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SPECIAL REPORT

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Options for Prosecuting International Terrorists

ABOUT THE REPORT

One of the critical issues in the campaign against terrorism is how international terrorists will be prosecuted if they surrender or are apprehended. This report examines many of the options for prosecution that will confront policymakers.

The report was prepared by David Scheffer, a senior fellow at the United States Institute of Peace and formerly U.S. ambassador at large for war crimes issues (1997–2001). Scheffer was deeply engaged from 1993 to 2001 in the negotiation and establishment of international criminal tribunals for the former Yugoslavia, Rwanda, and Sierra Leone, as well as the Extraordinary Chambers in Cambodia. He also led the U.S. delegation to UN talks on the permanent International Criminal Court.

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Briefly . . .

- During the campaign against terrorism, the United States and the international coalition are using both armed force and criminal investigative tools to exercise their right of self-defense and, if circumstances permit, to bring the perpetrators to justice. The latter goal has been instrumental in building the international coalition against terrorism.
- Grounds for criminal prosecution of the al Qaeda terrorist suspects include outstanding U.S. indictments, UN Security Council resolutions, the violations of U.S. criminal laws and crimes against humanity that occurred on September 11, 2001, and the political commitment to criminal justice demonstrated by the United States Government, the United Nations, and coalition governments.
- The terrorist suspects should not be granted prisoner of war status if apprehended, although officially organized forces of the Taliban in Afghanistan probably would qualify for prisoner of war status.
- The options for prosecution of the terrorist suspects include nine judicial forums that need not be mutually exclusive. There may well be occasion to prosecute different terrorist suspects in different courts in different jurisdictions simultaneously. The options include U.S. federal courts, military courts, or a military commission; foreign national courts; a UN Security Council ad hoc international criminal tribunal; a UN General Assembly ad hoc international criminal tribunal; a coalition treaty-based criminal tribunal; a special Islamic court; and UN-administered courts in Afghanistan.
- At least for the near future, key options for prosecution of terrorist suspects will be U.S. federal courts—where so many of them already have been indicted for pre–September 11 crimes—and foreign national courts that will certainly play a key role in the investigation and prosecution of terrorist suspects. For the long term, much will depend on how many terrorist suspects are apprehended and how feasible and realistic any U.S., military, international, or Islamic law option for prosecution becomes. Nonetheless, discussion should commence on the feasibility of other options in terms of legal, political, and practical concerns.

- Ultimately the judicial system in Afghanistan will require major surgery, with international assistance, to instill the rule of law and bring to justice in a credible manner those al Qaeda terrorists or operatives who may not be prosecuted elsewhere.

Introduction

A primary objective in the long campaign against terrorism that was launched in the wake of the September 11, 2001, terrorist attacks on the United States is to bring the perpetrators of those crimes to justice. President George W. Bush and other U.S. officials have articulated this objective repeatedly since September 11. The justice objective has been a major premise for the international coalition against terrorism, which would not have come together as quickly and successfully as it did without the integrity of a U.S. intention to bring the suspects to justice in courts of law. But U.S. officials have emphasized the possibility that suspects might be killed in self-defense if circumstances so require during the military campaign against the al Qaeda terrorist network and the Taliban regime in Afghanistan. This appears to be particularly the case if suspects are located in and thus exposed to the legitimate targeting of command and control centers pursuant to the laws and customs of war. On October 21, 2001, the chairman of the Joint Chiefs of Staff, General Richard B. Myers, confirmed that if the prime suspect, Osama bin Laden, were to be found, U.S. forces would not necessarily shoot him on sight. He said, "It depends on the circumstances. If it's a defensive situation, then, you know bullets will fly. But if we can capture somebody, then we'll do that." In short, during the campaign against terrorism the United States and the coalition are using both armed force and criminal investigative tools to exercise their right of self-defense and to bring the perpetrators to justice, if circumstances permit.

The number of terrorist suspects around the world, including within the United States, is large and growing. Already, 22 suspects of terrorist crimes committed against U.S. targets have been indicted by U.S. courts and are publicly listed as the FBI's "Most Wanted." As of early November 2001, more than 1,000 suspects have been detained in the United States, although only a small number of those individuals appear to be suspected of direct involvement with the al Qaeda network and the September 11 attacks. Much may be ascertained about the reach of the al Qaeda network and its future possible targets through the investigation and prosecution of terrorist suspects, a prospect that will fade quickly if the suspects are killed in military actions. The long-term goal of dismantling al Qaeda and of deterring international terrorism could depend greatly on what is learned through judicial processes with live suspects. A great deal about the al Qaeda network was learned from U.S. federal criminal trials of terrorists who have been convicted of prior terrorist attacks, such as the 1993 World Trade Center bombing and the 1998 U.S. embassy bombings in Africa. Therefore, it is important to consider the options for prosecution that will confront authorities as suspects are apprehended and governments consider the pro's and con's of various forums for trial. This Special Report sets forth some of those options and explains their advantages and disadvantages, particularly from the perspective of U.S. interests.

Grounds for Criminal Prosecution

There are several legal and political grounds for pursuing the criminal prosecution of certain terrorists associated with the al Qaeda network as well as any other possible suspects implicated in the September 11 attacks on the United States.

- Osama bin Laden and 21 other suspects have long been indicted by U.S. federal courts for terrorist crimes occurring prior to the September 11 attacks. These individuals

already are indicted fugitives from U.S. justice. Even though the current military operations leave open the real possibility of lethal targeting of some of the suspects, the fact remains that some of the same individuals are indicted for prior terrorist crimes for which they are expected to stand trial. Their deaths now would leave those prior crimes open to much speculation as to who planned or committed them. When several prime suspects in the 1995 Khobar Towers bombing were beheaded by Saudi authorities prior to FBI questioning, the FBI was not able to obtain evidence that probably would have helped solve that terrorist crime and perhaps pointed towards measures to deter future terrorist crimes.

- Prior to September 11, the United Nations Security Council adopted resolutions identifying Osama bin Laden and his associates as indicted fugitives from U.S. law and, acting under Chapter VII of the United Nations Charter, directing the Taliban authorities in Afghanistan to turn Osama bin Laden over "to appropriate authorities in a country where he has been indicted, or to appropriate authorities in a country where he will be returned to such a country, or to appropriate authorities in a country where he will be arrested and effectively brought to justice. . ." [UN Docs. S/RES/1267 (1999) and S/RES/1333 (2000)]. In two resolutions, the Security Council called on states to bring the perpetrators, organizers, and sponsors of the September 11 attacks to justice [UN Docs. S/RES/1368 (2001) and S/RES/1373 (2001), invoking Chapter VII enforcement authority]. (See page 14 for excerpts.)

- The terrorist crimes of September 11 violate a host of U.S. criminal laws, including laws that criminalize acts of international terrorism (specifically when such acts include homicide); destruction of aircraft, incapacitating any individual on an aircraft, performing an act of violence against any individual on an aircraft, or conspiring to do so; and forgery of passports or other immigration documents. The terrorist crimes also probably constitute crimes against humanity, namely, multiple acts committed as part of a widespread or systematic attack knowingly directed against any civilian population in furtherance of a state or organizational policy. The latter would be a novel charge to prosecute in a U.S. federal court, as it derives from customary international law and is not codified as such in the U.S. federal criminal code. But as a matter of international law, the attacks of September 11 could be characterized as crimes against humanity and could be charged against the perpetrators, if not in U.S. federal court then in a foreign jurisdiction or international tribunal that exercises personal jurisdiction over one or more suspects or recognizes such crimes as crimes of universal jurisdiction.

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- The United States Government, the United Nations, and the governments that have joined the coalition against terrorism have publicly established an objective of bringing the perpetrators of international terrorism, including those associated with the September 11 attacks, to justice. Law enforcement agencies in the United States and around the world are working intensively to investigate, track, apprehend, question, and consider indictments of terrorist suspects. The Federal Bureau of Investigation's "Most Wanted" list has included leading terrorist suspects since September 11, 2001, for the purpose of apprehending and prosecuting such individuals in U.S. federal courts. The U.S. Rewards for Justice Program, enthusiastically promoted by the Bush administration, is directed toward apprehension and conviction of the terrorist suspects (and payments thereunder presumably would not be available if the suspects died prior to apprehension). Thus the political commitment to criminal justice is exceptionally high and could not be sidestepped without creating a credibility gap in governments' justifications for their actions. The commitment to criminal justice is joined, however, with the inherent right of individual and collective self-defense arising from the September 11 attacks, which has been affirmed by the United Nations Security Council [UN Docs. S/RES/1368 (2001) and S/RES/1373 (2001)]. The latter right can take precedence over criminal justice depending upon the circumstances

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that arise during military operations and the imminent threat some of the suspects may pose with respect to future terrorist attacks, which could give rise to anticipatory self-defense against such a threat.

Terrorist Suspects or Prisoners of War?

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The character of the campaign against terrorism has given rise to explicit invocations of war by President Bush and his cabinet and to the use of armed force by the United States and the United Kingdom in Afghanistan. The question naturally arises whether the terrorist suspects are not only international terrorists but also belligerent combatants entitled to prisoner of war status if captured. Answering that question does not require us to answer the overriding factual question of whether an actual war has begun. That is a very different debate. The status of an individual as a prisoner of war under the 1949 Geneva Convention III Relative to the Treatment of Prisoners of War arises in "all cases of declared war *or of any other armed conflict* [italics added] which may arise between two or more of the High Contracting Parties [of the Convention], even if the state of war is not recognized by one of them." The question of status also may arise in "all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance." Both Afghanistan and the United States are High Contracting Parties of the third Geneva Convention.

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Terrorist suspects already are in custody in numerous jurisdictions, including the United States. None of them have been accorded prisoner of war status by law enforcement authorities. Achieving prisoner of war status may be difficult in any case. Article 4(A)(2) of the third Geneva Convention would have the effect of requiring that any al Qaeda terrorist must be a member of a militia or volunteer corps, including those of organized resistance movements, and he or she must have fulfilled each of the following conditions:

- that of being commanded by a person responsible for his subordinates;
- that of having a fixed distinctive sign recognizable at a distance;
- that of carrying arms openly; and
- that of conducting their operations in accordance with the laws and customs of war.

An al Qaeda terrorist suspect presumably would fail the final three requirements. Article 5 of the third Geneva Convention provides enough flexibility, particularly in the theater of operations, to grant a person prisoner of war status "until such time as their status has been determined by a competent tribunal." This may prove necessary with respect to military operations in Afghanistan in the event individuals are apprehended whose identity and background is not easily determined.

But beyond this temporary situation, any erroneous permanent designation of a terrorist suspect as a prisoner of war could lead to some odd situations. In particular, any prisoner of war who is a chaplain or a minister of religion would be at liberty to minister freely to others in captivity, which could lead to some awkward albeit manageable situations with any captured leaders of al Qaeda who claim religious ministry. Also, a prisoner of war would be required only to give his surname, first name, rank, date of birth, and army, regimental, personal, or serial number, or failing that, equivalent information. Of course, no other person in custody could or should be forced to provide information, but prisoner of war status might encourage terrorists to withhold information. Furthermore, prisoners of war would be released and repatriated without delay after the cessation of active hostilities unless they were involved in criminal proceedings for an indictable offense, although that probably would be the case with a terrorist suspect.

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The designation of terrorist suspects as prisoners of war would accord them and their operatives non-combatant belligerent status, an identity that could give rise to arguable justifications for some of the targets (such as military or government facilities) al Qaeda may select for its terrorist attacks. Such status would afford defense counsel arguments in defense of a terrorist suspect that would not be credible if delivered with respect to an individual who does not have prisoner of war status.

If military personnel of the Taliban or any other officially organized military force are captured during the campaign against terrorism, then it would be prudent to treat them as if they were prisoners of war for the moment, as is the usual U.S. practice. After examination, some of the fighters or top leadership who have collaborated with al Qaeda might be disqualified for prisoner of war status, but one would expect that the bulk of such forces would be treated as prisoners of war until the end of hostilities and their release pursuant to the third Geneva Convention.

Options for Prosecution

This report briefly examines nine possible options for prosecution of terrorist suspects. These options are not intended to be mutually exclusive. There may well be occasion to prosecute different terrorist suspects in different courts in different jurisdictions simultaneously. The simple reality is that terrorist suspects who are apprehended or surrender voluntarily will doubtless be prosecuted in numerous jurisdictions.

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The forthcoming permanent International Criminal Court is not considered as an option since its jurisdiction applies only with respect to crimes committed after the entry into force of its treaty-based statute, and that has not yet occurred. Therefore, it would not be empowered to investigate any of the terrorist crimes associated with the current campaign against terrorism. Any change in temporal jurisdiction would require an amendment to the statute of the International Criminal Court, and no amendments are permitted until the review conference that will be convened seven years after the court is established. Any protocol to the statute of the International Criminal Court on this issue probably would require consensus support, which is highly unlikely among all of the 139 signatories of the statute.

The International Criminal Court's subject matter jurisdiction also does not extend to crimes of international terrorism, although it is entirely possible that once the court is established, certain crimes of international terrorism may also meet the definition of crimes against humanity, war crimes, or genocide. UN Security Council action seeking to broaden the International Criminal Court's temporal and subject matter jurisdiction to encompass the September 11 attacks and perhaps other prior terrorist actions in defiance of the court's temporal and subject matter jurisdiction doubtless would be challenged on significant legal grounds. Such a Security Council resolution also would establish a precedent that might be used in other circumstances to modify the temporal and subject matter jurisdiction of the International Criminal Court in ways that would be profoundly disturbing to many signatories to the court's statute. The negotiations leading to the statute of the International Criminal Court were firmly grounded on the principle of prospective jurisdiction and on an initial limiting of the court's subject matter jurisdiction to three categories of crimes until proposed additional crimes could be reviewed seven years after establishment of the court and in the context of formal amendment to the statute.

1. U.S. Federal Court

Several trials of individuals associated with the al Qaeda network already have taken place in U.S. federal courts in connection with the 1993 World Trade Center bombing and the 1998 U.S. embassy bombings in Kenya and Tanzania. Convictions have been

rendered in all of these trials, which produced significant evidence implicating al Qaeda and Osama bin Laden in terrorist crimes. These jury trials were seen as fair (at least in the West) and complied with due process requirements.

In addition, Osama bin Laden and other terrorist suspects have been indicted by U.S. federal courts for pre-September 11 crimes and thus would stand trial in federal court if apprehended and brought to the United States. The advantages of a U.S. federal prosecution of these terrorist suspects are considerable:

The United States has enacted comprehensive anti-terrorism laws that greatly facilitate the investigation and prosecution of terrorist suspects who fall within U.S. federal jurisdiction.

- For several decades the United States has led the world in the negotiation and implementation of anti-terrorism conventions that require states either to prosecute terrorists in national courts or to extradite terrorists to jurisdictions that are willing and capable of prosecuting them. The United States has enacted comprehensive anti-terrorism laws that greatly facilitate the investigation and prosecution of terrorist suspects who fall within U.S. federal jurisdiction. A purposeful denial of U.S. prosecution of apprehended terrorist suspects in deference to an alternative foreign or international forum of prosecution could undermine the objective of national prosecutions of terrorist suspects so vigorously sought by the United States for so many years. Prosecution in U.S. federal courts would demonstrate to the world that the United States takes its obligations under the anti-terrorism conventions seriously.

Federal prosecution would enable prosecutors to use sensitive information that probably would not be available for any foreign or international prosecution.

- Federal prosecution would enable prosecutors to use sensitive information that probably would not be available for any foreign or international prosecution. A great deal of evidence in terrorism cases is classified, and the procedures available under U.S. law for the use of that information in federal criminal trials can make the difference between pursuing a prosecution or dropping it.
- A U.S. federal criminal trial would guarantee the defendant due process rights that might not exist in a foreign or international trial. Those due process rights help ensure that a fair trial can take place, even if a U.S. trial may appear politically unfair to some foreign observers.
- The thousands of American families, friends, and colleagues of the victims of the September 11 terrorist attacks and of the other terrorist attacks for which suspects have been indicted probably would expect the criminal trials to take place in U.S. federal courts. Their interests and rights are considerable and might prove difficult to accommodate if trials took place outside of the United States.
- The United States has been a strong supporter of the principle of complementarity (deferral to national courts) that is found in the statute for the International Criminal Court. U.S. federal trials of the terrorist suspects would demonstrate U.S. willingness and capability to pursue national prosecutions of terrorist actions that probably constitute crimes against humanity within the jurisdiction of the International Criminal Court had the Court been established prior to September 11, 2001. American reluctance to prosecute could be used by those who argue that the International Criminal Court is needed to respond to the inability or unwillingness of national justice systems to deal with such matters, an argument that may have merit with respect to other jurisdictions but should not justified with American non-performance.

The disadvantages of U.S. federal prosecution include the following:

Given the due process rights of a defendant in a federal trial, the terrorist suspect may reach acquittal and freedom more easily in a federal courtroom than in a foreign or international courtroom.

- The burden of proof in a terrorist trial in U.S. federal court is high (beyond a reasonable doubt) and thus may hinder efforts to bring terrorist suspects to justice. Federal prosecutors may be unwilling to use sensitive information that is incriminating but derived from sources and methods that could be jeopardized by the disclosure requirements of a federal trial. Given the due process rights of a defendant in a federal trial, the terrorist suspect may reach acquittal and freedom more easily in a federal courtroom than in a foreign or international courtroom (although the same information almost certainly would not be made available to any non-U.S. prosecution).

- The imposition of the death penalty on a convicted terrorist in a U.S. federal trial could transform the defendant into a martyr for their cause. But the mere availability of the death penalty also may prevent certain foreign jurisdictions, particularly in Europe, that have prohibited the death penalty from extraditing terrorist suspects to U.S. courts. The United States may have to waive the death penalty in certain cases in order to obtain custody of terrorist suspects, and federal prosecutors may decide to seek life imprisonment as an alternative to the death penalty in order to avoid the martyrdom issue.
- The certainty of a jury trial in a federal prosecution gives rise to the question of whether any such trial could be fair given the impact of the terrorist attacks on the American psyche and the U.S.-led campaign against terrorism. Jury trials have been successfully and fairly held (at least as far as most westerners are concerned) for terrorist suspects of the 1993 World Trade Center bombing and the 1998 U.S. embassy bombings. It would be a severe setback for the principle of jury trials in the United States if U.S. authorities assumed that such trials could not be fair for the most heinous crimes ever to be committed on U.S. soil. The alternative in a foreign or international court almost certainly would rely exclusively on judges to examine the evidence and render verdicts.
- A federal criminal trial, particularly of the leaders of al Qaeda such as Osama bin Laden and Dr. Ayman al-Zawahiri, could turn into a political firestorm sparking political demonstrations against the United States in Islamic countries, more acts of terrorism against U.S. targets, and significant security risks for the trial itself. The location of the federal trial and of the prisons where terrorist suspects are held could become magnets for disturbances and security threats. It could also be argued, however, that no matter where al Qaeda leaders are prosecuted, the U.S. role in that prosecution will be so dominant that the political firestorm will ignite anyway.

The certainty of a jury trial in a federal prosecution gives rise to the question of whether any such trial could be fair.

2. U.S. Military Court

A fundamental issue arises whether U.S. military courts or commissions (see next option) would have jurisdiction under U.S. law over crimes committed in the United States outside the context of an ongoing armed conflict. Without attempting to answer that very difficult question, if one assumes that U.S. military courts might indeed have such jurisdiction, then it should be recognized that U.S. military courts offer the procedures, constraints, and secrecy under the Uniform Code of Military Justice that may be desirable with respect to the terrorist suspects. The crimes that were committed on September 11 were unique in character and execution, and the prosecution of terrorist suspects may require the unique attributes of a military trial. An overriding advantage of a military trial is the degree of control that the United States could exercise over the process. Notwithstanding the September 11 attacks, U.S. military courts or commissions certainly may prove useful with respect to any crimes committed by terrorist suspects or the Taliban or other regular enemy forces during the military operations in Afghanistan or elsewhere.

However, military trials in the United States would present exceptionally negative optics to international audiences, particularly in the Islamic world. A U.S. military trial could embolden extremists to lash out at the militaristic character of the trial. While it may be determined that it is possible to prosecute the terrorist suspects for terrorism crimes outside of an ongoing armed conflict, they would be likely to raise defenses as prisoners of war and as belligerents that would deflect the anti-terrorism prosecution and seek to refocus the trial on the struggle between two belligerents rather than on crimes of terrorism.

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3. U.S. Military Commission

U.S. federal law permits the establishment of "military commissions" to exercise concurrent jurisdiction with courts-martial in order to prosecute violations of the laws of

war or other offenses (such as perhaps terrorism) that may be authorized by statute. There is considerable flexibility associated with this authority, although it has rarely been used. On November 13, 2001, President Bush signed a presidential directive declaring an "extraordinary emergency" and empowering him to establish military commissions to prosecute non-U.S. citizens arrested in the United States or abroad. This tilt towards military trials no doubt arises from their utility in adopting specifically tailored procedures for the extraordinary prosecutorial challenges that probably will arise with the al Qaeda terrorist suspects and perhaps senior Taliban officials who collaborated with the terrorist suspects.

The military commission could be established outside the United States on occupied foreign territory or on foreign territory with the consent of local de facto authorities (such as perhaps in Afghanistan or in Northern Iraq). Such a location would have the advantage of not having to transfer captured suspects to U.S. territory, either through rendition or through extradition proceedings. This might also minimize the degree to which extremists and al Qaeda itself would seek to direct further attacks against U.S. targets in retribution. However, the fact that the court remains a U.S. forum could stoke the flames of anti-American hatred and retaliatory actions regardless of where the military commission is located. Again, the optics of a U.S. military commission prosecuting the terrorist suspects, particularly on their own territory, might project images of a special victor's court and ignite far more opposition to the United States than would other alternatives for prosecution.

4. Foreign National Courts

Prosecution in foreign national courts may prove to be the more likely alternative to U.S. prosecution in a number of cases.

Prosecution in foreign national courts may prove to be the more likely alternative to U.S. prosecution in a number of cases. British prosecution of the Lockerbie (Pan Am 103) defendants (albeit in a special courtroom established in The Netherlands and adjudicated under Scottish law by Scottish judges) proved in the long run to be a much more attractive option than U.S. prosecution for that particular terrorist crime. Foreign prosecutions may also have important political advantages. In terms of constructing a robust international legal architecture for dealing with terrorism, the optics and the practical consequences of having prosecutions in both U.S. and foreign courts is significant. This may prove crucial to the long-term campaign, and American victims should take comfort from a scenario in which the United States does not have to go it alone; rather a variety of countries, through rigorous prosecutions, would treat the September 11 attacks and their fallout as attacks against all civilized nations. Foreign trials may also prove essential in dealing with persons in the al Qaeda network who cannot be prosecuted for U.S. crimes but are still important parts of the overall terrorist threat to us.

Terrorist suspects may be investigated and prosecuted in one or more foreign courts regardless of U.S. interests or desires, and this is already happening. A foreign government may refuse a U.S. extradition request, for example. This could well be the case if the United States declines to waive the death penalty with respect to a terrorist suspect held in an anti-death penalty jurisdiction. Also, foreign officials may consider it their own responsibility to bring to justice individuals who engaged within their jurisdiction in the planning or commission of terrorist attacks either on their own soil or elsewhere. And the United States may find it preferable for certain low- or mid-level terrorist suspects to be prosecuted before foreign courts, particularly in highly developed jurisdictions where we have confidence in the judicial system.

Foreign trials of terrorist suspects indicted by the United States for crimes committed against the United States could lead to far more unpredictable outcomes.

However, foreign trials of terrorist suspects indicted by the United States for crimes committed against the United States could lead to far more unpredictable outcomes, including acquittals. Addressing the needs of U.S. victims, including access to the trials, would be far more difficult. The availability of U.S.-generated evidence may be greatly constrained because of the sensitivity and sources and methods associated with that evidence. The applicable law in the foreign jurisdiction may prove troublesome, as the

charges that could be prosecuted in some foreign courts may not encompass the totality of the crimes committed on U.S. soil and which are so clearly identified under U.S. law. Many foreign governments may balk at local trials, recognizing that they could invite violent internal disturbances that can threaten their own stability and survival. But their reluctance to prosecute domestically may also manifest itself in a reluctance to extradite terrorist suspects to the United States, an action that could generate a comparable degree of internal violence from supporters of al Qaeda or the individual terrorist suspects who have been extradited.

5. UN Security Council Ad Hoc International Criminal Tribunal

As it did in 1993 with the establishment of the International Criminal Tribunal for the Former Yugoslavia and in 1994 with the creation of the International Criminal Tribunal for Rwanda, the UN Security Council could establish an international criminal tribunal on terrorism that would operate under UN Charter Chapter VII enforcement authority to investigate, indict, detain, and prosecute terrorist suspects. All things considered, this would be the most potent legal option that could be selected at the international level. The blueprints for such a tribunal already exist with the Yugoslav and Rwanda tribunals. The terrorism tribunal presumably would exercise primary jurisdiction over any individual suspected of perpetrating the crime of international terrorism. It could request the cooperation of any member state of the United Nations to obtain evidence and to apprehend and transfer to the tribunal any indicted suspect. A member state's failure or refusal to cooperate with the terrorism tribunal probably would trigger the Security Council's powers to compel cooperation through diplomatic, economic, military, or other means. The judges of the tribunal probably would be elected by the UN General Assembly and be drawn from an international roster of candidates representing the major legal systems of the world. The prosecutor probably would be selected by the UN Security Council. One would expect the location of the terrorism tribunal to be in a very secure jurisdiction, but one not directly targeted yet by international terrorists or heavily involved in the military campaign against terrorism.

A variation on this option would be Security Council action under Chapter VII of the UN Charter to expand the jurisdiction of the existing International Criminal Tribunal for the Former Yugoslavia (ICTY) to include the entirely separate terrorist crimes of September 11, 2001, and perhaps other terrorist crimes, and place one or more Islamic judges on the bench for political balance. The chief prosecutor of the ICTY has indicated her willingness to shoulder this additional responsibility. Expansion of the ICTY's jurisdiction has been proposed in the past for other atrocities, and each time such proposals failed for lack of adequate political and financial support. Most of the problems identified below with respect to a free-standing ad hoc tribunal also would apply to an expanded ICTY.

Although a UN Security Council ad hoc tribunal is an attractive option because of its legal authority and the support it would generate from the international community, any effort to establish it would be exceptionally challenging. Security Council members, both permanent and non-permanent, suffer from "tribunal fatigue." This has been true for many years now. Although Chapter VII ad hoc international criminal tribunals were recently proposed for Cambodia (regarding prosecution of senior Khmer Rouge leaders for crimes committed during the Pol Pot regime of 1975–79) and Sierra Leone (regarding prosecution of perpetrators of heinous crimes in Sierra Leone during its civil war), the Security Council balked each time, instead preferring hybrid arrangements that minimized council engagement.

Although a UN Security Council ad hoc tribunal is an attractive option because of its legal authority and the support it would generate from the international community, any effort to establish it would be exceptionally challenging.

The Security Council's fatigue derives from several sources. First, ad hoc international criminal tribunals are very costly to establish and operate. The annual budget of each of the Yugoslav and Rwanda tribunals hovers around $100 million, and their budgets increase each year. Given the always precarious condition of the UN general

budget, any proposal that would impose such a significant additional cost to the budget could fail unless, perhaps, the United States were prepared to make huge voluntary contributions to the cost. Second, the imminent establishment of the permanent International Criminal Court (ICC), which will be financed largely by states that sign the ICC treaty, makes many council members wary of creating a separate judicial bureaucracy that could undermine the authority or stature of the ICC. Third, the inability of UN member states to define international terrorism and its criminal attributes, as most recently evidenced in General Assembly debates and ongoing UN talks about drafting an international convention on terrorism, indicates there is not sufficient international consensus to give such a tribunal the legitimacy it would require.

Fourth, there probably would be a long and perhaps futile effort to define the personal jurisdiction of such a tribunal, namely, who precisely could be targeted for investigation and indictment. Given the uncertainty in the definition of international terrorism and the political interests of different sectors of the international community, reaching agreement on who qualifies as a terrorist suspect for the tribunal would be exceedingly difficult. There would be enormous pressure from certain governments to extend the jurisdiction of the terrorism tribunal to all coalition military actions in the campaign against terrorism and to the conduct of Israel in the Middle East.

Fifth, the Security Council itself is an unpopular entity among many Arab states and among many other member states of the United Nations, including some which have challenged the legitimacy of the Yugoslav and Rwanda tribunals. Moreover, relations between the UN General Assembly and the Security Council are strained, particularly with respect to how the Security Council has handled the campaign against terrorism. Under these conditions, the willingness of the General Assembly to approve a hefty budget for such a tribunal would be very problematic.

Finally, given the sensitive character of so much of the evidence implicating terrorist suspects, it could prove extremely difficult to make that evidence available to any international court, even one established by the Security Council and empowered with the same rules on protection of sensitive information that are used by the existing Yugoslav and Rwanda tribunals. Without such information, prosecutions may fail.

6. UN General Assembly Ad Hoc International Criminal Tribunal

The General Assembly has no power to create an international tribunal that would have any authority to deprive an individual of his or her freedom while awaiting trial, or any authority to convict an individual and incarcerate that person.

The alternative to action by the Security Council might be action by the General Assembly to establish an ad hoc international criminal tribunal. This approach is popular with the critics of the Security Council as it presumably would demonstrate a broader international consensus for the creation of an international court. However, the idea is fraught with difficulties. The General Assembly cannot exercise Chapter VII enforcement authority under the UN Charter. That authority is reserved exclusively to the Security Council. Therefore, the General Assembly has no power to create an international tribunal that would have any authority to deprive an individual of his or her freedom while awaiting trial, or any authority to convict an individual and incarcerate that person. Only the Security Council can compel a member state to cooperate with such a tribunal, and in the absence of Security Council action to establish the tribunal, there would be no basis for using the council to take any such enforcement action.

Further, the politics of the General Assembly are such that reaching agreement about the personal and subject matter jurisdiction of the tribunal would be extremely difficult and probably unachievable. Attempts would be made to expand the jurisdiction of the tribunal to encompass coalition military operations, and thus to sit in judgment of the legality of the military campaign against al Qaeda and the Taliban forces in Afghanistan, and anywhere else the United States and participating coalition partners choose to strike in the future. The United States and other permanent members of the UN Security Council likely would oppose any attempt by the General Assembly to create such an international criminal tribunal.

7. A Coalition Treaty-Based Criminal Tribunal

The de facto coalition that has formed to wage the campaign against terrorism on numerous fronts, including diplomatic, economic, and military efforts, could negotiate among all or some of its members a multilateral treaty that would create a criminal court for the purpose of investigating and prosecuting terrorist suspects. The jurisdiction of such a court might be constrained to the territories of the states that are parties to such a treaty and to terrorist suspects located in such territories as well as to terrorist suspects who also are citizens of such states. The coalition court would be powerless to compel cooperation by non-states parties, particularly with respect to the production of evidence and the apprehension and delivery into the custody of the court of indicted terrorist suspects.

A coalition court may have an easier time arriving at an acceptable definition of international terrorism and determining who are the targets of investigation, especially if such a court focuses only on terrorist crimes that have led to U.S. federal indictments of a large number of terrorist suspects. The judges for a coalition court could be uniquely selected to suit the political requirements of coalition members. For example, one or more Islamic law judges could be chosen by coalition members to sit on the court. The prosecutor's staff could include Islamic lawyers.

The costs of the coalition court would have to be borne by the parties to the treaty establishing the court. If the United States were to offer to shoulder a large and disproportionate share of that cost, other coalition members might show greater interest in the proposal. Nonetheless, the time required to negotiate a coalition treaty-based criminal court could be significant and cause unacceptable delay in bringing perpetrators to justice. Given the ebb and flow of the anti-terrorism coalition, and its admittedly fluctuating composition depending on the particular mission, it might prove difficult to establish a broad-based group of states willing to enter into a treaty to establish such a special court. Some of the difficulties that would confront the UN General Assembly, such as defining the crimes and the targets of investigation, could burden a coalition effort as well. Islamic states, whose participation in a coalition court would be preferable to enhance its legitimacy and political acceptability, might prove to be troublesome partners if their vision of a coalition court diverges too greatly from American and other western plans.

The time required to negotiate a coalition treaty-based criminal court could be significant and cause unacceptable delay in bringing perpetrators to justice.

The precedents for a coalition criminal court are few in number, but they do offer some experience. The Independent Special Court for Sierra Leone will be a treaty-based court created by international agreement between the United Nations and the government of Sierra Leone, with the option of drawing in more governments if the court needs to locate outside of Sierra Leone for security purposes. The Nuremberg and Tokyo tribunals established after World War II were uniquely tailored courts located on former enemy territory and administered by the victors of the war. Their unusual circumstances do not offer a legal or political model for prosecuting terrorist suspects in the campaign against terrorism.

8. A Special Islamic Court

Given the fundamentalist Islamic underpinnings (however distorted and misguided) of al Qaeda and of various terrorist cells implicated in international terrorism, some observers have suggested that a special Islamic court be established to investigate and bring terrorist suspects of Islamic faith to justice. It is argued that such a court would be more acceptable to the Islamic world and thus quell the anti-American demonstrations and acts of retribution that are occurring and would likely increase if trials are held in U.S., international, or foreign courts.

Some observers have suggested that a special Islamic court be established to investigate and bring terrorist suspects of Islamic faith to justice. . . . The proposal raises many difficult questions, however.

The proposal raises many difficult questions, however. First, how would such an Islamic court be created and in what jurisdiction? Would it be a treaty-based court formed by certain Islamic governments and, if so, which ones? Would Islamic law have enough scope to require full investigation and prosecution of the terrorist crimes that have been committed against U.S. targets? In other words, is Islamic law sufficiently flexible to confront

the challenge of international terrorism? How could the international community, and particularly the United States and non-Islamic coalition partners, be assured that terrorist suspects would be vigorously pursued and prosecuted by a special Islamic court? What defenses could be raised by defendants before such a court? Would a special Islamic court seek to exercise jurisdiction over the coalition military campaign or seek to examine Israeli actions? How could a special Islamic court satisfy the demands of the families, friends, and colleagues of the victims of the terrorist crimes committed in the United States or against U.S. targets globally, particularly if the trials are held in relatively inaccessible locations and using law that falls far short of what is available under U.S. federal law, the laws of other coalition partners, or international anti-terrorism conventions?

Finally, while the sentencing guidelines of an Islamic court might indeed include the death penalty, they might also include measures that would be regarded under international standards of due process, and certainly in the United States, as cruel and unusual punishment. European governments probably would not endorse any Islamic court that could render the death penalty, and the United States probably would not endorse any Islamic court that could render a sentence with punishment that would be viewed as cruel and unusual under U.S. constitutional law (notwithstanding the views of some that the death penalty itself is cruel and unusual punishment).

A sub-option might be the prosecution of certain terrorist suspects in, for example, U.S. federal courts or foreign national courts for crimes committed against U.S. citizens, U.S. military targets, or non-Islamic foreign nationals, followed by trials of the same terrorist suspects before a special Islamic court (or perhaps an existing Islamic law court in a foreign jurisdiction) for crimes committed against Muslims. This would include the Muslim victims of the September 11 attacks. However, it might prove difficult if not impossible to extradite any terrorist suspect convicted in a U.S. or foreign court to a special Islamic court or even an Islamic law court in another foreign jurisdiction. It also might not prove attractive to prosecutors in the United States or a foreign jurisdiction to exclude the murder of Muslims from their indictments.

9. UN-Administered Courts in Afghanistan

UN authorities could establish one or more courts on Afghan territory that would exercise jurisdiction over terrorist suspects.

In the event the United Nations assumes administrative authority in Afghanistan in the wake of the coalition military campaign against al Qaeda and the Taliban, UN authorities could establish one or more courts on Afghan territory that would exercise jurisdiction over terrorist suspects apprehended in Afghanistan for crimes they are charged with committing anywhere in the world. Precedents for UN courts are found in Kosovo and East Timor in recent years, albeit under different circumstances and with varying degrees of success. The UN courts would have the advantage of exercising personal jurisdiction and of applying international norms of investigation and prosecution on the territory where the suspects are located. In any event, assuming deployment of some UN peacekeeping force and the erection of a UN temporary administration in Afghanistan, there likely will be UN-administered courts and they presumably will have to deal with ongoing crimes related to terrorist suspects or their operatives. The real question will be what crimes these courts will be empowered to handle and what will be adjudicated in other forums.

Many other questions and issues arise with respect to this option. What would be the applicable law, a question that has bedeviled UN initiatives elsewhere in the world? Would the Security Council be willing to invest authority in such courts, and would the General Assembly be willing to pay for them? There would be significant security concerns for such courts on Afghan territory, and large associated costs with ensuring their security. Staffing such courts with competent judges, prosecutors, defense counsel, and administrators would prove daunting given the infrastructure of Afghanistan and the risks associated with any assignment there for such individuals (who typically do not work under such conditions). Finally, the United States and other key states probably

would be very reluctant to provide UN courts situated in Afghanistan with the sensitive information that likely would be required for successful prosecutions.

There could be variations on this option, however, that may prove desirable and even essential in the months ahead. There might be national Afghan courts under some form of UN authorization or sanction. Another variation would be a mixed tribunal in Afghanistan negotiated by the United Nations and tailored roughly along the lines of the Extraordinary Chambers in Cambodia that will investigate and prosecute senior Khmer Rouge leaders from the Pol Pot era. But this option would have to assume a far more accommodating government in Kabul and enough of a judicial infrastructure to establish the most basic requirements for a court using both international and national personnel and laws.

There might be national Afghan courts under some form of UN authorization or sanction.

There might simply be national Afghan courts under a new government that would be given general recognition and international assistance. Whether or not these courts are turned to for prosecution of al Qaeda personnel, there will be a need for credible courts in Afghanistan. So the international community still will have reasons to incur the burdens of providing legal resources and personnel to courts in Afghanistan (after the military campaign and an acceptable governmental transition). Even if such courts are not suitable for trial of the September 11 attacks, they may still be important means for dealing with al Qaeda operatives who cannot be prosecuted in U.S. courts, or whose trial here would be an administrative and political liability.

Conclusion

The criminal justice objective of the campaign against terrorism is well established and indeed the strongest pillar of the international coalition that has been forged by the United States since September 11, 2001. There are clear advantages to bringing terrorist suspects to justice, including the evidence that would be derived from criminal trials and might help to further uncover the al Qaeda terrorist network, as well as the simple fact that justice is a lynchpin of American society. Thousands of victims look to courts of law for punishment and closure. The United States was not founded on the principle of summary execution. It is likely, however, that at least some terrorist suspects will perish as the United States and the coalition exercise their inherent rights of individual and collective self-defense against terrorist threats and actions. Nonetheless, law enforcement authorities around the world as well as the U.S. and UK militaries are intensively seeking out terrorist suspects and already apprehending many of their suspected accomplices to stand trial.

The criminal justice objective of the campaign against terrorism is well established and indeed the strongest pillar of the international coalition that has been forged by the United States since September 11, 2001.

At least for the immediate future, key options for prosecution of terrorist suspects will be U.S. federal courts—where so many of them already have been indicted for pre–September 11 crimes—and foreign national courts that have custody of terrorist suspects and are willing and capable of bringing them to justice. The stark reality that so many terrorist crimes have been directed at U.S. targets (including many on U.S. territory), the U.S. commitment to international anti-terrorism conventions that require national prosecution or extradition for trial of terrorist suspects, and the comprehensive character of U.S. anti-terrorism laws—all these factors point toward U.S. trials where custody can be obtained. The United States should demonstrate its determination to prosecute terrorist suspects without being intimidated by threats of Islamic demonstrations and retributions. Certain highly developed foreign national courts, in jurisdictions of the coalition where many of the terrorist suspects and their accomplices have been and will continue to be found, also will play a key role in investigations and prosecutions.

Whichever of the options is ultimately used, it will be beneficial if the current military campaign incorporates the goal of preservation of relevant evidence where possible, so that it may be effectively used in prosecutions.

Much will depend on how many terrorist suspects are apprehended and how feasible and

For the long term, there is little doubt that a viable and credible judicial system will need to emerge in Afghanistan, and that substantial internal assistance will be required to help instill the rule of law.

realistic any military, international, or Islamic law option for prosecution may become. Nonetheless, the debate should begin now on what combination of U.S., military, foreign, and/or international courts might prove most useful for the effective prosecution of international terrorists. For the long term, however, there is little doubt that a viable and credible judicial system will need to emerge in Afghanistan, and that substantial international assistance will be required to help instill the rule of law in that country and perhaps to bring to justice those al Qaeda operatives who are not extradited or otherwise removed from Afghanistan.

Related UN Security Council Resolutions

Resolution 1267 (1999)

The Security Council, . . .

Recalling the relevant international counter-terrorism conventions and in particular the obligations of parties to those conventions to extradite or prosecute terrorists,

Strongly condemning the continuing use of Afghan territory, especially areas controlled by the Taliban, for the sheltering and training of terrorists and planning of terrorist acts, and reaffirming its conviction that the suppression of international terrorism is essential for the maintenance of international peace and security,

Deploring the fact that the Taliban continues to provide safe haven to Usama bin Laden and to allow him and others associated with him to operate a network of terrorist training camps from Taliban-controlled territory and to use Afghanistan as a base from which to sponsor international terrorist operations,

Noting the indictment of Usama bin Laden and his associates by the United States of America for, inter alia, the 7 August 1998 bombings of the United States embassies in Nairobi, Kenya and Dar es Salaam, Tanzania and for conspiring to kill American nationals outside the United States, and noting also the request of the United States of America to the Taliban to surrender them for trial (S/1999/1021),

Determining that the failure of the Taliban authorities to respond to the demands in paragraph 13 of resolution 1214 (1998) constitutes a threat to international peace and security, . . .

Acting under Chapter VII of the Charter of the United Nations,

1. *Insists* that the Afghan faction known as the Taliban, which also calls itself the Islamic Emirate of Afghanistan, comply promptly with its previous resolutions and in particular cease the provision of sanctuary and training for international terrorists and their organizations, take appropriate effective measures to ensure that the territory under its control is not used for terrorist installations and camps, or for the preparation or organization of terrorist acts against other States or their citizens, and cooperate with efforts to bring indicted terrorists to justice;

2. *Demands* that the Taliban turn over Usama bin Laden without further delay to appropriate authorities in a country where he has been indicted, or to appropriate authorities in a country where he will be returned to such a country, or to appropriate authorities in a country where he will be arrested and effectively brought to justice; . . .

5. *Urges* all States to cooperate with efforts to fulfil the demand in paragraph 2 above, and to consider further measures against Usama bin Laden and his associates; . . .

7. *Calls upon* all States to act strictly in accordance with the provisions of this resolution, notwithstanding the existence of any rights or obligations conferred or imposed by any international agreement or any contract entered into or any licence or permit granted prior to the date of coming into force of the measures imposed by paragraph 4 above. . . .

Resolution 1333 (2000)

The Security Council, . . .

Recalling the relevant international counter-terrorism conventions and in particular the obligations of parties to those conventions to extradite or prosecute terrorists,

Strongly condemning the continuing use of the areas of Afghanistan under the control of the Afghan faction known as Taliban, which also calls itself the Islamic Emirate of Afghanistan (hereinafter known as the Taliban), for the sheltering and training of terrorists and planning of terrorist acts, and *reaffirming* its conviction that the suppression of international terrorism is essential for the maintenance of international peace and security, . . .

Deploring the fact the Taliban continues to provide safe haven to Usama bin Laden and to allow him and others associated with him to operate a network of terrorist training camps from Taliban-controlled territory and to use Afghanistan as a base from which to sponsor international terrorist operations,

Noting the indictment of Usama bin Laden and his associates by the United States of America for, inter alia, the 7 August 1998 bombings of the United States embassies in Nairobi, Kenya and Dar es Salaam, Tanzania and for conspiring to kill American nationals outside the United States, and *noting also* the request of the United States of America to the Taliban to surrender them for trial (S/1999/1021), . . .

Determining that the failure of the Taliban authorities to respond to the demands . . . in paragraph 2 of resolution 1267 (1999) constitutes a threat to international peace and security, . . .

Acting under Chapter VII of the Charter of the United Nations,

1. *Demands* that the Taliban comply with resolution 1267 (1999) and, in particular, cease the provision of sanctuary and training for international terrorists and their organizations, take appropriate effective measures to ensure that the territory under its control is not used for terrorist installations and camps, or for the preparation or organization of terrorist acts against other States or their citizens, and cooperate with international efforts to bring indicted terrorists to justice;

2. *Demands also* that the Taliban comply without further delay with the demand of the Security Council in paragraph 2 of resolution 1267 (1999) that requires the Taliban to turn over Usama bin Laden to appropriate authorities in a country where he has been indicted, or to appropriate authorities in a country where he will be returned to such a country, or to appropriate authorities in a country where he will be arrested and effectively brought to justice;

3. *Demands further* that the Taliban should act swiftly to close all camps where terrorists are trained within the territory under its control, and *calls* for the confirmation of such closures by the United Nations, inter alia, through information made available to the United Nations by Member States in accordance with paragraph 19 below and through other means necessary to assure compliance with this resolution; . . .

16. *Requests* the Committee to fulfil its mandate by undertaking the following tasks in addition to those set out in resolution 1267 (1999): . . . (b) To establish and maintain updated lists, based on information provided by States and regional organizations, of individuals and entities designated as being associated with Usama bin Laden. . . .

Resolution 1368 (2001)

The Security Council, . . .

Recognizing the inherent right of individual or collective self-defence in accordance with the Charter,

1. *Unequivocally condemns* in the strongest terms the horrifying terrorist attacks which took place on 11 September 2001 in New York, Washington, D.C. and Pennsylvania and

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regards such acts, like any act of international terrorism, as a threat to international peace and security; . . .

3. *Calls* on all States to work together urgently to bring to justice the perpetrators, organizers and sponsors of these terrorist attacks and *stresses* that those responsible for aiding, supporting or harbouring the perpetrators, organizers and sponsors of these acts will be held accountable;

4. *Calls also* on the international community to redouble their efforts to prevent and suppress terrorist acts including by increased cooperation and full implementation of the relevant international anti-terrorist conventions and Security Council resolutions, in particular resolution 1269 (1999) of 19 October 1999;

5. *Expresses* its readiness to take all necessary steps to respond to the terrorist attacks of 11 September 2001, and to combat all forms of terrorism, in accordance with its responsibilities under the Charter of the United Nations. . . .

Resolution 1373 (2001)

The Security Council, . . .

Reaffirming also its unequivocal condemnation of the terrorist attacks which took place in New York, Washington, D.C. and Pennsylvania on 11 September 2001, and expressing its determination to prevent all such acts, . . .

Reaffirming the inherent right of individual or collective self-defence as recognized by the Charter of the United Nations as reiterated in resolution 1368 (2001),

Reaffirming the need to combat by all means, in accordance with the Charter of the United Nations, threats to international peace and security caused by terrorist acts, . . .

Calling on States to work together urgently to prevent and suppress terrorist acts, including through increased cooperation and full implementation of the relevant international conventions relating to terrorism,

Recognizing the need for States to complement international cooperation by taking additional measures to prevent and suppress, in their territories through all lawful means, the financing and preparation of any acts of terrorism, . . .

Acting under Chapter VII of the Charter of the United Nations, . . .

2. *Decides* also that States shall: . . . (e) Ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts; (f) Afford one another the greatest measure of assistance in connection with criminal investigations or criminal proceedings relating to the financing or support of terrorist acts, including assistance in obtaining evidence in their possession necessary for the proceedings; . . .

3. *Calls* upon all States to: . . . (b) Exchange information in accordance with international and domestic law and cooperate on administrative and judicial matters to prevent the commission of terrorist acts; (c) Cooperate, particularly through bilateral and multilateral arrangements and agreements, to prevent and suppress terrorist attacks and take action against perpetrators of such acts; (d) Become parties as soon as possible to the relevant international conventions and protocols relating to terrorism, including the International Convention for the Suppression of the Financing of Terrorism of 9 December 1999; (e) Increase cooperation and fully implement the relevant international conventions and protocols relating to terrorism and Security Council resolutions 1269 (1999) and 1368 (2001). . . .

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