# Rethinking international law

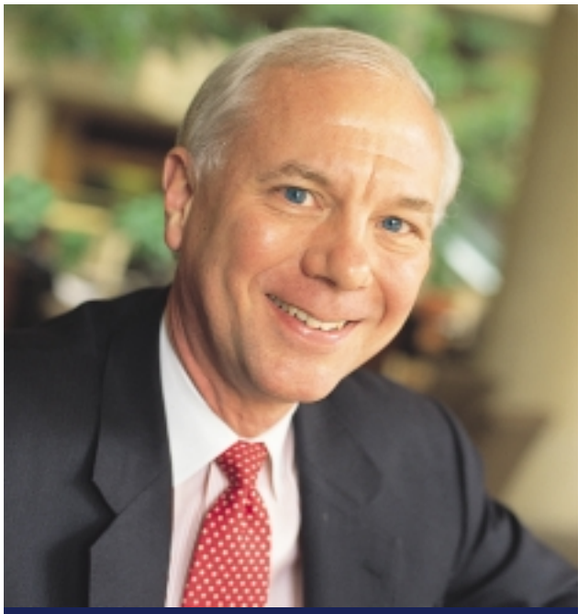
International terrorism now appears to pose risks of previously unthinkable magnitude. While civilised nations must resist resorting to lawlessness, nevertheless, argues David Rowe, the accepted rules of engagement, as reflected in international law, need to change

As an American baby boomer, I told my children that the events of September 11, 2001 were their generation's 'Kennedy assassination', and now my generation has two such awful days frozen in our memories.

Sudden, horrific acts of violence are a sad blight on the human condition, but for the US at least, until now, the impact of such acts has been localised and the number of people affected relatively limited. To be sure, the situation is far different in Israel or Sri Lanka, where residents have lived under the threat of random violence year after year. For most of the industrial world, however, despite the Aum Shinrikyo in Japan, the ETA in Spain or the IRA in Britain, terrorism has been of sufficiently limited scope to be viewed as a law enforcement problem, not a military problem. It is this very presumption that the events of September 11 call into question.

Serious and thoughtful voices, including the UK's Terry Waite, who was held hostage himself while trying to negotiate in the Middle East, continue to call for bringing the criminals to justice before a court of law. A growing body of opinion, however, including an overwhelming majority of Americans, believe that a military response is both necessary and justified. This view is reinforced by the unprecedented degree of organisation and international reach required to carry out the attacks in New York and Washington.

Clearly, all civilised nations are entering a dangerous time. This is true in the obvious sense that further terrorist attacks represent a continuing threat. The more subtle danger is that we undermine our attachment to the very norms that define a 'civilised nation'. Many of these norms are reflected in what we know as international law. Therein, however, we confront the central quandary of our situation. Dating back less than 150 years, international law is a continuing attempt to define mutually respected conventions of conduct between sovereign nations and certain other recognised types of entities. It includes what are now well-recognised norms such as the obligation to protect surrendering combatants from further violence, the humane treatment of prisoners and avoidance of indiscriminate violence without regard to civilian casualties.



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### The nature of the enemy

The difficulty is that the kind of entity represented by Osama bin Laden and his al-Qaida organisation is not covered by the current provisions of international law. It is neither a 'state' with territorial dominion, nor a people recognised as a 'nation'. It is also not a recognised 'belligerent', such as one side in a civil war, or an 'insurgency' within the meaning of international law. Rather, we have one or more groups of non-state actors, based abroad, possibly in several countries, launching an attack against a state.

Without a formal declaration of war, even infringement of the territorial integrity of another state in pursuit of a known perpetrator is a murky area, although the recognised right of self-defence lends some legal support for such action. A broadly accepted definition of aggression formulated in 1974 by the International Law Commission and the UN General Assembly includes military attacks, sending armed mercenaries against another state, and allowing one's territory to be used for perpetrating an act of aggression against another state. Thus, ironically, the US may well have a basis in international law for a state of war with the government of Afghanistan, although not with Osama bin Laden and his organisation. In short, the current situation simply does not fit the model that international law provides.

Clearly a careful rethinking of international law is in order. To cite just one example, according to a recent version of the Draft Articles on State Responsibility of the UN International Law Commission: "The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct." It is far from clear that this test has been met in the current situation relative to the government of Afghanistan. Some international law advocates, however, call for lowering the threshold for holding states accountable to "the wilful failure to prevent violations by non-state actors". In light of recent events, this strikes me as a minimal necessary revision.

In combating global terrorism, it is important that the civilised world adhere to widely accepted rules of international law and conduct. This is not just a normative moral issue. From a risk standpoint, such adherence enhances predictability and narrows the range of uncertainty. In the current crisis, political leaders are working as best they can to formulate responses that are both effective and proportionate. As currently constituted, international law provides very limited guidance to them or to the general public. Prudent revisions of the accepted rules of engagement will reduce the amount of systemic risk surrounding similar situations that occur in the future, and should be supported by risk managers as an important public policy priority. ■