

The Rule of Law: Indispensable to a Wider War

By Peter Charles Choharis

Sunday, January 6, 2002; Page B01

Even as U.S. Marines search for Mohammad Omar and remaining Taliban and al Qaeda members in Afghanistan, American policymakers are debating where future battlefields in the war on terrorism will be. Press reports indicate that Somalia is a likely target, while some in Congress have called for the removal of Iraqi President Saddam Hussein -- regardless of whether his regime assisted in the Sept. 11 attacks.

But wherever the next battle takes place, to win both it and the larger war against terrorism, the United States must be able to keep the fragile coalition of moderate Muslim states and European allies together. And to stop terrorism from gaining new adherents, America must win the hearts and minds of others in the Muslim world.

As part of this effort, the United States will have to show that its war effort continues to be not just moral, but legal -- in other words, that it is fighting to uphold the rule of law against terrorists who are trying to destroy it. How well America can convince the international community that it is acting within the law will be crucial to the level of allied support it can command worldwide. That, in turn, will have a huge impact on how effectively America can fight and win the "war of will and mind," as national security adviser Condoleezza Rice has called the non-military aspect of the war.

Recent polls suggest that gaining support from our allies to expand the war will be difficult. An International Herald Tribune-Pew Research Center poll of influential people in politics, media, business, culture and government in 24 countries reports that only 29 percent would support a U.S. attack against other regimes, such as those in Iraq or Somalia, if they were found to support terrorism. Nor was there any difference between Western European opinion makers and those in Islamic countries: Only 32 percent of each group support attacking such regimes. By contrast, 50 percent of American opinion leaders support attacking such countries.

The legal case for invading Afghanistan and toppling the Taliban was straightforward. The Taliban had integrated al Qaeda members into its armed forces and relied upon the organization for weapons and money. As a matter of law as well as military reality, the Taliban and the terrorists were allied combatants, rendering both of them legitimate targets for U.S. military assaults. But what about countries such as Sudan or Malaysia, or even Saudi Arabia, that to varying degrees tolerate terrorists or their supporters? After all, al Qaeda operates in dozens of countries worldwide.

Can the United States pick and choose which countries to attack merely on the basis of how well we think their governments are cooperating in the war against terrorism? Can we target terrorist cells in a foreign country without that country's permission? Can the United States seek to topple governments for supporting or even just tolerating terrorists? Does it matter whether the terrorists we target were involved in the Sept. 11 attacks or not?

America has already begun confronting these issues. U.S. Ambassador to the U.N. John Negroponte has warned the Security Council that America may take further actions against organizations and states outside Afghanistan. Deputy Secretary of Defense Paul Wolfowitz has suggested that America must commit itself to "ending states who sponsor terrorism," while Secretary of State Colin Powell has limited the goal to "ending terrorism" by eliminating terrorist organizations, not necessarily the regimes that support them.

Opposition to an expanded war has also started. The Organization of the Islamic Conference has issued a statement warning against any strikes outside Afghanistan. More recently, Russian President Vladimir Putin has warned against attacking Iraq. And as the IHT-Pew poll revealed, it is unclear whether U.S. allies -- be they Islamic countries or European ones -- will tolerate, let alone support, America's attacking sovereign countries merely because they host terrorists. Toppling foreign governments would presumably meet with even greater resistance.

Making the legal case for a wider war will not be easy. There is a strong presumption in international law against attacking another country. One of the most widely accepted principles is the respect nations accord each other's sovereignty. Indeed, Article 2 of the U.N. Charter commits member states to "refrain in their international relations from the threat or use of force against the territorial integrity . . . of any state." A U.S. military strike against a terrorist group within another nation's borders -- especially if that country's citizens are killed or injured during the strike -- would arguably violate that nation's "territorial integrity" and might be considered an act of aggressive war (one that lacks legal justification) and therefore a war crime.

Some have maintained that America's inherent right of self-defense justifies expanding the war. But that doctrine is not a hunting license that will vindicate an attack on any perceived enemy or hypothetical threat. Rather, the right of self-defense applies to instances where "an armed attack occurs," in the words of Article 51 of the U.N. Charter, or, most legal experts would add, where such an attack is imminent. Although self-defense will certainly be part of the equation, we must be careful not to expand the doctrine too far beyond its traditional scope lest aggressor nations abuse it to justify their own invasions.

Despite the strong legal prohibition against violating the territorial integrity of sovereign countries, international law does recognize some exceptions. The doctrine of humanitarian intervention allows a country to intervene in another country's affairs in order to pursue a humanitarian mission, such as feeding starving people in Biafra. In

addition, the U.N. Security Council can authorize the use of military force, as it did with regard to Somalia in 1992.

Thus far, however, no Security Council resolution authorizes military intervention in a sovereign country hosting terrorists. Security Council Resolution No. 1373 requires all countries to take steps to combat terrorism, including refraining "from providing any form of support . . . to entities or persons involved in terrorist acts." But it does not provide for any sanctions, much less authorize military force, against violators.

Nor is such a resolution likely. Even though Russia and China have so far supported the effort against terrorism, they would hardly approve an open-ended resolution permitting the United States to attack countries of its choosing.

Although some international legal experts would disagree, most Western experts do not believe that Security Council approval is always necessary in order to project military force. For example, recognizing that Russia would not agree to a Security Council resolution authorizing military force against Yugoslav President Slobodan Milosevic, NATO adapted the principle of humanitarian intervention to justify its air war in Kosovo. Russia, which was confronting its own human rights debacle in Chechnya, and a few other countries objected. But most international legal scholars agreed that NATO could intervene in Kosovo to stop Yugoslav and paramilitary forces from killing civilians and waging ethnic cleansing.

Although high civilian casualties from the air war led the U.N. special prosecutor for the former Yugoslavia to investigate (but not ultimately to indict) NATO for war crimes, the precedent of waging war to protect innocent civilians endures. If NATO can intervene in another country to protect that nation's citizens, coalition forces should be able to do the same to protect their own citizens against terrorism.

American diplomatic and military history also provides precedents -- though, again, they are by no means universally accepted. Nearly from its inception, the United States has defined its spheres of national interest in increasingly expansive terms. From the Monroe Doctrine (defend the Americas) to the Truman Doctrine (contain communism) to the Carter Doctrine (protect Middle East oil), America has affirmed its willingness to defend not only its own shores, but its vital interests overseas. So, too, the "Bush Doctrine" (or perhaps the "107th Congress Doctrine") could assert America's willingness to combat terrorism anywhere it poses a clear and present threat to the United States or its citizens.

International law, like all law, is not static. It can evolve to meet the changing needs of the international community. Both international law and U.S. history offer precedents for the United States to justify military strikes against countries harboring terrorists. How persuasive these arguments will be and how much support they garner will probably depend more on the specifics of the attacks than the legal principles justifying them. Which countries are attacked, how extensive the damage is, and how many innocent civilians are killed will determine how the international community responds.

Still, as key as these political considerations will be, America's legal justification will also be important. The United States must be careful to develop a principle for attacking that is both persuasive and, at the same time, limited. Otherwise, we risk some countries withdrawing their support for the U.S. war effort, while others exploit the U.S. precedent as a pretext for launching their own attacks. For example, a mysterious explosion in Shanghai would not justify an invasion of Taiwan by China. The United States must take care to propound nothing that could be interpreted as saying it might. More immediately, America's justification for attacking Somalia or Iraq would surely be adopted by India, if need be, to launch a massive assault against Pakistan over Kashmir. It would be disastrous to U.S. interests if our war efforts created both the legal basis and strategic catalyst for a wave of regional armed conflicts, all in the name of stopping terrorism.

Properly understood, international law is not a burden to be borne but a weapon to be wielded against terrorists and outlaw regimes. America's commitment to the rule of law, including developing a legal basis for the expanded war on terrorism, will not hinder our ability to wage war. To the contrary, it will bolster U.S. support at home and abroad, and will ultimately help us prevail.

Peter Charles Choharis practices international law at Mayer, Brown & Platt in Washington.

© 2002 The Washington Post Company