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Terrorism and the Market State

Philip Bobbitt

I.

*I*n the past decade, there has been an increasing recognition that we are entering the transition from one constitutional order to another.¹ A *constitutional order* may be described by the unique claim it makes on legitimate power. Thus, the order of princely states, which flourished in the 16th century, demanded power on the basis of the legitimacy of the princes with whom it was associated. Give us power, the state said, and we will better protect the person and the possessions of the prince. The constitutional order within which most states have lived for most of the 20th century can also be characterized in a unique way. Nation-states, that is, states that exist to serve national groups, asked for legitimacy on the basis of a characteristic claim. Give us power, the state said, and we will improve your material well-being. The record of economic and material progress during the 20th century amply justified this claim. So why, then, is this highly successful order about to be replaced?

There are many reasons. I will give five. First, nation-states are finding it increasingly difficult to protect, much less improve, the cohesion and influence of national cultures, as these are strained by immigration (without which the demographically challenged developed world cannot sustain its material well-being), and by the electronic penetration of every society so that nation-states cannot manage their cultural lives. As an illustration, sixty percent of educated Chinese get their news from abroad, despite strenuous efforts on the part of the government to block these channels.

Second, nation-states are unable to govern the value of their national currency, owing to a global system of trade and finance from

which no state can withdraw without plunging itself into falling living standards. The commodification of money in finance must rank with the relativity of time in physics as one of the great breakthroughs of the century. What were hitherto merely fixed measurements suddenly became varying objects of value themselves. But the consequence of this was to remove the control over national currencies from states and give it to the pitiless international market.

Third, nation-states cannot determine the laws to be applied within their states because these are being superseded by an international system of human rights. For example, the reason Milosevic is in the dock today is not because he failed to obey the laws of Serbia or because he was not democratically elected by the Serbian nation. Rather, he ran afoul of a set of norms, some not codified, which Serbian national institutions had not endorsed or given him authority to defy.

Fourth, nation-states face transnational threats (like AIDS and now SARS) as well as climate changes (like global warming) that no state can either hide from or successfully resolve on its own. It is hard not to expect that sometime in the early 21st century, a mutated, drug-resistant strain of influenza will strike the human population with a terrible ferocity, quickened by international travel and urbanization. All the finger pointing among nation-states after the collapse of the Kyoto agreement only emphasizes how poor this kind of state is at coping with transnational problems. It is hard to know whom to blame more: those states that insisted on industrial reforms they knew were unachievable, or those states—like our own—that denounced the agreement and then proposed nothing of substance to solve the problem.

The fifth reason is the development of weapons (like biological or nuclear warheads) and delivery systems (like ballistic missiles) that can radically shift the balance between offense and defense, because no nation-state can protect itself by simply fortifying its national borders or increasing the size of its army. The United States now has about a million and a half men under arms. Its defense budget is larger than that of the next fourteen countries combined, and will, by 2006, be larger than the total aggregate of all the other defense budgets in the world. Yet we are probably in greater danger today—and will be in increasingly greater danger tomorrow—than we have been at any time in the past century. For a state that claims power on the basis of our steadily improving material well-being, this is not an encouraging development.

How did all this happen? These developments occurred, ironically, as a consequence of the greatest success of the society of nation-states: the end of the Long War of the 20th century and the triumph of market-based democracies over competing forms of the nation-state — communism and fascism. What defeated our competitors and discredited their systems? It was our success in building an international system of trade and finance; winning acknowledgment of human rights norms; bringing rapid industrial development to virtually every northern tier (and many southern tier) states; achieving higher living standards and reproductive control; creating international communications; and inventing and deploying weapons of mass destruction. The very tactics, technologies, and strategies that brought us success in war have now brought us new challenges, challenges that cannot be met by the currently prevailing constitutional order.

II.

It would be a mistake, however, to conclude that the decay of the nation-state as a constitutional order means the withering away of the state itself. This conclusion is a tempting one if you believe, as many do, that the development of the nation-state is synonymous with the development of the state, and that the nation-state originated in the Peace of Westphalia in 1648 and has been with us ever since. But if one recognizes that several constitutional orders have existed since Westphalia (and at least one before), then it is not hard to imagine that the state will, as in past eras, undergo reform in order to accommodate changed circumstances.

I have speculated elsewhere² that the new constitutional order will resemble that of the 21st-century multinational corporation rather than the 20th-century state in that it will outsource many functions to the private sector, rely less on law and regulation and more on market incentives, and respond to ever-changing consumer demand rather than to voter preferences expressed in relatively rare elections. This new constitutional order, which I have called the “market state,” has not arrived, but one can already see evidence of its approach.

When states move from raising armies by conscription to all-volunteer forces; when they introduce vouchers into the allocation of educational funds; when they deregulate not only vast areas of enterprise by repealing industrial statutes but also deregulate the reproduction of our species by striking down anti-abortion and anti-contraception

laws; when states replace relatively generous unemployment compensation with retraining programs designed to prepare the unemployed for re-entry into the labor market; and when states permit their officials to be removed through *ad hoc* recall votes, and their laws to be replaced by voter initiatives and referenda — when all of these developments occur, then we are witnessing the characteristics of the emerging market state.

This transition will occur over many decades, and there are many varying forms that the market state might take. If the past is any guide, the transition will not be complete without violent conflict. In the past, decades-long epochal wars brought about these transitions. It may be that the war on terrorism is the first engagement of this new conflict.

III.

In the decade following the end of the Long War, three interesting assessments were offered to give shape to the years that would follow. The first theory arose from the fact that there now appeared to be a consensus among the Great Powers, those states that had kept the Long War going for seventy-five years, over just such a lack of consensus. These states now agreed that parliamentary systems of consent, market-based economies, and human rights grounded in the rule of law were indispensable elements of a legitimate government. This theory, memorably embodied in the phrase “The End of History,”³ held that the dynamic of historical change had now reached a plateau with stasis as far as the eye could see.

A second theory also arose from the apparent Great Power consensus, but drew the opposite conclusion. Now that the ideological battles of the Long War had ended and the adversaries appeared to have achieved a political and strategic consensus, we could expect future conflicts, not arising from ideological strife but along the great geopolitical seams of regional culture. “The Clash of Civilizations”⁴ awaited us at the junctures where Western, Muslim, Slavic-Orthodox, Indian, Chinese, and Japanese civilizations abraded each other.

A third theory did not treat the strategic, political, or cultural but rather the economic elements of the life of states. In the 21st century, we could look forward to a “virtuous circle of globalization.” As states opened themselves to trade and international commerce, they would become more prosperous; greater prosperity would bring a freer trade in ideas, which would move countries toward greater democracy;

greater democracy would lead to an enhanced role for women, whose fertility would decline, easing population pressures; and stable populations would lead to greater education, which, in turn, would lead to greater competitiveness that would bring still greater prosperity.⁵ No two states with a McDonalds restaurant, so the story went, had ever gone to war with each other.

These popular theories have been widely discussed and I do not intend to materially add to that discussion. Events since their publication have not been altogether supportive. If history ended with German unification and the end of the Cold War, it began again with a fury three years later in the Balkans. While we were watching the horrors of a clash of civilizations in Israel and on September 11, India and Pakistan, North and South Korea, and Iraq and her neighbors threatened to go to war. In other words, profoundly worrying conflicts seemed to arise within the great regional civilizations. Nor did it escape the attention of journalists that there was a McDonalds just down the street from some of the buildings shelled by NATO in Belgrade.

In fact, however, each of these theories held a good deal of truth. Fukuyama correctly viewed the demise of the Cold War as the end of a long century of ideological conflict that would enshrine a particular form of the nation-state in every Great Power. Huntington wisely appreciated that the end of the Long War did not mean the end of war, and Friedman insightfully drew attention to the political and strategic consequences, rather than causes, of globalization.⁶ But their importance, I think, lies not so much in what they drew attention to as in the mere fact that these were the subjects — warfare, culture, and globalization — to which they drew attention. Each of these subjects was a key to the coming of the market state and its relationship to terrorism, even though not one of these theories seems capable of accurately describing that relationship. Three unforeseen developments arose from these three subjects, respectively, and they will be sufficient to largely undo the postwar consensus among nation-states, to say nothing of stalling globalization and calling into question the very division of the world into geographical (rather than global) conflict.

IV.

The first of these unforeseen developments was the commodification of weapons of mass destruction (WMD). There arose a clandestine

market in these weapons, which grew ever cheaper. States no longer had to be rich to develop WMD and thus did not need to be Great Powers, rendering the Great Power consensus less significant. Indeed, it was no longer necessary for a state to develop its own nuclear or biological weapons at all — which might require years of sophisticated technological and scientific effort—or to leave evidence of such development for U.N. inspectors to detect. It will soon be possible for WMD to be bought in the marketplace. A lucrative trade may already exist between North Korea, which supplies ballistic missile technology; Pakistan, which supplies fissionable material; and Iran, which needs both and will soon be able to supply both to others.

The main reason for seeking a regime change in Baghdad was not, in my opinion, because Iraq had certain weapons of mass destruction (although I have no doubt that they did), but rather to keep it from getting specifically *nuclear* weapons. The fact that the U.N. inspectors did not find such weapons, from this point of view, is heartening rather than, as the war's detractors would have, damning to the Bush and Blair administrations. One has to wonder at the logic of demonstrators who, while professing a horror of nuclear proliferation, marched in favor of keeping Saddam Hussein in power. Yet the logic of those who would have waited to strike until such weapons were in Iraq's possession (even assuming that the U.N. could have detected them, as they did not in North Korea during the same period) is equally baffling.

The second unforeseen development was the emergence of a global terrorist network that in many respects more closely resembles the multinational corporation than it does a government. I draw attention to this resemblance for an important reason: only if this structure is appreciated can we connect the changes in terrorism (which many commentators, especially in Europe, are at pains to deny) with the changes in the constitutional order of the state.

In many respects, Al-Qaida is a kind of state. Like other states, it has a standing army; it has a treasury and a consistent source of revenue; it has a permanent civil service; it has an intelligence collection and analysis cadre; it even runs a rudimentary welfare program for its fighters and their relatives and associates. Furthermore, it has a recognizable hierarchy of officials; it makes alliances with other states; it promulgates laws, which it enforces ruthlessly; and it declares war.

But unlike the terrorist groups with which we are familiar, Al-Qaida does not mimic the nation-state. The IRA, ETA, and PLO are all organized as tiny parodies of the hierarchical, militarized, ideologized

nation-state. This is hardly surprising as each is engaged in a struggle for national liberation. By contrast, the multinational mercenary terror network that Osama bin Laden and others have assembled is a new and mutated version of the market state. It resembles the organizational structure of VISA or MasterCard with their radical decentralization, more than the usual national government (or the usual 20th-century national corporation, like Air France or Krupp or IBM, for that matter). It is not located in any particular place, though it had training facilities in Afghanistan. It provides logistical support, financing, and some leadership to the *ad hoc* coalitions — coalitions of the willing, if you like—and it pulls together for operations, often drawing fighters from local groups that have battled each other for years.

The third unforeseen development was the greater vulnerability that emerged as a concomitant of the dramatic growth in wealth and productivity during the last half-century. During World War II, it required the resources of the wealthiest nations to develop the weapons that enabled them to destroy the industrial plant of their adversaries. Perhaps only the United States could have been the first to produce nuclear weapons. Certainly it would be idle to suppose that a teenager, sitting in the parlor of a suburban home, could have destroyed the tank-manufacturing plant run by General Motors. But today, and increasingly tomorrow, just such a boy or girl will be able to hack into the computerized supervisory systems that control gas pipelines, phone networks, electrical grids, and electronic banking, at a cost to the society of amounts of wealth not dissimilar to the destruction of an industrial plant by aerial bombing. This new vulnerability should not be confused with that arising from the spread of WMD. The atrocities of September 11 were not perpetrated by persons using sophisticated weapons. Rather, they were made possible because we had assembled an immense array of talent and capital, and put this glittering assemblage inside a few large buildings. The vulnerability I have in mind is a direct consequence of the steps we have taken to link parts of the economy, to increase productivity by relying on computerization, and to bring persons into efficient proximity.

These three developments are outside the frame of reference of the popular theories of international relations that circulated at the end of the 20th century, but they are quite consonant with the decay of the nation-state (of which they are important drivers) and the emergence of the market state (which they reflect). Moreover, they have the potential to interact. Lucrative targets in every postindustrial society will

soon be vulnerable to anonymous attack, including crude radioactive or biotoxic assault. It is not hard to imagine the public reaction if, for example, an ordinary fertilizer bomb were detonated on Wall Street, spreading nuclear isotopes bought on the black market. Few would be killed outright, but who would want to work there again? The anthrax attacks of 2001 shut down postal services and governmental facilities with just a few letters. It is not inconceivable that hundreds of such letters could be mailed rather than just a handful, with proportionately greater effect. We have as yet to even identify the author of the original attacks. But by far the most important consequence of these three unforeseen developments in the wake of the Long War is their effect on our understanding. As far as I can tell, it has not been much.

V.

Let us review in some detail the last two years during which we have energetically and intrepidly fought Al-Qaida and modern terrorism. This is the timeline of events between September 11, 2001, and September 11, 2003:

September 12, 2001: the North Atlantic Council invokes Article 5 of the NATO Charter for the first time in 52 years. The Council unanimously declares the attacks of the preceding day on the United States to be acts of aggression that trigger the support of all members of the alliance.

September 15: President George W. Bush announces in a nationwide address that the United States is at war.

October 5: a man dies in the U.S. after contracting a most rare form of anthrax. The anthrax attacks eventually kill five people and leave seventeen seriously ill. The weapons-grade anthrax was posted in letters to a number of people and institutions, including U.S. broadcasters and Senate buildings.

October 7: the U.S. and British forces begin air strikes against targets in Afghanistan in an attempt to overthrow the Taliban and shut down Al-Qaida; within two months, they have conquered the country and driven the Taliban rulers from the capital, Kabul, and their stronghold in Kandahar.

October 21: it emerges that the CIA is given leave to do whatever is necessary to destroy Al-Qaida. This is widely interpreted as meaning

the agency is being allowed to carry out assassinations, 25 years after President Gerald Ford decreed that: "no person employed by or acting on behalf of the U.S. Government shall engage in, or conspire to engage in, assassination."

October 24: the U.S. Congress approves anti-terrorism legislation that gives law enforcement agencies sweeping new powers to monitor and detain suspected terrorists. The bill comes in for heavy criticism from civil liberties groups. More than 900 people across the U.S. are detained without charge or trial.

November 16: Mohammed Atef, a key Al-Qaida figure, is killed in U.S. bombing.

December 14: authorities in Indonesia acknowledge for the first time the ties between local Islamic groups and Osama bin Laden's Al-Qaida network. Laskar Jihad, a Muslim militant group, is alleged to have received help from Al-Qaida members in waging *jihād* against Christians in eastern Indonesia, the Moluccan Islands, and central Sulawesi. U.S. officials discovered in August that Al-Qaida had obtained detailed plans of the U.S. diplomatic compound in Jakarta.

December 26: Osama bin Laden broadcasts a message over the Al-Jazeera television network rallying his supporters and denouncing the U.S. He had apparently escaped.

January 11, 2002: the first prisoners captured on the battlefield in Afghanistan but believed to be non-Taliban irregulars are transferred to a prison camp at the American base in Guantanamo, Cuba. The men are hooded and shackled. Some are sedated. Controversially, the U.S. classes the detainees as "illegal combatants" rather than as ordinary prisoners of war.

January 29: President Bush delivers the State of the Union Address. He announces the second phase of the war on terrorism. He calls North Korea, Iran, and Iraq part of an "Axis of Evil," and says the U.S. will "prevent regimes that sponsor terror from threatening America or our friends and allies with weapons of mass destruction."

January 31: the U.S. sends military personnel to the Philippines and begins joint military exercises. The U.S. soldiers train Filipino troops to fight terrorists from Abu Sayyaf, an Islamic extremist group the U.S. believes to be linked with Al-Qaida.

February 14: the U.S. sends military advisors to Yemen. They train troops there to fight terrorists inside its borders.

March 17: the head of the U.S. military Central Command says Al-Qaida terrorists are operating in Somalia.

April 3: Abu Zubaydah, bin Laden's chief of operations, is captured; he tells interrogators that Al-Qaida is capable of creating a dirty bomb and smuggling it into the U.S.

April 11: a blast at a synagogue on the Tunisian island of Djerba kills seventeen people — eleven German tourists, five Tunisians, and a Frenchman. German officials believe the explosion, which was caused by a fuel truck eruption, was a deliberate attack, while the Tunisian authorities say it was probably an accident. German ministers report that there is evidence that Osama bin Laden's Al-Qaida network was behind the blast.

April 19: the FBI warns that terrorists are planning attacks on banks in the northeastern U.S. These do not materialize.

May 7: terrorists blow up a tour bus near Karachi, Pakistan. Most of the injured are French. That same day, U.S. forces attempt an encirclement of Al-Qaida holdouts in eastern Afghanistan. On May 30, however, Pakistan removes its forces along the Afghan border (which were meant to interdict fleeing Al-Qaida fighters), and redeploys its units to the Indian border where new tensions have increased.

May 18: the FBI reports that captured Al-Qaida members told them terrorists may have a plan to rent apartments in the U.S. and load them with explosives. The FBI also says Al-Qaida may be planning another large-scale terrorist attack against the U.S. They point to a recent increase in Al-Qaida communications.

May 19: Vice-President Dick Cheney says it is "almost certain" that Al-Qaida will carry out another terror attack on America.

May 30: FBI guidelines give agents more latitude to monitor e-mails, Internet sites, libraries, and religious institutions without first having evidence of criminal activity. A spokesperson for the American Civil Liberties Union says: "The FBI is telling the American people that they no longer have to do anything unlawful to get that knock on the door."

June 6: President Bush proposes a Cabinet-level Department of Homeland Security. The Department will restructure many of the govern-

ment's departments and agencies in order to focus on "securing the American homeland and protecting the American people."

July 1: the U.S. Justice Department proposes Operation TIPS, the Terrorism Information and Prevention System, described on a government website as "a nationwide program giving millions of American truckers, letter carriers, train conductors, ship captains, utility employees and others a formal way to report suspicious terrorist activity." The American Civil Liberties Union voices concern that participants would, in effect, be searching people's homes without warrants, resources would be wasted on useless tips, and vigilantism and racial profiling would result.

July 3: the FBI warns of attacks on the following day, during U.S. independence celebrations. These do not materialize.

September 8: Al-Qaida operatives report that they initially planned to attack nuclear installations rather than the World Trade Center. Al-Jazeera says it has interviewed two senior Al-Qaida members who made the claim, Khalid Sheikh Mohammed, allegedly one of bin Laden's key lieutenants, and Ramzi Binalshibh.

September 12: President Bush goes to the United Nations and makes clear that the United States will move against Iraqi President Saddam Hussein on its own if the U.N. Security Council fails to act. The next day, Ramzi Binalshibh, one of the Al-Qaida operatives most wanted by the U.S. government, is arrested.

September 23: the U.S. government issues guidelines on vaccinating the entire population of the U.S. in 5–7 days in case there is a smallpox attack.

September 25: the White House issues "The National Security Strategy of the United States," a document required by law and sent to Congress. One controversial passage provides, "We must be prepared to stop rogue states and their terrorist clients before they are able to threaten or use weapons of mass destruction against the United States and our allies and friends. . . . To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively."

October 7: President Bush delivers a speech asserting that the U.S. needs to invade Iraq in order to change the regime in Baghdad.

October 8: a U.S. marine is killed in Kuwait when two gunmen in a pick-up truck open fire on a group of marines during training. The previous week, a bomb in the Philippines killed a Green Beret. Officials believe both attacks were done by Al-Qaida.

October 10: the U.S. Senate passes a resolution authorizing President Bush to use whatever means necessary to overthrow Saddam Hussein.

October 12: bombs go off in Bali, Indonesia, in front of a nightclub, killing more than 180. Officials say these may be terrorist attacks associated with Al-Qaida.

November 4: six Al-Qaida members are killed by a Hellfire missile fired from an unmanned CIA drone at a car believed to be carrying Ali Qaed Senyan al-Harathi, whom the U.S. had linked to the attack on the warship USS Cole off Aden in October 2000.

November 28: two attacks are launched against Israeli targets in Mombasa, Kenya. A hotel blast kills sixteen, including the three suicide bombers, and a missile is fired but misses an Israeli plane. A message on a website purporting to come from Al-Qaida claims the group carried out the attack.

December 12: North Korea announces its plans to resume reprocessing nuclear fuel in order to make nuclear weapons.

December 14: Jordan says two men arrested in connection with the killing of U.S. diplomat Laurence Foley are members of Al-Qaida.

January 6, 2003: United Kingdom anti-terror police find the deadly poison ricin in a London flat. The discovery is followed up with raids in Manchester, in which a policeman is killed, and in a London mosque. A number of North Africans are arrested.

February 13: anti-aircraft missile batteries are placed around Washington and troops are deployed to guard Heathrow airport in London amid fears of an imminent Al-Qaida attack. The move follows the broadcast of a taped message purportedly from Osama bin Laden, calling for Muslims to attack U.S. and British targets in retaliation for any attack on Iraq.

March 1: Khalid Shaikh Mohammed, believed to be the key planner of the September 11 and other Al-Qaida attacks, is arrested. That same day, Turkey refuses to join the U.S.-led coalition against Iraq.

April 30: Whalid ba Attash, a senior Al-Qaida official, is arrested along with five others.

May 12: at least 34 people are killed in a series of bomb attacks in Saudi Arabia's capital, Riyadh. The attacks are carried out against luxury compounds housing foreign nationals and a U.S.-Saudi office. The U.S. and Saudi governments say Al-Qaida is the prime suspect in the blasts, which coincided with a visit to the kingdom by U.S. Secretary of State Colin Powell.

May 16: the Moroccan city of Casablanca is hit by a series of suicide bomb attacks that kill 41 people, including twelve attackers. The Moroccan authorities say that the attacks are linked to "international terror."

June 6: French officials disclose that two suspected Al-Qaida militants have been arrested in separate incidents at Charles de Gaulle airport in Paris. Investigators believe the first man, Karim Mehdi, a Moroccan national, has links with Al-Qaida militants based in Germany who planned the attacks on New York and Washington. The second man, Christian Ganczarski of Germany, is suspected of being involved in the April 2002 bombing of a synagogue in Djerba, Tunisia, in which 21 people were killed.

June 7: four German peacekeepers are killed and dozens of other people injured in an apparent suicide attack on a bus in the Afghan capital, Kabul. The attack is the deadliest assault on International Security Assistance Force (ISAF) troops since they arrived in the country to bolster the government of President Hamid Karzai after the fall of the Taliban. German Defense Minister Peter Struck blames "Al-Qaida terrorists."

June 27: the man suspected of masterminding the series of bombings in Riyadh is detained in Saudi Arabia. Ali Abdul Rahman al-Ghamdi, also known as Abu Bakr al-Azdi, was number two on the list of most-wanted suspects in connection with the 12 May attacks. A U.S. official described the arrest as a major blow to Al-Qaida's operations in Saudi Arabia.

July 15: North Korea announces it has enough fissionable material for six nuclear weapons.

August 12: a missile is smuggled from Russia by a British citizen of Indian descent. An independent arms dealer, he is arrested as he attempts to sell the weapon to persons he believes to be terrorists. The arrest occurs in New Jersey.

July 18: amid concern from senior U.K. government figures and criticism from civil rights campaigners, the U.S. agrees to suspend military court proceedings against Moazzam Begg and Ferroz Abbasi, two Britons among six Al-Qaida suspects due to face a military tribunal in the U.S. Along with 680 other detainees, they have been held without being remanded for criminal prosecutions.

July 30: the U.S. Department of Homeland Security warns that Al-Qaida terrorists may carry out hijackings or suicide bombings against U.S. airlines by the end of the summer. These do not materialize.

August 4: Mr. John Ashcroft and the Homeland Security Secretary Tom Ridge say that anti-terrorism measures introduced since the September 11, 2001 attacks have prevented more than 100 new strikes.

August 14: the operations chief of the Jemaah Islamiyah terrorist group, who collaborated in the Bali bombings, is arrested.

August 19: at 4:45 p.m., a massive truck bomb explodes outside U.N. headquarters in Baghdad, killing seventeen, including the chief U.N. envoy to Iraq. A few hours later, a suicide bombing in Jerusalem leaves at least 20 dead and over 100 wounded, prompting Israel to suspend all talks with the Palestinian leadership.

August 29: a bombing attack on a Shiite shrine kills at least 125, including a leading Shiite cleric who was collaborating with the U.S.-led coalition. Nineteen men are subsequently arrested, all with admitted links to Al-Qaida.

What are we to make of these two years?

VI.

I have listed these events—and they are by no means all—to remind us of the drumbeat of violence in this period, and to emphasize that far from abating, it is picking up momentum. Since September 11, 2001, the U.S. has declared war. It has received the unprecedented invocation of Article 5 of the North Atlantic Treaty by its allies on its behalf.

Congress has passed various statutes, including the Patriot Act, aimed at making the prosecution and detection of terrorists easier. The federal bureaucracy has been reorganized and new funds—funds greater than the defense budgets of Iran, Iraq, Syria, North Korea, and Libya combined—have been authorized. U.S.-led coalitions have invaded and conquered Afghanistan and Iraq in lightning campaigns, and the U.N. has sanctioned, for the first time, the invasion of a member state (Afghanistan) in order to suppress terrorism. The first sanctioned targeted assassination by U.S. forces against terrorists has taken place. Off the Yemeni coast, intelligence vessels collect and collate information on suspect ships, arms traders, and furtive conversations. The Pentagon's Combined Joint Task Force in the Horn of Africa keeps a fleet of blacked-out helicopters on permanent standby in Djibouti.⁷ Much of the senior leadership of Al-Qaida has been killed or detained, with fruitful possibilities for interrogation. What remains—the senior figures of bin Laden and Zawayiri—is in desperate flight.

Yet at the same time, Al-Qaida has continued to strike. In Bali, Kenya, Pakistan, Tunisia, Afghanistan, Iraq, Israel, and Morocco as many people have been killed or wounded in terrorist attacks since September 11 as died on that date. Virtually every week, U.S. soldiers are killed. The rights of U.S. citizens and those who, while not citizens, are in the custody of the U.S. are fewer than before. We have seen countless alerts, color-coded to indicate their threat level, and with some justice we can conclude that Americans are less safe than before, perhaps less safe than ever.

It is therefore worthwhile to step back and ask the most basic questions about winning the war on terrorism. Is there a connection between the strategies and tactics we are pursuing in the war on terrorism and the habitual way we treat warfare—that is, as a conflict between nation-states? These habits are enshrined in international institutions like the U.N. and NATO, in military plans that contemplate invasion and conquest, and in intelligence operations that are geared toward renditions and prosecutions. But are these habits appropriate to the decentralized operations of a mutated market state like Al-Qaida, which finds lucrative targets in the emerging market states of the West?

VII.

Let me very briefly outline how I believe these basic questions should be addressed. I will organize this inquiry into five parts.

First, we have defined the problem of winning the war against terrorism in a way that makes that problem impossible to solve. The way we understand “winning” (a victory with an armistice agreement, followed by occupation and a peace treaty), “war” (a conflict between nations over issues of statehood and sovereignty), and “terrorism” (a criminal act by the disenfranchised or the psychopathic) means that we simply cannot defeat terrorism. “The War on Terrorism” becomes little more than a metaphor for propaganda purposes. We can no more win such a war than we can win a war against disease or disillusionment.

We must reconceptualize each of the key ideas. To begin with, we are going to have to understand terrorism from the supply side, not simply the demand side. By that I mean we must change our exclusive focus on who is the terrorist and what troubles him to what vulnerabilities we have created and how to reduce them. This will become ever more urgent, regardless of what happens to Al-Qaida, as we enter a period in which it will be increasingly difficult to determine precisely who is striking at us and from what remove.

We shall have to abandon the nation-state’s dichotomy of crime and war, the inner and outer dimensions of state violence, and replace it with a worldview that admits a free flow between these two dimensions. The members of the Irish Republican Army were criminals who hungered to be treated as soldiers; the Waffen SS were soldiers who behaved like criminals and deserved to be treated as such. But the atrocities committed on September 11, though crimes of historic ugliness, were not committed by mere criminals. These actions were plotted with military precision against military and political targets, by perpetrators willing to sacrifice themselves for purely political goals.

Victory itself will have to be redefined. Whereas it was once like a tooth extraction, finally ending pain and promising healing, now victory will be more like the problem of earning a living: it will start all over every morning. Not being defeated — carrying on the constitutional life of the society that is under attack — will be the standard of victory in this war.

Second, we must be clear about what we are fighting for, and what that fight requires of us, lest the terrorists effectively defeat us through our own misguided attempts to protect ourselves. This determination

is not nearly as easy as it is made to look by those civil libertarians who alarm us by claiming that any diminution of our liberties means that “the terrorists win” or by those bureaucrats and politicians who soothingly reassure us that all the necessary measures can be taken without compromising our civil freedom of action. In every era of the state, throughout the evolution of its constitutional orders, societies have the problem of determining the proper relationship between strategy and law. Outside its territorial domain, the state seeks to be free of external coercion; this is strategy. Inside its boundaries, the state seeks to monopolize legitimate violence; this is law. But also within its territory, what measures are appropriate to prosecute the war outside, when inside and outside have lost their clear boundaries?

We must explore the changing relationships between the intelligence agencies (as they become more dependent on open sources) and the media (as they become more powerful purveyors of secrets); between the political parties who seem to have shunned the traditional bipartisanship of governance during war in favor of more party conflict; and between unions and their constituent parts (such as the United States, where intelligence is not shared with the states of the union, and the European Union, where it is not shared with the central union owing to national distrust and self-serving states). We will have to learn how to find and work with private sector collaborators, partly because they own most of the critical infrastructure that we must make less vulnerable and partly because they are market oriented and global, thus bridging some of the gaps between the nation-state and our Al-Qaida adversaries. We must rethink ideas like “Homeland Security” when the threats to our security cannot be neatly cabined as *in* or *out* of the homeland, just as we must revisit the issue of CIA-FBI cooperation, because these two agencies are so completely defined by the Long War and its basis in the territorial nation-state.⁸

It is a common assumption that the rights of individuals and the powers of government exist along a spectrum, or along a gauge whose needle indicates the precise division at any moment between rights and powers. The more tranquil the period, the more we can expect the needle to shift toward the people and away from the state; the greater the emergency, the likelier that the needle will veer toward increased centralized power. And there is something to this. To take another image, rights and powers are like the shoreline and the sea, constantly shifting but generally staying within high and low tides, the movement of one line matching exactly the retreat or advance of the other.

But this two-dimensional way of looking at things does not exhaust matters because it omits the role of alternative but possible worlds. We must not only measure our loss of liberty against that which we once enjoyed, because things are changing dramatically and threats to us are growing. Rather, the appropriate measure is against those liberties we would enjoy had we not taken action, or had taken other action. A state that fails to protect its people's security in order to keep their liberties intact will end up with neither security nor liberty.

We must also measure our tactical and strategic policies against the impact such policies are likely to have on our future constitutional development. If we abandon the Executive Order against assassinations, what is the cost to our legitimacy as a state before our people? This is not a matter of civil liberties but rather self-respect. If we engage in torture, perhaps by turning over prisoners to less squeamish intelligence services, are we substantiating the charges made against us by those who say that we are the true rogue state, and that state terror is every much a threat to mankind as the terrorism of Al-Qaida? If we ally ourselves with undemocratic autocracies who share our fear of Al-Qaida but perhaps with whom we have little else in common, are we simply borrowing against a future in which those peoples that we have helped suppress rise up and blame us—much as we are blamed for collaborating with dictators in the Third World to fight communism (though we are seldom blamed for the equally awful collaboration with communism to defeat fascism)? If it is true that full and fair elections in a dozen Islamic states would bring bin Laden to power, does this make us hypocrites to claim that the sovereignty of other states, like Iraq, is forfeited owing to its undemocratic practices? Or does it mean that our commitment to democracy itself must be rethought?

Third, the United States must play a leading role in winning the war against terrorism, but that war can only be won with the collaboration of many states. The risks of leadership are two-fold: if the U.S. is out in front, it becomes the target for every terrorist group that simply wants a free hand for its predations, while at the same time, the U.S. becomes the focal point of charges by other states that it is seeking an empire. Some of those who make the latter claim believe simply that overwhelming power necessarily leads to empire, indeed is the very definition of empire.

The United States is very powerful economically and militarily. We have the world's largest economy, greater than that of all the other

members of the G-7 combined, and we are growing at a faster rate. We are the only state that can settle its debts in its own currency. Militarily, we are the only remaining superpower, owing to the collapse of the Soviet Union and our continued \$100 billion-plus defense budgets. Yet we should not be misled by these figures. Like the much-cited increase in the gap between high and low income earners, these statistics conceal an equally important truth—the development gap between high and low is closing. This means that while the U.S. has a vastly larger army, equipped with infinitely superior weaponry and communications, the harm that can be done to the U.S. is increasing more quickly (as technology disperses and becomes cheaper) than our lead is growing. In other words, poor states — and poor terrorist groups — who could not begin to mount a challenge by invading across a contested plain, can hope to do enough damage to dissuade the U.S. or any other powerful state from attempting to coerce them. This was the important, but often missed, argument about deterrence with respect to Iraq. It wasn't that the U.S. couldn't deter Saddam Hussein if he got nuclear weapons; surely there was no chance of an unprovoked Iraqi attack on the U.S. because that would trigger certain retaliatory annihilation. Rather, it was that, with a very few nuclear weapons, Saddam Hussein would have a free hand in the Gulf because the United States could scarcely afford to put half a million troops within the scope of such weapons in order to dislodge an Iraqi aggression. This paradox — the increasingly greater power and increasingly greater vulnerability of the U.S. — means that the United States is the indispensable leader of the war on terrorism. It alone has the resources as well as the interest in being such a leader because it is also very vulnerable.

Yet American leadership actually tempts disarray and non-cooperation. The former French foreign minister, Hubert Vedrine, spoke for many when he said, "We cannot accept a politically unipolar world."⁹ For those of us who remember the bipolar world from which we have only recently emerged, such statements are especially galling but they are, I fear, an accurate reflection of opinion abroad. With respect to terrorism, such attitudes exploit the solipsism so characteristic of the nation-state. It will always be possible for states to sacrifice other states to terrorists on the theory that not only does it buy them protection but it also weakens their competitors. It is, I am afraid, actually true that when the current French foreign minister, Dominique de Villepin, was asked at the International Institute for Strategic Studies which side he wanted to see win in Iraq, he simply declined to answer after a long

and amused pause. Indeed, there are many who see the war on terrorism as a kind of stalking-horse for an American empire. One think tank has thoughtfully provided a list. The Americans are prosecuting this war so they can:

- Instigate a ‘clash of civilizations’ that will provide the U.S. with an excuse to reorganize the world under the tutelage of an American empire.
- Secure control of the oil and gas rich lands of Central Asia and the Middle East.
- Undermine the political and economic development and integration of the Eurasian landmass.
- Maintain economic power during the course of the current financial crisis by using U.S. taxpayer money (and lives) to force on the world that which a truly free market would not have otherwise allowed—unchallenged American economic and political supremacy.¹⁰

One must shudder at the consequences for the world (to say nothing of the war on terrorism) of such attitudes for they invite an anti-American multipolarity with which the worst and most retrograde forces can combine.

If neither unipolarity nor multipolarity is acceptable, what about multilateralism? Should the war against terrorism be prosecuted under the auspices of a multinational organization such as the United Nations, or perhaps NATO or the E.U.? Or should what have come to be called “coalitions of the willing” become an acceptable means of fighting this war? And finally, what constitutional and strategic models can we look to for the reconstitution of societies that have been ravaged by conflict and have sheltered terrorists? It may be that we can revive the otherwise outmoded provisions of the U.N. Charter and create U.N. trusteeships for failed states like Afghanistan or postwar Iraq. Or it may be that we will need new models that are less territorial and exclusive, such as free trade zones with both the U.S. and the E.U. for areas like Palestine, Kashmir, the Koreas, and Iraq.

Fourth, we must develop legal and strategic parameters for state action. We might start with a definition of what constitutes terrorism. I suggest that terrorism is the use of violence to prevent persons from doing what they would otherwise lawfully do, when undertaken for political goals and without regard to the protection of noncombatants.

Beginning with such a definition, we can then work out what a state is permitted to do in its search for terrorists.

For example, we might then be able to address the new U.S. National Security Strategy and its call for preemption in light of the obvious conflict with Article 2 (4) of the U.N. Charter. If it is unlawful for a state to use force in the absence of an actual or imminent attack or authorization by the U.N. Security Council, is it not also unlawful, in the absence of such a resolution, for one state to preempt another's war-making capabilities before these are ever put to use? Yet in this era of disguised attack, isn't such preemption an absolute necessity where WMD are concerned? Once a state acquires nuclear weapons, a moment that U.N. or U.S. monitoring seems incapable of predicting with precision, it is too late to put the genie back in the bottle. What is the chief reason that Saddam Hussein is not in power while Kim Jong-Il remains? It is because the latter got to the nuclear finish line before he was preempted (despite, it should be noted, U.N. inspections for the preceding nine years).

Nor should a search for such parameters exclude the consideration of the so-called "root" causes of terrorism. I, for one, do not believe that the developed world should seek to aid the peoples of the less developed states — to improve their health and longevity, their per capita income and education, their human rights and political liberties — on the grounds that this will reduce the threat of terrorism. The tie between such causes and effects is too tenuous. And, as suggested above, my "supply-side" approach to terrorism better fits the global, anonymous networks we shall have to face in the 21st century than the "demand-side" approaches that were relevant to the national liberation movements of the 20th century. But the search for root causes does raise one important issue with far-reaching relevance for the legitimacy of the war on terrorism. That is the question of state terrorism. If the assassinations and torture by the Israeli state are countenanced, indeed financed, by the United States, then aren't we subject to the same accusations of terrorism as we would hurl at any other state that employed such methods? Or are these tactics the only effective means of protecting a society at war with those who can easily infiltrate it, and thus prefigure the tactics we will ourselves be forced to adopt. And if we do adopt these methods, are they more like the strategic bombing of World War II, which relied on an *in terrorem* effect to achieve its military goals (as at Hiroshima and Nagasaki) or more like the bombing of civilian populations that we would now condemn as

war crimes (like the blitz against London or the Allied bombing of Dresden)?

Finally, we must develop new rules of international law that incorporate these parameters and determine when it is permissible for one state to intervene in another's affairs in order to protect itself or its allies from terrorism. Obviously, we need to amend the Geneva Conventions to deal with the question posed at Guantanamo: what treatment is to be accorded prisoners in the war on terrorism? They are not combatants in uniform with a publicly acknowledged chain of command. But they are not spies or partisans either. As soldiers, even if unlawful ones, who are captured on the field of battle, they can be held in prisons until the end of the conflict without trial or arraignment. But does this make sense when there is no nation-state to agree to end the conflict or to make arrangements for prisoner exchanges — when, that is, these prisoners may be held in perpetuity?

Equally obviously, we must confront in international law the changing face of sovereignty. Roughly speaking, there are three contending views of sovereignty at present. One, which I call "opaque" sovereignty, holds that the acts of a state within its own jurisdiction (possibly with the qualification of *jus cogens*) are matters of the state's own judgment and cannot be the basis for any penetration of the state's sovereignty. What China does in Tibet is its own affair, no matter what the Dalai Lama or Richard Gere may say. Indeed, what China does in Taiwan, in Beijing's view, may also be cloaked with such opacity. A second view, which I call "translucent" sovereignty, holds that a state's acts can be the subject of intervention when they are judged by a competent international body to have disqualified the state's right to independence. This was the basis for the intervention in Afghanistan, which was authorized by the U.N. Security Council. A third view, which may be called "transparent" sovereignty, is more radical. It holds that because sovereignty arises from the people and cannot be wholly delegated to the state, a government forfeits its sovereignty when it makes war on its own people (through campaigns of ethnic cleansing, for example) or when it systematically denies them human rights of a broad scale. These three views can come into conflict when one state seeks the help of another in capturing and extraditing terrorists, confiscating terrorist funds, interdicting terrorist transit, or sharing intelligence. They are, therefore, fraught with the potential for conflict. Developing a consensus on this issue ought to be given the

highest priority in international law. As Sir Michael Howard wisely put it:

[W]e need to know rather more about the new structure of international legitimacy towards which we are striving before we abandon the old. An explicit American hegemony may appear preferable to the messy compromises of the existing order, but if it is nakedly based on commercial interests and military power it will lose all legitimacy. Terror will continue and, worse, widespread sympathy with terror. But American power placed at the service of an international community legitimized by representative institutions and the rule of law, accepting its constraints and inadequacies but continually working to improve them: that is a very different matter. It is by doing this that the US has earned admiration, respect, and indeed affection throughout the world over the past half century. But if that relationship is to continue, and respect is to overcome hate, the US must cease to think of itself as a heroic lone protagonist in a cosmic war against 'evil,' and reconcile itself to a less spectacular and more humdrum role: that of the leading participant in a flawed but still indispensable system of co-operative global governance.¹¹

Fifth, we must confront the possibility that we will not win the war on terrorism because we, along with the rest of the international community, are unable to transform our ideas. That is, we must consider the question: if winning the war against terrorism is simply not losing, what constitutes losing? I submit that we will have lost if the United States loses its strategic hegemony and its legal legitimacy as the foremost leader of the West. This could happen in three different contexts:

(1) The U.S. might lose the war within the United States itself if it was forced to resort to martial law for an extended period. Nothing is more urgent than for the Congress to stockpile laws as assiduously as the Pentagon is stockpiling vaccines. For example, I am serving on a commission on the "continuity of government" — a euphemism for what to do if mass deaths of senior officials occur. One element of this has to do with the reconstitution of the House of Representatives if it is successfully attacked. The U.S. Constitution provides that the House must have a quorum of half its members in order to conduct business. If a member of the House dies, he or she can only be replaced by an election (in contrast to the Senate, which can be temporarily reconstituted by gubernatorial appointment). That means that if half of the

House members were killed or incapacitated, the United States couldn't even declare war on the state that attacked it. If this seems far-fetched, then recall the fact that the fourth hijacked plane of September 11 was, we now believe, headed for the Capitol before it was commandeered by incredibly courageous passengers. Had it reached the terrorists' intended destination, it would have arrived just after a roll call vote in the House of Representatives, with incalculable consequences. Nevertheless, for perhaps the same reasons that people hesitate to make out a will, the Congress has been unwilling to address this issue. The excuse given is that the House wishes to preserve its role as an elected body. How idle this sounds when we realize that the alternative to correcting this problem is not a rump Congress but martial law, the very opposite of representative government.

(2) The war could be said to be lost if we were compelled to revert to multipolarity in the strategic environment. In some capitals, perhaps Paris, to take a random example, the wish for multipolarity is linked to the daydream of a European empire rich and influential enough to pose alternatives to the world community that, whatever the content, are not American. In the strategic environment, this means a competition for adherents in other parts of the globe, as the French sought when they lined up opposition to the U.S.-U.K. resolutions about Iraq in the U.N. Security Council. It means an enormous expenditure of wealth on the technology of the 21st century that ought to be deployed for the common defense of the West. With respect to terrorism, it means a divided alliance in which terrorists can negotiate safe passage and clandestine arms in exchange for becoming the clients of the great opposing poles. It means, finally, a return to the era when giant behemoths confronted each other with lethal weapons.

(3) Or the war on terrorism could be lost if, in the chaos of failed nation-states or the fog of virtual market states, the proliferation of weapons of mass destruction reached a critical point beyond which they could not be re-cabined. This has happened, one fears, with respect to handguns in the United States. There is no reason it could not happen with respect to biotoxins or nuclear isotopes in the world at large.

My own view is that much important work remains to be done on the question of losing the war on terrorism. I particularly think that the

use of global scenarios—a technique pioneered by Royal Dutch Shell and eloquently recommended by Joseph Nye when he was head of the National Intelligence Council—is an appropriate but at present underutilized means of anticipating such failures and coping with, or even preventing, them.

VIII.

Our current ways of understanding terrorism render the problem practically insoluble. The United States still tends to separate strategy and law so that the strategists are either ignoring the need for new international laws or busily ripping up the domestic ones, while the lawyers are denouncing the strategic effort as an excuse for creating a more intrusive and aggressive state. To make matters worse, both the United States and the other Great Powers insist on importing into the emerging world of market states the understandings that were successful in the old world of nation-states.

Osama bin Laden may have risen to prominence in the nation-state conflict in Afghanistan between communism and parliamentarianism, but Al-Qaida, despite its occasional flickers of interest in nation-state conflicts, is something quite different. Until we recognize this difference, we will have difficulty not only in stopping the terrorist campaign, but also in rallying domestic and international support for our efforts.

My arguments go back to a fundamental analysis of the relationships between strategy and law and between history and legitimacy. I close with the increasingly urgent exhortation that the United States undertake the organization of coalitions to defeat terrorism and intervene in humanitarian crises, articulating a collective vision of the future that its allies can support and have a hand in creating—before it's too late. ●

Notes

1. See, for example, Mark Tushnet, *The New Constitutional Order* (Princeton: Princeton University Press, 2003).
2. Philip Bobbitt, *The Shield of Achilles: War, Peace, and the Course of History* (New York: Knopf, 2002). See also Archbishop of Canterbury, "The Richard Dimbleby Lecture," Westminster School, London (19 December 2002), and Prime Minister Ranil Wickremesinghe of Sri Lanka, "Millennium Lecture — 2003," The Hindu Media Resource Centre for Sustainable Development, M.S. Swaminathan Research Foundation, Chennai (23 August 2003).

3. Francis Fukuyama, *The End of History and the Last Man* (New York: Avon, 1993).
4. Samuel P. Huntington, *The Clash of Civilizations and the Remaking of World Order* (New York: Simon & Schuster, 1998).
5. Thomas L. Friedman, *The Lexus and the Olive Tree: Understanding Globalization* (New York: Anchor, 2000).
6. See Philip Bobbitt, *The Shield of Achilles: War, Peace, and the Course of History*.
7. Frank Gardner, "Al-Qaeda Adapts to Survive," BBC News (11 July 2003).
8. See, for example, the National Security Act of 1947 (Pub. L. No. 80-253, §102, 61 Stat. 495, 498 (1947)), and *Weissman v. CIA*, which make specific provisions forbidding the CIA to investigate persons within the U.S.
9. R. W. Apple, "Power: As the 'American Century' Extends its Run," *New York Times* (1 January 2000).
10. Center for Cooperative Research. See website: <http://www.cooperativeresearch.org/wot/default.html>.
11. Sir Michael Howard, "Smoke on the Horizon," *Financial Times* (7 September 2002).