

**Rethinking the ‘War on Terror’:  
Legal Perspectives on Containment and  
Development Strategies**

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# Rethinking the 'War on Terror': Legal Perspectives on Containment and Development Strategies

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*This article describes strategic alternatives to the United States (US) 'war on terror' and consequences of past policies. It is argued that the 'war on terror' metaphor has failed and that strategic incoherence and tactical errors have mired the US in a series of failing land wars in Southwest Asia. The article proposes the adoption of a containment policy and recasting the 'war on terror' into a criminal law framework.*

## I. INTRODUCTION

The United States (US) is and has been at war for nearly a decade now. It is at war with a non-state actor, Al Qaeda. Al Qaeda is a small,<sup>1</sup> elite, well financed<sup>2</sup> network of terrorists willing to die<sup>3</sup> for their cause — not a mass based peasant movement.<sup>4</sup> Al Qaeda cannot win this 'war' militarily: US territory is too distant and vast to ever be conquered, even if Al Qaeda — in the 'worst case scenario' — were able to marshal an Islamic holy war of all Moslem countries against the US, cutting off oil and exploding a few nuclear bombs within the US territory. However, although Al Qaeda cannot win this war,<sup>5</sup> the US can

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<sup>1</sup> JBajoria and G Bruno, 'Backgrounder: Al Qaeda' (30 December 2009) <<http://www.cfr.org/publication/9126/>> accessed 30 May 2010.

<sup>2</sup> Global Security.Org, 'Al Qaeda' <<http://www.globalsecurity.org/military/world/para/al-qaida.htm>> accessed 30 May 2010.

<sup>3</sup> Mia Bloom, 'What the Tigers Taught Al-Qaeda' Washington Post (Washington 24 May 2009) <<http://www.washingtonpost.com/wp-dyn/content/article/2009/05/22/AR2009052202033.html>> accessed 30 May 2010.

<sup>4</sup> Peter Taaffe, 'The False Methods of Terrorism' The Socialist (5 October 2001) <<http://www.socialistalternative.org/literature/terrorism/introduction2.html>> accessed 30 May 2010.

<sup>5</sup> Andrew Sullivan, 'The Fog of War' The Atlantic (26 April 2007) <[http://andrewsullivan.theatlantic.com/the\\_daily\\_dish/2007/04/the\\_white\\_lie\\_o.html](http://andrewsullivan.theatlantic.com/the_daily_dish/2007/04/the_white_lie_o.html)> accessed 30 May 2010.

certainly lose it.<sup>6</sup> In fact, the US is perhaps losing the ‘war on terror’.<sup>7</sup> US foreign policy since 2001 has failed to protect the long term interests of the US.<sup>8</sup>

Whereas Part II of this article analyses how the ‘war on terror’ metaphor has failed, Part III explains why the US policies in this area have been incoherent and poorly executed. Adverse economic and political consequences of this ‘war on terror’ are described in Part IV. As an alternative strategy to the current paradigm, Part V presents some policies that could prove effective in not only keeping the US safe but also restoring its international image.

## II. THE FAILED METAPHOR OF WAR

The bedrock error in the war on terror is to see it as a war, a war against a non-state actor. Legally, criminal law had already adequately covered any and every conceivable form of terrorism<sup>9</sup> one could see in history or imagine in the future.<sup>10</sup> No instance of a war between a state actor and a non-state actor had existed prior to the war between the US, Al Qaeda, and the Taleban. By casting the conflict in terms of a so-called war with a non-

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<sup>6</sup> See, e.g., Fiona De Londras, ‘How the US Can Lose the War on Terror: The Complicity of Lawyers’ University College Dublin-School of Law, Discussion Paper (23 April 2008) <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1125846](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1125846)> accessed 30 May 2010.

<sup>7</sup> Reza Aslan, ‘Losing the “War on Terror” by Dropping the Controversial Phrase, the US may be Redefining the Contest with Radical Islam’ Los Angeles Times (Los Angeles 8 April 2009) <<http://www.latimes.com/news/opinion/la-oe-aslan8-2009apr08,0,7881551.story>> accessed 30 May 2010; Jon Basil Utley, ‘36 Ways the US Is Losing the War on Terror’ (Antiwar.com 2004) <<http://www.antiwar.com/utley/?articleid=3234>> accessed 30 May 2010.

<sup>8</sup> Eric Engle, ‘I am my own worst Enemy: Problems and Possibilities of European Foreign Policy vis-a-vis the United States’ (2006) 18 *St Thomas L Rev* 737 (Engle, ‘Problems and Possibilities’).

<sup>9</sup> For an example of UN Treaty Collection, Text and Status of the United Nations Conventions on Terrorism (2009) <[http://treaties.un.org/Pages/DB.aspx?path=DB/studies/page2\\_en.xml&menu=MTDSG](http://treaties.un.org/Pages/DB.aspx?path=DB/studies/page2_en.xml&menu=MTDSG)> accessed 30 May 2010; Bernard J Hibbitts, ‘US Anti-Terrorism Laws’ Jurist (University of Pittsburgh, 2009) <<http://jurist.law.pitt.edu/terrorism/terrorism3.htm>> accessed 30 May 2010. That goes without mentioning the laws of foreign states which can also apply to terrorists. If terrorists are like pirates, a likely analogy, then universal jurisdiction would apply to their crimes. See Douglas R Burgess Jr, ‘The Dread Pirate Bin Laden’ Legal Affairs (July 2005) <[http://www.legalaffairs.org/issues/July-August-2005/feature\\_burgess\\_julaug05.msp](http://www.legalaffairs.org/issues/July-August-2005/feature_burgess_julaug05.msp)> accessed 30 May 2010.

<sup>10</sup> But see, e.g., Matthew C Waxman, ‘Administrative Detention of Terrorists: Why Detain, and Detain Whom?’ (2009) 3 *Journal of National Security Law & Policy* 1. See also Colin William Masters, ‘On Proper Role of Federal Habeas Corpus in the War on Terrorism: An Argument from History’ (2008) 34 *J Legis* 190 (‘any rational person would support waging a war on terrorism if the alternative is criminal law sanctions that were inadequate to prevent the attacks in the first instance.’) The problem with that line of argument is that suicidal people cannot be deterred. Inexpensive yet very destructive weapons and suicidal terrorists mean that terrorism cannot be prevented in open societies as shown by the Bali and London bombings which occurred after 9/11. Even dictatorships have been victims of terrorist attacks (Moscow, 1977; Spain under Franco against the Basque separatist ETA; Nazi Germany 1944). So long as conditions in the third world are so heinous that people will be willing to kill themselves to aid their countrymen, there will be the risk of terrorism. A war metaphor only exacerbates the problem by framing terrorist attacks as acts of war waged by one nation against another.

state actor, an entirely unknown legal terrain was created.<sup>11</sup> That new terrain could be, and was, abused by the US<sup>12</sup> and its opponents.<sup>13</sup> By casting the criminals as soldiers at war, legitimacy was lent to the opponents of the US. Furthermore, invoking the metaphor of war also invoked the law of armed conflict and humanitarian law. This did not create any real new possibilities for the US foreign policy to oppose Al Qaeda. However, invoking that metaphor operated to both restrict the ambit of US action and created the possibility that the US would be able to abuse criminals as 'enemy combatants'.<sup>14</sup> Because criminals do not wear uniforms, the law of war would not apply to them<sup>15</sup> nor would they obtain the usual rights of prisoners:<sup>16</sup> this created the perception that the US was abusing the law<sup>17</sup> to abuse criminals, and undermined both US moral authority and foreign support for the US.<sup>18</sup> Additionally, opponents of the US attempted to discredit the US strategy by pointing out the US efforts to exclude the operation of the Geneva Conventions.<sup>19</sup>

The conclusion of any neutral observer of the conflict would be that the US acted unilaterally,<sup>20</sup> first, in attacking entire nations for the wrongful acts of a network of individuals unrepresentative of their own culture, and second, in the maltreatment of 'enemy combatants'.<sup>21</sup> Rather than isolating those criminals from the people they claim to represent, the US policies drove the masses in the Islamic world into the arms of terrorists.<sup>22</sup>

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<sup>11</sup> See, e.g., Helen Duffy, *The 'War On Terror' and the Framework of International Law* (CUP, Cambridge 2005).

<sup>12</sup> Noam Chomsky, 'Distorted Morality: America's War on Terror?' (Speech delivered at Harvard University February 2002) <<http://www.chomsky.info/talks/200202--02.htm>> accessed 30 May 2010.

<sup>13</sup> Jacques Steinberg, 'Experts Say Bin Laden Is Distorting Islamic Law' *New York Times* (New York 8 October 2001) <<http://www.nytimes.com/2001/10/08/national/08ISLAM.html>> accessed 30 May 2010.

<sup>14</sup> Gabor Rona, 'An Appraisal of US Practice Relating to "Enemy Combatants"' (2007) 10 *Yearbook of Int'l Hum L* 232.

<sup>15</sup> Kenneth Roth, 'The Law of War in the War of Terror' *Foreign Affairs* (February 2004) <[http://uniset.ca/terror/art/foaff\\_lawwarterror.html](http://uniset.ca/terror/art/foaff_lawwarterror.html)> accessed 30 May 2010.

<sup>16</sup> See Arnold Krammer, *Prisoners of War* (Praeger, Connecticut 2007).

<sup>17</sup> Howard M Hensel, *The Law of Armed Conflict: Constraints on the Contemporary Use of Military Force* (Ashgate, London 2005) 151.

<sup>18</sup> Robert McMahon, 'World: Rights Group Says US "Policy" Of Abuse Undermines Global Efforts' (Radio Free Europe Radio Liberty 18 January 2006) <<http://www.rferl.org/content/article/1064844.html>> accessed 30 May 2010.

<sup>19</sup> See, e.g., David Jenkins, 'The Closure of Guantanamo Bay: What Next for the Detainees?' (2010) *Public Law* 46; James G Stewart, 'The Military Commissions Act's Inconsistency with the Geneva Conventions: An Overview' (2007) 5 *Journal of International Criminal Justice* 26.

<sup>20</sup> Jorge Alberto Ramírez, 'Iraq War: Anticipatory Self-Defence or Unlawful Unilateralism?' (2003) 34 *Cal W Int'l LJ* 1.

<sup>21</sup> For one of the many accounts on the abuse of prisoners by the US at Abu Ghraib and elsewhere see, e.g., Jens David Ohlin, 'The Torture Lawyers' (2010) 51 *Harv Int'l LJ* 193.

<sup>22</sup> David Wernick even argues that provoking a disproportionate response to radicalise the masses is a *deliberate* strategy adopted by terrorists. David Wernick, 'Terror Incognito: International Business in an Era of Heightened Geopolitical Risk' in Gabriele GS Suder (ed) *Corporate Strategies Under International Terrorism and Adversity* (Edward Elgar Publishing, Cheltenham 2006) 75. This is also seen, historically, in Randall Law, *Terrorism: A History* (Polity UK, 2009) 85, 147.

Furthermore, the policy of justifying unilateral armed aggression as anticipatory self defence<sup>23</sup> set a dangerous precedent for other nations to follow in ways which will be unpredictable to a now greatly economically weakened US. Unilateralism<sup>24</sup> as a policy utterly failed<sup>25</sup> to defend Americans and US interests, especially of maintaining a stable productive world led by the US and governed by the rule of law with a robust global human rights regime. Arguably, one could not imagine more incoherent, ineffective, or self-destructive policies in operation.

### III. INCOHERENT US POLICIES

How did the US wind up well down the road to losing another land war in Asia?<sup>26</sup> The reason is that the US policies toward Southwest Asia are incoherent.<sup>27</sup> The neo-conservative theory<sup>28</sup> that a series of democratic revolutions would spontaneously sweep across the Middle East<sup>29</sup> as a result of short, sharp interventions<sup>30</sup> has proven to be an unrealistic and ill-considered illusion. Those policies were badly implemented *and* ill-conceived because they were unrealistic. However, although the policies of the neo-conservatives

<sup>23</sup> Stanimir A Alexandrov, *Self-Defence Against the Use of Force in International Law* (Kluwer, The Hague 1996) 99.

<sup>24</sup> David M Malone and James Cockayne, 'Creeping Unilateralism: How Operation Provide Comfort and the No-Fly Zones in 1991 and 1992 Paved the Way for the Iraq Crisis of 2003' (2006) 37 *Security Dialogue* 123.

<sup>25</sup> Ali Khan, 'Lawlessness in Iraq and the Failure of Unilateralism' *Jurist* (7 July 2003) <<http://jurist.law.pitt.edu/forum/forumnew119.php>> accessed 30 May 2010.

<sup>26</sup> It is an anecdote that General Douglas MacArthur told president Harry Truman to never get involved in a land war in Asia. See, e.g., Michael David Pearlman, *Truman & MacArthur: Policy, Politics, And The Hunger For Honor And Renown* (Indiana University Press, Bloomington 2008) 66. This is because the population of Asia is vast and much of Asia is inaccessible to navies. The US has fought at least two major land wars in Asia: Korea, fought to a draw, and Vietnam, where it lost. The US was also humiliated by the Iranian revolution of 1989 and has steadfastly sought to prevent another Indo-Pakistani war perhaps for this reason. In all events, despite the intervention of the People's Republic of China in the Korean war, the US did not extend that war to Chinese territory, reputedly due to this anecdote.

<sup>27</sup> Michael Mann, *Incoherent Empire* (Verso, New York 2003) 120, 223; Ali Khan, 'Forcing Them to Be Free: Bush's Project for the Muslim World' (2006) 8 *Global Dialogue* 1.

<sup>28</sup> The intellectual foundations of neo-conservatism are found in Leo Strauss and Carl Schmitt. See, e.g., Leo Strauss, *Thoughts on Machiavelli* (University of Chicago Press, London 1978); Carl Schmitt *Verfassungslehre* (Duncker & Humblot, München 1928).

<sup>29</sup> See, e.g., Fred Barbash, 'Bush: Iraq Part of "Global Democratic Revolution" Liberation of Middle East Portrayed as Continuation of Reagan's Policies' *Washington Post* (Washington 6 November 2003) <<http://www.washingtonpost.com/wp-dyn/articles/A7991-2003Nov6.html>> accessed 30 May 2010. Amir Butler correctly traces the roots of the neo-conservative vision to Trotskyism. Amir Butler, 'When the Rattlesnakes Bite Back' *Asia Times* (10 December 2003) <[http://www.atimes.com/atimes/Middle\\_East/EL10Ak04.html](http://www.atimes.com/atimes/Middle_East/EL10Ak04.html)> accessed 30 May 2010. See also François Debrix and Mark J Lacy, *The Geopolitics of American Insecurity: Terror, Power and Foreign Policy* (1<sup>st</sup> edn Routledge, Oxon 2009) 55.

<sup>30</sup> 'Neocon 101: Some Basic Questions Answered' *Christian Science Monitor* (2004) <<http://www.libertyparkusafd.org/lp/Hale/Special%20Reports/Empire%20Builders/Neocon%20101.htm>> accessed 20 July 2010.

such as Paul Wolfowitz and the Project for a New American Century (PNAC)<sup>31</sup> have been utterly discredited by ugly practical experience, no new policies<sup>32</sup> such as 'isolating the terrorists' or 'containing terrorism' have yet emerged to replace them.<sup>33</sup> Consequently, the US tries 'surges',<sup>34</sup> apparently not learning the lesson from Vietnam<sup>35</sup> that as soon as the 'surge' ends, the guerrilla returns.<sup>36</sup> As anyone can see, the war in Iraq continues.<sup>37</sup> The US 'misunderestimated' the low costs of insurgency and the inability of First World armies to sustain heavy casualties. The costs in monetary and human terms of the wars in Southwest Asia are too great for even the US to bear and might arguably conclude with the bankruptcy of the American Union.<sup>38</sup>

I argue that the US policies are incoherent because US goals are unarticulated. If the wars were about capturing or killing Bin Laden, they have failed; he is still at large nearly ten years later. If the wars were about preventing terrorism on the US soil, one can recall

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<sup>31</sup> Project for a New American Century, 'Rebuilding America's Defences: Strategies, Forces, and Resources For a New Century' (2000) <<http://www.newamericancentury.org/>> accessed 30 May 2010.

<sup>32</sup> But see The White House, 'National Security Strategy' (May 2010) <[http://www.whitehouse.gov/sites/default/files/rss\\_viewer/national\\_security\\_strategy.pdf](http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf)> accessed 30 May 2010.

<sup>33</sup> But see 'US Terror Strategy: Hard and Soft Power Top Adviser Says White House Seeking to Defeat Terrorism by Fusing Military Strikes, Economic Development and Political Aid' CBS News (6 August 2009) <<http://www.cbsnews.com/stories/2009/08/06/national/main5221000.shtml>> accessed 30 May 2010. The article itself however notes that the US has limited resources and that there is skepticism towards the idea of lending aid to terrorist havens. Further, the military strategy is seen as short term, any aid strategy as long term. Of course, a 'carrot and stick' approach is old hat. See CIA, 'National Strategy for Combating Terrorism' (February 2003) 23 <[https://www.cia.gov/news-information/cia-the-war-on-terrorism/Counter\\_Terrorism\\_Strategy.pdf](https://www.cia.gov/news-information/cia-the-war-on-terrorism/Counter_Terrorism_Strategy.pdf)> accessed 30 May 2010. I do not see those tactics as coordinated in a coherent strategy; while the neo-con strategy, to seek to incite a series of democratic revolutions in the middle-east via a series of short sharp intervention was wrong and badly implemented there was a strategy. In contrast I do not see any strategy in current US efforts. Here I try to develop a containment strategy to meet that problem.

<sup>34</sup> A 'surge' is a sudden massive temporary increase in military presence intended to quell dissent. For a view critical of the effectiveness of troop 'surges' as a counterinsurgency tactic, see Ernesto Londoño, 'Al-Qaeda in Iraq regaining strength: Government is the Target' Washington Post (Washington 22 November 2009) A16.

<sup>35</sup> Lionel Beehner, 'ASIA: US Military Bases in Central Asia' (Council on Foreign Relations 26 July 2005) <<http://www.cfr.org/publication/8440/>> accessed 30 May 2010.

<sup>36</sup> But see Darin EW Johnson, '2007 In Iraq: The Surge and Benchmarks: A New Way Forward?' (2008) 24 Am *U Int'l L Rev* 249.

<sup>37</sup> See, e.g., CNN, 'War in Iraq' (2009) <<http://www.cnn.com/SPECIALS/2003/iraq/>> accessed 30 May 2010.

<sup>38</sup> See, e.g., Joseph F Stiglitz and Linda Bilmes, 'The Three Trillion Dollar War: The True Costs of the Iraq Conflict' Vanity Fair (April 2008) <<http://www.vanityfair.com/politics/features/2008/04/stiglitz200804>> accessed 30 May 2010. See also Rupert Cornwell, 'Iraq war set to be more expensive than Vietnam' *The Independent*, (London 28 April 2006) <<http://www.independent.co.uk/news/world/americas/iraq-war-set-to-be-more-expensive-than-vietnam-475919.html>> accessed 30 May 2010.

the anthrax<sup>39</sup>/ricin attacks, the sniper murders around the Washington DC, beltway<sup>40</sup> and the recent attempted bombing at Times Square.<sup>41</sup> If the wars were simply about seizing oil<sup>42</sup> fields and controlling pipelines,<sup>43</sup> an oil grab, then they have failed to obtain resources cheaply. If the wars were about obtaining bases, then they have succeeded, but at what cost and for what gain? Clearly, bases in Central Asia further isolate Russia, finishing the dismemberment of the former Soviet Union.<sup>44</sup> But the questionable benefits of weakening an already crippled former opponent and possible partner are well outweighed by the costs of economic suicide.<sup>45</sup> Equally clearly, without conscription, the US cannot invade, let alone occupy, Iran. So the bases obtained by the wars are essentially irrelevant, at least in the foreseeable future. Basing arrangements could have been obtained fairly easily just by tying basing treaties with development aid<sup>46</sup> to any or all of the central Asian republics without waging a war in Afghanistan which was surely more costly and less effective than any foreign aid to potential market partners of the US.<sup>47</sup>

In sum, incoherent policies have led to these failures. Although US oil dependency and its waning global hegemony essentially compel the US to engage the Middle East, the disproportionate, ill-conceived, badly implemented and ultimately incoherent responses amounted to self-inflicted blows. The neo-conservative strategy was unrealistic and thus inapt. Attacking entire countries following that strategy was disproportionate. The strategy was ill-conceived due to unrealistic expectations of democratic revolutions; it was badly implemented due to seeking unnecessary bases and failing to impose law and order immediately after occupying Iraq. The responses of the Obama administration are

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<sup>39</sup> Eric Lichtblau, Nicholas Wade, 'FBI Details Anthrax Case, but Doubts Remain' *New York Times* (New York 18 August 2008) <[http://www.nytimes.com/2008/08/19/us/19anthrax.html?pagewanted=1&\\_r=2&hp](http://www.nytimes.com/2008/08/19/us/19anthrax.html?pagewanted=1&_r=2&hp)> accessed 30 May 2010.

<sup>40</sup> James Dao 'Polite but Dogged, Sniper Suspect Offers Defence' *New York Times* (New York 22 October 2003) <<http://www.nytimes.com/2003/10/22/us/polite-but-dogged-sniper-suspect-offers-defense.html?partner=rssnyt&emc=rss>> accessed 30 May 2010.

<sup>41</sup> Michael M Grynbaum, William K Rashbaum and Al Baker 'Police Seek Man Taped Near Times Square Bomb Scene' *New York Times* (New York 2 May 2010) <<http://www.nytimes.com/2010/05/03/nyregion/03timesquare.html>> accessed 30 May 2010.

<sup>42</sup> Graham Paterson, 'Alan Greenspan Claims Iraq War was Really for Oil' *The Sunday Times* (London 16 September 2007) <<http://www.timesonline.co.uk/tol/news/world/article2461214.ece>> accessed 30 May 2010.

<sup>43</sup> BBC, 'Afghanistan Plans Gas Pipeline' (London 13 May 2002) <<http://news.bbc.co.uk/2/hi/business/1984459.stm>> accessed 30 May 2010.

<sup>44</sup> Dmitriï Trenin, *Getting Russia Right* (Carnegie Endowment for International Peace, Washington 2007) 2–3.

<sup>45</sup> Kenneth L Russell, 'Economic Suicide' *The Populist Party* (29 September 2008) <[http://www.populistamerica.com/economic\\_suicide](http://www.populistamerica.com/economic_suicide)> accessed 30 May 2010; Justin Raimondo, 'America — A Bankrupt Empire' (*Antiwar.com* 26 January 2008) <<http://original.antiwar.com/justin/2008/01/25/america-a-bankrupt-empire/>> accessed 30 May 2010.

<sup>46</sup> Al Jazeera, 'Kyrgyz closure of US base "final"' *AlJazeera.net* (6 February 2009) <<http://english.aljazeera.net/news/asia/2009/02/2009267365553460.html>> accessed 30 May 2010.

<sup>47</sup> Rupert Cornwell, 'Iraq war set to be more expensive than Vietnam' *The Independent* (London 27 April 2006) <<http://news.independent.co.uk/world/americas/article360657.ece>> accessed 30 May 2010.



incoherent due to failure to elaborate a new strategy beyond merely rationalising the prosecution of what remains in fact, though not in words, a global war on terror. The Obama administration has not recast the terms of the debate out of war and into penal law or developed new strategies to replace those it has rejected in practice, and has instead intensified the tactical use of assassination and troop 'surges' while expanding the war on terror into Pakistan.

## IV. CONSEQUENCES OF THE WAR

### A. Economic Consequences

The 'war on terror' has been underway nearly ten years. The war has cost tens of thousands of lives and about one trillion dollars,<sup>48</sup> with no end in sight. As a direct result of the extravagant spending on the war, the US is in fiscal ruin: massive debt, trade deficits, and unbalanced budgets have led to the deepest economic recession since the great depression.<sup>49</sup> A bankrupt economy, alienated allies, and the US betrayal of its own human rights ideals are the results of this war. Consequently, the US can no longer credibly claim, at least at this point of time, to be the global champion of human rights.<sup>50</sup> It has thereby lost the legitimator of its passing global hegemony. The US is losing its ill-conceived war on terror, and it is a self-inflicted defeat.<sup>51</sup>

### B. Political Consequences of the So-Called 'War On Terror' within the US

Within the US, the war on terror has created the dysfunctional and wrong belief, among elites and the masses alike, that violence and death are normal and acceptable parts of the

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<sup>48</sup> For a running estimate, see 'Cost of War' <<http://costofwar.com/>> (likely, not including 'black budget' covert operations) accessed 30 May 2010.

<sup>49</sup> See David R Francis, 'More Spending on Afghan War Could Hurt the Dollar' *Christian Science Monitor* (26 October 2009) <<http://features.csmonitor.com/economyrebuild/2009/10/26/economic-scene-more-spending-on-afghan-war-could-hurt-the-dollar/>> accessed 30 May 2010; Tom Raum, 'Rising National Debt May Be The Next Economic Crisis' *USA Today* (Washington 4 July 2009) <[http://www.usatoday.com/money/economy/2009-07-04-national-debt\\_N.htm](http://www.usatoday.com/money/economy/2009-07-04-national-debt_N.htm)> accessed 30 May 2010. The usual analysis is that the current economic recession — the worst since the great depression of 1929 — is merely due to a mortgage bubble in the US housing market bursting. But this seems non-sense. The savings and loans (S&L) crisis of 1988 did not unleash a global recession. For a brief comparison of the S&L crisis of 1988 to the mortgage bubble, see Aaron Withrow, 'Developments in Banking and Financial Law 2008–2009: Parallels Between the Fannie and Freddie Debacle and the Savings and Loan Crisis of the 1980s' (2008) 28 *Rev Banking & Fin L* 32.

<sup>50</sup> The incidence of torture by the US is well documented and undeniable. See, e.g., Karen J Greenberg, Joshua L Dratel, *The Torture Papers: The Road to Abu Ghraib* (1<sup>st</sup> edn Cambridge University Press, Cambridge 2005); Jeremy Brecher, Jill Cutler and Brendan Smith, *In the Name of Democracy: American War Crimes in Iraq and Beyond* (1<sup>st</sup> edn Metropolitan Books, New York 2005).

<sup>51</sup> CNN, 'Bin Laden: Goal is to Bankrupt U.S.' *CNN.com* (1 November 2004) <<http://www.cnn.com/2004/WORLD/meast/11/01/binladen.tape/>> accessed 30 May 2010.



international political processes. Torture<sup>52</sup> and assassination<sup>53</sup> are now seen as normal, even desirable.<sup>54</sup> The Death's Head has become a popular icon throughout the US.<sup>55</sup> Even if those attitudes did not deny the promise of liberty, democracy and the rule of law (and not of men),<sup>56</sup> distorting political processes<sup>57</sup> in both subtle and obvious ways, the fact is that those lawless views are not shared by the US allies such as France and Germany. Obama has dropped the use of the phrase 'global war on terror'<sup>58</sup> but still sees the US as engaged in a war against Al Qaeda.<sup>59</sup> Obama has continued George W Bush's<sup>60</sup> policy of

<sup>52</sup> Adam Brodsky, 'Torture Regrets Cheer our Enemies' *New York Post* (New York 1 May 2009) <[http://www.nypost.com/p/news/opinion/opedcolumnists/torture\\_regrets\\_cheer\\_our\\_enemies\\_iU3Jhk6gEgKjVpae9j5NIJ](http://www.nypost.com/p/news/opinion/opedcolumnists/torture_regrets_cheer_our_enemies_iU3Jhk6gEgKjVpae9j5NIJ)> accessed 30 May 2010.

<sup>53</sup> Amy Davidson, 'Close Read: What Did Seymour Hersh Say About Assassinations?' *New Yorker* (New York 21 July 2009). <<http://www.newyorker.com/online/blogs/newsdesk/2009/07/close-read-seymour-hersh-assassinations.html>> accessed 30 May 2010.

<sup>54</sup> Generally speaking, continuity, rather than change, marks the way Obama has handled the 'war on terror'. Newsweek points out, for example, that 'US intelligence and counterterrorism officials say they see little difference between Barack Obama's policy on remote-control drone attacks as articulated last week by a top administration lawyer and that of George W Bush.' Mark Hosenball, 'What Obama's Predator-Strike Policy Tells Us About Bush's Covert Attacks' *Newsweek* (30 March 2010) <<http://www.newsweek.com/blogs/declassified/2010/03/30/what-obama-s-predator-strike-policy-tells-us-about-bush-s-covert-attacks.html>> accessed 30 May 2010.

<sup>55</sup> 'Death's Head Symbol' DesignBoom.com (2009) <<http://www.designboom.com/history/death.html>> accessed 30 May 2010.

<sup>56</sup> 'We do not allow a man to rule, but rational principle, because a man behaves thus in his own interests and becomes a tyrant' Aristotle, *Nicomachean Ethics*, Book V (350 BC) Ch 6 <<http://www.sacred-texts.com/cla/ari/nico/nico049.htm>> accessed 30 May 2010.

<sup>57</sup> E.g., the 'Patriot Act' which severely infringes fundamental rights, in my opinion, unconstitutionally. David Abraham, 'The Bush Regime from Elections to Detentions: A Moral Economy of Carl Schmitt and Human Rights' (2008) 62 *U Miami L Rev* 249.

<sup>58</sup> Sue Pleming and Jon Boyle, 'Obama Team Drops "War on Terror" Rhetoric' Reuters (31 March 2009) <<http://uk.reuters.com/article/idUKTRE52T7N920090330>> accessed 30 May 2010; Al Kamen, 'The End of the Global War on Terror' *Washington Post* (Washington 24 March 2009) <[http://voices.washingtonpost.com/44/2009/03/23/the\\_end\\_of\\_the\\_global\\_war\\_on\\_t.html](http://voices.washingtonpost.com/44/2009/03/23/the_end_of_the_global_war_on_t.html)> accessed 30 May 2010; Oliver Burkeman, 'Obama Administration Says Goodbye to "War on Terror"' *The Guardian* (London 25 March 2009) <<http://www.guardian.co.uk/world/2009/mar/25/obama-war-terror-overseas-contingency-operations>> accessed 30 May 2010. But see AFP, 'No Ban on "Global War on Terror": US officials (25 March 2009) <<http://www.google.com/hostednews/afp/article/ALeqM5j2wAb-X08AUmhtRYHutWGZ01WOPg>> accessed 30 May 2010.

<sup>59</sup> 'We are at war with a specific network, al-Qaeda, and its terrorist affiliates who support efforts to attack the United States, our allies, and partners.' – Barack Obama. Toby Harnden, 'Obama Declares the "War on Terror" Is Over' *The Telegraph* (London 27 May 2010). <<http://www.telegraph.co.uk/news/worldnews/northamerica/usa/barackobama/7772598/Barack-Obama-declares-the-War-on-Terror-is-over.html>> accessed 30 May 2010.

<sup>60</sup> James Risen and David Johnston, 'Bush Has Widened Authority of CIA to Kill Terrorists' *New York Times* (New York 15 December, 2002) <<http://www.nytimes.com/2002/12/15/international/15INTE.html?intemail1>> accessed 30 May 2010.

assassination<sup>61</sup> and intervention in Afghanistan.<sup>62</sup> Continuity, rather than change, defines Obama's military policies in Southeast Asia which continues to consider war on Iran<sup>63</sup> and which have extended the war into northern Pakistan.<sup>64</sup> Instituting policies of aid and development to remove the root sources of terrorism, hunger, disease, poverty and fear would be the real 'politics of hope'.

### C. Political Consequences amongst the US Allies and Opponents

The US's unilateral choice to normalise illegal<sup>65</sup> and outrageous actions such as torture, assassination, and unilateral armed aggression has significantly undermined the US power globally and deeply eroded its relations, even with close historical allies such as France and Germany. Each instance of torture<sup>66</sup> and wanton slaying of civilians generates more enemies for the US to face.<sup>67</sup> Potential Third World allies such as India rightly view the US willingness to ignore the rule of law and violate clear *jus cogens* rules<sup>68</sup> by torturing

<sup>61</sup> 'More CIA drone attacks have been conducted under President Obama than under President George W Bush.' *New York Times* 'Predator Drones and Unmanned Aerial Vehicles (UAVs)' (New York 3 June, 2010) <[http://topics.nytimes.com/top/reference/timestopics/subjects/u/unmanned\\_aerial\\_vehicles/index.html](http://topics.nytimes.com/top/reference/timestopics/subjects/u/unmanned_aerial_vehicles/index.html)> accessed 30 May 2010.

<sup>62</sup> Helene Cooper and Eric Schmitt, 'White House Debate Led to Plan to Widen Afghan Effort' *New York Times* (New York 27 March 2009) <<http://www.nytimes.com/2009/03/28/us/politics/28prexy.html>> accessed 30 May 2010.

<sup>63</sup> 'Asked why he wouldn't spell out any consequences, the president replied, "Because I think that we don't know yet how this thing is going to play out. I know everybody here is on a 24-hour news cycle. I'm not."' 'Obama Toughens his Talk on Iran' CNN (23 June 2009) <<http://www.cnn.com/2009/POLITICS/06/23/obama.news.conference/index.html>> accessed 30 May 2010. More directly, Obama may wage war on Iran via Israel. See Bret Stephens, 'Obama Is Pushing Israel Toward War President Obama can't outsource matters of war and peace to another state.' *Wall Street Journal* (15 September, 2009) <<http://online.wsj.com/article/SB10001424052970203917304574410672271269390.html>> accessed 30 May 2010.

<sup>64</sup> See, e.g., Zulfiqar Ali and Laura King, '30 killed in US airstrike in Pakistan' *Los Angeles Times* (Los Angeles 15 February 2009) <<http://articles.latimes.com/2009/feb/15/world/fg-pakistan-strike15>> accessed 30 May 2010.

<sup>65</sup> United Nations, 'Torture: UN Convention Against Torture (CAT)' <<http://www.hrweb.org/legal/cat.html>> accessed 30 May 2010; Andrea Bianchi and Yasmin Naqvi (eds), *Enforcing International Law Norms Against Terrorism* (Hart Publishing, Portland 2004) 20; Thomas Joseph Lawrence, *The Principles of International Law* (Chicago University of Chicago Press, 2009) 553–554; War: Anthony C Arend, Robert J Beck, *International Law and the Use of Force: Beyond the UN Charter Paradigm* (Routledge, London, 1993) 23. Moreover the use of torture is a violation of peremptory norms of international law (*jus cogens*) Craig Scott, *Torture as Tort* (Hart, Oxford 2001) 253 as is armed aggression. Larry May, *Crimes Against Humanity: A Normative Account* (Cambridge University Press, Cambridge 2005) 48.

<sup>66</sup> Edward Gomez, 'Torture Generates Anger; Australia's "Leb" bashings' SFGate (13 December 2005) <<http://www.sfgate.com/cgi-bin/article.cgi?f=/g/a/2005/12/13/worldviews.DTL>> accessed 30 May 2010.

<sup>67</sup> Tom Olson, "'Collateral damage' creating more enemies' *The News Tribune* (3 November 2009) <<http://www.thenewstribune.com/468/v-printerfriendly/story/710899.html>> accessed 30 May 2010.

<sup>68</sup> *Jus cogens* norms are basic rules of international law which all countries are bound by and which cannot be derogated by any state. Ulf Linderfalk, 'The Effect of Jus Cogens Norms: Whoever Opened Pandora's Box, Did You Ever Think About the Consequences?' (2007) 18 *Eur J Int'l L* 853.

prisoners as anathema. Consequently, the US finds itself with no committed coalition to implement any policy — and, as noted earlier, the US policies are unrealistic and incoherent.<sup>69</sup>

Furthermore, the US violations of the laws of war by torture and indiscriminate killing have the effect of strengthening the resolve of those who would oppose the US with violence. Each incidence of torture committed by the US or those extradited by the US to secret prisons or torture centres administered by the US or US client states<sup>70</sup> under ‘extraordinary rendition’<sup>71</sup> builds lasting hatred against the US. Every incident of wanton slaying of civilians, of arrogance, likewise motivates the opponents of the US to fight for their family, their homeland.

## V. POLICIES WHICH WORK

The US military is far from home. Each US soldier could be back at home working in McDonalds and going shopping at the shopping mall instead of sweating, killing, and possibly dying in deserts and mountains far from home. In contrast, Afghan peasants have nowhere to go: they are fighting for their homes, their families, and their friends. One can simply note with dismay the US blindness to the historical fact that both Britain<sup>72</sup> and the former Union of Soviet Socialist Republics (USSR)<sup>73</sup> invaded Afghanistan only to be eventually forced to withdraw due to the savage warlike nature of the Afghan people. Guess who is next?<sup>74</sup>

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<sup>69</sup> Kaveh L Afrasiabi, ‘Incoherence Stymies US’s Iran policy’ *Asia Times* (16 Nov 2006) <[http://www.atimes.com/atimes/Middle\\_East/HK16Ak02.html](http://www.atimes.com/atimes/Middle_East/HK16Ak02.html)> accessed 30 May 2010. See also Michael Mann, *Incoherent Empire* (Verso Books, London 2003).

<sup>70</sup> A client state is in some sense dependent on a hegemonic state for its defence and protection. Historically, client states generally paid tribute (i.e., taxes) for their external security to the hegemon. However, contemporary client states are more often tied to the hegemon by ties of aid and trade rather than by tribute. Several states, most prominently Japan, financially sponsored the first Gulf War. They were not legally bound. Contemporary client states tend to be bound by defence and basing treaties rather than by tribute. South Korea might be seen as a US client in that South Korea exports merchandise to the US and the US stations troops in Korea and also has defence treaties with Korea. Another example would have been pre-revolutionary Iran. See, e.g., Mark Gasiorowski, *US Foreign Policy and the Shah*, (1<sup>st</sup> edn Cornell University Press, Ithaca 1991).

<sup>71</sup> Daniel Benjamin, Steven Simon, *The Next Attack: The Failure of the War on Terror* (Holt, New York 2005) 256.

<sup>72</sup> Wikipedia, ‘Invasions of Afghanistan’ (2009). <[http://en.wikipedia.org/wiki/Invasions\\_of\\_Afghanistan](http://en.wikipedia.org/wiki/Invasions_of_Afghanistan)> accessed 30 May 2010.

<sup>73</sup> Victor Sebestyen, ‘Transcripts of Defeat’ *New York Times* (New York 28 October 2009) <<http://www.nytimes.com/2009/10/29/opinion/29sebestyen.html>> accessed 30 May 2010.

<sup>74</sup> Artemy Kalinovsky, ‘Afghanistan Is the New Afghanistan’, *Foreign Policy* (4 September 2009) <[http://www.foreignpolicy.com/articles/2009/09/04/afghanistan\\_is\\_the\\_new\\_afghanistan](http://www.foreignpolicy.com/articles/2009/09/04/afghanistan_is_the_new_afghanistan)> accessed 30 May 2010.

Considering that the current US policies are incoherent and self-destructive,<sup>75</sup> what should and could be done? I propose three measures as part of an overarching strategy.

### A. Reconceiving Terrorism as a Criminal Activity

The US must reconceive terrorism as a criminal activity — not an act of war, and contain it by isolating terrorists from the masses.<sup>76</sup> If the US 'war on terror' rhetoric was ill-considered in the first place, and is not an accurate reflection of the tactical reality of a struggle against an elite, disciplined, and well-organised minority, then abandoning that rhetoric, which clearly has failed, should be relatively easy. A better analogy to terrorism would be piracy, not war.<sup>77</sup> The terrorist, like the pirate, is *hostes humani generis*<sup>78</sup> — a common enemy to all mankind. Therefore, terrorists, like pirates, should be (and in my opinion are) subject to universal jurisdiction.<sup>79</sup> Treating criminals as *criminals*, not soldiers, would go further to properly addressing the problem.

### B. Containment

A further reason for the failure of the 'war on terror' metaphor is seen by looking at the costs and consequences of the US policies of the last decade. The cold war metaphor of 'containment' would be a much better way to consider the problem of politicised violence committed by non-state actors.<sup>80</sup> If 9/11 was, in fact, the work of a disciplined well-financed elite known as the Al Qaeda network, then it makes almost no sense at all to be attacking poor peasants who have no means to strike at the US.<sup>81</sup>

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<sup>75</sup> See, e.g., Kaveh L Afrasiabi, 'Incoherence Stymies US's Iran Policy' *Asia Times*, (16 November 2006) <[http://www.atimes.com/atimes/Middle\\_East/HK16Ak02.html](http://www.atimes.com/atimes/Middle_East/HK16Ak02.html)> accessed 30 May 2010; Mann (n 72); Gilles Dorransoro, 'A London Fog on Afghanistan' *Foreign Policy* (5 February 2010) <[http://afpak.foreignpolicy.com/posts/2010/02/05/a\\_london\\_fog\\_on\\_afghanistan](http://afpak.foreignpolicy.com/posts/2010/02/05/a_london_fog_on_afghanistan)> accessed 30 May 2010.

<sup>76</sup> Philip P Purpura, *Terrorism and Homeland Security: An Introduction with Applications* (1<sup>st</sup> edn Buuterworth-Heinemann, Burlington 2007) 95.

<sup>77</sup> Anthony C Arend and Robert J Beck, *International Law and the Use of Force: Beyond the UN Charter Paradigm* (Routledge, London 1993) 144.

<sup>78</sup> Myra Williamson, *Terrorism, War and International Law* (Ashgate, Burlington 2009) 240.

<sup>79</sup> *Ibid*; Stephen Macedo (ed), *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes under International Law* (University of Pennsylvania Press, Philadelphia 2004) 11.

<sup>80</sup> Russell D Howard and Erik Iverson, 'Fight Al Qaeda's Plan, not its Ideas' *Christian Scientist Monitor* (30 April 2008) <<http://www.csmonitor.com/Commentary/Opinion/2008/0430/p09s02-coop.html>> accessed 30 May 2010.

<sup>81</sup> See, e.g., Rod Nordland, 'NATO Airstrike Kills Afghan Civilians' *New York Times* (New York 22 February 2010) <<http://www.nytimes.com/2010/02/23/world/asia/23afghan.html>>; 'Civilian Catastrophe as US Bombs Afghan Wedding' *The Guardian* (London 1 July 2002) <<http://www.guardian.co.uk/world/2002/jul/01/afghanistan>> accessed 30 May 2010; 'Bombing Kills Afghan Civilians, US-Led Soldier' *Press TV* (1 Mar 2010) <<http://www.presstv.ir/detail.aspx?id=119748&sectionid=351020403>> accessed 30 May 2010.

Containment involves isolating the access points<sup>82</sup> to and from potential terrorist bases — airports, ports, roads and trails at borders. Such access points should be policed, not militarised. Military, paramilitary, and police operations should focus on interdiction of potential criminals, not destruction of poor, desperate peasants who basically have no choice but to take up arms in self defence. Third world countries have few international transit points and those can be well policed. Of course, though a unilateral containment strategy can work for Afghanistan and even Iraq, it might not work for a country like Saudi Arabia. Afghanistan and Iraq have been invaded and overtly occupied; there is a guerrilla insurgency in those countries. None of that is the case of Saudi Arabia. Further, Saudi Arabia has much greater contact with the rest of the world than Iraq or Afghanistan. In Saudi Arabia, the US foreign policy must not focus exclusively on elite level governmental ties but also on improving the lives of non-elites so as to reduce the risks that disaffected non-elites will resort to violence as their only option. Close cooperation and basic police functions such as surveillance, arrest, interrogation, and trials are the path to an effective coherent policy of containment.

### C. Aid and Development

Prevention of terrorism also occurs through elimination of poverty.<sup>83</sup> People who are not doomed and desperate have reasons to live and will not willingly die for abstractions or promises of paradise in the hereafter. Thus, developmental aid policies are a key defence policy. At one point in the Afghan conflict, the US was dropping MREs ('meal ready-to-eat') in Afghanistan — an instance of food aid.<sup>84</sup> This sort of policy seriously undercuts the base of the US opponents' criticisms of the US. The US military can enable non-governmental organisations to operate on the ground and can build infrastructure for the impoverished.<sup>85</sup> That might be a more effective policy to protect Americans than indiscriminately killing and torturing the wrong people. The US can and should avoid local conflicts and stay out of local disputes. The idea of exporting western values of democracy

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<sup>82</sup> HDS Greenway, 'Opinion: Isolating Insurgents is Nothing New' *GlobalPost* (6 October 2009) <<http://www.globalpost.com/dispatch/worldview/091004/opinion-isolating-insurgents-nothing-new>> accessed 30 May 2010.

<sup>83</sup> Eric Engle, 'A Social-Market Economy for Rapid Sustainable Development' (2009) 2 *GNLU Journal of Law, Development & Politics* 42–62; Engle, 'Problems and Possibilities' (n 10) 757; Kevin J Fandl, 'Terrorism, Development & Trade: Development and Terrorism: Winning the War on Terror Without the War' (2004) 19 *Am U Int'l L Rev* 587, 630.

<sup>84</sup> Staff Sgt Andrea Thacker, 'Iraq, Afghanistan airdrops Reach All-time High' *AFCENT Public Affairs - Combined Air and Space Operations Center* (26 August 2008) <<http://www.globalsecurity.org/military/library/news/2008/08/mil-080826-afpn01.htm>> accessed 30 May 2010.

<sup>85</sup> See, e.g., Faith Kisinga, 'The Process of Reviewing the NGO Coordination Act, 1990: A Step-By-Step Road Map' (2009) 11 *International Journal of Not-for-Profit Law* 55; Bard E O'Neill, *Insurgency & Terrorism: Inside Modern Revolutionary Warfare* (Brassey's, Virginia 2001) 138.

and western standards of gender relations to Southwest Asia has clearly failed.<sup>86</sup> As such, one can rightly ask what the US is doing in Southwest Asia other than making more enemies and wasting blood and treasure? Your guess is at least as good as mine.

## VI. CONCLUSION

Correct counter-terrorism policies emphasise (1) conception of terrorism as a criminal activity, (2) containment of potential threats through policing of borders, especially access points, and (3) economic aid and development. Economic development at this point can only be encouraged at a distance due to making so many enemies in the past. However the US can and should airdrop food<sup>87</sup> and medicine to the people it has miscast into the role of enemies at war with the US. By reconceptualising the 'war on terror' as crime rather than war, by focusing on developing the local economy and infrastructure in the Third World countries, by abandoning unrealistic plans to instantly export democracy and western sex and gender roles to other cultures and by adopting a containment strategy, the US can expend fewer resources far more effectively and reverse its precipitous decline.<sup>88</sup>

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<sup>86</sup> See, e.g., Fred M Kaplan, *Daydream Believers: How a Few Grand Ideas Wrecked American Power* (Wiley, New Jersey 2008); Ahmed Rashid, *Descent Into Chaos: The US and the Disaster in Pakistan, Afghanistan, and Central Asia* (Viking Penguin, New York 2009).

<sup>87</sup> Thacker (n 90).

<sup>88</sup> "Let's face it. If you're trying to borrow \$9 trillion to bail out your financial system and economy and already half your public debt is held by foreigners, it's not really the conduct of a rising empire, is it?" Dan Weil, 'Harvard Prof: US Empire in Decline' *Moneynews* (22 October 2009) <<http://www.moneynews.com/StreetTalk/harvard-us-decline/2009/10/22/id/335722>> accessed 30 May 2010. See also Niall Ferguson, *Colossus: The Rise and Fall of the American Empire* (Penguin, New York 2004).