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## Post-September 11 Terrorism Measures

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*George Millard\**

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### I. INTRODUCTION

The attack of September 11, 2001 had an impact not just on the United States of America. The aftermath caused a succession of events that altered the shape of the world.

When we analyze the measures taken after this terrorist attack, we find events unfolding dramatically worldwide with social, political, economic, and cultural consequences. Brazil’s immediate position of repudiating this terrorist action resembled that of almost every nation as they joined a chorus of solidarity, sadness, and moral support.

However, Brazil’s major response was the invoking of the Inter-American Treaty of Reciprocal Aid. This was a regional reply to the intense international mobilization of support for the United States.<sup>1</sup> This treaty allowed for, from the Brazilian standpoint, the establishment of a compatible judicial framework within its 1988 Constitution.

Article 4, subsection VIII, of the 1988 Constitution determines that terrorism and racism should be repudiated, constituting the fundamental principles which govern Brazil’s foreign policy. A strong outcry in demand of justice developed, and immediately work began responding to the emergency thus created.

Two simultaneous points of attack emerged. One was to identify, pursue, and punish those responsible. The other, no less important, was to establish measures of a preventative order, in order to avoid a repetition of this heinous act.

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1. Minister of Foreign Affairs Celso Lafer, Remarks Before the Federal Senate — Relations and National Defense Committee, Brasilia, Brazil (Oct. 3, 2001), *available at* <http://www.patriotresource.com/wtc/intl/oct/0103/brazil.html> (last visited Sept. 29, 2003).

The preventive measures, proactive to a certain point, in fact even overlapped the repressive measures, as was demonstrated by the subsequent action that took place. Within the ambit of the United Nations, as well as the regional forums, such as the European Union and Organization of American States, voices were raised and measures to be taken were announced.

The tragedy of September 11 did not strike the United States alone. The perplexity in the face of the criminal act is not just on the part of the United States. The sudden sensation of vulnerability does not belong to them alone. The victims of the attack are not just the citizens of the United States. . . . There are visible networks and there are invisible networks. Networks for good and networks for evil. Criminal networks that make use of legitimate and legal channels. Networks of terrorists whose actions are designed to attract the attention of networks of the global media in order to magnify their impact.

Citizens of many or all of our countries suffer from the action of these networks, through organized crime, drug trafficking, corruption, money laundering, urban violence, assassination, and terrorism. . . . [T]he fight against these networks has to be fought also by means of the networks that join us all together. The basic institutional and legal infrastructure already exists: the United Nations . . . [w]e must break the cover of secrecy under which the networks of crime and terrorism hide, without by any means endangering any of the fundamentals rights of our citizens — the essence of our democracy — including the right to privacy and free expression.<sup>2</sup>

That was the message from Brazil, at the XXIII Meeting of the Ministers of Foreign Affairs, in the Organization of American States (OAS), which took place in Washington D.C. on September 21, 2001.<sup>3</sup>

After September 11, support came from all around the world. The entire hemisphere, the Caribbean Common Market, Central American leaders, and the OAS offered their help, including assistance in formulating a new hemispheric counterterrorism treaty.

Terrorism was, and always will be, an issue in the Western Hemisphere. Designated foreign terrorist organizations are operating in South America, most notably in Colombia. There, the Revolutionary

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2. Minister of Foreign Affairs Celso Lafer, Speech at the XXII Meeting of Consultation of the Ministers of Foreign Affairs in the Organization of American States of Washington, D.C. (Sept. 21, 2001), available at <http://www.patriotresource.com/wtc/intl/0921/brazil.html> (last visited Sept. 29, 2003).

3. *Id.*; see also Celso Lafer, *Firm and Clear*, FOLHA DA MANHÃ (São Paulo), Sept. 27, 2001.

Armed Forces of Colombia, the National Liberation Army, and the United-Self Defense Forces have continued their actions for decades.

The triple border region of Argentina, Brazil, and Paraguay is an economic shadow area. Terrorists operating in this region have connections with the Middle East, including the formation of cells for supporting and financing terrorist organizations in the Middle East itself.

The entire hemisphere forms a critical part in the world's criminal pipelines — drugs, arms, and people are smuggled up, down, and through these nations every day of the year. The combating of crime and terrorism is of the highest priority.

The hemisphere's nations do not have to fight this battle alone. In response to the attacks, the U.S. government and its allies have developed a four-part approach to address these threats.

First, we have asked all countries to ratify the 12 international counterterrorism treaties. . . . These treaties allow international cooperation to work smoothly, enabling the exercise of universal jurisdiction over terrorists.

Second, we are working with the nations of the hemisphere to ensure the identification and the seizure of the financial assets of terrorism. . . . The Financial Action Task Force is assisting the passage of anti-money laundering legislation in all countries. . . . Many nations have created or are now creating financial intelligence units, some with the assistance of the United States. . . . The places where terrorist can hide their assets are rapidly dwindling.

Third, we are working with countries to ensure that terrorism is criminalized in all its forms. . . . Together with the universal jurisdiction created by the treaties, this strips away much of the appeal of using the Caribbean or Central America as pipeline.

. . .

Last, and perhaps most importantly, we are working to improve border controls.<sup>4</sup>

Under the auspices of the United Nations, conventions and protocols against terrorism have been developed. With the need to fulfill obligations imposed by the conventions, member states ratify these international instruments and implement them through passage of their own domestic legislations. These treaties provide the legal framework for the suppression

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4. Lino Gutierrez, September 11 and Its Aftermath: The Impact of Doing Business in the Americas, Remarks to the George Washington University Center for Latin American Issues in Washington, D.C. (Nov. 27, 2001), available at <http://www.state.gov/p/wha/rls/rm/2001/6706.htm> (last visited Oct. 22, 2003).

of terrorist acts and the pursuit of perpetrators of terrorism. They also set out ways to limit access to the tools terrorists need. The U.N. Security Council has passed resolutions 1267, 1333, and 1363 calling for sanctions against the Taliban, Osama bin Laden, and their associates.<sup>5</sup>

Most U.N. anti-terrorism treaties negotiated from 1963 to 1999 were penal in nature with a common format. These include: defining a type of terrorist violence as an offense, such as seizure of an aircraft in flight by threat or violence; requiring member states to penalize that activity; and requiring the establishment of jurisdiction, with territorial or national registration.

In 1999, the Convention on the Suppression of Financing Terrorism came into being. The U.N. Security Council has the responsibility for the maintenance of international peace and security. Resolution 1373 of September 28, 2001, requires member states to criminalize the provision of funds to terrorists, freeze the financial assets of people who commit terrorist acts, and prohibit the provision of services to those who participate in terrorism; this last element is commonly known as “no safe haven for terrorists.”<sup>6</sup>

A high-level working group was set up to review the U.N. role in combating terrorism. In September 2002, a thirty-one page recommendations report was presented, aimed at improving and changing that role. This document was denominated the “Report of the Policy Working Group on the United Nations and Terrorism.”<sup>7</sup>

The activities of the United Nations should be part of a tripartite strategy supporting global effects to: (a) dissuade disaffected groups from embracing terrorism, (b) deny groups or individuals the means to carry out acts of terrorism, (c) sustain broad-based international cooperation in the struggle against terrorism. The protection of human rights was considered to be of essential concern. According to the report, “[t]errorism often thrives where human rights are violated, which adds to the need to strengthen action to combat violations of human rights.”<sup>8</sup> The Counterterrorism Committee, which was established pursuant to resolution 1373, represents an important innovation and opens new possibilities for

5. S.C. Res. 1267, U.N. SCOR, 54th Sess., 4051st mtg. at 1, U.N. Doc. S/RES/1267 (1999); S.C. Res. 1333, U.N. SCOR, 55th Sess., 4251st mtg. at 1, U.N. Doc. S/RES/1333 (2000); S.C. Res. 1363, U.N. SCOR, 56th Sess., 4352d mtg. at 1, U.N. Doc. S/RES/1363 (2001).

6. S.C. Res. 1373, U.N. SCOR, 56th Sess., 4385th mtg. at 1, U.N. Doc. S/RES/1373 (2001).

7. *Report of the Policy Working Group on the United Nations and Terrorism*, U.N. Policy Working Group on the United Nations and Terrorism, 57th Sess., at 1, U.N. Doc. A/57/273, Annex 1 (2002), available at <http://www.un.org/terrorism/a57273.htm> (last visited Oct. 22, 2003).

8. *Id.*

interstate cooperation. It is the center of the U.N. activities related to terrorism.

The Security Council resolutions have formed the legal basis for freezing terrorist assets around the world. The Financial Action Task Force on Money Laundering has proven its effectiveness in dealing with financial crime. The same level of success was shown regarding financial terrorist networks. In October 2001, eight Special Recommendations on Terrorist Financing, representing a set of financial, regulatory, and practice standards, were issued.

Working in close cooperation with the U.S. government, alternative remittance systems such as the hawala have been examined, and regional and local authorities have been advised to make informal banking channels more transparent and accountable.<sup>9</sup> Simultaneously, the United States has attacked terrorists, terrorist organizations, and their supporters on several fronts.

Since our enemy has global reach and is supported by a global network, we need a global strategy. The State Department has been a close partner with the Department of Treasury, the Department of Justice and Homeland Security, law enforcement agencies, and intelligence agencies, as the Administration has formulated and implemented a comprehensive strategy to disrupt, dismantle and shut down the financial networks that support terrorism.<sup>10</sup>

Just twelve days after the attack on New York and the Pentagon, the President issued an executive order which has proven to be a key weapon in fighting terrorism. It is denominated as Executive Order 13224 — Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten to Commit, or Support Terrorism. “The order initiated an unprecedented effort in history to identify and to freeze the assets of individuals and entities associated with terrorism across the board.”<sup>11</sup> This response to the terrorist attacks, in short, mandates that no U.S. company

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9. “Hawala” is a form of money transfer wherein networks of informal bankers called “hawaladars” arrange for long-distance fund transfers, often with greater speed and cost-effectiveness than traditional banks. This system has led to concerns that it may be used to finance terrorism or other illegal dealings. *See, e.g.*, PATRICK M. JOST & HARJIT SINGH SANDHU, INTERPOL, THE HAWALA ALTERNATIVE REMITTANCE SYSTEM AND ITS ROLE IN MONEY LAUNDERING (2000), available at <http://www.interpol.int/Public/FinancialCrime/MoneyLaundering/hawala/default.asp> (last visited Oct. 22, 2003).

10. *International Dimension of Combating and Financing Terrorism: Before the House Comm. on Int’l Relations, Subcomm. Int’l Terrorism in Washington, D.C.* (Mar. 25, 2003) (testimony of E. Anthony Wayne), available at <http://www.state.gov/e/eb/rls/rm/2003/19113.htm> (last visited Sept. 29, 2003).

11. *Id.*

shall do business with any person that is subject to the prohibitions of the executive order. These persons include those who posed a risk or have committed or supported terrorist acts, and those identified on a list of specially designated nationals and blocked persons.

This list was issued by the Office of Foreign Assets Control and was considered as an Annex of Order 13224. Penalties for violators are severe, including having their assets frozen or forfeited. Corporations can face up to U.S. \$500,000 in penalties, while individuals can face up to U.S. \$250,000 in penalties and ten years of imprisonment for violations.

In addition, on October 26, 2001, Congress passed an act entitled "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism," more commonly known as USA PATRIOT or simply the Patriot Act.<sup>12</sup> The Act gives federal officials greater authority to track and intercept communications, both for law enforcement and foreign intelligence gathering purposes. It allows regulatory powers to the Secretary of the Treasury to combat corruption of U.S. financial institutions for foreign money laundering purposes; close borders and detain and remove those within the U.S. borders; creates new crimes, new penalties, and new procedural efficiencies for use against domestic and international terrorists.<sup>13</sup>

Penalties for violations of the Patriot Act can be quite severe. Depending upon which provision of the Patriot Act is violated, companies can have their assets frozen and can face up to U.S. \$1 million in fines. Individuals can be fined up to U.S. \$500,000 and face up to 20 years of imprisonment.

## II. SOME CONSIDERATIONS WITH RESPECT TO THE "RULE OF LAW"

As judicial instruments, judges and attorneys are guarantors of the enforcement of substantive rights; the judicial system itself is "a progressive conquest of civilization and of respect for human dignity."<sup>14</sup> It is a contribution to the cultural heritage of humanity. Since classical times, judicial civilization stressed that through the legal process rights are effectively recognized. Therefore, the success of the "rule of law" also rests upon the organization of the administration of justice.

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12. USA PATRIOT Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001).

13. *Id.*

14. Ettore Balestrero, Rule of Law Against Terrorism, Human Traffic and Organized Crime, Address at the Plenary Session Organization for Security and Cooperation in Europe, Warsaw, Poland (Apr. 23, 2002), available at <http://www.petersnet.net/browse/4338.htm> (last visited Sept. 29, 2003).

The success of the rule of law cannot be separated from the recognition of and the respect for human rights. No human institution can alter or eliminate those fundamental rights. The defense and promotion of democracy, therefore, requires respect for human rights. Even more so, respect for them is the limit of democracy.<sup>15</sup> The rule of law — and concurrent terms such as *rechtsstaat*, *etat de droit* or *estado de derecho* — is a disputed concept. It is not enough that certain acts, whether by public officials or by private persons, are ruled by law, but that they conform to *secundum legem* within given legislation. The rule of law is not only a gathering together of legal rules, even if all have been properly enacted. It is a legal system, a set of rules that has several characteristics, in addition to having been properly enacted.<sup>16</sup>

The concepts of rule of law, *etat de droit*, and *estado de derecho* are not synonymous. Each of these terms is subject to various definitional and normative disputations. A common core is the hierarchy of the legal system, crowned in constitutional norms. As a result, the legal system within the legal state brings definition, specificity, clarity, and thus, predictability into human interactions.<sup>17</sup> Rule of law, which has no fixed meaning, is a term that originated in normative writings on law and government by western authors, each tailoring the term to fit the vision of the ideal or the just. The terms are categorized as open-ended concepts that are subject to permanent debate.<sup>18</sup>

A formal definition of the rule of law is measured by the conformity of the legal system to certain standards. Some of these standards are an independent and impartial judiciary; laws that are public; absence of laws that apply only to particular classes or individuals; no retroactive laws; and judicial review of government action. The idea of rule of law is intimately connected to the history of political liberties and the rights of the individual — principles within the penal context.

The Magna Carta, enacted in 1215, was the cornerstone of this historical process in the Anglo-American system. Through it, no person — not even the monarch — is above the law. This same instrument extends to all the right to “due process,” which means nobody can suffer any

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15. *Id.*

16. See generally GUILLERMO O'DONNELL, POLYARCHIES AND THE (UN)RULE OF LAW IN LATIN AMERICA (1998).

17. *Id.*

18. Matthew Stephenson, The Rule of Law as a Goal of Development Policy, The World Bank Group, available at <http://www.worldbank.org/publicsector/legal/ruleoflaw2.htm> (last visited Sept. 29, 2003).

restriction or penalty without previous trial. Within the Anglo-Saxon context, it was the basis for the limitation of the powers of the monarchy.

Thus, the Petition of Rights 1628, the Habeas Corpus, the Bill of Rights, and the U.S. Constitution are also embraced. The latter is a landmark within the formulation of the concept of the rule of law.<sup>19</sup>

With the social revolutions in the twentieth century, the fundamentals of the so-called State of Social Well-Being were initiated. Through these, new responsibilities were attributed to the state order. This added a substantial dimension to the rule of law, such as the continental tradition of the *rechtsstaat*, to include provisions for the guarantee of the fundamental rights. This new order is called the constitutional state.

The major difference lays in the fact that it not only limits the formal aspects of the legality of the exercise of power, but also includes substantive norms expressed in the norms of the so-called “constitutional principles,” relative to fundamental rights.<sup>20</sup> Therefore, one can conclude that it is fundamental, when dealing with the question of the guarantees of the individual represented by the constitutional principles.

### III. COMBATING TERRORISM UNDER THE RULE OF LAW

Starting from the principle that terrorist acts constitute a serious violation of human rights, the need for combating them with a firm hand, and in an unremitting manner, with no leeway, must be taken into account. An interesting observation classifies terrorists as “depraved opponents of civilisation” and notes that “terrorism is not the weapon of the weak, it is the weapon of those who are against ‘us,’ whoever ‘us’ happens to be.”<sup>21</sup> The rule of law requires that perpetrators be investigated, pursued and handed over to the courts, to be duly tried in a legal environment. In this way, the rights of the innocent are preserved, and the possibility of a violation of human rights is avoided.

The legal system in all societies is forever subject to the challenge of finding the right balance, where constitutional safeguards protect the individual and, at the same time, allow action by the state. The difference to be established between tyranny and liberality is sufficiently ample. But

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19. Eduardo R. Rabenhorst, *Democracia e Direitos Fundamentais, em Torno da Noção de Estado de Direito*, DHNet Direitos Humanos e Cidadania, available at [http://www.dhnet.org.br/educar/pbunesco/I\\_04\\_Democracia.html](http://www.dhnet.org.br/educar/pbunesco/I_04_Democracia.html) (last visited Sept. 29, 2003).

20. Rabenhorst, *supra* note 19.

21. Shri J.S. Verma, *Combating Terrorism under the Rule of Law*, Remarks to the National Human Rights Commission (Nov. 19, 2001), available at <http://www.geocities.com/notopoto/views/jverma.html> (last visited Sept. 29, 2003).

how to get over these questions, in the subtle and fluid substances of legislative interpretation, is the dilemma of democracy.

The basic values of democracy denote the dignity of the man and the integrity of the nation. Therefore, there is no doubt whatsoever that all constitutional precepts should be respected when combating terrorism. It cannot be any different!

There will always be clashes when the reasons for state security and the safety and integrity of the individual confront one another. Terrorism and criminality often find themselves sailing the same seas, supporting one another and living together harmoniously. The same legal instruments should correspond to combating one or the other. The acts and practices of both, by different paths, contribute in the same way to the disquiet and destruction of the human being. This is what we observe, for example, in those countries tied in with the production and trafficking of drugs.

This is not an easy problem to deal with since innumerable human rights violations, most more blatant, pile up anytime there is an increase in violence and societal outrage. The demand for, and the respect of, international conventions whose foundations are found incorporated in the constitutions of their signatory countries, is an ever-present topic on the agenda of the rights of the individual. Such is the case when considering the Convention Against Torture. Particularly when the reaction is a military one, the Geneva Conventions must be observed.

The United Nations is the proper forum for discussing and implementing international measures to deal with terrorism. Certainly, the mechanisms of that institution must be improved, starting with the Security Council. It is up to all to guarantee that the progress in the relationship between countries, so hard-won in the period after the Second World War and the Cold War, is preserved. Tranquility can once again prevail, if we could count on the very existence of an International Criminal Tribunal, duly instituted and charged with judging offenses related to terrorism. In that way, the compatibility between rule of law and combating terrorism could be fully assured.

