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**Law, Language and Terror: Policemen or Soldiers?
The Dangers of Misunderstanding the Threat to
America (Commentary on 9-11)**

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Policemen or soldiers: The dangers of misunderstanding the threat to America.

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TLS Commentary on September 11

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Last week, nine months after his inauguration, George W. Bush irrevocably became President of the United States. No matter what one thought of the election fiascos, the first political consequence of last Tuesday's attack on the United States was an understanding that there was indeed a structure of authority behind which Americans would unite. America, in a crisis of the first order, was peculiarly in the hands of the President and his administration, and it no longer mattered how they had got there, but simply that they were there.

Yet Bush's brief speech on Tuesday night inspired few. The nation seized on the only substantive remark in the address - the announcement that the United States would not distinguish between the terrorists who committed the attack and those countries which harboured them - and wondered what it meant. The speech, along with follow-on statements from senior administration officials, waffled unconvincingly between the two principal conceptual frameworks of response: on the one hand, going to war, overtly, covertly, or both; and on the other, pursuing criminals, under US domestic law, international law, or both. Still more disturbingly, administration statements sometimes seemed to suggest that the administration did not comprehend that there might be a difference between them.

It had all the hallmarks, in other words, of the anti-terrorism strategy that the Clinton administration had followed for nearly a decade, so evidently in ruins, yet without even the evanescent but still momentarily consoling Clintonian sharing of our pain. Tuesday night's speech could have been a moment for Lincolnian rhetoric, for "treading the grapes of wrath", and the imminence of a "terrible swift sword". It could have been a time for the clarity of de Gaulle, who understood that the world is not the same as a domestic legal jurisdiction and that the remit even of lawyers and judges, subpoenas and indictments, arrests and convictions, must somewhere come to an end, to be replaced by something else. But Bush's Tuesday speech neither moved us nor clarified the situation.

Friday, September 14, marked by the speech he delivered at the conclusion of services for the dead and missing in Washington's National Cathedral, was the day that Bush finally assumed the mantle of the Presidency. As a religious service, it was conspicuously traditional in its scriptures, homilies and hymns.

Bush's message was straightforward: mourn the dead, pray for the survival and rescue of the living, and be steadfast in carrying war to the enemy. It contained, fittingly, an oblique echo of Lincoln and the Second Inaugural Address, in which Bush warned that America had neither sought nor begun this conflict, but that it was now liable to finish it, "in a way and an hour of our choosing". The service concluded (as also heard in the service at St Paul's in London) with the Civil War marching song, "The Battle Hymn of the Republic" - a song whose bellicose nationalism and religiosity (despite its impeccable anti-slavery credentials) would, just a few days before, have been considered in strikingly poor taste by America's fashionably supranationalist elites. The language of just war had, for the moment, prevailed over its rivals.

But what, precisely, are its rivals? Given the religious origins of just-war doctrines, it was perhaps appropriate to hear attempts to articulate an alternative religious view at the prayer service I attended with my family at the United Methodist Church's Washington DC headquarters, the same day as the National Cathedral service. Rather than "The Battle Hymn of the Republic", the Methodist service ended with a young child singing a verse of "We Shall Overcome", with the words "we shall live in peace".

The preachers struggled mightily to distance themselves from naive pacifism, while at the same time they proclaimed a vision of peace that was frankly eschatological - a peace for the end of time, a reign of peace for the city of God - the connection of which to the present situation was less than apparent.

It was clear just how far America's mainstream religious denominations have strayed (principally in pursuing the anti-nuclear campaigns of the 1980s) from traditional Christian concepts of just war and *tranquillitas ordinis*, the maintenance of a just and ordered political society, within which the people of God might pursue their salvation in fear and trembling, but without pretending that the fact of an ordered society constitutes the eschatological peace of the end of time. *Tranquillitas ordinis*, as conservative Catholic writers such as George Weigel have noted, recognizes not merely the powers of Caesar but, within limits, his legitimacy. Preaching instead the peace of the end of days gives the Church a permanently transcendental place from which to criticize the temporal order. This has certain uses, but is liable to become utopian pacifism or quietism, the pursuit of individual, inner peace.

Pacifism is a coherent theological and moral position, but the preachers at the Friday night service I attended seemed to want it both ways, to maintain the moral purity of pacifism while still sounding relevant to the real world of conflict,

sin and death. They recognized the inevitability of armed retaliation, but elided the question of its legitimacy. They thus deprived themselves, it seemed to me, of the rich moral frameworks that Christianity, Judaism and indeed Islam have developed over millennia, frameworks which simultaneously authorize but also morally limit armed force.

Inevitably the preachers reached, as in other churches across the land, for the words of Isaiah 2: 4, "they shall beat their swords into ploughshares, and their spears into pruninghooks: nation shall not lift up sword against nation, neither shall they learn war any more." It is curious how infrequently this exemplar of eschatological peace is connected with the conditions which the prophet specifies for it to come about: "And it shall come to pass in the last days, that the mountain of the Lord's house shall be established in the top of the mountains, and shall be exalted above the hills; and all nations shall flow unto it. And many people shall go and say, Come ye, and let us go up to the mountain of the Lord . . . For out of Zion shall go forth the law, and the word of the Lord from Jerusalem."

The conditions of eschatological peace, in other words, are the establishment of a world order: a place to which all nations shall flow, and out of which shall come the law. Today, secular elites have embraced their own version of eschatological peace. It relies on the premiss of world governance, a structure of law that will bind all nations and peoples, and so finally establish peace. In the world today, the dream of Isaiah has been embraced by international lawyers.

In the immediate wake of the attacks, these voices were muted. They have begun to re-emerge, however, arguing that international law provides a framework for response that the United States is morally and legally obliged to follow. The essence of the international-law framework as a basis for a response to attack is articulated by a professor from Harvard Law School, Ann-Marie Slaughter, in the Washington Post (August 16). Asserting the commonly held view of professors of international law, she says, quoting the UN Charter, that "In the case of an act of aggression (a condition easily met in this situation), the Security Council must authorize an armed response by one or many nations. States retain their right of self-defense, particularly in response to an armed attack, but only 'until the Security Council has taken measures necessary to maintain international peace and security'." The reading that Professor Slaughter here gives the Charter emphasizes that, even in response to aggression, the Security Council "must" be the party to authorize an armed response. Self-defence is seen as a short-lived right to self-protection until the Security Council shall have taken matters in hand.

This is not, to say the least, the understanding that the United States has taken of the UN Charter. It is also strangely at odds with the view that many of these same international lawyers took on the Kosovo war - a US and Nato military action which could not conceivably be characterized as "self-defense" under the

strictures Ann-Marie Slaughter imputes here, and one which was never authorized by the Security Council. These experts remained silent on the violation of international law in the Kosovo conflict, apparently believing that, in this special case, international law had to give way to European and American moral sensibilities. Why, one may wonder, in that case, but not in this? Professor Slaughter is careful to add that, if the US cannot get Security Council approval, it must "at least turn to Nato", for moral, if not legal, approval of US action. But this position is at odds with international law itself; Nato, however much its members may regard it as a specially privileged moral organ of the world, is legally merely a body of collective security, with no special standing in international law that could substitute for the Security Council.

In current circumstances, when, for reasons of their own, Russia, China and France as Security Council members have all given assent (for the moment) to US action, it may be a temptation for the Bush administration to accede to this process of seeking to legitimize its actions under the international law professoriat's view of international law, especially given the administration's evident desire to re-create the original Gulf War coalition.

This would be, however, a mistake of a grave order. In seeking to satisfy the inflated expectations of international law as seen by those international elites (whose principal desire is to expand the brief of international law itself), the US would bury itself - in procedural arguments, fruitless attempts at consensus, vetoes from militarily irrelevant but morally preachy states, and endless consultations rather than action - as surely as the Soviets buried themselves, for other reasons, in Afghanistan.

The coalition that George Bush Snr created for the Gulf War cannot be re-created for the present struggle. Although, in the Gulf War, the principle of territorial sovereignty was endorsed by all parties, the principals today will very shortly fall out over how to define terrorism. In the Gulf War, moreover, there was a clear path to victory, even if it might require considerable blood and treasure; no one can see a clear endgame to terrorism.

No one can doubt the importance of the assistance other countries can give in intelligence gathering, overflight permissions, arrests and detentions, shutting down of terrorist financing, and so on. Yet France is already moving away from any open-ended endorsement of US military action, Russia has already ruled itself out as a staging area against Afghanistan, and retreats by other countries will soon follow. The coalition that Secretary of State Colin Powell seeks will be built on an unstable combination of countries that will join for some kind of often oblique quid pro quo. Europe will press for the US to soften its stand against the International Criminal Court (ICC), which heretofore the US has rejected outright. A certain pressure is likely to build on the US, not to join - nothing so direct - but instead to accept that the ICC is the logical tribunal to hear cases against captured terrorists, rather than US courts. The United States, however, should

not feel obliged to thank its friends by giving up its own core moral commitments, should not allow itself to be held hostage to an unstable multilateralism.

Second, Europe is likely to join a coalition in return for the privilege of restraining the US from actions that it might otherwise take.

European countries will see their role in a coalition - quite sincerely, to be sure, and drawing from their own considerable experience in dealing with terrorism - as that of impeding the US from more impetuous action; the same restraining role, in other words, which prevented the first Bush administration from completing the job it ought to have done to bring down the Baghdad regime in the Gulf War.

The argument for restraint has practical merits which must seriously be weighed by the US. What exactly does the US plan to attack that is worth the trouble, including collateral damage to non-combatants? Is there any worthwhile target that can be achieved by military forces? What might be the unintended consequences? (After all, Osama bin Laden himself is partly an unintended by-product of America's proxy war against the Soviets in Afghanistan.) A healthy scepticism about what military action can accomplish is an invaluable part of military planning. For the international lawyers, however, for whom the most important part of the exercise is not to attack terrorism but instead to use the crisis as a way to build their quasi-religious venture in international governance, the argument for restraint will be built around the concept, found in both just war theory and international law of armed conflict, of "proportionality".

Proportionality is indubitably a crucial moral factor in conducting just war; the question, however, is "proportionate to what?" It appears that over 5,000 people will have perished in the attacks on New York and Washington. Does that suggest a yardstick of innocent civilian casualties that could result from US action as a "proportionate" response?

It cannot, however, because the US response should seek to minimize any innocent civilian casualties, since in fighting the just war, noncombatant civilians may not be a target. The appropriate measure, the one ignored by the Gulf War coalition in failing to destroy Saddam Hussein's military machine and bring down his regime, is not the damage caused by the original attack, but the magnitude of the threat posed. It is this that justifies the level of response -even if, seen in relation merely to the actual number of people killed in the attack, or the damage to property caused, the response seems somehow "disproportionate".

It is true that the United States, if it is to conduct just war and not merely war against these terrorists and their supporters, must adhere to the rules as laid down in such bodies of law as the Geneva Conventions. It should, however, be these laws as traditionally interpreted by the United States, and not as expansively reinterpreted by international tribunals and self-appointed human rights NGO referees. Those rules do not require, as Ann-Marie Slaughter

surprisingly says they do, that we "fight soldiers rather than civilians"; they require, rather, that in fighting whoever fights us, whether soldiers, terrorists or otherwise, we do not aim at noncombatants and that we minimize collateral damage to non-combatant civilians and their property, consistent with imminent and specific military necessity. The difference is fundamental. Professor Slaughter says that the "coordinated planning and militaristic actions lend the status of soldiers". This is not the case. As a matter of black-letter international law of war, these terrorists do not meet the definition of soldiers entitled, for example, to the protections of the Third Geneva Convention regarding prisoners of war. The terrorists benefit from no privilege as soldiers under the laws of war, because, as their declared, actual and systematic method of warfare, they deliberately and knowingly targeted civilians and civilian objects. They are therefore, legally speaking, "unprivileged combatants" - to be fought on military terms with respect to non-combatants in their midst, but if captured treated as criminals.

What Professor Slaughter urges, along with others such as Michael Ignatieff (Financial Times, September 13), is not an ethics of warfare at all. It is that the United States abandon both its rhetoric and preparations for war, and instead approach the problem of terrorism with a combination of international criminal law and the criminal laws of the United States and other countries. But the international criminal law to which Professor Slaughter refers - various treaties on terrorism, hijackings and hostage taking - has been less than conspicuously successful in combating terrorism. And it is, frankly, hard to take seriously her invocation of UN General Assembly resolutions on the subject. These efforts are bound to founder, because there is no general agreement on what constitutes terrorism - and, given the profound differences among peoples and their perceptions of the rightness of differing causes, there will not be one any time soon.

Likewise, it is hard to agree with Ignatieff that the "most effective response may not be the instant vengeance of a cruise missile but concerted international police work that leads to arrest, extradition, trials and imprisonment of the perpetrators". It is surely clear that the past decade of concerted international police work has not worked. While no one would disagree that there is a sizeable role for such police work, it cannot be effective so long as terrorist groups have safe havens in particular states. The solution to this problem, at least at this point, can only be military force or its credible threat. The Bush administration clearly has no interest in Clinton-style cruise-missile attacks aimed cynically at CNN coverage with little follow-up and ultimately nothing to show for them. A measure of American seriousness will be the degree to which the administration can resist domestic pressure for quick strikes in favour of the months of intensive planning that sustained operations will require.

The only thing recommending the purely criminal-law strategy urged by Ignatieff has been, up to now, that it did not arouse the passions of Arab populations. This

was not, however, because these populations thought the criminal-law procedures and court trials of Western democracies were somehow more legitimate or just than military action, or covert military action. It was because such reliance on criminal law alone has been, as we now know, ineffective. Quiet, unspectacular police work unfortunately failed to prevent the emergence of a cadre of suicidalists of far greater sophistication and dedication than ever seen before.

Because, in these circumstances, confronting terrorism requires both police work and military action, it is vital that the US be prepared to distinguish sharply between the two, at the levels of both metaphor and action. Ever since the confrontation between the first Bush administration and Manuel Noriega in Panama, in the late 1980s, American military excursions have been characterized by an unfortunate mixing of the metaphors of police work with war. The characteristic act of war-making in recent years has been, not a concerted campaign to destroy an enemy's will and ability to resist through its armed forces, but instead the formation of a military posse, sent abroad to arrest some bad guy. Thus the first Bush administration sent a posse to arrest Noriega, under a US indictment; Gulf War propaganda presented the war as a mission to dispossess the bad guy of his ill-gotten gains; in Somalia, US Rangers went to arrest Mohammed Aideed under a warrant issued by the Security Council, with horrific results; in Haiti, US forces entered to exercise police powers, albeit without a particular person to arrest; in Bosnia and Kosovo, action was conceived as stopping the crimes of Slobodan Milosevic; and in the wake of the current attack on the US, military action is conceived of as a posse to hunt down the terrorists, whether bin Laden or others.

Sometimes, the contemplated military action is literally police work, that is, arresting someone; sometimes the rhetoric is designed to assure Western public opinion that their forces are engaged "merely" in police actions, as though this was somehow less dangerous and more legitimate than making war.

But the differences between what police do in maintaining order and soldiers do in making war, no matter what the euphemism, is considerable. First, there is the difference in firepower. Police are armed with relatively light weapons, for the simple reason that maintaining public order cannot rest for very long on firepower alone but must rest on the legitimacy of that public order and its police forces. Military firepower, by contrast, exists to destroy military forces, in which the greater the ability to concentrate firepower, the better. A city cannot be policed with tanks and mortars.

Second, while the fundamental task of the military is to destroy forces, the fundamental task of a police force is to stop criminal behaviour and apprehend (literally to catch) and arrest (literally to stop) perpetrators.

Only that level of force is permitted to police. The critical moral difference between police and soldiers is in this area of the permissibility of collateral damage and injury to the innocent. Police have restricted firepower principally because of the risks to uninvolved bystanders and because the person they seek to apprehend may in fact be innocent. In military operations, however, we accept morally the possibility of at least some collateral damage, provided that the military necessity is great enough.

When a war-making operation, conducted by the military, is given the euphemism of "police action", there is a tendency to overlook collateral damage, because it is naturally assumed that it has the cleanliness of idealized police arrests, whereas in fact it may, for example, constitute a full-scale assault on a city. Conversely, when activities conducted by police are assigned war-making metaphors, it is a signal that its commanders have relaxed the normally strict police rules on dealing death and destruction. Confusing the two can also lead to the mistaken underuse of force in some circumstances and its overuse in others. In pursuing Noriega, for example, US forces, acting as what they imagined were police, criminally shot up a couple of neighbourhoods in Panama City with 50 mm machine guns, on misleading tips that Noriega was hiding out in the area. In the Gulf War, the operation failed to destroy the forces that then massacred the Kurds and the inhabitants of the southern Marshes. This was a foolish underuse of force. The aftermath of that under-use of force against purely military targets, however, has led to a morally dubious overuse of force in sanctions that fundamentally hurt ordinary Iraqis.

Simultaneous war and police operations against terrorism have another risk.

As Michael Ignatieff is correct to point out, justifications of war may sweep aside civil liberties, both for ordinary Americans as well as for those suspected of terrorist connections. Although politicians of all stripes are being careful now not to demonize, for example, Arab Americans or followers of Islam as such, such restraint may not last, or may not make any real difference in how they are treated by police; moreover, there is already serious and disturbing talk of domestic security measures such as surveillance of the Internet or national identity cards that represent a significant erosion of civil liberties of Americans. These are liberties that, once lost, are not easily recovered.

The Bush administration is obliged, morally and practically, to prepare to make war. Police work has simply proved itself insufficient, premised as it is on wishful thinking, on the dream of the world as a unitary domestic society under a gradually emerging global political order. If the administration makes war, it must do so according to its constitutional pact with its own people and its own political community. If friends and allies will join it, so much the better; and if their counsel is good, including arguments of restraint, it should take it. Yet, however much the United States might seek to resurrect multilateral coalitions of the past or to create new ones for the future, it must not allow the present crisis to hold it

hostage to an alien concept of international governance and overreaching concepts of international law.

In peace or war, alone or not, supported or unsupported, America will have to abide by its own counsel and go where it must. It is therefore a time for soldiers to sing "The Battle Hymn of the Republic", rather than for children to sing "we shall live in peace", however much one might wish it otherwise.

The peace of the city of God is not today within our grasp, and yet the peace of tranquillitas ordinis just might be - at least the promise of enough ordinary peace to rebuild and hold to that which was destroyed, and say to our children in years to come: yes, here died many innocent men and women; but behold, look around you, si monumentum requiris circumspice.

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