THE UNITED STATES VS THE INTERNATIONAL COMMUNITY:

ARE THEIR TWO APPROACHES TOWARDS THE ERADICTION OF TERRORISM COMPATIBLE?

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Since September 11 much attention has been devoted to the notion of 'terrorism'. By reading the press, watching television, one has the impression that, all of a sudden, the world has discovered terrorism and has been so shocked by its effects that the "international community" cannot tolerate acts of terrorism. In quasi-unanimity, the world leaders expressed their condolences to the American population. "The international community has not seen such a coalition since the struggle against slavery and the defeat of fascism."[1] The unanimity behind this condemnation, however, seems to corrode with time passing by. There certainly is an increasing divergence of opinions about responding to terrorism. "Is the fracture line over globalisation actually a division not between the West and the Rest but between the United States and the Rest?"[2] Some argue that it is the result of the United States policy as a leader of this fight against terrorism, that the United States, by its behaviour, has created a front against the "war on terrorism". This paper shows that it may be possible to reconcile the different approaches if the international community agrees on the definition of terrorism and on the means to suppress it and if the United States does not blatantly act against the interests and wishes of the international community. It is argued that, in the fight against international terrorism, States need to stand united if they wish their efforts to be fruitful and international terrorism to be eradicated.

THE DEFINITION OF THE 'INTERNATIONAL COMMUNITY'

In the past few years, journalists, politicians and academics have closely associated international law and international relations with the concept of the international community. It is their view that the international community is a protector of collective values and bearer of identical interests without which humanity could not exist in a peaceful and moral society.[3] According to them, the 'international community' needs to take measures to secure peace and security, to send humanitarian assistance, to prevent massive refugee flows and so on.

Yet, despite the numerous references made to the international community, there is hardly any agreement as to its composition. A definition is of paramount importance for determining the legal and moral validity of the "war on terrorism" lead by the United States and of the claims and criticisms aired against the policy of that State.

A classical definition of international community would encompass all sovereign States, each State being equal and independent from other State entities.

A more contemporary approach would also include other entities which enjoy legal personality on the international level such as international organisations or entities which are legally recognized on the national level and have a certain leverage on international affairs such as non-international organisations, and transnational corporations. An even wider

definition of the international community would include non-State entities (such as rebels, terrorist networks, transnational regions), international scholars and probably the press. This modern definition appears to be more relevant in the current context since the fight against terrorism aims to disarm and dismantle the Al Qaeda network, a non-State entity that contests the concept of territory upon which the principle of sovereignty is based. Another reason for adopting such an approach is that inter-ethnic conflicts have shown the limits of contemplating the world in terms of an assembly of States. Yet, as of now, "there are no grounds for concluding that the state-based system cannot meet the challenge[s]"4 because the war against terrorism is being waged by States, which, thereby, proves the utmost relevance of States in international affairs.

If the contemporary definition is adopted, it might be contended that, to some extent, the United Nations represents the international community. Indeed, its actors and partners are not only States but also, among others, NGOs, multinationals, and individual experts although the States are the primary subjects of UN decisions and negotiations. Unfortunately, the current predominance of the Security Council in international affairs gives the impression that apart from that body no other UN organ is taking any action. It is a matter of fact that the public opinion does not even know that the General Assembly has wide-ranging powers. Worth being mentioned is that, in 1950, the General Assembly adopted the United for Peace Resolution that led to military intervention in Korea.5 Since the breakup of the Soviet Union, the Security Council, because it is endowed with enforcing powers, often has overshadowed the painstaking work carried out by other bodies of the United Nations.

If the UN is seen through the lenses of the Security Council, then it does not represent the international community but the leadership of five States that are bestowed with the right to veto.6 On the other hand, if the entirety of the work accomplished by the United Nations and more particularly by the General Assembly, the Human Rights Commission and by the Special Rapporteurs is taken into account, then it may be argued that the UN adequately represents the international community.

In addition, "[w]hoever assumes the existence of a community suggests that States live under a kind of constitution which, from the very first moment they come into being, they are bound to respect".7 It is argued that such a community exists because certain norms of international law are of customary nature and have been accepted by the international community of States. For examples, the prohibition of a war of aggression,8 the prohibition of genocide,9 the prohibition of torture are well entrenched.10 Whether these norms are implemented is yet another question but the core point is that they are accepted amongst the international community. Furthermore, there exists a more or less extended set of common interests that can be found in the Charter of the United Nations as well as in the two universal Covenants on human rights of 1966. "Many authors characterize the Charter of the United Nations as the constitution of humankind, since it comprises the ground rules of today's international legal order."11

Before delving into the debate related to the position of the international community and the battle against terrorism, it is necessary to signal the difference of approaches towards the United Nations as a representative of the international community. Whereas the United States contends that "[i]nternational law and organization have no existence independent of […] voluntary agreement between sovereign nation-states", i.e. the United Nations cannot exist as such, Europeans, by contrast, tend to believe that the "[international community] hands down legitimacy to existing international institutions, which are seen as partially embodying it."12

THE LEAD IN THE FIGHT AGAINST TERRORISM:

THE UNITED NATIONS AND THE UNITED STATES

The international community, through the adoption of several conventions and resolutions, shows its determination to eradicate all forms of terrorism. Still, from the inception, this consensus was fragile as some States claimed that so-called terrorists were in fact freedom fighters, thereby creating the hackneyed expression "one's freedom fighter is another one's terrorist". The disagreement over the definition of terrorism has always prevented the international community from forming a real front against terrorism. The events of September 11 compelled States to bite the bullet and to stand firm and unite against terrorism, without paying attention to previous vexing points. "United against terrorism" became the leading word in international affairs. Indeed "the nature of the terrorist threat demonstrated the necessity of bolstering the international community, which is built on non-proliferation agreements, intelligence co-operation and legitimising institutions such as the UN, as well as a broad consensus on democracy, free market, and human rights."13

The previous discordance nonetheless re-emerged and the international community seems to have split between the United States that leads the operations and other States that have expressed their doubts as to the legality and the legitimacy of the United States' action.

A comparison can be drawn with the NATO operation in Kosovo. The initial wide approval for NATO's intervention in Kosovo in order to prevent ethnic cleansing was opposed by many States such as the Russian Federation which were not NATO members. Some argued that "humanitarian intervention" without Security Council's approval was in sheer contravention of international law.14 More important is however the opposition that came from within States that had, in fact, participated in the operations in Kosovo. Not only the legality of this operation was questioned but also its necessity. Others, such as the British Parliament "conclude[d] that NATO's military action, if of dubious legality in the current state of international law, was justified on moral grounds."15 A third group questioned whether an operation led in the name of the protection of humanity and the prevention of ethnic cleansing, could result in civilian casualties and in the intensification of the conflict on the ground.

A similar debate is now taking place within the international community. Legality and legitimacy issues are again in the spotlight mainly because before the operations against terrorism were launched the fight against terrorism was not a settled issue yet.

In fact, it first appears that the approach adopted by the United States contradicts in many points the work of the United Nations and more particularly the basic principles of international law as enshrined in the United Nations Charter. Both approaches are running concurrently on the international level and one may wonder first whether they are compatible and second, which one will be more successful in this war against terrorism. The author of this article believes that only a combination of these two approaches will result in the suppression of international terrorism.

It is also argued that, unless both the international community and the United States make concessions more and more States and organizations will cast doubts upon the operations conducted by the American government against international terrorism and more generally

terrorism. The two major bones of contention are the definition of terrorism and the methods used to fight it.

WHO IS A TERRORIST?

The Lack of Definition of Terrorism

Acts of terrorism are known to almost each State apparatus because it is the violent expression of political will when, in the eyes of the perpetrator, no peaceful solution is available. Generally, terrorism "aims to change prevailing power relations through subversive means."16 Despite numerous resolutions and conventions on the international level, no particular legal definition of terrorism has attracted universal acceptance.17 Richard Baxter, former Judge on the International Court of Justice, once remarked, "We have cause to regret that a legal concept of 'terrorism' was ever inflicted upon us. The term is imprecise; it is ambiguous; and above all, it serves no operative legal purpose."18 No comprehensive definition of acts of terrorism was agreed upon in a legally binding instrument. Instead of delineating a clear definition of terrorism, States have preferred a piece-meal approach, as a result of which certain acts falling within the purview of a specific convention are branded as terrorist. The international community managed to reach an agreement on the qualification of certain actions: hostage-taking, hijacking, use of explosives, etc, acts which are now world-wide regarded as belonging to the terrorist arsenal As the events of September 11 were of an extraordinary nature, a combination of hijacking and murder, specialists in the field of terrorism and on the use of force were uneasy in classifying this attack as terrorism although popular opinion and the majority of governments quickly branded the attack as terrorist. Several experts such as Gina Cassese19 thought that, provided certain requirements were met, it was more suitable to use the notion of 'crimes against humanity' in order to categorize the acts of September 11. Yet, 'terrorism' became the triggering word for the international community.

Targets of Terrorists

A possible way to define terrorism is to find the common denominator of targets of such attacks. The fight led by Osama Bin Laden undoubtedly questions the legitimacy of the Western, liberal dominance especially in the world of human rights. It is often wrongly asserted that acts of terrorism are aimed at Western targets, at States that embody values such as human rights, democracy and rule of law.20 A quick overview of the facts reveals that most acts are committed by groups who are fighting against a government that refuses to grant them autonomy or independence. For example, so-called terrorists in Kashmir are engaged in a constant battle with the Indian armed forces and Palestinians are almost on a daily basis launching attacks against the Israeli authorities. Another example is the Basques' struggle in Spain. They do not oppose westernised values, they simply fight for their independence. The list of acts of terrorism perpetrated in countries that are under attack for other reasons than their "westernised" values is long and often overlooked especially since September 11 because the focus has been on international terrorism.

It is rightly pointed out that international terrorism targets States symbolising wealth, democracy, and free market. In this regard, the majority of such criminal acts have been committed against nationals21 of or, more recently, on the territory of the United States.22 Precisely for that reason and because the biggest terrorist attack occurred in the United States, no one questioned at the beginning the lead that the United States took in the fight against

terrorism. However, it should be borne in mind that its fight against terrorism is only against one particular form, namely international terrorism. It is important to remember this because September 11 has created in people's mind the impression that besides international terrorism, no other forms exist. The international community seems to have obliterated from its agenda internal terrorism or to have linked it to international terrorism. In particular certain news agencies and the press have shunted most other forms of terrorism to the sidelines. Headings on purely national terrorist acts are rare or if mentioned, these attacks are explained in the context of international terrorism.

An excellent example is the hostage seizure in Moscow in October 2002. At the beginning, the press focused on the activities around the theatre, then, after the raid, it started to see them in the light of the armed conflict in Chechnya. References were made to the fact that the terrorists had linked with persons outside the Russian Federation and notably nationals of Saudi Arabia, Qatar or the Emirates.23 Attention was also paid to the presence of Zakaev24 in Denmark and then in the United Kingdom. This appeared to prove the existence of an international network. Some time later, as part of an investigation which started in November into the activities of groups from Chechnya, France arrested four alleged terrorists which had been trained in Chechnya and had planned attacks on the Russian embassy.25 The need to link every single terrorist act to a wider global network irremediably illustrates the change of focus from national terrorism to international terrorism.

International Terrorism

In this fight against international terrorism, the United States has pointed to several States suspected to be involved in supporting terrorist activities or harbouring terrorists. As a matter of fact, Afghanistan was the first country upon which the US decided to take action. Indeed, the United States was convinced that a group based in Afghanistan carried out the attack. Previous events such as the attack on the US embassy in Kenya had pointed at a terrorist cell called Al Qaeda which, at that time, was based in Sudan but later took refuge in Afghanistan. On several occasions, the United States had requested the government of Afghanistan, the Taliban to hand over Osama Bin Laden, the head of this terrorist group. Afghanistan had nevertheless refused even after the Security Council of the United Nations had passed resolutions demanding his extradition. After the September 11 attack, the United States understood that it would have to enforce this resolution by using force. Very few members of the international community criticised the US decision to send troops to Afghanistan in order to capture terrorists and destroy their training camps. Only the international legal community raised the issue of the legality of the operation, for under international law, as established in article 51 of the United Nations Charter, force can also be used in self-defence, namely after a State has suffered an actual armed attack.26 Still the majority supported the US intervention, notably NATO States which shortly after the attack declared their unanimous support to the United States.   Some countries such as the United Kingdom, France or Germany also sent troops on the ground to help the US in the war against terrorism and to create a new State respective of human rights and rule of law.

The member States were less supportive after the Bush statement relating to the 'axis of evil'. The American president's speech was a blow to the approach adopted by all sovereign States willing to be engaged in the fight against terrorism. In many regards a parallel can be drawn between Bush's 'axis of evil' and Reagan's 'empire of evil': the same tone, the need to use military power to overcome the enemy, a strong foreign policy against the 'evil', the conclusion of agreements with States that violate human rights only for the sake of weakening

the chief enemy.27 Yet, the reaction of the international community is totally different from the world's reaction after Reagan's denunciation of the politics of the Soviet Union. Whereas Reagan's policy found approval by all NATO States and other allies of the United States, Bush's statement met with first surprise and then great scepticism because it appeared that the axis of evil was constituted by regimes that had displeased or opposed the American policy in their region and that their appearance on the list was attributed to their attitude towards terrorism.28

Branding these particular Sates as non-law abiding was not misplaced as such but it raised many questions that are still debated nowadays. Since1996 the US has been pointing the finger at seven States known to be sponsoring international terrorism: Cuba, Iran, Iraq, Libya, North Korea, Sudan and Syria. For unknown reasons Cuba, Libya, Sudan and Syria managed to fall through the net and were not mentioned in the 'axis of evil' speech. Yet, generally, these countries have been recurrently considered by the US as sponsors of international terrorism.29

First, it must be noted that these States are often called 'rogue', an infamous qualification attributed by the United States. "These States are a sub-product of the hegemonic policy of the United States as they are pointed to as the bad pupils, delinquents in a quasi-penal approach of international relations."30 They are extremely diverse and in some instances such as Iran and Iraq oppose each other. The common denominator is their relative weakness and their capacity to destroy. Some States have managed to move out from this category by adopting a softer policy towards the US or simply have kept silent.31 Indeed, more than just being outcasts of the international community, one of their chief mistakes is not so much to be cut out of the international community but to refuse to follow the general policy of the US.

As to the 'war on terrorism' more specifically, their silence as to their participation in this immense undertaking and their lack of sympathy publicly expressed to the US after the tragic events of September 11, probably led the US to believe, under the principle "if you are not with us, you are against us", that they had decided to go their own path. As rephrased by Hirsch, Bush's message to the world delivered on 20 September 2001 was "either you stand with civilisation and good (us), or with barbarism and evil (them). Choose. And to those nations that choose wrongly, beware."32 Several States and organisations sharply reacted after the speech, not so much to support the concerned States as they were already regarded as pariahs by the international community but because the list seemed to have been arbitrarily drawn. For example, it did not refer to some States that had supported terrorist activities. It is alleged by India that Pakistan offers substantial help to the Kashmiri independence movement who use 'terrorist' methods. Yet, Pakistan was never listed as a country part of the 'axis of evil'. One may think that this particular position was earned by Pakistan's consideral and opportunistic suport to the US during the operation in Afghanistan. Yet, earlier the State Department had listed at least three Pakistani terrorist groups, Harkat-ul-Mujahideen, Lashkar-e-Toiba and Jaish-e-Mohammed that target Jammu and Kashmir State of India. These groups were said to have well known connections to global terrorism and to collaborate with the Al Qaeda network.

Second, the international community's doubts after the 'axis of evil' speech were also sowed due to the difficulty of grasping the direct and immediate link between these States and the war on terrorism. It is contended that international support can only be obtained and international legal validity only bestowed if it is predicated on a clear linkage to September 11 or on hard evidence that these States are threatening international peace and security. To

understand the morality of an action, it is pertinent to show a direct link between two events or actions. As a matter of fact, terrorism and anti-terrorism are nowadays the chief doctrinal references in the foreign policy of the United States.33 The United States has tried to make a two-tiered connection between terrorism and these States. The first step is the assumption of a link between terrorism and the possession of certain types of weapons, namely weapons of mass destruction. Some States believe that terrorists have been trying to get access to weapons of mass destruction, a proposition that has been recently verified as some tapes recorded by the Bin Laden network showed experiments with lethal chemicals. David Kay, formerly a United Nations weapons inspector in Iraq, who watched the tapes, declared that the tapes raise the spectre of weapons of mass destruction. However, Hoffman argues in an article published in 2000 that although terrorist groups may have acquired such know-how and even have the ability to produce weapons in big quantities, they are far from being able to weaponise and effectively disseminate chemical and biological weapons.34

The second step, also in the form of an assumption, is to assert that these States are not able or willing to prevent terrorists from obtaining access to these weapons. Many States doubt that these issues are connected and prefer to view this axis of evil as a separate issue raised by the United States. Indeed, Prime Minister Aznar, in the name of the European Union stated, "In the fight against terrorism, there should be no division within the international coalition. However, to attack so-called rogue States from which a supposed threat stems is distinct from the fight against terrorism."35

The first State member of this infamous league is Iraq, the next military target of the United States. The United States has been bombing the territory of Iraq on repeated instances in conjunction with the United Kingdom in the past few years. Now this collaboration of States not only wishes to enforce resolutions of the United Nations but also to put an end to the regime of Saddam Hussein by overthrowing it during a major military operation. This plan is severely criticised by the international community and more particularly by countries such as France and Germany who formally announced that without a Security Council resolution the attack of the United States upon Iraq would be in violation of international law. The United States however remains untouched by these declarations, probably because the US prefers to give way to home popular opinion and advantageous military and political outcomes over ethics and the rule of law or, as others argue, probably because the US believes that the position of Germany and France does not reflect current international law. The United States is constantly using terminology relating to the discourse of 'just war' and to the need to come to an end with Iraq before it is too late. "By engaging in a 'just war', in opposition to core Charter objectives to prevent states from using force in international relations to promote their policy agendas no matter how just, except for the right of self-defence or a collective decision by the Security Council",36 the US would be in breach of international law. Besides States, organisations are questioning the real aim of an attack against Iraq, whether such an operation serves any purpose other than finding a scapegoat and thereby gaining internal popular support in the United States. The lack of definition of terrorism has unfortunately led the US to believe that under the fight against terrorism, it could cover other aims of its current foreign policy. The international community is nonetheless well aware that an attack upon Baghdad and the thwarting of the regime of Saddam Hussein is not linked to the war against terrorism but the continuity of the US policy that began in 1991 against Iraq.

National Terrorism

Another troubling aspect of the lack of definition of terrorism for the international community is that since September 11 and the ensuing fight against terrorism, States which are confronted with internal forms of terrorism, have taken the opportunity to justify their actions. States have easily portrayed their internal enemies as terrorists without much criticism by either the UN or other international organisations. To the naked eye, it seems that the events of September 11 have legitimated States' right to point at these individuals as terrorists and hence their right to use any means available. For instance, "Deputy Prime Minister Mesut Yılmaz of Turkey declared that it was unfortunate that Turkey's attitude to fight against terrorism was justified with such a disastrous terrorist attack."37 Russia's stance after September 11 towards the so-called terrorists in Chechnya well illustrates how quickly and easily governments used the tragic outcome of this attack to gain the support of the international community in their domestic fight. Israel is probably the most poignant and sad evidence of how the attack in the US has changed world affairs and more particularly the position of the United States. Jimmy Carter argues that instead of sponsoring substantive negotiations between Palestinians and Israelis, the current policy of the US is "to support almost every Israeli action in the occupied territories and to condemn and isolate the Palestinians as blanket targets of the [US] war on terrorism, while Israeli settlements expand and Palestinian enclaves shrink."38

Furthermore, members of terrorist groups have been suspected of being parts of a wider terrorist network, namely the Al Qaeda network. The head of this network, Bin Ladin uses an extensive international network to maintain a loose connection between Muslim extremists in diverse countries. There is growing evidence that 'national' terrorist groups are part of a loose transnational network of which Al Qaeda is one active member. In some instances a clear link was proved between Al Qaeda and other terrorist groups. As soon as Washington had identified the Abu Sayyaf Muslim terrorists as part of bin Laden's terrorist network, in January 2002, it sent special forces, support and technical staff to the Mindanao region of the Southern Philippines to assist local troops. National terrorist groups have become a cause of concern for the international community and more particularly for the United States. In its entirety, any group that has contacts with Al Qaeda is deemed to be terrorist. Domestic terrorism that used to be treated as a criminal problem and addressed using the tools of law enforcement is now perceived as a military threat by many governments. In other instances such a connection between the presumed perpetrators of the attack on September 11 and other terrorist groups or even States could only be partially demonstrated. There is still much wrangling as to whether Iraq is part of the Al Qaeda network. Whereas the United States have insisted on the existence of such a link, scholars and experts have claimed that no such connection could be found. For example, Noam Chomsky, a virulent critic of the US policy, stated that "[d]espite enormous efforts to tie Saddam to the 9-11 attacks, nothing has been found, which is not too surprising. Saddam and bin Laden were bitter enemies, and there's no particular reason to suppose that there have been any changes in that regard."39 The fact that simply a link between Al Qaeda and another group confers the former denomination of "terrorist" is worrisome. The question should, from a legal point of view, be solved by assessing whether this group launches attacks that fit into the definition of terrorism. However as there is no such definition, it is the moral values of this entity and more particularly its capacity to detach itself from the work of the members of the Al Qaeda network that are judged by the international community.

Shortly after the September 11 attack, the General Assembly of the United Nations called upon member States to define the term 'terrorism' again. Yet, as of now, no such definition could be agreed upon. And this despite numerous attempts by the United Nations and

international legal scholars that date back to 1937.40 One may consequently wonder whether the international community is indeed keen on accepting a common definition of terrorism. In reviewing the reports submitted by States to the Counter-Terrorism Committee that was established by the Security Council in its resolution 1373, one may be able to point at common and recurrent features. It is consequently hoped that the work of the Counter-Terrorism Committee will give birth to a universally adopted definition of terrorism and will prevent further debate as to who is a terrorist (-supporter) and hence will prevent governments from branding groups terrorists in order to receive help from the international community in the fight against terrorism.41

MEANS TO COMBAT INTERNATIONAL TERRORISM

In the last decades, several types of means and methods have been used to combat international terrorism. Terrorism in this context may be "defined as an ideologically-motivated strategy of internationally proscribed violence designed to inspire terror within a particular segment of a given society in order to achieve a power-outcome or to propagandise a claim or grievance, irrespective of whether its perpetrators are acting for and on behalf of themselves, or on behalf of a State".42 "Policy tools in combating international terrorism range from the 'soft' means of diplomacy, international co-operation, constructive engagement, and protective security measures through coercive means such as economic sanctions, covert action, and military force."43 While the United Nations has concentrated on the adoption of legal instruments and tried to obtain as much support as possible through resolutions of the General Assembly and more recently of the Security Council (It must however be noted that prior to September 11, "the Security Council was responsible for enacting twelve resolutions in a continued effort to stop international terrorism")44, other States such as the United States45 and Israel assert their right to use force against terrorists based in another State without that State's approval.

The UN Fight against Terrorism

The international community, in numerous fora, condemned acts of terrorism. The primary intent is to apply and strengthen the rule of law by improving judicial and legal mechanisms and more particularly enforcement capabilities of States that are victims of international terrorism. For years, the international community has felt the need to combat terrorist acts and has stressed States' obligation to co-operate. Strong emphasis has been put on intelligence gathering, information sharing and improved security arrangements for aircraft and maritime facilities.

First to be mentioned is the work of the General Assembly that has adopted no less than 25 resolutions setting measures to prevent international terrorism and harshly criticizing terrorist methods. While these resolutions are not legally binding on Member States of the United Nations, they are of paramount importance as they clearly and expressly assert the impermissibility of terrorism in any manifestation. Resolution 49/60 is assuredly one of the best illustrations of how the international community views terrorism. Such acts "constitute a grave violation of the purposes and principles of the United Nations, which may pose a threat to international peace and security, jeopardise friendly relations among States, hinder international co-operation, and aim at the destruction of human rights, fundamental freedoms and the democratic bases of society."

In addition, the UN has developed a wide range of international legal instruments that enable the international community to take action to suppress terrorism. Bassiouni speaks of 14 Conventions dealing with specific methods of terror violence while the Special Rapporteur on Terrorism and Human Rights, Ms. Kalliopi K. Koufa cites 19 Conventions. The Security Council on several occasions and more particularly in Resolution 1373 called upon States to sign and ratify the anti-terrorism conventions so as to ensure better   co-operation between States in the fight against terrorism.

Furthermore, the Security Council, in adopting Resolution 1373, showed its willingness to combat international terrorism through a series of steps and comprehensive strategies and through the establishment of a committee that gathers material related to States' anti-terrorist measures. Amongst others are mentioned the prevention and suppression of financing terrorist acts, the exchange of information and assistance amongst States in preventing terrorism, the denial of safe heaven to terrorist, an effective control of the borders and the denial of usage of the territory for terrorist purposes.

The Fight against Terrorism Led by the United States Appears to be Based on the Use of Force

While the United Nations tackles the terrorist plague via conventions and declarations, the United States has opted for a more forceful solution, that has been criticized by the international community via others States, NGOs and international legal scholars. "The US response has included military air strikes against targets in Afghanistan that directly or indirectly support Al-Qaeda",46 a US-customary practice that it started against Libya in 1986 and then continued with the bombing of Iraq in 1993 and eventually of Sudan and Afghanistan in 1998 following the attacks on the US embassies.

To examine this issue, it is best to follow George Lopez's yardsticks: "[t]he moral compass to guide our best scrutiny of options may come in three simple categories for governing the use of force in world affairs: that it adhere fully to the rule of law, that there be a logical relationship between the means and ends and that concern for protecting civilians and limiting collateral damage be paramount."47

From the debates that have been taking place since last year, three issues need to be investigated: the operation carried out by the Americans in Afghanistan, the status of the prisoners of Guantanamo Bay and the possible use of force against Iraq.

Since the attack on the Twin Towers in New York and on the Pentagon was extraordinary, classical counter-terrorism measures appeared to be of less use to come to terms with the alleged perpetrators. As a matter of fact, the US decided that an appropriate counter-action was an intervention in Afghanistan after the Talibans, the then government, refused to surrender Bin Laden and its accomplices. The issue whether the US was entitled to reply to the September 11 attack by using force and enter the territory of Afghanistan is much debated in the legal sphere. According to Articles 2(4) and 51 of the UN Charter and international customary law, it is prohibited to use force except in self-defence. It means that unless a State is the victim of an armed attack, it cannot use force against another State. Terrorist attacks have until now not been considered as an armed attack since the perpetrators are individuals and not a State. Yet, some States such as the US, Israel or South Africa, have, prior to September 11, argued that they could use   force in self-defence to respond to terrorist attacks by targeting members and material owned by the terrorist group alleged to have

committed the attack. For example, in June 1993 the USA fired missiles at the Iraqi Intelligence Headquarters in Baghdad. It claimed the right to self-defence. "There was widespread sympathy for the US action, but in the Security Council only the UK and Russia expressly supported the legality of the US action. Conversely, only China actually condemned the US action." The US renewed such an action in 1998 against Afghanistan and Sudan in response to the bombing of US embassies in Kenya and Ethiopia. The right to self-defence was once more invoked.48

However, until recently other States had vehemently denied such a right. As Cassese noted, "in a matter of few days, practically all states […] have come to assimilate a terrorist attack by a terrorist organisation to an armed aggression by a state, entitling the victim state to resort to individual self-defence and third states to act in collective self-defence. The magnitude of the terrorist attack on New York and Washington may perhaps warrant this broadening of the notion of self-defence."49 The US has based its intervention in Afghanistan on Resolution 1368, which, in its view, supports the right to self-defence and entitles the US government to send troops. Others have claimed that the attack on the World Trade Centre and on the Pentagon was disturbing the classical approach of the international use of force and hence the reply of the United States was in a grey area. Furthermore, in its operation in Afghanistan, the United States is bound by international humanitarian law that requires it to abide by amongst others the principles of humanity, of proportionality and of distinction between civilians and armed forces. This is even more difficult as the planners and executors of September 11 appear to operate free of moral values while America's "collective psyche believes that is unfair that [Americans], victims of such atrocity, must play by rules that [Americans'] unknown foe disdains."50

On the other hand, morally, it was clear after the events of September 11 that a strong response was required to suppress international terrorism, including the use of military force. Indeed, "[t]he visuals of terror and suffering, coupled with instantaneous satellite communications and the Internet, compress the time period between earning of events and responding to demands to 'do something'".51 The American population as well as the international community were longing for a tough answer. NATO's immediate reaction "on 12 September 2001 to invoke Article 5 of the Washington Treaty underscored the profound link between two continents and nineteen nations, and underlined the Allies' collective determination to act."52 This is assuredly the strongest commitment sovereign States can give to each other and the proof that the international community or at least its Western component fully agreed with the US view that military action was necessary against Afghanistan, the country that harboured the alleged perpetrators of the attack on September 11. As Jamie Shea stresses "[t]he acceptance of such shared destiny is at the heart of ethics in international security policy, for it makes opting out or neutrality in the face of the new, transnational terrorist threats much more difficult to justify."53

There is no doubt that without the operation in Afghanistan the terrorist network of Al Qaeda would be intact and probably able to carry out other attacks. "Years of diplomatic and law enforcement efforts to arrest Bin Laden and his network and freeze their financial assets have not worked."54 However, the recent activities of the United Nations has brought about closer co-operation and has also been able to cut the financial arms and reduce the leverage of the Al Qaeda network in the world. Consequently, the simultaneous actions of the United States and the United Nations through different means have been proved fruitful in these terms.

Whereas the discussion related to the legality of the US action in Afghanistan occurred on the academic and NGO level, probably because any State could understand that the US could not tolerate such an attack on its territory, the issue of the status of the prisoners held in prison in Guantanamo Bay generated intense disagreement in the international community and even attracted negative comments from some States. No sooner than the Taliban and Al Qaeda prisoners were captured in Afghanistan, the US administration declared that they were 'enemy combatants' not entitled to prisoner of war status according to the third Geneva Convention. Despite calls made by the International Committee of the Red Cross, NGOs and international legal experts, the US has maintained its position. With difficulty some States have obtained access to their nationals incarcerated in Guantanamo but many have not been managed to do so.55   The majority cannot understand "[o]n what ethical basis can captured combatants be incarcerated indefinitely with no crimes charged against them, and no prospect for return as a POW?"56. The treatment of the prisoners was also a cause of concern at the beginning when they arrived hooded and shackled in Guantanamo. Yet, after much international pressure, the US gave them better living conditions and accepted visits from delegates of the International Committee of the Red Cross. Recently, due to all the attention paid to a possible armed conflict with Iraq, the fate of the prisoners is not discussed anymore. Yet, the are still detained and not afforded judicial rights as illustrated by the Hamdi case.57

Another more recent bone of contention is the possible military action of the United States against Iraq. As previously mentioned the use of force in international affairs is banned unless a State or States act in self-defence or is entitled by a Security Council resolution to take action. For the US to gain legitimacy for its action against Iraq, first, the US could point to the link between Iraq, Al Qaeda and the September 11 attack and thereby use Security Council Resolution 1368. The international community is unconvinced that any attack on Baghdad is part of the 'War against Terrorism'. The slender evidence of any Iraqi involvement present or potential with Al Qaeda nevertheless casts doubts as to the relevance of this resolution in the present case. Obviously, a new resolution considering Iraq as a threat to international peace and security would be necessary.

An alternative is to convince the world that a new interpretation of the right to self-defence is necessary in the light of the most recent events and the emergence of non-State actors in the international arena.58 According to international law, a more permissive right to self-defence can only be based on a wider scope of interpretation of Article 51 of the UN Charter.59 However the paper at hand does not intend to discuss this interpretation and focuses on other propositions. Some authors argue that military action that is supported freely and in coalition by democratic governments can be legitimate without explicit UN Security Council endorsement. The concept of 'humanitarian intervention'60 has found little approval amongst scholars mainly because, though appealing in theory (the protection of human rights, the end of a dictatorship), it appears dangerous in practice. A right to humanitarian intervention could be misinterpreted and lead to interventions solely based on political considerations. However, some States such as Canada are pleading in favour of humanitarian intervention and have subsequently come forward with a list of legal criteria that needs to be fulfilled to make such an intervention both legal and legitimate.61 Few scholars argue on the basis of international customary law that there is a   pre-Charter right of self-defence to act pre-emptively against an enemy but not all rely on 'just war' concepts.

In this framework of thinking, the concept of 'just war' attracted much support. Despite the fact that 'just war' is not allowed under modern international law, it is still used in the legal literature as well as by State officials to justify an attack on a State that has not launched a

military operation. "Just war theory describes the ethical responsibilities of public authorities for protecting and defending the common good."62

Key criteria to gauge whether a military action can fit the mould of the just war theory are: just cause, right intention, legitimate authority, war as a last resort and probability of justice. In the instant case, the common good is international peace and security provided one could show that Iraq is indeed posing such a threat by giving terrorists access to weapons of mass destruction. Walzer agrees that pre-emptive strikes are permissible if a State demonstrates "a manifest intent to injure, a degree of active preparation that makes that intent a positive danger, and a general situation in which waiting, or doing anything other than fighting, greatly magnifies the risk".63 The view is that a State cannot wait like a sitting duck for the attack to take place.

The requirement that force is only used as a last resort is fulfilled since the international community has, on several occasions, requested Iraq to agree to the presence of international inspectors to check the Iraqi stock of biological, chemical and nuclear weapons. So far, the Iraqi government has informed the United Nations that it accepts the examination of its military arsenal. In its last speech in September 2002 to the General Assembly, President Bush stressed that unless a compromise is found, the United States will use military force. It must nonetheless be borne in mind that "containing the military power of Iraq […] has few moral justifications. All States have militaries and all States seek to increase the potential destructive power of those militaries."64

Whether the US is vested with the legitimate authority is in question as more and more concerns are expressed as to the legitimacy and the legality of an operation against Iraq. Besides, the use of force without Security Council authorisation seriously undermines the long-term objectives of the US since it damages its relationship to other States, notably those that are permanent members of the Security Council, and the UN system that is regarded as the embodiment of world order interests shared by the international community. Although these two approaches appear divergent, they can, to a certain extent, be reconciled if the US can demonstrate that it truly aims at bringing peace and security to the Gulf region. However, as "the goals of the US policy have never been clearly articulated [it] makes many of the policy options raised here morally dubious. One of the most important aspects of ethical reasoning is clarity concerning ends".65 And the international community does not seem to be convinced that the US is genuinely interested in only securing peace in the Gulf region especially after the Secretary of Defence, Donald Rumsfeld, made clear that the US wished a change of government in Iraq, a government based on democratic principles.66 To some extent, the aim of the US can be seen as a change of regime in favour of the US.

Consequently, the just war theory may not be applicable in the given circumstances unless the US obtains the approval of the international community positively via a UN resolution from the General Assembly or the Security Council or negatively if only a minority of States express their dissent.

TWO APPROACHES - ONE GOAL

All in all, the 'fight against terrorism' conducted by both the US and the international community has persuaded many States to adopt a tougher approach towards terrorists. Syria is trying to promote itself as an example of counter-terrorism success, Iran is becoming nervous and President Khatami assured that Iran will not harbour any terrorist groups and that

members of Al Qaeda have been arrested and sent back to their country of origin,67 Sudan is now cooperating with the US while Yemen and the Philippines have invited US troops for military support and advice. "It was reported that Somali faction leaders are openly talking about inviting US military personnel in, to help them cleanse the country of its suspected Al Qaeda presence."68

These changes are the product of the US and the UN demands. Although a better-combined pressure would have been more efficient and probably would have led to less controversy as to the legality and the legitimacy of the US in the lead against terrorism, the result is satisfactory. First, the United States as a permanent member of the Security Council is able to win UN support for its operations against the terrorist network and for a better monitoring of the production of weapons in Iraq. Earlier the US had used in an opportunistic manner the Security Council in order to bless its freedom of action during the Gulf War (Resolution 678), after the intervention in Kosovo (Resolution 1244) and after September 11 (Resolution 1368). There is no shimmer of doubt that the US can persuade the Security Council to vote a resolution legalizing its unilateral action. As of now, the US has concentrated its action on the General Assembly. The leverage of President Bush' speech to the General Assembly on 12 September 2002 is of considerable importance. In the words of the Secretary-General, it galvanized the international community and lead to the acceptance by Iraq of the presence of inspectors without conditions.

Second, the US is able to gather more firepower than any country in the world. The operations during the Gulf War and against the Former Republic of Yugoslavia have clearly demonstrated the overwhelming military power of the United States. The will to keep military superiority over any potential opponent or even any possible coalition is the most visible element of the American policy in terms of security.69 In addition, as far as rapid forces are concerned, no country with the probable exception of Israel is able to pull in and out of a country like the US troops. An operation led by the US is likely to be the best solution in military terms.

In addition, without doubt, a US operation that has strong multilateral or international support strengthens its ethical legitimacy. It is argued that the US action cannot sit on solid legal or moral grounding unless there is international backing either in the form of the UN Security Council resolution or in the form of a wide coalition formed not only by States that are the main powers but also representing different values. No matter how strong and powerful the nation, without the UN backing, it loses its legitimacy in the world community and hence its ability to lead. Consequently, despite its military and economic strengths in comparison to other nations, the US should seek support from the United Nations system and from other States, support that can be in the form of a resolution adopted by the Security Council or by the General Assembly.

In its battle with terrorism, the US needs to be careful. It is not necessarily acting in an unlawful manner but it may trigger a very hostile attitude towards its current policy as a result of which it may loose any support in the international war against terrorism. The US, which has now become a hegemonic State, should understand that there is more to be won from being a powerful leader negotiating with its partners than from being a democratic dictator. But, on the other hand, "[t]he US and the rest of the world each need to decide whether having the US act alone is in their respective interests".70

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19   Gina Caccese, 'The United Nations and Terrorism: The Response to September 11th and Mayor Giuliani's Address to the General Assembly', New York Law School Journal of Human Rights, No. 18, summer 2002, pp. 461-465.

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21   Christopher C. Joyner and Tamara C. Wittes, op.cit.

22   See for example the Oklahoma bombing in 1995.

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33 Azmi Bishara, 'Terrorisme et Résistance', Le Monde, 26 February 2002.

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37   High Level Turkish Officials Condemn Terrorism, Summary of Turkish Press on the Terrorist Attacks against the US Prepared by the Directorate General of Press and Information of Turkey, 12 September 2001.

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39   Interview with Noam Chomsky, 'Chomsky on Iraq', 5 September 2002, available at: http://www.zmag.org/sustainers/content/2002-09/05chomsky.cfm.

40   Noëlle Quénivet, 'A Definition of 'Terrorism' Urgently Needed after the September 11th Attacks', available at: http://www.auditorium.ru/conf/conf_fulltext/noelle.pdf.

41   Unfortunately, as of today, the prospects of an agreement upon a definition of terrorism are very bleak.   In this regard, it is enlightening to look at the work of the Security Council Committee Established Pursuant to Resolution 1373 (2001) Concerning Counter-Terrorism and more particularly at the State reports submitted to that Committee.

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44   Antonio Cassese, 'Terrorism is also Disrupting Some Crucial Legal Categories of International Law', European Journal of International Law No. 12, 2001, pp. 993-1001.

45   See also Dino Kritsiotis, 'The Legality of the 1993 US Missile Strike on Iraq and the Right of Self-defence in International Law', International Comparative Law Quarterly, Vol. 45, January 1996, pp. 162-177.

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49   Antonio Cassese, op. cit.

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51   Henry Shelton, 'Keynote Address at Inaugural Carnegie-Georgetown Forum', Edited Transcript of Remarks, Carnegie Council on Ethics and International Affairs, 2001, available at: http://www.carnegiecouncil.org/about/transcript_shelton.html.

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54   Maryann Cusimano Love, 'Globalization, Ethics, and the War on Terrorism', Notre Dame Journal of Law, Ethics and Public Policy No. 16, May 2002, pp. 65-79.

55   Pascal Ceaux & Erich Inciyan, 'Sept français identifiés parmi les prisonniers de Guantanamo', Le Monde, 2 March 2002.

56   Maryann Cusimano Love, op. cit.

57   United States Court of Appeals for the Fourth Circuit, Yaser Esam Hamdi and Esam Fouad Hamdi v. Donald Rumsfeld and W. R. Paulette, No. 02-6895, 12 July 2002.

58   Antonio Cassese convincingly shows how the right to self-defence has been affected since September 11th. Antonio Cassese, op.cit. A quick look at the amount of academic conferences dedicated to analysing the effect of September 11th on the right to self-defence illustrates the topicality of this discussion.

59   See the discussion on the site of the War Crimes Project, available at:

http://www.crimesofwar.org/expert/bush-intro.html.

60   For an interesting view on humanitarian intervention see chapter 7 of Fernando R. Teson, Humanitarian Intervention: An Inquiry into Law and Morality, New York: Transnational Publishers, 1997, pp. 133-174.

61   International Commission on Intervention and State Sovereignty, The Responsibility to Protect, December 2001, available at: http://www.dfait-maeci.gc.ca/iciss-ciise/pdf/Commission-Report.pdf

62   Maryann Cusimano Love, op. cit.

63   Michael Walzer, Just and Unjust Wars: A Moral Argument with Historical Illustrations, New York: Basic Books, 2000, p. 81.

64   Anthony F. Lang, 'Moral Dilemmas of US Policy toward Iraq', Carnegie Council on Ethics and International Affairs, 2001, available at: http://www.carnegiecouncil.org/lib_mideast_lang.html.

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66   Kathleen T. Rhem, 'Rumsfeld Describes What He'd Like to See in Iraq Government', American Forces Press Service, 9 August 2002.

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