

Modern Geopolitics and Security

Strategies for Unwinnable Conflicts

Amos N. Guiora

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CONTENTS

Acknowledgments	vii
Introduction	ix
About the Author	xv
1 Background and Definitions	I
2 International Security and Diplomacy	17
Geopolitics	17
International Security	20
Threats: Local, Regional, and Global	22
Diplomacy	28
Issues to Consider	31
3 Self-Defense, Humanitarian Intervention, Leadership, and International Cooperation	37
Introduction	37
Self-Defense	41
The <i>Caroline</i> Doctrine	42
UN Charter: Article 51	43
UN Security Council Resolutions Post-9/11	46
Leadership	48
Comparative International Cooperation	50
European Union	50
Threat Assessment	52
Intervention	52
Law of Humanitarian Intervention	56
4 Negotiating Agreements: Security and Understanding the “Other”	61
A Short History	62
The Agreement	63
Implementing the Agreement: Lessons Learned	64
Assume Neither Side Understands the Other	67

CONTENTS

Negotiators Must Have an Open Line of Real-Time Communication to the Principal Decision Maker	68
Continuity of Participants, a Core Group, Is Essential to Negotiation Success	70
Understand with Whom You Are Truly Negotiating and Their Chain of Command	71
Have Functional Counterparts (e.g., Commanders–Commanders; Lawyers–Lawyers) on Each Side of the Negotiating Table	72
Problem Solving: Develop Mechanisms Both Internally (Within Your Side) and Externally (Between the Sides)	73
Crisis Management: Develop an Agreed-Upon Mechanism and Infrastructure Because Crises Will Occur	75
Sensitivity to Cultural Differences Is Essential	78
Minimize Outside “Noise” in Order to Stay on Course	79
Understand the Costs and Benefits of Third-Party Involvement	80
Conclusion and Final Word	81
5 Sovereignty	83
Self-Defense and the Wild West	96
Pat Garrett and the Death of Billy the Kid	97
The Shootout at the O.K. Corral	98
International Law and Self-Defense	100
6 Containment, Use of Force, and Failed States	105
Containment Policy	108
Role of Modern Technology	118
The Decision-Making Process	119
The Importance of Process	120
Who Are Legitimate Targets?	122
Is the Intelligence Actionable?	123
Is the Response Proportional?	124
The Drone Policy	127
7 Moving Forward: The New World	131
Employment Rates	136
Holland	136

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There are, however, four individuals in particular that I would like to acknowledge. I do so with the recognition that although all faults and errors are mine, this book enormously benefited from their contribution

Professor Holbrook without whose extraordinary collegiality this project would not have come to fruition; my research assistant, Jason Shelton (JD expected, 2014) who provided invaluable assistance throughout the research and writing process; my editor, Mark Listewnik, who was a full participant in this project; and my friend and Dean, Hiram Chodosh who, as always, created an intellectual environment that enormously facilitated scholarship.

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INTRODUCTION

GEOPOLITICS AND INTERNATIONAL SECURITY

This book is a product of professional experiences, academic scholarship, and personal reflection. In many ways my interest in the topic of geopolitics and international security dates back to my childhood when *Foreign Affairs* arrived regularly at my parents' house. Although I was initially drawn by the distinct quality of the page (readers of my generation will recall its unique feel), I found myself increasingly reading the articles. My parents had subscriptions to other magazines (*Newsweek*, *New Yorker*, *Commentary*) and I had the obligatory subscription to *Sports Illustrated*; however, there was something different about *Foreign Affairs*. Whether a direct or indirect result of *Foreign Affairs* is unclear but for as long as I can recall, foreign affairs have captivated me.

My interest in foreign affairs became professionally relevant when I was assigned to the Middle East desk while working in the office of U.S. Congressman Howard Wolpe (D-Michigan). I never pursued a career directly related to foreign affairs, however, various postings during the nineteen years I served in the Israel Defense Forces were directly related to foreign affairs and geopolitics. Two experiences in particular are an important background to this book: the five years (1994–1999) I was directly involved in on-the-ground implementation of the Oslo Peace Process in the Gaza Strip and my direct experience in targeted killing decision making.* Those two experiences formed much of my thought regarding state power, particularly determining its effectiveness and recognizing its limits.

Based on that dilemma—the limits of power—I accepted the suggestion of my friend and colleague, Professor James Holbrook regarding the subtitle for this book. It was neither randomly offered nor chosen for it captures one of the most important dilemmas in contemporary geopolitics. The transformation from traditional war between nation-states to

* While serving as the Legal Advisor to the Gaza Strip (1994–1997).

conflict between nation-states and nonstate actors requires decision makers, policy analysts, military commanders, intelligence officials, jurists, and legislators to answer the question of whether there is a strategy for an unwinnable conflict. The question is both theoretical and practical. It takes on particular urgency given the extraordinary number of conflict points that define the current state of international relations.

As discussed in the pages that follow, the contemporary geopolitical dilemma is enormously complicated and fraught with danger for a number of reasons including:

- The “lack of rules” that largely define the relationship between the nation-state and the nonstate actor
- The number of players with significant weaponry at their disposal who are not a part of the traditional world order
- The economic crises
- Dwindling natural resources
- Profound uncertainty regarding the limits of sovereignty and borders, as traditionally understood, because of the remarkable impact and penetration of the Internet

An essay I wrote previously regarding the 2012 Israeli film, *The Gatekeepers*, highlights two questions: whether there is a strategy for an unwinnable conflict and what the strategic ramifications are regarding the use of force. To that end, the movie addresses the twin tensions that reflect contemporary geopolitics: the use of force in a nontraditional setting and the imperative for negotiated settlement of conflict. In focusing on both, separately and together, the film sets the stage for much of this book’s discussion.

The Israeli movie, *The Gatekeepers*, nominated for an Oscar award earlier this year, serves as extraordinary background for a discussion of critical issues—and not just with respect to the Israel–Palestine conflict. What makes the movie compelling is the direct, unapologetic and reflective manner in which the limits of power are addressed. What makes the movie even more compelling is that six retired heads of the Israeli intelligence agency, the Shin Bet, address the subject. Speaking frankly, without pathos and devoid of undue emotion, the six look directly into the camera to say there is a limit to the effectiveness of power.

Their frankness is particularly noteworthy because all six authorized the use of force against suspected Palestinian terrorists. The second part of their message is that Israel must negotiate directly with the

Palestinians—that the conflict can be resolved only through the pen, not the sword.

The Gatekeepers is particularly relevant to America on two distinct levels: American involvement in Iraq and Afghanistan and the recently released Department of Justice White Paper articulating drone policy, including against U.S. citizens. Both manifest executive power at its zenith, unchecked by Congress or court. Rearticulated: each reflects Justice Jackson's warning in the 1952 Supreme Court case *Youngstown Sheet & Tube vs. Sawyer* regarding the danger posed by an "unfettered executive."

While the movie focuses on the Israeli dilemma regarding resolution of the Israel-Palestinian conflict, it also serves as an invaluable jumping off point for a broader geopolitical discussion. That is, though the direct focus of the movie is local (Israel-Palestine), its subtext (geopolitics) is of equal importance.

The six retired heads of Shin Bet—Avraham Shalom, Ya'kov Pe'ri, Carmi Gillon, Ami Ayalon, Avi Dichter and Yu'val Diskin—speak compellingly and bluntly regarding the limits of state power. The six do not come from the "faint of heart school": all deployed state power in an effort to protect Israeli society against Palestinian terrorism. None are apologetic or engaged in maudlin mea culpas expressing remorse for authorizing tough measures. That is not their message; that is not the import of the film. The significance of the film lies in the willingness of the six retired Shin Bet heads to engage in reflection and offer this conclusion—that force alone cannot not resolve conflict.*

Since joining American academia (2004), my scholarship has addressed issues related to national security, comparative counterterrorism, conflict, extremism (religious and secular), and limits on state power. Although occasionally encouraged by friends and colleagues to reflect on my Oslo-related experiences, I consistently resisted such suggestions. My resistance ultimately met a greater force: Professor Holbrook who repeatedly suggested that such an article would provide an "insider's" insight regarding implementation of a peace agreement, as compared to the drafting of an overarching agreement that others have previously addressed.[†] As is well known, flattery will get you everywhere.

* Guiora, A.N. *The Gatekeepers: Geopolitics and the Limits of Power*. Foreign Policy Research Institute (2013). Accessed May 28, 2013. <http://www.fpri.org/articles/2013/03/gatekeepers-geopolitics-and-limits-power>

[†] Savir, U. *Peace First: A New Model to End War*. San Francisco: Berrett-Koehler, 2008; and Ross, D. and Makovsky, D. *Myths, Illusions, and Peace: Finding a New Direction for America in the Middle East*. New York: Viking, 2009.

My article “Negotiating Implementation of a Peace Agreement: Lessons Learned from Five Years at the Negotiating Table,”^{*} is a direct result of Professor Holbrook’s constant encouragement and conviction that the tale is “worth telling.” In many ways, the article is the impetus for this book. In the course of researching and writing the article I found myself increasingly discussing geopolitics while teaching my comparative counterterrorism course, “Global Perspectives on Counterterrorism.” In that spirit, the more my scholarship reflected comparative analysis, the more relevant geopolitics became. Although unclear which came first, the chicken or the egg, the relationship among geopolitics and extremism, national security, international security, and international law, makes studying geopolitics essential to understanding themes both large and small.

One of this book’s aims is to give the reader a snapshot into the process of negotiating implementation of an agreement. In doing so, I hope to enhance understanding of the relationship between geopolitics and security in the context of the broader question regarding strategy and conflict. The book’s intended audience ranges from students and academics in a variety of forums and stations, to the general public and policy makers. The range of the potential audience reflects the breadth of the book’s themes. A discussion about geopolitics implies a wider discourse touching upon different academic disciplines, including political science, international relations, national security, history, economics, conflict resolution, and international law. No one area of study is more important than another; in that regard, this book is applicable to a number of different academic programs at both the undergraduate and graduate levels, in the United States and worldwide. In that spirit, the text incorporates the following:

- Definitions necessary to establish a baseline
- “Scenarios to Consider” intended to facilitate discussion points
- Maps, for a discussion of geopolitics is predicated on understanding geographical realities
- Personal reflections, particularly regarding my experience in negotiating implementation of the Oslo Peace Process
- Analysis of a wide range of issues relevant to understanding geopolitics

^{*} Guiora, A.N. Negotiating implementation of a peace agreement: Lessons learned from five years at the negotiating table. *Cardozo J. Conflict Resolution* 11 (2010): 411–436.

Walter Lippmann was, arguably, the greatest American commentator on the modern world. Like any commentator, his batting average was not 100%; nevertheless, his observations, insights, and reflections were enormously, perhaps inordinately, important in shaping U.S. foreign policy. Henry Kissinger's book *Diplomacy** sheds extraordinary light on foreign relations, diplomacy, and power politics. Although some suggested the book be called *Kissinger on Kissinger*, its importance cannot be dismissed. Kissinger's unique personal and academic experiences significantly contributed to our understanding of diplomacy. Other scholars and practitioners have written books considerably adding to our understanding of geopolitics from both an American and international perspective. Some of these books are referenced in the pages to come.

In undertaking this book I draw on a wide range of sources and experiences. I am not a political scientist nor do I teach international relations, however, my eclectic background will, it is hoped, enable me to address the issues of geopolitics, strategy, and conflict from a unique and new perspective. Although drawing on personal experiences, I rely on the insights, observations, and wisdom of others whose experiences and scholarship are immensely important to understanding the issue at hand.

* Kissinger, H. *Diplomacy*. New York: Simon & Schuster, 1994.

ABOUT THE AUTHOR

Amos N. Guiora is Professor of Law and Co-Director of the Center for Global Justice at the S. J. Quinney College of Law, the University of Utah. Guiora, who teaches Criminal Procedure, International Law, Global Perspectives on Counterterrorism, and Religion and Terrorism, incorporates innovative scenario-based instruction to address national and international security issues and dilemmas.



Guiora is a Member of the American Bar Association's Law and National Security Advisory Committee; a Research Associate at the University of Oxford, Oxford Institute for Ethics, Law and Armed Conflict; a Research Fellow at the International Institute on Counter-Terrorism, The Interdisciplinary Center, Herzlyia, Israel; and a Corresponding Member, The Netherlands School of Human Rights Research, University of Utrecht School of Law.

Professor Guiora has published extensively both in the United States and Europe on issues related to national security, limits of interrogation, religion, and terrorism, and the limits of power, multiculturalism, and human rights. He is the author of *Legitimate Target: A Criteria Based Approach to Targeted Killing*; *Freedom from Religion: Rights and National Security* (first and second editions); *Global Perspectives on Counterterrorism* (first and second editions); *Fundamentals of Counterterrorism*; *Constitutional Limits on Coercive Interrogation*; *Homeland Security: What is it and Where is it Going*; and *Tolerating Intolerance: The Price of Protecting Extremism* (forthcoming, 2013).

Professor Guiora has received grants from both the Stuart Family Foundation and the Earhart Foundation and was awarded a Senior Specialist Fulbright Fellowship for The Netherlands in 2008. He served for nineteen years in the Israel Defense Forces as Lieutenant Colonel (retired), and held a number of senior command positions, including Commander of the IDF School of Military Law and Legal Advisor to the Gaza Strip.

ABOUT THE AUTHOR

Professor Guiora has testified before the U.S. Senate Judiciary Committee, the U.S. House of Representatives Committee on Homeland Security, and the Committee on Foreign Affairs in the Dutch House of Representatives.

Professor Guiora was awarded the S.J. Quinney College of Law Faculty Scholarship Award, 2011.

1

Background and Definitions

This book seeks to examine subjects that, at first blush, are not obviously linked; perhaps, however, the connection is not a wild stretch. After all, geopolitics is the sum total of state actions that affect the international community, whereas international security suggests mechanisms whereby global order is enhanced. Although some might claim, not implausibly, that geopolitics represents the opposite of force and security, a compelling argument can be made that the two are cousins if not blood relatives. Rearticulated: there is a greater link between geopolitics and international security than readily meets the eye, considering one enhances understanding the other.

To wit: international security reflects both national self-interest and geopolitical calculations and considerations. After all, as this book is written, enormous international efforts are being exerted to convince Iranian leaders to back away from a planned nuclear initiative. These efforts reflect a desire to ensure international security through a combination of diplomatic and economic sanctions. Success, defined as convincing the Iranians to step back from their intention without the use of force, reflects a combination of geopolitics and international security.

As history has repeatedly demonstrated, there comes a time when force is necessary to ensure both national survival and international security. In those instances, use of force wins out over geopolitical considerations; under those circumstances, while the cannons roar, muses and diplomacy are relegated to positions of secondary importance. However, even in times of death and destruction, diplomacy, negotiations, long-term security considerations, and geopolitics re-assert their importance.

Therefore, it is imperative to recall that the abeyance of geopolitics, when conflict is at its zenith, is but temporary, and perhaps an illusion. Once the conflict ends security and geopolitical considerations rise to the fore; what is post-conflict diplomacy if not the re-emergence of international security draped in the cloak of geopolitics. In addition, as the film, *The Gatekeepers*, makes crystal clear, the effectiveness of force is limited.

This was made readily apparent when I was tasked with negotiating implementation of the Oslo Peace Process in the Gaza Strip. As discussed at length in Chapter 4, my involvement provided me an invaluable opportunity both directly to participate in and observe complex negotiations seeking to resolve the Israeli–Palestinian conflict. This enabled me to gain significant understanding regarding the realities and limitations of negotiation regarding both tactical and strategic considerations. See Figure 1.1.

That involvement facilitated my appreciation for the powerful tension among geopolitics, conflict, and the use of force. Lessons learned from the Oslo Peace Process are applicable to other conflicts, both large



Figure 1.1. Map of Israel.

and small. Admittedly, each conflict has its unique history, culture, and nuance; nevertheless, sufficient similarities exist to draw parallels and suggest common themes. For that reason, lessons learned from how the Oslo Agreement was implemented in the Gaza Strip provide an effective backdrop to issues this book seeks to address.

Negotiating the implementation of the Oslo Agreement required both deciphering the drafters' intent and applying that decoding to an on-the-ground reality not foremost in the drafters' minds. Although great efforts were made to resolve complicated conundrums, we were saddled with the weight of religion, history, and mutual suspicion regarding motivation and intent. In addition, powerful competing forces were determined to derail the peace process. Those efforts are as important to understanding geopolitics, as are the efforts of those seeking to resolve conflict.

In other words, geopolitics cannot be fully understood without sufficient attention paid to the motivations and actions of those who inflame rather than resolve conflict. The question of motivation was a constant in the negotiations; that query was oftentimes unresolved which had a significant impact on the effectiveness of particular sessions and the negotiation process in general.

As mentioned in the Introduction, Professor Holbrook's terminology correctly reflects the practical reality of managing conflict. In many ways "managing conflict" and "the limits of intervention" could be this book's subtitle. They represent a most compelling confluence of geopolitics and conflict, particularly in determining whether there is a strategy for an unwinnable conflict. The chapters that follow address this question in a multidisciplinary manner, reflecting the reality of geopolitics, which suggests it inhabits many "homes." That has been made very clear to me in the course of researching and writing this book; innumerable conversations with subject matter experts from different countries covering a wide range of disciplines reinforced the broadness of the subject. Focusing on strategy and conflict facilitates addressing the important question regarding the limits of power. Highlighting the limits of power requires recognizing the centrality of a wide range of issues and concerns extending significantly beyond the use of force. These additional issues are of particular relevance given that the effectiveness and utility of force is, ultimately, largely limited.

The geopolitical jigsaw puzzle is, I suggest, inherently more complex than in years past. While not diminishing its previous tensions and dilemmas, significant developments suggest contemporary "crisis points" that highlight profound changes confronting decision makers.

The post-World War II binary world, largely divided between East and West, has been replaced by the increasing emergence of powerful nonstate actors and the decreasing power of nation-states. Rearticulated, the Cold War, dominated by the United States and the Soviet Union, reflected a paradigm that could be described as “my side or the other side.”

Nonaligned countries managed to create a niche for themselves—the former Yugoslavia and Indonesia are primary examples—however, the world map was largely divided into two distinct spheres. The dominance of nation-states was, literally, a given; the strategies of both the United States and the Soviet Union were in the main, mutually understood and respected. Conflict by proxy enabled both countries to advance their respective agendas without direct engagement. The terms mutual assured deterrence, *détente*, and superpowers were the “codex” of the day. Those terms, in large part predicated on mutual recognition of the limits of power and predicated on respect for and wariness of the “other side,” have been replaced by a new glossary reflecting a new reality. Terms appropriate to a rapidly changing world include: nonstate actors, failed states, social media, weakened sovereignty, diminished natural resources, religious extremism, and cyberspace/cyber security.

The plethora of terms reflects the extraordinary challenges confronting national decision makers. Although some concepts are obviously as old as human beings (religious extremism is a prime example), the weakened condition of nation-states accentuates the importance, if not danger, posed by concepts whose importance was previously dwarfed by the unquestioned dominance of the nation-state. That the Westphalian concept of the nation-state has been replaced, as suggested by some, is in my opinion an exaggeration. What is not an exaggeration is the weakening of the nation-state and the rise of significant, “other” forces.

To gainsay both realities and the complexity of their confluence is an “at risk” proposition. In many ways, the convergence of distinct factors highlights the geopolitical dilemmas and conundrums that are the essence of the contemporary world. Perhaps the speed, range, and danger of the information age (highlighted by the Internet, social media, and vulnerability of individuals and national and corporate infrastructure to hacking) exacerbates the complexity of contemporary geopolitics. As Captain Wayne Porter (U.S. Navy) wrote me in response to a PowerPoint presentation that is the “basis” for Chapter 1:

Non-linearity creates complexity through interactive feedback structures...
take each of the perimeter bubbles and consider it a dynamic, behavioral

system in its own right, then consider how that bubble influences and is influenced by each of the other bubbles (systems), and you will begin to glimpse the potential for emergent, complex and adaptive systems . . .*

Captain Porter's insightful commentary highlights the complexity of the interdependence and interconnectedness that is, in many ways, the essence of geopolitics. It cogently and coherently reflects the enormous challenges confronting decision makers. Dramatically affecting the capability of decision makers to address, much less resolve, contemporary geopolitical dilemmas is the weakened condition of the traditional nation-state. Whether that is a positive or negative development is an important question that deserves careful attention; that said, the working assumption of this book is that a fundamental transformation is occurring and that the world of yesterday is neither today's nor tomorrow's.

It is to that end, then, that this book's subtitle takes on particular significance; considering geopolitics in the abstract is neither the intent nor my "wheelhouse." Rather, our focus is on the practical: understanding distinct and disparate forces that comprise contemporary geopolitics as I understand them. I am particularly concerned about what I identify as a lack of strategic thinking in recognizing the limited effectiveness of force. That, however, does not suggest that force is never justified or effective.

That is neither accurate historically nor a reasonable proposition. International law, after all, allows for the nation-state to engage in self-defense subject to restrictions and limitations. Rearticulated, force under certain conditions is justified, legal, and necessary. Nevertheless, the question regarding its efficacy can be neatly summarized as "to what end."

That is why strategic considerations are an essential component of the discussion; perhaps that is, paradoxically, the reason they are largely avoided. To articulate "limits" is to acknowledge their existence; to recognize the limited ability of the nation-state to counter contemporary (and future) threats and weaknesses is, to say the least, politically fraught with danger. To that end, bluster and a determined effort not to engage the public on the "limits" discussion seems to be the default position adopted by national decision makers. That is, I suggest, a remarkably irresponsible and risky approach; the risks of not directly addressing limits is magnified when government leaders place young people in harm's way in what are, often,

* Private email, in author's records.

unwinnable conflicts. In many ways, that is the powerful message of the movie *The Gatekeepers*:

The importance of the movie lies in their willingness to engage in reflection, however complicated, and to recognize—and articulate—that force does not resolve conflict. Both President Bush’s decision to intervene in Iraq and Afghanistan and President Obama’s decision to expand the drone policy reflect the implementation of significant U.S. power. The question is why, and to what end. The larger question is whether the force has long-term significance or is its impact limited to the immediate, here and now. Re-phrased: is state power, as implemented by Bush and Obama, tactical only or is strategic thinking at its core, reflecting profound geopolitical decision-making? *

That question I posed in an op-ed is a dominant theme throughout this book; when presenting on the book in various forums, I have been told, “Okay, you have identified a problem, but you need to propose solutions.” I found myself in agreement with that observation, viewing it as a challenge. As one thoughtful individual noted, “What is your point?”† It is a fair question also asked by one of my colleagues.

My answer is three-fold:

1. To engage in a practical discussion regarding geopolitics
2. To provide specific examples regarding the interaction among geopolitics, strategy, and power
3. To suggest mechanisms whereby strategic thinking can be implemented in the context of the limits of power and dwindling resources

To satisfactorily address these three, the book is divided into the following chapters.

- Chapter 1: Background and Definitions
- Chapter 2: International Security and Diplomacy
- Chapter 3: Self-Defense, Humanitarian Intervention, Leadership, and International Cooperation
- Chapter 4: Negotiating Agreements: Security and Understanding the “Other”
- Chapter 5: Sovereignty

* Guiora, A.N. “The Gatekeepers: Geopolitics and the Limits of Power.” Foreign Policy Research Institute (2013). Accessed May 28, 2013. <http://www.fpri.org/articles/2013/03/gatekeepers-geopolitics-and-limits-power>

† Private email, in author’s records.

- Chapter 6: Containment, Use of Force, and Failed States
- Chapter 7: What Do We Do Now?

This chapter is, admittedly, unusual both in content and format; in advance, I ask the reader's indulgence. To discuss this book's themes most effectively, definitions are essential, and, to that end, this chapter contains an accumulation of terms forming the backbone of the chapters that follow. The intention is not to inundate the reader with definitions; that said, laying the definitional groundwork is imperative to creating a common denominator. The format, best defined as evolving, reflects an innovative approach suggested, and subsequently developed, by my research assistant, Jason Shelton.

To this end—and due to the wide scope of policy tools and dynamic factors that, collectively, encompass the whole of geopolitics—we introduce in this chapter a running diagram of overlapping circles to illustrate the broad spectrum of considerations that can interact with each other to comprise and influence geopolitics. We will introduce circles to the diagram at the beginning of each chapter as well, as we systematically address each of the factors in the pages that follow.

Our intent is creatively to present terms and definitions that represent the concepts necessary for an informed discussion regarding geopolitics. The reader will note that this chapter does not include discussion of the terms; that occurs in the subsequent chapters. Those chapters address issues relevant to discussion focusing on geopolitics, strategy, and conflict. In that sense, Chapters 2 through 6 focus, both directly and indirectly, on those three themes. Chapter 7 is intended to address, perhaps *allay* is a more apt term, concerns raised in the preceding chapters. To that end, it seeks to highlight future trends and developments while providing a proposed roadmap for developing and implementing geopolitical strategy predicated on the themes raised by *The Gatekeepers*. See Figure 1.2.

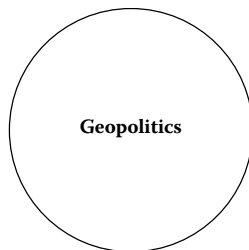


Figure 1.2. Geopolitics.

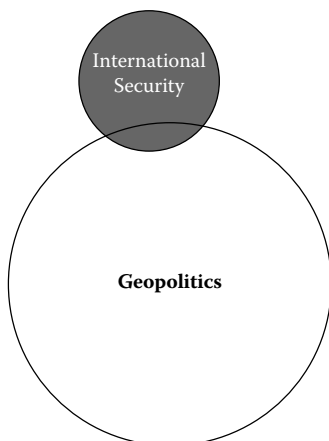


Figure 1.3. International security.

GEOPOLITICS: The relationship between geography and nation-state politics.

Geopolitics takes as its task the disruption of geopolitical discourses: to study not the geography of politics within pre-given or commonsense places, but rather to foreground the politics of the geographical specification of politics. Security and geopolitics function in a dualistic manner. On the one hand, diplomacy and foreign policy are commonly conceived as high-brow issues shrouded in secrecy. On the other hand, and in parallel with this reliance on specialized language, discourse of security and geopolitics draw heavily on commonsense narratives about places and identities. Most geopolitical reasoning is not formal but practical. It draws on common sense rather than esoteric academic and technical arguments.*

INTERNATIONAL SECURITY: Measures, including diplomatic agreements and military action, taken by nation-states, to ensure mutual survival and safety. See Figure 1.3.

These measures include military action and diplomatic agreements such as treaties and conventions. International and national security

* See Kuus, M. *Geopolitics Reframed: Security and Identity in Europe's Eastern Enlargement*. London: Palgrave MacMillan, 2007.

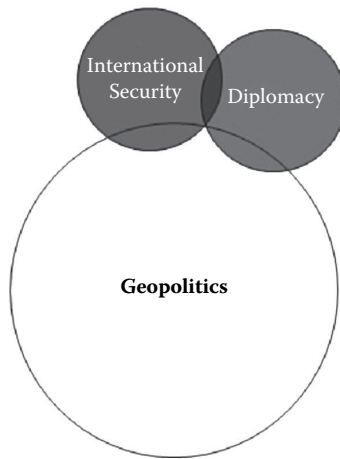


Figure 1.4. Diplomacy.

are invariably linked. International security is national security or state security in the global arena.*

DIPLOMACY: Instrument by which a nation-state attempts to achieve its aims, in relation to those of other nation-states, through dialogue and negotiation. See Figure 1.4.

SELF-DEFENSE: Measures, whether proactive or reactive, of a nation-state to defend and protect its population and territory; its legality is subject to acting in accordance with principles of necessity and proportionality. See Figure 1.5.

INTERVENTION: The actions or activities of a nation-state to involve itself in the domestic affairs of another nation-state, whether that nation-state consents or not. See Figure 1.6.

The following definitions may suffice as an illustration of the various approaches to capturing the meaning of intervention. Lassa Oppenheim explains intervention as “dictatorial interference in the affairs of another state for the purpose of maintaining or altering the actual condition of

* See Buzan, B. and Hansen, L. *The Evolution of International Security Studies*. Cambridge: Cambridge University Press, 2009.

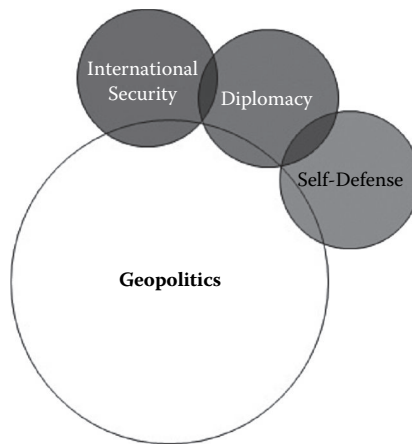


Figure 1.5. Self-defense.

things.” Stanley Hoffman defines intervention as “a move by a state or an international organization to involve itself in the domestic affairs of another state, whether that state consents or not.”[†] Patrick Regan describes intervention as “activities in the internal affairs of a foreign country targeted at the authority structures of the government with the aim of affecting the balance of power between the government and opposition forces.”[‡]

LEADERSHIP: The capacity to define reality, establish and articulate direction, and deliberately influence others to follow that direction. See Figure 1.7.

* See Oppenheim, L.F. and Lauterpacht, H. *International Law, Vol. I. - Peace*. London: Longmans, 1955, in Kirchhoff, L.. *Constructive Interventions: Paradigms, Process and Practice of International Mediation*. Vol. 3 of *Global Trends in Dispute Resolution*. Kluwer Law International, Zuidpoolingel, 2008.

† See Hoffmann, S. Commentary: Beware the Slippery Slope: Notes Towards the Definition of Justifiable Intervention in *Emerging Norms of Justified Intervention*, edited by Reed, I.W. and Kaysen, C. 88–89 at 88. Cambridge: Committee on International Security Studies, American Academy of Arts and Sciences 1993, in Kirchhoff, L. “Constructive Interventions: Paradigms, Process and Practice of International Mediation.” Vol. 3 of *Global Trends in Dispute Resolution*. Kluwer Law International, Zuidpoolingel, 2008.

‡ See Regan, P. M. Choosing to intervene: Outside interventions into internal conflicts as a policy choice. *Journal of Politics* 60 (1998): 754–779, at 756, in Kirchhoff, L. *Constructive Interventions: Paradigms, Process and Practice of International Mediation*. Vol. 3 of *Global Trends in Dispute Resolution*. Zuidpoolingel: Kluwer Law International, 2008.

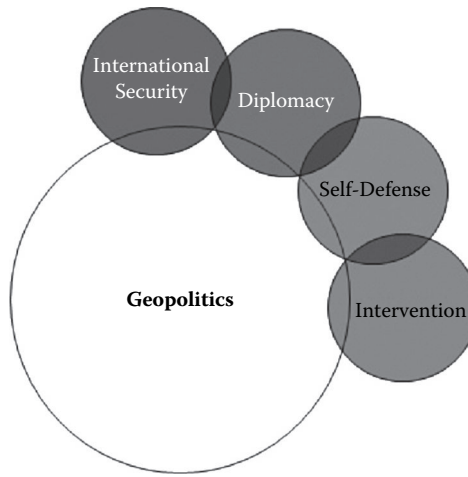


Figure 1.6. Intervention.

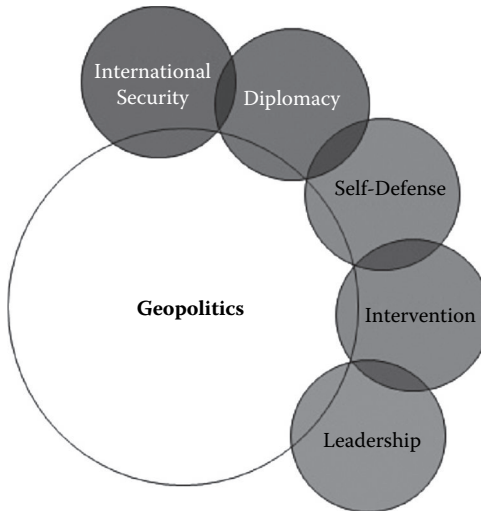


Figure 1.7. Leadership.

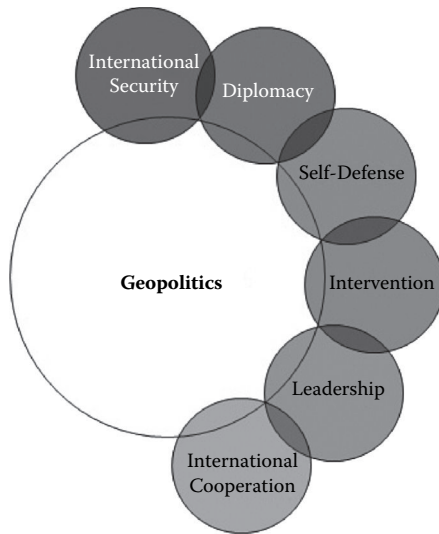


Figure 1.8. International cooperation.

INTERNATIONAL COOPERATION: Interaction of nation-states in the pursuit of a common goal or interest. See Figure 1.8.

NEGOTIATION: The process of engaging in mutual discussion where interests, cooperation, or compromise are articulated with the intent of reaching an understanding and producing an agreement. See Figure 1.9.

SOVEREIGNTY: The supreme power or authority of a nation-state to govern itself or another nation-state. See Figure 1.10.

CONTAINMENT: A foreign policy implemented by a nation state, that seeks to prevent the expansion of power by another nation state, without the use of force while relying on economic and military strength. See Figure 1.11

Kennan explains “Soviet pressure against the free institutions of the Western world is something that can be contained by the adroit and vigilant application of counterforce at a series of constantly shifting geographical

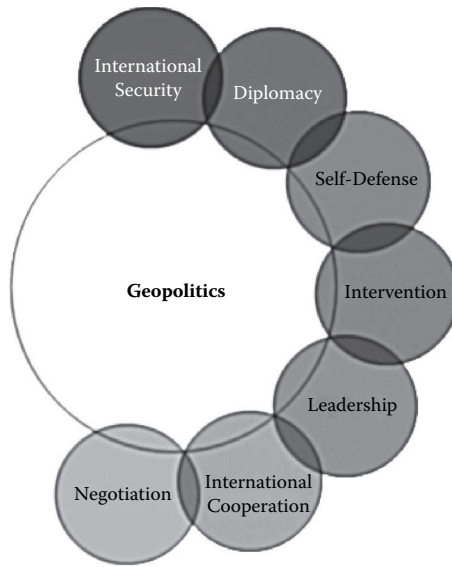


Figure 1.9. Negotiation.

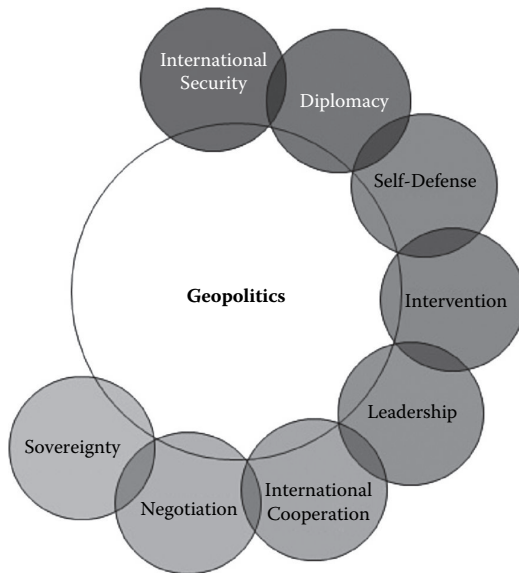


Figure 1.10. Sovereignty.

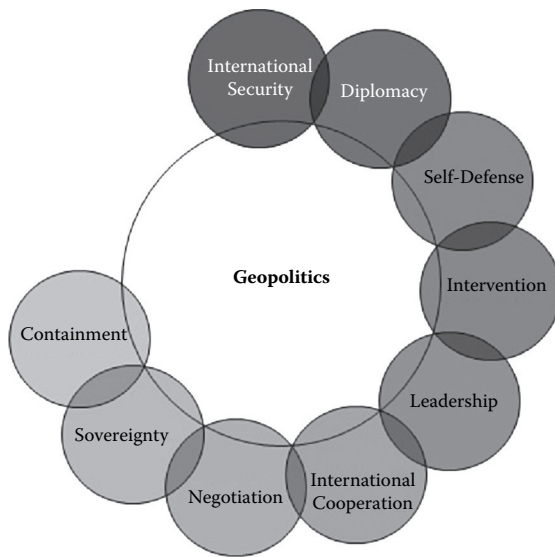


Figure 1.11. Containment.

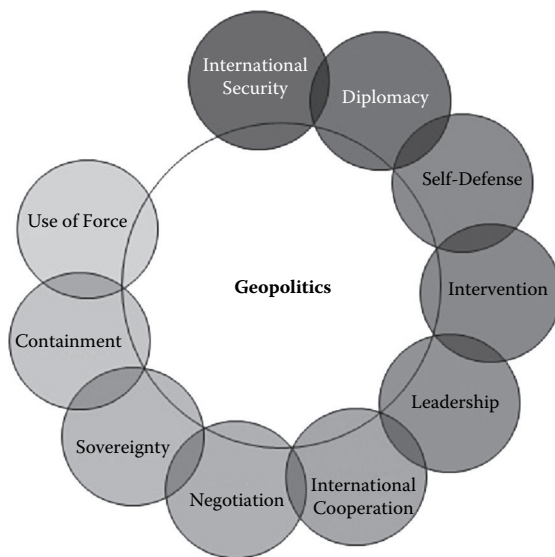


Figure 1.12. Use of force.

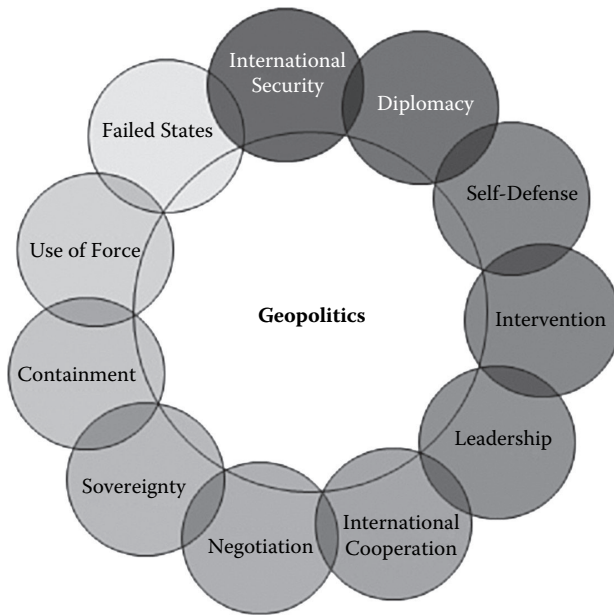


Figure 1.13. Failed states.

and political points, corresponding to the shifts and maneuvers of Soviet policy, but which cannot be charmed or talked out of existence.”*

USE OF FORCE: Armed force or nonmilitary intervention directed at a nation-state or nonstate actor. See Figure 1.12.

FAILED STATES: A nation-state perceived to be ineffective, unable to enforce its laws, thereby provoking instability and eventual collapse of its economy, political institutions, and national security. See Figure 1.13.

* Kennan, G. (published as Mr. X). The sources of Soviet conduct. *Foreign Affairs* (1947), Vol. 25 (July 1947), pp. 566–582.

2

International Security and Diplomacy

GEOPOLITICS

As suggested in previous writings, I am the self-selected president of the Winston Churchill fan club. Careful reading of books that Churchill penned, and those written about him, reflect a leader who instinctively understood both the need for military power and the importance of diplomacy among allies.* In addition, Churchill clearly understood the power of the word, whether written or spoken. The importance of the message and how it is articulated is of great importance in understanding the practical application of geopolitics. See Figure 2.1.

Whether in short speeches, long articles, or brief phrases, Churchill was able to clearly, perhaps more than any other leader, convey a message.†

* See Churchill, W.S. *The River War*. London: Longmans, Green, 1902; and Churchill, W.S. *The Second World War* Vol. 1–6. [Titles comprised of: Vol. 1. *The Gathering Storm* (1948), Vol. 2. *Their Finest Hour* (1949), Vol. 3. *The Grand Alliance* (1950), Vol. 4. *The Hinge of Fate* (1950), Vol. 5. *Closing the Ring* (1951), and Vol. 6. *Triumph and Tragedy* (1953).] London: Cassell, 1948–1954; and Churchill, W.S. *A History of the English-Speaking Peoples* Vol. 1–4. London: Cassell, 1961–1969.

† For an invaluable collection-compendium of his speeches please see: Gilbert, M. *Churchill: The Power of Words*. Boston: Da Capo Press, 2012; and Gilbert, M. *Churchill: A Life*. London: Random House, 2000.

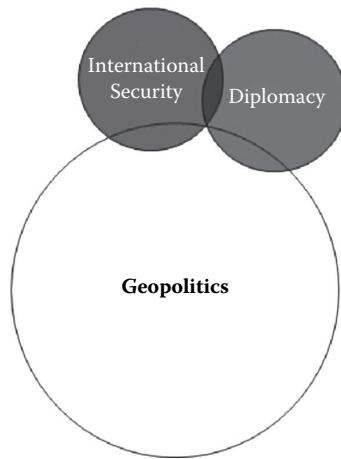


Figure 2.1. International security and diplomacy.

Although some phrases, including “I have nothing to offer but blood, toil, tears and sweat,” and “never in the field of human conflict was so much owed by so many to so few,” are immemorial, it is important to recall that his greatest contribution went beyond these oft-recalled phrases.

With one eye toward domestic politics and the other eye firmly focused on international coalitions and alliances, Churchill’s actions reflect extraordinary understanding of the twin obligations of geopolitics. A national leader, intent on implementing policies sensitive to geopolitical considerations and aspirations, must recall his two audiences: the domestic and the international. Election is in the hands of the former, however, in an age marked by globalization, the latter is, perhaps, of no less importance.

Churchill was defeated in the first postwar election, but his contribution to, and impact on, both the United Kingdom and the world is immeasurable; his genius touched both domestic and international audiences. In doing so, Churchill had three primary goals: (1) create an extraordinary alliance with Roosevelt, (2) defeat Hitler, and (3) limit Stalin’s postwar territorial ambition. Although achieving success on the first two, he was largely unable to implement the third, owing to England’s weakened position and Roosevelt’s debilitated physical condition. Nevertheless, his keen insight and understanding of postwar geopolitics enabled him to understand, far better than Roosevelt, Stalin’s postwar goals. This is in

many ways the manifestation of geopolitics: on the one hand respond to the immediate threat (Hitler/Nazi Germany), while understanding the long-term threat (Stalin/USSR) and seeking to minimize the dangers it potentially possesses.

Churchill's sensitivity to history, language, and symbols was unparalleled. This is of particular relevance to geopolitics; after all, diplomacy is part cajoling, kneading, convincing, and perhaps, manipulating.* In that vein, Churchill's frequent gestures of respect to De Gaulle (with whom he had an uneasy relationship) must be understood in a larger context: to preserve the French–UK alliance in the face of German occupation and the Vichy government's collaboration with Germany.† Whatever Churchill's foreboding regarding France and de Gaulle, the ability to focus on larger issues significantly contributed to the Allied victory. In doing so, Churchill placed supreme value on long-term strategic goals, reflective of sophisticated geopolitics.

This book is not, in any way, a biography of Churchill (I leave that monumental task to others far more qualified‡), but discussing Churchill in the context of geopolitics and international security is *de rigueur*. Other leaders—Wilson, Roosevelt, Nixon, and Gorbachev—have made invaluable contributions to geopolitics and international security. None, however, combined Churchill's remarkable ability to presciently identify future global threats while simultaneously addressing domestic realities, therefore significantly enhancing international security. This, then, is our definition of geopolitics; in doing so, we analyze negotiation and intervention. The two are, in many ways, critical cornerstones of geopolitics.

* For additional reading on this issue, please see: Kissinger, H. *Diplomacy*. New York: Simon & Schuster, 1994.

† For additional reading on this issue please see: Churchill, W.S. *Their Finest Hour: The Second World War Vol. 2*. Boston: Houghton Mifflin, 1948; and Kersaudy, F. *Churchill & De Gaulle*. London: Fontana Press, 1990.

‡ Manchester, W. *The Last Lion: Winston Spencer Churchill: Visions of Glory, 1874–1932*. Boston: Little, Brown, 1983; and Manchester, W. *The Last Lion: Winston Spencer Churchill: Alone, 1932–1940*. Boston: Little, Brown, 1988; and Manchester, W. *The Last Lion: Winston Spencer Churchill: Defender of the Realm, 1940–1965*. Boston: Little, Brown, 2012; and Jenkins, R. *Churchill: A Biography*. New York: Farrar, Straus, Giroux, 2001; and Johnson, P. *Churchill*. New York: Viking, 2009; and Gilbert, M. *Churchill: The Power of Words*. Boston: Da Capo Press, 2012; and Gilbert, Martin. *Churchill: A Life*. New York: Random House, 2000.

INTERNATIONAL SECURITY

In the late stages of World War II, Churchill, Roosevelt, and Stalin created the postwar world; as Churchill correctly predicted, two powerful spheres of influence were created: the United States and the USSR. Those two spheres encouraged, facilitated, and participated in innumerable regional conflicts for over forty years, under the umbrella of the Cold War.* Nonaligned nations, the most powerful being Yugoslavia and Indonesia, sought to carve out a middle ground, often playing east against west. For the most part, accepted norms, conventions, and treaties dictated both conflict and resolution; recognized principles of international law and mutual deterrence were critical safeguards as both the United States and the USSR recognized and respected the limits of power. In other words, the rules of the game were clearly understood by both protagonists in what was often a chess match with pieces and moves understood and familiar.

On the other hand, 9/11 and its aftermath have significantly contributed to a different type of conflict, best characterized as state/nonstate. Nonstate actors (NSA) unlike nation-states are not beholden to international laws and norms. The decision whether to undertake a particular action is not subject to external obligations and restraints imposed on the nation-state in accordance with international law, treaties, and conventions. In other words, a carefully constructed world order, based on recognized principles of sovereignty, limited self-defense, and international law, has given way to a world filled with more uncertainty than certainty.

That is not to suggest that the pre-9/11 world was devoid of conflict, unmarked by excessive use of force and violations of international law. That would be an incorrect assertion. Nevertheless, recognized mechanisms and infrastructures, established in the aftermath of WWII, were largely effective either in preventing conflict or contributing to resolution. However, horrors visited on civilian populations by nation-states, in the years following WWII, must not be gainsaid. Tragically, the international

* A list of proxy wars during the Cold War era: Greek Civil War, 1946–1949; Malaysian Emergency, 1948–1960; Arab–Israeli Conflict, 1948–Present; Korean War, 1950–1953; Suez Crisis, 1956–1957; Cuban Revolution, 1953–1959; 1959 Tibetan uprising, 1959–1973; Laotian Civil War, 1953–1975; Vietnam War, 1957–1975; Guatemalan Civil War, 1960–1996; Congo Crisis, 1960–1965; Bay of Pigs Invasion, 1961; Cuban Missile Crisis, 1962; Angolan Civil War, 1974–2002; Ogaden War, 1977–1978; Afghan–Soviet War, 1979–1989; Iran Hostage Crisis, 1979; Iran–Iraq War, 1980–1988; Invasion of Grenada, 1983; Nicaraguan Civil War, 1979–1990; Salvadoran Civil War, 1980–1992.

community was either unable or unwilling to prevent extraordinary violations of international law. To list the most obvious: Sadaam Hussein's chemical gas attacks on the Kurds, massacres in Africa, horrors in the former Yugoslavia, and unlimited attacks in Syria. These are but examples of nation-states acting in direct contravention to the rule of law and the international community's hesitation at best, unwillingness at worst, to protect the innocent civilian population forcefully in accordance with humanitarian principles and obligations.

The above are important in understanding the complicated relationship among geopolitics, international security, national self-interest, sovereignty, and the limits of intervention. Although massacres of innocent civilians disturb the international community, they do not automatically warrant or justify foreign intervention in a domestic crisis, regardless of the tragedy and extent of human suffering. The decision to intervene, reflecting a rationally based assessment model, must weigh global and domestic considerations, reflecting political realities, military strength, and economic capability.

In addressing geopolitics and international security, attention must be paid to national security. Nation-states are members of international alliances and treaties, guaranteeing mutual obligation in the face of armed attack, however, the ultimate responsibility of national leaders is to protect their own civilian population. Therefore, geopolitics must be examined through the dual lens of broader international security and narrow, country-specific security.

The tension between the two is the result of the obvious dichotomy between national priorities and international obligations. This tension, possibly disconnect, between the two is inevitable; internationalization of conflict does not inherently reflect domestic responsibilities and obligations. Accordingly, national leaders are hard-pressed to justify intervention in conflict when national interest is not readily apparent. Nevertheless, the broader context of geopolitics imposes on national leaders the responsibility to recognize that domestic security is interwoven with international security; to ignore the latter affects the former.

Admittedly, the challenges of convincing the domestic electorate that national resources are required to ensure international security are significant. That challenge is compounded when legitimate concerns are raised regarding national priorities, particularly when national leaders confront economic crises requiring attention and resources. Widespread

recognition exists regarding globalization and its practical application. Nevertheless, two significant factors have recently cast a shadow over its viability and sustainability: the Eurozone crisis and domestic opposition to involvement in Iraq and Afghanistan, particularly in the face of the loss of life among military personnel.* Sensitivity to the economic crisis and the financial and human cost of intervention is essential when examining the practicality of geopolitics; individually and collectively they test the limits of intervention.

Nation-state decision making, reflecting predictability and consistency, significantly enhances global order. However, threats, actual or perceived, dramatically affect regional and global stability. In that vein, assessing how nation-states respond, whether unilaterally, bilaterally, or multilaterally, to particular crisis points is essential to understanding the practical impact of geopolitical considerations.

A critical question is what the particular policies developed by the nation-state in the face of crisis are, and whether goals arising from the policy are clearly articulated and objectively attainable. As previously discussed, coherently articulating viable security and international relations policy is essential to effective geopolitics. However, as history has repeatedly demonstrated, many nation-states fail in articulating, much less implementing, policy.

THREATS: LOCAL, REGIONAL, AND GLOBAL

In the immediate aftermath of Benazir Bhutto's assassination,[†] many commentators asked the appropriate question: who is guarding Pakistan's nuclear warheads? It is beyond the scope of this book to examine the development of Pakistani nuclear capability. However, suffice it to say that the combination of Pakistani nuclear capability, along with national and regional instability, presents significant potential for regional and

* For more information please see: Pew Research. European Unity on the Rocks: Greeks and Germans at Polar Opposites. Last modified May 29, 2012. <http://pewresearch.org/pubs/2271/europe-euro-eurozone-european-integration-greece-germany-spain-great-britain-france-italy-poland-czech-republic-european-union--eu->; and Pew Research. "War Support Slips, Fewer Expect a Successful Outcome." Last modified February 15, 2007. <http://pewresearch.org/pubs/412/war-support-slips-fewer-see-positive-outcome>

[†] BBC News. Benazir Bhutto Killed in Attack. Last modified December 27, 2007. http://news.bbc.co.uk/2/hi/south_asia/7161590.stm

international conflict. In addition, it is the working assumption of British intelligence experts that Pakistan is critical to the radicalization of British Muslim youth. Furthermore, according to Indian intelligence, the overwhelming majority of terrorist attacks committed inside India are initiated by the Pakistani domestic intelligence service, the ISI. See Figure 2.2.

Although Pakistan is a sovereign nation and a U.S. ally, America has aggressively conducted drone attacks against targets inside Pakistan; in addition, Osama bin-Laden was killed in Pakistan by Navy SEALs without the United States giving the Pakistanis early warning of the planned attack. Although the targets of the drone attacks have been terrorists associated either with al-Qaeda or the Taliban, the violation of Pakistani sovereignty cannot be ignored. That violation speaks volumes about the nature of the U.S.–Pakistani relationship. Simply put,



Figure 2.2. Map of Pakistan.

an international law analysis suggests the United States is violating Pakistani sovereignty.

Whether that is justified in the context of anticipatory self-defense depends on an interpretation of the Bush Doctrine,^{*} which establishes that nations harboring terrorists are legitimate targets. Pakistan must be viewed as presenting a triple threat: regional (planning and directing terrorist attacks inside India), center of radicalization, and nuclear. Whether that justifies pre-emptively attacking targets located inside Pakistan, depends on the degree of threat posed and to whom. From a geopolitical perspective, Pakistan may well represent the most complicated—and dangerous—threat.

On the face of it, President Obama has adopted the Bush Doctrine. That said, the Pakistan dilemma requires decision makers, policy makers, and commanders to determine the limits of self-defense in the context of multiple threats posed by one country. That is an immensely complicated challenge.

Similarly, the nuclear threat posed by Iran has been much discussed and analyzed.[†] Nuclear physicists and intelligence experts suggest a window of opportunity exists to exert diplomatic and economic pressure on the Iranian regime to cancel the program. If the Iranians reject sanctions, then the critical question is when would a potentially “affected” nation-state act in accordance with the principles of anticipatory self-defense? Whether it is the United States, Israel, a combination of the two, or a third nation-state, is a matter of enormous speculation. The *Caroline Doctrine*[‡] and Article 51 of the United Nations Charter[§] articulate restrictive applications

^{*} White House. National Security Council. Accessed May 31, 2013. <http://www.whitehouse.gov/nsc/nss.pdf>

[†] As examples see: Nebhay, S. Iran Is Biggest Threat to Nuclear Pact’s Credibility: U.S. *Reuters*, April 22, 2013. Accessed June 3, 2013. <http://www.reuters.com/article/2013/04/22/us-nuclear-npt-idUSBRE93L0US20130422>; and Oren, M. Iran’s Nuclear Designs are the Greater Middle East Threat. *The Washington Post*, May 24, 2013. Accessed June 3, 2013. http://articles.washingtonpost.com/2013-05-24/opinions/39502760_1_iranians-centrifuges-supplying-syrian-president-bashar; and Pan, E. IRAN: The Nuclear Threat. *Council on Foreign Relations*, September 6, 2005. Accessed May 31, 2013. <http://www.cfr.org/publication/8830/>; and Calabresi, M. Iran’s Nuclear Threat. *Time World*, March 8, 2003. Accessed on May 31, 2013. <http://www.time.com/time/world/article/0,8599,430649,00.html>

[‡] See Rouillard, L.-P. The Caroline Case: Anticipatory Self-Defence in Contemporary International Law. *Miskolc Intl. Law* 1 (2004): 104–120. Accessed June 1, 2013. <http://www.uni-miskolc.hu/~wwwdrint/20042rouillard1.htm>

[§] See United Nations. Charter of the United Nations. Accessed May 31, 2013. <http://www.un.org/aboutun/charter/>

of self-defense, but I would suggest the Iranian dilemma brings to the fore application of anticipatory self-defense in its broadest sense.

There is, obviously, significant uncertainty regarding “who, what, why, where, and when,” however, an attack on Iran would not be beyond the realm of the possible. From the perspective of decision makers, the possible Iranian response to such an attack must be carefully weighed and discerned with recognition that “unclear” is the working presumption. That said, the essence of geopolitics, and therefore the burden on decision makers, is weighing legal, political, policy, and military considerations regarding operational actions and possible responses alike.

Afghanistan’s importance is manifested both in the continued presence of American forces and the resurgence of the Taliban, which has clear regional implications. Admittedly, there are many “ifs” in the Afghanistan discussion. Because of its geographic reality, situated between Pakistan and Iran, Western leaders may determine that it is of such strategic importance that “losing Afghanistan” is “beyond the conceivable.”

This potential reality, then, raises significant questions regarding the “limits of power.” How far foreign governments can (or will) go in protecting their interests, whether ill- or well-defined, is the essence of foreign involvement in Afghanistan. When analyzing Afghanistan, it is incumbent upon decision makers to recall Winston Churchill’s prophetic words that a foreign power will never successfully defeat or occupy Afghanistan. A powerful case can be made that former President Bush neglected to consider Churchill’s sage assessment when he committed U.S. forces to Afghanistan, thereby seemingly ignoring the bitter lesson the Soviet Union learned in the late 1970s–early 1980s. Whether Afghanistan presented the presumed threat Iraq did is a matter of conjecture and controversy. In retrospect, the Bush administration’s rationale for the Iraq invasion reflects decision making based on false assumptions, misreading (whether deliberate or not is a matter of conjecture) intelligence information, and misguided policy planning and implementation. Although President Obama has announced that U.S. forces will withdraw from Afghanistan by 2014, it is unclear what will be the long-term impact of significant U.S. involvement over the years. In other words, whether the tribal culture of Afghanistan will result in history judging that U.S. forces were committed to a “lost cause,” harkening back to the American involvement in Vietnam, is a matter of historical conjecture. What is clear, on the eve of American withdrawal from Afghanistan, is that significant sectarian violence in Iraq following U.S. withdrawal bodes ill for the immediate future of Afghanistan.

Decision makers are confronted with assessing the viability of threats; rearticulated, the quandary is determining if any of the previously mentioned threats may become “palpable.” Were decision makers to conclude that they are, their obligation is then to determine whether their respective national interests are at stake. The answer to that question is based on how the limits of self-defense are applied. That analysis requires recognizing both the limits of power and the inherent risks and complexity commensurate with committing military force. In determining whether an identified, and therefore presumed, threat justifies military intervention, there are a number of decision points worthy of consideration including:

- Careful analysis of historical patterns
- Recognition of challenges posed (thereby not underestimating the degree of difficulty posed)
- Ability to separate geopolitics from domestic political realities
- Complexity posed by conflict between nation-states and non-state actors

Important to recall is that traditional conflict between nation-states has been replaced by amorphous and ill-defined conflict between states and nonstate actors. The inherent murkiness of this new conflict dramatically affects geopolitics, for previously established rules and understandings are subject to significant challenges and tensions.

SCENARIO TO CONSIDER

As the President of the United States boarded Air Force One, she was confident that the upcoming—and much planned and scheduled—trip to Amsterdam, Paris, and Bonn would provide much needed respite from increasing domestic turmoil. The turmoil was predicated on a significant downturn in the American economy and a series of politically clumsy statements by the Secretary of the Treasury. Although the media, senators, and members of Congress had demanded that the President dismiss the Secretary, she had decided not to do so. For now.

Traveling with POTUS are the Secretary of State (who is considering running for the party’s nomination should POTUS decide not

to seek re-election, given her extremely low public opinion polling numbers), the Secretary of Commerce, and a number of additional senior and junior officials (including press secretaries, White House, and State) and business leaders, invited by POTUS both to improve her standing with the business community and to facilitate possible contracts with European corporations.

If that were not enough, in the past two weeks, in a number of tragic incidents in Iraq, American soldiers had killed innocent Iraqi civilians. That, for sure, would lead to demonstrations in the European capitals. "Damn lefties!" she muttered to herself. On the other hand, better demonstrations in Europe than the constant drumbeat of criticism in the United States, related to the economy.

In the European capitals, POTUS was to visit, there was concern, not so much because of the killing of innocent civilians in Iraq, but because of how extremist Islamic imams might "use" the killings for their own purposes.

After all, nothing "rallies the troops" quite like the innocent deaths of Muslims in Iraq; innocent deaths in the form of killing, by the hated occupier, the United States, especially considering that the United States had come to free Iraq from Sadaam Hussein. Liberator had become occupier. The freer of Iraq had become the killer of Iraqis.

The German, Dutch, and French security services were well aware of the danger posed, not only by the imams, but also by their more radical supporters. Intelligence sources had indicated that the president's visit could not come at a worse time. Efforts to warn national leadership of potential dangers had fallen on deaf ears. Not only were politicians afraid to address this issue directly, precisely, and concisely, but the media were overly respectful of minority communities. Respectful was code for scared. In the radicalization versus assimilation discussion, it was clear that the latter was a bad joke. Open immigration was going to destroy Europe, or as the Statue of Liberty stated:

*Give me your tired, your poor,
Your huddled masses yearning to breathe free,
The wretched refuse of your teeming shore.*

*Send these, the homeless, tempest-tossed to me,
I lift my lamp beside the golden door!*

Among the members of the media, there were some who thought POTUS's trip "odd." "Why come to Europe now?" was the overwhelming sentiment. How does a four-day, three-country trip help an American president? Why come to a Europe, absorbed with its own problems of Islamic extremism, concern with possible Turkish membership in the European Union, constant "liberation" movements in the former Soviet Union (see Georgia–East Ottestia–Russia), possible placement of U.S. missiles in Central Europe, and the nagging issue of increasing anti-Semitism (what pundits have called "anti-Semitism without Jews")? America was *not* at the forefront of European concerns; Europe was at the forefront of European concerns.

On the other hand, embarrassing their respective nations was very much on the minds of a wide variety of domestic groups, ranging from skinheads in Germany to Islamic extremists in the Netherlands and France. Their actions (real or imagined) certainly did not pose a threat to the stability of the three nations POTUS was to visit, however, POTUS certainly presented an "attractive" target.

DIPLOMACY

9/11 had a dramatic impact on geopolitics, for it dramatically introduced state/nonstate conflict into American living rooms and forced U.S. decision makers to seek to establish coalitions in response to terrorism. In doing so, traditional alignments were called into question, largely because of the changing nature of the threat. In large part, at the risk of oversimplification, the world moved from the Cold War (1945–1989) to terrorism.*

This sharp break, *significant delineation* is perhaps the better term, forced decision makers to make noteworthy adjustments with respect to

* Although disagreement exists among experts regarding when the modern age of terrorism began as some suggest the late 1960s (airplane hijackings), and others point to the 1972 Munich Olympic Games, there is little doubt that September 11, 2001 brought terrorism front and center, with respect to public consciousness and awareness, and forced decision makers to confront terrorism directly.

Proxy Wars of the Cold War Era

- | | |
|---------------------------------------|-----------------------------------|
| • Greek Civil War, 1946–1949 | • Congo Crisis, 1960–1965 |
| • Malaysian Emergency, 1948–1960 | • Bay of Pigs Invasion, 1961 |
| • Arab-Israeli Conflict, 1948–Present | • Cuban Missile Crisis, 1962 |
| • Korean War, 1950–1953 | • Angolan Civil War, 1974–2002 |
| • Suez Crisis, 1956–1957 | • Ogaden War, 1977–1978 |
| • Cuban Revolution, 1953–1959 | • Afghan-Soviet War, 1979–1989 |
| • 1959 Tibetan Uprising, 1959–1973 | • Iran-Iraq War, 1980–1988 |
| • Laotian Civil War, 1953–1975 | • Invasion of Grenada, 1983 |
| • Vietnam War, 1957–1975 | • Nicaraguan Civil War, 1979–1990 |
| • Guatemalan Civil War, 1960–1996 | • Salvadoran Civil War, 1980–1992 |
-

Figure 2.3. Proxy wars of the Cold War era.

geopolitics. Simply stated: akin to a board game with recognized rules and players, 9/11 introduced new players and new rules. This highlights one of the realities of geopolitics: the requirement for flexibility and nimbleness, combined with a healthy dose of *realpolitik*.^{*} See Figure 2.3.

The set-piece Cold War between the United States and the USSR reflected a paradigm, best described as “mutual assured deterrence,” as each side had nuclear capability; the Cold War largely played itself out in regional conflicts, pitting U.S.-supported allies against USSR-supported allies with clearly articulated stakes, interests, and limits of power.

That set-piece paradigm greatly facilitated certainty and predictability in the context of geopolitics; although conflicts occurred there was predictability as to their scope, impact, and means. This, in large part, is in direct contrast to the post-9/11 world, largely marked by uncertainty, evolving alliances, and complicated allegiances. In many ways, the Western world was unprepared both for the actual terrorist attack of 9/11 and for the diplomacy required in its aftermath.

Both reflect failure: the former, an inability to gather and analyze intelligence information sufficiently and the latter, an inability to “game” possible scenarios satisfactorily in the aftermath of an out of the box attack by

^{*} The term was applied to the Austrian diplomat Metternich’s efforts, at the 1815 Congress of Vienna; the term is deemed “Machiavellian” by some, however, geopolitics does require national leaders to understand realism and power. Critics of *realpolitik* argue the term implies politics, devoid of moral and ethical considerations.

nonstate actors. It is safe to assume decision makers had, over the years, conducted untold war games, predicated on known and assumed threats, nevertheless, post-9/11 reaction suggests insufficient preparation for the “day after,” regarding diplomatic needs and realities.

To wit: the first President Bush was able to create a significant international coalition under UN auspices that largely enabled the First Gulf War,* whereas the second President Bush was unable to create a similar broadbased coalition, regarding both Iraq and Afghanistan.† In the first instance, Sadaam Hussein’s attack on Kuwait was perceived by the international community to violate principles of international law and to pose a clear threat to global order and security. In the second instance, coalition partners were leery of their further involvement in what was perceived as largely an American issue, and were skeptical regarding the larger impact of the conflict in Iraq and Afghanistan.‡

Whether this reluctance was reflective of “conflict fatigue” or “US fatigue” (or “Bush fatigue”) is a matter of conjecture and speculation. Coalition creation requires recognition of a particular threat and understanding the degree of danger involved; otherwise, the nation-state cannot justify its participation in the internationalization of a conflict. In other words, geopolitics requires national leaders to step beyond their immediate boundaries, practically and philosophically. In contrast, President George Washington’s famous Farewell Address warning against “foreign entanglements,”§ Senator Joseph McCarthy’s (R-Wisconsin) “jingoism” regarding perceived Communists in the U.S. government, particularly the State Department, and Senator William Knowland’s (R-California)

* Baker, J.A., III, with DeFrank, T.M. *The Politics of Diplomacy: Revolution, War and Peace, 1989–1992*. New York: GP Putnam’s Sons, 1995.

† Weisman, J. War Will Be Mostly an American Effort. *Washington Post*, March 19, 2003; and Malone, D.M. and Foong Khong, Y. *Unilateralism and U.S. Foreign Policy: International Perspectives*. Boulder, CO: Lynne Rienner, 2003.

‡ Anderson, S., Bennis, P., and Cavanagh, J. Coalition of the willing or coalition of the coerced? *The Institute for Policy Studies* (2003).

§ Oberg, B.A., Editor. *The Papers of Thomas Jefferson, Volume 33: 17 February to 30 April 1801*. Princeton, NJ: Princeton University Press, 2006. (Washington’s Farewell Address, Senate Document No. 106-21, Washington, 2000. George Washington’s farewell address is often cited as laying the foundation for the tradition of American noninterventionism. President Thomas Jefferson extended Washington’s ideas in his inaugural address: “. . . peace, commerce, and honest friendship with all nations, entangling alliances with none.”)

advocacy of U.S. isolationism,^{*} reflect narrow articulation and application of geopolitics. Rather than focusing on international security and cooperation, Washington, McCarthy, and Knowland advocated an approach reflective of "American Firsters."[†]

ISSUES TO CONSIDER

1. Pakistan TV is reporting that fifty-five people have been killed, including children, in Western Pakistan, as a result of an American drone attack. Reports are sketchy as to whom the intended target was; what is clear is that children were killed.

This drone attack comes on the heels of a significant increase in American drone attacks in Pakistan, reflecting significant concern in Washington regarding the potential destabilization of the Pakistani regime as a result of intensified Taliban activity in Pakistan. It is an open secret that American policy makers have long been concerned about the danger that Pakistan's nuclear warheads will fall into the hands of the Taliban.

Furthermore, there is deep-rooted skepticism in the Administration regarding Pakistan's commitment to counterterrorism. After all, it is an all but open secret that Pakistan's foreign intelligence service (ISI) is a "government within a government," with its own foreign policy and national security agenda. Only diplomatic protocol prevents U.S. policy makers to state publicly what is largely understood to be a reality: the ISI protected Bin Laden and provided him a safe haven.

It is important to add that there is broad debate in the administration regarding the effectiveness of the drone attacks (referred to as targeted killing by the Israelis) as some suggest they eliminate valuable intelligence assets. That said, the present attack raises significant questions regarding

^{*} Cole, W.S., *Charles A. Lindbergh and the Battle Against American Intervention in World War II*. New York: Harcourt Brace Jovanovich, 1974. (As WWII approached, noninterventionism was well rooted in the public sentiment, concerning involvement in Europe. Charles Lindbergh was one of the most outspoken noninterventionists. Senators Taft (R-Nebraska) and Nye (R-North Dakota) were other outspoken noninterventionists.)

[†] Cole, W.S. *America First: The Battle against Intervention, 1940–41*. Madison: University of Wisconsin Press, 1953. (The America First Committee (AFC) was the foremost noninterventionist organization that was against entry into WWII. Membership peaked at 800,000 paid members in 650 chapters.)

important international law issues, including collateral damage, military necessity, alternatives, and proportionality.

All, no doubt, to be subject to intense media and public attention and with the possibility of strong, diametrically opposing viewpoints presented to the president by the Secretary of Defense and the Secretary of State, known to have very different opinions, regarding the policy. Although the former believes that self-defense is almost unlimited, the latter is much more of an internationalist, arguing that self-defense must be viewed in the context of Article 51 of the United Nations Charter.

2. British sources are reporting that American forces are moving into Pakistan from Afghanistan. It is unclear if the forces are pursuing Taliban militants or if this is a preplanned military operation. Although U.S. forces have been engaged with the Taliban in Afghanistan, the possibility of U.S. forces now entering Pakistan raises enormously complicated questions.

The U.S. drone policy, which many suggest violates Pakistani sovereignty, has been largely defended by the United States as not a violation, but rather as attacking non-Pakistani targets inside Pakistan from the air, meaning American soldiers are not physically on Pakistani soil. Some, such as the Secretary of State, have described this argument as specious, if not intellectually disingenuous. Others have suggested that operational counterterrorism is just that: operational actions by a fully engaged military. Be that as it may, conducting ground operations on the soil of an American ally, who has not, according to all sources, invited the American military, raises profoundly important questions, regarding both sovereignty and rules of engagement.

Pakistan, according to sources inside the State Department, raises fundamentally different questions than does Afghanistan; the latter invited the coalition forces, whereas the former has not. If that is indeed the case, then is this not a violation of Pakistani sovereignty, more than the drone policy, that, in principle, would justify Pakistani response against U.S. forces? From the perspective of the Defense Department, this is not the time for diplomatic niceties. The relationship between the Taliban and al Qaeda and the ISI clearly warrants aggressive American action.

Those in the administration, who seek to strike a middle ground between the Secretary of State and the Secretary of Defense, argue that drones, albeit problematic, do not violate Pakistani sovereignty as non-Pakistani assets are targeted, and that collateral damage is an unfortunate

reality of operational counterterrorism. That argument is too nuanced for the Secretary of State, who has long argued that the drone policy is illegal. Given that line of thought, today's action, if accurate, will further drive a wedge within the administration that the president will be hard-pressed to resolve. Strains of President Lincoln's famous "Team of Rivals" might well be the appropriate adage for today's news.

3. The previous report regarding American troops moving into Pakistan from Afghanistan has been confirmed. This is the second American military intrusion into Pakistan today, both representing significant violations of Pakistani sovereignty. What can we face from Pakistan? Are the Pakistanis going to demand that the United States withdraw from Pakistan? Will the Pakistani government demand UN action? Or, will Pakistan turn a blind eye, and understand that in the U.S. effort to defeat the Taliban, incursions by American forces are inevitable. However, what will be the Pakistani government's response if, as a result of American action, innocent Pakistanis are killed by, for example, an errant U.S. missile?

Although mistakes are an inevitable reality of war, and collateral damage is almost a necessary by-product, it is difficult to foresee how an ally will respond to collateral damage to its innocent population, caused by another ally. It is essential to recall that the Pakistani government has been (at least publicly) tolerant of U.S. drone missile attacks. The presence, on Pakistani soil, of American forces, opens a whole new can of worms that will put America's foreign policy and counterterrorism efforts to significant test.

Couching American efforts, in the context of the larger danger posed by the Taliban and concerns regarding the safety of the 100 nuclear warheads, is theoretically understandable, and can be "spun" by administration spin masters, explaining this action in forums such as the United Nations presents unique challenges. To be the Secretary of State today is not an enviable task, for it requires articulating American respect for sovereignty of another nation-state, while adding a critical caveat: "limited by larger American interests." That plays well in Washington, DC, and across America; how it plays out in the United Nations and foreign capitals is a different question.

Needless to say, for critics of American expansiveness and aggression, this action is "food for fodder." It must be added that American targets, such as schools, corporations, and tourists, become increasingly vulnerable at a time like this. One can only assume that the Secretary of Homeland Security is considering imposing various measures, to ensure

the safety and security both of Americans and American assets. No doubt the following question is creeping into the collective mind of America watchers worldwide: If the United States can violate the sovereignty of an ally with such extraordinary temerity, what is to prevent it from doing the same to an enemy? I am sure that decision makers in Tehran have taken full notice of today's action.

4. At the United Nations, according to sources, the following officials are in a private meeting: the president of Pakistan, the UN secretary general, the U.S. ambassador, and the Afghani ambassador to the United Nations. On the assumption that they are not discussing the latest sports scores, one can but surmise that they are seeking to resolve a fast-developing crisis in south Asia. What clearly complicates resolution is the multiplicity of actors in play and the range of issues to resolve. To summarize: the United States is actively engaging the Taliban both in Afghanistan and Pakistan. Whether that is the same Taliban in both countries is an open, and fair, question that has, for whatever reason, flown under the radar of public scrutiny.

That is not an insignificant question, for it dramatically affects how policy makers justify what is clearly an American invasion of Pakistani sovereignty, when ground forces pursued escaping Taliban from Afghanistan. Put another way: does international law allow for "hot pursuit," as understood in criminal law? That would, perhaps, justify American action. However, international law experts raise the all-important point that Pakistan is a sovereign nation, responsible for its own borders and internal security, and do not recall that the United States has been asked to assist in that duty.

A cogent argument can be made that the United States is in Afghanistan as part of an international coalition, but that argument carries no weight with respect to the presence of American forces in Pakistan. What is the United Nations to do? Can the secretary general mediate a peaceful resolution of this crisis?

Experts are extremely skeptical for the following reason. The United States, according to most observers, has little if any faith in the ability of the Pakistani government to keep the Taliban at bay, and therefore are convinced that the United States will be hard-pressed to agree to a forced withdrawal from Pakistan. Does that mean the United States views Pakistan as a partial failed state that justifies international presence, without permission of the host government? Put another way: what are the

limits of operational counterterrorism according to the American model, as presently articulated, on the ground, in Pakistan?

Let us look at this from the Pakistani perspective. American forces have invaded Pakistan, in pursuit of Afghan-based Taliban who managed to escape from coalition forces, meaning that coalition operational incompetence has resulted in violation of national sovereignty. Although that may convince the American public, experts are doubtful that will carry the day with respect to Pakistan, much less the international community. Does that raise the possibility that the United States will be subject to UN condemnation?

Perhaps that seems to be a tad of a stretch, however, it is not a possibility that should be dismissed out of hand, for there is—without doubt—a violation of Pakistani sovereignty. As to Afghanistan, experts are suggesting that the continued presence of coalition (almost exclusively American) forces, suggests that the international community must address the possibility that Afghanistan is a failed state, with recognition of what such a designation entails.

Although there were elections in Afghanistan, sufficient questions have been asked to call into question their legitimacy, and whether there truly is a democratically elected government that, on the face of it, requested the intervention of non-Afghan forces. The post-9/11 Bush Doctrine created an American justification for operational involvement, where if a nation, designated by the United States, is creating a haven for terrorists, it is unclear whether that doctrine meets the test of international law.

The question is, in many ways, directly related to the limits of self-defense and, furthermore, the limits of pre-emptive self-defense. It seems that when the representatives of the four countries meet, they will embark on a discussion of paramount importance regarding self-defense, sovereignty, and international law in the context of state-state and state-nonstate relations.

3

Self-Defense, Humanitarian Intervention, Leadership, and International Cooperation

INTRODUCTION

Effective geopolitics requires a confluence of the theoretical and the practical. The former demands that national leaders understand a wide range of issues, including international law, international relations, finance, geography, and military power, particularly its limits. The latter requires the implementation of these distinct disciplines with sensitivity, both to domestic politics and the global community, while recognizing the importance of tactical and strategic issues alike. Although, *prima facie*, tactical and strategic considerations suggest a dissonance, effective national leaders are able to incorporate both in the decision-making process. See Figure 3.1.

Tactical thinking reflects decision making, focused solely on the immediate, whereas strategic thinking reflects keen understanding of, and appreciation for, the long term, devoid of immediate results and impact. Perhaps circumstances justify, or dictate, a narrow perspective. That may be the case, but effective leadership demands the ability to

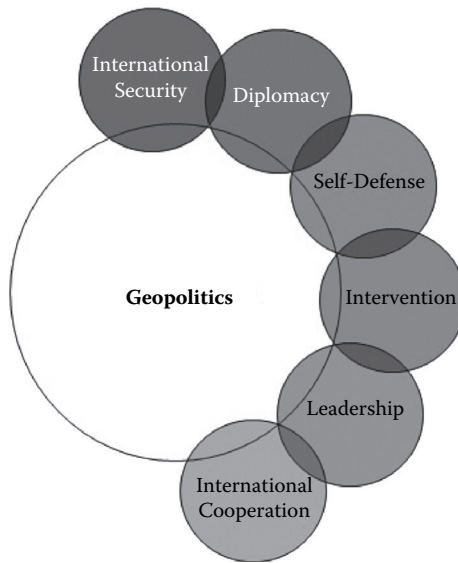


Figure 3.1. Self-defense, intervention, and leadership.

weigh and consider broader ramifications of particular decision points. A leader who cannot consider issues beyond the immediate is incapable of engaging in effective geopolitics. A leader whose focus is exclusively tactical is incapable of identifying future threats and risks.

A global community implies enhanced cooperation across a wide range of issues, including finance, security, border control, environment, health care, and natural resources. National leaders, understandably, primarily emphasize domestic considerations; nevertheless, effective geopolitics suggests national interests are significantly enhanced when international affairs are factored into domestic decision making. That is, geopolitics implies recognition that global markets and global security enhance domestic economy and domestic security alike.

Although international law emphasizes sovereignty, that principle is subject to limits, sometimes self-imposed, and other times externally imposed. For example, respect for the principle of sovereignty is minimized in the context of humanitarian intervention. After all, the very act of intervention, regardless of its basis, implies violating the sovereignty of a nation-state. As discussed below, the principles of intervention do

not necessarily match its application; that inconsistency is deeply troubling in the face of significant human rights violations committed by state and nonstate actors alike. In addition, specific nation-states in particular and the international community in general are confronted with dilemmas regarding the limits of sovereignty in the face of actual or perceived threats.

For example, challenges posed by Iran's commitment to the development of a nuclear program have forced the international community to weigh distinct options regarding the limits of Iranian sovereignty and international intervention alike. The majority of the international community recognizes the threats a nuclear Iran poses, both regionally and internationally. Nevertheless, concerns regarding fallout from an armed attack on Iran have significantly contributed to imposition of wide-ranging economic and diplomatic sanctions, the effectiveness of which is an open question. In determining the appropriate response to the threat posed by a nuclear Iran, the international community has demonstrated extraordinary discomfort regarding military measures. This is understandable, but the broader question is what are the ramifications, should the international community *not* prevent Iran from fulfilling its nuclear program? This dilemma is at the heart of geopolitics, for it reflects the confluence of sovereignty, self-defense, global security, and natural resources. In addition, the decision of how to confront the Iranian regime most effectively raises important questions regarding leadership and decision-making. See Figure 3.2.

The international community has consistently demonstrated extraordinary hesitation regarding Iran; similarly, it has manifested inconsistency with respect to humanitarian intervention. Decisions to intervene in the domestic affairs of a nation-state imply violation of national sovereignty. Conversely, not intervening in the face of human rights violations reflects an unwillingness to interfere in domestic matters of a sovereign nation, although the consequences of the decision are clear. The dilemma of whether, when, and how to engage in humanitarian intervention is directly related to geopolitics. In many ways, it highlights the tension in balancing sovereignty with humanitarian-predicated intervention. This tension, much like determining how to respond most effectively to the Iranian threat, is at the heart of contemporary geopolitics.

The decision of whether to intervene requires resolving the proper role of the international community regarding domestic issues of a sovereign state. With the exception of refugees seeking safe haven in a bordering



Figure 3.2. Map of Iran.

country, domestic human rights violations do not have an impact beyond the borders of the state committing human rights violations. That is in direct contrast to the threat potentially posed to the international community by a nuclear Iran. Nevertheless, both paradigms reflect cutting-edge issues, relevant to understanding contemporary geopolitics. In both cases, the international community must determine the limits of sovereignty, the extent of self-defense, and the limits of collective defense and collective responsibility. How national leaders engage in, and resolve, the decision-making process, is essential to understanding the practical implementation of geopolitics.

This chapter, then, examines four issues, essential to understanding geopolitics:

1. Self-defense
2. Leadership

3. Humanitarian intervention
4. International cooperation.

Self-defense is of particular importance because it addresses the extent and manner in which nation-states protect their population, resources, and interests. Leadership is germane to the discussion as it highlights the qualities necessary to resolve complicated paradigms, reflecting distinct disciplines with minimal margin for error. Humanitarian intervention requires reconciling sovereignty with international obligations to human rights. International cooperation is essential to effective implementation of geopolitics, on the premise that unilateralism is at odds with the principle of a global community.

Addressing these four issues in one chapter is intended to facilitate understanding the nuts and bolts of geopolitics. Although the four topics may, at first blush, seem unrelated to one another, reality suggests otherwise for the four, individually and collectively, reflect the essence of the global community at the core of geopolitics. The four topics are presented in a stand-alone manner, but their larger significance is best understood in an integrative, rather than silo, manner.

Geopolitics imposes on national leaders the recognition that their decisions are not made in a vacuum; quite the opposite, for the financial and security interdependence between nation-states represents the reality of the global community. To that end, viewing these four issues in the discussion that follows significantly facilitates understanding the relationship between the nation-state and the global community.

SELF-DEFENSE

One of the most important questions, post-9/11, is how a nation-state defends itself against an unseen enemy. How a nation-state that believes in the rule of law and morality, in armed conflict, prevents attacks against its innocent citizens, is our focus. Self-defense, or active pre-emptive self-defense, against the unseen enemy is extraordinarily difficult and fraught with enormous risks and dangers. How and when the state defends itself against such an enemy is critical to address; it is the combat of the future.

In the context of post-9/11 operational counterterrorism, the question is whether self-defense, as presently articulated by international law, enables a state to act preventively in an effective way. 9/11 taught decision makers and commanders alike that in future military conflict, states are

more likely to confront nonstate actors, rather than other nation-states. The traditional state–state war, as understood by the founding fathers of international law, is largely a historical relic.

In the traditional self-defense paradigm, states protect themselves either against armies massing at their border, or after attack by another nation-state. Self-defense in the “unseen enemy” paradigm is ambiguous. It is not inherently clear who is attacking the state or whom the state is protecting itself against. Unlike traditional warfare, where militaries faced off with planes, tanks, and warships, an often-unseen enemy characterizes counterterrorism, and battles take place in “back alleys with dark shadows.” Self-defense in this environment is enormously complicated. The decision to attack a highly elusive target pre-emptively, oftentimes in the vicinity of civilians, is based almost exclusively on intelligence information.

How the state, under the rubric of the rule of law and morality in armed conflict, protects itself by acting before an attack is an issue of enormous significance. In the self-defense debate, the critical questions are: *what* are the restraints, *when* can the state act, against *what* target, and against *what* enemy. In answering these questions, it is critical that guidelines and criteria be developed regulating if and when a state may take anticipatory action. That is not to suggest that the state may not act; rather, quite the opposite. It is, however, to advocate forcefully that the underlying reasons for state action are sound, legal, and moral. How international law seeks to define and limit the right to self-defense has been analyzed through the ages.

The *Caroline* Doctrine

In 1837, U.S. Secretary of State, Daniel Webster, articulated a definition of self-defense, which evolved into customary international law.* Webster’s definition followed what has come to be known as the *Caroline* incident. The *Caroline* was a U.S. steamboat, attempting to transport supplies to Canadian insurgents.† A British force interrupted the *Caroline*’s voyage, shot at it, set it on fire, and let it wash over Niagara Falls. Webster said that Britain’s act did not qualify as self-defense because self-defense is only

* Customary international law “derives from ‘a general practice accepted as law.’” International Committee of the Red Cross Customary International Humanitarian Law: Questions & Answers. Last modified August 15, 2005. <http://www.icrc.org/eng/resources/documents/misc/customary-law-q-and-a-150805.htm>

† See Rogoff, M.A. and Collins, E., Jr. *The Caroline incident and the development of international law*. 16 *Brook. J. Intl. L.* 493 (1990).

justified, "if the necessity of that self-defense is instant, overwhelming, and leaving no choice of means, and no moment for deliberation."^{*}

According to Webster, Britain could have dealt with the *Caroline* in a more diplomatic manner. The *Caroline* Doctrine limits the right to self-defense to situations where there is a real threat, the response is essential and proportional, and all peaceful means of resolving the dispute have been exhausted. Article 51 of the UN Charter[†] narrowed self-defense, making it permissible only in the event of an armed attack.[‡]

UN Charter: Article 51

The UN Charter sought to articulate a world order, devoid of military conflict.[§] In an effort to avoid repeating the horrors of World War II, the UN Charter calls on nation-states to resolve their conflicts peacefully.

The purpose of the United Nations is to save the succeeding generations from the scourge of war.[¶]

UN Charter, Preamble, Section 1

"All Members shall settle their international disputes by peaceful means."^{**}

UN Charter Article 2(3)

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.^{††}

UN Charter Article 2(4)

^{*} Gross, E. Thwarting terrorist acts by attacking the perpetrators or their commanders as an act of self-defense: Human rights versus the state's duty to protect its citizens. *Temple Intl. Comp. L. J.* 15 (2001): 195, 211.

[†] Article 51. "Charter of the United Nations." Accessed July 20, 2007. <http://www.un.org/en/documents/charter/chapter7.shtml>

[‡] See Gross, *supra* note 94.

[§] See Tackaberry, Maj. K.G. Time to stand up and be counted: The need for the United Nations to control international terrorism. *Army Lawyer* (2007): 1,6; United Nations. History of the United Nations. Accessed December 28, 2007. <http://www.un.org/aboutun/unhistory/>; History of the United Nations. History of the United Nations Charter. Accessed December 28, 2007. http://www.un.org/en/aboutun/history/charter_history.shtml

[¶] Charter of the United Nations. "Preamble." Accessed July 20, 2007. <http://www.un.org/aboutun/charter/>

^{**} Charter of the United Nations. "Article 2(3), Chapter I." Accessed July 20, 2007 <http://www.un.org/aboutun/charter/>

^{††} Charter of the United Nations. "Article 2(4), Chapter I." Accessed July 20, 2007. <http://www.un.org/aboutun/charter/>

To that end, the UN Charter sought to limit when states could implement self-defense against other nation-states. Article 51 authorizes self-defense *only if armed attack "occurs."*^{*}

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.[†]

This is a narrowing of the *Caroline* Doctrine that provided for anticipatory self-defense, provided the threat to national security *is reasonably believed to be imminent*.[‡] Article 51's concept of pre-emption has been significantly reduced from the *Caroline* Doctrine. The significance of this narrowing cannot be underestimated: from a customary international law principle enabling pre-emption, to a treaty-based definition of self-defense, dependent upon the occurrence of an armed attack.

Article 51 clearly expresses the obligation of nation-states to prevent war; Professor Lobel has suggested the following.

The United Nations Charter prohibits the use of force except when authorized by the Security Council or when undertaken by individual nations in self-defense and in response to "an armed attack." Moreover, as a general matter, the United Nations has sought to limit the Article 51 self-defense exception to prevent its misuse. First, Article 51 permits only those actions taken in self-defense; reprisals and retaliations are proscribed under the U.N. Charter. In other words, a nation can respond to an ongoing attack, including one waged by a terrorist organization, by using force. However, that nation may not forcibly retaliate against another in response to an unlawful act that the latter committed against

^{*} Charter of the United Nations. "Article 51." Accessed May 31, 2013. <http://www.un.org/en/documents/charter/chapter7.shtml>

[†] Charter of the United Nations. "Article 51, Chapter VII." Accessed July 20, 2007. <http://www.un.org/aboutun/charter/>

[‡] Brown, D. Use of Force Against Terrorism After September 11th: State Responsibility, Self-defense, and Other Responses." *Cardozo J. Int'l & Comp. L.* 11 (2003): 1, 37.

the former in the past. The reasoning behind this rule is simple: a nation subject to an ongoing attack cannot be expected to wait for the international community's aid before fighting back. Obviously, when a nation is under attack, immediate action is necessary. On the other hand, a nation whose citizens are no longer being attacked must seek U.N. intervention; to allow military reprisals would be to encourage the renewed use of force. This would result in a spiraling escalation of violence. Thus, the U.S. government, most state actors, the U.N. Security Council, and the International Court of Justice have officially taken the position that armed reprisals are outlawed.*

The question facing decision makers in the context of self-defense is *when* preemptive actions can be undertaken.

Preventive measures can be undertaken even if that involves violating the sovereignty of another nation-state. In violating the sovereignty of another nation-state, under the banner of self-defense, it can be argued that there is an implicit determination that the violated state is a failed state, or in the alternative, a partial failed state. As an example, in response to a terror attack in Israel, the Israeli Air Force (IAF) attacked terrorist bases in Syria. Although Israel was widely criticized, the government explained the target was not Syria; rather, the Israeli Air Force was attacking terrorist bases located in Syria, with no intent to violate Syrian sovereignty.

This argument would appear disingenuous at best as Syrian sovereignty was clearly violated by the breach of Syrian airspace by the IAF. In contrast, the IAF attack on a facility identified as instrumental to Syrian efforts to develop nuclear capability is arguably different, for the former raid was directed at terrorist bases (located in Syria) whereas the latter attack was aimed at specific Syrian targets. Nevertheless, both attacks violated Syrian sovereignty; the question is whether terrorism/counterterrorism justifies violating nation-state sovereignty when the nation-state is not the intended target.

Similarly, the United States violated Sudanese and Afghanistan sovereignty when the U.S. Air Force, in response to the 1998 embassy

* Lobel, J. The use of force to respond to terrorist attacks: The bombing of Sudan and Afghanistan. *Yale J. Intl. L.* 24 (1999): 537, as cited in Guiora, A.N. *Global Perspectives on Counterterrorism* (Gaithersburg, MD: Aspen, 2008).

bombings in Kenya and Tanzania, attacked targets in both countries. The United States fired seventy-nine Tomahawk missiles at alleged al-Qaeda outposts in Sudan and Afghanistan including a factory believed to produce chemical weapons. President Clinton relied on traditional Article 51 self-defense in justifying the act noting the strikes “. . . were a necessary and proportionate response to the imminent threat of further terrorist attacks against U.S. personnel and facilities.”^{*} Although the attack may be considered to be retaliatory rather than self-defense, the question of anticipatory self-defense is relevant to this attack. If, as had been reported, the factory was indeed producing chemical weapons, then an argument could be made that America, and America’s allies, would potentially be in danger.

UN Security Council Resolutions Post-9/11

Following the 9/11 attacks, the UN Security Council passed two resolutions addressing appropriate responses to terrorism, UN Security Council Resolution 1368⁴¹ and 1373.⁴² Relevant passages of UN Security Council Resolution 1368 are:

The Security Council, Reaffirming the principles and purposes of the Charter of the United Nations, Determined to combat by all means threats to international peace and security caused by terrorist acts, Recognizing the inherent right of individual or collective self-defense in accordance with the Charter, . . .

- (3) *Calls on all states to work together, urgently, to bring to justice the perpetrators, organizers and sponsors of these terrorist attacks and stresses that those responsible for aiding, supporting or harboring the perpetrators, organizers and sponsors of these acts will be held accountable;*
- (4) *Calls also on the international community, to redouble their efforts to prevent and suppress terrorist acts, including by increased cooperation and full implementation of the relevant international anti-terrorist conventions and Security Council resolutions, in particular, resolution 1269 (1999) of 19 October 1999;*

^{*} Martinez, L. September 11th, Iraq, and the doctrine of anticipatory self-defence. *U. Mo. Kan. City L. Rev.* 72 (2003): 123 at 143.

- (5) *Expresses* its readiness to take all necessary steps to respond to the terrorist attacks of 11 September 2001, and to combat all forms of terrorism,

The Security Council, Reaffirming its Resolutions 1269 (1999) of 19 October 1999 and 1368 (2001) of 12 September 2001. . . .

Reaffirming further that such acts, like any act of international terrorism, constitute a threat to international peace and security. *Reaffirming* the inherent right of individual or collective self-defense, as recognized by the Charter of the United Nations as reiterated in resolution 1368 (2001). . . .

- (2) *Decides also* that all states shall: . . . (b) Take the necessary steps to prevent the commission of terrorist acts, including by provision of early warning to other States by exchange of information;...
(3) *Calls upon* all states to: . . . (c) Cooperate, particularly through bilateral and multilateral arrangements and agreements, to prevent and suppress terrorist attacks and take action against perpetrators of such acts;...'

What effect did these resolutions have on self-defense? Some scholars have suggested that the resolutions made a difference:

- (i) Both resolutions reaffirmed the inherent right of "individual or collective self-defense" as recognized by the UN Charter, under Article 51.
- (ii) 1373 emphasized that any further acts would be considered threats to peace and security.
- (iii) Both "implicitly" recognized that the September 11 attacks constituted an attack on the United States, under Article 51.
- (iv) According to 1373, members are "obligated to create the prescribed legal framework in its national laws and institutions to combat terrorism, and to cooperate fully with other states on a global scale in this effort... thereby establishing an international legal framework to combat terrorism."[†]

* UN Security Council Resolution 1373 (emphasis added).

[†] See Ward, C.A. Building capacity to combat international terrorism: The role of the United Nations Security Council. *JCSL* 8 (2003): 289 at 293–394 (discussing the effects of UN Resolutions 1368 and 1373); and see also O'Connell, M.E. Lawful self-defence to terrorism. *U. Pitt. L. Rev.* 63 (2002): 889 at 892 (emphasizing that the operative part of the resolution was to mandate economic sanctions and emphasize that the attacks were significant enough to trigger self-defense).

Although existing international law grants a fundamental right to self-defense, the existing limitations (the *Caroline* Doctrine, UN Charter Article 51, Security Council Resolutions 1368 and 1373) do not provide a sufficiently clear guideline regarding when a state may act. The existing law does not address when a state may take pre-emptive or anticipatory action against a nonstate actor, and thus does not provide an actionable guideline for modern-day armed conflict.

LEADERSHIP

In his book, *Supreme Command*,* Professor Eliot Cohen carefully analyzes leadership in wartime by examining U.S. President Lincoln (U.S. Civil War), French Prime Minister Clemenceau (World War I), British Prime Minister Churchill (World War II), and Israeli Prime Minister Ben Gurion. Cohen's primary focus is on their decision making in the face of tensions between civil and military leadership. Although the four leaders faced, naturally, distinct paradigms, what unified them was an ability to understand competing forces, while making decisions with both immediate and long-term ramifications. According to Cohen: "It is not, however, only the selection and dismissal of generals that constitutes a politician's chief responsibility in war, nor is it even . . . the articulation of goals or the allocations of resources. Rather, a politician finds himself managing military alliances, deciding the nature of acceptable risk, shaping operational choices, and reconstructing military organizations."[†]

Of Lincoln, Cohen writes:

Lincoln had to educate his generals about the purposes of the war and to remind them of its fundamental political characteristics. He had not merely to create a strategic approach to the war, but to insist that the generals adhere to it. His subordinates did not always agree with him or with one another, and indeed, he often found himself having to arbitrate disputes among general officers at odds with each other over matters weighty or trivial.[‡]

Of Clemenceau, Cohen writes:

When Clemenceau became premier Russia was exiting the conflict, allowing Germany to turn its full force on the staggering Allies in

* Cohen, E.A. *Supreme Command*. New York: Free Press, 2002.

† Cohen, *supra* note 36 at 11.

‡ Cohen, *supra* note 36 at 58.

the West. The United States had yet to appear in force; Britain had suffered its own hideous losses. . . . Clemenceau saw France through the German offenses of the spring and early summer of 1918. . . . He helped maintain the troubled coalitions with Britain and the United States. . . . Finally he presided over the negotiation of a peace treaty that, however flawed, restored to his country the lost provinces of Alsace and Lorraine, left Germany constrained though not crippled, and provided France, if she had the will to maintain them, positions on the bank of the Rhine to repel a possible future German bid for power.*

Of Churchill, Cohen writes:

In part because he mistrusted all foresight, including his own, Churchill believed that the formulation of strategy in war did not consist merely in drawing up state documents sketching out a comprehensive view of how the war would be won, but also in a host of detailed activities which, when united and dominated by a central conception, would form a comprehensive picture. This attention to detail stemmed from his unwillingness to put full reliance on military expertise.†

With respect to Churchill's political and strategic judgments, Cohen writes:

. . . Churchill's record is astonishingly good. . . . In 1938 he judged aright the importance of opposing Hitler early, at a time when the odds were against the German dictator. Arguments that he exaggerated the German air menace and underestimated the strain on Britain's financial resources miss the central point, which was that firm opposition to Hitler by a coalition led by Britain, with France and at least one of the East European powers, made sense before Hitler had completed his rearmament and laid his hands on the resources of Eastern Europe. He was right too in the weight he assigned to the American relationship and to the assiduousness with which he and Roosevelt constructed the closest alliance in history. And he was right as well in his concern about Soviet intentions in Europe, little though he could do to thwart them.‡

Of Ben Gurion, Cohen writes:

The sheer size of a military action—the numbers of soldiers involved, casualties suffered, or ground conquered—is no measure of its strategic

* Cohen, *supra* note 36 at 65.

† Cohen, *supra* note 36 at 127.

‡ Cohen, *supra* note 36 at 131.

and operational complexity and hence its value to the student of war. The Israeli war of independence, fought though it was in an area no larger than the state of New Jersey, provides a capital demonstration of this fact. Strategically, the conflict began as a war of survival, at least from the Israeli point of view: the leaders and people of Israel believed that upon their victory depended not only the existence of an independent Jewish state but the physical survival of its citizens. They fought, therefore, a total war, as all-embracing in its efforts as the conflict that had swept the world in the preceding ten years. . . . Yet the war had another strategic aspect, as a coolly conducted struggle for limited ends among powers who had in mind a peace settlement of a moderate kind. Even at the outset, the leaders of the provisional government of Israel (Ben-Gurion, ANG) declined to describe the borders of the Jewish state, suspecting that by force of arms they might secure more territory from favorable adjustments to the partition plan of 1947—as indeed they did.*

COMPARATIVE INTERNATIONAL COOPERATION

Although we want to promote trade and other cooperation among countries, it is important that countries protect themselves through assessing threats and securing their borders against terrorism. The two main elements to address are first, the threat assessments of each country, with regard to its intelligence, sharing, and sanctions, and second, the security measures each country takes in air travel and protecting its borders. Several other variables should be considered in this study, including each country's geography, foreign relations, and, more specifically, relations with neighboring countries.

After 9/11, countries reassessed their risk and now take additional measures to secure the safety of their respective countries, including implementing new programs, developing new technology, and working more closely with other allied nations, all in an international cooperative effort to ensure the safety of their respective countries.

EUROPEAN UNION

The European Union, by way of example, faces unique challenges as a union of sovereign nations in providing for their collective security. One

* Cohen, *supra* note 36 at 180–181.

area where this challenge is especially apparent is in the area of border security. The European Union faces the paradox of a desire to keep internal borders open for citizens of member nations, and guarding the Union's external border from illegal infiltration. Often EU proposals run into opposition from individual member nations that feel their sovereignty would be unduly burdened. However, by and large, the European Union works well together collectively, and has experienced success in many of their efforts. The European Union is home to an illegal immigrant population estimated at three to eight million people, a population that grows by as much as half a million each year. The immigrants, similarly to the U.S. situation, are largely drawn to the European Union in search of employment. See Figure 3.3.



Figure 3.3. Map of the European Union countries.

Threat Assessment

One of the main agencies in Europe that deals with intelligence gathering and threat assessment is Europol. The agency relies on intelligence provided by individual EU nations and third parties to fight both crime and terrorism. Europol reports indicate that there were 498 failed, foiled, or successful terrorist attacks in 2006 and 583 in 2007. The policing efforts of Europol in 2006 resulted in 706 arrests (257 of which were for Islamist terrorism) and 257 convictions. In 2007, the total arrests increased to 1,044, largely due to an increase in Separatist arrests in Spain and France. Of the 303 individuals charged in 2006 for terrorist crimes, 15% were acquitted. In the 2007 report, Europol lists challenges that may have affected the number of acquittals, including: a lack of investigative and prosecutorial capacity, the high cost of translation services to analyze evidence, inadequate duration of pretrial detentions, and the time and costs associated with cross-border crimes. Despite an improvement in real numbers of convictions in 2007, the acquittal rate jumped to 26%.

INTERVENTION

Military intervention can occur for humanitarian purposes: NATO intervention (albeit after much tragedy and atrocity) in the former Yugoslavia is a clear example as is U.S. intervention in Haiti after the massive earthquake in 2010. The philosophy behind humanitarian intervention is simple: it stems from the principle that "Intervention for human protection purposes . . . is supportable when major harm to civilians is occurring or imminently apprehended, and the state in question is unable or unwilling to end the harm, or is itself the perpetrator."^{*} In other words, humanitarian intervention is based on the belief that "When a government turns savagely upon its own people . . . it becomes the responsibility of "[a]ny state capable of stopping the slaughter . . . to try to do so."[†]

The brutally repressive regime of President Assad (the father) was made clear in the 1982 massacre in the Syrian town of Hama: over

^{*} See *Report of the International Commission on Intervention and State Sovereignty. The Responsibility to Protect*. Accessed May 31, 2013. <http://responsibilitytoprotect.org/ICISS%20Report.pdf>

[†] See Walzer, M. *Just and Unjust Wars: A Moral Argument with Historical Illustrations*. New York: Basic, 2006.

10,000 citizens were massacred when Assad ordered the Syrian army to squash a purported revolt against the regime. Although the brutal nature of the regime (in addition to the Hama massacre) was well known and documented, successive U.S. presidents turned a blind eye in the name of larger interests and goals. In the context of this pragmatic policy, President Assad brutalized his people while negotiating with the United States; simply put, Syrian domestic affairs were an internal matter the United States chose to ignore while focusing on broader geopolitical considerations. See Figure 3.4.

The U.S. “blind eye” policy, regarding domestic policy—regardless of its repressive nature and inevitable human cost—reflects respect for the principle of national sovereignty. However, as documented above, the United States has repeatedly violated that principle when broader American interests are perceived to be at stake. Which brings us to the question of why the Obama administration chose not to intervene in Syria



Figure 3.4. Map of Syria.

beginning in the spring of 2011 and continuing through 2013. How does the Obama administration distinguish between Syria and Libya? Why does the extraordinary violation of human rights in the latter justify international intervention, whereas the massacre of innocent civilians in the former does not? With respect to Syria, the Obama administration has limited its response largely to rhetoric. Secretary of State Clinton commented: "Syria's future is up to the Syrian people," she said, "but of course the efforts by the opposition to come together to organize in order to articulate a political agenda is an important part of political reform."^{*}

In both Libya and Syria, brutal regimes were deliberately torturing, imprisoning, and killing their own citizens. In both cases, thousands of citizens were forced to flee their homes, recognizing that the regime would brook no dissent, giving open fire orders that enabled indiscriminate shooting by armed forces into crowds of individuals. In other words, both regimes were engaged in massacring their citizens. The power of social media⁺ contributed to enormous public scrutiny of both regimes.

In Libya (see Figure 3.5), opponents of the regime took to the streets. Although uncertainty existed regarding the identity and nature of their organization, the Obama administration[‡] and NATO[§] decided to intervene militarily on their behalf. Over a five-month period (April–August, 2011), the United States flew 5,316 sorties; that total included 1,210 airstrike missions

^{*} Arsu, S. Clinton Chides Turkey on Rights Record. *New York Times*, July 17, 2011.

⁺ See Halal, W. The Arab Spring and the technology revolution. *World Future Society*, May 27, 2011. Accessed May 30, 2013. <http://www.wfs.org/content/arab-spring-and-technology-revolution> (recognizing the major role information technology, namely social media, played in accelerating the Arab Spring).

[‡] President Obama deployed U.S. military forces to Libya without receiving congressional authorization under the 1973 War Powers resolution. See Savage, C. and Landler, M. White House Defends Continuing U.S. Role in Libya Operation. *New York Times*, Jun. 16, 2011. ("U.S. operations do not involve sustained fighting or active exchanges of fire with hostile forces, nor do they involve U.S. ground troops," rendering war powers authorization unnecessary in the eyes of the administration); see also Starobin, P. Op-Ed., A Moral Flip-Flop? Defining "War". *New York Times*, Aug. 7, 2011. (illustrating the issue of framing the Libyan intervention through a critical examination of Department of State Legal Adviser Harold Koh's position on the applicability of the war powers resolution).

[§] See Newton, P. NATO: Libya Mission Will Be to Protect, Not Arm. *CNN*, March 28, 2011. Accessed May 30, 2013. http://articles.cnn.com/2011-03-28/world/libya.nato_1_nato-civilians-libya-mission?_s=PM:WORLD (indicating that NATO's control of the Libyan operation increased during its early stages).



Figure 3.5. Map of Libya.

and 101 Predator drone strike missions.* In addition, the United States was providing nearly 70% of the intelligence capabilities and refueling assets,[†] and by July 31, 2011, had spent over \$896 million since intervention began.[‡] The stated purpose of the military engagement was to force Gadhafi either to step down or leave Libya; that mission was accomplished.

However, there is an important dichotomy: an organized rebel group receives significant international military assistance, and a largely unorganized opposition barely receives meaningless platitudes that accompany nonintervention in the face of extraordinary violations of human rights. Declarations that the Syrian regime has lost legitimacy are true, but they are just that, declarations; devoid of intervention, they are akin to whistling in the wind. That, however, is the essence of the Obama administration's

* Martinez, L. U.S. Military Intervention in Libya Cost At Least \$896 Million. *ABC News*, August 22, 2011. Accessed May 30, 2013. <http://blogs.abcnews.com/political-punch/2011/08/us-military-intervention-in-libya-cost-at-least-896-million-.html> (tallying total cost as of Aug. 22, 2011).

[†] United States activities in Libya. *Foreign Policy*, June 27, 2011. Accessed January 4, 2012. http://www.foreignpolicy.com/files/fp_uploaded_documents/110615_United_States_Activities_in_Libya_--_6_15_11.pdf (providing a detailed overview of American operations in Libya compiled by the White House).

[‡] Martinez, *supra* notes 51.

policy with respect to Syria: merely words. Needless to say, that is a far cry from the aggressive intervention policy regarding Libya.

Herein lies the rub: a compelling argument can be made that unorganized Syrians are in greater need of international intervention than organized Libyan rebels. That is, the United States and NATO have deliberately turned their back on the citizens of one country, while readily coming to the assistance of the citizens of another country. With that in mind, we turn our focus to humanitarian intervention.

Law of Humanitarian Intervention

As Professor Ryan Goodman asked, "Should international law permit states to intervene militarily to stop a genocide or comparable atrocity without Security Council authorization?"^{*} According to Article 39, Chapter VII of the UN Charter, "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security."[†]

Although the United Nations authorized military force against Libya,[‡] it has not done so regarding Syria.[§] Does that mean the United

^{*} Goodman, R. Humanitarian intervention and pretexts for war. *Amer. J. Intl. Law* 100 (2006): 107.

[†] UN Charter Art. 39.

[‡] Solomon, J., Entous, A., and Lauria, J. U.N. Clears Way for Attack on Libya. *Wall Street Journal*, May 18, 2011. Accessed May 31, 2013. <http://online.wsj.com/article/SB10001424052748703818204576206373350344478.html> (noting that the UN Security Council authorized military force against Libya).

[§] "Outraged" by Rising Death Toll in Syria, General Assembly Demands Halt to All Violence. *UN News Centre*, May 15, 2013. Accessed June 3, 2013. <http://www.un.org/apps/news/story.asp?NewsID=44916#Ua0Eqpxz6z4> (the General Assembly adopted a resolution reiterating its call for rapid progress on a political transition); and Schake, K. "A Strategy for Intervention in Syria: Help the Refugees. *The Guardian*, May 31, 2013. Accessed June 3, 2013. <http://www.guardian.co.uk/commentisfree/2013/may/31/intervention-strategy-syria-help-refugees> (the need to invoke the UN Responsibility to Protect as the legal basis for intervention); and MacAskill, E. Three New Cases of Chemical Weapons Use by Syrian Regime, UN Told. *The Guardian*, May 29, 2013. Accessed June 3, 2013. <http://www.guardian.co.uk/world/2013/may/29/syria-chemical-weapons-use-britain-allegations>; and "U.N. Security Council Issues Statement Condemning Violence in Syria." *CNN*, August 3, 2011. Accessed June 3, 2013. http://www.cnn.com/2011/WORLD/meast/08/03/syria.unrest/index.html?hpt=hp_t1 (noting that thus far, the U.N. Security Council has only issued a statement condemning the violence in Syria).

States cannot intervene in Syria? As Professor Goodman and others have written,^{*} international humanitarian intervention raises legitimate questions regarding pretext to “wage wars for ulterior motives.”[†] From the perspective of international law, a discussion regarding international humanitarian intervention requires carefully analyzing the relationship between national sovereignty, international responsibility, and grave violations of human rights. The pretext argument, suggested by Professor Goodman, is of justifiable concern when examining specific examples of intervention. In the two examples discussed in this chapter, the application of international humanitarian intervention principles reflects the inconsistency previously referenced.

Humanitarian intervention is an inherently complicated proposition because it clearly implies both that nation-state A is engaged in significant violations of the human rights of its own citizens thereby requiring nation-state B and/or the international community to recognize that intervention is essential.[‡] However, analysis of when intervention is deemed essential suggests lack of clarity and objective standards and benchmarks.

The lack of clear criteria as to when intervention is justified, if not required, suggests that the question is one of interpretation, subject to

^{*} Goodman, *supra* note 54; see, e.g., Cogan, J.K. The regulatory turn in international law. *Harvard Internat. Law J.* 52 (2011): 321. (purporting that there has been an unnoticed change in international regulatory law allowing for states who treat their citizens improperly to come under international scrutiny); and Eaton, J. “An emerging norm? Determining the meaning of legal status of the responsibility to protect. *Michigan J. Intl. Law* 32 (2011): 765. (discussing the emerging norm in the UN General Assembly to protect during humanitarian intervention); Lamp, N. Conceptions of war and paradigms of compliance: The “new war” challenge to international humanitarian law. *J. Conflict Security Law* 16 (2011): 225 (arguing that modern new wars pose challenges to international humanitarian law).

[†] Goodman, *supra* note 54.

[‡] See Responsibility to Protect. Learn About the International Coalition for the Responsibility to Protect. Accessed July 14, 2011. <http://www.responsibilitytoprotect.org/index.php/about-coalition> (detailing an effort to impose a normative standard for demanding preventative intervention).

specific circumstances and particular interests.* In that vein, then, the question is: why does the United States not determine that the actions of the Syrian government justify international humanitarian intervention? As of April 2013, the Syrian death toll was estimated to exceed 80,000 people.† In addition to the rising death toll, up to 38,833 protesters have been reported missing or in Syrian custody since the protests began.‡

In fact, a high-level UN human rights team reported finding systematic human rights violations by the Syrian government, including summary executions, prisoner torture, and the targeting of children during the government's crackdown on opposition protestors.§ Based on its findings,

* Compare Borgen, C. The "Libya and humanitarian intervention" meme. *Opinio Juris*, February 24, 2011. Accessed May 31, 2013. <http://opiniojuris.org/2011/02/24/the-libya-and-humanitarian-intervention-meme/> (compiling internet responses related to the humanitarian intervention in Libya); and Bali, A.Ü. and Abu-Rish, Z. On international intervention and the dire situation in Libya. *JADALIYYA*, February 23, 2011. Accessed May 31, 2013. <http://www.jadaliyya.com/pages/index/725/on-international-intervention-and-the-dire-situation-in-libya> (advocating for solutions to the situation and Libya and describing the condemnation of the violence in Libya); and El Amrani, I. A different take on foreign intervention in Libya." *The Arabist*, February 24, 2011. Accessed May 31, 2013. <http://arabist.net/blog/2011/2/24/a-different-take-on-foreign-intervention-in-libya.html> (opposing foreign military intervention); and Hamid, S. Libya uprising: It's time to intervene. *Slate*, February 23, 2011. Accessed May 31, 2013. <http://www.slate.com/id/2286184/> (giving the international community options for supporting a regime change in Libya).

† See Nichols, M. Syria Death Toll at Least 80,000, says U.N. General Assembly President. *Reuters*, May 15, 2013. Accessed June 3, 2013. <http://in.reuters.com/article/2013/05/15/syria-crisis-un-deaths-idINDEE94E0CJ20130515>; and By the Numbers: Syria Deaths. *CNN*, April 2, 2013. Accessed June 3, 2013. <http://www.cnn.com/2013/01/08/world/meast/syria-civil-war-compare>

‡ See Center for Documentation of Violations in Syria. Statistics for the Number of Detainees. Accessed June 3, 2013. <http://www.vdc-sy.info/index.php/en/> (statistics for the number of detainees as of June 2013); and Syrian Arrests Are Said to Have Snared Tens of Thousands. *New York Times*, June 27, 2012. Accessed May 31, 2013. http://www.nytimes.com/2012/06/28/world/middleeast/beyond-arms-syria-uses-arrests-against-uprising.html?pagewanted=all&_r=0.

§ See Independent UN Panel Urges Action Amid Ongoing Human Rights Abuses in Syria Conflict. *UN News Centre*, February, 18, 2013. Accessed June 3, 2013. <http://www.un.org/apps/news/story.asp?NewsID=44163&Cr=syria&Cr1=human%20rights#Ua0VeJxz6z4>; and Syria: Visit Reveals Torture Chambers. *Human Rights Watch*, May 17, 2013. Accessed June 3, 2013. <http://www.hrw.org/news/2013/05/16/syria-visit-reveals-torture-chambers> (evidence of torture and arbitrary detention); and UN Human Rights Council, Rep. of the U.N. High Comm'r for Human Rights on the Situation of Human Rights in the Syrian Arab Republic, ¶22, U.N. Doc. A/HRC/18/53; GAOR, 18th Sess. (Sept. 15, 2011) (listing human rights violations in Syria); see also Jordans, F. U.N. Syria Mission Finds Systematic Human Rights Violations. *Huffington Post*, August 18, 2011. Accessed May 31, 2013. http://www.huffingtonpost.com/2011/08/18/un-syria-hman-rights_n_930577.html

the UN team recommended that Syria be referred to the International Criminal Court, for prosecution of the alleged atrocities. By comparison, the Libyan death toll was estimated at over 1,000, on February 23, 2011,* only weeks before the United Nations authorized intervention in Libya, and NATO began flying sorties over the country.

Precisely because international law does not articulate either normative or architectural standards as to when international humanitarian intervention is justified, national leaders arguably have a responsibility to act.[†] For a variety of reasons, the international community has determined, whether actively or passively, that the massacre of the Syrian population by the Assad government does not justify international humanitarian intervention. Although the human rights violations occurring on a daily basis do not compare to the horrors of Rwanda,[‡] Kosovo,[§] or Sierra Leone,[¶] they are certainly not less compelling than the event that had transpired in Libya.

* Donadio, R. Italy Says Death Toll Is Likely Over 1,000. *New York Times*, February 23, 2011. Accessed May 31, 2013. <http://www.nytimes.com/2011/02/24/world/europe/24italy.html>

[†] See The Crisis in Syria. *International Coalition for the Responsibility to Protect*. Accessed June 3, 2013. <http://www.responsibilitytoprotect.org/index.php/crises/crisis-in-syria> (discussing alleged human rights violations by the Syrian government and calling for intervention by the international community); Bajoria, J. Libya and the Responsibility to Protect. *Council on Foreign Relations*, March 24, 2011. Accessed on May 31, 2013. <http://www.cfr.org/libya/libya-responsibility-protect/p24480> (stating if a state fails to protect its citizens from genocide or other war crimes, it becomes the international community's responsibility to do so); Cotler, I. and Genser, J. Libya and the Responsibility to Protect. *New York Times*, February 28, 2011. Accessed May 31, 2013. http://www.nytimes.com/2011/03/01/opinion/01iht-edcotler01.html?_r=2 (authorizing action from the international community to protect a state's population from genocide or other war crimes if that state is unable or unwilling to protect its citizens, or if that state is the perpetrator of such actions; at a UN world summit in 2005).

[‡] See Bureau of Democracy, Human Rights, and Labor. 2009 Human Rights Report: Rwanda. *U.S. Department of State*, March 11, 2010. Accessed May 31, 2013. <http://www.state.gov/g/drl/rls/hrrpt/2009/af/135971.htm>

[§] See Q & A Counting Kosovo's Dead. *BBC NEWS*, November 12, 1999. Accessed May 31, 2013. <http://news.bbc.co.uk/2/hi/europe/517168.stm> (The death toll in Kosovo was estimated between 5,000 and 12,000.). For a more recent report, see Bureau of Democracy, Human Rights, and Labor. 2009 Human Rights Report: Kosovo. *U.S. Department of State*, March 11, 2010. Accessed May 31, 2013. <http://www.state.gov/g/drl/rls/hrrpt/2009/eur/136039.htm>

[¶] See Bureau of Democracy, Human Rights, and Labor. 2009 Human Rights Report: Sierra Leone. *U.S. Department of State*, March 11, 2010. Accessed May 31, 2013. <http://www.state.gov/g/drl/rls/hrrpt/2009/af/135975.htm>

4

Negotiating Agreements: Security and Understanding the “Other”

For five years (1994–1999), I directly negotiated on-the-ground implementation of the Oslo Peace Process in the Gaza Strip. In my capacity as the Israel Defense Forces Judge Advocate General’s Corps Legal Advisor to the IDF Commander, Gaza Strip (1994–1997), I had direct responsibility for both interpretation and negotiation, first for the Gaza–Jericho Agreement and subsequently for the Interim Agreement, as it applied to the Gaza Strip. See Figure 4.1.

It is not my intention in this chapter to cast aspersions as to the motivations and conduct of those involved, either in the drafting and negotiating of the Agreements or in their implementation. For purposes of clarity, the term implementation refers to on-the-ground negotiation of how agreements negotiated in Oslo were to be implemented. This chapter provides a bird’s-eye view of the negotiating process, with respect to the implementation of an agreement.

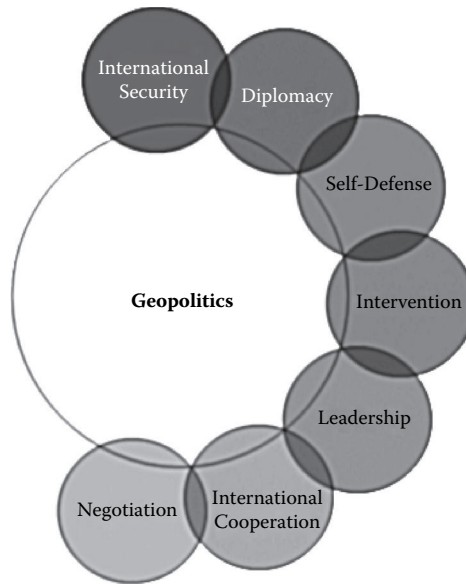


Figure 4.1. Negotiation.

A SHORT HISTORY

A short historical recounting is in order: in the aftermath of the 1967 Six-Day War, Israel gained control of the Sinai Peninsula and the Gaza Strip (formerly under Egyptian control), the West Bank, and East Jerusalem, including the Old City of Jerusalem (formerly under Jordanian control), and the Golan Heights (formerly under Syrian control). The Gaza Strip and the West Bank are relevant to this chapter. The State of Israel annexed neither, instead establishing a military government under the command of an IDF general. In accordance with international law, the existing civilian institutions were left intact; that said, a military occupation was implemented. From 1967–1987, the occupied Palestinian population was largely docile, tolerating the occupation with minimal resistance. In December 1987, a number of residents of the Gaza Strip were killed in a traffic accident (by an Israeli driver). Long-simmering tensions quickly came to the fore in the immediate aftermath, resulting in the Palestinian intifada.

Thousands of Palestinians—initially in the Gaza Strip and, shortly thereafter, in the West Bank (see Figure 1.1 in Chapter 1)—took to the

streets, violently demonstrating against the occupation, throwing stones and then Molotov cocktails at IDF soldiers and vehicles, and within a few months murdering Palestinians suspected of collaborating with the IDF and General Security Services (today referred to as the Israel Security Agency, ISA).

The Israeli authorities were caught completely off guard. Only days before, the Ministry of Defense had published a report stating, in part, that the Palestinian population in the West Bank was "grateful" to the IDF. The Palestinian leadership (in Tunis, following their eviction from Lebanon) was similarly surprised at the intensity and duration of the demonstrations, and largely played "catch up" with respect to local Palestinian leadership.

In 1992, the Labor Party won the Israeli general elections and Yitzhak Rabin became prime minister. In August 1993, the Israeli media reported that Israeli and Palestinian negotiators had met in secret in Oslo, and drafted a Declaration of Principles for the resolution of the Israeli-Palestinian conflict. In September 1993, Prime Minister Rabin and PLO Chairman Yasser Arafat, the president of the new Palestinian Authority, signed the Declaration in the presence of President Clinton in a ceremony on the White House lawn. In Cairo, in May 1994, Rabin and Arafat signed the Gaza-Jericho Agreement, according to which a Palestinian state would be established within five years.

Palestinians and Israelis woke up to a new era: a peace process intended to enable both peoples, after years of conflict and strife, to move ahead under the structure of a negotiated peace. Although there was skepticism, and opposition on both sides the sense of optimism was undeniable.

THE AGREEMENT

A brief description is necessary, even though this chapter's primary focus is lessons learned, rather than an analysis of the Agreement. The Gaza-Jericho Agreement, in accordance with the Declaration of Principles (and as reflected in the subsequent Interim Agreement), called on the newly created Palestinian Authority (PA; which stepped into the shoes of the Palestine Liberation Organization) to assume responsibility for civilian and criminal affairs in the Gaza Strip and Jericho (in the West Bank). The IDF maintained responsibility for all security affairs, both within the Gaza Strip and externally (sea, air, and on the border between Gaza and Israel). In addition, the PA was to be a partner in counterterrorism,

referring in particular to Hamas and the Islamic Jihad. Israel, therefore, supplied weapons and vehicles to the Palestinian police, which was created in the context of the agreement.

To symbolize the partnership joint patrols, consisting of Palestinian police and IDF soldiers, were established as were District Coordination Offices (DCOs), to facilitate joint resolution of on-the-ground issues emanating from the agreement and the new reality it represented. Although Israel maintained responsibility for granting entry permits into Israel from Gaza, the DCOs were intended to enable Palestinian participation in the process. The IDF maintained the right to arrest and engage Palestinians suspected of involvement in terrorism, but the agreement's underlying philosophy was to create mechanisms and infrastructure for the PA to assume responsibility with respect to counterterrorism. For example, the agreement called on the PA to extradite Palestinians suspected of involvement in terrorism to Israel.

The Agreement called for the creation of a "Safe Passage" between the Gaza Strip and the West Bank. Although the Agreement referred to the West Bank and Gaza Strip as a single integral unit, the geographical reality suggests that the phrase was included for political negotiating purposes. Safe Passage was extraordinarily important for Arafat because, if implemented, it would enable Palestinians to travel between the two areas of the PA. Although it would not physically connect the two areas, its importance from an existential perspective was extraordinary.

IMPLEMENTING THE AGREEMENT: LESSONS LEARNED

In July 1994, I participated in what I believe to have been the first meeting of the Civil Affairs Committee. The meeting's purpose as briefly explained to me was to establish procedures and mechanisms for the committee. Unfortunately, and most telling for our purposes, the PA representatives had a fundamentally different agenda. The meeting was a "dialogue of the deaf," which is why it is important to discuss its larger significance in the context of lessons learned. From the Israeli perspective, the two sides had turned a page and were now equals in this venture; for the Palestinians, the initial meetings were intended to develop the infrastructure for negotiating, and the implementation of the agreement presented an opportunity to request entry permits for friends and relatives. The Israeli side assumed the Palestinians had similarly turned a page. It never occurred to us that the

intended change for the Palestinians from occupied to partner would be so dramatic as to be almost, at this beginning stage, untenable.

We were talking principles; they were talking entry permits. There had been no preliminary preparatory meeting (at least not one to which I had been invited). Instead, we simply walked into the room designated for the meeting, introduced ourselves to the Palestinians (some of the participants were previously acquainted), and began the process. The process was not a "process" because it was readily apparent that mutuality of purpose, goal, and mechanism were clearly missing. That is, although perhaps each side had an internal understanding regarding to what end we were meeting, there was a lack of understanding of the other side's agenda. Simply stated, we were meeting for different and distinct purposes, as reflected in our different understandings of each other's practical and existential perspectives.

Perhaps this should not have been a surprise because it was after all the first meeting, intended to begin the process of implementing a peace agreement. That said, it reflected an impression that I had, both then and in innumerable meetings thereafter, that the two sides did not share a common understanding of why we were meeting. It was publicly stated that we were meeting to implement the agreement, but I believe there was a fundamental disconnect regarding what the phrase "implementing the agreement" meant.

In retrospect, this might have been inevitable. After all, the Palestinians had lived under an occupation and all that it entails for twenty-seven years. Although we expected (hoped?) that the "page turning" would be instantaneous, in an effort to forge ahead perhaps greater attention should have been paid to the psychology of the implementation process. What, in the IDF, was referred to as "changing of the disc," articulating a fundamentally different paradigm and defining the changed relationship between the parties, would be far more complex and difficult than those who drafted the agreements anticipated. In many ways, the bread and butter (negotiating implementation) demonstrated the profound gap between the sides and the long road that truly lay ahead.

By analogy, in writings and lectures elsewhere, I have criticized the U.S. military for paying insufficient attention to the "soft" elements of combat (e.g., teaching language skills, developing understanding of cultural and tribal nuances) with respect to Iraq and Afghanistan. The same criticism, in retrospect, can be applied to how we approached negotiating sessions because we, frankly, were insufficiently sensitive to the radical

transformation required of the Palestinian side. Mistrust was inevitable, given the history of the Israeli–Palestinian conflict. Perhaps that could have been minimized if greater attention had been paid to the existential transformation required to move ahead.

That first meeting of the Civil Affairs Committee provides a useful jumping-off point for the lessons learned. This is the time and place to state, on this note, that the architects of Oslo on both sides did not fully appreciate the enormous complexity of implementing what they drafted. In this failure to grasp the nature of the task, they left those of us at the implementing table with one key overarching lesson:

I do not know the tone and tenor of the Palestinian internal discussion, however, our meetings were marked by an increasing realization that we were two ships passing in the night. Perhaps negotiating realities required vagueness, perhaps wiggle room was essential for domestic

Implementers must have sufficient guidelines and structure regarding how an agreement is to be implemented on the ground, and clear instructions with respect to the true endgame.

political consumption, perhaps lack of clarity reflected the personalities involved (including the leaders of both sides), but all these significantly impeded the on-the-ground implementation process. To be blunt, those of us mandated with negotiating implementation found ourselves (sometimes together) wondering what the drafters intended.

The Oslo architects (with whom I never met) may have expected this, perhaps they never fully considered or determined the true endgame. Either way, the vagueness of the language they used (and, frankly, the absolute lack of direction they provided) left us, the implementers, in the position of trying to create agreements from scratch. Rearticulated, those responsible for implementation were forced to assume the role of strategic, not tactical, negotiators because of the very limited guidance (actually, none) the Oslo language provided to us. Those of us negotiating implementation believed that the architects had addressed the large picture issues and we, the implementers, were to attend to the nuts and bolts. Their fundamental failure to provide us with clear guidelines meant that we, the implementers, were articulating policy.

That frustration was particularly relevant to the negotiating of the Safe Passage Agreement, which was ultimately signed in a public ceremony

in Jerusalem. The history of its negotiation is particularly telling in the context of lessons learned. A quick recounting is in order. One morning I received a phone call from a senior IDF commander who instructed me to meet that evening with a senior PA security official in order to hear what the PA "wants with respect to the Safe Passage." So, began an extraordinary period in my professional life.

My involvement in the Safe Passage negotiations serves, in many ways, as the core of many—if not most—of the lessons learned. To facilitate the reader's understanding, the ten points below are the core lessons I propose addressing:

- 1) Assume neither side understands the other: parties have fundamentally different understandings of and expectations about important concepts, including basic terms, on the negotiating table.
- 2) Negotiators must have an open line of real-time communication to the principal decision maker.
- 3) Continuity of participants, a core group, is essential to negotiation success: develop a core group, minimize substitute or "add-on" negotiators, and meet regularly.
- 4) Understand with whom you are truly negotiating and their chain of command: members of negotiating teams may represent different and possibly competing factions.
- 5) Have functional counterparts (e.g., commanders—commanders; lawyers—lawyers) on each side of the negotiating table.
- 6) Problem solving: Develop mechanisms, both internally (within your side) and externally (between the sides).
- 7) Crisis management: Develop an agreed-upon mechanism and infrastructure because crises will occur.
- 8) Sensitivity to cultural differences: What food to serve, what hour to meet, is essential.
- 9) Minimize outside "noise" in order to stay on course: Negotiating in the aftermath of a terrorist attack.
- 10) Understand the costs and benefits of third-party involvement.

Assume Neither Side Understands the Other

Safe Passage was intended to facilitate travel for Palestinians between the Gaza Strip and West Bank. The expression in Hebrew is (transliteration)

ma'avar batu'ah; when the "b" is replaced with a "p" it becomes (transliteration) *ma'avar patu'ah* which, translated, is "open passage." The Israeli side used the term with the "b," the Palestinian side used the term with the "p."

Language is essential to understanding the implementation process; the official language of the agreements was English, meaning that the agreement was written and signed in English. The negotiating sessions were conducted in English, although side-bar conversations between individuals from the two sides were conducted either in Hebrew or Arabic. Nevertheless, the official discussion (at the meetings, at which I was present) was always conducted in English (either directly or through translation), and all agreements (at least those I wrote) were in English.

The difference between the two terms for Safe Passage is fundamental and goes to the essence of the question. The Israeli side envisioned passage through Israel, subject to rigid controls, strict monitoring, and limited hours; the Palestinians envisioned free and unlimited passage from part A to part B of a single territorial unit. At the first negotiating session, the Palestinian representative submitted a draft agreement, clearly reflecting the Palestinian view. Later that day, I reported to my "principal," who instructed me to prepare a counterproposal reflecting what he believed to be the Israeli position. The following day, I met with my Palestinian counterpart, for what would become a fascinating routine of innumerable negotiating sessions in a small group.

The inherent difficulty with this reality is that we (on all levels) had a fundamental and thorough disagreement with respect to both the essence of Safe Passage and how it would "look on the ground." That fundamental dissonance was a recurring theme: the two sides simply had distinct understandings of what "Safe Passage" truly means for Palestinians wishing to travel on the Safe Passage roads and for the IDF regarding security arrangements. The Palestinians viewed Safe Passage as linking the two units of the Palestinian Authority (therefore its overwhelming importance), whereas many IDF officers and the Israeli public were concerned about the possible danger to public safety and security.

Negotiators Must Have an Open Line of Real-Time Communication to the Principal Decision Maker

Frustrating and groping would be appropriate adjectives when describing the lack of direction and instruction we felt in the implementation

process. The critical disconnect between the drafters and implementers manifested itself (from my perspective) in the failure to receive clear instructions from the decision-making level. At the risk of being repetitive, with respect to the overarching lesson referenced above regarding the need for clear instructions, the following highlights the need for clear and steady communications between principals and implementers.

The lead IDF negotiator (tasked with the Safe Passage issue), whom I met with regularly, was (it was clear) reporting to his senior command that the lack of clear answers received was extraordinarily problematic (his frustration was obvious to me); in and of itself this directly contributed to a lack of clarity in the implementation process. The result, frankly, was negotiations, largely shaped by an intimate group, devoid of direct communication with the decision maker.

Perhaps this lack of clarity and understanding was a deliberate policy intended to create an illusion of seemingly negotiating, but in essence it created a stalemate. Although this might have been the case, the increasing number of meetings and discussions involving IDF officers and government officials alike suggests that there was not a Machiavellian intent at play here. Rather, the lack of direction reflected a fundamental failure to understand, or decide, how the "Safe Passage" language was to be implemented. That, I suggest, was the fundamental cause for a lack of direction that in turn explains the failure to communicate fully with the working level tasked with implementation.

The above perhaps explains conduct, but it is not intended to minimize the fundamental reality: the implementation effort was conducted largely devoid of direction from the decision-making level. This, I suggest, reflected two fundamental realities: senior decision makers were unclear regarding how to articulate their preferred final outcome, and the drafters viewed the Safe Passage issue as an afterthought. In reality, for the Palestinians, in general, and Arafat, in particular, it was perhaps the most important clause in the Oslo Accords to be negotiated. I am not convinced the Israeli side was sufficiently sensitive to the importance of Safe Passage to the Palestinian side, or possibly, precisely, because its importance was correctly understood, the lack of direction was deliberate; it is hard for me to tell. The reality was a lack of direct communications with those who could have shed light both on the larger picture and a practical direction.

Continuity of Participants, a Core Group, Is Essential to Negotiation Success

It is important to recall the context of these implementation negotiations. After twenty-seven years of occupation, the two sides were now sitting daily to implement an agreement largely devoid of guidelines. Negotiating is inherently difficult, but doing so in this most unusual of circumstances is all but impossible. Developing an orderly process, predicated on continuity, is essential to minimizing inevitable confusion and uncertainty.

Interchangeable substitutes are, perhaps, legitimate in athletics, but are extremely problematic in the negotiation context. Not only does the coming and going of individuals impede progress (meeting to meeting), but it also creates a lack of certainty regarding the decision-making process. In a word, on innumerable occasions, sitting across from me were individuals who had not participated in previous meetings and were not to be seen again.

First, a core group develops a common language (with respect to the issues negotiated), shared experiences, and mutual understanding of strengths and weaknesses. Furthermore, continuity of the group ensures that valuable time is not lost in constantly bringing new participants up to speed. On occasions when the core group was expanded to include individuals representing additional areas of expertise, the result was, more often than not, unhelpful. The decision to expand may have reflected an overarching strategic goal, however, the reality was very different. To be blunt, both sides were feeling themselves (and each other) out with the result that decisions with strategic significance were made at the tactical level. The usual result was to impede progress and create frustration, rather than establish a sense of moving forward.

Second, holding regularly scheduled meetings ensures continuity, vitally important with respect to both participants and content. Continuity significantly facilitates development of subject matter expertise, which is so critical to issues that are contentious legally, politically, and historically, but only develops over time. Expertise and understanding of nuances are essential to negotiating an agreement replete with literally an endless series of legally complicated and politically charged details. There is no doubt that together, the core group negotiating the Safe Passage Agreement became subject matter experts; we gained this expertise individually and collectively, and came to understand the essence (philosophically and practically) of each other's positions. That mutual recognition,

even if not articulated, was essential to developing an infrastructure that created a working environment predicated on a core understanding of the issue.

Third, negotiating with the same group (internal and external) also facilitates the drafting process (tactical) and actual negotiation (strategic) because of the inherent continuity of process and participants alike. The expertise and understanding that continuity brings is crucial for resolving the minute details—literally, an endless series of legally complicated and politically charged details—that are the essence of drafting.

Fourth, continuity also significantly facilitates the mutual development of a set of ground rules for negotiating, including an agreed-upon mechanism for how to conduct the negotiations, ranging from where/when to meet, to how to track changes in the evolving core document. This is essential for enhancing an orderly process in a context that is largely disordered. Similarly, an agreed-to process enabling exchange of reliable drafts is extraordinarily important; otherwise the negotiating sessions are haphazard at best, dysfunctional at worst.

Finally, continuity minimizes gamesmanship, whereas the introduction of new participants goes hand in hand with posturing, generally intended to demonstrate strength and resolve. It is important to add, depending on the new participants' identity, that both the core group and new participants may engage in posturing. In either case, posturing is showmanship that is perhaps amusing but serves to impede progress and affects the tenuous relationship a core group develops.

Understand with Whom You Are Truly Negotiating and Their Chain of Command

Members of negotiating teams may represent different and possibly competing factions, leading to an uncertainty, compounded by who the participants are and whether they will be there the next time. The problem of a steady stream of new participants, raised above, was particularly problematic when all participants were busy transcribing what other participants were saying, raising legitimate questions regarding for whom they were keeping copious notes and to what end.

Uncertainty, regarding both the participants' affiliation and the role played by their superiors, affected the manner in which the negotiations were conducted and the overall ability to negotiate in an orderly

and systematic fashion. The uncertainty was both internal and external, because individuals on the same side of the table were occasionally unsure, regarding (frankly) to whom their own loyalty was owed. This was particularly acute when Palestinian negotiators representing different security organizations would participate in negotiating sessions. The inevitable internal politicking and playing to internal audience(s), significantly hampered progress when, frankly, too many individuals representing competing organizations were present.

Arafat's management theory was once described to me as "spokes" (with him in the middle), rather than a hierarchical chain of command (as is, e.g., the traditional military model). As a result, according to Israeli experts, competing Palestinian factions were in a constant battle to curry favor and improve their position in his eyes. That is perhaps inevitable in the paradigm of a new regime (the PA), however, it dramatically affected the negotiation process. Although not privy to internal Palestinian memos/discussions, the description above resonates with respect to negotiating sessions in which I participated. Needless to say, this presented a fundamental difficulty for both sides; the failure to clearly designate clear lines represents an important "how not to" lesson.

Have Functional Counterparts (e.g., Commanders–Commanders; Lawyers–Lawyers) on Each Side of the Negotiating Table

Because common professional language and similar experience are extraordinarily important process facilitators, having functional counterparts at the negotiating table significantly enhances the process. Senior Palestinian officials repeatedly told me that they would respect my interpretation of the agreement, however, they were not my "client." The PA's failure to appoint an attorney, either to the Civil Affairs or the Security Affairs Committees, was a major failure on the Palestinians' part. It was, frankly, a continuing source of puzzlement: I had, in different circumstances, interacted with outstanding Palestinian attorneys, and was convinced that their abilities would have made a significant contribution to implementation negotiations. In particular, the Safe Passage negotiations would have been significantly advanced if a Palestinian lawyer had been involved, because much of the discussion turned on complicated legal terms and analysis.

This was consistently reinforced in Security Affairs Committee meetings, where commanders instinctively understood each other. Common language among commanders enormously facilitated the resolution of important tactical disputes so essential to implementation. Members of the Israeli side were current IDF commanders; members of the Palestinian side were individuals who had been arrested (in some cases deported), tried, and incarcerated for their involvement in terrorism over the years. Some had been involved in attacks that will long live in the collective memory of Israelis. However, that very experience facilitated a common language among the participants who shared many similarities: they were commanders, who understood decision making under fire, at risk both to themselves and those under their command, and the need to "decide and act." This shared professional culture contributed to meetings that were intense and fraught with tension (and on occasion raised voices), but most importantly, to a sense that issues could be resolved.

It would be fair to state that commanders had mutual respect for each other; perhaps this is why the Security Affairs Committee was the most effective (in the context of problem solving) of the committees in which I participated. However, the last comment must be tempered, for progress was, in large part, tactical rather than strategic. However (the reader will excuse the double caveats), perhaps the reality of negotiating implementation of a peace agreement is that progress is largely in the sphere of tactical issues, rather than overarching strategic considerations.

Choosing and developing negotiating teams are critical to the negotiating process; in so doing, decision makers must be sensitive to the issues to be discussed and how to advance the ball most effectively. From my perspective, a Palestinian attorney would have significantly contributed to discussion of the Safe Passage issue for the very reasons that IDF and PA commanders were able effectively to address tactical issues. Although the commanders obviously did not always resolve their disputes, their dialogue was predicated on a common language that facilitated mutual understanding, if not agreement.

Problem Solving: Develop Mechanisms Both Internally (Within Your Side) and Externally (Between the Sides)

This lesson is best explained with the following vignette. In November 1997, I was asked to accompany a high-level Israeli delegation to Washington, DC, to meet with Palestinian representatives under the auspices of the U.S.

government. After meeting for five consecutive days, we made significant progress on the Safe Passage issue. As the sole lawyer (even on this occasion, the Palestinian delegation did not include a lawyer), I was asked by both sides to draft the agreement in accordance with the discussions. In order to guarantee accuracy, I shared the draft in progress with Palestinian participants. Before leaving DC the Israeli and Palestinian negotiators met with Ambassador Dennis Ross (President Clinton's chief Middle East negotiator), Mahmoud Abbas (Abu Mazen, then Arafat's deputy, today the PA President), and David Levy (then Israel's Foreign Minister), in order to report both on progress and indicate how we intended to proceed upon our return to Israel/PA. It was agreed that significant progress had been made.

A few days later, we (including, but not only, the same individuals who had participated in the DC negotiations) met in the Jerusalem area. Evidently, word of our progress had been leaked to the media. When I arrived, cameras and reporters were omnipresent. In accordance with the procedure agreed upon in DC, I presented the updated version of the agreement to the Palestinian representatives (including those who had been in DC). The response was quick in coming: "I have never seen this before." The Israeli response was equally quick; the lead Israeli negotiator ordered that we immediately leave the room.

I subsequently learned the background: when the lead Palestinian negotiator reported our progress to Arafat, he was severely reprimanded for concessions agreed to in DC. Furthermore, according to what I have been told by well-placed sources with intimate access to this information, the Palestinian negotiator was ordered to renounce the agreement publicly, hence perhaps the very demonstrative manner in which he responded.

Clearly, there were problems in both the internal (intra-Palestinian) process and the external (Israeli-Palestinian) process that required resolution. I cannot, obviously, comment on how the Palestinians resolved crises, however, their reaction in this instance (questioning the document's accuracy) raised serious questions about trust and mutual confidence. Although, according to Israeli sources, the reaction was unrelated to the Israeli actions, the vignette highlights the absolute necessity of establishing mechanisms to minimize the impact of internal and external crises. Drama and theatre are inevitable in negotiations (perhaps diplomatic negotiations are particularly susceptible to this), however, establishing mechanisms, including prenegotiation preparatory sessions, would minimize their negative impact.

Crisis Management: Develop an Agreed-Upon Mechanism and Infrastructure Because Crises Will Occur

Crises are inevitable; after all, while we were negotiating the implementation of the Oslo Agreement, terrorism was a daily reality. Hamas and the Islamic Jihad rejected the peace process, vowing to continue to commit acts of terrorism in order to derail it. Jewish extremists were violently opposed to the process; ultimately Prime Minister Rabin was assassinated by a Jewish extremist who sought to derail the peace process; some would suggest successfully so.

A vignette is in order. In October 1994, a number of Israeli soldiers were killed at the Netzarim Junction in the Gaza Strip in two separate attacks. Following the second attack, an emergency meeting of the Security Affairs Committee was called; participants included senior IDF and PA officials, including those not tasked as committee members. The two attacks were a direct challenge to the agreement, and how the IDF and PA would respond was critical.

During the course of my IDF career, I had participated in innumerable meetings and discussions; this was, without a doubt, the most emotionally charged, bitter and angry. In a nutshell: senior IDF commanders were convinced (and made it very clear) that the PA was facilitating Hamas terrorism. That accusation was so directly and candidly made by a senior IDF commander that the PA representatives were clearly caught off guard. This was not theatre; this was pure anger and resentment, expressed by a commander who the next day would need to bury his soldier. It also, unintentionally, highlighted a fundamental weakness of the agreement. The agreement facilitated the meeting, but it did not create a crisis-management infrastructure. Although a meeting in response to a crisis is important, it is not akin to mutual management of the crisis. Perhaps this event was too soon after the signing, but the environment was not conducive to mutual problem solving, which, undoubtedly, was the architect's intent. The reality, however, was fundamentally different.

The meeting's structure was inherently flawed, perhaps a result of personalities or possibly owing to the essence of the event (death of a soldier). In retrospect, the effectiveness of an emergency meeting as crisis management does not benefit from the presence of an individual who is not a regular member of either side's negotiating team. Although the theatre may have been important for point-making purposes, it did

not facilitate resolution of the crisis; the latter would have benefited from a meeting of regular participants only.

The unilateral restrictions the IDF imposed on the Palestinian population in the aftermath of this crisis violated the agreement. In this vein, it is important to recall the fundamental inequality between the two sides. The Palestinians were still under Israeli occupation and therefore in a much weaker position than Israel. In retrospect, I am not sure the Israeli side fully and consistently internalized this.

There was a new reality—an agreement—which clearly stated that terrorism was to be fought jointly by the IDF and PA, however, the initial imbalance between the sides clearly affected on-the-ground circumstances. IDF commanders argued that the attacks reflected a fundamental failure of the PA; the PA was still in its earliest stages as crises were occurring only months after the Cairo signing ceremony. This is not intended to excuse the PA for its innumerable failings, but there was a clear distinction between the expectations and obligations arising from the agreement and the PA's ability and willingness to deliver.

As a result, it was incumbent upon IDF commanders to understand that creating a viable effective PA was not going to be an overnight occurrence. Creating a PA and arming it was a rational (albeit, controversial) decision by Rabin; although reacting in the heat of the moment was, perhaps, understandable, its significance should not be lost, from a process perspective. Unilateral measures reinforced the inherent imbalance between the sides, and signaled to the Palestinians that at moments of crisis, the former paradigm (occupier–occupied) would be the dominant reality, and the partnership in the fight against terrorism was largely ephemeral.

Did the PA make every effort to prevent the attack? Considering it occurred exactly where a similar attack had occurred only one week before, the answer to me is certainly “no.” However, imposing unilateral measures on the Palestinians illustrates the lack of an infrastructure process to facilitate joint responses to significant crises. Crisis-response meetings and suggesting dialogue are important, but they are not an operationalized, mutual crisis-management process. The Oslo drafters should have anticipated the need for crisis-response paradigms, but either did not foresee or did not sufficiently address this need. However, perhaps the essence of implementation negotiations is to create such an infrastructure mutually, from scratch. If so, creating an appropriate and effective mutual infrastructure during a crisis is an iffy proposition at best, dependent more on the personalities involved and not on the reactive-response lessons of history.

In contrast, the following vignette reflects a far more measured response to a crisis and, to the best of my knowledge, it reflects the individual decisions of two senior commanders who understood the importance of developing a process response. I do not suggest there had been a strategic lesson learned after the October 1994 Netzarim Junction attacks. However, I do believe this vignette shows how individuals working within a developing paradigm, the essence of peace implementation negotiations, can create a crisis-management process.

On December 31, 1994, a number of Palestinian policemen were killed. The circumstances were cloudy, but it was widely assumed that the IDF was responsible for the attack. In an effort to both defuse the extraordinary tension and to determine the facts on the ground, a joint commission of inquiry was established. I served as the legal advisor to the commission, which met for five very intense weeks, gathering evidence, questioning witnesses, and analyzing information received from numerous sources. The commission did not jointly announce its findings, nor was there an official termination of its responsibilities. However, the importance of the commission's efforts should not be diminished. It was, in every sense, a joint commission; any strong suspicions the Palestinians may have had regarding the circumstances did not destroy the joint effort.

Those responsible for creating the commission understood that its implementation was dependent on mutuality rather than the unilateralism that occurred in the aftermath of the October 1994 attacks. Although not privy to the decision making regarding the commission's establishment, given the short time from attack to decision, I doubt the commission's establishment was the result of intensive discussions between the commanders. Rather, based on my working relationship with those involved, I believe its success was personality-based and predicated on these commanders' joint correct assessment of what was required on the ground and their understanding of the essence of mutual implementation.

As such, it represents a significant improvement over the unilateral measures following the October 1994 attacks, but I am not convinced it manifests a crisis-management infrastructure. It does, however, demonstrate the manner in which insightful and thoughtful personalities can be utilized to minimize extraordinary tension, thereby achieving ad hoc crisis management. Although this vignette highlights the overwhelming importance of personalities, successful crisis management must be systemic and structured with built-in rules and guidelines rather than dependent on who has a seat at the table.

Sensitivity to Cultural Differences Is Essential

It became a running joke among the core group that meetings the Palestinians hosted were gastronomically far superior to meetings the IDF hosted. We served basic IDF food; they served the best Middle Eastern dishes. It was, frankly, one of the few side benefits of my five-year involvement in the peace process. Humor aside, cultural sensitivity is an important issue because it addresses how each side views the misnamed, so-called "soft issues," which are of enormous importance to the success or failure of the negotiating process. The IDF culture is largely brusque, impatient, and devoid of social lubricants; the Palestinian culture, with respect to hosting, is fundamentally different. Although cultural sensitivity does not ensure a successful negotiating session, environment and atmosphere affect, however subtly, tone and tenor. The oft-used expression "breaking bread" may be the most accurate description of the soft aspect of negotiating; perhaps underappreciated, I would suggest it can significantly contribute on both a tactical and strategic level alike. It does not, obviously, guarantee success, but it does represent the negotiators' fundamental mutual task of working together.

The physical environment for a negotiating session must offer, in addition to the main meeting room, more intimate private rooms for additional discussion. The importance of corridor talk (during breaks) should not be minimized, because off-the-cuff human encounters are essential in seeking to better understand the experiences and motivations of negotiating "partners." Negotiators on both sides were subject to their respective chains of command, but better understanding by participants of the other side's limitations and expectations was important on two counts: such insight would facilitate understanding, regarding how a particular negotiating session was conducted, and would provide insight into expectations/assumptions regarding what and how an individual would report regarding the session. The latter point is of extraordinary importance because the information the decision maker receives both dictates the responses to a previous session and influences future discussions.

The physical environment where negotiating sessions are conducted is important; physical comfort or discomfort directly contributes to the tone and tenor of meetings. It was well known that Arafat led a nocturnal existence, which directly affected when negotiations were scheduled, because Palestinian representatives would meet with him directly, before or after meeting with us. There must have been an implicit understanding

that "this was the way it is," because I do not recall discussions about the inherent inconvenience to all involved. The significance of this should not be dismissed because it highlights an important reality: the imposition of personal or cultural norms and mores should be minimized because they serve little, if any, benefit. For example, it was known that I am a rabid fan of Hapoel Jerusalem (the professional basketball team in the Israel basketball league). When we scheduled negotiating sessions, my counterparts regularly asked me whether a time would conflict with one of the team's evening games, a concern for which I was immensely appreciative. This, coincidentally, reinforces the importance of the value of having a core group (as discussed above).

Minimize Outside "Noise" in Order to Stay on Course

A wide variety of circumstances dictates how much to allow external factors to influence the negotiation process. First and foremost: can the parties ignore outside "noise," and how much do they want to be influenced by it? More specifically, should (can) they negotiate in the immediate aftermath of a terrorist attack, for example? To fully appreciate these tensions, it is important to understand the political and practical realities under which we were operating. As discussed above, both sides were subjected to vociferous internal opposition, both sides were under the watchful gaze of the United States, whose representatives were deeply involved, and the media were a constant reality.

In response to the October 1994 terrorist attack, discussed above, a previously scheduled negotiating session was cancelled and the negotiating process was stopped. Whether those decisions were correct depends on a wide array of factors, ranging from what message is being sent, what issues were to be discussed, whether the particular session would have contributed to stability, and what a cost-benefit analysis would suggest regarding the implications of cancelling negotiations in response to an attack.

Although I understood the justification for the decisions, I am not sure (with the benefit of retrospection) that they were the correct calls. Internal political considerations and "message sending" to the other side were the impetus for cancellation, but developing and implementing a process should have outweighed the more short-term calculations. Perhaps once a process has been sufficiently developed, additional considerations can then come into play.

The public invariably clamors for an aggressive military response in the aftermath of an attack, yet implementation of a peace process would suggest that negotiating in the face of terrorism is the essence of the process. This is easy to suggest years later; nevertheless, I would suggest that the decision to negotiate implementation of a peace agreement requires a giant leap of faith and an understanding that specific terrorist attacks should not be distractions, notwithstanding the anger, pain, and tragedy they (intentionally) create. Although it is, understandably, easy to lose sight of the larger picture when the TV is showing tragic victims of terrorism, a peace process seeks fundamentally to rearticulate the traditional negative-reactive paradigm. There is, I suggest, neither a right nor a wrong answer here. Rather, it is incumbent upon the negotiators to understand that implementing a peace agreement implies a fundamentally different decision-making process.

Understand the Costs and Benefits of Third-Party Involvement

During the course of my involvement, I was—and am in subsequent reflection—of two minds regarding the efficacy, effectiveness, and worthiness of third-party involvement. The discussion below is predicated on a third party that the two principal parties understand is in a position to influence the process directly. The third party clearly forces both parties to stay focused within the parameters of the discussion. On the other hand, both parties play to the third party, hoping to curry favor and score points. The former is a benefit; the latter is a cost. In the negotiating sessions I participated in with American representatives, they were actively engaged, regularly (during breaks) speaking with their colleagues (by phone), and receiving instructions regarding specific issues relevant to the discussion. For a third party to contribute, that party must demonstrate expertise regarding the issues devoid of favoritism or preference. That said, there is a larger, more fundamental question of what the most appropriate role of the third party is, and how to implement that role most effectively.

Discussing the political basis and ramifications of American involvement in the Middle East peace process is beyond the purview of this chapter, but addressing the impact of third-party participation is an important aspect of lessons learned. With respect to third-party presence, the dilemmas are complex. In a nutshell: when representatives of the United States were present, both sides spoke to each other through the U.S. representative rather than directly. Ostensibly a bilateral process,

it became bilateral plus in the presence of U.S. representatives (not quite trilateral because the United States was not negotiating directly, but rather was observing and facilitating).

I do not recall discussions regarding this issue, even though they may have been conducted at more senior levels. Those actually negotiating need to have a clear understanding of the role of additional parties, otherwise, the parties directly involved are groping, trying to determine how to structure their arguments and presentations. A third party is not invisible, rather quite the opposite: on a number of occasions American participants directly intervened, forcing the parties to articulate their positions more rigorously and better understand the other side. Conversely, American representatives were relegated to note-taking only, several times without directly participating. The inconsistency, perhaps reflective of a policy decision with the consent of senior Palestinian and Israeli decision makers, resulted in significant confusion, from the perspective of those tasked with actual negotiation. In a word: an inconsistent, poorly defined role for third parties unquestionably affects their ability to contribute, however that is defined.

CONCLUSION AND FINAL WORD

The lessons learned reflect my check-list; it is, in essence, a modest proposal for guidelines that can, it is hoped, be effectively implemented in whole or in part both in the Middle East and in other parts of the world. Negotiating is, as I came to know, extraordinarily complex; it is inherently complicated by political and historical tensions and deeply held suspicion as well as deeply held cultural differences. The architects saw themselves as artists painting a broad strategic canvas intending the implementers to merely paint within clearly contoured lines and limits. The reality, as I came to know it, was fundamentally different: the implementers became responsible for strategic considerations because the architects failed to pay sufficient attention to on-the-ground realities and circumstances. The overwhelming lack of instructions and guidelines meant, in reality, that the implementers became, in many ways, the architects. Historians will judge all involved; perhaps, given political circumstances and realities, such an approach was the only way to forge ahead.

5

Sovereignty

A recent exchange with a European friend serves as a relevant introduction to this discussion, the question at hand, related to the European Union. Although I spend significant time in Europe traveling, lecturing, teaching, and writing, both the intricacies and philosophy of the European Union are a constant source of curiosity to me. My friend reminded me of the horror of the Second World War and recognition of strength through numbers. I acknowledge both, in conjunction with under the surface concerns, regarding German power and history, the willingness to cede sovereignty voluntarily is, for me, puzzling. That is not to suggest establishment of the European Union is not understandable; given Europe's history, it is. The history of Europe and, in particular, the voluntary relinquishment by EU members, serves as an important backdrop to this chapter. After all, the decision to join the European Union, and therefore to agree to minimizing national sovereignty, clearly suggests that sovereignty is not absolute. Rather, both the European Union and operational counterterrorism highlight that sovereignty is fungible, whether voluntary or not. See Figure 5.1.

The focus of this chapter is neither European history nor Europe today, however, touching upon both is essential to understanding sovereignty and self-defense. The question is whether joint security and economic interests and protections outweigh specific national interests and desires. To that end, it is not by chance, according to experts, that not all European nations belong to the European Union. Furthermore, public opinion polls reflect continued uncertainty, if not discomfort, regarding the European Union. That said, elections in Greece, during the height of

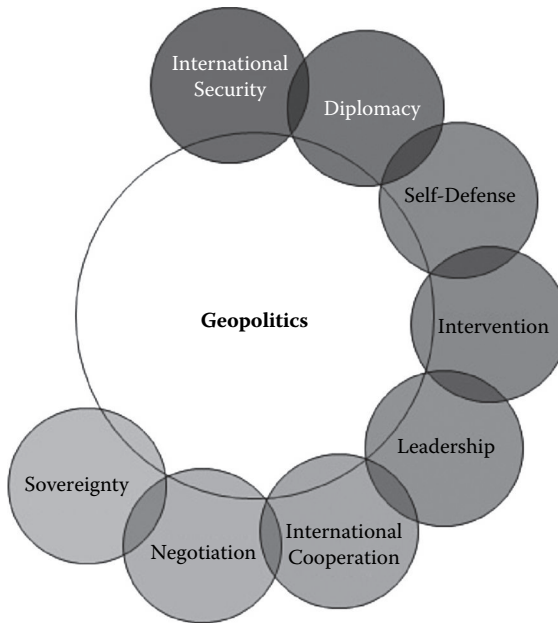


Figure 5.1. Sovereignty.

the Hellenic nation’s economic crisis, reaffirmed Athens’ commitment to the European Union.

In the context of geopolitics, it is important to recognize that a contemporary sovereignty discussion must include both state–state and state/nonstate relations. Perhaps an earlier iteration of this book would have focused exclusively on the former; however, current realities heightened since 9/11 require addressing the latter as well. In the traditional, post-Westphalia world, nation-states engaged in war, economic trading, and alliances in largely understood limits, parameters, and interests. Although alliances were subject to shifting based on changes in specific needs and interests, the rules of the game were, in the main, clear.

That is not to suggest that the global community was harmonious and conflict free. History, obviously, suggests otherwise. However, even as unimaginable numbers of soldiers were killed (it is not by chance that British soldiers, killed in the First World War, are referred to as the “Lost Generation,” for an entire generation of young men was wiped away in

the trenches of Europe) the conflict was concluded with a peace treaty among the warring countries. The Treaty of Versailles made the Second World War all but inevitable, however, a peace treaty seeking ostensibly to end a war among nation-states is the essence of state–state relations.

In the same vein, the Japanese surrender, signaling the end of World War II, received by General MacArthur on the deck of the *USS Missouri*, graphically illustrates the essence of state–state relations: conflict with a beginning, middle, and end. In that vein, the Geneva Conventions guarantee that captured soldiers may not be tried, unless suspected either of committing a war crime or a crime while in captivity, and must be returned to their country upon cessation of hostilities.

That is in direct opposition to contemporary conflict: rather than nation-states engaged in war with each other, nation-states are in conflict with nonstate actors who do not have definable borders and are not members of the community of nations. Although nonstate actors may exercise control over territory within a particular state,* they are not sovereign nations, as understood and defined by international law. Al-Qaeda was firmly entrenched in parts of Afghanistan, and although Hezbollah controls southern Lebanon, neither terrorist organization is the sovereign government of either country. Although, arguably, in some aspects acting akin to a sovereign, neither al-Qaeda nor Hezbollah is recognized by the international community as a legitimate government, although both require significant resources in efforts to minimize their influence and power. After all, the United States sent significant forces to Afghanistan, a sovereign, to engage al-Qaeda, and Israel has repeatedly entered Lebanon, a sovereign, to engage Hezbollah.

It is, then, the changing nature of conflict—in conjunction with challenges to the traditional notions of sovereignty—that is the focus of this chapter. In examining this paradigm, the American Wild West is offered as a basis of comparison. Historical analogy is complicated and fraught with danger, however, there are sufficient parallels between state/non-state conflicts and the American Wild West to justify the comparison. Perhaps, a more accurate heading to this chapter could be “The Old World Out, the New World In.” The former is largely illustrated by state–state conflict, the new by state–nonstate conflict. The Old World had clearly demarcated rules and boundaries; the New World is characterized by a challenging confluence of nebulousness and great danger: the former

* See subsequent conversation regarding failed states.

because the nation-state is confronting a largely unseen enemy, and the latter because the unseen enemy, not subject to restrictions or otherwise accepted codes of conduct, is poised to strike wherever the nation-state is vulnerable. This chapter examines geopolitics through the lens of sovereignty and self-defense; the discussion relies on current and historical examples alike.

These actions, the United States' and Israel's, violate the national sovereignty of Afghanistan and Lebanon, respectively. The response, from the perspective of the violating state, is that self-defense and protection of national interests justify such actions. Important to note is that the justification for the military engagement is not directly related to the actions of either Afghanistan or Lebanon, but rather, for lack of a better term, their inaction, facilitating the presence of terrorist organizations on their territory. The distinction is important, although ultimately the result is the same: sovereignty is violated by nation-state A because of the nonaction of state B that facilitates the action of nonstate actor C. Unlike the traditional state-state paradigm, which directly involved conflict between nation-states, the new conflict is a triangle, encompassing two sovereign nations and a nonsovereign entity deemed to threaten one of the sovereigns.

Redefining the relationship between nation-states results in rearticulating the definition of sovereignty. The redefinition is predicated on the inability—unwillingness—of nation-state B to prevent nonstate actor C from effectively gaining a foothold in its sovereign territory. Rearticulated, it is the nonaction of nation-state B that directly contributes to its loss of sovereignty on two distinct fronts: the presence of nonstate actor C and the resulting actions by state actor A, threatened by the actions of C. A's action, directly contributing to impinging on B's sovereignty, must be viewed through the paradigm of self-defense. That said, how broadly self-defense is defined, and subsequently applied, is essential in determining whether A's actions are in accordance with established principles of international law.

With respect to sovereignty, in the context of the triangular relationship outlined above, the ability of nation-state A to engage nonstate actor C (on B's territory) is not unlimited. The restriction, subject to application of the rule of law, morality in armed conflict, and principles of effectiveness, are twofold: limited definition and application of the legitimate target (C actors) and engagement in B's territory exclusively where C is located. Nevertheless, the argument proffered by nation-states that attacking C (on B's territory) does not violate B's sovereignty, as the intended target

is C is, largely, devoid of validity in the context of international law. For example, in the aftermath of a suicide bombing in Jerusalem, the Israeli Air Force attacked a suspected terrorist training base in Syria. Israel argued that the attack was not intended to violate Syrian sovereignty for the target was a terrorist organization rather than Syrian property or assets, but the practical result of the attack was an Israeli incursion into Syrian airspace. See Figure 5.2.

In the sovereignty–geopolitics discussion, this example is particularly instructive for it highlights the triangular relationship, while emphasizing the right to self-defense, its limits, and the practical impact of a strike of this nature. With respect to the geopolitical considerations, the Israeli action, although directly aimed at the terrorist organization responsible for the suicide bombing, was also indirectly aimed at the Syrian government. The direct attack is clear; the indirect attack is more complicated and subtle.

The former is intended, predicated on intelligence information, to prevent additional terrorist attacks; the latter can be perceived as “message sending” to Syria that Israel, claims notwithstanding, holds Syria



Figure 5.2. Map of the Middle East.

responsible for the establishment of terrorist training bases on its territory. Syrian forces (according to reliable intelligence and media reports) were involved neither in planning nor executing the attack nor in operation of the training base, however, both (planning and training) ostensibly occurred in Syria. The Israeli decision is, of course, not risk-free; although public statements sought to distinguish between the terrorist organization and Syrian sovereignty, the attack unequivocally violated Syrian sovereignty.

Syrian action/nonaction can be perceived as facilitating the attack, however, there is no direct Syrian involvement or engagement in the suicide bombing. What, then, are the limits of sovereignty and of self-defense in contemporary geopolitics? In many ways, the practical ramification of this development is a minimization of sovereignty, predicated on the aggressiveness of nonstate actors and weakness of sovereigns. The question is whether the attacking sovereign, in violating the sovereignty of the "weakened" sovereign, is applying an unnecessarily broad definition of self-defense that significantly expands recognized international law definitions and conventions. This question is asked neither rhetorically nor abstractly, as it represents a foundational basis for establishing the rules of engagement in the nature of future conflicts.

It is not, however, a new question: in the aftermath of King Hussein's brutal campaign forcing the Palestine Liberation Organization (PLO) to leave Jordan (September, 1970),* the PLO established a new "beachhead" in southern Lebanon. Until the PLO was forced to withdraw from Lebanon (September, 1982), Israel held Lebanon responsible for PLO attacks in Israel and therefore regularly attacked PLO targets in southern Lebanon. The attacks culminated in the Lebanon War (June, 1982), when the Israel Defense Forces (following the attempted assassination by the PLO of Israel's Ambassador to the United Kingdom) fully engaged the PLO in southern Lebanon. Although the war resulted in the PLO's withdrawal from Lebanon to Tunisia, the government of Lebanon was unable to assert control over its own territory and in subsequent years the terrorist organization Hezbollah in essence replaced the PLO as the effective ruling force in southern Lebanon. See Figure 5.3.

* The terrorist organization, Black September, responsible for the attack against the Israeli Olympic team in the Munich Olympics (resulting in the deaths of 11 athletes, coaches, and officials), took its name from the events of September, 1970.



Figure 5.3. Map of Lebanon.

In 2006, following the kidnapping-killing of two IDF soldiers (June, 2006) by Hezbollah, the IDF again engaged in southern Lebanon. The stated mission of the Second Lebanon War was the return of the two soldiers* and to weaken Hezbollah significantly. The international community overwhelmingly condemned Israel's actions in southern Lebanon. Nevertheless, the actions (initially of the PLO and subsequently of Hezbollah) raise important questions regarding the right of nation-state A (Israel) to engage nation-state B (Lebanon), which consistently demonstrated an inability to control its own territory. Without doubt, Israeli actions violated Lebanese sovereignty. However, by failing to exercise control over its own territory effectively, did Lebanon not waive the right to claim violation of its sovereignty?

* The bodies of the two soldiers, Ehud Goldvasser and Eldad Regev, were returned to Israel in 2008; in exchange, Israel released Samir Kuntar who had been involved in a terrorist attack in 1979 in the Israeli city of Nahariya.

With respect to sovereignty, the two examples indicate that the practical result of a sovereign nation unable/unwilling to prevent the presence of a nonstate actor that threatens another sovereign is in violation of its sovereignty. Examining sovereignty in the context of the triangular relationship is profoundly more complicated than in the traditional binary state–state relationship. The drafters of the UN Charter, writing when the ashes of WWII were still hot, were determined to facilitate a world order devoid of conflict. It is in that spirit that Article 51 must be considered and analyzed; in limiting the right to self-defense, the drafters hoped that nation-states would succeed in resolving conflict in a manner fundamentally more distinct than the events of 1914–1918 and 1939–1945.

In that vein, the United Nations was intended to be a far stronger and more effective body than the League of Nations, created in the aftermath of WWI and thoroughly incapable of preventing the events that led to WWII. As repeatedly noted by commentators,^{*} the Treaty of Versailles directly contributed to the rise of Germany's Nazi party, and ultimately to the Second World War. These events are mentioned because, as complicated and tragic as they were, the actors were all nation-states, readily identifiable and understood in the context of the then existing world order. Although oft-times turbulent, violent, and tragic, the world order created in the aftermath of the Peace of Westphalia[†] was comprised of actors who, largely, played in accordance with rules they established, implemented, and understood. In that world order, nation-states engaged in trade and security relations predicated on self-interest resulting in shifting alliances and treaties.[‡]

Nevertheless, the basic entity was the nation-state, and the relationship that defined the world involved two nation-states. It is in that spirit that Articles 51 and 2 (4) must be read; similarly, the developing world

^{*} See Hughes, M., and Seligmann, M.S. *Does Peace Lead to War?: Peace Settlements and Conflict in the Modern Age*, Phoenix Mill: Sutton, 2002; and Grunberger, R. *Germany 1918–1945*, New York: Harper & Row, 1964; and Mayor, A.J. *Politics and Diplomacy of Peacemaking*, New York: Alfred A. Knopf, 1967 (commentary on how the Treaty of Versailles ultimately led to the rise of the Nazi party in Germany and ultimately to the Second World War).

[†] See Treaty of Westphalia. *The Avalon Project at the Yale Law School*. Accessed May 31, 2013. http://avalon.law.yale.edu/17th_century/westphal.asp

[‡] Examples include: the Treaty of Münster between the Dutch Republic and the Kingdom of Spain, signed on January 30, 1648, and ratified in Münster on May 15, 1648; see Manzano Baena, L. Negotiating sovereignty: The Peace Treaty of Münster, 1648. *History of Political Thought* 28 (2007): 617–641; and the Treaty of Osnabrück between the Holy Roman Emperor, Sweden, and their respective allies.

order must be understood in accordance with the triangular relationship discussed above. The geopolitics of previous years is just that: a largely antiquated system that does not reflect contemporary realities, tensions, and relationships. The state-state paradigm was akin to a “set-piece” chess game with both players and moves largely predictable, but the new paradigm is both evolving and largely unpredictable.

Previous assumptions, concepts, and understandings have been replaced by a paradigm that is, in many ways, rule-less and devoid of clear boundaries and limits. The mutually assured deterrence that largely defined the post-World War II world has been replaced by conflict between states and largely amorphous and undefined actors, subject neither to agreed-upon standards of morality or international law. What significantly complicates both the nature of engagement and the resultant geopolitics is that state actors, subject to restrictions imposed by international law, largely conduct conflict in accordance with existing standards and principles. See Figure 5.4.

Although exceptions clearly exist, asymmetrical warfare has been turned upside down. In its original conception, the term suggested imbalance, favoring the nation-state; in reality, the restrictions imposed on

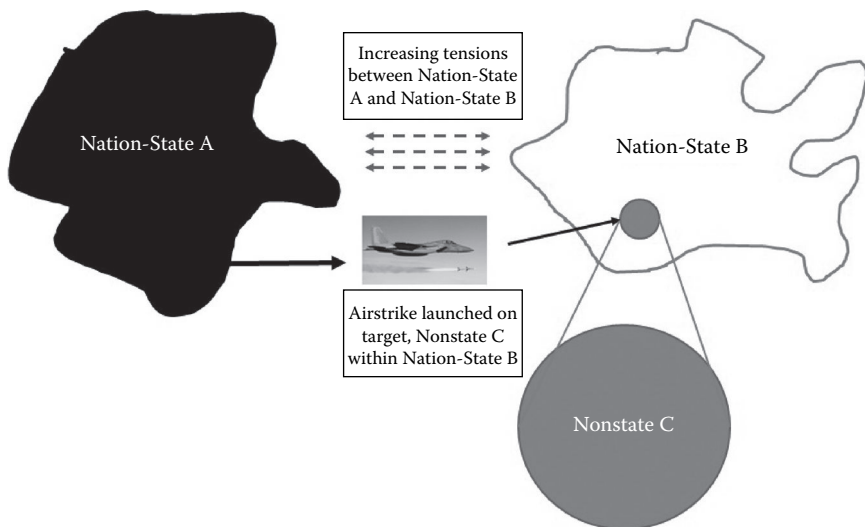


Figure 5.4. A pre-emptive act by nation-state A against nonstate C within nation-state B's borders.

nation-states by international law and considerations relevant to the court of international opinion suggest that nonstate actors have a certain, perhaps unquantifiable, advantage in the present conflict. Although this edge does not suggest that nonstate actors will defeat state actors, it does have very significant and practical ramifications both for the present and the future.

There is complexity given the dissonance in the asymmetrical relationship: as originally conceived, the nation-state was perceived to be the dominant power, given its clear superiority in arms, equipment, and personnel. However, given the reach, nature, and manner in which non-state actors engage nation-states, a viable argument can be made that the former have important advantages. That is not to suggest that nonstates will defeat nation-states, but it is to highlight that significant changes have occurred; perhaps the most important is the manner in which NSA (non-state actors) are facilitated and enhanced by nation-states.

This affects the traditional definition and application of sovereignty that directly affects the geopolitical relationship between nation-states regardless of their physical proximity. Rearticulated, the actions of NSA C in state B may, in theory and practice, sufficiently affect the national security interest of state A to justify A's military action against targets located in B. For those actions to meet international law standards requires adopting a broadened definition, both of self-defense and national security. It is important to recall that rearticulated definitions are not intended to create justification for war between two nation-states, but are relevant in facilitating the right to violate another state's sovereignty. It goes without saying that warning signs must be clearly posted, for the ramifications of this development are significant. Followed to its logical end, this proposed paradigm is a breeding ground for an international wild west, under the guise of self-defense and national security.

One of the most important questions, post-9/11, is how a nation-state defends itself against an unseen enemy. How a nation-state that believes in the rule of law and morality in armed conflict, prevents attacks against its innocent citizens, is our focus. Self-defense or active pre-emptive self-defense against the unseen enemy is extraordinarily difficult and fraught with enormous risks and dangers. How, and when, the state defends itself against such an enemy is critical to address; it is the combat of the future. In the context of post-9/11 operational counterterrorism, the question is whether self-defense as presently articulated by international law enables the United States to act preventively in an effective way. This chapter addresses the issue in an interdisciplinary manner, analyzing American

criminal and constitutional law in addition to international law. Such an analysis enables policy and decision makers, academics, the general public, and military commanders to develop and implement a definition of self-defense relevant to post-9/11 conflicts.*

9/11 taught decision makers and commanders alike that in future military conflicts states will confront nonstate actors, rather than other nation-states. The traditional state-state war, as understood by the founding fathers of international law, is largely a thing of the past. Given this change in the nature of the conflict, the events of 9/11 clearly suggest the need to rearticulate international law.[†] In the debate regarding the rearticulating of international law, the question of self-defense is paramount. The question to be addressed is this: How does the nation-state defend itself, preemptively, against an unseen enemy? In the traditional war/self-defense paradigm, states protect themselves either against armies massing against their border, or after an attack by another nation-state. Self-defense, in the “unseen enemy” paradigm, is ambiguous. It is not inherently clear who is attacking the state, or against whom the state is protecting itself. It is this issue that has significantly affected the self-defense discussion. As stated previously, determining the extent of self-defense is critical in examining the relationship between international law and counterterrorism. Unlike traditional warfare, where militaries face off with planes, tanks, and warships, an often unseen enemy characterizes counterterrorism and the battles take place in “back alleys with dark shadows.” Self-defense, in this environment, is enormously complicated. The decision to pre-emptively

* The reference is to the threat nation-states face from nonstate actors, some state supported, others not.

[†] For articles emphasizing the need to rearticulate self-defense in international law, see Baker, M. Terrorism and the inherent right of self-defense: A call to amend Article 51 of the United Nations Charter. *10 Hous. J. Intl. L.* 25 (1987); Hendrickson, R.C. Article 51 and the Clinton presidency: Military strikes and the U.N. Charter. *B.U. Intl. L.J.* 19 (2001): 207; Travalio, G.M. Terrorism, international law, and the use of military force. *Wisc. Intl. L.J.* 18 (2000): 145; Franck, T. When, if ever, may states deploy military force without prior Security Council authorization? *Wash. U. J.L. Poly* 5 (2001): 51; Falk, R. What future for the UN Charter System of War prevention? *Am. J. Intl. L.* 97 (2003): 590; Stromseth, J. Law and force after Iraq: A transitional moment. *Am. J. Intl. L.* 97 (2003): 628; Nabati, M. International law at a crossroads: Self-defense, global terrorism, and preemption: A call to rethink the self-defense normative framework. *Transnatl L. Contemp. Probs.* 13 (2003): 771; Franck, T. What happens now? The United Nations after Iraq. *Am. J. Intl. L.* 97 (2003): 607; Slaughter, A.-M. Security, solidarity, and sovereignty: The grand themes of UN reform. *Am. J. Intl. L.* 99 (2005): 619; Lupu, Y. Gaps and power: Assessing reform of the U.N. Charter. *Berkeley J. Intl. L.* 24 (2006): 881.

attack a highly elusive target, oftentimes in the vicinity of civilians, is based almost exclusively on intelligence information.*

How the state, under the rubric of the rule of law and morality in armed conflict, protects itself by acting before an attack is a question of enormous significance. In answering this question, it is critical that guidelines and criteria be developed regulating if and when a state may take anticipatory action. The legal analysis of self-defense in the post-9/11 world will be augmented by historical analogy[†] to the American Wild West.[‡] This does not suggest that operational counterterrorism is akin to the Wild West: U.S. presidents are not Wyatt Earp,[§] and terrorist leaders are not Jesse James.[¶] Furthermore, it does not imply that American forces whether in Iraq, Afghanistan, or Yemen are vigilantes in Montana,** seeking to protect narrow interests. However, the Wild West assists us in analyzing two critical issues: the *limits* of self-defense and the *criteria* for determining when it may be invoked, particularly when the sovereignty of a nation-state stands in the balance even though it has not directly engaged another nation-state in conflict. The basis

* See Caron, D.D. The rule-outcome paradox, madness cascades and the fog of preemption: Seeking the “best rule” for use of force. *Hastings Int’l Comp. L. Rev.* 27 (2004): 481, 492–495; Guiora, A.N. and Page, E.M. The unholy trinity: Intelligence, interrogation and torture. *Case W. Res. J. Int’l Law* 37 (2006): 427; Marks, S.P. Branding the “War on Terrorism”: Is there a “new paradigm” of international law? *Mich. St. J. Int’l L.* 14 (2006): 71, 94.

† I have previously used the historical analogy approach to address a post-9/11 issue; I examined the “limits of interrogation” through the lens of the interrogations African-Americans were subjected to in the American Deep South in the 1930s and ‘40s; see Guiora, A.N. *Constitutional Limits on Coercive Interrogation*, Oxford: Oxford University Press, 2008; and Guiora, A.N. Interrogating the detainees: Extending a hand or a boot. *U. Mich. J.L. Reform* 41 (2007).

‡ Traditionally defined between the years 1840–1890.

§ Wyatt Earp (1848–1929) is best known for his participation in the gunfight at the O.K. Corral. Earp resided in the American West and established himself as a lawman, unafraid to use force to keep the peace. See Slotkin, R. *Gunfighter Nation: The Myth of the Frontier in Twentieth-Century America*. Boston: Atheneum, 1985.

¶ Jesse James (1847–1882) was an American West outlaw and bandit, robbing and raiding banks, residences, trains, and stagecoaches. See Slotkin, *supra* note 81.

** On December 23, 1863, a group of citizens in Montana met secretly to form a vigilante committee, an extrajudicial group designed to keep local order. During January and February of 1864, the committee executed 21 men by hanging, with more to come in the months and years ahead. Not one of the executed men had a trial, an appeal, nor a chance to set his affairs in order before being hanged. More information available at: Vigilantes of Montana. *Secret Trials and Midnight Hangings 1863–1864*. Accessed July 14, 2007. <http://montana-vigilantes.org/>

for violation of sovereignty is, largely, the nonaction of the nation-state whose sovereignty stands to be violated.

Historical analogies rarely, if ever, are perfect matches because no sets of events and circumstances are exactly similar. Nevertheless, sufficient similarities between the Wild West and the post-9/11 world exist to justify the comparison. In particular, a similarity in developing limits to self-defense in an environment pitting the state against a variety of perceived although not clearly identified enemies. The relevance of the Wild West to post-9/11 is in establishing self-defense standards in an amorphous environment. In defending society, the sheriff acted against those perceived to be threatening either the existing or the developing civil society. In examining his actions, this chapter seeks to propose a new standard of self-defense. That is, when, and on the basis of what, did the sheriff determine that he could open fire against a particular individual? Against whom was the sheriff acting defensively? These questions are the core of this chapter. It is important to emphasize, and re-emphasize, that the analogy does not suggest that the state today is akin to the sheriff of yesteryear. It does, however, propose that analyzing the sheriff in the Wild West facilitates development of a new self-defense standard in the context of violating state sovereignty.

Adopting the Wild West as a valid historical analogy facilitates examining how states defend themselves in the post-9/11 world. Although international law grants states the right to protect themselves, the question is when that right becomes "operational." That is, does the state have to await attack, or can it act on the basis of intelligence? The answer, akin to the Wild West, is that pre-emptive action is lawful, provided the actor has cause to act. How "cause" is defined is critical to the discussion. If cause is to be loosely defined, then the state is liable to act in a paradigm best described as "literally unlimited." Such a paradigm threatens the world order, for it all but ensures unlimited state power. Such a paradigm may be tempting, but it is illegal and self-destructive. Unlimited state action involves the killing of innocent civilians and guarantees the birth of the next generation of terrorists. Conversely, international law clearly justifies self-defense. What is unclear is when the state can act.

That is, under what circumstances and subject to what conditions can the commander order a military unit to pre-emptively attack an identified enemy? The critical variable in this discussion is how identified does the enemy have to be? What degree of certainty is required prior to giving an attack order? Perhaps the question can best be phrased as "how certain

is certain?" The policy and legal discussions must provide the commander and decision maker with concrete responses to these questions. Otherwise, not only will the enemy continue to be "unseen," but also the guidelines will be similarly "unseen." That combination, in the context of operational counterterrorism, is unworkable.

A "who, what, when" analysis of pre-emptive self-defense will enable the commander and decision maker to understand better who the enemy is. The analysis inherently presupposes that the state may act; it does not, however, suggest that the state may *always* act. The proposed model explicitly involves limits; after all, the essence of the rule of law paradigm is an inherent limit on state power. The retired president of the Israel Supreme Court, Aharon Barak, advocated the principle of "self-imposed restraints."^{*} In the self-defense debate, the critical questions are: what are those restraints, and when can the state act? Against what target, and who is the enemy?

SELF-DEFENSE AND THE WILD WEST

The Wild West conjures up multiple images, from the gun-slinging sheriff to the cowboy in the saloon, to the chasing of American Indians off their land. The images of a Wyatt Earp[†] and Billy the Kid[‡] are prominent points of reference when the Wild West is discussed. Furthermore, the term is commonly used to express a paradigm of lawlessness, or at the very least, of a situation where one man, the sheriff, was to bring and preserve peace and tranquility to a particular community. Any discussion regarding the Wild West invariably involves analyzing the role of the local sheriff.

Presented are two very different scenarios: the story of Wyatt Earp and the gunfight at the O.K. Corral, and the story of Sheriff Pat Garrett[§] and his quest for Billy the Kid. The sheriff has been glorified as the

^{*} Barak, A. A judge on judging: The role of a supreme court in a democracy. Vol. 116 *Harv. L. Rev.* 16 (2002).

[†] Wyatt Earp (1848–1929) was an American farmer, teamster, officer of the law, gambler, saloon-keeper, and miner. Earp resided in the American West and established himself as a lawman, unafraid to use force to keep the peace.

[‡] Billy the Kid (1859–1881), alias Henry McCarty and William H. Bonney, was a noted gun-fighter and outlaw, known best for his involvement in the Lincoln County War, and for escaping jail sentences several times throughout his life.

[§] Pat Garrett (1850–1908) was a noted American West sheriff responsible for bringing famed outlaw, Billy the Kid, to justice then killing him after Kid's final escape from jail.

ultimate manifestation of good. He protects the weak and helpless, and drives out, if not kills, those who, if not for him, would destroy society. He is perceived as the representative of the community, acting on its behalf, devoid of personal gain or benefit. However, as we see in both stories, many questions remain as to whether the glory was rightfully bestowed on both Wyatt Earp and Pat Garrett. Against whom were these sheriffs protecting society? How did these sheriffs protect society? Defining the limits of, or establishing criteria for, self-defense ultimately depends first on accurately identifying the enemy.

Pat Garrett and the Death of Billy the Kid

Pat Garrett's alleged killing of Billy the Kid raises the question of pre-emptive self-defense. Although Billy the Kid was known as a notorious outlaw,^{*} there are several questions surrounding his death. According to Garrett's account, after Billy escaped from jail, Garrett got wind of where Billy was hiding out in Fort Sumner, entered the house and sat on a bed.[†] Billy entered the room where Garrett was sitting, and Billy shouted "Quien es?" (Who is it?). Garrett saw that Billy had a "gun in his right hand and a butcher knife in his left . . . and he [Billy] came directly toward me."[‡]

However, others question whether Garrett told the correct version of the story. "[W]as Pat Garrett justified in killing the Kid in the parlor . . . without having given him even the slightest chance to know that his life was in jeopardy? Did the Kid at the time he was killed, have a butcher knife in his hand, and was he on his way to the kitchen to slice off a chunk of meat from the hindquarter of beef, because he was hungry?"[§]

This event is of seminal importance in the self-defense debate. Although the Kid's outlaw status was widely recognized, and the threat he posed to society was indisputable, what is not clear is whether he presented a threat at the time he was killed. One of the critical questions in the self-defense debate is what threat does the perceived enemy present at

^{*} See Calhoun, F.S. Westering and the law. 1 *Wyo. L. Rev.* 603 (2001); Glicksman, R.L. Fear and loathing on the federal lands. *U. Kan. L. Rev.* 45 (1997): 647, 662; Smith, A. They dream of growing older: On kids and crime. *B.C. L. Rev.* 36 (1995): 953.

[†] Garrett, P. *The Authentic Life of Billy the Kid*. Norman: The University of Oklahoma Press, 1954.

[‡] Garrett, *supra* note 89.

[§] Adams, Ramon F. *A Fitting Death for Billy the Kid*. Norman: University of Oklahoma Press, 1960.

a specific moment of time. The Billy the Kid incident raises an additional question: is a perceived enemy a legitimate target at all times? That is, should a pre-emptive self-defense doctrine enable the state to kill a serious threat regardless of whether the individual is engaged in harmful or threatening activity when attacked?

Accounts regarding the death of Billy the Kid suggest controversy regarding whether Garrett acted based on intelligence information. We may never know the true story of what happened on that night in Fort Sumner, but Garrett was never questioned on his actions and the issues remain. However, nation-states today do not have the luxury of Pat Garrett; the nation-state is held accountable for its actions. Precisely because decision makers bear substantive responsibility for their actions, the strict-scrutiny model protects them from relying on inaccurate intelligence information. Billy the Kid's past was literally, a matter of public record.

However, his future actions were unknown to Pat Garrett. There was no available intelligence information justifying self-defense. Although it is clear Garrett initiated the event, his basis for doing so was predicated on past events, rather than future actions. If Garrett had possessed intelligence information indicating plans to commit future crimes, then arguably self-defense (in protecting the community) could be claimed.

The Shootout at the O.K. Corral

The shootout at the O.K. Corral is one of the most famous and storied among all the tales from the days of the Wild West. It took place in Tombstone, Arizona Territory on October 26, 1881 and involved the Earp brothers City Marshal Virgil, Assistant Town Marshal Morgan, and temporary Sheriff Wyatt, and Doc Holliday on one side versus outlaws Billy Claiborne, brothers Ike and Billy Clanton, and brothers Tom and Frank McLaury.

Run-ins between the Clantons and the Earps had occurred off and on the previous two years including Wyatt Earp retrieving a stolen horse from Ike Clanton as well as another incident involving government property: six U.S. Army mules stolen from Camp Rucker. Later in 1881, and prior to the shooting, Ike Clanton had implicated Doc Holliday, Virgil Earp, Wyatt Earp, and Morgan Earp, claiming in a hearing that they had confided to him that they were involved in a stagecoach robbery. To further complicate matters, Clanton claimed Wyatt Earp had confessed that he had killed the stagecoach driver. His testimony was deemed to lack

credibility and none were ever charged with anything. However, this was a serious charge as murder was deemed a capital offense.

In addition, there were additional accusations later on by Ike Clanton of Doc Holliday being involved in another subsequent stagecoach robbery, as well as a direct confrontation between the parties related to this.

All this led to increasing tension between the Earp and Clanton brothers in particular, as well as involving Doc Holliday in the mix. In preceding weeks, and even hours prior to the gunfight, Ike and Billy Clanton repeatedly threatened the Earp brothers with bodily harm, including Ike threatening openly to kill them hours prior to the shootout. And so, it is not surprising that this led to the confrontation which occurred. Wyatt Earp was notified by townspeople that the Clanton brothers were on Fremont Street. He, determining that he had to act at that point, went with his brothers and Doc Holliday to confront them there. The outlaws were armed with revolvers and rifles that were attached to their horses, in blatant violation of a city ordinance forbidding carrying firearms in the city.

According to accounts at the time, the gunfight lasted a mere thirty seconds, in which approximately thirty shots were fired. In the end, Tom and Frank McLaury and Billy Clanton were killed. Billy Claiborne and Ike Clanton escaped unharmed. Wyatt Earp escaped unharmed and Virgil was shot in the calf, Morgan was injured in both shoulders and a vertebrae by a single shot, and Doc Holliday suffered minor injury.

As evidenced by the series of events, and as compared to the death of Billy the Kid at the hands of Pat Garrett, the evidence points to an increasing and imminent indication of clear and present danger: multiple and repeated threats of current and future intent to harm verging on imminent harm. But there was also the long history in conjunction with the increasing threats. Unlike Pat Garrett the threats were directed at the individuals themselves, personally. In addition, it was not simply derived from a general history of violent crime and independent of knowledge of future threats or plans of robbery or other mayhem. It took into account a series of items including direct knowledge of the individual, a long and storied history, clear threat, and threat with intent to harm, as well as an act of provocation (the final straw of openly carrying firearms) that we can safely assume was meant to initiate the conflict. As such, there is argument to be made that there is more cause and justification to be found in the case of the pre-emptive attack where personal attacks, threats, and then death threats, are combined with a specific instance of provocation.

INTERNATIONAL LAW AND SELF-DEFENSE

As alluded to earlier in Chapter 3 when discussing the *Caroline* Doctrine and the UN Charter, Article 51, the question facing decision makers in the context of self-defense is when pre-emptive actions can be undertaken. Pre-emptive action is predicated on intelligence information that must meet the reliability and corroborated standard this chapter seeks forcefully to advocate. Furthermore, for pre-emptive action to be legitimate, it must be proportional in the context of the attack it is intended to prevent.* The threat must be concrete, not vague, based on loosely gathered intelligence that may be more fantasy than fact.† In determining proportionality, decision makers must determine both the immediacy of the threat and its severity.‡

Customary international law permits a state to respond to a threat, and infringe on the territorial sovereignty of another nation, when four criteria are met:

1. It is acting in self-defense.
2. The attack is substantial and military (i.e., not an “isolated armed incident”).
3. The offending nation is complicit, unwilling, or unable to prevent further attacks.
4. The attack is widespread and imminent.§

* See The public committee against torture in Israel v the Government of Israel. HCJ 769/06, citing Guiora, A.N. *Targeted Killing as Active Self-defense*, 36 CWRU JIL 319 (2004).

† It cannot be overemphasized just how complex the relationship between received intelligence information and operational decisions was. Participation in numerous operational planning meetings with senior IDF commanders, seeking to “translate” received intelligence to information capable of justifying operational decisions, has convinced me, beyond all doubt, that this is one of the most difficult aspects of counterterrorism. It cannot be sufficiently emphasized how much care and caution must be exercised before determining the viability and reliability of received information. Commanders are not prone to engage in doubt, but the burden of successfully “translating” cannot be, nor should it be, underestimated.

‡ See Lobel, *supra* note 104.

§ See generally, Biggio, F.A. Neutralizing the threat: Reconsidering existing doctrines in the emerging war on terrorism. 34 CWRJIL 1 (2002); Halberstam, M. The U.S. right to use force in response to the attacks on the Pentagon and the World Trade Center. *Cardozo J. Int'l Comp. L.* 11 (2004): 851, 852–855; Palmer, E.A. Democratic intervention: U.S. involvement in small wars. *Penn St. Int'l L. Rev.* 22 (2003): 313, 338.

States, in order to adequately defend themselves, must be able to take the fight to the terrorist before the terrorist takes the fight to them. From experience gained over the years, the state must act pre-emptively in order either to deter terrorists or, at the very least, prevent terrorism. The question that must be answered, both from a legal and policy perspective, is what tools are necessary for the state to combat terrorist bombings? Active self-defense would appear to be the most effective tool; that is, rather than wait for the actual armed attack to “occur” (Article 51), the state must be able to act anticipatorily (*Caroline*) against the nonstate actor (not considered in *Caroline*).

The development of a new body of international law providing legal justification for such actions (active self-defense against a nonstate actor) must be consistent with existing principles and obligations, such as proportionality, military necessity, collateral damage, and exhaustion or unavailability of a peaceful alternative. The two concepts—active self-defense and the four fundamental principles listed above—are not in conflict; rather, they are critical to formulating international law’s response to modern “warfare,” which is clearly, a very different “war” than traditional state versus state conflict. In undertaking operational counterterrorism, decision makers are increasingly faced with the following dilemma: whether an action, either responsive or preventive, can be undertaken even if it involves violating the sovereignty of another nation-state. In violating the sovereignty of another nation-state under the banner of self-defense, it can be argued that there is an implicit determination that the violated state is a failed state.

We refer again to examples presented earlier where, in response to a terror attack in Israel, the Israeli air force attacked terrorist bases in Syria.* Although Israel was widely criticized,† the government explained that the target was not Syria; rather the Israeli Air Force (IAF) was attacking terrorist bases located in Syria,‡ with no intent to violate Syrian sovereignty.

* Israel Strikes Base Inside Syria. *CBS News*, February 11, 2009. Accessed May 31, 2013. <http://www.cbsnews.com/stories/2003/10/05/world/main576590.shtml>

† Secretary-General strongly deplores Israeli air strike on Syrian territory. SG/SM/8918 *United Nations Press Release*, October 6, 2003. <http://unispal.un.org/unispal.nsf/9a798adbf322aff38525617b006d88d7/d961f5dc627810a385256db700486b7c?> “Israeli Jets Attack Site Inside Syria.” *The Seattle Times*, October 6, 2003.

‡ Security Council Meets on Israeli Attack in Syria. *CNN*, Oct. 5, 2003. Accessed December 17, 2006. <http://www.cnn.com/2003/WORLD/meast/10/05/mideast/index.html>

Similarly, the United States violated Sudanese and Afghani sovereignty, when the U.S. Air Force attacked targets in those two countries in response to the 1998 embassy bombings in Kenya and Tanzania.

Although the attack may be considered to be retaliatory rather than self-defense in nature, the question of anticipatory self-defense is relevant to this attack.^{*} If, as had been reported,[†] the factory was indeed producing chemical weapons, then an argument could be made that America and America's allies would potentially be in danger. "Imminence" is, in many ways, the standard term-of-art in discussing self-defense.[‡] The standard operational dilemma confronting commanders is how imminent is imminent.[§] By analogy to the schoolyard bully, is it when a fist is about to come in contact with the nose, or when the fist is elevated in the direction of the nose? Is it when the hand is about to be closed into a fist? Perhaps, when

^{*} See e.g., Bennet, J. U.S. Fury on 2 Continents: The Overview; U.S. Cruise Missiles Strike Sudan and Afghan Targets Tied to Terrorist Network. *New York Times*, August 21, 1998. Eckert, A.E. and Manooher, M. Doctrine or doctrinaire—The first strike doctrine and preemptive self-defense under international law. *Tul. J. Intl. Comp. L.* 12 (2004): 117, 142–145 (discussing whether state-based action solely in response to acts of terrorism is a violation of international law).

[†] See Bennet, *supra* note 115; Johnston, D. No Chemical Threat Found at Bombed Plant in Sudan. *New York Times*, February 14, 1999; Risen, J. and Johnston, D. Experts Find No Arms Chemicals at Bombed Sudan Plant. *New York Times*, February 9, 1999; Myers, S.L. and Weiner, T. After the Attack: The Chemicals; Possible Benign Use is Seen for Chemical at Factory in Sudan. *New York Times*, August 27, 1998.

[‡] See Moriarty, J.C. "While dangers gather": The Bush preemption doctrine, battered women, imminence, and anticipatory self-defense. *30 N.Y.U. Rev. L. Soc. Change* 1 (2005); Rosen, R.A. On self-defense, imminence and women who kill their batterers. *N.C. L. Rev.* 71 (1993): 371, 378–390; Skopets, M. Battered nation syndrome: Relaxing the imminence requirement of self-defense in international law. *Am. U.L. Rev.* 55 (2006): 753, 775–777; Volokh, E. Self-defense, prohibited experimental therapies, and payment for organs. *Harv. L. Rev.* 120 (2007): 1813, 1823–1824; Wallace, S. Beyond imminence; evolving international law and battered women's rights to self-defense. *U. Chi. L. Rev.* 71 (2004): 1749, 1760–62.

[§] See Duncan, Lt. Col. J.C. Primer on the employment of non-lethal weapons. *Naval L. Rev.* 45 (1998): 1, 45–55; Martinez, L. September 11th, Iraq and the doctrine of anticipatory self-defense. *UMKC L. Rev.* 72 (2003): 123, 185–187; Martins, M.S. Rules of engagement for land forces: A matter of training, not lawyering. *Mil. L. Rev.* 143 (1994): 3, 68–80; Nabati, M. International law at a crossroads: Self-defense, global terrorism, and preemption (a call to rethink the self-defense normative framework). *Transnat'l L. Contemp. Probs.* 13 (2003): 771, 797–799; Weiner, A.S. The use of force and contemporary security threats: Old medicine for new ills? *Stan. L. Rev.* 59 (2006): 415, 437–445.

the nose has reasonable suspicion* to believe it is in danger? In the alternative, is it when the nose concludes there is probable cause?[†] There are two distinct paradigms at work here: one, when the nose “sees” the fist; the second, when the nose “believes” it is conceivably in danger. The first is physical and immediate: the fist is cocked. The question is how close to the nose does the fist come, and what measures may the nose take to minimize the danger?[‡] The second is predicated on different factors and considerations: rather than seeing the fist, the nose has gathered[§] intelligence information that the fist intends to strike. That is, rather than seeing the fist, the nose believes it is in danger from the unseen (by him) fist.

What does “unseen” mean? Does it suggest the possibility of being blind-sided or unseen to the extent that while the hand is not closed, there are *indications* that it *will be* closed? If there are such indications, are they time-sensitive or event-dependent? Is there a prior history between the fist and the nose that would affect the requisite decision making? If the nose has not seen the clenched fist, is there the possibility that someone else has taken it upon herself to warn the nose? Is the purveyor of the warning reliable? Is the information viable, and can it be corroborated?

* See Pence, C. Reform in the rising sun: Koizumi’s bid to revise Japan’s pacifist constitution. *N.C. J. Int’l L. Com. Reg.* 32 (2006): 335, 365 (stating that “Japanese forces are authorized to return fire when an unavoidable and reasonable cause exists for use of weapons to protect lives and bodies of themselves . . . or those who are with them (internal quotation marks omitted)); Defense and Justification. *Model Jury Instructions for Use in the District Court* Volume II Instruction 6.01 (Handbook Supplement), MJII MA-CLE S-6.01-1 (2003). *But see* Martinez, L. September 11th, Iraq and the doctrine of anticipatory self-defense. *UMKC L. Rev.* 72 (2003): 123, 167 (arguing that “State A must satisfy each of the elements . . . on the basis of clear, unequivocal and convincing evidence, or ‘clear, cogent and convincing’ evidence, and more than a reasonable suspicion is required.”).

[†] See Roosa, S.B. Rules of engagement for armed standoffs and the last full measure of devotion: Should sedition be a factor in the use of deadly force? *Rutgers L. J.* 28 (1996): 229, 231 (explaining that “in *Tennessee v. Garner* which outlines the Fourth Amendment ‘objective reasonableness’ standard for justifying the use of deadly force to apprehend a fleeing suspect. Under *Garner*, for a law enforcement officer to be justified in using deadly force, other than for self-defense purposes, there must be probable cause that the suspect “poses a threat of serious physical harm,” and the deadly force must be “necessary to prevent escape.” (internal footnotes omitted)); Yoo, J.C. and Ho, J.C. The status of terrorists. *Va. J. Int’l L.* 44 (2003): 207, 208.

[‡] Possible measures include moving back (retreat), mollifying the fist (negotiation), getting into a boxer’s crouch (self-defense), or waiting (passive, nonresistance).

[§] Through sources (HUMINT), intercepted conversations (SIGINT), or open sources.

The Wild West, as most commonly understood,^{*} was largely devoid of restraints. In the nose context, the classic paradigm suggests that an internalized threat justifies physical action.[†]

In applying the Wild West analogy, the Billy the Kid paradigm represents how nation-states should not conduct operational counterterrorism because the new world order, post-9/11, requires enormous thoughtfulness, sophistication, and creative strategic thinking. Mere lashing out, either in advance of an assumed attack or in response to an attack, is counterproductive, long- and short-term alike. Conversely, the Wyatt Earp paradigm reflects action predicated on a series of met criteria and a check-list[‡] that reflects a self-defense model, more in accordance with how nation-states should conduct operational counterterrorism in the context of violating the sovereignty of a nation-state. Adoption of the Earp model limits state action; rather than engaging one and all blindly and wildly, the knowledge-based paradigm is predicated on intelligence information. However, it is also the antithesis of acting only when hit. That is not a model that the nation-state can adopt from any perspective.

^{*} See Coquillette, D.R. The Lessons of Anglo-Saxon "Justice." *Green Bag* 2d 2 (1999): 251, 255 (alluding to the Wild West as a time where "sheriffs administered a rough justice."); Dobris, J.C. Federal transfer taxes: The possibility of repeal and the post repeal world. *Clev. St. L. Rev.* 48 (2000): 709, 719 (alluding to an unrestrained Wild-West saloon); Smith, M.R. Levels of metaphor in persuasive legal writing. *Mercer L. Rev.* 58 (2007): 919, 933 (alluding to the "unrestrained frontier justice in the lawless Wild West").

[†] See Kremnitzer, M. and Ghanayim, K. Proportionality and the aggressor's culpability in self-defense. *Tulsa L. Rev.* 39 (2004): 875, 882-884; Segev, R. Fairness, responsibility and self-defense." *Santa Clara L. Rev.* 45 (2005): 383, 454-456.

[‡] Whether Mr. Earp knowingly and consciously acted in accordance with a "check-list" is neither known nor important. Relevant for our purposes is his adoption of what I refer to "knowledge-based action" rather than "assumption-based action."

6

Containment, Use of Force, and Failed States

A number of years ago, I was invited to give a talk on homeland security in Minneapolis, Minnesota. After my talk, I was approached by a U.S. military serviceman, who shared with me that he was shortly Afghanistan-bound, where he would be training local policemen. In response to my question regarding his language skills, the response with a wry smile was, “Sir, I barely speak English.” Although we both sort of laughed, it was clear that the mission was inherently problematic if not guaranteed to fail from the outset. The story has stuck with me since, for a number of reasons, but primarily because it highlights the enormous complexity, relevant to military missions, where language skills present an enormous challenge. In addition, it raised questions regarding knowledge and understanding of the “other;” sending U.S. military personnel who speak only English to train Afghani policemen raises profoundly important questions regarding both the mission and U.S. understanding of local culture mores and norms. Although we both chuckled at his self-deprecating response, I think we both recognized the mission had a dubious chance of success. See Figures 6.1 and 6.2.

I recalled that story recently while meeting with a former senior official in the Israeli intelligence community. The official (hereinafter, Mr. X) shared with me the following vignette. When posted with senior Israel Defense Force (IDF) officers in the First Lebanon War (1982), he was deeply

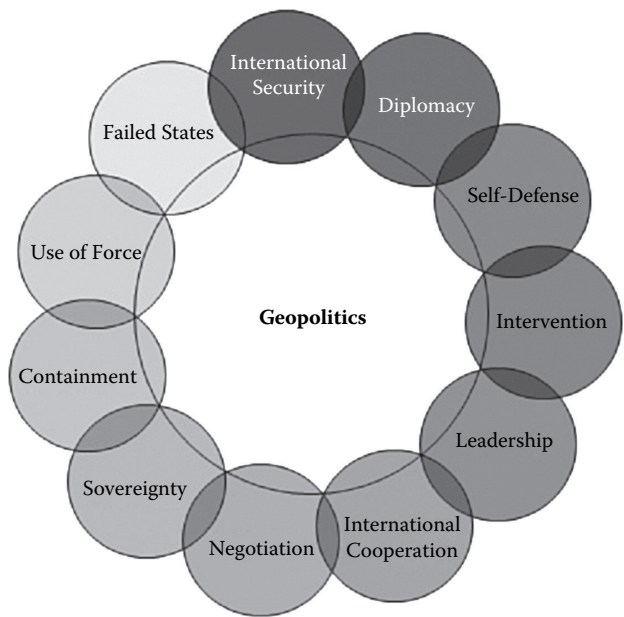


Figure 6.1. Containment, use of force, and failed states.

struck by their lack of understanding of domestic Lebanese culture and politics, and how that dramatically affected both their intelligence-gathering *modus operandi* and subsequent operational decision-making process. In addition, Mr. X emphasized that the involvement of IDF officers in Lebanese political issues reflected confusion, regarding the proper role of a military in nontraditional conflict, when nation-states are not engaged in war with other nation-states.

Both President Bush’s decision to intervene in Iraq and Afghanistan and President Obama’s decision to expand the drone policy, reflect the implementation of significant U.S. power. The question is why, and to what end. The larger question is whether the force has long-term significance, or is its impact limited to the immediate here and now. Rephrased, is state power, as implemented by Bush and Obama, tactical only, or is it strategic thinking at its core, reflecting profound geopolitical decision making?



Figure 6.2. Map of Afghanistan.

The question is neither amorphous nor abstract; both actions, intervention and drone, directly result in the loss of life. Bush's action placed U.S. forces in harm's way; Obama's significantly enhances collateral damage. The question is "to what end?" This was poignantly brought home when I posed, to cadets at the U.S. Military Academy, the following question: "What is the true mission in Iraq?" The wide-eyed, deer in the headlights looks told me everything I needed to know; we were sending America's finest without a clear sense of mission. In the aftermath of my talk, Dean (then Professor) Martha Minow and I wrote the following: "The junior leader, armed with an unclear understanding of the strategic objectives, increasingly loses the confidence of his troops. They may fear their superiors are recklessly endangering them. He is the representative of the senior commanders, yet he cannot articulate a clear purpose coming down from

the top; he is the voice of command, but cannot give a compelling justification for putting soldiers' lives and well-being at risk."

CONTAINMENT POLICY

In his monumental work, *George Kennan: An American Life*,* Professor John Lewis Gaddis describes in painstaking detail the unmatched contribution by Kennan to post-world war U.S. foreign policy. Kennan, the brilliant architect of the "containment" policy that defined U.S.-USSR relations for decades, was a profoundly insightful student of the Soviet Union. Not only did Kennan speak fluent Russian, he had an extraordinary understanding of Russian culture, politics, and society. In other words, he was a brilliant student of the Soviet Union, uniquely positioned to develop U.S. policy. It is important to recall that Kennan was a State Department official when *Foreign Affairs* published his seminal "X" article.† In writing the article, Kennan, drawing on his insight of the Soviet Union—which was immeasurably more acute than his understanding of U.S. society and culture—was able to articulate an implementable foreign policy that guided American presidents for decades. Containment was predicated on Kennan's recognition that although Soviet leaders were not actively pursuing armed confrontation with the United States, American policy was best served by an active containment of the Soviet Union.

That is, American policy reflected, as outlined in the containment policy, a twofold recognition: the Soviet Union was not on "war footing," but there was a need for active and consistent American measures seeking to ensure war did not become an option. The strategic thinking that guided Kennan reflected a keen understanding both of Soviet goals and the limits of Soviet power. Needless to say, recognizing both was essential to development and implementation of the containment policy. This recognition of the limits of Soviet power was fundamental; unlike others who believed the Soviet Union was firmly committed to military engagement with the United States, Kennan understood the powerful limits that constrained Soviet expansionism. Kennan was not, obviously, oblivious to Soviet domination of Eastern Europe, but he understood the limits of that domination.

* Gaddis, J.L. *George F. Kennan: An American Life*. New York: Penguin Books, 2011.

† See Kennan, *supra* note 14.

The containment policy, then, is important to one of the core themes that drive this book: the lack of articulate and coherent U.S. policy in the post-9/11 world. In direct contrast to the Cold War policy that guided American decision making from 1945–1989, the decisions and policies implemented since 9/11 suggest a lack of clarity and coherence. The distinction between the two is essential: containment reflected a strategic approach, predicated on deep understanding of current realities in conjunction with extraordinary perception regarding long-term consequences, whereas post-9/11 policy is largely guided by short-term tactical measures.

The difference between the two approaches is monumental; it also cuts to the essence of geopolitics. To that end, in formal and informal conversation with U.S. military personnel, the overwhelming sense is the following: area commanders, regardless of rank, are able to articulate a very specific operational goal, but express concern, if not resentment, that the “larger picture” has not been conveyed to them. Although, perhaps, in concert with Tennyson’s immortal words “Ours is not to do, ours is but to do and die,”^{*} the complexity of operational counterterrorism suggests this approach is both remarkably shortsighted and fraught with danger. Precisely because the state/nonstate paradigm is immeasurably more complicated than the traditional state–state regime, the inability to convincingly and consistently convey to area commanders a large mission suggests a powerful disconnect between senior and junior leadership. This model was, perhaps, appropriate in the traditional state–state conflict; however, given the ambiguity indigenous to the state/nonstate paradigm, the traditional hierarchical approach is, arguably, unsuited.

Dialogue with U.S. military personnel over the past years consistently highlights the following reality: very little is known by on-the-ground commanders regarding local culture, much less local language. That troubling paradigm is equally applicable to Iraq and Afghanistan. Not only does this reality present significant practical challenges for commanders, but it highlights the additional burden of the lack of an articulated mission, whether in Iraq or Afghanistan. This is of particular importance in the broader geopolitical discussion. If national leadership is unable, perhaps unwilling, to articulate a mission, what are commanders expected to implement? Restated, President Obama’s decision to leave approximately 30,000 troops in Afghanistan after 2014 suggests a mission best described

^{*} Tennyson, A. *The Charge of the Light Brigade*. Accessed May 28, 2013. <http://poetry.eserver.org/light-brigade.html>

as “staying alive.” The ramifications are significant from a number of different perspectives related to domestic policy and international relations alike. The combination has a direct impact on the tactics–strategy delineation: in the immediate aftermath of World War II, “containment” reflected clear strategic considerations, whereas the Iraq/Afghanistan paradigm suggests tactical decisions devoid of a larger picture.

Geopolitics requires analyzing the relationship between strategy and geography. Insufficient articulation of mission and goals to our military leadership (because senior political leadership has consistently failed to develop or at least communicate coherent policy) is relevant to the state/nonstate paradigm. The failure to do so violates fundamental principles in broader geopolitics; it directly affects defining broader national interests thereby and by correlation, affecting prioritizing of domestic capabilities. This is particularly important when nation-states confront diminished resources in the context of an economic crisis. In addition, given the murkiness inherent to the state/nonstate relationship, particularly with respect to the role played by the “failed”/“partially failed” state, significant questions regarding the definition of sovereignty arise.

In contrast to the binary relationship (East–West) that was Kennan’s world, contemporary decision makers confront situations inherently and significantly more complex and nuanced than those of the Cold War era. The dexterity required to both articulate and implement a policy regarding the new paradigm is formidable, however, the ramifications in failing to do so are enormously significant. In particular, but not exclusively, failure to articulate broad strategic themes has direct implications for the nation-states’ security capability precisely because of the inordinate difficulty in distinguishing between real and perceived threats. In the context of the proposed three-step continuum of containment/domino theory/state–nonstate, the increased inability coherently and consistently to define the threat posed to the nation-state, results in ad hoc decisions reflecting circumstance-specific responses, with unclear application of a cohesive and consistent definition of threat. This is of enormous significance, for how threat is defined directly affects application of security resources, personnel, and armament alike.

That reflects a significant departure from Kennan’s containment policy which enabled implementation of profound strategic thinking over the course of four decades. In many ways, the discussion harkens back to the war in Vietnam; the “domino theory” guided American decision makers, but it is clear in retrospect that the policy, both in theory and practice, was



Figure 6.3. Map of Vietnam.

misguided. Forcefully articulating and implementing the domino theory required the Johnson administration to massively engage the U.S. military in what was clearly a misbegotten effort, requiring unprecedented and unjustified cost, human and financial alike. In a nutshell (see Figure 6.3), the domino theory held that:

The domino theory, which governed much of U.S. foreign policy beginning in the early 1950s, held that a communist victory in one nation would quickly lead to a chain reaction of communist takeovers in neighboring states. In Southeast Asia, the United States government used the domino theory to justify its support of a non-communist regime in South

Vietnam against the communist government of North Vietnam, and ultimately its increasing involvement in the long-running Vietnam War (1954–75). In fact, the American failure to prevent a communist victory in Vietnam had much less of a global impact than had been assumed by the domino theory. Though communist regimes did arise in Laos and Cambodia after 1975, communism failed to spread throughout the rest of Southeast Asia.”

In both Lebanon and Afghanistan, the militaries (Israel and the United States, respectively) are fighting nonstate actors (in Lebanon, initially the Palestine Liberation Organization, currently, Hezbollah; in Afghanistan, the Taliban) with innumerable additional ethnic, tribal, and religious forces influencing the conflict. The sheer volume of actors who have a stake regardless of its size and weight, significantly affects the already tenuous nature of multicultural and multifaceted countries, and imposes significant dilemmas on the external nation-state that seeks to influence local mores, norms, and culture. Dialogue with U.S. military personnel over the past years consistently highlights the following reality: very little is known by on-the-ground commanders regarding local culture, much less local language. That troubling paradigm is equally applicable to Iraq and Afghanistan. Not only does this reality present significant practical challenges for commanders, but it highlights an additional burden that has, unfortunately, been largely unaddressed: articulating the mission, whether in Iraq or Afghanistan.

This is of particular importance in the broader geopolitics discussion; if national leadership is unable, perhaps unwilling, to articulate a mission, what are commanders expected to implement? To that end, a senior U.S. military commander wryly noted the following, “When I was in Afghanistan we built many schools; that was a great achievement on our part. The only problem: we forget that we need to train teachers to fill the new schools.”[†]

To fully appreciate the significance of the commander’s insight, it is important to recall that geopolitics represents a confluence of balance of power, geography, and interests. To that end, Figure 6.4 depicts the distinct interests relevant to geopolitics. In determining government policy,

* History. Domino Theory. Accessed March 4, 2013. <http://www.history.com/topics/domino-theory>

† Notes in my records.

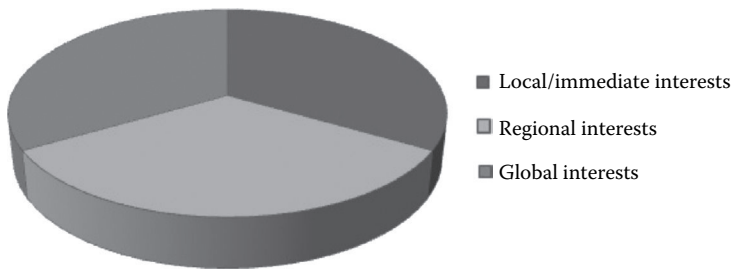


Figure 6.4. Interests relevant to geopolitics.

the questions below are particularly relevant; in weighing their relative importance, the commander's observation is particularly appropriate:

- 1) What are the particular and unique characteristics of the local culture?
- 2) What justifies intervention by a state actor?
- 3) What is the cost of intervention?
- 4) When can power be used, and what is the cost of using power?

In direct contrast to Kennan's containment theory, created in response to a set-piece paradigm between two known actors reflecting clear objectives and predicated on a model where the "known" significantly outweighs the "unknown," contemporary decision makers are confronted with distinctly different realities. Rearticulated, the concise containment theory, supplemented by an ostensibly clear domino theory that, in reality, reflected reflexive fear and profound misunderstanding, has been overwhelmingly replaced by tactical decision making, reflecting a profound lack of strategic thinking. If, in the past, the spheres of influence and strategic alliances were largely clear, subject to the inevitable vagaries of national self-interest that affected the longevity of alliances, contemporary geopolitics is significantly more complex. The state/nonstate paradigm is predicated on an important paradox: the limits of state power and the limited ability of militaries, regardless of clear superiority in material and manpower. To that end, the ability of the nation-state to impose order or to determine the outcome of conflict, broadly defined (as compared to a specific act of operational counterterrorism) is inherently limited. For example, although the United States can kill bin-Laden, al-Qaeda (however defined) is, nevertheless, capable of conducting acts of terrorism and

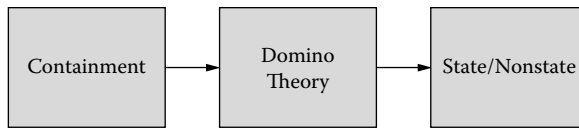


Figure 6.5. The progression to the new paradigm of state/nonstate conflict.

air travelers are still subject to long security lines at airports the world over. See Figure 6.5.

In many ways, both Afghanistan and Lebanon highlight similar themes: the nation-state (United States/Israel), violating the sovereignty of another country (Afghanistan/Lebanon) with the intention of attacking nonstate forces (Taliban/PLO–Hezbollah) perceived as presenting a national security threat to the attacking country because of a conviction that the host country is unable/unwilling to quell the threat. That is, the host country is perceived, in essence, as a “failed state,” or at least as a “partial failed state.” Regardless of the specific definition, whether “partial failed” or “failed,” the practical result is that the “threatened state” (whether in actuality or only in perception) exercises the right to self-defense in accordance with its interpretation of Article 51 of the UN Charter, by attacking terrorist targets located in that state. This unilateral action clearly violates the territorial sovereignty of the “failed”/“partial failed” state, however, the vulnerable state posits a theory that although it is attacking terrorist targets located in the territory of the sovereign state, it is not violating that state’s sovereignty.

This is not a matter of semantics; it reflects an exceptionally important issue regarding the limits of sovereignty, the essence of a failed state, and the application of geopolitics. One of the significant questions, then, is how does the nation-state define its goals in this complicated paradigm comprised of three distinct actors: the nation-state (vulnerable/attacking), the nonstate actor, and the “failed”/“partial failed” (attacked) state. Distinct from containment that focused on the binary relationship between the United States and the Soviet Union, and the domino theory that argued the “cost” of losing a particular country (see Vietnam), it was so significant (in the context of the Cold War) that the United States had “no alternative” to active military engagement. The state/nonstate paradigm introduces an enormously significant “delta”: the nonstate actor physically located in the territory of a sovereign country, exercising significant influence and endangering both the citizens and infrastructure of the nation-state.

For example, in the context of Israel's conflict, initially with the PLO and subsequently with Hezbollah, much damage was incurred by Lebanon.

In both countries, the paradigm is significantly complicated by the important roles based on religion, interest, and history of domestic non-state organizations, extraordinarily effective and skilled in the gamesmanship and skills essential to survival. In many ways, the skills possessed by indigenous tribes and ethnic organizations incomparably outweigh those of the intruding nation-state seeking to impose its will using traditional military methods far better suited to classical war than to the reality that is Lebanon and Afghanistan. Whether the preferred term of art is insurgency, guerrilla warfare, or nontraditional conflict is, frankly, beside the point. What is of primary importance is the recurring pattern of the nation-state's assumption that it can impose "its ways" on both other sovereign countries and distinct internal groups.*

That assumption is both historically flawed and fraught with risk and arrogance. It also reflects a profound misunderstanding of geopolitical realities: indigenous groups will invariably have extraordinary, built-in advantages because of their deep familiarity with the lay of the land, literally and figuratively. Perhaps the oft-used sports expression, "home field advantage," is particularly relevant and appropriate in describing this paradigm. This uncomfortable reality is of particular importance in understanding geopolitics, both historically and presently. Precisely because the "forces at play" stretch well beyond the traditional state actor, the requirement to understand local language, culture, and politics is of the utmost importance.

Imposing will by strength alone reflects a profound mistake; yet, it is one that consistently recurs. Whatever the cause, the consequences are far-reaching; it results in enormous loss of life, significant property damage, unnecessary expenditure of financial resources, hardening of traditional animosities, and ultimately significant questions regarding the nation-state's success in affecting long-term change in accordance with its stated goals and ambitions.

In many ways the question, although seemingly complicated, is remarkably basic. What is the nation-state seeking to accomplish when it engages state and nonstate actors alike? The question is, evidentially, far easier to ask than it is to answer. The answer is complicated by the bluster that invariably clouds political judgment and policy articulation, however, it is the lack of

* See, among others, Nagl, J.A. *Learning to Eat Soup with a Knife*. Westport, CT: Greenwood, 2002.

clarity that is particularly striking. As a result, government action largely “lurches” from event to event. Rearticulated, the action of the nation-state, generally speaking, in this new paradigm can best be described as *ad hoc*. Needless to say, this is extraordinarily dangerous on a number of different levels, primarily because it suggests tactical considerations significantly outweigh strategic thinking.

Furthermore, it calls into question how the term “sovereignty” is applied. Although international law is predicated on nation-states respecting borders and sovereignty of other nation-states, the state/nonstate paradigm has dramatically affected the limits of sovereignty. The practical result of the significant presence of nonstate actors in nation-states is the weakening of sovereignty when the intended target is not the nation-state. This has affected not only the two nation-states directly involved, but also on the larger global order, for it calls into question basic concepts that have been the staple of international law and the international community for centuries.

That is not to suggest that wars between states have not been endemic to the human condition. It is, however, intended to highlight that the profoundly important new paradigm that is the contemporary reality requires the rearticulating of traditional concepts and principles. The practical import of this new paradigm is extraordinary, for it demands that nation-states develop policies with respect both to other nation-states and to nonstate actors. However, because the latter are not beholden to the principles and standards of international law, there is a profound asymmetry in the discussion, both philosophically and practically. Perhaps the best way to examine this issue is through the U.S. drone policy.

We are at a crossroads: traditional state war has morphed, by force of circumstances, into conflict between state and nonstate actors. Traditionally, international law sought to establish criteria and limits by which nation-states fought wars against other states, although violations of the laws of war inevitably occurred. Nevertheless, the rules were clearly articulated and understood, although not always implemented or respected. The era of state versus nonstate conflict, in contrast, has been marked by both random and deliberate attacks against innocent civilians by nonstate actors.

The state, in response, has been forced to develop and implement operational counterterrorism measures intended to protect the civilian population while striking at those responsible for the attacks. Such response has been legitimate and necessary. The primary obligation of the state is to protect its innocent civilian population and valuable

national resources and assets.* This obligation is unambiguous, however, the question remains as to how a state can meet these obligations. Should there be limits imposed regarding the use of force? And if so, what are those limits?

It is, unfortunately, easy in the face of terrorism to take an expansive view regarding self-defense and the definition of a legitimate target. That ease is magnified in the immediate aftermath of an attack when the public, media, and politicians are clamoring for aggressive responses to strike at those responsible, and to deter those considering future acts of terrorism. The rhetoric in the United States immediately after 9/11 demonstrates how such calls for aggressive responses to terrorism play out. Former U.S. Attorney General Alberto Gonzales' disdainful description of international law as "quaint," was matched only by former Vice President Richard Cheney's reference to waterboarding as a mere "dunk in the water." The result was an operational counterterrorism model, predicated on lawlessness and state power, subject neither to the rule of law or morality. From the perspective of the "boots on the ground," there is extraordinary danger when national decision makers adopt a paradigm best described as lawless.

The concern for a moral and legal basis in conflict and counterterrorism operations is not based on compassion for terrorists. Anyone who deliberately targets innocent men, women, and children is a legitimate target.† However, decision making, subject to moral and legal restraints, must go beyond an indiscriminate application of power that is devoid of articulated and narrowly applied criteria. Although collateral damage may well be inevitable to war and counterterrorism alike, it is nevertheless essential that states recognize their absolute obligation to minimize proactively the deaths of innocent individuals.

That burden is unduly affected by the callous decision by nonstate actors to place their innocent civilians in harm's way deliberately. Human shielding is a clear violation of international law and reflects extraordinary disregard for the value of human life.‡ As made clear during

* See Report of the International Commission on Intervention and State Sovereignty. *The Responsibility to Protect*. *supra* note 45.

† See Carpenter, C. Fighting the laws of war. *Council on Foreign Relations*, Mar—Apr. 2011, at 146 (discussing the challenges posed by modern warfare, but concluding that traditional laws of war, including those that prohibit targeting innocent civilians, still apply).

‡ See generally Schmitt, M.N. Human shields in international humanitarian law. *Colum. J. Transnat'l L.* 47 (2009): 292.

Operation Cast Lead (i.e., the Gaza War),* terrorist organizations deliberately use their own civilians as human shields.[†] However, that fact does not and must not justify targeted killing which results in undue collateral damage. The fact that terrorist organizations violate standards of law and morality must be universally condemned, but such conduct does not justify a paradigm in which collateral damage is tolerated. Ethical decision making, human judgment, a moral conscience, and the rule of law must all work together to ensure that Americans do not become the enemy we are fighting.[‡]

ROLE OF MODERN TECHNOLOGY

The use of drones, also known as unmanned aerial vehicles (UAV), has further complicated the relationship among counterterrorism, self-defense, and morality in armed conflict. Many argue that the combination of modern technology and sophisticated intelligence analysis all but ensures that UAV policy is the most effective contemporary means to conduct operational counterterrorism.[§] The argument sounds compelling and convincing: what is more attractive than killing terrorists from the air, with the use of sleek technology, while minimizing risk to ground forces? We are in an age where shiny technology and seemingly sophisticated intelligence gathering and analysis converge, potentially removing the human element and humanity from decision making.[¶] However, targeted killing is fraught with extraordinary risk. Computers and advanced technology are, undoubtedly, essential to intelligence gathering and other important aspects of counterterrorism and armed conflict; suggesting

* See Israel Says Gaza Death Toll Lower Than Claimed. *CNN*, March 26, 2009. Accessed May 31, 2013. <http://www.cnn.com/2009/WORLD/meast/03/26/israel.gaza.death.toll> (discussing Operation Cast Lead).

† See Youtube. Terrorists Use Palestinian Civilians As Human Shields. Last modified January 1, 2010. http://www.youtube.com/watch?v=n_YP6AtdwJQ &feature=fvwrel; see also Youtube. Cast Lead Video: Hamas Terrorist Uses Children as Human Shield. Last modified September 17, 2009. <http://www.youtube.com/watch?v=2vHDyuSTneA>

‡ My gratitude to Margaret Hu for articulating this point so clearly for me.

§ See, e.g., Blank, L.R. After "Top Gun": How drone strikes impact the law of war. *U. Pa. J. Intl. L.* 33 (2011): 675, 679, 701 (discussing the potential impact of unmanned drones on the law of armed conflicts).

¶ Sanger, D.E. 244 (2012) (reporting a top Obama Administration official's concern that new technology distracts from human realities).

otherwise would be folly. However, the trend toward relaxed or flexible definitions of imminence, legitimate targets, and proportionality means that such an increasing reliance on technology can exacerbate, rather than curtail, these dangers.

THE DECISION-MAKING PROCESS

The Obama Administration articulated a broad rationale for the Anwar al-Awlaki killing based on the theory of aggressive self-defense.* More recently, the administration has acknowledged the broader drone program, again defending it as lawful:

In practice, the U.S. approach to targeting in the conflict with al-Qa'ida is far more aligned with our allies' approach than many assume. This Administration's counterterrorism efforts outside of Afghanistan and Iraq are focused on those individuals who are a threat to the United States, whose removal would cause a significant—even if only temporary—disruption of the plans and capabilities of al-Qa'ida and its associated forces. Practically speaking, then, the question turns principally on how you define “imminence.”[†]

We are finding increasing recognition in the international community that a more flexible understanding of “imminence” may be appropriate when dealing with terrorist groups in part because threats posed by nonstate actors do not present themselves in the same ways as evidenced imminence in more traditional conflicts. After all, al-Qaeda does not follow a traditional command structure, wear uniforms, carry its arms openly, or mass its troops at the borders of the nations it attacks. Nonetheless, it possesses the demonstrated capability to strike with little notice and cause significant civilian or military casualties. Over time, an increasing number of our international counterterrorism partners have begun to recognize that the traditional conception of what constitutes an “imminent” attack should be broadened in light of the

* Brennan, J.O. Assistant to the President for Homeland Security and Counterterrorism, Strengthening Our Security by Adhering to Our Values and Laws. Address at Harvard Law School, Harvard, September 16, 2011. <http://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an>

[†] See Brennan, *supra* note 140.

modern-day capabilities, techniques, and technological innovations of terrorist organizations.

The Importance of Process

Effective counterterrorism requires the state to apply self-imposed restraint; otherwise, violations of both international law and morality in armed conflict are all but inevitable. The manner in which a counterterrorism operation is carried out will determine its legality under governing international instruments. Among the many important international law principles applicable to targeted killing, the obligation of distinction sits at the pinnacle. The notion of counterterrorism as self-defense against imminent threats from terrorist or other nonstate actors means that the state must know, in a detailed manner, who poses such a threat, in what circumstances, and how and when such a person can be targeted.*

This information and analysis lies at the heart of the legitimate target determination. Next, the state (i.e., those making decisions regarding targeted strikes) must undertake the necessary proportionality analysis: will civilians be harmed and if so, how many. In an effort to minimize successfully the number of innocent civilians killed during conflict (usually referred to by the unfortunate term “collateral damage”), the attacking party must refrain from any attacks where the expected civilian casualties will be excessive in relation to the anticipated military advantage gained.†

In the end then, the lawfulness of targeted killing depends in large part on the efficacy of the internal administrative measures adopted to identify targets.‡ Only when those procedures are effective and discriminating will targeted killing be both legal and moral. Why? Because targeted killing is not about encountering a division of the enemy’s forces on the battlefield and stopping it from advancing across the front toward your borders or essential infrastructure. Such are the tactics of traditional

* This section builds on a previous article; see Blank, L. and Guiora. A.N. Targeted Killing’s “Flexibility” Doctrine that Enables U.S. to Flout the Law of War. *The Guardian* (UK), August 10, 2012. Accessed May 31, 2013. <http://www.guardian.co.uk/commentisfree/2012/aug/10/targeted-killing-flexibility-doctrine-flout-law-war>

† See Blum, G. and Heymann, P. Law and policy of targeted killing.” *Harv. Nat’l Sec. J.* 1 (2010): 145,148 (comparing targeted killing in international war and proportionality concerns to U.S. domestic law enforcement and related principles of proportionality).

‡ See Blank, L. and Guiora. A.N. Teaching an old dog new tricks: Operationalizing the law of armed conflict in new warfare. *Harv. Nat’l Sec. J.* 1 (2010): 45, 71.

1. Can the target be identified accurately and reliably?	→ Is the target legitimate?
2. Does the target pose a threat, such that an attack on the target <i>at that moment</i> is justified, or are there alternatives available?	→ Is the intelligence actionable?
3. What is the anticipated extent of collateral damage?	→ Is the response proportional?

Figure 6.6. Questions to pose in evaluating the threat.

conflict, trench warfare, and tank warfare, in state versus state conflict. Targeted killing rests on the specific identification of individuals who pose an imminent threat to the state's national security and are, therefore, legitimate targets within the framework of lawful self-defense.* The state, thus, needs a method and a process for figuring out who poses a threat, why they pose a threat, and how that threat can be deterred or eliminated. Understanding more clearly what precisely those targeting procedures are, is an important first step.

Therefore, in any targeted killing decision, some important questions must be addressed (see Figure 6.6). To answer these questions legally, morally, and effectively, decision makers must use a criteria-based process. Criteria-based decision making increases the probability of correctly identifying and attacking a legitimate target while minimizing collateral damage, thereby enhancing the policy's effectiveness. The criteria-based process is dependent upon the gathering of intelligence information from three separate sources: human intelligence, signal intelligence, and open-source information.† Intelligence analysts then determine whether the information is actionable.

* See Guiora, A.N. Targeted killing as active self-defense. *Case W. Res. J. Int'l L.* 36 (2004): 320, 325.

† See Szayna, T.S. et al. *Improving Army Planning for Future Multinational Coalition Operations*. Rand Corporation, (2001). http://www.rand.org/pubs/monograph_reports/MR1291.html

Analysis of the threat's nature	Identifying the threat's source	Identifying the timeline when the threat is anticipated to materialize	Assessment of the threat's imminence
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Figure 6.7. Thought process in analyzing the threat.

Who Are Legitimate Targets?

The foundation for determining the legality of targeted killing is assessing whether the threat's imminence justifies the action in order to protect an innocent civilian population.* In order to implement legal, moral, and effective operational counterterrorism, decision makers must initially evaluate the threat. This evaluation must include the attributes shown in Figure 6.7.

The suicide bomber infrastructure is instructive in highlighting the complexities of determining whether an individual is a legitimate target. It is important to point out that four distinct actors are necessary for a successful suicide bombing as shown in Figure 6.8.

The financier is a largely unexplored subject; in the context of targeted killings, the financier is a legitimate target when involved in wiring or laundering money, both of which are essential for terrorist attacks. There is significant room for debate regarding when the financier is not in the act of financing. To that extent, the question is whether the financier is more akin to the "bomber" or the "logistician." Arguably, due to the central role the financier plays in the structure, the correct placement is between the logistician and the planner.

Imminence must be understood from two distinct perspectives: the imminent threat posed by the bomber, and the future threat posed by a planner or financier, considered legitimate targets, even when not directly engaged in planning or implementing a suicide bombing. In order for a state's actions under either scenario to be considered legal, the limits of self-defense must be defined. The policy of targeted killing should only be used in response to imminent threats, rather than those that are distant, unviable, or merely foreseeable.† Targeted killings, based on vague

* See Rockefeller, M.L. The imminent threat requirement for the use of preemptive military force: Is it time for a non-temporal standard?" *Denv. J. Int'l L. Pol'y* 33 (2005): 131, 131 (discussing the imminence standard).

† Jaffer, J. Targeted killing and the courts: A response to Alan Dershowitz." *Wm. Mitchell L. Rev.* 37 (2011): 5315, 5317 (discussing the imminence requirement for lethal force).

Target—The Suicide Bombing Infrastructure	
1. Planner —	legitimate target at all times
2. Financer —	legitimate target when involved in financing a current, confirmed attack operation. Not a legitimate target when not involved in a specific, future attack
3. Logistician —	legitimate target when involved in all aspects of implementing suicide bombing, but unlike the planner, not a legitimate target when not involved in a specific, future attack
4. Bomber —	legitimate target, solely when operationally engaged

Figure 6.8. The distinct actors necessary for a successful suicide bombing and suggested target priority and clearance.

threats, are grounded in revenge and emotion, rather than in objective, criteria-based decision making. Put simply, a legitimate target is an individual who, according to intelligence information, poses a direct and immediate threat to national security. Here, the notion of proportionality in self-defense is operationalized in the plainest manner: the decision maker must determine whether lethal force is the appropriate response to the threat posed in order to repel or deter that imminent threat. It is important, therefore, to recognize that as definitions of imminence become broader and more flexible, the parameters of that proportionality analysis stretch as well.*

Is the Intelligence Actionable?

Threat analysis refers to the nature of the target and his or her planned activities and attacks.[†] Assessing the source of the information about the target and the planned attack is an equally vital aspect of the decision-making process. Information, provided by a human source should be

* McKelvey, Cf. B. Due process rights and the targeted killing of suspected terrorists: The unconstitutional scope of executive killing power. *Vand. J. Transnatl. L.* 44 (2011): 1353,1368 (noting that the imminence standard becomes useless if the decision-maker must go through months of evaluation).

[†] Guiora, A.N. and Hakimi. M. Targeted killing is lawful if conducted in accordance with the rule of law. *ABA LawJ.* (2012). Accessed May 31, 2013. http://www.abajournal.com/magazine/article/targeted_killing_is_lawful_if_conducted_in_accordance_with_the_rule_of_law

analyzed closely for possible biases, grudges, or personal agendas that might taint its reliability. Therefore, source analysis becomes a fundamental component of the criteria-based approach. Signal intelligence includes information gathered from sources such as satellite, intercepted phone, and email conversations.* Open sources such as the Internet and newspapers are generally available and can often help paint a landscape against which a perceived threat can be evaluated. The combination of these three sources allows the intelligence community to develop an accurate operational picture from which to work. In this information-gathering process, the intelligence produced from UAV reconnaissance is highly valuable, particularly with regard to tracking targets and ensuring that the person under analysis is actually the person who poses the threat. However, this type of intelligence alone simply cannot be a substitute for the complex web of information and analysis woven together using all three sources of intelligence described above. It is essential, therefore, to guard against over-reliance on the extraordinary capabilities of modern technology.

Ultimately, the question central to this operational puzzle is whether the acquired information is actionable. The main goal of decision makers is to enhance the objectivity in their decision-making process. Figure 6.9, developed to evaluate detention decisions, is an example of articulated guidelines for determining whether the intelligence is sufficiently actionable.

Is the Response Proportional?

Even if a legitimate target is identified and the intelligence about that target is actionable, the use of lethal force, in this case a targeted killing, is lawful only if it meets the international law obligation of proportionality.† As noted above, an attack violates the principle of proportionality if the expected civilian casualties will be excessive in relation to the military advantage gained. Proportionality is a difficult concept to apply in any conflict situation, but it is absolutely essential for the protection of the civilian population.‡ This analysis requires intelligence, not just about the target of the attack, but also about who and what else is in the area and is

* See National Security Agency. Signals Intelligence. Last modified September 9, 2011. <http://www.nsa.gov/sigint/index.shtml>

† See Cannizzaro, E. The role of proportionality in the law of international countermeasures. *Euro. J. Intl. L.* 12 (2001): 889, 889

‡ See Fenrick, W.J. The law applicable to targeting and proportionality after operation allied force: A view from the outside. *Yearbook of International Humanitarian Law* 3 (2000): 58.

Test Prong	Definition/Use
<i>Reliable</i>	<ul style="list-style-type: none"> ○ Past interactions show the source to be a dependable provider of correct information ○ Determination, as to whether the information is useful and accurate ○ Requires analysis by case officer into source's personal agendas or grudges with respect to identified target.
<i>Viable</i>	<ul style="list-style-type: none"> ○ Is it possible that an attack could occur, in accordance with the source's information? (Based on source's information, such a terrorist attack is both possible and feasible.)
<i>Relevant</i>	<ul style="list-style-type: none"> ○ The information has bearing on upcoming events ○ Consider both timeliness of the information and whether it is time sensitive, thereby imposing the need for immediate counterterrorism measures
<i>Corroborated</i>	<ul style="list-style-type: none"> ○ Another source confirms the information in part or whole ○ This second source must also meet the above reliability test

Figure 6.9. Detection decisions and guidelines as determined by whether the intelligence is sufficiently actionable.

likely to be killed, injured, or destroyed (when dealing with property) as a result of the attack.* It also requires a complete evaluation of significance of reaching the target.†

Of the principles discussed, proportionality receives the greatest attention and is the most scrutinized.‡ It is also, I would suggest, the most problematic, most misconstrued, and least attainable. Proportionality is not about equality of capability or power of the two sides. State versus nonstate conflict is inherently disproportionate. History is replete with examples of disproportionate warfare between states, much less between

* See Fenrick, *supra* note 153.

† See Fenrick, *supra* note 153.

‡ See Cannizzaro, *supra* note 152; and Henckaerts, J.-M., and Doswald-Beck, L. Customary international humanitarian law. *International Committee Resource Center* 3 (2009): 46 ("Launching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited").

states and nonstate actors. War is often won, in large part, by the use of significant, indeed overwhelming or disproportionate, force in order to defeat the other military. Proportionality seeks to minimize harm to the civilian population within the context of conflict, not to equalize the capabilities of warring states.

In the person-specific operational counterterrorism model, however, the legal principle of proportionality in self-defense is also a significant component of the legal decision-making process. Here, proportionality means that state action, proactive and reactive alike, must be proportional to the threat posed whether actual or perceived, because in each specific instance the state is using and justifying the use of force in self-defense.* When made operational, the term means the commander must be very selective, both with respect to force used and individuals targeted.†

It is precisely at this confluence of legal principles and decision making that proportionality has become out of proportion in the framework of the U.S. targeted killing program. International law requires that targeting an individual with lethal force as self-defense can only be undertaken when the threat posed is such as to require the use of force to mitigate or eliminate the threat; that is, the use of force is proportional to the threat and the need to deter it.‡ At the same time, international law also requires that the commander take into account the likely civilian harm, and refrain from any attack where the expected collateral damage (civilian harm) is excessive, given the value gained, by killing the targeted individual.§

As the discussion to follow highlights, the increasingly flexible and broad notion of imminence and threat have significant effects on the notion of “military advantage gained” (i.e., the value of the target), and therefore on the application of the proportionality principle governing the minimization of civilian harm. If all threats are as imminent and dangerous as to justify the use of lethal force in self-defense, then the value of taking them out will be great enough to justify significant amounts of

* See Fenrick, *supra* note 153, at 58 (stating that “there must be an acceptable relation between the legitimate destructive effect and undesirable collateral effects”).

† See Fenrick, *supra* note 153.

‡ See Blum and Heymann, *supra* note 143, at 146 (stating that targeted killings are allowed only in limited circumstances such as self-defense when the person poses an immediate threat).

§ See Blank and Guiora, *supra* note 144 (“Whether a commander chooses to engage will depend on whether the person poses a threat at that moment and the likelihood of mission success”).

civilian harm, meaning that broad understandings of the first concept of proportionality eliminate the need for the second, equally essential, proportionality analysis. The result is a targeted killing policy not grounded on a sufficient legal and moral footing.

THE DRONE POLICY

The U.S. drone policy raises profoundly important questions regarding the very nature of operational counterterrorism; its implementation reveals how morality and the rule of law are applied in an inherently ambiguous and amorphous paradigm. At present, the increasingly broader and more flexible definition of imminence, combined with a continually growing reliance on sleek new technology, is highly problematic and raises significant concerns about whether law and morality are truly serving as the necessary guiding force here. Law not only provides a state with the right to engage those who deliberately and randomly target innocent civilians, but it also provides the essential guiding framework for the extent to which and manner by which the state can target and engage those individuals. Simply articulating an aggressive “tough on terrorism” policy is not sufficient. Rather, the devil truly is in the details: the state must carefully define both the limits of force and how that limited force is to be applied. Such a carefully defined limit and application of force is the essence of both moralities in armed conflict and the rule of law. In contrast, deliberately operating in an open-ended paradigm with opaque parameters where state power is broadly defined and implemented, opens the door unnecessarily to significant violations of morality and law.

Unlimited drone warfare where limits, targets, and goals are not narrowly defined creates an operational environment in which anyone killed, regardless of whether intended or unintended, is considered a legitimate target. This expanded articulation of legitimate target premised on significant expansion of tolerable collateral damage creates a slippery slope that inevitably results in the deaths of otherwise innocent individuals. The allure of modern technology has led many decision makers to minimize the need to distinguish carefully between the individuals who pose a threat and those who do not.

Decision makers must not lose sight of the fact that targeted killing on the basis of received and actionable intelligence information is inherently problematic; it poses extraordinary operational challenges that must

be resolved precisely because of targeted killing's importance to lawful self-defense. It must be operationalized in the most careful, narrow, and specific manner possible, meaning that a discriminating analysis of who is a legitimate target must be matched by an equally discriminating analysis of who constitutes collateral damage, how much collateral damage is likely, and, most important, how much collateral damage is legally and morally acceptable or tolerable.

Morality in armed conflict is not a mere mantra: it imposes significant demands on the nation-state that must adhere to limits and considerations beyond simply killing "the other side." For better or worse, drone warfare of today will become the norm of tomorrow. Multiply the number of attacks conducted regularly in the present and you have the operational reality of future warfare. It is important to recall that drone policy is effective on two distinct levels: it takes the fight to terrorists, directly involved either in past or future attacks, and serves as a powerful deterrent for those considering involvement in terrorist activity.* However, its importance and effectiveness must not hinder critical conversation, particularly with respect to defining imminence and legitimate target.

The overly broad definition, "flexible," in the Obama administration's words,[†] raises profound concerns, regarding how imminence is applied. That concern is concrete, for the practical import of Brennan's phrasing is a dramatic broadening of the definition of legitimate target. It is also important to recall that operators—military, CIA, or private contractors—are responsible for implementing executive branch guidelines and directives.[‡] For that very reason, the approach articulated by Brennan on behalf of the administration is troubling.

This approach, although theoretically appealing, fails on a number of levels. First, it undermines and does a profound injustice to the military and security personnel tasked with operationalizing defense of the state, particularly commanders and officers. When senior leadership deliberately obfuscates policy to create wiggle room and plausible deniability, junior commanders (those at the tip of the spear, in essence) have no framework

* See Vogel, R.J. Drone warfare and the law of armed conflict. *Denv. J. Intl. L. Pol'y* 39 (2010): 101, 107–09 (explaining the geographic expansiveness of drone policy and its use to prevent future attacks).

† See Brennan, *supra* note 140.

‡ See Targeting operations with drone technology: Humanitarian law implications. Background Note for the American Society of International Law Annual Meeting, Human Rights Institute, Columbia Law School, March 25, 2011.

to guide their operational choices.* The results can be disastrous, as the example of Abu Ghraib shows all too well.[†] Second, it gravely endangers the civilian population. What is done in the collective American name poses danger both to our safety, because of the possibility of blowback attacks in response to a drone attack that caused significant collateral damage, and to our values, because the policy is loosely articulated and problematically implemented.[‡] Third, the approach completely undermines our commitment to law and morality that defines a nation predicated on the rule of law. If everyone who constitutes “them” is automatically a legitimate target, then careful analysis of threats, imminence, proportionality, credibility, reliability, and other factors become meaningless. Self-defense becomes a mantra that justifies all action regardless of method or procedure.

Accordingly, the increasing reliance on modern technology must raise a warning flag. Drone warfare is conducted using modern technology with the explicit assumption that the technology of the future is more sophisticated, more complex, and more lethal. Its sophistication and complexity, however, must not be viewed as a holy grail. Although armed conflict involves the killing of individuals, the relevant questions must remain who, why, how, and when. Seductive methods must not lead us to conclude reflexively that we can charge ahead. Indeed, the more sophisticated the mechanism, the more questions we must ask. Capability cannot substitute for process, and technology cannot substitute for analysis.

* See Guiora, A.N. and Minow, M. National objectives in the hands of junior leaders. In *Countering Terrorism and Insurgency in the 21st Century*, J.J. F. Forest (Ed.) 179, 184–85. Westport, CT: Greenwood, 2007.

[†] See Guiora and Minow *supra* note 165.

[‡] See Guiora and Minow *supra* note 165 (discussing the illustrative “black flag” incident, in which 56 innocent Israeli civilians were killed after junior leaders mistakenly interpreted a commanding officer’s comment that God should have “mercy” on any villager out after curfew, as a command to shoot anyone returning from the fields after curfew).

7

Moving Forward: The New World

The Boston Marathon bombing of April 15, 2013, provides much material and thought for this chapter. The actions of Dzhokhar and Tamerlan Tsarnaev represent a highly challenging confluence of domestic and international developments that represent the enormous complexity of contemporary geopolitics. Their decision to kill participants and spectators, young and old alike, represents a terrorist attack, however, the larger issues are of the utmost importance in understanding security, strategy, and conflict.

The impact of their actions is directly related to many of the themes discussed in this book. Understanding geopolitics, particularly in the context of the “global village” that accurately defines national and international relations, increasingly requires stepping outside traditionally understood and accepted borders and boundaries.

The terms “borders” and “boundaries” are arguably similar; nevertheless, a nuanced reading suggests they are distinguishable and distinct. Borders, in the context of geopolitics, refers to the demarcation line between nation-state A and nation-state B; boundaries refers to the tangible and intangible in articulating limits and opportunities alike. In the nation-state paradigm, borders are defensible by posting soldiers, physical barriers, and demanding that an individual seeking to cross a border legally present appropriate and valid documentation. In accordance with principles of sovereignty, the nation-state has the right to deny entry to an individual seeking to cross its borders regardless of the intent to enter the country.

Primarily because of their inherent intangibility, boundaries are significantly different. For example, although an individual may be denied physical access (cannot cross the border) his reach, and impact, into the country he wishes to enter may well transcend mere physical limitations. The Internet has dramatically affected the scope and power of the "reach." Rearticulated: the Internet has significantly minimized the importance of physical borders and expanded the importance of intangible boundaries. To that end, acts of terrorism can be committed without crossing a border, but solely by expanding the boundaries. What, after all, is at the essence of cyberterrorism if not borderless attacks?

The complexity of the Boston attack requires, then, focusing on borders and boundaries alike, whether equally or not is a matter of interpretation and prioritization. The attack occurred in Boston, but it is likely that the background and motivation are international with the Internet providing a mechanism for the articulation of beliefs and viewpoints that were, evidentially, essential to the attack. That is, although the bombings and subsequent events were seemingly local in nature, the reality is that the attack of April 15, 2013, reflects both international and domestic terrorism. In that vein, it reflects the crossing of borders and boundaries alike. After all, the Tsarnaev family moved to the United States hoping to create a better life, similar to untold immigrants before them. And younger brother Dzhokhar officially became a U.S. citizen on September 11, 2011.

To that end, then, the Boston Marathon bombers encompass a significant number of "stories within the story" related to geopolitics, reaching far beyond the bombing itself. Whether Tamerlan Tsarnaev was radicalized in a mosque or self-radicalized, religious extremism as a motivating factor is essential to understanding the actions of the Tsarnaev brothers. Similarly, the issue of assimilation and acculturation is relevant to understanding the relationship between immigrants and the society they have chosen for their new home.

This question is of particular importance given the politically charged debate both in the United States and Europe regarding immigration. In this vein, the geopolitics discussion must include analysis of integration, immigration, and extremism. In many ways, the three are directly related to security concerns and considerations, both domestically and internationally. Some have suggested that the Boston bombers represent domestic terrorism only, however, a more cautious analysis suggests a complicated confluence of domestic and international security considerations. It is in that spirit that the events of April 15, 2013, and the data uncovered since,

are relevant to this book. The connection between Boston and geopolitics goes deeper than meets the eye. Not only are the security ramifications extraordinarily relevant, but also their relationship to demographics and ethnic groups and immigration is of particular importance to geopolitics.

To use a parallel example, as the conflict in Afghanistan clearly suggests, tribal loyalty is exponentially more significant than any sense of "nationalism." I again hearken to the U.S. sergeant posted to train Afghan policemen whom I learned was thoroughly unschooled in both relevant language and relative culture. This is especially worrisome and relevant to a discussion of cultural and language training relative to an intelligence and security perspective.

In a talk I gave following the Boston attack, I referenced my speech at West Point, particularly my grave concern that this soon-to-be-commissioned officer did not speak Arabic. By analogy, I suggested that same concern regarding linguistic and cultural "challenges" is applicable to the ability of the FBI and local law enforcement to penetrate domestic ethnic and religious populations. To that extent, the importance of language and culture to developing and implementing effective geopolitics is essential; simply put, inability to speak the relevant language prevents understanding the particular culture. In the context of geopolitics the importance of both failures is extraordinary.

Immigration is, needless to say, an important American political, social, and cultural issue. The current political debate, highlighted by a consistent inability to resolve the conundrum, reflects the reality of powerful competing forces. Congress and the president are "locked in battle" regarding immigration reform, and the public is divided on a variety of issues requiring resolution. However, to truly understand the tone and tenor of the political discussion, it is necessary to recognize the ambivalence with which society regards immigration. That same wariness regarding immigrants is very relevant to contemporary European debate; in many ways, it is "the" issue.

In researching additional writing projects, I spent significant time in Europe; in particular my research took me to Germany, The Netherlands, Norway, and the United Kingdom. Wide-ranging discussions with subject matter experts from different fields and disciplines emphasized the importance of immigration to Europeans. A clear connection was "drawn" between immigration, security, and extremism. In that vein, the question oft-posed was how, and to what extent, does society protect itself against the "outsider."

The irony, needless to add, was that the “outsider” was a member of society although distinct culturally, religiously, and ethnically from “traditional” society. As European leaders weigh their individual and collective responses to events both in Europe and beyond its borders, sensitivity is necessarily paid to the possible reactions of relevant immigrant populations. The relevance of this issue to geopolitics is significant; simply stated, concern regarding domestic political pressures directly affects foreign policy. That is both obvious and timeless, however, the difference is the careful attention paid to a particular domestic population in developing foreign policy.

The discussion is relevant because it focuses attention on a broader “read” of geopolitics than traditionally understood. The economic crisis that has struck both the United States and Europe (“Eurozone”) has raised profound questions regarding Europe’s future.^{*} These questions address not only the future of the European Union but also whether European nations will be able to honor their financial obligation in the context of social benefits and the welfare state.

Hand in hand with the economic crisis is the question of immigration to Europe. The spotlight naturally focuses on immigration from North Africa and Turkey.[†] Discussions with a broad range of European academics, policy makers, and security officials suggest that contemporary social tensions are particularly acute regarding immigration from North Africa. Those conversations highlight a powerful connection between the economic crisis and immigration; in many ways, the two are inexorably linked both in reality and perception.[‡]

^{*} Lister, T. The future of Europe: 3 scenarios. *CNN*, June 18, 2012. Accessed May 31, 2013. http://www.cnn.com/2012/06/15/world/europe/europe-future/index.html?hpt=hp_c1

[†] For a thorough and objective analysis, please see Congressional Research Service. Muslims in Europe: Promoting Integration and Countering Extremism. Last modified September 7, 2011. Accessed June 17, 2012. <http://www.fas.org/sgp/crs/row/RL33166.pdf>

[‡] See generally Kern, S. Islam in Germany: Germany Does Away with Itself. *Right Side News*, June 16, 2012. Accessed June 1, 2013. <http://www.rightsidenews.com/2012061616432/world/geopolitics/islam-in-germany-qgermany-does-away-with-itselfq.html>; and Madslie, J. Norway’s far right not a spent force. *BBC News*, July 23, 2011. Accessed June 1, 2013. <http://www.bbc.co.uk/news/world-europe-14260195>; and Bridge, R. Rise of right-wing extremism rattles Europe. *RT*, July 25, 2011. Accessed June 1, 2013. <http://rt.com/politics/norway-extremism-russia-multiculturalism/>; and Poggioli, S. Norway questions its tolerance of extremism. *NPR*, July 26, 2011. Accessed June 1, 2013. <http://www.npr.org/2011/07/26/138696308/norway-questions-its-tolerance-of-extremism>

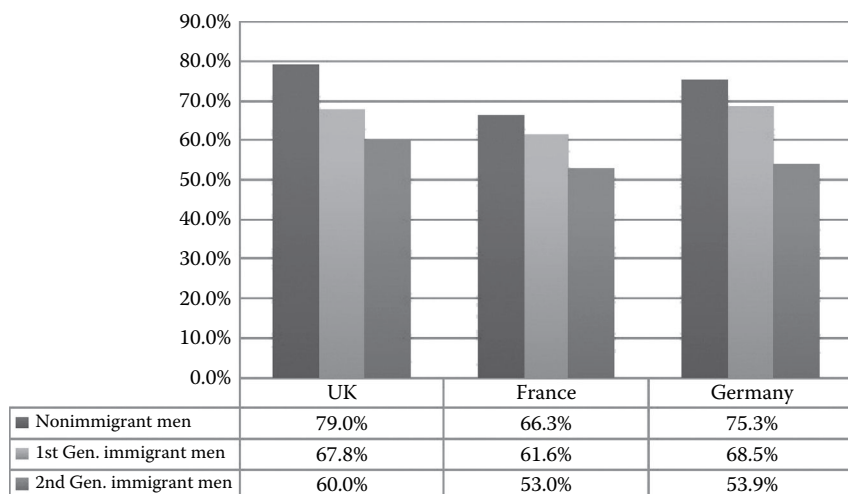


Figure 7.1. Employment rate of immigrant and nonimmigrant men.

The graphs shown in Figures 7.1 and 7.2 highlight the sharp discrepancies in employment between immigrants and nonimmigrants and between first- and second-generation immigrants. Needless to say, high unemployment among second-generation male immigrants is particularly problematic in the context of extremism for it accentuates any financial hardships, feelings of isolation, and the status of “outsider” that can potentially make one susceptible to radicalization. That is not to suggest that radicalization occurs exclusively among the unemployed. Or, that it is an automatic connection by any stretch. Individuals in the middle class and upper-middle socioeconomic strata have committed acts of terrorism in England, Israel, Scotland, the United States, and elsewhere. It is, however, to suggest an important—and dangerous—link between unemployment and radicalization. As the saying goes, “Idle hands are the devil’s workshop.”

In this vein, the opening discussion regarding Boston was intended to suggest tensions in the United States regarding immigration and radicalization of individuals who, *prima facie*, have been acclimated to mainstream society. Although circumstances and motivations may differ, the larger question is how domestic conditions affect geopolitical decision making. The discussion that follows regarding The Netherlands is

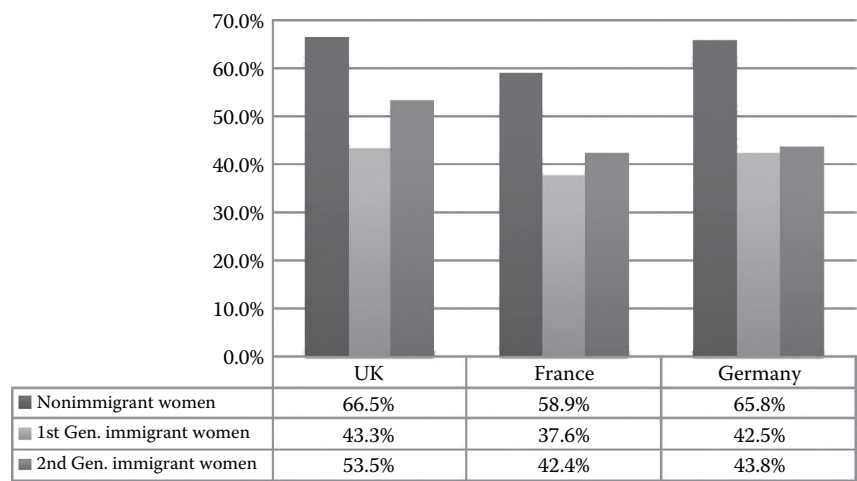


Figure 7.2. Employment rate of immigrant and nonimmigrant women.

intended to illustrate the tensions confronting contemporary European society. The comments are specific to Holland, however, they are relevant to Europe as a whole. Their relevance to the broader geopolitics, and hence their inclusion, is that they compellingly highlight the enormous domestic pressures facing European leaders exacerbated by clear economic strains. To that end, we turn our attention to Europe in general, and The Netherlands in particular.

EMPLOYMENT RATES*

Holland

A leading Dutch journalist starkly posed the question, “What is Dutch society today.”[†] In posing the question in such a manner, my interlocutor suggested that the key issues in understanding the relationship between

* Algan, Y., Dustman, C., Glitz, A., and Manning. A. The economic situation of first and second-generation immigrants in France, Germany and the United Kingdom. *The Econ. J.* 542 (2010): F4–f30. Accessed June 1, 2013. <http://ideas.repec.org/a/ecj/econjl/v120y2010i542pf4-f30.html>

† Private conversation; records in author’s files.



Figure 7.3. Map of The Netherlands/Holland.

traditional Dutch society and the immigrant population required focusing on four things: education, housing, crime rates, and employment (please see Figure 7.2). In doing so, he suggested (as others have) that Europe today is largely composed of “parallel societies.” In raising the specter of parallel societies, the focus in The Netherlands is on first- or second-generation immigrants to Holland from Morocco and Turkey. In the context of social tensions a critical question is one of allegiance and identity. According to a leading Dutch academic, Moroccan youth identify with Islam, whereas Turkish youth identify with Turkey.[†] Please see Figure 7.3.

* See discussion in Chapter 3.

[†] Private conversation; records in author’s notes.

Jean Tille and Marieke Sloomman's research regarding the radicalization of Muslim youth in the Netherlands is particularly insightful:

Muslims differ from the average resident of Amsterdam especially in the two core convictions. Muslims are three times more likely to consider their religion superior to others than the Christians in Amsterdam, and they are more likely than the average Amsterdammer to find the debate about Islam is conducted in a negative manner. These differences indicate a gap between many Muslims, especially Moroccans, and the average Amsterdammer in their religious beliefs (or at least in the manner these beliefs are formulated) and in their perception of the social discourse. Turkish Muslims agree with the average Amsterdammer in their perceptions of the debate about Islam although they are in general more orthodox than Moroccans. These differences seem relevant to us, because contrasts with the rest of society can lead to a mutual feeling of discord and of not being understood.*

This research is particularly relevant for it highlights both the reality and danger of alienation from mainstream society and how this, in turn, significantly facilitates the ability of extremists to prey on disaffected youth contributing to their radicalization. In discussing immigration in the context of extremism, the question is the degree of integration into the larger society. That question, in essence, is to what extent does traditional Dutch society welcome immigrant values, mores, and norms.

The scholarship of Professor Paul Scheffer is particularly important to this issue. Scheffer's book *Immigrant Nations* is particularly insightful regarding a number of issues addressed in this chapter. Professor Scheffer writes:

It's clear that in times of large-scale immigration, tolerance is put to the test. Innumerable people have arrived in the Netherlands after growing up in unfree societies. Sometimes, conservative Muslims express beliefs that were commonplace some 40 years ago, but that doesn't make them any less disturbing in the here and now. This was clearly demonstrated by a case known to the Dutch as the el-Moumni affair. A Rotterdam imam at the An-Nasr mosque, who had been banned from preaching in Morocco because of his radical beliefs, caused a huge stir when he delivered a sermon in which he said of homosexuality, among other things:

* Sloomman, M. and Tillie, J. Processes of radicalisation: Why some Amsterdam Muslims become radicals. *Inst. for Migration and Ethnic Studies, Univ of Amsterdam* (2006). Accessed June 1, 2013. <http://dare.uva.nl/document/337314>

"If this sickness spread, everyone will be infected and that could lead to us dying out."

Furthermore, according to Scheffer:

The Dutch now find themselves with a new religious community in their midst, and this time history, language and the constitution can't be assumed to serve as ties that will mitigate division. . . . The past it was possible to find shared points of reference. . . . The extent to which the Dutch underestimate the command of a common tongue as one of the essential sources of mutuality available in their fragmented country is remarkable. . . . In the Netherlands today, the Dutch language cannot be taken for granted as a shared vehicle, given many immigrants' limited proficiency in it.[†]

In quoting August Hans den Boef, Scheffer points out that "Integration via the mosque means integration within religious communities that are divided along national and regional lines and led by their conservative male segments, which largely consist of people from tribal cultures who have little education. In Dutch Muslim communities most children attend black schools, or Islamic schools that are an extension of the mosque."[‡]

With respect to social tensions in the context of immigrant communities Scheffer writes:

A nation that enjoys freedom of religion can make room for Islam only on condition that the vast majority of Muslims accept their duty to defend that same freedom for people with whom they fundamentally disagree. This attitude is lacking in many mosques, where the principles and institutions of liberal democracy are questioned and in some cases rejected. Governments have looked away for a long time, not wanting to cause conflict.[§]

In this vein, a major study undertaken by Ineke Roex, Sjef van Stiphout, and Jean Tillie is of particular importance. According to this study:

Sensitivity to radicalism and extremism is higher among orthodox Dutch Muslims. Their tolerance towards a multi-religious society is lower, they think that Dutch women have too much freedom, they politically participate less in society, they identify less with The Netherlands

* Scheffer, *P. Immigrant Nations*. Cambridge: Polity Press, 2011.

† Scheffer, *supra* note 176 at 125.

‡ Scheffer, *supra* note 176 at 127.

§ Scheffer, *supra* note 176 at 128.

and, most importantly, they think, more than other groups, that violence is a legitimate means for religious goals.*

According to Tille and Slootman:

Feelings of deprivation are widespread among Muslims in the Netherlands. This feeling is fed by the current tone of debate. Although some feel victimised, there is a certain degree of actual socio-economic deprivation. For example, there has been an increase in the percentage of students from immigrant backgrounds who go on to higher education, from approximately a sixth in 1996 to around a quarter in 2002, but this is still far below the half of all students from a Dutch background who register for higher education. Secondary school drop-outs are also more common among young people with immigrant backgrounds. In Amsterdam, 6 percent of the native-born Dutch working population is unemployed, compared with 16 percent of the Turks and 28 percent of the Moroccans.

The situation of the Turks has improved since 1997, but that of the Moroccans has deteriorated. Both the first and the second generation of immigrants are disappointed in the opportunities they have in the Netherlands; the first-generation guest workers are mostly dissatisfied with their own housing situation and their financial position. They are also disappointed that their children do not have the social and economic opportunities they had hoped for. The younger generation, who see their future in the Netherlands, experiences stigmatization and discrimination in their daily lives.

With respect to second-generation radicalization, Tillie and Slootman note:

Due to the disappearance of the national-ethnic ties and the contact with Dutch society, many young people seek their own version of Islam, "pure" and free from the "superficial" Moroccan traditions of their parents. This way the children can take their own respectable place in the community. Parents are often labeled as ignorant by their own children. Some of these developments are approved of by parents because they wish to see that their children take religion seriously, but some find the young people are becoming too strict. These parents then begin to fear

* See Roex, I., van Stiphout, S., and Tillie, J. *Salafisme in Nederland. Instituut voor Migratie-en Etnische Studies* (2010) at viii.

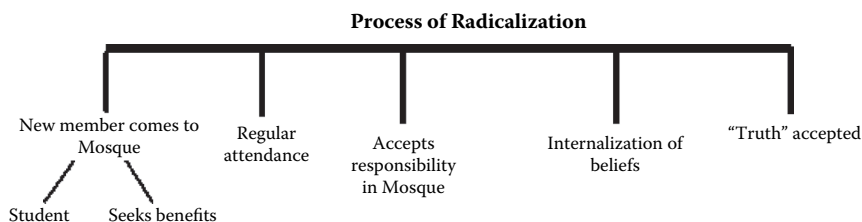


Figure 7.4. Process of radicalization.

that their children are putting too much distance between themselves and Dutch society, limiting their social options and opportunities.*

On the issue of self-identification, Tillie and Sloodman comment:

In our conversations with the interview subjects, we learned that young people increasingly identify themselves with their religion. They call themselves “Muslim” more often. This was noticed by Buijs, Demant and Hamdy. This trend towards identifying oneself as a Muslim is not only an individual self-identification, but also a result of labeling by others. In Dutch society, there is still a split between immigrants and the native-born Dutch—the terms “allochtone” and “autochtone,” implying language skills and not ethnic background, are used frequently in the Dutch media and illustrate this division, increasingly formulated as Islamic versus non-Islamic. In so doing, a “Muslim category” is created, especially by the media. Muslims are often spoken of as a group, in the Netherlands as well as internationally.†

Marginalization from mainstream society often leads to radicalization among young immigrants and natives alike (see Figure 7.4). In a report given by the European Commission’s Expert Group on Radicalization it explained:

At the global level, polarising tendencies and radicalisation processes can be witnessed within many religious, ethnic and cultural population aggregates. Within this global mood that is also characterised by widespread feelings of inequity and injustice a very acute sense of marginalization and humiliation exists, in particular within several Muslim communities worldwide as well as among immigrant communities with a Muslim background established in European countries.

* See Roex, *supra* note 180 at 51.

† See Roex, *supra* note 180 at 54.

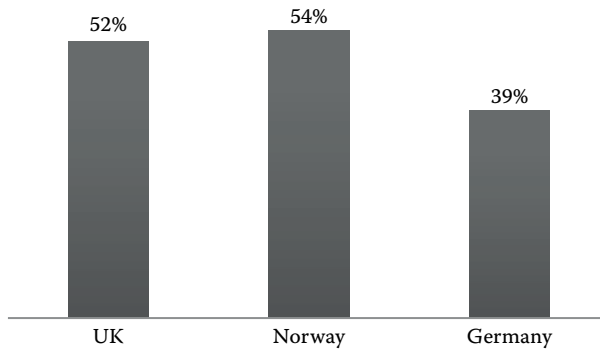


Figure 7.5. Negative view of immigrants.*

The widespread feeling of humiliation and uncertainty basically rests upon a whole array of widely diverging specific local circumstances. As in the past, it offers fringe groups an opportunity to justify their recourse to terrorism.†

Figure 7.5 then is of particular importance because it highlights the tension between “traditional” society and the immigrant community; that tension is particularly exacerbated in times of economic crisis that inevitably foment enormous domestic pressure and anxiety. The relationship between domestic “pressure points” and geopolitics is of particular importance in how nation-states develop and implement their foreign policy. However, before turning our attention to that topic, the

* Source: Surveys show UK antipathy towards immigration is growing. *Workpermit*, September 19, 2012. Accessed June 1, 2013. <http://www.workpermit.com/news/2012-09-19/surveys-show-uk-antipathy-towards-immigration-is-growing>; and Anti-immigration sentiment rises in “tolerant” Norway. *Norway News*, Oct. 7, 2011. Accessed May 27, 2013. <http://www.norwaynews.com/en/~view.php?72Wb554BNb4825s285Jnf844TN3883QW76ECp353Nb48>; and see Transatlantic Trends. Transatlantic Trends: Immigration 2011 Partners. Accessed May 27, 2013. http://trends.gmfus.org/files/2011/12/TTI2011_Topline_final1.pdf

† Radicalisation processes leading to acts of terrorism. *Eur. Comm.*, May 15, 2008. Accessed June 1, 2013. http://www.rikcoolsaet.be/files/art_ip_wz/Expert%20Group%20Report%20Violent%20Radicalisation%20FINAL.pdf

succinct analysis by an astute commentator of this discussion is worth noting:

- (1) The economic pie is shrinking so why share it with outsiders?
- (2) Many immigrants claim benefits, while nationals are hardworking; why should we accept that?
- (3) Outright xenophobia.*

How does this affect security, conflict, and the concept of an unwinnable conflict? Perhaps the best answer is the word “limits.” As nation-states grapple with multiple tensions domestically and internationally something has to give. This is particularly challenging when resources are finite and the threats are fluid and nebulous. Increasingly, nation-states and decision-makers are confounded by the enormous difficulty in carefully defining and identifying the threat.

As discussed in previous chapters, the traditional state–state conflict has been largely replaced by state/nonstate conflict, earlier described as “dark shadows and back alleys.” There is extraordinary difficulty imposed on commanders required to conduct operational counterterrorism subject to rule of law obligations and morality in armed conflict principles. That difficulty is significantly heightened when decision makers are incapable of articulating strategic goals; the practical result is that tactical considerations rule the day which, rearticulated, may suggest a rue the day result.

The nation-state possesses an extraordinary arsenal, unmatched in the course of human history. Nevertheless, as dramatically demonstrated in Boston on the night of April 18–19, a lone terrorist, the subject of an unprecedented manhunt, is able to force law enforcement officials to order a “lock-down.” In other words, while thousands of policemen were using the most sophisticated equipment available, Dzhokhar Tsarnaev was able to stay one step ahead of his pursuers. Although ultimately caught, in large part because of an alert and fast-thinking resident of Watertown, Massachusetts, Tsarnaev’s evasive efforts illustrate the limits of law enforcement/operational counterterrorism, even when mobilized on a massive and, again, unprecedented scale.

* Private email; in author’s records.

From media reports, law enforcement officials conducted the search with extraordinary care and caution, reflecting enormous respect for both the safety of innocent civilians and the rule of law in the context of the rules of engagement. For that, they are to be commended, for their efforts were ultimately successful. The difference between the events of Boston and the “unwinnable conflict” are clear. One is a single event with a clear purpose with a readily definable conclusion as compared to the other, a conflict against an unknown, culturally and sociologically alienated, and perhaps even an as-yet radicalized (or never-to-be radicalized) adversary without a seeming end. Boston, therefore, is certainly applicable to the broader themes this book addresses. To confront this issue we must circle back to the definitions presented in Chapter 1; in a nutshell, the proffered definitions are as follows.

INTERNATIONAL SECURITY: Measures, including diplomatic agreements and military action taken by nation-states, to ensure mutual survival and safety

DIPLOMACY: Instrument by which a nation-state attempts to achieve its aims, in relation to those of other nation-states, through dialogue and negotiation

SELF-DEFENSE: Anticipatory means of a nation-state to take action in order to defend and protect peoples and territory, when conditions of necessity and proportionality are met

INTERVENTION: The actions or activities of a nation-state to involve itself in the domestic affairs of another nation-state, whether that nation-state consents or not

LEADERSHIP: The capacity to define reality, establish and articulate direction, and deliberately influence others to follow that direction

INTERNATIONAL COOPERATION: Interaction of nation-states in the pursuit of a common goal or interest

NEGOTIATION: The process of engaging in mutual discussion where interests, cooperation, or compromise are articulated with the intent of reaching an understanding and producing an agreement

SOVEREIGNTY: The supreme power or authority of a nation-state to govern itself

CONTAINMENT: A foreign policy implemented by a nation-state that seeks to prevent the expansion of power by another nation-state without the use of force while relying on economic and military strength

USE OF FORCE: Armed force or nonmilitary intervention directed at a nation-state or nonstate actor

FAILED STATES: A nation-state perceived to be ineffective, unable to enforce its laws, thereby provoking instability and eventual collapse of its economy, political institutions, and national security

In undertaking this analysis, the preceding discussion regarding immigration, extremism, and employment is important. After all, this triangle is directly related to domestic politics both in the United States and Europe which directly affects foreign policy and geopolitics alike. The triangle represents a number of important themes including prioritization of national resources, individual rights and their possible curtailment, multiculturalism, homeland security, threat identification, and home-grown terrorism. Concurrent with these daunting domestic challenges, the nation-state must articulate, develop, and implement foreign policy focused primarily on an increasingly nebulous and ill-defined threat.

However, does that inherently justify implementation of measures "strong on tactics but weak on strategy"? Perhaps the admittedly complex nature of conflict between nonstate actors and the nation-state has enabled the latter to implement measures without sufficiently considering their long-term ramifications. That is, in seeking to ensure protection of national security interests, in accordance with principles of sovereignty and self-defense, nation-states fail to satisfactorily examine alternatives that would facilitate more effective geopolitics.

In addressing the question of unwinnable conflicts, the premise is that the nation-state is engaged in a series of conflicts against an implacable foe whose advantages are significant. The nonstate actor has a far superior understanding of local terrain, topography, geography, and culture; furthermore, the NSA's goals and motivations are far clearer than those of the nation-state. This is a pattern oft-repeated throughout history; obvious recent examples include the United States in Vietnam, Iraq, and Afghanistan; Israel in Lebanon; and the Soviet Union in Afghanistan. In all four paradigms, the indigenous NSA had, to borrow a sports phrase, "home field advantage."

The results were predictable and painful to the nation-state primarily because the mission was ill-defined and commanders and soldiers largely unprepared for the nature of the conflict. The nation-state enjoyed enormous material and quantitative superiority regarding personnel, but those were insufficient to outweigh the intrinsic advantages enjoyed by

the indigenous NSA. In all four examples, the nation-state was woefully unprepared for the unique nature of protracted conflict (read: long war) with an implacable foe that, largely, chose the points of attack in accordance with their profound understanding of all things local.

It is in that context that Kennan's containment strategy—albeit in a different context—is so extraordinarily important and relevant. Although Kennan's X article was focused on a fundamentally different conflict, the lessons it offers are worthy of consideration with respect to contemporary conflicts. In developing the containment strategy, Kennan focused on the requirement to both gain a deep understanding of the “other side,” particularly its goals, limits, and weaknesses. Furthermore, containment was predicated on an assumption based on profound study and analysis of the Soviet Union that Stalin was not prepared to engage the United States directly, preferring bellicose actions and conflict by proxy, if necessary.

What Kennan brilliantly emphasized, and where contemporary decision-makers fall disturbingly short, is the requirement to study the other side thoroughly in order to understand the world through their lens and perspective. Undoubtedly, Kennan's profound understanding of the Soviet Union was significantly enhanced by the longevity of his in-country postings and by his deep familiarity with the Russian language and culture.

That is in sharp contrast to the reality of the United States, Soviet Union, and Israel in Vietnam, Iraq, Afghanistan, and Lebanon. The results, tragically, speak for themselves. In the context of the tactic-driven paradigm rather than a model predicated on strategic considerations, the United States is regularly violating the sovereignty of nation-states. Although perhaps reflective of a conviction that these states are incapable of effective counterterrorism, thus endangering U.S. national security interests (broadly defined), the broader ramifications of this policy must be considered. A viable argument can be made that these actions enhance the failed state paradigm. The United States purportedly conducts drone attacks in a number of sovereign countries including Afghanistan, Pakistan, Yemen, Somalia, Nigeria, and Sudan suggesting that these are failed states.

In the context of geopolitics, the ramifications are extraordinary:

1. Sovereignty has been minimized.
2. Self-defense is broadly expanded.
3. Diplomacy is largely negated.
4. Intervention is inconsistent (see the Syria–Libya imbalance).

5. International cooperation, although significant in the Iraq invasion, has taken a back seat in the Afghanistan conflict which has become, largely, a U.S.-led war.
6. Negotiation is largely nonexistent.
7. Leadership is profoundly called into question.
8. Security is not enhanced.

That is the essence in a nutshell of the unwinnable conflict. That analysis is equally applicable to Afghanistan, Pakistan, Vietnam, and Lebanon. The question is why do decision makers repeatedly make the same mistakes, suggesting an inability to learn from history? It clearly recalls Barbara Tuchman's *March of Folly* for the examples presented in this book suggest consistent and institutionalized failings of nation-states.

Perhaps former President George Bush's famous statement, "It's the economy, stupid" is particularly relevant; the "stupid" in the context of the unwinnable conflict is the consistent failure to recognize the limits of state power. In all four examples mentioned above, decision makers in the United States, the Soviet Union, and Israel in Vietnam, Iraq, Afghanistan, and Lebanon were, seemingly, convinced that quantitative superiority in arsenal and personnel alike translated into an unparalleled qualitative advantage. That assumption reflects both historical and lingering contemporary assumptions regarding the seeming advantages of quantitative superiority.

It is, in many ways, the most dramatic articulation of the unwinnable conflict because numerical advantage does not result in victory (however defined) in asymmetrical conflict. Unlike traditional war between nation-states when victory was clearly demarcated by the surrender of "A" to side "B," surrender is not relevant to conflict between states and nonstates. That is why, moving forward, nation-states must engage in a profound rearticulation of how conflict is to be conducted both in the zone of combat and beyond it.

To engage in a rethinking of the paradigm requires decision makers to recognize both the limits of state power and the significant advantages enjoyed by nonstate actors. Failure to recognize this dual reality will result in continued conflict marked by undefined missions, unclear goals, misuse of state power, significant collateral damage, and emboldening of nonstate actors and their communities. To prevent this, or at least to turn the tide, requires decision makers to exhibit leadership reflecting recognition that limited goals are the reality of this conflict. In addition to

rearticulating the goals' paradigm, decision makers must seek to gain a better understanding of the other side's culture and language.

The importance of both cannot be sufficiently emphasized. That was abundantly clear to me during the five years I was involved in negotiating implementation of the Oslo Peace Process. Although in the Palestinian–Israeli paradigm language is not a significant barrier, I was repeatedly struck by failure to understand what the other side's priorities and desires were. This is particularly surprising given the two have been locked together in conflict for decades. In that context, the inability of U.S., USSR, and Israeli decision makers to fully understand Vietnamese, Iraqi, Afghan, and Lebanese culture is more understandable. However, that cannot—and must not—justify consistent failure to articulate much less implement realistically achievable goals.

In many ways, contemporary geopolitics requires leadership skills distinct from the challenges that confronted decision makers decades ago. The extraordinary complexity of contemporary conflict requires flexibility, recognition of nuance, sophisticated understanding of the limits of power, and recognition of the importance of powerful domestic considerations. It is in that spirit that Kennan's theory is, decades later, still relevant. It is also why seemingly localized or national issues such as the Boston bombing and European immigration tensions and economic crisis are essential to understanding contemporary geopolitics. Kennan was on point regarding the state/nonstate conflict because he understood power while recognizing that, when applied in measured tones, it could be extraordinarily effective, perhaps more than when implemented full force. That voice of reason reflecting strategic leadership is largely missing today. Perhaps that is why the examples presented in this book are primarily indicative of short-term tactical measures whose effectiveness is an open question.

The triangle of immigration, extremism, and economic concerns throws a curve ball into the foreign policy discussion because it requires decision makers to recognize combustible domestic issues. The importance of these three, individually and collectively, takes on added relevance in an era of diminishing national resources requiring difficult prioritizing decisions. That is, in spite of clear international crises the nation-state must tighten its belt because of significant domestic flash points and increasing financial limitations. It is for that reason, then, that

geopolitics is so affected, if not limited, by domestic realities. To what extent they act as restrainers is largely determined by political realpolitik and the intensity of threats to public order.

It is, then, back to Boston we turn our final attention in seeking to come full circle. Although critical details remain unclear as these lines are written,^{*} possible lessons learned are, by analogy, relevant to the geopolitical conversation. Law enforcement was quickly able to identify the involved individuals thanks to extraordinary technological advances and disseminated their pictures immediately. In doing so, law enforcement officials were able to overcome a lack of intelligence information[†] that, ultimately, did not affect the capture of the bombers.

Needless to say, intelligence information may have prevented the bombing but that, unfortunately, was not the case. Once the bombers exposed themselves the chase was on. Law enforcement was focused, determined, and committed to capturing the two bombers. Killing the one and arresting the other represented finality and a satisfactory conclusion to a terrible tragedy. In direct contrast, contemporary conflict is characterized by a profound lack of focus, direction, mission, and sense of closure.

For that reason, we are in an era of the unwinnable conflict; the burden on decision makers is to engage in honest conversation and dialogue to begin the process of defining goals and missions in the context of geopolitics. Otherwise, the mistakes of today will, indeed, represent Tuchman's *March of Folly*.

^{*} Calabresi, M. The hunt for the marathon bomber. TIME, April 16, 2013. Accessed June 3, 2013. <http://swampland.time.com/2013/04/16/the-hunt-for-the-bomber/>

[†] As these lines are written it is unknown if intelligence failures occurred.

The transformation from traditional war between nation-states to conflict between nation-states and nonstate actors requires decision makers, policy analysts, military commanders, intelligence officials, and legislators to answer the question: is there a strategy for an unwinnable conflict? This question takes on particular urgency given the extraordinary number of conflict points that define the current state of international relations.

Modern Geopolitics and Security: Strategies for Unwinnable Conflicts draws on the author's extensive experience in counterterrorism, negotiation, and the implementation of the Oslo Peace Process with his more recent work in academia. The book uses an interdisciplinary case study model to illustrate valuable lessons learned and best practices in strategic analysis and decision making that are based on international relations, international law, and negotiation/intervention.

The book defines sovereignty, intervention, geopolitics, security, and what they mean in a global landscape. It examines historical examples of global crises and security concerns as well as contemporary geopolitical issues, including the Israeli-Palestinian conflict, intervention in Libya, non-intervention in Syria, the Good Friday Agreement, the conflict in the former Yugoslavia, and the Arab Spring.

We are entering a new era, where disaffected individuals who are willing and able to act have more power and potential influence than ever before. Conflicts like those occurring in Egypt, Syria, Afghanistan, Iraq, Israel, and elsewhere are all complex organisms—nuanced as never before. Add in increasing regional asymmetrical conflicts, global economic strain, social media, and the accelerating speed of communication, ideological and regional state versus nonstate conflicts—such as in the case of al-Qaeda and other such movements—and traditional “business as usual” geopolitics is somewhat being turned on its head.

Modern Geopolitics and Security addresses topics that aren't currently covered anywhere—establishing a new paradigm to rethink modern geopolitics, given new and emerging challenges to traditional schools of thought.