
International Law, the United States, and the Non-military 'War' against Terrorism

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Abstract

Considerable attention is focused on the use of military force as a means of combating terrorism, whether it be in Afghanistan, Iraq or elsewhere. However, the more dominant means for combating terrorism worldwide lies in non-forcible measures undertaken by states. In this realm, states that might otherwise be inclined to pursue unilateral action, such as the United States, are forced to pursue cooperative strategies that rely considerably on international law and international institutions. This essay briefly assesses various non-military initiatives undertaken by the United States — including criminal litigation and the imposition of economic sanctions on states and terrorist groups — so as to consider the broader question of whether, and if so how, international law and institutions are conditioning the behaviour of the United States. It demonstrates that, for various issues, US policy-makers and courts use international law and institutions as a means of advancing US interests, and suggests that in doing so US behaviour is affected by the expectations of the global community as embodied in international legal norms.

Since the terrorist attacks of September 11, 2001, the United States has embarked on an aggressive campaign to punish those responsible for the attacks and to deter future terrorist activities. In the minds of many, this 'war on terrorism' principally features two phenomena: (1) the use of military force as the means for striking at terrorists; and (2) unilateral action by the United States. In fact, the US campaign against terrorism, which predates September 2001, is quite multifaceted in its reliance on different kinds of non-military sanction regimes, law enforcement techniques, civil and criminal litigation, and covert measures. Moreover, while the United States is capable of advancing some of its interests through either unilateral action or through aggressive, even coercive, diplomacy, the United States remains reliant on other countries in waging its 'war on terrorism', such that international law and institutions play a visible role in shaping, if not constraining, US action. Through reference to various examples, this essay seeks to illuminate some of the relationships

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that exist between US law and international law in this area of non-military responses to terrorism.

1 Inter-state Economic Sanctions

One obvious means for combating terrorism has been to impose economic sanctions on states that commit or sponsor terrorist acts. Those sanctions may take the form of blocking (or ‘freezing’) the assets of such states, prohibiting financial transactions by persons with such states, trade embargoes, and other economic restrictions. In the United States, various statutory authorities contemplate imposition of economic sanctions of this type.¹ Thus, under US export control laws, the US Secretary of State has designated certain countries as ‘terrorist countries’, which allows US authorities to block the assets of those countries located within the United States or under US control.² The countries currently designated as sponsors of terrorism are Cuba, Iran, Iraq, Libya, North Korea, Sudan and Syria.³ Under US criminal law,⁴ US persons may not engage in financial transactions with the governments of countries designated as terrorist states, except as provided in regulations issued by the Secretary of the Treasury in consultation with the Secretary of State.⁵

US presidents may also use these statutes to target governments not recognized by the United States. For example, as a part of the pre-September 2001 US campaign against the Saudi-born terrorist Osama bin Laden (for the terrorist bombings of two US embassies in East Africa), President Clinton issued an executive order in July 1999 barring the import of products from Taliban-controlled Afghanistan, prohibiting US companies from selling goods and services to the Taliban, and freezing all Taliban assets in the United States.⁶ In a message to Congress, President Clinton indicated that these economic sanctions were intended to pressure the Taliban to surrender bin Laden to US custody.⁷

International law does not prevent a state from severing economic relations with

¹ See, e.g., Trading with the Enemy Act, 50 U.S.C. App. §§ 1–6, 7–39, 41–44 (2000); International Emergency Economic Powers Act, 50 U.S.C. §§ 1701–1706 (2000) (IEEPA); International Security and Development Cooperation Act, 22 U.S.C. §§ 2349aa-8 & -9 (2000); and Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104–132, 110 Stat. 1214, 1247–1258 (1996) [hereinafter AEDPA].

² See Section 40(d) of the Arms Export Control Act, 22 U.S.C. § 2780(d) (2000).

³ As of early 2002, the blocking programmes had captured the following gross amounts of reported US-based assets (in millions): Cuba, \$112.3; Iran, \$251.9; Iraq, \$2398.9; Libya, \$1182.5; North Korea, \$32.4; Sudan, \$27.4; and Syria, \$104. ‘Annual Report to the Congress on Assets in the United States of Terrorist Countries and International Terrorism Program Designees’, Department of the Treasury, at 7 (2001) available at <http://www.treasury.gov/offices/enforcement/ofac/reports/tar2001short.pdf>.

⁴ AEDPA § 321, 18 U.S.C. § 2332d (2000).

⁵ For this purpose, the relevant designation is made under section 6(j) of the Export Administration Act of 1979, 50 U.S.C. App. § 2405 (2000). The countries listed under the section 6(j) list are the same as those listed under the section 40(d) list, referred to in *supra* note 2.

⁶ Exec. Order No. 13,129, 64 Fed. Reg. 36,759 (July 4, 1999).

⁷ Letter to Congressional Leaders Reporting on the National Emergency with Respect to the Taliban, 35 *Weekly Comp. Pres. Docs.* (July 12, 1999) 1283.

another state, absent a treaty obligation to the contrary.⁸ International law is, however, concerned with the allocation among states of jurisdictional competence, such that states normally may not seek to regulate entities with which they have no territorial or juridical relationship.⁹ US economic sanctions against terrorist states generally fall within the realm of an acceptable exercise of US jurisdiction, since they are typically tailored to persons or assets either within the United States or under the control of persons with whom the United States has a juridical relationship (i.e., a US corporation operating abroad).¹⁰

Nevertheless, US policy clearly recognizes that, as a general matter, multilateral sanctions are far more effective than unilateral sanctions. Thus, it is no surprise that the United States, backed by Russia, introduced a resolution in 1999 before the UN Security Council seeking UN sanctions against the Taliban. Having previously demanded that 'the Taliban stop providing sanctuary and training for international terrorists', the Security Council in October 1999 unanimously adopted Resolution 1267 stating that the Taliban's failure to respond to that demand constituted a threat to the peace, and demanding the transfer of bin Laden to a 'country where he has been indicted, or to appropriate authorities in a country where he will be returned to such a country'.¹¹ The Security Council further adopted sanctions that took effect in November 1999 requiring states to deny permission for any Taliban aircraft to take off or land in any of their territories, and to freeze funds and financial resources owned or controlled by the Taliban.¹² In December 2000, the Security Council adopted a resolution co-sponsored by Russia and the United States that imposed a comprehensive arms embargo on Afghanistan (except for non-lethal military equipment intended solely for humanitarian or protective uses), and that tightened financial, diplomatic and travel sanctions on Taliban leaders.¹³

Of course, these sanctions did not preclude the Taliban from continuing to harbour terrorists, as was dramatically demonstrated in the terrorist attacks of September 2001. Yet such economic sanctions have induced cooperation by targeted states. After the Security Council imposed sanctions on Libya for failing to surrender two

⁸ Many treaties regulating economic affairs allow a state to undertake measures necessary to protect its essential security interests even if such measures would otherwise be inconsistent with the treaty. See, e.g., General Agreement on Tariffs and Trade, 30 Oct. 1947, Art. XXI, T.I.A.S. 1700, 55 U.N.T.S. 194 (providing that '[n]othing in this Agreement shall be construed . . . to prevent any contracting party from taking any action which it considers necessary for the protection of essential security interests . . . taken in time of war or other emergency in international relations . . .').

⁹ See, e.g., *Restatement (Third) on the Foreign Relations Law of the United States*, Part IV (1987).

¹⁰ A form of sanction against states that arguably transgresses international law jurisdictional principles is the US legislation imposing penalties on companies and persons of third states that 'traffick' in property seized by the state from US nationals, such as under the 'Helms-Burton' law directed against Cuba. For competing views on the permissibility of such laws, see Lowenfeld, 'Agora: The Cuban Liberty and Democratic Solidarity (Libertad) Act', 90 *AJIL* (1996) 419.

¹¹ SC Res. 1267 (1999), at Preamble and para. 2.

¹² *Ibid.*, paras 3-4.

¹³ SC Res. 1333 (2000); see also SC Res. 1363 (2001) (establishing a mechanism to monitor the implementation of SC Res. 1333).

Libyan nationals accused of bombing Pan Am Flight 103,¹⁴ Libya surrendered the two nationals and, as anticipated by Security Council Resolution 1192,¹⁵ the UN sanctions were suspended. In January 2001, a Scottish court sitting in the Netherlands convicted one of the Libyans and sentenced him to life imprisonment; the second Libyan was found not guilty.¹⁶

2 Economic Sanctions against Terrorist Organizations

Economic measures directed against terrorists and terrorist organizations focus both on tracking and seizing their assets and on the financing of such organizations. In the United States, there are two sanctions programmes with a global reach targeting terrorists and terrorist organizations.¹⁷ First, the US Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) sought ‘to provide the Federal Government the fullest possible basis, consistent with the Constitution, to prevent persons within the United States, or subject to the jurisdiction of the United States, from providing material support or resources to foreign organizations that engage in terrorist activities’.¹⁸ The AEDPA therefore authorized the Secretary of State to designate an organization as a ‘foreign terrorist organization’ (FTO), meaning that it is a non-US organization that engages in terrorist activity that threatens US nationals or national security.¹⁹ To engage in terrorist activity is, under the act, to commit ‘in an individual capacity or as a member of an organization, an act of terrorist activity or an act which the actor knows, or reasonably should know, affords material support to any individual, organization, or government in conducting a terrorist activity at any time’.²⁰ Terrorist activity includes such acts as hijacking, kidnapping, assassination, and the use of any explosive or firearm, ‘with the intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property’. Threats, attempts and conspiracies to commit the above acts also come within the definition.²¹ The AEDPA requires the Secretary of State to notify the Congress of the designations and to publish them in the *Federal Register*, without first notifying the organization. No more than 30 days following publication of the designation, an organization may challenge

¹⁴ SC Res. (1992); SC Res. 748 (1992); SC Res. 883 (1993).

¹⁵ SC Res. 1192 (1998), at para. 8.

¹⁶ *Her Majesty's Advocate v. Megrahi*, No. 1475/99, slip. op. (High Ct. Judiciary at Camp Zeist 31 Jan. 2001), reprinted in 40 *ILM* (2001) 582. An effort to appeal the conviction and sentence was unsuccessful. See The Appeal Court of the High Court of Justiciary: *Al Megrahi v. Her Majesty's Advocate* (Appeal Against Conviction), Appeal No. C104/01 (14 Mar. 2002), at <http://www.scotcourts.gov.uk/download/lockerbieappealjudgement.pdf>.

¹⁷ A third sanctions programme concerns terrorists who ‘threaten to disrupt the Middle East Peace Process.’ See Exec. Order No. 12,947, 60 Fed. Reg. 5079 (23 Jan. 1995); Exec. Order No. 13,099, 63 Fed. Reg. 45,167 (20 Aug. 1998).

¹⁸ AEDPA, §301, 18 U.S.C. §2339B note (2000).

¹⁹ 8 U.S.C. §1189(a)(1) (2000).

²⁰ *Ibid.*, §1182(a)(3)(B)(iii) (2000).

²¹ 8 U.S.C. §1182(a)(3)(B)(ii).

its designation before the District of Columbia Court of Appeals. The Court's review is based solely upon the administrative record, except that the government may submit, for *ex parte* and *in camera* review, classified information used in making the designation.²² Otherwise, the statute prevents the release of any classified information used as the basis for the Secretary's designation.

Once an FTO has been designated, a number of consequences follow. Its members who are not US citizens will not be admitted to the United States. All assets of the FTO located in the United States may be frozen at the discretion of the Secretary of the Treasury. All persons who knowingly provide material support or resources to the FTO (other than medical or religious supplies) may be fined or imprisoned for up to 15 years.²³ Further, a 'financial institution' that becomes aware that it controls funds of an FTO (or an FTO's agent) must freeze the funds and alert the US Government, or face substantial fines.

On 2 October 1997, Secretary of State Albright made the first designations under this provision of the AEDPA, along with listings of each organization's alter egos or aliases.²⁴ Since the Secretary's designations lapse after two years, new designations occur regularly.²⁵ For example, in 1999, Osama bin Laden's group Al Qaeda was first designated as a foreign terrorist organization, thus triggering the various measures described above. FTOs have challenged the constitutionality of the AEDPA, but with mixed success.²⁶

The second US sanctions programme concerns 'specially designated global terrorists'. This programme emerged in the aftermath of the September 2001 attacks, when President Bush issued Executive Order 13,224 so as to expand the US Treasury Department's power to target financial support for such terrorist organizations worldwide.²⁷ Under this programme, there is authority to block the assets of not just financial institutions but all US persons holding funds of a designated terrorist, as well

²² 8 U.S.C. § 1189(b) (2000).

²³ 18 U.S.C. §2339(B) (2000). The breadth of this criminal sanction — which makes it a crime to provide anything of value to an FTO, even in theory a book on non-violence — is such that the Bush Administration is using the statute aggressively against persons alleged to be parts of Al Qaeda 'sleepers' in the United States.

²⁴ See Additional Designations of Terrorism-Related Blocked Persons, 62 Fed. Reg. 52,650–51 (Oct. 8, 1997) (designating 30 FTOs). The designations became effective on the date of publication, 8 October 1997.

²⁵ See Designation of Foreign Terrorist Organizations, 64 Fed. Reg. 55, 112–13 (8 Oct. 1999); Additional Designations of Terrorism-Related Blocked Persons, 66 Fed. Reg. 54,404–09 (26 Oct. 2001).

²⁶ See *United States v. Rahmani*, 209 F. Supp. 2d 1045 (C.D. Cal. 2002) (finding the relevant statute facially unconstitutional because it denies the designated organization the opportunity to be heard in a meaningful manner); *Nat'l Council of Resistance of Iran v. Dep't of State*, 251 F.3d 192 (D.C. Cir. 2001) (finding that the Secretary of State must afford due process to organizations before they are designated as FTOs, such as notice that the designation is impending and an opportunity for the organization to present evidence in its favour); *Humanitarian Law Project v. Reno*, 205 F.3d 1130 (9th Cir. 2000) (upholding constitutionality of statute except with respect to its prohibitions on providing 'personnel' and 'training' to FTOs, which was found unduly vague); *People's Mojahedin Org. of Iran v. U.S. Dep't of State*, 182 F.3d 17 (D.C. Cir. 1999) (upholding the Secretary's FTO designation of the People's Mojahedin Organization of Iran and of the Liberation Tigers of Tamil Eelam), *cert. denied*, 529 U.S. 1104 (2000).

²⁷ Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 23, 2001).

as block the assets of US persons ‘associated with’ designated terrorists. Thus, the executive order froze the assets of 27 persons (including bin Laden) and groups, and blocked the US transactions of those persons and of others who support them. Further, the executive order increased the ability of the Treasury Department to block US assets of, and to deny access to US markets by, foreign banks that refused to cooperate with US authorities in identifying and freezing terrorist assets abroad. Using such authority, in early 2002, the United States launched a round of domestic raids and international banking actions to shut down two financial networks that were allegedly funding Al Qaeda.²⁸ Within a year of the September 11 attacks, some US\$ 112 million of suspected terrorist assets in domestic and foreign banks had been frozen.²⁹

One controversial aspect of this programme is that the United States has frozen the assets of major charitable groups in the United States that provide humanitarian aid to Muslims worldwide. Thus, in October 2002, the Treasury Department designated an Illinois-based Muslim charity, Global Relief Foundation, as a terrorist organization largely because it had received some funding from a senior Al Qaeda financier and because its co-founder had worked for a group created by Osama bin Laden in the 1980s.³⁰ While such acts have been challenged, US courts have generally found in favour of the Treasury Department.³¹

Both programmes target persons within the United States or subject to US jurisdiction, and in that regard fall squarely within international law on jurisdictional competence. In blocking the assets of (and denying access to US markets to) foreign banks that refuse to cooperate with US authorities, the second programme perhaps ‘pushes the margin’ of permissible action under international law, and might best be justified on grounds of the ‘protective principle’.³² In recognition of this, the executive order associated with the second programme does what no prior executive order did; it references the recent Security Council resolutions imposing sanctions on Afghanistan,³³ as well as US law calling upon the President to implement those sanctions.³⁴

In its efforts to seize terrorist assets, the United States received support from some

²⁸ See Milbank and Day, ‘Businesses Linked to Terrorists Are Raided’, *Wash. Post*, 8 Nov. 2001, at A1; Williams, ‘Swiss Probe Illustrates Difficulties in Tracking Al Qaeda’s Cash’, *Wash. Post*, 12 Nov. 2001, at A19.

²⁹ See U.S. Department of the Treasury, Contributions by the Department of the Treasury to the Financial War on Terrorism (Sept. 2002) 8 (reporting that \$34 million of the assets were frozen in the United States and \$78 million overseas). For a UN report stating that such seizures represent just a fraction of the resources still thought available to Al Qaeda and the Taliban, see UN Doc. S/2002/1050, para. 36 (20 Sept. 2002).

³⁰ See Mintz, ‘U.S. Labels Muslim Charity as Terrorist Group’, *Wash. Post*, 19 Oct. 2002, at A2.

³¹ See, e.g., *Holy Land Found. for Relief & Dev. v. Ashcroft*, 219 F.Supp. 2d 57 (D.D.C. 2002) (upholding US Government of seizure of the assets of the largest Muslim charity in the United States).

³² See I. Cameron, *The Protective Principle of International Criminal Jurisdiction* (1994).

³³ See *supra* notes 10, 11, and 13.

³⁴ United Nations Participation Act, 22 U.S.C. § 287c (2000).

countries, such as Saudi Arabia and the United Arab Emirates,³⁵ but encountered resistance from others.³⁶ Consequently, here, too, the United States turned to international law to pursue effective measures. The United States pressed for new Security Council resolutions — Resolutions 1373 and 1390 — that direct UN Member States to criminalize terrorist financing and to adopt regulatory regimes intended to detect, deter and freeze terrorist funds.³⁷ Under these and earlier resolutions, a UN financial sanctions committee maintains lists of persons associated with the Taliban, Osama bin Laden, or Al Qaeda, whose assets must be frozen by all states; the United States and other states cooperate with the committee in adding and removing names from the list.³⁸ When a state believes that a person or entity should be included on the UN sanctions list (which the United States does when a new person or entity is listed pursuant to Executive Order 13,224), the names are forwarded to the UN sanctions committee. Unless one of the members of the committee objects within 48 hours, the names are placed on the UN list. As of November 2002, more than 300 persons and entities had been listed.³⁹ While there has been some criticism of the process of listing persons and entities without their having any opportunity to challenge the listing (except through their own government), the work of this UN sanctions committee is similar to that of nearly a dozen other sanctions committees established by the Security Council over the course of the past decade, which have targeted various persons, entities and governments as a means of promoting peace and security.

A separate ad hoc committee of the Security Council established by Resolution 1373 (which comprises all Council members and meets in closed session) receives and reviews reports from states on the steps they have undertaken to criminalize terrorist financing and to adopt regulatory regimes intended to detect, deter and freeze terrorist funds.⁴⁰ In essence, this committee is charged with determining whether states have appropriate legislative and executive measures in place (or contemplated) that give effect to Resolution 1373 and associated resolutions.

In addition, in the aftermath of the September 2001 attacks, the United States ratified the Convention adopted by the General Assembly in December 1999 on the suppression of financing for terrorism.⁴¹ The Convention provides — for the first time

³⁵ See Gerth and Miller, 'U.S. Makes Inroads in Isolating Funds of Terror Groups', *NY Times*, 5 Nov. 2001, at A1; 'Saudis Freeze Funds of 66 on U.S. List', *NY Times*, 1 Nov. 2001, at B4. Even when cooperation is forthcoming, however, proving that assets are connected with terrorist organizations is often difficult. See, e.g., Finn, 'Terrorism Probes Falter in Europe', *Wash. Post*, 1 June 2002, at A13.

³⁶ See, e.g., Schneider, 'Lebanon Won't Freeze Hezbollah Assets', *Wash. Post*, 9 Nov. 2001, at A21.

³⁷ SC Res. 1373 (2001); SC Res. 1390 (2002).

³⁸ Since the committee was initially set up under SC Res. 1267, the committee is referred to as the '1267 committee'.

³⁹ For the list, see <http://www.un.org/Docs/sc/committees/1267/1267ListEng.htm>.

⁴⁰ This committee is referred to as the 'Counter-Terrorism Committee'.

⁴¹ International Convention for the Suppression of the Financing of Terrorism, GA Res. 109, 9 December 1999, S. Treaty Doc. No. 106-49 (2000). For the US implementing legislation, see Suppression of the Financing of Terrorism Convention Implementation Act of 2002, Pub. L. No. 107-197, Title II, 116 Stat. 724 (2002).

— an obligation on states parties to criminalize the financing of terrorist groups. Further, it establishes an international legal framework for cooperation among states parties to prevent such financing and to prosecute and punish offenders. In engaging in such multilateral cooperation, however, the United States has been forced to confront objections by foreign states that it is overreaching. Thus, the United States has had to agree within the UN framework of sanctions to ease or eliminate certain restrictions on suspected associates of the Taliban or Al Qaeda network based on pressure from other states.⁴²

3 Criminal Litigation

Traditionally, a central feature of the US campaign against terrorism has been the investigation, apprehension and prosecution of alleged terrorists in US courts. At every step in this process, international law has had a major or minor role.

With respect to the investigation and apprehension of alleged terrorists, in the aftermath of September 2001, the United States sought to enhance its law enforcement capabilities by means of the USA PATRIOT Act.⁴³ The new law contained various components, including the lifting of prior restrictions on sharing of information between intelligence and criminal justice officials, and the greater use of searches and wiretaps in the United States for foreign intelligence surveillance purposes.⁴⁴ Provisions in Title III designed to prevent money laundering are ostensibly not extraterritorial in that they are directed against US financial institutions, requiring them to establish and implement anti-money laundering programmes. However, the provisions require US financial institutions to deny access or participation to foreign institutions, unless the latter comply with stringent disclosure requirements. Given the United States unique status as a magnet for foreign capital, these provisions thus have the potential for establishing the United States as the unofficial regulatory agency for the global financial system. While the USA PATRIOT Act was (and still is) intensely debated in the United States, the final product in some respects is far more restrained than statutes passed in Europe after September 11.⁴⁵

⁴² See, e.g., Lynch, 'Easing Sanctions on Bin Laden Associates Urged', *Wash. Post*, 16 Aug. 2002, at A19 (reporting on pressure on the United States to agree to easing of restrictions by the financial sanctions committee set up pursuant to SC Res. 1267 for humanitarian reasons); Lynch, 'U.S. Seeks to Take 6 Names Off U.N. Sanctions List', *Wash. Post*, 22 Aug. 2002, at A13 (reporting on pressure on the United States to remove certain listed persons and businesses based on lack of evidence against them).

⁴³ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107–56, 115 Stat. 272 (2001).

⁴⁴ The standard for obtaining a Foreign Intelligence Surveillance Act (FISA) wiretap or search warrant is relatively low and does not require probable cause that a crime is being committed. On 18 November 2002, the US Foreign Intelligence Surveillance Court of Review upheld the lifting of such restrictions.

⁴⁵ For example, in December 2001, the United Kingdom enacted a wide-ranging statute that authorizes the government to record all e-mail, Internet browsing, and other electronic communications of a targeted individual or organization for use by law enforcement authorities *without any requirement for a court order*. See Anti-terrorism, Crime and Security Act, 2001, ch. 24, pt. 11, available at www.hmso.gov.uk/acts/acts2001/20010024.htm.

Further, as a means of bringing known terrorists into custody, the Bush Administration has taken other measures on its own authority. In October 2001, President Bush announced the creation of a 'most wanted' list of 22 suspected terrorists, including bin Laden. A reward of up to US\$5 million (later increased to US\$25 million) was offered for information leading to the capture of anyone on the list.⁴⁶ In November 2002, the US Justice Department announced a plan to require thousands of adult students, workers and other men principally from five Muslim countries, who are temporarily residing in the United States (i.e., non-immigrants), to be fingerprinted and photographed. While the programme targets aliens from Iran, Iraq, Libya, Sudan and Syria, it also covers aliens from other countries that the Justice Department deems warrant extra scrutiny when they visit the United States.⁴⁷

Yet US policy-makers are well aware that the investigation and apprehension of alleged terrorists can only be pursued effectively through cooperation with other states. For that reason, US law requires that the US Department of State annually transmit to the Congress a report providing not just detailed assessments of foreign countries where significant terrorist acts occurred or which have repeatedly provided state support for international terrorism, but also information on which countries cooperate with the United States in apprehending, convicting, and punishing terrorists responsible for attacking US citizens and or interests.⁴⁸ This transnational cooperation is coordinated principally through three sets of treaties: treaties addressing specific terrorist acts; extradition treaties; and mutual legal assistance treaties (MLATs).

The United States is a party to several of the anti-terrorist conventions that require states to make it an offence to engage in acts such as hijacking of aircraft,⁴⁹ sabotage of aircraft,⁵⁰ taking of hostages,⁵¹ violent offences onboard aircraft,⁵² and crimes against certain protected persons.⁵³ These conventions also require states parties either to extradite alleged offenders or to submit the matter to prosecution in their own courts. In the aftermath of the September 2001 terrorist attacks, the United States ratified a

⁴⁶ See U.S. Dep't of State, Most Wanted Terrorists, at www.rewardsforjustice.net (last visited 11 July 2002).

⁴⁷ See U.S. Dep't of Justice Press Release on Attorney General's Remarks on Implementation of NSEERS (7 Nov. 2002) (NSEERS stands for 'National Security Entry-Exit Registration System').

⁴⁸ See 22 U.S.C. §2656(g)(4) (2000).

⁴⁹ See Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105.

⁵⁰ See Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 23 Sept. 1971, 24 U.S.T. 565, 974 U.N.T.S. 177.

⁵¹ See International Convention against the Taking of Hostages, 17 Dec. 1979, T.I.A.S. 11,081, 1316 U.N.T.S. 205.

⁵² See Convention on Offences and Certain Other Acts Committed on Board Aircraft, 14 Sept. 1963, 20 U.S.T. 2941, 704 U.N.T.S. 219.

⁵³ See Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 28 U.S.T. 1975, 1035 U.N.T.S. 167.

further treaty relating to the suppression of terrorist bombings.⁵⁴ Further, in June 2002, the United States (along with virtually all other states of the western hemisphere) signed the Inter-American Convention against Terrorism, which is designed to improve regional cooperation in this area.⁵⁵

The United States has also concluded dozens of extradition treaties and MLATs with other states worldwide. Extradition treaties provide for the transfer of international fugitives from one state to another, while MLATs (a programme that has developed since the 1970s) provide a formal framework between two or more states for cooperation in investigating and prosecuting crime, including crimes of terrorism. Whereas under a system of letters rogatory, a requested state need not provide assistance, under the MLAT a requested state is obligated to provide assistance except in limited circumstances. Further, MLATs are an effective means of circumventing bank secrecy laws and business confidentiality laws that impede investigations into terrorist activities, and in some instances contain provisions for the tracing, seizure and forfeiture of assets.⁵⁶

Within the framework of these treaties, there are numerous examples of transnational cooperation on investigation and prosecution of persons in the aftermath of the September 2001 attacks. In November 2001, German authorities identified a group of five persons in Hamburg thought to have provided financial and other support to the September 2001 hijackers,⁵⁷ leading to the indictment of one of the suspects in August 2002. Also in November 2001, Spanish authorities arrested and charged a group of eight persons on suspicion that some may have assisted the hijackers.⁵⁸ Belgian, Dutch, French and Italian authorities arrested 23 men with suspected links to Al Qaeda.⁵⁹ Yemeni troops even assaulted tribal forces in Yemen's central Marib region when local tribal leaders refused to turn over five persons suspected of connections with Al Qaeda.⁶⁰ By the end of November 2001, some 50 countries had detained about 360 suspects with alleged connections to Al Qaeda.⁶¹

International law, however, has played a smaller role once persons are detained in the United States. Prior to the September 2001 attacks, US authorities had uncovered

⁵⁴ See International Convention for the Suppression of Terrorist Bombings, GA Res. 164, 15 December 1997. For the US implementing legislation, see Terrorist Bombings Convention Implementation Act of 2002, Pub. L. No. 107–197, Title I, 116 Stat. 721 (2002).

⁵⁵ Inter-American Convention against Terrorism, AG/RES. 1840 (XXXII-O/02), at www.oas.org/juridico/english/signs/a-66.html.

⁵⁶ See, e.g., Treaty on Mutual Legal Assistance in Criminal Matters, 25 May 1973, U.S.–Switz., 27 U.S.T. 2019, 1052 U.N.T.S. 61.

⁵⁷ See Finn, 'Germans Identify More Terror Suspects', *Wash. Post*, 17 Nov. 2001, at A21.

⁵⁸ See Dillon, 'Spanish Judge Charges 8 with Terrorism, Citing Likely Links to Al Qaeda', *NY Times*, 19 Nov. 2001, at B5; Finn and Rolfe, 'Calls Central to Spain's Sept. 11 Case', *Wash. Post*, 21 Nov. 2001, at A17.

⁵⁹ See Drozdiak, '14 Held in Europe; Bin Laden Ties Alleged', *Wash. Post*, 27 Nov. 2001, at A5; Delaney, 'Italy Arrests Man Believed to Have Key Ties to Al Qaeda', *Wash. Post*, 2 Dec. 2001, at A14; Simons, 'Dutch Charge 8 Men with Aiding Al Qaeda', *NY Times*, 3 Sept. 2002, at A6.

⁶⁰ See Schneider, 'Yemen Attacks Tribes Linked to Al Qaeda', *Wash. Post*, 19 Dec. 2001, at A16.

⁶¹ See Woodward, '50 Countries Detain 360 Suspects at CIA's Behest', *Wash. Post*, 22 Nov. 2001, at A1.

several groups or 'cells' of persons in the United States that had ties to Al Qaeda. Since these persons had entered the country legally and had not engaged in any illegal activities, most were kept under surveillance but not arrested. When, after the September 2001 attacks, the FBI intercepted telephone calls in which these same persons were overheard celebrating the attacks, the FBI arrested them as material witnesses to a crime.⁶² The FBI arrested other persons who were engaged in highly suspicious activities and also, as a preventive strategy against future terrorist operations, hundreds of others on assorted other grounds, mostly immigration law violations. Ultimately, more than 1,200 people were detained.⁶³ In November 2001, the Justice Department announced that it had charged 104 individuals with federal criminal offences (55 of those individuals were in custody), while another 548 individuals under investigation were in the custody of the Immigration and Naturalization Service (INS) on immigration charges.⁶⁴ By November 2002, at least 44 persons reportedly had been detained as 'material witnesses', with most held under maximum security conditions, for periods of time ranging from days to months, but with virtually none charged with any crime nor brought before a grand jury.⁶⁵

The treatment of these individuals has been the subject of extensive actions in US courts turning largely on US constitutional and statutory law.⁶⁶ While international law has been raised in these proceedings, as of late 2002 it has not been dispositive in any of them.⁶⁷ Indeed, human rights organizations within the United States have challenged without success various aspects of these detentions by reference to US

⁶² See 18 U.S.C. §3144 (2000). First enacted in 1984, the material witness statute allows a prosecutor to seek an arrest warrant if a potential witness is 'material' to a criminal proceeding and the individual is likely to flee. A judge must approve the warrant and the witness is entitled to a bond hearing and a court-appointed attorney.

⁶³ See Liptak *et al.*, 'After Sept. 11, a Legal Battle On the Limits of Civil Liberty', *NY Times*, 4 Aug. 2002, at 1.

⁶⁴ Attorney General Ashcroft Provides Total Number of Federal Criminal Charges and INS Detainees (27 Nov. 2001), at www.justice.gov/ag/speeches/2001/agcrisisremarks11_27.htm.

⁶⁵ See Fainaru and Williams, 'Material Witness Law Has Many in Limbo', *Wash. Post*, 24 Nov. 2002, at A1.

⁶⁶ See, e.g., *Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2002) (finding unconstitutional under the First Amendment the US Government's refusal to allow public access to deportation hearings of aliens detained after September 11); *North Jersey Media Group v. Ashcroft*, 308 F.3d 198 (3d Cir. 2002) (finding US Government's refusal to allow public access constitutional despite the First Amendment); *Center for National Security Studies v. Dep't of Justice*, 215 F.Supp. 2d 94 (D.D.C. 2002), stayed by 217 F.Supp. 2d (D.D.C. 2002) (ordering the disclosure of the names of aliens detained after September 11 and of their counsel).

⁶⁷ See, e.g., *Amer. Civil Liberties Union of New Jersey v. County of Hudson*, 799 A.2d 629 (N.J. Super. A.D. 2002) (involving unsuccessful claim by plaintiffs that failure to release information on the detainees violates, among other things, the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights); *United States v. Awadallah*, 202 F.Supp. 2d 17 (S.D.N.Y. 2002) (involving unsuccessful effort by a Jordanian detainee to obtain dismissal of an indictment for perjury on grounds that the United States failed to comply with the consular notification provision of the Vienna Convention on Consular Relations).

obligations under human rights treaties, such as the International Covenant on Civil and Political Rights.⁶⁸

There has been some speculation in the United States that, if US authorities are precluded by law from torturing detained persons so as to obtain information, such persons should instead be extradited to other countries for that purpose. Here, international law plays a role. Extradition from the United States is governed by federal statute,⁶⁹ which confers jurisdiction on ‘any justice or judge of the United States’ or any authorized magistrate to conduct an extradition hearing under the relevant extradition treaty between the United States and the requesting foreign state. Pursuant to US obligations under the Torture Convention,⁷⁰ this extradition process must now take account of the US obligation in Article 3 that no state party ‘shall expel, return (“*refouler*”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.’⁷¹

Once alleged terrorists are brought to trial in the United States, international law may play a role in defining the rights and obligations of the defendant. For example, after the East Africa Embassy bombings, the United States obtained custody of several persons suspected of involvement in the bombings. Prior to the commencement of their trial, four defendants filed various pre-trial motions challenging the extraterritorial application of the US statutes under which they were charged, forcing the district to consider whether international law permitted the exercise of US jurisdiction. The Court found that the exercise of US jurisdiction under the relevant statutes, even with respect to acts that harmed non-US nationals, was permissible under international law since it was in accordance with the ‘protective principle’.⁷² Separately, some defendants argued that international law completely barred the use of the death penalty by the United States. The Court found the argument without merits, since the United States is not a party to any treaty banning capital punishment, and ‘the total abolishment of capital punishment has not risen to the level of customary international law’.⁷³ The Court also rejected the challenge that the application of the

⁶⁸ See, e.g., United States of America: Memorandum to US Attorney General — Amnesty International’s Concerns Relating to the Post 11 September Investigations, Doc. No. AMR 51/170/2001 at 1–7, 12–14 (Nov. 2001), at www.amnesty.org/ailib/index.html.

⁶⁹ 18 U.S.C. §3184 (2000).

⁷⁰ UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted 10 Dec. 1984, S. Treaty Doc. No. 100–20 (1988), 1465 UNTS 85, reprinted in 23 *ILM* (1984) 1027, as modified, 24 *ILM* (1985) 535 [hereinafter Torture Convention]. The Convention entered into force for the United States on 20 November 1994.

⁷¹ In 1998, Congress passed legislation implementing Article 3 of the Torture Convention as part of the Foreign Affairs Reform and Restructuring Act (‘FARR Act’) of 1998. See Foreign Affairs Reform and Restructuring Act of 1998, Pub.L. No. 105–277, § 2242, 112 Stat. 2681, 2681–2682. Consequently, US courts must now confront this issue if raised as a defence by the person faced with extradition. See, e.g., *Cornejo-Barreto v. Seifert*, 218 F.3d 1004 (9th Cir. 2000) (concluding that such a defence, brought in a petition for *habeas corpus*, becomes ripe as soon as the Secretary of State determines that the fugitive is to be surrendered to the requesting government).

⁷² *United States v. Bin Laden*, 92 F.Supp. 2d 189, 193–97 (S.D.N.Y. 2000).

⁷³ *United States v. Bin Laden*, 126 F.Supp. 2d 290, 294 (S.D.N.Y. 2001); see *Coleman v. Mitchell*, 268 F.3d 417, 443 n.12 (6th Cir. 2001).

death penalty to the defendants would be arbitrary in violation of Article 6(1) of the International Covenant on Civil and Political Rights. According to the Court, the defendants simply failed to allege or prove that some inappropriate and arbitrary factor 'infected capital decision-making with respect to this particular prosecution'.⁷⁴

Further, one of the defendants, a Tanzanian national, argued that, when he was arrested in South Africa, he was allegedly denied the right to consular notification pursuant to Article 36 of the Vienna Convention on Consular Relations.⁷⁵ For the purposes of the motion, the District Court assumed that the Vienna Convention confers individual rights and that the defendant was denied his rights.⁷⁶ Regardless of these assumptions, the Court rejected the challenge, noting that the Second Circuit had repeatedly ruled that the provisions of the Vienna Convention are not fundamental rights. Since at best only a non-fundamental right of the defendant had been violated, the defendant had to show that he suffered prejudice before any judicial relief would be proper under the Vienna Convention. The Court found no such showing of prejudice; the defendant had not even attempted to explain how his prosecution would have been affected if he had been granted the right of consular notification upon his arrest. Even if some prejudice had occurred, the defendant had not provided any relevant authority to support his argument that dismissing the government's death penalty notice was the appropriate remedy for violation of the Vienna Convention. According to the Court: 'The treaty itself provides for no such relief. Significantly, all courts that have considered the issue have already found evidentiary suppression — a far less drastic remedy — to be outside proper judicial authority with respect to consular notification claims.'⁷⁷

4 Military Detention/Litigation

By four devices, the Bush Administration has sought to avoid the application of standard US and international due process norms for persons associated with Al Qaeda who have been taken into custody. First, the vast majority of such persons have

⁷⁴ *Bin Laden*, 126 F.Supp. 2d at 294–295.

⁷⁵ 24 Apr. 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

⁷⁶ The International Court of Justice has held that the failure to inform aliens of their right of consular notification constitutes a violation of the Vienna Convention and, further, that the failure to provide judicial review of their convictions and sentences in light of the lack of notification constitutes a further breach of the Convention. Consequently, the Court has found that 'should nationals of the Federal Republic of Germany nonetheless be sentenced to severe penalties' without their right to consular notification having been respected, the United States, 'by means of its own choosing, shall allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights sets forth' in the Vienna Convention. *LaGrand (Germany v. United States of America)*, Judgment 27 June 2001, ICJ Reports (2001), para. 128, 40 ILM 1069 (forthcoming), available at www.icj-cij.org/icjwww/idocket/igus/igusframe.htm.

⁷⁷ *United States v. Bin Laden*, 126 F.Supp. 2d at 295–296. For a similar outcome in the case of one of the other defendants, a Saudi national, see *United States v. Bin Laden*, 132 F.Supp. 2d 168, 194–197 (S.D.N.Y. 2001). After a four-month trial and 14 days of jury deliberation, all four men were convicted on 29 May 2001 of conspiracy in the bombing of the US embassies. In October 2001, they were each sentenced to life imprisonment without parole.

been detained *outside* US territory, principally at the US naval base at Guantánamo Bay, Cuba. The reason for detention outside the United States is that, under US law, enemy aliens detained by the United States in time of war⁷⁸ outside US territory have no right to seek review of their detention before US courts.⁷⁹ To date, efforts by those detained to obtain US court review have failed.⁸⁰ However, *US citizens* taken into custody have been brought to the United States, at which point they are either placed in the regular criminal justice system (e.g., John Walker Lindh) or held in military confinement (e.g., Yaser Esam Hamdi).

Second, many persons taken into custody have been classified by the United States as *combatants*, who may be held until the cessation of hostilities, are not entitled to access to counsel, and need not be charged with an offence. Persons falling into this category are all the several hundred persons picked up on the battlefield in Afghanistan (including Lindh and Hamdi), but also certain other individuals picked up elsewhere, such as Jose Padilla (who was seized at Chicago airport and placed in military confinement). Detainees held within the United States have access to federal *habeas corpus* review, but the Executive Branch has argued that US courts should decline to second-guess the President's determination that the detainee is a combatant for reasons of non-justiciability (i.e., the 'political question doctrine'). US courts have not regarded this issue as non-justiciable, but to date have been sympathetic to the President's determination.⁸¹

Third, these combatants have been determined by President Bush to be *unlawful* combatants, who are not entitled to the status of prisoners of war under the Third Geneva Convention, nor entitled to combatant immunity in the event that they are prosecuted for acts undertaken as part of an armed conflict.⁸² As noted above, detainees held outside the United States cannot challenge this determination in US courts. Concerns voiced by foreign governments and international institutions, such as the International Committee for the Red Cross, over the failure to regard these

⁷⁸ Some commentators have questioned whether, under US constitutional law, the US Government may rely on judicial precedents relating to 'war' since the US Congress did not formally declare war in the aftermath of September 11. Other commentators assert that the President's constitutional authority to detain and prosecute enemy combatants does not depend on a formal declaration of war by Congress. Still other commentators regard the joint resolution passed by Congress authorizing the President to use 'all necessary and appropriate force against' those who perpetrated the September 11 attacks as being the functional equivalent of a formal declaration of war under Article I of the US Constitution. See Authorization for Use of Military Force, Pub. L. No. 107–40, 115 Stat. 224 (2001).

⁷⁹ See *Johnson v. Eisentrager*, 339 U.S. 763 (1950).

⁸⁰ See *Coalition of Clergy v. Bush*, 189 F.Supp. 2d 1036 (C.D. Cal. 2002), *aff'd in part*, 2002 WL 31545359 (9th Cir. Nov. 18, 2002); *Rasul v. Bush*, 215 F.Supp. 2d 55 (D.D.C. 2002) (finding that aliens held by the United States outside US territory could not use US courts to pursue petitions for *habeas* relief). By contrast, a UK court determined that such detention appeared to be a violation of both international law and the concept of *habeas corpus* developed over centuries under English common law. See Lewis, 'British Judges Criticize U.S. on the Prisoners Held at Guantánamo', *NY Times*, 9 Nov. 2002, at A11.

⁸¹ See *United States v. Lindh*, 212 F. Supp. 2d 541 (E.D. Va. 2002); *Hamdi v. Rumsfeld*, 296 F.3d 278 (4th Cir. 2002).

⁸² On the US decision not to accord these persons prisoner of war status, see Murphy, 'Contemporary Practice of the United States Relating to International Law', 96 *AJIL* (2002) 475.

persons as prisoners of war appear to have influenced the Bush Administration in asserting that it would accord them most of the rights that would otherwise exist under the Third Geneva Convention. In February 2002, US-based human rights lawyers filed a petition with the Inter-American Commission on Human Rights challenging US treatment of the detainees. In March 2002, the Commission issued a decision on 'precautionary measures' requesting the United States 'to take the urgent measures necessary to have the legal status of the detainees at Guantanamo Bay determined by a competent tribunal'.⁸³ To date, however, the Bush Administration has not convened such a tribunal to assess the status of the detainees on a person-by-person basis.

Fourth, the Bush Administration has proposed using military tribunals in the event that charges are brought against such persons.⁸⁴ During the Second World War, the US Supreme Court upheld the use of such military tribunals for the prosecution and execution of Nazi saboteurs that had infiltrated the United States.⁸⁵ It should be noted, however, that presently European authorities have expressed reluctance to extradite persons to the United States if they were to be tried before such a military tribunal.⁸⁶ While the effect of the European attitude is unclear, the one individual who was formally indicted for conspiracy to commit the acts of September 2001⁸⁷ — a French national named Zacarias Moussaoui — is being prosecuted in US federal court and not before a military tribunal.

5 Civil Litigation

The AEDPA amended the Foreign Sovereign Immunities Act (FSIA) so as to permit civil suits for monetary damages against foreign states that cause personal injury or death 'by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources . . . for such an act'.⁸⁸ To come under the

⁸³ Organization of American States, Inter-American Commission on Human Rights, Pertinent Parts of Decision on Request for Precautionary Measures (12 Mar. 2002).

⁸⁴ Military Order of 13 November 2001: 'Detention, Treatment, and Trial of Certain Non-Citizens in the War against Terrorism', 66 Fed. Reg. 57,833 (Nov. 16, 2001), reprinted in 41 *ILM* (2002) 252. On 21 March 2002, the US Department of Defense issued 'Military Commission Order No. 1', containing guidelines for members of the military commissions, trial procedures, admissibility of evidence, legal safeguards for the defendants, a review process, and requirements for conviction and sentencing. See Department of Defense, Military Commission Order No. 1 (21 Mar. 2002), at www.defenselink.mil/news/Mar2002/d2002032lord.pdf.

⁸⁵ See *Ex Parte Quirin*, 317 U.S. 1 (1942).

⁸⁶ See Reid, 'Europeans Reluctant to Send Terror Suspects to U.S.', *Wash. Post*, 29 Nov. 2001, at A23.

⁸⁷ According to the US Government, Moussaoui engaged in the same kind of training and other activities as the hijackers, received funding from Al Qaeda sources, may have intended to be the twentieth hijacker, but was detained in August on immigration charges and thus was unable to participate in the September 2001 attacks. Attorney General John Ashcroft, News Conference Regarding Zacarias Moussaoui at Department of Justice Conference Center (Dec. 11, 2001), at www.usdoj.gov/ag/speeches/2001/agcrisisremarks12_11.htm.

⁸⁸ Pub. L. No. 104-132, § 221, 110 Stat. 1214, 1241-43 (1996).

new provisions, the claimant or victim must have been a US national when the terrorist act occurred; the state must be one designated by the Secretary of State as a sponsor of terrorism; and the act must have occurred outside that state's territory.⁸⁹ At the same time, Congress passed a civil liability statute⁹⁰ creating a cause of action against an agent of a foreign state that acts under the conditions specified in the new FSIA exception. This civil liability statute, known as the 'Flatow amendment', is, by its terms, more narrow than the terrorist-state exception to sovereign immunity; the Flatow amendment confers a right of action only against an 'official, employee, or agent of a foreign state', not against the foreign state itself.⁹¹ The civil liability statute provides that the official, employee or agent shall be liable for 'money damages which may include economic damages, solatium, pain and suffering, and punitive damages'.⁹² Since 1996, several judgments have been rendered by US courts based on this exception,⁹³ and various efforts have been made by claimants to execute those judgments, with mixed success.⁹⁴

If the defendant is not a foreign government or its employees, other US statutes may permit civil redress for terrorist acts. Thus, US law also provides a civil cause of action, with treble damages, for those injured by an act of international terrorism against a terrorist group or person, or against those who 'aid and abet' such terrorists, such as through financing them.⁹⁵ For example, a US court recently upheld the ability of the parents of a victim murdered in Israel by the military wing of Hamas to sue certain organizations in the United States for funding Hamas.⁹⁶ Separately, the Alien Tort Claims Act⁹⁷ and the Torture Victim Protection Act⁹⁸ provide for civil causes of action in US courts for certain extraordinary torts such as torture and extrajudicial killing. Thus, using these statutes, families of 600 victims of the September 11 attacks have sued Saudi Arabian banks and charities (as well as members of the royal family) accusing them of financially sponsoring the Al Qaeda network.⁹⁹

⁸⁹ 28 U.S.C. §1605(a)(7) (2000). If the act occurred within the terrorist state's territory, then the plaintiff must first provide that state the opportunity to place the matter before international arbitration. If the state declines to do so, then the plaintiff may proceed with the claim under the FSIA.

⁹⁰ Civil Liability for Acts of State Sponsored Terrorism, 28 U.S.C. §1605 note (2000).

⁹¹ *Ibid.*; see *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 87 (D.C. Cir. 2002).

⁹² 28 U.S.C. §1605 note (2000).

⁹³ See, e.g., *Flatow v. Iran*, 999 F.Supp. 1 (D.D.C. 1998).

⁹⁴ For recent amendments to US law allowing greater satisfaction of judgments, in the first instance against blocked assets of a terrorist government (with certain restrictions), including any of its agencies or instrumentalities, and in the second instance against US Treasury funds, see Terrorism Risk Insurance Act of 2002, Pub. L. No. 107–297, §201, 116 Stat. 2322; and Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106–386, §2002, 114 Stat. 1464, 1542–1543.

⁹⁵ 18 U.S.C. § 2333 (2000).

⁹⁶ See *Boim v. Quranic Literacy Institute*, 291 F.3d 1000 (7th Cir. 2002).

⁹⁷ 28 U.S.C. §1350 (2000).

⁹⁸ 28 U.S.C. §1350, note §3(b)(1) (2000).

⁹⁹ See *Burnett v. Al Baraka Investment & Dev. Corp.*, Complaint (D.D.C. Aug. 15, 2002) (suit based on 18 U.S.C. § 2333 (2000), the terrorist state and other exceptions to the FSIA, the Alien Tort Claims Act, and the Torture Victim Protection Act).

6 Covert Action

The United States has also relied on covert action in its campaign against terrorism. Two weeks after the United States began its 2001 military action against the Taliban and Al Qaeda, President Bush reportedly signed a classified 'intelligence finding' that authorized the Central Intelligence Agency to pursue an intense effort to end bin Laden's leadership of Al Qaeda.¹⁰⁰ Similarly, President Bush in early 2002 reportedly signed an intelligence order directing the Central Intelligence Agency to undertake a covert programme to oust Iraq's Saddam Hussein, using lethal force to capture him.¹⁰¹

The capabilities of such covert action were vividly demonstrated in November 2002 in Yemen. Six Al Qaeda operatives travelling in a motor vehicle were killed by a Hellfire missile launched from a propeller-driven, unmanned reconnaissance drone (known as a 'Predator') that was under the remote control of the Central Intelligence Agency. Among the persons killed was a senior Al Qaeda official suspected of orchestrating the October 2000 attack on the *USS Cole* in the Yemeni port of Aden. The action reportedly was carried out with the approval and cooperation of the Yemeni Government.¹⁰²

Although a standing US executive order bars assassination,¹⁰³ the President may amend an executive order by a subsequent presidential order or directive.¹⁰⁴ Moreover, the wording of the executive order ('assassination'), coupled with the context in which it was originally formulated and passed during the Ford Administration,¹⁰⁵ arguably suggest that the executive order was intended to prohibit the killing of government officials, not non-governmental persons, such as leaders of terrorist groups. The extent to which norms of international law on the use of force or non-intervention have any influence upon such action is unclear, but appears minimal.

¹⁰⁰ See Cushman, Jr., 'New Orders Spur C.I.A. Hunt for bin Laden', *NY Times*, 22 Oct. 2001, at B5; Gellman, 'CIA Weighs "Targeted Killing" Missions', *Wash. Post*, 28 Oct. 2001, at A1. President Clinton also reportedly issued two classified presidential directives seeking Bin Laden's capture or death. See Risen, 'U.S. Pursued Secret Efforts to Catch or Kill bin Laden', *NY Times*, 30 Sept. 2001, at A1; Gellman, 'U.S. Was Foiled Multiple Times in Efforts to Capture Bin Laden or Have Him Killed', *Wash. Post*, 3 Oct. 2001, at A1.

¹⁰¹ See Woodward, 'President Broadens Anti-Hussein Order', *Wash. Post*, 16 June 2002, at A1.

¹⁰² See Pincus, 'Missile Strike Carried Out With Yemeni Cooperation', *Wash. Post*, 6 Nov. 2002, at A10.

¹⁰³ The executive order provides: 'No person employed by or on behalf of the United States Government shall engage in, or conspire to engage in, assassination'. Exec. Order No. 12,333, §2.11, 46 Fed. Reg. 59,941, 59,952 (Dec. 4, 1981) (issued by President Reagan); see also Exec. Order No. 12,036, 43 Fed. Reg. 3,674 (Jan. 24, 1978) (issued by President Carter); Exec. Order No. 11,905, 41 Fed. Reg. 7,703 (Feb. 18, 1976) (issued by President Ford).

¹⁰⁴ Memorandum from U.S. Dep't of Justice, Office of Legal Counsel, on Legal Effectiveness of a Presidential Directive, as Compared to an Executive Order (29 Jan. 2000), at www.usdoj.gov/olc/2000opinions.htm.

¹⁰⁵ The original executive order was adopted largely to head off legislation proposed in the Congress that would have barred assassination of foreign officials, expressly defined as senior officials of foreign governments. See 'Alleged Assassination Plots Involving Foreign Leaders: An Interim Report', *S. Rep. No. 94-465*, at App. A (1975).

7 Conclusion

The scope of US action against terrorism clearly extends well beyond use of military force and just as clearly contains elements of multilateralism, since the assistance of other states is indispensable in achieving US objectives. Where multilateralism features, so too does international law and international institutions. The degree to which such law constrains US behaviour is difficult to assess, and appears to ebb and flow depending on the issue. Yet US policy-makers and courts speak in terms of, and consider arguments based upon, what is permissible and what is required by international law. As such, it appears that their actions in the non-military ‘war’ against terrorism are being tempered in part by the contemporary expectations of the global community as embodied in international legal norms.