or failures to act—codified by act of the local governing body, and which reflect the prevailing values of the society or certain groups within society at the time the laws are passed.<sup>45</sup>

**Characteristics.** Crimes are defined in terms of three factors: *actus rea* (the conduct itself), *mens rea* (the actor’s mental state), and the consequences of the act.<sup>46</sup> The first factor provides for distinctions within broad categories of actions. Reckless driving, for example, and drunken driving (which is also a reckless act) are considered different crimes. Additionally, the *mens rea* principle holds people individually responsible for their actions, also encompassing the concept of criminal intent. Someone

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<sup>43</sup> Stanley Hoffman, “The Politics and Ethics of Military Intervention,” *Survival* 35 (Winter 1995-6), 29-40.

<sup>44</sup> Gerald D. Robin, *Introduction to the Criminal Justice System: Principles, Procedures, Practice*, 2<sup>nd</sup> ed. (New York: Harper & Row, 1984), 2.

<sup>45</sup> *Ibid.*

<sup>46</sup> *Ibid.*, 2-3.

whose car malfunctions, for example, would generally not be held responsible for any apparently reckless driving as a result, whereas the drunken person is held to be responsible because the law assumes the drunkenness results from a voluntary act. Finally, an act's consequences factor into criminal justice calculations. An act in which no one is injured is generally considered less serious than one in which people are killed.

As we can see, the criminal justice moral framework considers both objective (statutory) and subjective (circumstantial) factors when determining the nature of crimes. Further, since the statutory portions of the law reflect the values of society within a given government's jurisdiction, such considerations vary immensely. It is a crime, for example, to serve draft beer in Montgomery, Alabama (with certain narrow exceptions), but not in Birmingham, Alabama. Other jurisdictions in the area outlaw the sale of alcohol entirely.

Another important facet of criminal justice as a moral framework is that it renders *individual* judgments. "The free will doctrine," according to Robin, "is a legal philosophy of personal responsibility for one's behavior, which is the basis of criminal accountability and punishment."<sup>47</sup> Further, these individual judgments are rendered through an adversarial system "based on the belief that the best way to get at the truth while providing fundamental fairness to the defendant is through a legal contest between two competent lawyers in a court of law presided over by a judge who sees that the rules of evidence and the defendant's constitutional rights are observed."<sup>48</sup>

**Benefits.** A criminal justice approach to the war on terror would provide several benefits. The first of these is that this is the traditional American approach, consistent

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<sup>47</sup> Ibid, 3.

<sup>48</sup> Ibid, 300.

with past practice and public understanding. According to Abraham Sofaer, former Legal Advisor to the Department of State,

Americans are particularly attracted to the law as a means for repressing violence, and are committed domestically and internationally to using law to control criminal conduct and to resolve disputes. They invoke the law almost instinctively, and repeatedly, assuming that it regulates international conduct, and, in particular, provides a system for bringing terrorists to justice.<sup>49</sup>

With respect to gaining and maintaining American popular support, the criminal justice framework has the advantage of requiring no change in traditional policy.

Another benefit of this approach is international acceptance. While there is not universal agreement among nations regarding how best to handle terrorism under the law, there is some degree of international cooperation with respect to detaining and extraditing criminals. According to Sofaer, “International law and cooperation in less controversial areas [than terrorism] have often proved reasonably effective.”<sup>50</sup> Within a criminal justice framework, then, there is a basis for international cooperation, despite a current lack of consensus regarding the specific problems posed by terrorism.

A third benefit of approaching the war on terror within the criminal justice moral framework is that it denies terrorist groups the very right to exist. Such a clear stance, much like that taken against drug cartels in the war on drugs, provides a compelling message with which to gain and sustain favorable media attention. Framing the public debate in this manner thus places terrorist groups on a par with gangs, the mafia, and drug

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<sup>49</sup> Abraham D. Sofaer, “Terrorism and the Law,” *Foreign Affairs*, 64, no. 5 (Summer 1996), 901.

<sup>50</sup> *Ibid*, 902.

cartels variously made up of thieves, rapists, murderers, pushers, and worse. Ideologically, this gives terrorist groups no quarter.

Finally, approaching the war on terror within the criminal justice moral framework allows for prosecution of all the terrorists and their knowing supporters. Depending upon certain jurisdictional considerations, discussed below, anyone who engaged in terrorist activity of any kind would be liable for prosecution, including those who engaged in conspiracy by helping plan, arrange, and finance the violence. Consistent with the basic principles of *actus rea*, *mens rea*, and consequence, terrorists would be individually liable for their criminal acts.

**Drawbacks.** There are also drawbacks to adopting the criminal justice moral framework for the war on terror. First, the American criminal justice system is based upon the notion that the rights of the accused outweigh the state's interest in prosecuting crime. This manifests in practice through the assumption of innocence, strict rules regarding law enforcement investigation procedure, and the adversary system.<sup>51</sup> Feinman notes that the burden is upon the state in the criminal justice system: "All through the process, up to the moment of conviction, the accused is presumed to be legally innocent. The state must meet a heavy burden to overcome this presumption, and it must follow all the rules in doing so."<sup>52</sup>

A further drawback is that other nations do not always cooperate with American investigators. After the Khobar towers bombing in 1996, for example, the Saudi Arabian

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<sup>51</sup> Feinman, 301.

<sup>52</sup> Ibid.

government would not allow FBI agents to interview suspects they had detained.<sup>53</sup> Arranging the necessary bilateral and multilateral agreements to allow American investigators access to citizens of other nations, or cooperating with existing law enforcement agencies of other nations will be a major challenge. As Sofaer points out, “The law has a poor record in dealing with international terrorism. Some terrorists are killed or captured during the course of their crimes, but few of those who evade these consequences are afterward found and arrested.”<sup>54</sup>

Additionally, the sheer multitude of different jurisdictions worldwide will present a major hurdle to effective investigation of international terrorism within the criminal justice framework. Several relevant types of jurisdiction pose problems. The first type simply refers to which actions are permissible in a given place. Conduct illegal in the United States may be perfectly acceptable elsewhere, hindering or preventing investigation or prosecution. The other two types of jurisdiction refer to which courts can try a given offense. Subject matter jurisdiction means that the chosen court must have the power to rule on the particular class of offense alleged, and personal jurisdiction means that the court’s rulings must be binding upon the parties involved.<sup>55</sup> While the former is not generally an issue, the latter can impact proceedings in unexpected ways. Even though he was arrested in the United States, for example, in connection with the attacks upon the World Trade Center and Pentagon, the French government initially offered

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<sup>53</sup> Eliot A. Cohen, *Obligations of Leadership: The Khobar Towers Bombing and Its Aftermath*, case study for The Paul H. Nitze School of International Studies (Washington, D.C.: Johns Hopkins University, no date), 2.

<sup>54</sup> Sofaer, 901.

<sup>55</sup> Feinman, 94.

consular help to Zacarias Moussaoui because they did not want one of their citizens subject to the death penalty.<sup>56</sup>

Criminal standards of evidence and proof are another drawback to the criminal justice approach to the war on terror. In addition to the restrictive rules of investigation, there are also strict requirements regarding the treatment and chain of custody of evidence in criminal trials. The famous murder trial of O.J. Simpson is perhaps a classic example of procedural flaws when handling evidence providing necessary doubt for a jury. Even a seemingly minor detail like putting a blood sample in a plastic bag rather than an approved container can give the defense a means of introducing doubt.<sup>57</sup> Doubt, of course, is all-important in a criminal trial, because, due to the presumption of innocence and the constitutional requirement of due process, the state must prove guilt beyond a reasonable doubt.<sup>58</sup>

Even to bring an accused criminal to trial, however, requires American investigators to extradite foreigners accused of crimes in the United States. Extradition is by no means an easy or a simple process, and its history with respect to allegations of terrorism is not encouraging. Terrorism is often politically motivated, and “political offenses” are exempt from extradition under international law.<sup>59</sup> While the United Nations has approved international agreements removing terrorism from the category of

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<sup>56</sup> Lee Dembart, “Death Penalty? Issue May Split Allies,” *International Herald Tribune*, 13 December 2001, n.p., on-line, Internet, 6 June 2002, available from <http://www.iht.com/articles/41741.html>.

<sup>57</sup> “Week by Week in the O.J. Simpson Criminal Trial: Week 12 (April 10-14, 1995),” *Court TV Case Files*, n.p., on-line, Internet, 6 June 2002, available from <http://www.courtstv.com/casefiles/simpson/criminal/summary/week12.html>.

<sup>58</sup> Feinman, 326.

<sup>59</sup> Sofaer, 906.

“political offenses,” some nations interpret those agreements quite loosely in the favor of suspected terrorists.<sup>60</sup> Even in cases where a nation is closely allied with the United States, extradition is by no means automatic, as the recent case of Lofti Raissi shows. The United States had hoped to extradite him from Britain on charges that he trained one of the pilots involved in the 11 September attacks, but a London court denied the extradition, citing lack of evidence.<sup>61</sup> While this remains a significant hurdle, European Union agreements have recently taken effect that aim to “simplify, harmonise, and speed up the extradition process.”<sup>62</sup>

### **Just War as Moral Framework for the War on Terror**

Choosing a single doctrine with respect to warfare is no easy task. There are many from which to choose: “The traditional approaches can be classified according to their restrictiveness on the conduct of warfare. In this order they are pacifism, just war theory, the supreme emergency doctrine, the retaliatory ethic, amoral reason of state, legalism, and the moral crusade or holy war,” according to Secrest, Brunk, and Tamshiro.<sup>63</sup> With the exception of pacifist ideals, which prohibit combat entirely, the others treat warfare as a moral act, within certain bounds. One must choose, of course, which restrictions to accept with respect to conduct during war.

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<sup>60</sup> Ibid, 907.

<sup>61</sup> “Pilot Beats U.S. Extradition Bid,” *CNN.Com*, 24 April 2002, n.p., on-line, Internet, 5 June 2002, available from <http://www.cnn.com/2002/WORLD/europe/04/24/inv.uk.hearing/>.

<sup>62</sup> “Speeding Up Extradition Across the EU,” *10 Downing Street Newsroom*, 21 March 2002, n.p., on-line, Internet, 5 June 2002, available from <http://www.pm.gov.uk/output/page4678.asp>.

<sup>63</sup> Secrest, et al, 197.

Of the moral approaches to warfare, just war theory is the most restrictive.<sup>64</sup> The supreme emergency doctrine is a subset of just war, except that it acknowledges a willingness to ignore just war rules if defeat seems imminent.<sup>65</sup> Since we do not embark upon the war on terror expecting to be defeated, or brought to the brink of defeat, this doctrine is unsuitable. Similarly, the retaliatory ethic, while perhaps viscerally appealing after the horrific attacks last fall, since it advocates an “eye for an eye” approach to warfare, is wholly unsuited to gaining and maintaining domestic, international, and media support, since the only moral difference between the two sides of such a war would be who did what to whom first.<sup>66</sup> Amoral reason of state doctrine is a teleological approach that considers only outcomes, allowing any action that guarantees victory.<sup>67</sup> Applying this approach to the war on terror would incur the fatal disadvantages of the *ad hoc* approach, making it wholly unsuitable. The moral crusade and holy war doctrines similarly allow any conduct that guarantees victory, although the moral sanctity of the cause, rather than simple expedience is the justification.<sup>68</sup> They, too, are unsuitable. Of the various frameworks in which to fight war, only the just war doctrine is suitable, in that it would allow the United States to gain and maintain the necessary domestic, international, and media support for the long war on terror.

**Characteristics.** Just war theory embodies two related but distinct principles: *jus ad bellum* (justness of the war) and *jus in bello* (justice in warfare). James Turner Johnson explains that, in just war theory, seven moral factors determine the *jus ad*

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<sup>64</sup> Ibid, 199.

<sup>65</sup> Ibid, 200.

<sup>66</sup> Ibid.

<sup>67</sup> Ibid, 201.

<sup>68</sup> Ibid.

*bellum*, or moral appropriateness of the war: “just cause, competent authority, right intention, reasonable hope of success, overall proportionality of good over harm, last resort, and the goal of peace.”<sup>69</sup> Additionally, once the decision to go to war is made, the *jus in bello* principles of proportionality and discrimination apply.<sup>70</sup>

With respect to *jus ad bellum*, or the decision to go to war, the first three of the seven criteria are most important.<sup>71</sup> In context of the war on terror, these three criteria mean that the United States, should it choose to operate within this moral framework, must not only make the case that its cause is just, but that its intentions are honorable (not, for example, to use the war to increase its sphere of influence). The United States, in the person of the President or Congress, is obviously such a competent authority. While just cause (self-defense and response to an attack) in the specific situation of the war on terror would not be hard to demonstrate, right intention would be a harder sell—as intentions generally are. The suspicion that the United States was using the war on terror to advance agendas other than those related to terrorism would undoubtedly be ever-present and require constant attention to allay.

More is required, however, than simply meeting *jus ad bellum* criteria. Once the United States justified the war itself, it would have a continuing responsibility to observe proportionality and discrimination criteria in each encounter. For Walzer, these responsibilities stem from the concept of noncombatant immunity: noncombatants have a right not to be harmed in the conduct of war, and it is incumbent upon soldiers to

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<sup>69</sup> James Turner Johnson, *Morality and Contemporary Warfare* (New Haven, Conn.: Yale University Press, 1999), 41.

<sup>70</sup> *Ibid.*, 36-38.

<sup>71</sup> *Ibid.*, 41.

discriminate between combatants, who are legitimate targets of violence, and noncombatants.<sup>72</sup> Even though these principles are relatively recent, according to Johnson, they have moved beyond mere guidelines into the realm of international law of war.<sup>73</sup> Controlling the ratio of destruction caused to the military goal sought is basic to these calculations. Should the United States accept the warfighting moral framework in its war on terror, one of its more difficult challenges will be distinguishing civilians from combatants in the process of upholding these principles.

**Benefits.** One of the great benefits of approaching the war on terror within a just war context is the resulting freedom of action. When a country is at war, it may bring all of the instruments of national power to bear on the situation legally. It may seek to negotiate, or it may use armed force, as with the overthrow of the Taliban government in Afghanistan.

Warfare has always been a part of international relations, also, so applying the just war moral framework to the war on terror will be understood by the international community. Indeed, international response to the 11 September attacks and President Bush's declaration of a war on terror, the UN Security Council denounced the attacks and restated America's inherent right of self-defense, the Organization of American States invoked the collective defense clause of the Inter-American Treaty of Reciprocal Assistance, and NATO invoked Article 5 of the Washington Treaty stating that an attack on one member was an attack upon all.<sup>74</sup>

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<sup>72</sup> Walzer, 316-17.

<sup>73</sup> Johnson, 134-5.

<sup>74</sup> United States Department of State, *Patterns of Global Terrorism 2001*, (Washington, D.C.: May 2002), x-xi.

An additional benefit of approaching the war on terror within the just war framework is that standards of proof are relaxed. While in combat, for example, there is no need to assume an enemy's innocence until proven guilty. When bombing Taliban and Al Qaeda positions in Afghanistan, for example, the presence of enemy soldiers in a given area was sufficient to allow bombing the position, as long as just war principles of proportionality and military necessity were followed.

Finally, even within the just war moral framework, those who violate the laws of war may be prosecuted for war crimes. The Nuremberg trials after World War II are the obvious example of this principle in action. More recently, however, a Bosnian Serb named Dusko Tadic was sentenced to 20 years in prison in 1997 after being convicted of war crimes including the rape, torture, and murder of prisoners in northern Bosnia during that conflict.<sup>75</sup>

**Drawbacks.** Approaching the war on terror within the just war moral framework also has serious drawbacks. First, accepting the just war framework entails accepting the legitimacy of attacks upon American military targets. While terrorists who deliberately attacked civilian targets would be subject to prosecution as war criminals, those who attacked military targets would not be subject to criminal prosecution. As long as they met certain other conditions within the laws of war, attacks such as that upon the USS Cole would not be war crimes under the just war framework.

Additionally, adopting the just war approach to the war on terror might seem to legalize political violence. Within just war, violence itself is not illegal, as it is under the criminal justice paradigm. It is merely that certain target sets are off limits (like

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<sup>75</sup> "The Bosnia War Crimes Tribunal," *Court TV Online*, n.p., on-line, Internet, 6 June 2002, available from <http://www.courttv.com/casefiles/warcrimes/>.

civilians). There is a real danger that groups would seek to take advantage of the situation, sparking an upsurge in terrorist activity. Indeed, the United States opted not to ratify the Geneva Conventions Protocol I because it defined combatants so broadly and gave them so much additional leeway that the United States feared it would legalize terrorism.<sup>76</sup>

A result of that ambiguity might be that terrorist groups, attempting to achieve combatant, and thus legitimate, status would be free to operate openly and seek state support for their activities. As Sofaer points out, the international community is deeply divided over the issue of non-state actors using violence for political ends.<sup>77</sup>

Once it decided to act within the just war moral framework, the United States would also be required to distinguish between combatants and noncombatants in fighting terrorist groups. Unlike states, however, which have clearly identifiable civilian populations and structures, and uniformed militaries, terrorist groups, like guerrillas, specialize in blending with civilian society to avoid capture. This is a problem even the laws of war fail adequately to address. According to Protocol I of the Geneva Conventions, which recognizes “that there are situations in armed conflicts where, owing to the nature of the hostilities,” non-traditional combatants might not wear distinctive uniforms, they must still carry their arms openly while deploying prior to attack, so that their opponents can distinguish them from civilians during the battle.<sup>78</sup> The flaw, of

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<sup>76</sup> Sofaer, 912.

<sup>77</sup> Ibid, 913.

<sup>78</sup> “Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I),” Office of the High Commissioner for Human Rights, n.p., on-line, Internet, 31 May 2002, available from <http://www.unhchr.ch/html/menu3/b/93.htm>. Although the United States is

course, is that such requirements cede the advantage and initiative always to the non-traditional forces, because they must only identify themselves when *they* are preparing to attack. There is no requirement for them to differentiate themselves from civilians at other times, making it hard for an adversary to mount an offensive.

A further drawback to acting within the just war moral framework to fight the war on terror is that doing so represents an erosion of traditional notions of state sovereignty. As we saw from the just war discussion earlier, only states traditionally have the right to use force for political means. Non-state actors are not competent authority with respect to establishing the *jus ad bellum* of just war. By extension, then, treating terrorists as if they enjoy the rights and responsibilities of fighting a just war involves treating them as if they were sovereign entities. Richard N. Haass, Director of the Policy Planning Staff at the US Department of State, acknowledged that traditional notions of sovereignty are changing in what he calls the post-post-Cold War world. Speaking to the Foreign Policy Association in New York, he said, “In the 21<sup>st</sup> century, the principal aim of American foreign policy is to integrate other countries and organizations into arrangements that will sustain a world consistent with U.S. interests and values.”<sup>79</sup> Notice the inclusion of organizations as well as countries, referring not only to the United Nations and other organizations of states, like NATO, but also to entities like the World Bank.<sup>80</sup> He goes

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signatory to Protocol I, it has no intent to ratify the treaty due to the fundamental problems involved in allowing non-state combatants to hide amongst the population until just prior to attack, among other reasons (see Sofaer for more of them).

<sup>79</sup> Richard N. Haass, “Defining U.S. Foreign Policy in a Post-Post-Cold War World,” *The 2002 Arthur Ross Lecture, Remarks to Foreign Policy Association*, 22 April 2002, n.p., on-line, Internet, 31 May 2002, available from <http://www.state.gov/s/p/rem/9632.htm>.

<sup>80</sup> Ibid.

on to say, “But over the past decade, we have seen an evolution in how the international community views sovereignty. Simply put, sovereignty does not grant governments a blank check to do whatever they like within their own borders.”<sup>81</sup> The concept of sovereignty is changing, and choosing to fight terrorism within the just war framework will perhaps modify it further.

Additionally, granting even tacit approval for non-state actors to engage in political violence, albeit within the strictures of just war, may have implications for domestic rule of law. While domestic insurrection is beyond the scope of this discussion, it seem reasonable to maintain that armed rebellion should remain both illegal and illegitimate where democratic means to achieve political change exist. Also, as we will see later, recognition of terrorist organizations as state-analogues for purposes of waging just war should be contingent not only upon their desire to force political change, but upon their demonstrated ability to perform sovereign functions within a specific geographic area or a given population. Domestically, then, as long as a state’s police forces could enforce the laws, and rebels did not actually control territory, they would not meet the criteria of legitimacy. Clearly, however, this is an area needing careful study.

Finally, adopting a just war framework to fight the war on terror, while it opens up the possibility of negotiated settlement and eventual reconciliation, there is no guarantee terrorist groups will either participate in diplomatic efforts, or do so in good faith. The cautionary examples of Northern Ireland and the Palestinian Authority make that abundantly clear. Negotiation may not always produce results.

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<sup>81</sup> Ibid.

## Comparing Criminal Justice and Just War

Given the characteristics detailed above, one sees the fundamental tradeoff the United States faces in choosing an appropriate moral framework for conducting its war on terror: denying terrorists legitimacy versus freedom of action. While choosing a criminal justice paradigm denies terrorists legitimacy by classifying them as criminals, it provides a restrictive environment with respect to gathering evidence and protecting civil rights within which the United States must act. On the other hand, choosing just war as its moral framework provides the United States great freedom of action, but grants terrorists legitimacy by classifying them as combatants.

Additionally, the just war framework operates upon collective, rather than individual, definitions of responsibility. Where guilt by association is anathema under the criminal justice framework, one may kill an enemy soldier in warfare based upon no more evidence than the uniform he is wearing or the professional company he keeps. Further, one extends certain professional considerations to those engaged in warfare. As long as enemy soldiers follow traditional laws of armed conflict, one presumes their honor and does not hold them responsible for overall *jus ad bellum* considerations.<sup>82</sup> In short, enemy soldiers are presumed to be honorable, and not liable for prosecution based upon a finding that the overall cause in which they were fighting was unjust. Conversely, while the criminal justice framework operates under strict presumptions of “innocent until proven guilty,” the attempt to prove individuals guilty remains central to one’s conduct.

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<sup>82</sup> Walzer, 38.

Finally, desired outcomes differ between the just war and criminal justice frameworks. While one could correctly state that “justice” is perhaps the overall goal of both moral approaches, they create it through very different means. The just war model, harking back to the *jus ad bellum* requirement that peace be the goal, focuses upon treating opponents as honorable combatants with whom ultimate reconciliation is not only possible, but is the desired end.<sup>83</sup> While there is precedent for prosecution of individuals guilty of violating the laws of war, securing such prosecutions is generally not the reason one enters conflict. Under the criminal justice framework, however, one focuses all activity upon securing conviction for criminal acts. One goes to war to secure a just peace, in other words, and war crimes convictions may or may not be a secondary goal. One pursues and prosecutes criminals, on the other hand, for the express purpose of convicting and punishing them, and a just peace is a by-product of that action.

## **Conclusion**

Although both criminal justice and just war provide fundamentally moral approaches within which America could gain and maintain domestic, international, and media support, each entails accepting serious drawbacks. A criminal justice approach accepts limited parameters within which to act, because protecting civil liberties is a higher priority than operational effectiveness. A just war approach tries to maximize freedom of action by bringing all aspects of national power to bear, but effectively grants terrorist groups privileges analogous to sovereign states. Choosing one or the other is important, however, because a purely *ad hoc* approach, as we saw earlier, does not

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<sup>83</sup> Johnson, 50.

provide the ability to sustain domestic, international, and media support, which are necessary for long-term success in the war on terror.

Yet how should American policy makers choose between the two paradigms? Should they choose based solely upon utilitarian considerations of freedom of action and likelihood of success? Unfortunately, such a choice would incur the very drawback that made an *ad hoc* approach to the war on terror untenable. It may appear random or capricious. Such a perception, of course, would undermine domestic support, international cooperation, and favorable media coverage, the three areas necessary for long term success.

The United States must answer one further question if it is to avoid such perceptions of caprice: is there sufficient basis to treat terrorist groups as state-equivalents in order to apply just war principles, or do terrorist organizations have more in common with organized crime? The next chapter will attempt to answer that question.

## Chapter 3

### Criminals, States, and Terrorists

*Look to the essence of a thing, whether it be a point of doctrine, of practice, or of interpretation.*

—Marcus Aurelius Antoninus, *Meditations*

It is important to choose a moral framework carefully. An *ad hoc* approach to the war on terror would potentially isolate the American government from its citizens, the media, and other countries by not offering a consistent, universally accepted moral framework within which to evaluate its past actions and predict its future ones. An arbitrary choice of moral framework could cause similar problems. The goal, as discussed earlier, should be to provide a consistent moral framework within which American citizens, the media, and other countries may evaluate, understand, and accept American actions. Although an arbitrary choice would offer such a consistent framework, its legitimacy might be questionable, polarizing rather than mobilizing the base of popular and international support necessary to fight a long war.

To avoid the appearance of arbitrary choice, the decision to adopt either a criminal justice or just war moral framework in fighting the war on terror must be based upon criteria that will classify terrorist organizations either as criminal or as state-analogues. Criminal organizations are characterized by their search for profit. States are characterized by their territorial sovereignty and their constitutional independence.<sup>84</sup>

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<sup>84</sup> David Armstrong, *Revolution and World Order: The Revolutionary State in International Society* (Oxford: Clarendon Press, 1993), 245.

Examining each, in turn, will allow us to find the essence of criminal organizations and of states, and to compare those with terrorist groups as a means to determine which moral framework to apply.<sup>85</sup>

### **Criminal Organizations**

International organized crime provides the best comparison to states for this purpose, because the similarities are sufficient to make the comparison worthwhile, yet the differences substantial enough to allow meaningful distinction. Individual criminals acting alone obviously provide no meaningful comparison, and, by extension, individual terrorists acting alone, like Ted Kaczynski, are best considered criminals. Three examples illustrate various characteristics of international organized crime: the Neapolitan mafia, Nordic chapters of the Hell's Angels motorcycle gang, and Nigerian advance fee frauds.

***Camorra.*** The Neapolitan mafia, the *Camorra*, is composed of competing factions: the urban *Nuova Famiglia*, and the suburban *Nuova Camorra Organizzata*.<sup>86</sup>

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<sup>85</sup> Evaluating terrorist groups in this manner may seem somewhat odd, in that organized crime and states are two very different kinds of organization. From a third-party state perspective—that of the United States embarking upon a war on terror—however, the comparison is relevant. Crime is generally a problem internal to states, and is handled domestically through sovereign powers using the criminal justice moral framework. Warfare, on the other hand, is usually a problem external to states, handled internationally between sovereign equals using the just war moral framework. Because of their transnational character, terrorist groups such as Al Qaeda represent a classification dilemma, in that they seem either to be at the very high end of what could be called international organized crime (mandating a criminal justice approach) or at the very low end of what could be called states (mandating a just war approach).

While the *Nuova Camorra Organizzata* is a local phenomenon, the *Nuova Famiglia* has expanded into national and international drug trafficking, arms deals, and money laundering.<sup>87</sup> For all that its influence is transnational in scope, however, the *Nuova Famiglia* is neither rigidly organized nor centrally directed, but rather operates, as the name suggests, along the lines of a family. When the organization switched, for example, from the black-market cigarette trade into drugs, “an unofficial committee was formed among its employees, of workers who suddenly found themselves without wages; the committee publicly expressed its ‘concern’ at the crisis in the cigarette sector.”<sup>88</sup> As a result of spontaneous internal pressure due to lost wages, the organization expanded into the drug trade.

The *Nuova Famiglia* also “maintains excellent business relations with national criminal organizations and has considerable knowledge and experience of the dynamics of transnational economics.”<sup>89</sup> Additionally, they have “access to international financial bodies—among them the EEC—and consequently can launch operations of a similarly international nature.”<sup>90</sup> Drugs and arms seem to be the big money-makers for the *Nuova Famiglia*, and the dynamics of their competition with the *Nuova Camorra Organizzata* are rooted in “the respective organizations, on entrepreneurial and commercial experience.”<sup>91</sup>

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<sup>86</sup> Vincenzo Ruggiero, “The Camorra: ‘Clean’ Capital and Organized Crime,” in *Global Crime Connections: Dynamics and Control*, ed. Frank Pearce and Michael Woodiwiss (Toronto: University of Toronto Press, 1993), 151-2.

<sup>87</sup> Ibid, 152-154.

<sup>88</sup> Ibid, 153.

<sup>89</sup> Ibid.

<sup>90</sup> Ibid.

<sup>91</sup> Ibid, 155.

As with any other business, the *Nuova Famiglia's* primary motivation is profit. From their humble beginnings in protection rackets to their current involvement in money laundering for international drug traffickers and arms dealers, they have been primarily market-driven.<sup>92</sup> Additionally, “its profits are not simply converted into status-symbols for the members of its higher echelons but are more widely distributed, in the form of social opportunity and material wealth.”<sup>93</sup> The *Camorra* is about wealth and is fundamentally a business, with a business’s imperatives and a profit-sharing plan with its employee-owners.

It was not always so, however. The *Camorra* originated as criminals, but also as a force for order in lawless areas, taking their name and their tradition as “men of honor” from a short story by Cervantes about a naïve robber.<sup>94</sup> Whereas the old *Camorra* felt a duty to the people, the new organization, while donning the trappings and rituals of the old school, does not live up to that tradition. In an interview just before his death, the last of the traditional mafia leaders “mourned the end of an era—that of the men of honour who succoured the people—and condemned the present, dominated by cruel, greedy and unscrupulous individuals.”<sup>95</sup>

Although it claims the legacy of the past, the essence of the new *Camorra* is that of a ruthless international business in drugs and arms, with a “vertical and fragmented structure.”<sup>96</sup> They are territorial in that they are an urban phenomenon, but their

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<sup>92</sup> Ibid, 148-53.

<sup>93</sup> Ibid, 156.

<sup>94</sup> Ibid, 144.

<sup>95</sup> Ibid.

<sup>96</sup> Ibid, 157.

territoriality is in the sense of controlling regional market share rather than providing for the stability and order of local communities.

**Nordic Hell’s Angels.** In contrast to the informally organized *Nuova Famiglia*, the Nordic chapters of the Hell’s Angels are strictly organized. Nearly anyone, from students to unemployed workers to white-collar professionals, could work for the *Camorra*.<sup>97</sup> In contrast, applicants for the Hell’s Angels—white males over 21 only—must not only submit an application and pass credit and background checks, but must prove their toughness by committing specified crimes.<sup>98</sup> There is no global Hell’s Angels structure: although each new chapter is issued a charter from the “mother chapter” in Oakland, California, “there is no international leader, and every member is considered equal.”<sup>99</sup> At the local level, however, Hell’s Angels chapters are organized almost militarily. Each chapter has a president, one or more “road captains,” a sergeant at arms who keeps order, and even a warlord during conflict.<sup>100</sup> Members wear distinctive black vests with patches and artwork, called “colors,” which detail their chapter affiliation, drug use/preference, and whether they have been in prison.<sup>101</sup>

According to the US Department of State, “Hell’s Angels has been attempting to control the world’s drug market and is the fastest growing organized crime group in the United States and Europe.”<sup>102</sup> Although similarly transnational in the scope of their interests, the Hell’s Angels’ approach is distinctly less “white collar” than that of the

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<sup>97</sup> Ibid, 152-3.

<sup>98</sup> Peggy Brown, “Nordic Motorcycle Gangs,” *Issues in Global Crime* (May 1998), 84.

<sup>99</sup> Ibid.

<sup>100</sup> Ibid, 87.

<sup>101</sup> Ibid.

<sup>102</sup> Ibid, 84.

*Camorra*. Until a cease-fire in 1997, for example, they were engaged in a bloody turf battle with rival gangs for control of the drug trade in Nordic countries.<sup>103</sup> In the absence of fighting, however, they are “building up their financial base with illegal activities involving drugs and weapons.”<sup>104</sup> As with the *Camorra*, trafficking in drugs and arms is their mainstay.

Hell’s Angels is fundamentally a business seeking control of the world’s drug trade, as mentioned above. Their expansion into Nordic countries, and the ensuing gang war, was in pursuit of that goal.<sup>105</sup> Oddly enough, they are also now a “legitimate nonprofit organization in the United States with their trademark patented.”<sup>106</sup> Like the *Camorra*, their territoriality is in pursuit of market share. Unlike the *Camorra*, though, they have no tradition of helping the unfortunate. They revel in their tough, outlaw image, instead, and many wear “1%” patches as part of their colors, proudly claiming membership in the 1% of motorcycle clubs dedicated to criminal activity.<sup>107</sup>

**Nigerian Advance-fee Fraud.** In contrast to the familial *Nuova Famiglia* and the loosely militaristic Hell’s Angels, those committing advance fee fraud “include university-educated professionals who are the best in the world for nonviolent spectacular crimes.”<sup>108</sup> Teams of criminals posing as businesspeople and Nigerian government officials perpetrate these frauds. The teams, however, are more than temporary ad hoc

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<sup>103</sup> Ibid, 78.

<sup>104</sup> Ibid, 79.

<sup>105</sup> Ibid, 76.

<sup>106</sup> Ibid, 84.

<sup>107</sup> Ibid, 85.

<sup>108</sup> Advance fee fraud is any of various confidence schemes in which Nigerian criminals attempt to lure foreign businesspeople into phony investment opportunities. Andy Corsun, “Nigerian Advance Fee Fraud,” *Issues in Global Crime* (May 1998), 29.

arrangements in search of a quick profit: not only can they “run this ruse for months or even years, depending on the gullibility of the victim,” but if one team cannot exploit a given situation, it may sell the scam to another team.<sup>109</sup> These teams often operate out of their homes or even front companies and resemble nothing so much as entrepreneurial business partnerships.

In further contrast to the Hell’s Angels or *Camorra*, those perpetrating advance fee fraud in and from Nigeria are selling strictly illusory services. Although there are many variations, all advance fee fraud schemes “are unsolicited, emphasize the urgency and confidentiality of the deal, and require the victim to pay various government and legal fees and taxes before receiving what turns out to be nonexistent money.”<sup>110</sup> The criminal teams attempt to lure victims to Nigeria to verify the legitimacy of the fraudulent business deal. These teams rely on the victim’s unfamiliarity with the country to gain “total control over the victim’s every move.”<sup>111</sup> Various team members pose as businesspeople or government functionaries to extort a long series of fees and bribes prior to concluding a deal for additional payments by the victim. If the victim consents to the payments, he or she is allowed to return home and the fraud continues; if not, he or she will be threatened and abused into cooperating.<sup>112</sup>

There can be little doubt as to the profit motive of those perpetrating advance fee fraud in Nigeria. The teams target individual victims with promises of illicit gain—for a small up-front investment.<sup>113</sup> Thereafter, as shown above, every act is designed to wring

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<sup>109</sup> Ibid, 33-35.

<sup>110</sup> Ibid, 36.

<sup>111</sup> Ibid, 35.

<sup>112</sup> Ibid.

<sup>113</sup> Ibid, 36.

as much money as possible from the victim before he or she balks. Like the others, this is a business geared toward maximizing profit through illicit activity. Interestingly, the advance-fee frauds flourish because the Nigerian government is unable to create a stable business environment, despite efforts by the United States and thirty-eight other governments “to impress upon them the serious nature of this problem.”<sup>114</sup> The *Camorra*, on the other hand, relies on the state to provide a stable business environment in which it can operate its protection rackets and black market activities.

**Organized Crime Summary.** The common thread among criminal organizations seems to be the profit motive. While the organizational structures of the *Camorra*, the Hell’s Angels, and the teams perpetrating advance fee fraud in Nigeria are very different, they are organized to maximize profit in the markets in which they compete. Although each goes about business in a different manner, despite drug and arms trafficking being common to both the *Camorra* and Hell’s Angels, their behaviors are designed to maximize profits in their particular markets. Although the *Camorra* and the Hell’s Angels are territorial, they regard territory in terms of market share. While they are structured to prey upon the population, they are not capable of actually administering territory. The essence of organized crime is the search for profit.

## **States**

Having looked at the essence of organized crime, we must now look to the essence of the state as international actor before classifying terrorists in order to determine the appropriate moral framework in which to continue the war on terror. We

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<sup>114</sup> Ibid, 47.

look at states because “since 1648 the dominant form of international society has been the ‘Westphalian conception’ of a loose association of sovereign states.”<sup>115</sup>

States are the traditional target of just war, as criminal organizations are the target of the criminal justice system.<sup>116</sup> States have two distinguishing characteristics: sovereignty and territory.<sup>117</sup> They exist within and relate to each other through an international community that has evolved norms and laws of its own.<sup>118</sup> That community, in turn, has given rise to international actors who are not states, but enjoy some of the rights and responsibilities normally reserved to states. A look at the essential characteristics of sovereignty and territory, as well as the newer phenomenon of “virtual states,” will provide the basis for comparing terrorist groups, states, and criminal organizations so we may determine whether organizations such as Al Qaeda have more in common with states or organized crime.

**Sovereignty.** The modern concept of sovereignty is based on the rational ideal of the rule of law. In the 16<sup>th</sup> century, Jean Bodin sought to formulate a nonreligious idea of government in which the rule of law, rather than the force and guile of which Machiavelli spoke, predominated, and in which the sovereign’s duty was to create and enforce

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<sup>115</sup> Armstrong, 40.

<sup>116</sup> Organized crime, of course, represents the most lucrative of criminal justice targets, rather than the sole target. Similarly, while the just war tradition speaks of states as the traditional participants, insurgencies are one case where one of the actors is not a state. Even in such cases, however, the state actor fighting an insurgency is expected to apply the just war principles to such combat. Regardless of the opponent, the *jus in bello* requirements of discrimination, proportionality, and military necessity apply.

<sup>117</sup> Walter C. Opello, Jr. and Shephen J. Rosow, *The Nation-State and Global Order: A Historical Introduction to Contemporary Politics* (Boulder, Colo.: Lynne Rienner, 1999), 7.

<sup>118</sup> Armstrong, 200.

domestic laws in harmony with natural and divine laws.<sup>119</sup> Thomas Hobbes, in his 1651 *Leviathan*, took the idea of rule of law further by discarding the ideas of divine and natural law and “inventing the ‘state’ (or, to use his own synonym, ‘commonwealth’) as an abstract entity separate both from the sovereign (who is said to ‘carry’ it) and the ruled.”<sup>120</sup> In the Hobbes model, the sovereign state created rational laws by which to govern domestic society, but itself existed in an anarchic international system where force was the only law.<sup>121</sup> These notions have evolved so that today, “sovereign statehood . . . means, essentially, that the sole source of legitimate authority over a group of individuals resides in their state and not in some external source.”<sup>122</sup>

Besides creating and maintaining domestic order, the other traditional sovereign function of the state is to wage war.<sup>123</sup> The need to maintain security or to assert itself in the anarchic international environment envisioned by Hobbes drove the formation of many social, economic, and industrial aspects of modern states.<sup>124</sup> Since the international situation is not one of constant war, however, diplomacy as an institution responsible for nonviolent means of state interaction has evolved alongside other state functions.<sup>125</sup>

The dual requirements of maintaining domestic order and ensuring security in the anarchic international environment imposed increasing burdens upon the state in terms of managing the different activities for which it became responsible. Thus, the growth and

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<sup>119</sup> Martin van Creveld, *The Rise and Decline of the State* (Cambridge: Cambridge University Press, 1999), 176-7.

<sup>120</sup> *Ibid.*, 179.

<sup>121</sup> *Ibid.*

<sup>122</sup> Armstrong, 245.

<sup>123</sup> Creveld, 336.

<sup>124</sup> *Ibid.*

<sup>125</sup> Armstrong, 245.

sophistication of bureaucracy has closely paralleled that of the state.<sup>126</sup> In modern liberal democracies, which they term “managerial states,” Opello and Rosow note that the state has become indistinguishable from the bureaucracy, which “continuously monitors, organizes, controls, and regulates the social, economic, and political activities within it [the state].”<sup>127</sup> Sovereignty and bureaucracy are inextricably linked in modern states.

**Territory.** Along with sovereignty, territory is one of the basic characteristics of states. As Crevelde puts it, “As time passed the ability of a political organization to be represented by a colored patch on a map of the globe grew into one of the most important symbols of statehood.”<sup>128</sup> In modern times, this drive for territorial statehood reached the point where “no space on the planet, except the open oceans, was left free from the control of a sovereign state, and even the oceans were regulated by international organizations created by sovereign states.”<sup>129</sup>

These facts are important for two reasons. First, territory delimits sovereignty. A state is sovereign, having the ultimate power to ensure the rule of law within its borders.<sup>130</sup> Outside its borders, however, a state no longer exercises the prerogatives of sovereignty, except to acknowledge, through diplomatic courtesies, the co-equal sovereignty of its peers.<sup>131</sup> Second, the maps are full. Those hoping to create new states thus enter into a zero-sum game with respect to territories of existing states. It is certainly possible to create new states peacefully, as the breakup of Czechoslovakia in

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<sup>126</sup> Crevelde, 142.

<sup>127</sup> Opello and Rosow, 133-4.

<sup>128</sup> Crevelde, 144.

<sup>129</sup> Opello and Rosow, 244.

<sup>130</sup> Armstrong, 199.

<sup>131</sup> Ibid, 246-7.

1993 shows. Most often throughout history, however, states formed through the violent processes either of conquest or of liberation.<sup>132</sup>

**Virtual States.** Rosecrance describes the economic trends in the latter half of the 20<sup>th</sup> century that have increased global interdependence and decreased first-world industrialization and reliance on territory for the creation of wealth as the evolution of “virtual states.”<sup>133</sup> His vision of universal devaluing of territory as states switch their economies to the service and high-level manufacturing sectors while exporting industrial tasks to less-developed states is rather optimistic, but contains an element of truth: control of territory is not always a requirement to enjoy certain benefits of statehood. For him, Hong Kong, Taiwan, and Singapore represent fully virtual states, which rely on intellectual rather than territorial wealth.<sup>134</sup>

A current look around the international community, however, reveals international actors perhaps more deserving of the title “virtual state,” in that they enjoy some of the benefits and responsibilities of states without the traditional requirement to govern territory. The most obvious of these is the United Nations. Although it has no “colored patch on a map” to call its own, the United Nations enjoys many state-like privileges: its Security Council resolutions function almost as laws internationally, it has the power (again through the Security Council) to employ armed forces to enforce its decisions, and its delegates are granted ambassador status and diplomatic immunity as if they represented a sovereign entity.<sup>135</sup>

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<sup>132</sup> Creveld, 263.

<sup>133</sup> Richard Rosecrance, *The Rise of the Virtual State: Wealth and Power in the Coming Century*, (New York: Basic Books, 1999), xii.

<sup>134</sup> *Ibid*, 120.

<sup>135</sup> Creveld, 384-5.

Nor is the United Nations as virtual as other entities that enjoy state-like privileges. It is, after all, composed of member states, and those member states participate in the United Nations decision-making process. The International Committee of the Red Cross, for example, is a private organization that enjoys many of the benefits of sovereign status.<sup>136</sup> Not only is the organization assigned official duties by international treaties like the Geneva Conventions, but many

[states] recognize it as an international legal entity and grant it the privileges and immunities normally enjoyed by intergovernmental organizations. These include immunity from legal process, which protects it from administrative and judicial proceedings, and inviolability of its premises, archives, and other documents. ICRC delegates enjoy a status similar to that of officials of intergovernmental organizations.<sup>137</sup>

In 1993, the organization, headquartered in Geneva, signed an agreement with the Swiss government “which recognizes the institution’s international legal personality and confirms its independence vis-à-vis the Swiss authorities.”<sup>138</sup> The International Committee of the Red Cross is thus *entirely* of international character, subordinate to no state, as if it were sovereign, but lacking both traditional sovereignty and a territory in which to exercise it.

**State Summary.** We saw earlier that the essence of organized crime was the search for profit. It is a business. States, on the other hand, exist as political organizations whose primary characteristics are sovereignty and territoriality. In the

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<sup>136</sup> “What is special about the ICRC’s status?” extract from *ICRC: Answers to Your Questions*, 1 August 1998, n.p., on-line, Internet, 15 June 2002, available from <http://www.icrc.org/Web/eng/siteeng0.nsf/iwpList109/6D07AE40B73BA514C1256B6600597CD1>.

<sup>137</sup> Ibid.

<sup>138</sup> Ibid.

modern conception, the population cedes certain freedoms to the state in exchange for domestic order and external security.<sup>139</sup> Sovereignty thus exists to provide domestic order and international security.

Territory, the other essential character of modern states, exists to delimit state sovereignty. Within its territory, there is no higher authority than the sovereign; outside its territory, the sovereign is one among equals in the international community.<sup>140</sup> Whereas organized crime seeks to control territory in terms of market share of a given illicit commodity, states seek to control territory in terms of social and political order.

Finally, states have evolved bureaucratic processes and institutions largely as a means to make war more efficiently.<sup>141</sup> Even within its borders, the state reserves legitimate use of violence for itself, as a means of keeping order.<sup>142</sup> Whether directed internally to maintain order, or externally to maintain security, directing violence for political purposes is one of the primary functions of state bureaucracy. Criminal organizations, on the other hand, use violence in service of their business objectives, and their organizations are designed to maximize their profits.

### **Terrorist Groups**

Having examined both organized crime and states, we turn now to terrorist groups. Since organized crime and states differ most strikingly in their *raison d'être*, determining whether they most resemble organized crime or states in this regard is the

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<sup>139</sup> Opello and Rosow, 92-3.

<sup>140</sup> Armstrong, 199/246.

<sup>141</sup> Creveld, 142.

<sup>142</sup> Ibid, 170.

first step in choosing the appropriate moral framework for the war on terror. Next, a look at terrorist group structure should provide further insight into their essential nature. Finally, examining the way terrorist groups treat territory and population will add to our understanding.

**Purpose.** According to Laqueur, “Terrorists by and large are not primarily interested in gain and glory, but instead want a state or a society in their own image, cleansed of their enemies.”<sup>143</sup> Their goals are essentially political. Further, Osama bin Laden has openly declared war on the United States.<sup>144</sup> His war is designed to instigate revolution in Saudi Arabia, to institute “rule in accordance with the seventh-century precepts of the Prophet Muhammad.”<sup>145</sup> The insistence they are at war is a common thread among terrorist groups. When asked why Hamas allowed their bombers to kill innocent Israeli civilians, Abdul Aziz Rantisi, a founding member, “answered in military terms, echoing the words that one of his colleagues used in discussing these matters with me in an earlier interview: ‘We’re at war.’”<sup>146</sup>

Laqueur also notes, “It used to be said in the 1970s that terrorists do not want many corpses but merely a big bang. But this referred to the terrorists of the extreme left in Europe and Latin America, not the very different species in Asia and Africa, where a

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<sup>143</sup> Walter Laqueur, *The New Terrorism: Fanaticism and the Arms of Mass Destruction*, (Oxford: Oxford University Press, 1999), 277.

<sup>144</sup> John Arquilla, David Ronfeldt, and Michele Zanini, “Networks, Netwar, and Information-Age Terrorism” in *Countering the New Terrorism*, RAND Project Air Force (Santa Monica, Calif.: RAND, 1999), 62.

<sup>145</sup> Peter L. Bergen, *Holy War, Inc.: Inside the Secret World of Osama bin Laden* (New York: The Free Press, 2001), 19.

<sup>146</sup> Mark Juergensmeyer, *Terror in the Mind of God: The Global Rise of Religious Violence* (Berkeley, Calif.: University of California Press, 2000), 73.

high number of corpses is also a desirable aim.”<sup>147</sup> The attacks on 11 September 2001 last year certainly reinforced his point. Examples of terrorist violence abound, and many share a common penchant for bombings. For years, the IRA and Britain’s Ministry of Defence engaged in a deadly arms race over bomb detonators, as each new IRA innovation was nullified by British countermeasures, only to be improved upon, and then countered again.<sup>148</sup> Along the same lines, suicide bombings seem to be the means currently in vogue for Middle Eastern terrorists.<sup>149</sup> The attacks on the World Trade Center and Pentagon were suicide bombings writ large, and designed to create as many casualties as possible.

At least with respect to their purpose, terrorist groups seem to have much in common with states. Rather than seeking profit for its own sake, as criminal organizations do, their goals tend to be political, centered on creating or changing a state. Similarly, they adopt the means of states, war, to force the desired political outcome.

**Structure.** In their essay on information-age terrorism, Arquilla, Ronfeldt, and Zanini distinguish two generations of Middle Eastern terrorist organizations: the traditional and the newer, more active.<sup>150</sup> The older, traditional groups, most of which are associated with the PLO, tend to be hierarchical, bureaucratic organizations.<sup>151</sup> In contrast, the newer groups display “relatively flat hierarchies, decentralization and delegation of decision making authority, and loose lateral ties among dispersed groups

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<sup>147</sup> Laqueur, 261.

<sup>148</sup> Bruce Hoffman, “Terrorism Trends and Prospects” in *Countering the New Terrorism*, RAND Project Air Force (Santa Monica, Calif.: RAND, 1999), 31-3.

<sup>149</sup> Juergensmeyer, 69.

<sup>150</sup> Arquilla, Ronfeldt, and Zanini, 58-60.

<sup>151</sup> *Ibid*, 59.

and individuals.”<sup>152</sup> While both display some level of hierarchy, newer groups are deliberately decentralizing to avoid counterterrorism measures that have reduced the effectiveness of the traditionally organized groups.<sup>153</sup> More specifically, though, Juergensmeyer has researched terrorist structure and motivation through extensive personal interviews with members of various organizations. He notes that Hamas (one of the decentralized new organizations according to Arquilla, Ronfeldt, and Zanini) has “vastly expanded as an organization, and although the heart of the movement still [lies] in decentralized, local cadres, Hamas [has] developed a fairly sophisticated organizational structure, divided between policy and military wings.”<sup>154</sup>

As we saw earlier, bureaucracy and statehood are linked inextricably. In terrorist groups, who want to become or supplant states, this manifests in the older bureaucratic groups, and in the division of military and policy wings in groups like Hamas. The decentralization of newer groups, though, seems to belie the similarity. Since operational pressures to avoid detection and capture have driven the decentralization, they resemble criminal organizations in that sense. When viewed in conjunction with their stated purpose (political change rather than profit), however, it is perhaps more accurate to characterize the decentralization as more guerilla than criminal in nature.

**Territory and Population.** We saw above that Osama bin Laden and Al Qaeda hope to recreate seventh-century Islamic rule in Saudi Arabia.<sup>155</sup> They direct their violence at the United States because they perceive it to be the biggest obstacle to

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<sup>152</sup> Ibid, 61.

<sup>153</sup> Ibid, 59-60.

<sup>154</sup> Juergensmeyer, 77.

<sup>155</sup> Bergen, 19.

achieving their goals.<sup>156</sup> Similarly, Hizbollah's violence against Israel centers on its goal of liberating Lebanon from Israeli occupation.<sup>157</sup> It has also "developed into an impressive political organization with a broad and varied constituency."<sup>158</sup>

Both of their territorial goals exactly align with that of states: to govern the population of a specific geographic region. Criminal organizations, as we saw, tend to treat territory in terms of market share, rather than governance. With respect to their treatment of territory and population, terrorist groups most resemble states.

## **Conclusion**

Notwithstanding the fact that many terrorists consider themselves soldiers fighting for a legitimate political or religious cause, what does our comparison of organized crime, states, and terrorist groups show?

It is clear terrorist groups have more in common with states than with organized crime.<sup>159</sup> Although they share their illicit nature with criminal organizations, which drives certain organizational imperatives like decentralization, terrorist groups are illicit more in the sense of guerillas than Mafiosos. Criminal organizations exist, like businesses, to make a profit. Terrorist organizations exist to further a political or religious cause. Terrorist groups are striving to become states, not to become rich.

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<sup>156</sup> Ibid, 222-3.

<sup>157</sup> Augustus Richard Norton, "Hizballah and the Israeli Withdrawal from Southern Lebanon," *Journal of Palestine Studies* 30, no. 1 (Autumn 2000): 27.

<sup>158</sup> Ibid, 23.

<sup>159</sup> It is important, here, to keep in mind the definitions laid out in Chapter 1. We are discussing terrorist groups with specific characteristics and international scope, such as Al Qaeda. This comparison in no way implies that *all* terrorists have more in common with states, or should be treated as such.

Because terrorists have more in common with states than with organized crime, the United States should probably choose the just war rather than the criminal justice moral framework to continue the war on terror. Not only would that allow freedom of action hunting down and fighting terrorists wherever they may be, but public debate could at last focus away from debating the rationale for various US actions, since re-labeling terrorists from criminals to combatants would channel discussion in useful directions. While the serious drawbacks discussed in the last chapter would still apply, such a move would free up all instruments of American national power for use in a coherent just war strategy.

What are the likely consequences of giving terrorists legitimacy as combatants and perhaps allowing them to participate in the international political process, though? A brief look at the insurgency in El Salvador, the transition of the PLO from terrorist organization to political entity, and recent internal pressures within Hizbollah to curb violence will highlight some possibilities. Additionally, the situation in Colombia, where the government, insurgents, narco-traffickers, and paramilitary organizations are engaged in a decades-long conflict with no end in sight, will provide a cautionary example.

## Chapter 4

### Legitimacy and Non-State Actors

*Example is the school of mankind, and they will learn at no other.*

—Edmund Burke, *Letters on a Regicide Peace*

Practical solutions are specific to particular situations, whereas principle is transcendent. In principle, we need only know what we ought to do prior to acting. The world, however, is not straightforward: principle and consequence are sometimes at odds. If we are to act based upon the principles we have discussed, we must not only know the right course of action, but also anticipate good consequences.

In discussing the appropriate moral framework within which to prosecute America's war on terror, we have identified three options: create an entirely new framework for dealing with terrorists, proceed within the criminal justice framework that has dominated in the past, or adopt the just war paradigm. While perhaps efficient in terms of allowing the United States great latitude to act, creating a new paradigm is wholly unsuitable, since it provides no basis to rally and maintain domestic and international support. We have seen that the just war paradigm allows the United States greater freedom of action than a criminal justice model, while still allowing general acceptance of those actions as fundamentally moral. Additionally, we know that certain terrorist groups look less like organized crime and more like states. In principle, this is enough to act.

Since consequences matter, however, the following examples from recent history will illustrate some potential good consequences of applying the just war framework, as

well as explore why other attempts have failed. A brief look at the FMLN in El Salvador illustrates the insurgent as state-analogue hoping to change the political system through armed resistance, and that peaceful resolution is possible even after years of bloody conflict. A look at today's Hizbollah will show how that organization's involvement in legitimate Lebanese politics created pressure to reduce terrorist violence. The PLO's unsuccessful transition from terrorist group to legitimate civil authority in the last decade shows the necessity of mutual commitment to finding a political solution. Finally, a look at the FARC in Colombia will illustrate how criminal gain can seduce groups that originate as political movements, which then evolve into organized crime rather than legitimate political actors.

### **The FMLN**

The example of the FMLN in El Salvador stands in stark contradiction to that of the FARC in Colombia (discussed later). They represent bookend positions with respect to possible outcomes in insurgencies where outside assistance is suddenly withdrawn. Where the end of the Cold War removed the long-term ability of the FMLN to support operations, it revitalized the FARC through association with narco-traffickers. Both provide potential lessons for fighting the war on terror within the just war framework.

According to Montgomery, a series of economic and political cycles in the early years of the 20<sup>th</sup> century served both to concentrate El Salvadorean land and wealth into the hands of a small minority and to concentrate political power into the military.<sup>160</sup> At

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<sup>160</sup> Tommie Sue Montgomery, *Revolution in El Salvador: From Civil Strife to Civil Peace*, 2<sup>nd</sup> ed., with an introduction by Ignacio Martín-Baró and Rodolfo Cardenal (Boulder, Colo.: Westview Press, 1995), 37.

the root of the economic problems was the reliance on coffee as the sole source of national wealth: by the 1920s, the coffee trade had made landowners rich, but completed the impoverishment of farm workers, who worked for pennies yet had to buy imported foodstuffs since coffee had supplanted such crops locally.<sup>161</sup> In 1932, after popular discontent with government manipulation of elections spilled over into insurrection, which the military repressed, “the military consolidated its hold on the government, and there was no more pretense of popular political participation.”<sup>162</sup> The oligarchy was content to let the military control the government in exchange for protection, and the military was content to protect the oligarchs in exchange for financing.<sup>163</sup>

During the 1970s, the political situation in El Salvador deteriorated. Although elections had continued through the sixties, providing at least the illusion of democracy, the military and the oligarchs had retained undisputed power.<sup>164</sup> In the seventies, however, opposition groups began to cooperate. Rather than produce reform, though, such cooperation spurred the military into ever more brutal means of retaining its control. The 1972 elections set the tone for the decade, as government-sponsored election fraud robbed the opposition party of the presidency. The fraud sparked an attempted *coup d’etat* by reformers in the military, but hard-liners crushed it.<sup>165</sup> The events surrounding the 1972 election removed any hope of peaceful reform from the opposition and marked the beginnings of armed insurgency.

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<sup>161</sup> Ibid, 32-3.

<sup>162</sup> Ibid, 36-7.

<sup>163</sup> Ibid, 37.

<sup>164</sup> Ibid, 51.

<sup>165</sup> Ibid, 63-5.

In 1979, there was a successful military coup meant to introduce reform.<sup>166</sup> Right-wing elements in the military were able to infiltrate the movement, however, and refused to implement the reforms after they were in power, prompting the civil government to resign.<sup>167</sup> With the civilian reformers out of the way, the military continued to repress “subversive” groups and “argued that the ‘terrorist’ activities of the left provoked harsh tactics and that when the left was brought under control these tactics would no longer be necessary.”<sup>168</sup>

The 1980s were a decade of all-out civil war in El Salvador. According to Robinson, “the right and left squeezed out moderate reformers as the two extremes waged all-out war against each other.”<sup>169</sup> During the first half of the decade, the United States backed the government against the FMLN guerillas, who received support from Cuba, Nicaragua, and the Soviet Union.<sup>170</sup> The political landscape changed, however, in the latter half of the decade; there was a military stalemate between the government and the rebels, the Soviet Union began focusing more on internal issues than sponsoring Third World revolutions (which in turn reduced American interest), and there was a resurgence of moderate politics as the nation tired of war.<sup>171</sup>

The FMLN signaled the beginning of the end of the conflict in 1989 when it offered to participate in presidential elections in exchange for specific government

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<sup>166</sup> Ibid, 75.

<sup>167</sup> Ibid, 78-79

<sup>168</sup> Ibid, 78.

<sup>169</sup> Linda Robinson, “The End of El Salvador’s War,” *Survival* (Sep/Oct 1991), 388.

<sup>170</sup> Ibid.

<sup>171</sup> Ibid, 388-9.

reforms.<sup>172</sup> Concurrently, Alfredo Cristiani, El Salvador's president, seeking to increase his standing with the people and in his party, agreed to participate in negotiations to allow FMLN participation in elections—under UN auspices.<sup>173</sup> The 1992 peace accords resulting from the process “sought to deal with the fundamental causes of the war by ending the armed conflict as quickly as possible; by promoting democratization; by guaranteeing absolute respect for human rights; and by reunifying Salvadorean society.”<sup>174</sup> “These objectives,” according to Montgomery, “are unprecedented; no previous civil war has ended with an agreement not simply to stop shooting but to restructure society.”<sup>175</sup>

Two external factors acted in concert with internal political developments to facilitate an end to the conflict: the end of superpower proxy support to both sides and the involvement of the United Nations and other international actors supporting a negotiated peace.<sup>176</sup> Militarily, the new US-Soviet cooperation that began in the late eighties was disastrous for both the rebels and the government. Without US support, the government simply could not afford to maintain the large army with which it had fought the rebels to a stalemate.<sup>177</sup> Without Soviet support, the FMLN's sole aid came from the trickle of arms coming from Nicaragua, insufficient for anything but defensive purposes.<sup>178</sup>

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<sup>172</sup> Ibid, 389.

<sup>173</sup> Ibid, 390.

<sup>174</sup> Montgomery, 226.

<sup>175</sup> Ibid.

<sup>176</sup> Earnest H. Evans, “The El Salvadoran Peace Process Five Years On: An Assessment,” *Studies in Conflict and Terrorism* 21, no. 7 (1998), 173.

<sup>177</sup> Robinson, 388.

<sup>178</sup> Ibid.

Without the superpowers supporting the conflict, international organizations like the United Nations, the Organization of American States, human rights groups, and other Latin American leaders, became a “third force” in the conflict, not only exerting pressure for a negotiated settlement, but also promising monitors who would ensure fairness.<sup>179</sup> For the first time, both the rebels and the governing elite began to see a political solution as more palatable than a military one. The promise of monitored negotiations and elections caused moderates in the rebel camp to agitate for a return to politics, and the 1989 election of Alfredo Cristiani convinced the conservatives in government they could compete with the left in democratic elections.<sup>180</sup>

Several lessons stand out with regard to America’s war on terror. First, ignoring just war requirements mobilized world opinion against El Salvador, even though it was fighting insurgents whose very resort to violence was a violation of law. After 1979, American political support for the government waned considerably “in the face of an escalating number of massacres and assassinations at the hands of the Salvadorean security forces and ‘men in civilian clothes’ [death squads].”<sup>181</sup> When the Soviets lost interest in El Salvador, the United States withdrew its support. Although the international community was willing to step in after the superpowers left, it was not in support of the government, but rather with the intent to correct its behavior as much as to bring the guerillas to the table.<sup>182</sup>

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<sup>179</sup> Evans, 173.

<sup>180</sup> Ibid.

<sup>181</sup> Montgomery, 78.

<sup>182</sup> Ibid, 209.

Second, it was the insurgents' ability to control significant portions of El Salvador and to provide stability for the population in those areas that was instrumental in forcing the government to negotiate.<sup>183</sup> Thus, when both sides lost their outside support, neither had sufficient military advantage to force a solution, leaving negotiation as the only way out.<sup>184</sup> Faced with failure due to rebel control of so much territory, the government negotiated on equal terms with the FMLN.

Finally, the FMLN's commitment to political change as a goal enabled it to take advantage of the offer of a negotiated settlement. Although it continued military operations during the early part of the negotiations as a means of pressuring the government, it accepted a compromise solution and the guarantee of free elections.<sup>185</sup> Additionally, the moderate factions of the FMLN had sufficient control to insure compliance with the peace accords.

## **Hizbollah**

Hizbollah formed as a faction of Shi'a militants reacting to the anarchy in Lebanon due to the civil war and Israel's occupation of the southern areas.<sup>186</sup> Its goal was to replace the anarchy with an Islamic republic in Iran's image.<sup>187</sup> Iran managed the organization quite closely, providing money, materiel, and training<sup>188</sup> Hizbollah thus

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<sup>183</sup> Ibid, 220.

<sup>184</sup> Robinson, 388.

<sup>185</sup> Montgomery, 226-7.

<sup>186</sup> Carl Anthony Wege, "Hizbollah Organization," *Studies in Conflict and Terrorism* 17, no. 2 (1994): 154-155.

<sup>187</sup> Ibid.

<sup>188</sup> Ibid, 156.

began as a “rigidly ideological organization known especially for kidnappings and suicide bombings of Western targets.”<sup>189</sup> That pattern continued through the 1980s.

In 1992, however, Hizbollah decided to participate in Lebanese elections, even though its first secretary-general, Shaykh Subhi Tufayli, opposed such a move, “arguing that Hizballah [sic] would be co-opted and sacrifice its ideals.”<sup>190</sup> These elections were to be a defining moment for Hizbollah, as it won the largest bloc (eight seats) in Lebanon’s 128-member parliament, and began “to develop a reputation as a serious political party adept at pragmatic parliamentary alliances and tactics, even while intensifying its guerilla warfare against the occupier.”<sup>191</sup>

The next significant evolutionary step for Hizbollah was its adoption of formal rules for combat with Israel in the 1996 April Understanding.<sup>192</sup> Although it had rejected any limitation to its actions in the 1980s, Hizbollah sought the public relations value inherent in seeming to follow accepted rules of warfare, agreeing that, so long as Israel ceased attacks on civilians or civilian targets, it would confine its military actions to Lebanon.<sup>193</sup> They also adjusted their tactics, as “suicide bombers were superseded by coordinated military attacks that benefited from excellent planning and intelligence.”<sup>194</sup> Further, they began to confine their attacks, for the most part, to military targets.<sup>195</sup>

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<sup>189</sup> Augustus Richard Norton, “Hizbollah and the Israeli Withdrawal from Southern Lebanon,” *Journal of Palestine Studies* 30, no. 1 (Autumn 2000): 23.

<sup>190</sup> *Ibid.*, 28.

<sup>191</sup> *Ibid.*

<sup>192</sup> *Ibid.*, 29.

<sup>193</sup> *Ibid.*

<sup>194</sup> *Ibid.*, 30.

<sup>195</sup> *Ibid.*

After the Israeli withdrawal from Lebanon, Hizbollah adopted a less militant outlook. While continuing to reject Israel's right to exist, as well as expressing support for the Palestinian cause, they have refused requests to join forces with Palestinian groups and focused their political efforts on local reforms and regional issues.<sup>196</sup> Hizbollah garners grassroots political support through providing hospitals and social services in areas where they are lacking.<sup>197</sup> Politically as well as militarily, they are a significant force in Lebanese politics.

With respect to the war on terror, this short example provides some potentially interesting insights. First, Hizbollah began observing just war *jus in bello* restrictions as a deliberate means of seeking legitimacy in Lebanon. Further, the Israelis accepted the overture, helping reduce the overall intensity of the conflict. Neither side recognized the other's right to exist, however. While we cannot draw too strong a lesson from this example, since there is no way to tell if such a tactic would work if initiated in the other direction, it remains interesting in that even as notorious a group as Hizbollah recognizes the political capital inherent in seeming to fight according to accepted rules.

Second, Hizbollah's entry into Lebanese politics, and its later restriction of combat operations to Lebanese territory, shows the importance of geography and popular support in the search for legitimacy. Rather than striking at Israel as a means to defend Lebanon, it sought the domestic aspects of sovereignty by participating in existing political processes.

More problematic, however, is Hizbollah's ability to control its organization. Although the moderate members of the organization have begun concentrating on

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<sup>196</sup> Ibid, 34.

<sup>197</sup> Ibid, 35.

legitimate Lebanese political activities, a radical faction that pays only lip-service to the group's central directives continues to exist in southern Lebanon.<sup>198</sup> While Hizbollah has made strides toward full integration into Lebanese society, some Lebanese still view them slightly askance.<sup>199</sup>

## **The PLO**

Just as in El Salvador, the end of the Cold War was a catalyst for sweeping changes of the status quo in the Middle East. According to Shlaim, “The collapse of the Soviet Union as a superpower orphaned Moscow’s military clients—Syria, Iraq, Yemen, Libya, and the radical Palestinian factions—and pulled the rug from under the Arab rejectionist front, which always opposed any peace settlement with Israel.”<sup>200</sup> Further, Desert Storm created dual incentives for the United States to sponsor Arab-Israeli peace negotiations, in that the war highlighted Israel as a strategic liability in a post-Cold War world, and embarrassment at Saddam Hussein’s continued hold on power in Iraq highlighted the need for another success in the region.<sup>201</sup> With both sides of the Arab-Israeli conflict left with vanished or diminished external support and the world’s sole remaining superpower looking to score a diplomatic victory, the stage was set for meaningful peace negotiations.

In October of 1991, the United States and the Soviet Union co-sponsored multi-lateral negotiations in Madrid between Israel, Syria, Lebanon, and a joint

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<sup>198</sup> Wege, 158.

<sup>199</sup> Norton, 33.

<sup>200</sup> Avi Shlaim, *War and Peace in the Middle East: A Concise History*, revised and updated (New York: Penguin, 1995), 104-5.

<sup>201</sup> *Ibid*, 106-8.

Jordanian/Palestinian delegation.<sup>202</sup> Although the United States excluded the PLO from the process entirely, Madrid was a watershed in that Secretary of State Baker “promised the Palestinians substantive negotiations on an equal footing with Israel—something never offered before.”<sup>203</sup> Although perhaps a promising start, Israeli and Syrian intransigence prevented any meaningful outcome beyond agreement to further talks.

Administration changes in both the United States and Israel set the stage for the 1993 Declaration of Principles between Israel and the PLO.<sup>204</sup> Although signed in Washington, however, the agreement was the result of secret talks between Israeli academics and members of the Tunis-based PLO government-in-exile.<sup>205</sup> According to Yigal Carmon, a former Colonel in Israeli intelligence, there had always existed a faction in Israel willing to defy the law preventing unauthorized contact with members of the PLO and who had been attending unofficial “symposia, conferences, and ‘dialogues,’ open as well as clandestine” for years.<sup>206</sup> This time, however, talks took place with the knowledge and consent of Yossi Beilin, Israel’s Deputy Prime Minister.<sup>207</sup>

Spurred by disappointment in the stalled Washington talks and increasing domestic pressure to meet campaign promises, Prime Minister Rabin later added his blessing, and official—though still technically illegal, as the cabinet had not given authorization—sanction to the Oslo process.<sup>208</sup> On the other side, “American ignorance

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<sup>202</sup> Ibid, 109-110.

<sup>203</sup> Ibid, 110.

<sup>204</sup> Ibid, 120.

<sup>205</sup> Ibid, 123.

<sup>206</sup> Yigal Carmon, “The Story Behind the Handshake,” in *The Mideast Peace Process: An Autopsy*, ed Neal Kozodoy (San Francisco: Encounter 2002), 13.

<sup>207</sup> Ibid, 14.

<sup>208</sup> Ibid, 16.

and incompetence in managing the [Washington] talks helped persuade PLO chairman Yasser Arafat to use the negotiating channel provided by the Norwegians.”<sup>209</sup>

The resulting agreement, while significant in that it formalized mutual recognition between Israel and the PLO in addition to limited Palestinian self-government, was also important because it defied American pressure to avoid recognizing the PLO.<sup>210</sup> Further, the United States later proposed that Prime Minister Rabin lead the Israeli delegation to the signing in Washington, which “enabled Arafat—still officially a wanted terrorist in the U.S.—to appear in Washington as a head of government.”<sup>211</sup> The United States’ quick reversal must have surprised even Arafat, since “his plane, donated by Saddam Hussein and still boasting the Iraqi colors, had to be hurriedly repainted with Algerian colors, since Iraqi planes were banned in the U.S.”<sup>212</sup>

This example illustrates several implications for America’s war on terror. First, as with El Salvador, removing state sponsorship from one or more parties may create an environment for negotiation. Once the Soviet Union lost its status as a superpower and turned its attention inward, stalwart Arab opponents to peace with Israel found themselves without the means to continue fighting. Additionally, many Arab states found alliance with America preferable to subjugation by Iraq before and after Desert Storm. Those states who had supported Iraq likewise found themselves eager to make good their embarrassing defeat by cooperating with the world’s sole remaining superpower afterward.

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<sup>209</sup> Shlaim, 123.

<sup>210</sup> Ibid.

<sup>211</sup> Carmon, 20.

<sup>212</sup> Ibid.

Second, the Oslo agreement highlights the potential utility of granting legitimacy to “terrorist” entities to enable a peace process. Although the Israeli-Palestinian peace process is far from complete, creating the Palestinian Authority in 1993 not only forced a split between Yasser Arafat and more radical elements within the PLO, but added the myriad concerns of civil government to the problems its leaders must solve.<sup>213</sup> Having accepted the mantle of legitimate government he had sought so long, Arafat is now constrained, at least in part, by the need to maintain the appearance of legitimacy.

While creating an environment where negotiated peace is theoretically possible, however, the creation of the Palestinian Authority has not resulted in peace. As we saw in Chapter 2, the just war approach to combating terrorism incurs risk. In this case, the Palestinian Authority has been unable or unwilling to exercise the domestic functions of sovereignty in order to produce peace. Peace was possible in El Salvador because moderates willing to negotiate a political solution were firmly in control of the FMLN. In Hizbollah’s case, the moderates were able to begin the move toward legitimacy, though militant factions remain in southern Lebanon to fight the Israelis. Here, such control seems not to exist, as granting legitimacy to the PLO by forming the Palestinian Authority has not served to moderate anything except official public rhetoric.

This may also be a case where geography and popular support are working against the legitimacy of the Palestinian Authority. As we saw in the last chapter, sovereignty normally entails providing domestic order within a specific geographic area, and involves the consent of the governed. In this situation, however, the territory given the Palestinian Authority for purposes of the peace negotiations is not the territory they

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<sup>213</sup> Barry Rubin, *The Transformation of Palestinian Politics: From Revolution to State-Building* (Cambridge: Harvard University Press, 1999), 3-7.

claim, or the territory from which they feel they were unjustly expelled. Rather than depicting current geopolitical reality, for example, the Palestinian National Authority State Information Service's web site shows a map of Palestine that encompasses all of the territory currently part of Israel, and Israel is not shown.<sup>214</sup> While the Israeli government has granted the Palestinian Authority legitimacy as a means to peace, it seems the Palestinian Authority is not willing to return the favor.

### **The FARC**

The example of the FARC in Colombia stands in stark contradiction to that of the FMLN in El Salvador (discussed above). They represent bookend positions with respect to possible outcomes in insurgencies where outside assistance is suddenly withdrawn. Where the end of the Cold War revitalized the FARC through association with narco-traffickers, it removed the long-term ability of the FMLN to support operations. Both provide potential lessons for fighting the war on terror within the just war framework.

According to Roskin, Colombia took its present form as a state in 1863, and “has never been able to rule wide areas of the country. . . . The ‘crisis of penetration,’ the ability of the state to enforce its laws over all its territory, has never been overcome.”<sup>215</sup> In 1948, the government collapsed completely, leading to a decade of violence and anarchy Colombians call *La Violencia*.<sup>216</sup> A “contrived stability” consisting of a power-alternating scheme between the Liberal and Conservative parties began in 1958, but the

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<sup>214</sup> Map of Palestine, n.p., on-line, Internet, 17 June 2002, available from [http://www.ipc.gov.ps/ipc\\_a/ipc\\_a-1/a\\_map/pal-e.html](http://www.ipc.gov.ps/ipc_a/ipc_a-1/a_map/pal-e.html).

<sup>215</sup> Michael G. Roskin, “Crime and Politics in Colombia: Considerations for US Involvement,” *Parameters* 31, no. 4 (Winter 2001-02): 127.

<sup>216</sup> *Ibid*, 128.

violence continued, complicated by Marxist rebels and revolutionary Catholic preaching.<sup>217</sup> “At a certain point,” Roskin says, “Colombia ceased to have a state. Maybe it never had one. At best, it was a weak state. With nominal borders on maps, diplomatic recognition, and too many bureaucrats and laws, Colombia only looked like a state, and such is its present condition.”<sup>218</sup>

There are two main rebel movements in Colombia. The smaller ELN was founded in 1965 by a Spanish priest, and has about 5,000 members.<sup>219</sup> The Marxist FARC was founded in 1964, and today boasts about 18,000 fighters.<sup>220</sup> The two movements control large areas of the country.<sup>221</sup> In 1998, the Colombian government even “granted FARC a Switzerland-sized ‘demilitarized zone’ in the middle of the country and promised not to invade.”<sup>222</sup>

Nor are the rebel groups the only threat to Colombian sovereignty. Mercenary paramilitary organizations have added another front to the war, and threaten both the guerillas and the government.<sup>223</sup> The paramilitaries were formed originally by narco-traffickers as a means to guard the vast estates and ranches they bought as a way of laundering drug money.<sup>224</sup> Ironically, many of the paramilitary groups were trained by

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<sup>217</sup> Ibid.

<sup>218</sup> Ibid.

<sup>219</sup> Ibid, 129.

<sup>220</sup> Ibid.

<sup>221</sup> Martin Dayani, “Terror Focus on Colombia,” *Jane’s Defence Weekly* 37, no. 4 (23 January 2002): 21.

<sup>222</sup> Roskin, 129.

<sup>223</sup> Gabriel Marcella and Donald Schulz, “Colombia’s Three Wars: U.S. Strategy at the Crossroads,” *Strategic Review* 28, no. 1 (Winter 2000): 10.

<sup>224</sup> Ibid, 11.

the Colombian armed forces, in the mistaken belief they would be allies against the rebels.<sup>225</sup>

How does the FARC sustain itself when so many other insurgencies in the region have folded in the aftermath of the Cold War? When its support from Cuba ran out, the FARC was uniquely positioned to strike a deal with the narco-traffickers.<sup>226</sup> In exchange for access to FARC-controlled areas in which to operate without fear from the government, narco-traffickers allowed the FARC to collect taxes on the drug trade.<sup>227</sup> Their annual income from the arrangement is estimated to be in the neighborhood of \$500-\$600 million annually.<sup>228</sup>

The situation in Colombia provides a cautionary example with respect to fighting the war on terror under the just war paradigm. With respect to the military situation, the government's attempts to negotiate with the rebels have failed. Unlike the FMLN in El Salvador, which could foresee its eventual demise through lack of resources, the FARC is stronger than ever. Although they haven't the means to defeat the government and paramilitaries to unite Colombia, they are in no danger of losing, and remain secure in their strongholds.<sup>229</sup>

A further disincentive for the FARC to negotiate in good faith is the fact that polls show few Colombians in favor of revolution.<sup>230</sup> The FARC's "extraordinary taxation and violence," in fact, contributed indirectly to the rise of the paramilitaries, since the narco-

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<sup>225</sup> Ibid.

<sup>226</sup> Hal Klepak, "Colombia: Why Doesn't the War End?" *Jane's Intelligence Review* 12, no. 6 (June 2000): 42.

<sup>227</sup> Ibid.

<sup>228</sup> Marcella and Schulz, 12.

<sup>229</sup> Klepak, 44.

<sup>230</sup> Roskin, 130.

traffickers who first created them were buying up land from those fed up with the FARC's harsh rule.<sup>231</sup> Even when it held territory, the FARC was unable to govern effectively.

Perhaps more important in explaining the lack of negotiated progress in Colombia than these, however, is the changing nature of FARC political commitment. Klepak notes that, due to the FARC's drug connections, "local power bases became essential and control of actual territory became the objective for financial as much as political or strategic reasons."<sup>232</sup> As we saw in Chapter 3, control of territory for market, rather than political reasons is one of the primary differences between criminal organizations and states. Former Colombian Defense Minister Rafael Pardo notes that 55-70% of guerilla income is from extortion and drug protection rackets, saying the rebels have discarded many of their political ideals and transformed into "large criminal enterprises."<sup>233</sup>

When President Pastrana offered land to the insurgents in hopes of enticing them into negotiations, he took one of the calculated risks inherent in applying the just war framework to non-state entities that we discussed in Chapter 2:

Pastrana's controversial measure was seen as a bold stroke to strengthen the government's credibility and legitimacy for the peace negotiations ahead. Some observers, however, were worried that it would enhance the FARC's position by legitimating their de facto control of territory.<sup>234</sup>

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<sup>231</sup> Marcella and Schulz, 11.

<sup>232</sup> Klepak, 42.

<sup>233</sup> Marcella and Schulz, 9.

<sup>234</sup> *Ibid*, 5.

Given their relative military and financial capabilities, the gambit may not have worked even if the FARC retained its original dedication to political reform. With their transition into a largely criminal organization, however, such a move was doomed.

## **Conclusion**

These historical illustrations indicate that ceding legitimacy to terrorists is perhaps not a setback, but rather an integral part of any permanent solution. They also indicate that such a course is fraught with risk, in that the group granted legitimacy might lack the ability or willingness to negotiate in good faith, as with the PLO. Or, as in the FARC's case, the group may have become corrupted by the means with which it supports itself, swapping priorities so that political means serve criminal ends rather than the opposite.

The FMLN example showed that negotiations are possible when both sides fear the consequences of continued struggle. The FARC example showed that, when one side has a clear advantage, negotiation will have little appeal. The Hizbollah example shows that a group seeking political legitimacy may moderate its conduct as it becomes more deeply involved in legitimate processes. The PLO example, on the other hand, showed that simply giving legitimacy to a group might not accomplish the same thing.

In the one fully successful example where granting a non-state actor legitimacy led to a negotiated settlement, cessation of violence, and peaceful coexistence, three critical factors were present. First, both groups saw a negotiated settlement as better than any alternative. Both El Salvador's government and the FMLN lost their external support for continued conflict, and the resulting impasse represented a window of opportunity before one side or the other began to collapse—and neither was sure which would

collapse first. Second, the FMLN remained true to its political purpose. It had not been subsumed by criminal elements, and it had not become too hard-line to compromise. Third, the FMLN had sufficient control of its membership that it could negotiate in good faith. Unlike the PLO, it could guarantee compliance when it accepted terms.

In this chapter, we have answered the question, “Can granting terrorists legitimacy in order to better deal with them work in practice?” with a cautious affirmative—if certain contextual factors are favorable. As President Pastrana found in Colombia, however, it is not a decision to make lightly, as the consequences of miscalculation can be severe.

In the next chapter, we must address the larger issues of applying the just war framework to the war on terror. Specifically, we must consider the specific benefits and drawbacks as applied to Al Qaeda as well as to the goal of maintaining domestic, international, and media support for the United States as it fights the war on terror.

## Chapter 5

### Target: Al Qaeda

*Amid the pressure of great events, a general principle gives no help.*  
—Georg Wilhelm Friedrich Hegel, *Philosophy of History*

In his address to a joint session of Congress and the American people on 19 September 2001, President Bush said, “Our war on terror begins with Al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped, and defeated.”<sup>235</sup> Why start with Al Qaeda? It “committed an act of war against our country” by attacking the World Trade Center and the Pentagon.<sup>236</sup> Beyond that, however, Al Qaeda is important in the larger war on terror.

First, one of Al Qaeda’s main functions has been to operate training camps for would-be terrorists from a variety of countries.<sup>237</sup> These camps “turn raw recruits with a general and inchoate antipathy to the West into skilled bomb makers.”<sup>238</sup> Destroying Al Qaeda will thus remove the shared training experience of many diverse terrorist organizations around the world, perhaps also destroying their ability to work together and coordinate attacks.

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<sup>235</sup> George W. Bush, “Address to a Joint Session of Congress and the American People” [transcript online] (Washington, D.C.: 20 September 2001, accessed 20 May 2002); available from <http://www.whitehouse.gov/news/releases/2001/09/print/20010920-8.html>.

<sup>236</sup> Ibid.

<sup>237</sup> Peter L. Bergen, *Holy War, Inc.: Inside the Secret World of Osama bin Laden* (New York: The Free Press, 2001), 30-1.

<sup>238</sup> Ibid, 234.

Second, Osama bin Laden has great stature among Muslim terrorist groups because of his exploits against the Soviets in Afghanistan. Many of these militants believe the Afghan jihad caused the Soviet collapse, and this belief is “inspiring and deeply evocative of the Muslim sweep across the world in the seventh and eighth centuries.”<sup>239</sup> Additionally, bin Laden claimed responsibility for ousting American troops from Somalia.<sup>240</sup> Al Qaeda is important in this respect because of the great moral authority it wields as instrument of the man who defeated both Cold War superpowers.

The war on terror, though it begins with Al Qaeda, will be a long one. It will be a “lengthy campaign, unlike any other we have ever seen,” according to President Bush.<sup>241</sup> Such a war will require support both at home and abroad, as we discussed in Chapter 1. Domestic support is currently not a problem, since the President enjoys job approval ratings among the highest Gallup has ever measured—even considering the gradual decline since last September.<sup>242</sup> President Bush stressed the importance of international support, saying, “This is the world’s fight. . . . We ask every nation to join us. We will ask, and we will need, the help of police forces, intelligence services, and banking systems around the world.”<sup>243</sup> Positive media coverage will also be essential, both to

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<sup>239</sup> Ahmed Rashid, *Taliban: Militant Islam, Oil and Fundamentalism in Central Asia* (New Haven: Yale University Press, 2000), 131.

<sup>240</sup> Bergen, 22.

<sup>241</sup> Bush.

<sup>242</sup> Jeffrey M. Jones, “Little Change in Public Perception of Bush: Job Approval and Personal Characteristics Ratings Remain Very Positive” [article online] (Princeton, NJ: Gallup News Service, 9 May 2002, accessed 20 May 2002); available from <http://www.gallup.com/poll/releases/pr020509.asp?Version=p>.

<sup>243</sup> Bush.

mobilize and sustain support domestically and to spread America's message internationally.

Because of the need to maintain support in these arenas, America should adopt one of the two moral frameworks we discussed in Chapter 2. Choosing an existing moral framework will provide a generally accepted set of criteria by which the world can judge American acts. Just as important, adopting an existing framework will delineate the moral playing field within which America is free to act, and within which its acts enjoy understanding and approval as long as it plays by the rules. Adopting an *ad hoc* approach to planning and justifying its acts, on the other hand, would be inherently divisive, because it would force each individual observer to evaluate not only the acts, but also their unique rationales. The criminal justice approach accepts limitations on freedom of action, because protecting civil liberties is a higher priority than operational effectiveness. The just war approach tries to maximize freedom of action by bringing all aspects of national power to bear, but effectively grants terrorist groups privileges analogous to sovereign states.

To determine the appropriate moral framework for a given situation, we asked the question, "Are terrorist groups more like criminal organizations or states?" in Chapter 3. Criminal organizations, as we saw, are motivated by profit. States are characterized by territorial sovereignty, which obligates them to provide an ordered society domestically and to provide security in the anarchic international realm. President Bush said, "Al Qaeda is to terror what the mafia is to crime. But its goal is not making money; its goal

is remaking the world—and imposing its radical beliefs on people everywhere.”<sup>244</sup> According to our process, this classifies Al Qaeda as more like a state than a criminal organization. Additionally, Al Qaeda is organized much as a state, having a ruling council, a military committee, a business committee, a religious committee, and a media group.<sup>245</sup>

That Al Qaeda is, in principle, similar to a state is not sufficient to adopt a specific policy, however, because, as we discussed in Chapter 4, contextual elements sometimes influence practical consequences when applying principles to real-world situations. In each of the examples in Chapter 4, the non-state actors were fighting in and over specific territory, and their ability either to control portions of the specific territory for which they were fighting (as with the FMLN and the FARC) or to disrupt effective control by their enemies (as with Hizbollah and the PLO), were factors in the governments’ decisions to grant legitimacy.

Control of territory is not the only important contextual element, however. The FARC controls vast areas of Colombia, after all, and we saw that it is a criminal organization with which negotiation is unprofitable. Beyond control of territory, a terrorist group must display commitment to its political goals, as did the FMLN by laying down its arms when granted participation in elections. In contrast, it was the FARC’s abandoning of its political agenda in favor of profit from its connection to narco-

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<sup>244</sup> Note that the structure of the analogy distinguishes terror and crime as belonging to different classes, reinforcing the salient point that Al Qaeda’s motivation is not criminal, but governmental in nature. Bush.

<sup>245</sup> Although he uses this structure to classify Al Qaeda as a kind of “multi-national holding company,” the divisions parallel states more than businesses (how many businesses have their own militaries?), especially when given the perspective of their intent to overthrow Saudi Arabia. Bergen, 29-30.

traffickers that sabotaged the peace process in Colombia.<sup>246</sup> Finally, a terrorist group must demonstrate initiative in its willingness to accept legitimacy. Israel gave the PLO legitimacy in exchange for promises, and those promises have not been kept. Hizbollah, on the other hand, initiated self-imposed restrictions on its conduct toward Israel that resulted in a successful tacit agreement to limit the conflict.

When deciding whether to apply just war or criminal justice principles, then, the United States should use three criteria. First, it should look for the actual ability to control or deny control of territory. Second, it should ensure the group is dedicated to its political goal. Finally, it should look for a demonstrated willingness to initiate the transition to legitimacy through positive actions to accept the responsibilities as well as the benefits of legitimacy.

How do these criteria apply to Osama bin Laden and Al Qaeda? First, they were intimately connected with the Taliban in Afghanistan:

Beyond his status as an honored guest, bin Laden has been a valued ally of the Taliban, having contributed money and men to its cause for years. He gave the Taliban \$3 million at a critical moment in 1996 as the religious warriors geared up to take Kabul. An Afghan journalist working for the Associated Press told me he witnessed a ‘kind of division’ of bin Laden’s troops—perhaps as many as three hundred men—fighting alongside the Taliban on the front line north of Kabul in the winter of 1997. They were well equipped, and even had tanks at their disposal. By 1999 four hundred Arabs under bin Laden’s leadership—the 055 brigade—were fighting against the anti-Taliban forces, the Northern Alliance.<sup>247</sup>

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<sup>246</sup> We must be careful to distinguish between organizations who fund their activities by criminal means while staying true to their political goals, as did the FMLN, and those who have abandoned their political agendas in favor of pursuing crime as a business, like the FARC.

<sup>247</sup> Bergen, 162.

Combined with its administration of terrorist training camps, this shows ability to control territory. With respect to the second criteria, Al Qaeda has remained consistent in its political goal. According to Bergen, Osama bin Laden is not at war with American values, and “cares little about such cultural issues. What he condemns the United States for is simple: its policies in the Middle East.”<sup>248</sup> Al Qaeda fails the third criteria, however, because it has displayed no willingness to moderate its behavior or desire to employ legitimate political means to achieve its objective. The attacks of last September represent a move *away* from legitimacy, as a matter of fact.

When the United States enters the next phase of the war on terror, following Afghanistan, it should perform the same test to determine what moral framework to apply. Whether fighting remnants of Al Qaeda or another terrorist group, American policy makers should use the criteria above to determine whether to apply just war principles. If so, it should accept the inherent risks associated with granting legitimacy in order to achieve the additional freedom of action bringing all instruments of power to bear allows. If not, it should apply the criminal justice model. Most important, however, is choosing an accepted moral framework for valid reasons, because a long, ambiguous conflict like the war on terror will require domestic support, international support, and the positive media attention that will facilitate gaining and maintaining them if it is to win.

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<sup>248</sup> Ibid, 222.

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