



Jus ad Bellum and International Terrorism

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Legal Regulation of the Use of Force: The Failure of Normative Positivism

The central tenet in international law is the legal regulation of the use of force. The nature, content and effectiveness of this area of international law mirrors, much more clearly than any other branch, the very character of international law. In order to grasp the essence of the current debate in this area of international law it is helpful to have a brief review of the evolution of the proscription on the use of force.

Thucydides' *History of the Peloponnesian War* demonstrates a complete absence of any legal (or even legal-moral-religious) restriction on the recourse to war. As Thucydides writes, "the Athenians and the Peloponnesians began the war after the thirty-year truce" since "Sparta was forced into it because of her apprehensions over the growing power of Athens."² This sounds somewhat familiar and contemporary as there was a violation of the balance of power that caused Sparta to ally with smaller Greek city-states—forming the Peloponnesian League to counter militarily the Delian League headed by

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2. THUCYDIDES, *THE PELOPONNESIAN WAR* 11–12 (W. W. Norton & Company, 1998).

Athens. But differently from today's or even from yesterday's world, Greek city-states did not need to justify their recourse to arms. Athenians believed it to be "an eternal law that the strong can rule the weak" as "justice never kept anyone who was handed the chance to get something by force from getting more."³ Their ambassadors explained to the Melians that "those who have power use it, while the weak make compromises. . . . Given what we believe about the gods and know about men, we think that both are always forced to dominate everyone they can. We didn't lay down this law, it was there—and we weren't first to make use of it."⁴ "[E]ach of us must exercise what power he really thinks he can."⁵

Starting from Saint Augustine, through Saint Thomas Aquinas and other Christian theologians, various concepts of just wars developed. War had to be declared and waged by proper authorities, had to have just cause and just intention. What causes were just was, of course, open to debate. During this period, natural law doctrines in international relations dominated and were indistinguishable from religious and moral reasoning. This period continued beyond the times of Hugo Grotius. Legal limits on the use of force came from the interpretation of religious texts or Roman private law and not from what states or other political entities actually did. If international law at all governed (i.e., limited or justified) the use of armed force it was because its arguments were drawn from and supported by religious texts and their interpretation.

Christianity was not the only religion that had something to say about the use of force, as interpreters of the Old Testament and the Koran, similarly, tried to distinguish between just and unjust causes of resorting to arms. There are some striking similarities, though no doubt there are significant differences too, between the main monotheistic religions in that respect. For example, the Spanish Dominican professor, Franciscus Victoria, explained that, as the Indians in America, though not Christians, were nevertheless humans and therefore endowed with reason, it was not possible to use force against them without just cause and "difference in religion is not a cause of just war."⁶ At the same time, "the Indians had violated the fundamental right of the Spaniards to travel freely among them, to carry on trade and to propagate Christianity."⁷ Hence, though force could not be used to proselytise, it could be

3. *Id.* at 30.

4. *Id.* at 229.

5. *Id.* at 227.

6. YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENSE* 61–62 (3rd ed. 2001) [hereinafter *DINSTEIN*].

7. *Id.* at 61.

used when proselytes refused to be proselytised. In 1948, Sheikh Shaltut of Al-Azhar University in Cairo justified the Muslim conquests of Byzantine and Persia on the grounds of the response by the Byzantines and Persians to communications calling them to convert to Islam. He wrote that “Moslems only attacked people when they showed a spirit of hostility, opposition and resistance against the mission and a contempt for it.”⁸ As Ann Elisabeth Mayer comments, “here religious reasons, resistance to converting to Islam and contempt for Islamic missionaries, apparently justify recourse to military force—at least where the states attacked are perceived to be a danger to Muslims or the spread of Islam.”⁹ Here too, only those who refused to adhere to the true faith were killed and their lands conquered.

After Emerich de Vattel, positivism gradually started to prevail in international law and the differentiation between just and unjust wars based on religious laws or the laws of nature (the human nature or the nature of the state) lost its meaning. Although this was not a return to the naked power politics of Ancient Greece it was only thinly veiled power politics where any offense, real or perceived, may have been good enough to justify the use of military force. In such a situation the *Caroline* incident and the subsequent exchange of letters between US Secretary of State Daniel Webster and the British Minister to Washington was more an aberration than a pattern of behavior.¹⁰ As will be discussed below, the *Caroline* formula holds interest for explaining some of today’s conflicts but in the middle of the 19th century, it was at best *opinio juris* of two states that was not confirmed by any practice. Recall that in 1914 during the Vera Cruz incident, triggered by the arrest by Mexican authorities of several crewmembers from the USS *Dolphin*, the United States used military force against Mexico when Mexican authorities refused to honor the US flag with a 21 gun salute as an official apology.¹¹ Similarly, Great Britain and Germany used gunboats to force Venezuela to pay its debts to nationals of these states.¹²

Positivism, that is the resort to the use of force without limits resulted in a system where any offense against a state or its honor could be responded to

8. Sheik Shaltut, Al-Azhar University Cairo, Egypt, *quoted in* ANN ELISABETH MAYER, WAR AND PEACE IN THE ISLAMIC TRADITION AND INTERNATIONAL LAW, IN JUST WAR AND JIHAD. HISTORICAL AND THEORETICAL PERSPECTIVES ON WAR AND PEACE IN WESTERN AND ISLAMIC TRADITION 204 (J. Kelsay and J. T. Johnson eds., 1991).

9. *Id.* at 205.

10. See R. Y. Jennings, *The Caroline and McLeod Cases*, 32 AM. J. INT’L L. 82 (1938).

11. IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES, 36–37 (1963) [hereinafter BROWNLIE].

12. *Id.* at 35.

with force. At the beginning of the 20th century, this positivism, became diluted by normativism. International law regulating the use of force evolved not to what states did to each other but what they had agreed they should or should not do (normative positivism). Using customary law terminology, it was not so much state practice as their *opinio juris* that mattered. Here, the term *opinio juris* is used in a wider sense and it includes authoritative statements by states as to what international law is, including those laws enshrined in international treaties.¹³

This has been a controversial development. It may be said that there has always been an immense gap between words and deeds, but words as well as the notions and ideas expressed in those words, when repeated long enough and desired by many, often change reality. Though this gap may be still immense, the world's views on the use of force is not what it was hundreds of years ago. A learned few may change laws, while laws may also change the views of many and even force those whose views remain unchanged to act within the law. Here the relationship between law and behavior is a kind of chicken-and-egg question as it is impossible to say whether European neighbors (e.g., the United Kingdom, Germany and France) who warred against each other for ages do not do it now because they finally concluded that they needed effective norms and institutions to protect their citizens from the scourges of war. Alternatively, it may well be that Europe remains at peace because of these very norms and institutions. Obviously, the change in viewpoint and the creation of norms and institutions occurred simultaneously.

Europe is not the only, though the most prominent place (having also been one of the bloodiest and having become the most peaceful), where such changes have taken place. The American continent also has moved in the same direction.

Beginning in the 20th century, the development of the League of Nations Covenant, the Kellogg-Briand Pact of 1928, the UN Charter and other important international treaties, worked to severely restrict use of military force in relations between states. Unfortunately, this normative system has been violated so many times, often with impunity, that it is hardly possible to call it an effective (even relatively effective) legal regime. This system does, however, reflect the world's desire to avoid the repetition of the two world wars that brought untold sorrow to Europe and mankind. This system now shapes the mentality of many people and therefore conditions their attitude towards the use of force amongst states.

13. Whether a treaty that is formally in force but that is not implemented in practice is law or not is another issue. The same question may be asked about *opinio juris* not confirmed by practice.

The current UN Charter paradigm concerning the use of force can be called normative positivism since it is based on the consent of states and not upon what states (or at least most of them) do in practice. It is normative since it is not premised on the actual practice of states. It is positivist since it does not make distinctions between just, unjust, more justified, and less justified causes for the use of force.

The Charter paradigm sees the use of force between states as an almost absolute evil (after the two world wars it is understandable) without distinguishing between causes for the resort to force. This paradigm, as understood by the founding fathers of the UN, did not provide for the use of force at all except in response to the illegal use of force (even the collective security paradigm was meant to provide for the possible pre-emptive use of force in collective self-defense). As the UN Charter was drafted, humanitarian crises or even civil wars were not considered to constitute threats to international peace and security, the magical talisman for Security Council approval. The Cold War period supported formal normative positivism as what was just for the West (e.g., containment of the Soviet expansion) was most unjust from the point of view of the Soviet Union and its satellites. Similarly, what was just in the eyes of the Soviet leaders (e.g., advancement of socialism throughout the world) was the thing most feared by the West. Accordingly, in this bipolar world order, international law on the use of force had to be based on the formal norms that the two antagonistic groups were able to agree upon. That it was difficult, if not impossible, for these competing titans to agree on the proper invocation of the use of force, except in self-defense, is not surprising.

Clearly, the world has now changed, though no change is ever absolute. There are still, and there will remain in the foreseeable future, states with competing interests. Additionally, religion may perhaps have replaced ideology as one of the main sources of confrontation, but is not religion one of the forms of ideology?

With respect to the use of force amongst states, a significant transition has occurred towards morality or ethics and away from strict positivistic formalism. Recent uses of force not sanctioned by the UN Security Council have been justified by references to morality. For example, references to “humanitarian intervention” have been used to legitimate if not legalize certain uses of force. None other than Kofi Annan, Secretary-General of the United Nations and the chief custodian of its Charter, speaking in Stockholm on the Kosovo Intervention, stated that “there is emerging international law that countries cannot hide behind sovereignty and abuse people without expecting the rest

of the world to do something about it.”¹⁴ Although the current legal regime may still be a far cry from the doctrine of just war, neither can it be claimed to be one of “formal positivism” on which the UN Charter was premised. The Security Council itself has expanded the concept of threats to international peace and security, legitimizing use of force that would not have been justified in the eyes of the drafters of the UN Charter. Just war considerations have led to this flexing of the Charter paradigm and are now even reflected in the new National Security Strategy of the United States. In that document, President George W. Bush stated that “the reasons for our [preemptive] actions will be clear, the force measured and the *cause just*” (emphasis added).¹⁵

***Changes in the World’s Political Configuration and Jus ad Bellum.
Jus ad Bellum in Treaties and Practice***

In 1963, British scholar Ian Brownlie published an excellent monograph still considered today as perhaps the best study of the history of the legal regulation of the use of force—*International Law and the Use of Force by States*.¹⁶ Almost forty years later, a highly decorated and respected Professor Brownlie (CBE, QC, Member of the International Law Commission), emphasizing the continuing relevance of the ideas and conclusions developed in this book, observed: “whilst there have been obvious changes in the political configuration of the world, especially in the 1990s, these changes have not had any particular effect on the law.”¹⁷ What does this mean? Is it true? If it is true, what are the implications of the gap between the “obvious changes in the political configuration of the world” and the absence of any particular effect of these changes on international law? Does this not mean that the world and the law exist as if in parallel universes without impacting one another at all?

14. Tim Burton & Robert Anderson, *UN Warns Yugoslavia Over Human Rights*, FINANCIAL TIMES, May 26, 1999, at 2.

15. The National Security Strategy of the United States of America 16 (Sep. 17, 2002) available at <http://www.whitehouse.gov/nsc/nss.html> (Nov. 26, 2002).

16. See generally BROWNLIE, *supra* note 11.

17. Ian Brownlie, A Europaeum Lecture on International Law and the Use of Force by States at HEI, Geneva (Feb. 1, 2001) [hereinafter Brownlie Lecture].

Law, as one of the main stabilizing factors in society, is indeed a relatively conservative phenomenon¹⁸ and changes in all legal systems typically lag behind transformations in “real” life. This phenomenon, a reflection of both the positive and negative sides of conservatism generally, is not of course wholly negative. Law not only cannot, but must not, vacillate in synchronicity with every change in society, reacting immediately to all political turmoil and social upheavals. In such an environment, law could not fulfill its stabilizing functions. At the same time, when economic, social or political transformations reflect longer-term trends that are substantial and lead to changes in political configuration of society, the conservative nature of the law’s change may create serious problems for both law and society.

International law has relatively recently (during the last quarter of the previous century) overcome some radical and rapid changes. However, it is true that such changes have mainly occurred not at the core of international law but instead in some, albeit important, but quite specific areas of international law. For example, the development of international space law occurred so quickly that it led to the emergence of the concept of “instant custom.”¹⁹ The law of the sea that had slowly developed over the centuries was codified in 1958 but so many of its basic norms were outdated even before the four Geneva Conventions entered into force that the 1982 Law of the Sea Convention was adopted to codify new developments. Equally, international environmental law has emerged and rapidly developed within only a few decades.²⁰

Despite this seemingly rapid evolution of international law in these three areas though, the treaties concerning the use of force have undergone little, if any, change since the adoption of the UN Charter in 1945. Even General

18. Of course, law may be used not only for the stabilization of existing relations and situations or for the enhancement of tendencies that are already discernible. Law can perform creative functions as well. Through treaty making or decisions of international bodies, international law may help to create new relations and situations. However, even in such cases (or maybe especially in such cases), international law also tends to freeze (crystallize, to use the widely accepted, but incorrect in my opinion, term to describe the process of custom formation) relations that are created with the assistance of such legal mechanisms.

19. BIN CHENG, “United Nations Resolutions on Outer Space: ‘Instant’ International Customary Law,” *INTERNATIONAL LAW: TEACHING AND PRACTICE* 273 (Bin Cheng ed., 1982).

20. See, e.g., Convention on International Trade in Endangered Species of Wild Fauna and Flora, (Mar. 3, 1973), 27 U.S.T. 1087; Convention for the Protection of the Marine Environment of the North-East Atlantic, Sept. 22, 1992, art. 23, *reprinted in* 3 Y.B. INT’L ENVTL. L. 759, (1992); Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution concerning the Control of Emissions of Volatile Organic Compounds or their Transboundary Fluxes, art. 3, para. 3, 31 I.L.M. 573, (1992).

Assembly resolutions on international law have not contained anything that could be remotely defined as “progressive development of international law.”²¹ Why? Why have treaties on the use of force been so conservative while in other areas they have demonstrated, responding to societal change (including international society), considerable ability for change? Perhaps the law on the use of force has changed but some experts and even states have not yet noticed?

The aforementioned branches of international law (space law, the law of the sea, environmental law) have undergone significant changes following, or in parallel with, equally manifest transformations in these respective areas of human activity. In the legal regime regulating the use of force, so central to international law that novelties in it may affect the very foundations of the overall legal system, significant changes have occurred only after the most terrible conflicts that shocked the conscience of humankind. In such cases, changes in the geo-political environment, in international law generally and in *jus ad bellum* in particular have not only coincided in time and space, but have all been caused by the same set of factors, simply reflecting different facets of the same process.

For example, the absence, existence, content or enforceability of rules concerning preservation of living resources in the Northern Atlantic are important political and economic issues for many countries. However, whether these issues are resolved in one way or other will not alter the structure or basic characteristics of international society or international law. At the same time, this is not the case depending upon how the following question is answered: Is the UN Security Council the only organization that can decide how and when to use force (not involving self-defense) or can states, for example, reclaim unpaid debts by using gunboat diplomacy? Radical changes in *jus ad bellum* reflect serious transformations taking (or that have taken) place in the very structure and characteristics of international society. Such transformations create shock waves necessary for overcoming states’ inertia and the traditional conservatism found in legal regimes.

21. For example, the 1987 Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations swearing allegiance to the UN Charter and confirming what had been already said in many previous UN resolutions, did not touch upon any controversial issue. See generally G.A. Res. 42/22, U.N. GAOR, 42d Sess., U.N. Doc. A/Res/42/22 (1987). See also TREVES, *La Declaration des Nations Unies sur le renforcement de l’efficacité du principe du non-recours à la force* 33 AFDI (1987); CHRISTINE GRAY, *INTERNATIONAL LAW AND THE USE OF FORCE* 5 (2000).

The Thirty Years War and its subsequent peace led to the emergence of the Westphalian international system. This system has served as the basis for the development of the modern international system as well as the development of international law, to include its fundamental principles such as sovereign equality of states and non-intervention in the internal affairs of such states. World War I provided the impetus for considerable innovations in international legal treaties generally and in the use of force in particular. The “cooling-off” periods provided for in the Statute of the League of Nations and the 1928 Briand-Kellogg Pact outlawing wars of aggression have been significant landmarks in the development of legal texts on the use of force in international relations.²² Moreover, after the horror and tragedy caused by World War II, significant changes occurred in both *jus ad bellum* (the UN Charter) and *jus in bello* (the 1949 Geneva Conventions). It is reasonable then, to conclude that only multi-state wars and the shocks felt in their aftermath are able to change international law on the use of force. Changes in *jus ad bellum* have always been accompanied by changes in the geo-political configuration of the world; or rather have been caused by the latter (e.g., the rise of nation-states instead of feudal multi-layered authority in Europe; the effect of the two world wars; the emergence and subsequent collapse of the Cold War bipolar world). If bilateral wars have usually ended with bilateral treaties on “eternal peace and friendship,” multi-state wars have ended with attempts to create general norms that purport to regulate, limit or even completely prohibit the use of force between states.

Geo-political restructuring does not seem, by itself to cause changes to the law regulating the use of force. These changes must also be accompanied by significant events operating to shock the conscience of the world, causing states to come together to ensure such events do not happen again. Such conferences took place after the Thirty Years War, the Napoleonic Wars, WW I and WW II. However, even after WW II, the consensus on the prohibition to use force was only temporary, conditional on unrealistic expectations (unrealistic understood only with hindsight) that the Chapter VII collective security mechanism would work. Unfortunately, bilateral treaties espousing “eternal friendship” as well as the general limitations on the use of force have been honored more in the breach than in the observance. Things are not completely hopeless and at least in one region, Western Europe, where both

22. See League of Nations, arts. 10–13; General Treaty Providing for the Renunciation of War as an Instrument of National Policy, art. 1 (Aug. 27, 1928), 46 Stat. 2343, 94 L.N.T.S. 57.

World Wars started as well as where many earlier bloody conflicts occurred, the consensus to ban the aggressive use of force has been quite genuine and the Europeans have made it work, at least in their mutual relations.²³

Since the end of the 1980s the geo-political structure has undergone dramatic changes but this has happened without any single shocking event that would have implicated the vital interests of the most powerful states to the extent, or in the manner, of the two World Wars of the last century. Rather, changes have been more gradual, and some of the most significant ones have not been bloody. Neither the genocide in Rwanda, nor the crimes against humanity committed in the former Yugoslavia, nor even the September 11th terrorist attacks (though the last directly affecting by far the most powerful state in the world), have forced the states to sit down and draft new rules corresponding to a changed political environment requiring new legal responses for such new threats. These developments have not impacted the evolution of international law treaties concerned with the core of international law itself—*jus ad bellum*, as the two World Wars did. However, due to the character of the main victim-state and the particularly tragic nature of the attacks witnessed by millions on television screens on 9/11, terrorists may well become victims of their own “spectacular success” for these events may have shocked the world enough to open the way to radical reappraisal through customary process of some basic principles of the *jus ad bellum*.

Consequently, a new geo-political environment now exists. New threats exist that can be effectively dealt with only by using, *inter alia*, military force in circumstances not foreseen in 1945 and therefore not provided for (at least explicitly) in the UN Charter. However, states have not been, and will hardly be, able to draft new rules corresponding to the new geo-political environment and allowing for an adequate response to these new threats. No consensus exists on responses to new global threats such as civil wars, humanitarian emergencies, international terrorism and the proliferation of weapons of mass destruction (including into the hands of terrorists). Achieving consensus on

23. The European experience, as well as various examples from other parts of the world, shows that there is no such thing as inherently peaceful nations or regions (or vice versa, inherently bellicose ones). Smaller and weaker nations have historically been more peaceful only due to their inability to successfully carry out more aggressive foreign policy. As the European experience testifies, institutions and rules that become a part of political culture are necessary to make peace durable. Peaceful relations between nations, like human rights in society, are not natural or inherent. Rather, war and human wrongs are natural. For nations and peoples to enjoy peace and human rights it is necessary to fight and constantly work for them as they are the rather fragile results of the long and difficult development and acculturation of humankind.

these issues is dependent, inter alia, on the co-existence in the contemporary world, of three different categories of states and societies—pre-modern, modern and postmodern—each with different characteristics, values, interests and perceptions of security threats. Of course, societies and states with different levels of societal development have co-existed in the world before but never before have they co-existed in the world that is so interdependent and shrinking.

Accounting for the fact that the treaties attempting to regulate the use of force which were adopted after WW I and WW II, created unrealistic expectations and noting the absence of consensus on important new issues concerning the use of force, the difficulty of drafting new rules of jus ad bellum may, however, not be so dramatic. The customary process may be not only more natural and flexible, but in today's circumstances, more rapid at consolidating emerging trends into law. Such a process, inevitably, has its shortcomings though.

Brownlie observes that the main reason for a huge gap between the dynamics of political change and the consistency in law lies in the fact that "individual States continue to have a fairly conservative view of the law." And he is critical of those academics, who think that the law has changed, and especially of those who, for instance, "believe that there is a right to use force for humanitarian purposes."²⁴

However, even if many states are conservative or inertial, given an absence of political will to draft new rules on the use of force and intervention, it does not necessarily follow that law too is as inertial as are these states. Recent practice in customary international law and its effect on jus ad bellum proves this point.

To an extent, this has been a kind of partial effect: a part of international law on the use of force, that was understood by most states and by most commentators, has ceased to exist as a reliable normative guide (if it had ever existed as a reliable guide).²⁵ Moreover, new norms that would have enjoyed general consensus have not (yet?) emerged, though there are new trends enjoying at least relative consensus.

24. See Brownlie Lecture, *supra* note 17.

25. A different, though related, question: to what extent did the Charter paradigm on the use of force correspond to the reality existing during the Cold War? During the Cold War, the Charter paradigm on the use of force competed (usually not very successfully) with rules of the game expressed, for example, in the Brezhnev, Johnson or Reagan doctrines, with concepts of wars of national liberation, as well as with various ad hoc practices that did not find legitimization in any laws or doctrines.

Therefore, I agree with Ian Brownlie, but only to an extent. Legal treaties and even some states' practice have not undergone any changes since the establishment of the UN Charter. However, the position on, and the practice of, the jus ad bellum by other states as well as actions undertaken by the Security Council in recent years, is in many ways quite different from the Charter paradigm of the legal regulation of the use of force.

What are these "obvious changes in the political configuration of the world," that, from Professor Brownlie's point of view, have had no effect on the law, but that in my opinion have had at least a partial effect and should have a complete effect on the jus ad bellum?

Most obvious is the conclusion of the Cold War. Initially, the end of the Cold War raised the expectation that the UN Charter, and especially its Chapter VII, would start working as planned when originally drafted. The Gulf War of 1990–91 provided support for this expectation. However, though the Security Council became considerably more active in the 1990s, the Chapter VII paradigm did not become reality. Instead, a new interpretation of "threats to international peace and security" and delegation of Security Council powers to individual states and regional organizations became widespread.²⁶ The Council also started to ex post facto legitimize cases of the use of force by individual states or groups of states²⁷ and the latter started to use Security Council's findings to carry out acts that, though arguably necessary for the implementation of the relevant resolutions of the Security Council, were nevertheless neither expressly nor implicitly authorized by the Security Council.²⁸

26. DANESH SAROOSHI, UNITED NATIONS AND THE DEVELOPMENT OF COLLECTIVE SECURITY (1999); Christine Gray, *From Unity to Polarization: International Law and the Use of Force against Iraq*, 13 EUR. J. INT'L L. 1–19 (2002), available at <http://www.ejil.org/journal/Vol13/No1/art1-03.html> (Nov. 26, 2002).

27. See, e.g., Security Council Resolution 866 stating that the UN peace keeping mission in Liberia is the "first peace-keeping mission undertaken by the United Nations in cooperation with a peace-keeping mission already set up by another organization." S. C. Res. 866, U.N. SCOR, 48th Sess., U.N. Doc. S/866/(1993). See also S. C. Res. 1181, U.N. SCOR, 53d Sess., U.N. Doc. S/1181/(1998) (authorizing the same thing in Sierra Leone).

28. For example, neither Operation PROVIDE COMFORT—the humanitarian aid mission in northern Iraq nor Operation ALLIED FORCE—the NATO led campaign for humanitarian intervention against the former Yugoslavia were undertaken pursuant to authorization although the Security Council had certainly expressed its concerns with situations in these areas. See, e.g., S. C. Res. 1203, U.N. SCOR, 53d Sess., U.N. Doc. S/1203/(1998) and S. C. Res. 688, U.N. SCOR, 46th Sess., U.N. Doc. S/688/(1991).

Secondly, the Cold War had frozen or at least limited the development of certain trends beginning before the two World Wars. Among these trends are the trends of globalization and its nemesis—fragmentation, both of which have a considerable impact on the issue of the use of force. Fragmentation often manifests itself in wars of secession, conflicts between different religious or ethnic groups. Globalization (which ironically leads also to the globalization of fragmentation itself), internationalizes such conflicts and other developments and processes, which in different circumstances may have had only a local or regional effect. Today, “internal” wars are neither politically nor even legally speaking internal affairs of the state in which they occur. Also, such internal wars often extend to neighboring states. This internationalizes the conflict.

The legal regime regulating the use of force is only one, though perhaps the most controversial, of the areas covered by international law demonstrating that traditional distinctions between domestic and international affairs are, if not disappearing, then at least becoming more confused. Strictly interstate *ius ad bellum* does not relate well to a changed international system where non-state, sub-state and super-state actors play important roles. Mary Kaldor is right that “the new wars involve transnational networks, which include both state and non-state actors—mercenary groups, warlords, as well as parts of state apparatus.”²⁹ Based on this, Richard Falk is also correct that:

at this stage it is unreasonable to expect the US government to rely on the UN to fulfil its defensive needs. The UN lacks the capability, authority and will to respond to the kind of threat to global security posed by this new form of terrorist world war. The UN was established to deal with wars among states, while a transnational actor that cannot be definitively linked to a state is behind the attacks on the United States. Al Qaeda’s relationship to the Taliban in Afghanistan is contingent, with al Qaeda being more the sponsor of the state than the other way around.³⁰

This is one of the reasons why Eric Myjer and Nigel White are worried that “the response to the Twin Towers attack may contribute to a development of international law, which would place self-defense outside the context and thereby outside the limit of the Charter of the United Nations.”³¹ This potential danger becomes real if the Charter norms are interpreted out of the current context.

29. MARY KALDOR, *The Power of Terror* [hereinafter *The Power of Terror*], RE-ORDERING THE WORLD—THE LONG TERM IMPLICATIONS OF SEPTEMBER 11TH (Mark Leonard ed. 2002) 21–22 [hereinafter RE-ORDERING THE WORLD].

30. Richard Falk, *Defining a Just War*, THE NATION, October 29, 2001 at 11.

31. Eric Myjer & Nigel White, *The Twin Towers Attack: An Unlimited Right to Self-Defence*, 7 J. CONFLICT AND SEC. 1 at 17 (2002) [hereinafter Myjer & White].

The end of the Cold War ended the Soviet-NATO confrontation and extended democracy and civil liberties to Eastern and Central Europe. It also lifted the lid on the multitude of suppressed hatreds and simmering conflicts. As Bernard Lewis observes:

The ending of the Cold War, and the collapse of the bi-polar discipline which the two superpowers, sometimes acting in competition, sometimes in accord, had managed to impose, confronted the people of the Middle East, like those of other regions liberated from superpower control or interference, with an awful choice. They could move, however slowly and reluctantly, to settle their disputes and live peacefully side by side, as happened in some parts of the world; or they could give free rein to their conflicts and hatreds, and fall into descending spiral of strife, bloodshed and torment, as happened in others.³²

Today, both scenarios are being realized in different parts of the world. In some parts of the world proliferation of weapons of mass destruction, terrorist attacks, humanitarian crises, inter-ethnic and inter-religious conflicts have all increased manifold after the end of the Cold War and these developments, unavoidably, affect how and whether military force is used in various regions.

Bassam Tibi is right that:

with the restraining power of bipolarity no longer maintaining a global order of checks and balances, the aspirations of ethnicities and religio-political ideologies that had lain low during the Cold War now boiled to the surface. It was only after the Cold War that the factors underlying these conflicts came to be perceived. Previously, ethnicity, religion, and culture were considered to be the terrain of anthropologists, and of little interest of international politics.³³

These factors were of even less interest for international law than for international politics. However, without taking these factors into account, international lawyers may indeed conclude today that international law is essentially the same as it was in 1945 notwithstanding that it is a very different world.

Morover, with the end of the Cold War, the polarity of the world changed. Instead of being distinctively bipolar, the world is now unipolar, especially in

32. BERNARD LEWIS, *THE MIDDLE EAST. 2000 YEARS OF HISTORY FROM THE RISE OF CHRISTIANITY TO THE PRESENT DAY* at 371–72 (1995).

33. BASSAM TIBI, *THE CHALLENGE OF FUNDAMENTALISM. POLITICAL ISLAM AND THE NEW WORLD DISORDER* at 64 (1998) [hereinafter Tibi].

the military field.³⁴ This means that state practices on the use of force (even if not *opinio juris*) will be determined for the foreseeable future mainly by the United States, acting either with its allies or unilaterally. Historically speaking, there is a tendency to counterbalance such dominance by one “hyperpower” and it would be natural that in the future the geo-political environment will change again. No balance, or imbalance for that matter, of power has yet been permanent. Nor is such a power arrangement likely to become permanent.

However, in the foreseeable future it is likely that the world will remain militarily unipolar (which does not at all mean that the United States militarily can do as it wishes) and US dominance will remain significant in most other instruments of power as well. For liberal democratic societies as well as for societies aspiring to become such, it would be counterproductive to try to counterbalance US dominance in either the political and military-strategic domain.³⁵ At the same time, it might well be necessary to join the United States in an effort to influence its policy choices to further enhance its role in the world as raw power does not always mix well with sophistication and moderation. Audrey Cronin of Georgetown University, writing insightfully on

34. Stephen Brooks and William Wohlforth, on the basis of thorough analysis of various indicators, write: “If today’s American primacy does not constitute unipolarity, then nothing ever will.” See Stephen Brooks & William Wohlforth, *American Primacy in Perspective*, 81 FOR. AFFS 21 (2002).

35. Until September 11, 2001 Russia seemed to be trying to create a multi-polar world. The Concept of National Security of Russia signed by President Putin in January 2000 stated that Russia “will advance the ideology of the creation of a multipolar world.” See Decree of the President of the Russian Federation, 24 (Jan. 10, 2000). However, things have changed considerably since then. In their Joint Declaration, the United States and Russia, speaking of the need to promote stability, sovereignty and territorial integrity in Central Asia and the South Caucasus, stated that they “reject the failed model of Great Power rivalry that can only increase the potential of conflict in those regions.” See Joint Declaration on New US-Russia Relationship 38 WEEKLY COMP. PRES. DOC. 21, 894–897 (May 24, 2002), available at <http://frwebgate.access.gpo.gov/cgi-bin/multidb.cgi> (Nov. 27, 2002). Dmitri Trenin writes that “a confrontation with NATO is something Russia cannot afford and should never attempt. . . . Rather, it is in Russia’s supreme national security interest to strive toward full demilitarisation of its relations with the West.” See DIMITRI TRENIN, *THE END OF EURASIA*, at 285 (2002). Trenin concludes that “Russia stands on the boundary between the post-modern and modern and even pre-modern world. It must make its choice. The only rational option is to fully stress Russia’s European identity and engineer its gradual integration into a Greater Europe.” *Id.*, at 311. Though there are various political forces in Russia vying to steer its foreign policy in opposite directions, it seems that President Putin has reasonably chosen supporting the United States on many strategic issues. In his keynote public address to the Russian Foreign Ministry on 12 July 2002, President Putin emphasized that cooperation with the United States is the key to Russian political and economic revival. B.B.C. *Worldwide Monitoring, Putin Notes Importance of Diplomacy in Helping Russian Business* (B.B.C. Radio Broadcast, July 12, 2002).

terrorism, observes that “the United States is ill-equipped by culture, history and bureaucratic structure to respond effectively to this new kind of strategic threat”³⁶ and that “US political and cultural sophistication lag behind its military technological capabilities.”³⁷

However, Europe can fulfill its potential in the current and future fight against terrorism and other threats by becoming militarily stronger and mentally tougher. Robert Kagan may have a point that Europeans “hope to constrain American power without wielding power themselves. In what may be the ultimate feat of subtlety and indirection, they want to control the behemoth by appealing to its conscience.”³⁸ Subtlety and sophistication without power though are often impotent while single-mindedness without subtlety and sophistication often leads to unexpected and unwanted consequences. Regardless, today’s liberal democracies can hardly afford the luxury of becoming disunited versus a less centralized but no less serious threat than the one that existed during the Cold War.

Subtlety and Sophistication or Single-Mindedness?

The war against terrorism is in many ways different from traditional wars. “War” cannot be used, in this context, as a legal term and “war” or rather “armed conflicts” are only a part of this wider war on terror to be fought by economic, financial, educational and other means.³⁹ Audrey Cronin is right that “military responses, while disruptive in the short run, tend to drive terrorists underground, to encourage innovation, to engender sympathy and, sometimes, even build support for the “underdog.” The point is not that swift and decisive uses of force are irrelevant; far from it. Instead, the argument is that effective counter-terrorism policy must be placed in a larger strategic context, in which the longer-term consequences are understood and calculated.”⁴⁰

36. Audrey Cronin, *Rethinking Sovereignty: American Strategy in the Age of Terrorism*, 44 SURVIVAL 2, at 127 (2002) [hereinafter Cronin].

37. *Id.* at 132.

38. Robert Kagan, *Power and Weakness*, 113 POL’Y REV. 7 (2002) [hereinafter Kagan].

39. Granville Byford makes an important point writing that “wars have typically been fought against proper nouns (Germany, say) for good reasons that proper nouns can surrender and promise not to do it again. Wars against common nouns (poverty, crime, drugs) have been less successful. Such opponents never give up. The war on terrorism, unfortunately, falls into the second category.” See Graham Byford, *The Wrong War*, 81 FOR. AFF’S, 34 (2002) [hereinafter Byford].

40. Cronin, *supra* note 36, at 127.

The use of force against terrorists in the new geo-political environment identifies some questions that before the end of the Cold War and September 11, 2001 seemed far from the law regulating the use of force. Today, because of the radical change of the political and military-strategic context in which *jus ad bellum* functions and the need to extend the application of *jus ad bellum* rules to areas such as humanitarian intervention, intervention in failed states or against “rogue” regimes that develop weapons of mass destruction (WMD), or self-defense against terrorist attacks by non-state actors, these questions are no longer distant from the law governing the use of force.

Flatland Thinking and the Fight Against Terrorism

The current debate about terrorism and responses to it reveal a dichotomy (sometimes almost an abyss) in thinking and acting between hawks and doves, left and right, liberals and conservatives, human rights activists and military (or political) leaders, and pacifists and militarists. This is not the natural dichotomy between terrorists, their supporters and civilized society, rejecting terrorism whatever its form. No, this dichotomy, to borrow the simple but effective words of President Bush, is “you’re either with us or against us” in this war against terrorism.

This division is clearly reflected in the different approaches to combating crime, including the crime of terror, and other forms of anti-social behavior. Liberals often speak of changing social, economic or political conditions causing high crime rates or terrorism while conservatives (often) call for zero tolerance, longer prison terms or wider use of the death penalty. As American philosopher Ken Wilber writes:

liberals tend to believe in exterior causes, whereas conservatives tend to believe in interior causes. That is, if an individual is suffering, the typical liberal tends to blame external social institutions (if you are poor it is because you are oppressed by society), whereas the typical conservative tends to blame internal factors (you are poor because you are lazy).⁴¹

Real life situations are fluid and dynamic and a pure liberal or conservative approach as the only answer for all circumstances is bound to fail. Wilber calls both of these approaches “flatland” thinking and acting. “Truly integral politics would . . . encourage both interior development and exterior

41. KEN WILBER, A THEORY OF EVERYTHING: AN INTEGRAL VISION FOR BUSINESS, POLITICS, SCIENCE AND SPIRITUALITY 84 (2001).

development—the growth and development of consciousness and subjective well-being, as well as the growth and development of economic, social, and material well-being.”⁴² What seems difficult, if sometimes not impossible, is to be conservative (or at least admit that those who are conservative may have a valid point) when the situation requires tough and resolute actions against terrorists and those who support them and to be more liberal in thought and deed when studying and addressing contextual issues giving rise to terrorists and their supporters (such contextual issues are often invoked as a pretext or justification for terrorist acts).

This dichotomy manifests itself in individual answers to the following questions. Whether the national policy should be to pursue vigorously terrorists, using all necessary means, dead or alive, or whether to “drain the swamp,” i.e., to deal with what some call root causes of terrorism (e.g., poverty, social inequality, injustice in various forms or religious fundamentalism and extremism)? What are the root-causes of terrorism? How does a government guarantee security in a liberal society without sacrificing fundamental human rights? Is the US strategy in its war on terrorism correct or inappropriate?

These are not easy questions and often contain real dilemmas as choosing one option may foreclose another. However, this is not always the case as when choices must be made the response must not always be dictated by the same set of reasons (e.g., either exclusively by humanitarian concerns or exclusively by security rationale). When comparing Benjamin Netanyahu’s views on terrorism⁴³ to that of some Amnesty International representatives, it is easy to feel frustrated by the simplicity and singlemindedness of either position. Those who are tough on crime, on terrorism, on “rogue” states may view talk about human rights, economic assistance, state building and other similar issues, as at best an annoyance, at worst as pouring water on the mill of terror.⁴⁴ On the

42. *Id.* at 88.

43. See generally, BENJAMIN NETANYAHU, FIGHTING AGAINST TERRORISM. HOW DEMOCRACIES CAN DEFEAT THE INTERNATIONAL TERRORIST NETWORK (2001) [hereinafter FIGHTING AGAINST TERRORISM].

44. For example, the American Civil Liberties Union has harshly criticized US Attorney General John Ashcroft for his testimony where he equated “legitimate political dissent with something unpatriotic and un-American.” The statement by Laura W. Murphy, Director of ACLU Washington Office emphasized that “the Attorney General swore an oath to guard the Bill of Rights and the Constitution, including the First Amendment. For him to openly attack as “aiding the enemy” those who question government policy is all the more frightening in light of his constitutional duty to protect each and every American’s right to speak and think their mind.” (Laura Murphy, Statement on Attorney General John Ashcroft’s Testimony (ACLU Washington National Office, Dec. 10, 2001)).

other hand, human rights activists, leftist liberals and sophisticated academics often seem to be blind to real life hard choices.

The former Prime Minister of Israel Ehud Barak analyzing the 11 September attacks writes:

This kind of terror cannot be defeated without determined patience, strategic goals and tactical flexibility. You have to think and act, not by the book, but “out of the box,” open eyed, your mind free from any dogma or conventional wisdom. The approach must be systematic: intensive worldwide intelligence-gathering; a wide operational and logistical deployment; economic sanctions and no softness in applying them; diplomatic ultimatums and no backing down from them.⁴⁵

Beyond this, writes Barak, a systematic battle will require fully streamlined immigration rules and procedures, internationally coordinated anti-money laundering legislation, and, importantly, the reassessment of the generation-old American practice not permitting pre-emptive strikes against terrorists and terror operatives.⁴⁶ These measures are clearly important and necessary to fight terrorists but are they sufficient? The short answer is they are not. It is rather futile to use only military or law-enforcement measures in the war against terrorism. It would be counterproductive and look very much like a Sisyphean toil. As Professor Lawrence Freedman observes, “if raids failed to differentiate between the guilty, the half-committed and the innocent then the main result would be to generate many new recruits and supporters.”⁴⁷ Juxtapose this insightful comment with the recent Israeli attack which killed the Hamas military commander Sheikh Salah Shehada and 14 others, including 9 children, while wounding more than 140 people.⁴⁸ Is it Barak then, or Freedman who is correct?

If Barak were only a former general it might be possible to understand his exclusive attention to military and law-enforcement measures. But Barak was also Prime Minister of Israel, a country constantly facing terrorist attacks. For a politician, such one-sidedness and single-mindedness may be fatal. And this

45. Ehud Barak, *Security and Counter-Terrorism* in RE-ORDERING THE WORLD, *supra* note 29, at 93.

46. *Id.*

47. Lawrence Freedman, *A New Type of War*, WORLDS IN COLLISION. TERROR AND THE FUTURE OF GLOBAL ORDER 40 (Ken Booth et al. eds., 2002) [hereinafter WORLDS IN COLLISION].

48. Brian Knowlton, *Heavy Handed Israeli Attack is Condemned*, INT’L HERALD TRIBUNE, Jul. 24, 2002, at 1.

is Ehud Barak and not Benjamin Netanyahu, whose views on terrorism are much more simplistic.⁴⁹

However, human rights activists and those with a liberal agenda are not doing any better. For example, Daniel Warner, the acting Secretary General of the Institute of International Studies in Geneva, writes:

But what is terrorism? It is the activity of the dispossessed, the voiceless, in a radically asymmetrical distribution of power. . . . Terrorism has causes. Growth in inequalities of wealth and lack of political access lead to frustration, which eventually leads to aggression, violence and terrorism. The greater the levels of frustration, the greater the levels of violence. The higher the levels of repression, the higher the levels of reaction.⁵⁰

This is the corresponding liberal approach to terrorism and while there is some truth in this approach, such a view is also one-sided and simple. It is often useless to argue what the root causes of terrorism are because there are different views on this issue that are firmly entrenched. It is also useless because it is often quite impossible to distinguish clearly between causes of, circumstances conducive to and pretexts or justifications for various phenomena, including terrorism. “To a Western observer,” writes Bernard Lewis,

schooled in the theory and practice of Western freedom, it is precisely the lack of freedom—freedom of the mind from constraint and indoctrination, to question and inquire and speak; freedom of the economy from corrupt and pervasive mismanagement; freedom of women from male oppression; freedom of citizens from tyranny—that underlies so many of the troubles of the Muslim world. But the road to democracy, as the Western experience amply demonstrates, is long and hard, full of pitfalls and obstacles.⁵¹

Thomas Friedman believes that, “the anti-terror coalition has to understand what this war is about. It is not fighting to eradicate “terrorism.” Terrorism is just a tool. It is fighting to defeat an ideology: religious totalitarianism.”⁵² Whether religious totalitarianism is a cause or a circumstance conducive to

49. Although most, if not all, of the remedies Netanyahu proposes may be necessary indeed, they are limited to law-enforcement measures, economic or diplomatic sanctions and the use of military force. See FIGHTING AGAINST TERRORISM, *supra* note 43, at 129–148.

50. Daniel Warner, *For The West, A War On Terror Makes No Sense*, INT’L HERALD TRIBUNE, Sep. 21, 2001, at 11.

51. Bernard Lewis, *What Went Wrong?*, 289 THE ATLANTIC MONTHLY 1, at 6 (2002).

52. Thomas Friedman, *World War III is Against Religious Totalitarianism*, INT’L HERALD TRIBUNE, Nov. 28, 2001, at 7.

terrorism is beyond the point. It is a factor closely linked to terrorism, especially to its modern version.

Poverty, discrimination, repression, inequality and religious intolerance all contribute to the creation and sustainment of terrorism. However, not all poor and oppressed are terrorists and most of the terrorists are not at all poor and oppressed. The false dilemma—whether to concentrate on changing the conditions that may be conducive to terrorism or to respond forcefully to acts of terror—is answered differently at different times. This is a false dilemma between liberals who see the problems arising from external factors and the conservatives blaming only internal factors—the mindset of perpetrators of criminal acts. Addressing both sets of factors is equally important and necessary. Responses to terrorism should involve various methods, addressing all the causes and conditions favorable to its creation and development. As Audrey Cronin writes, “the United States, working in tandem with key allies from the UK to Japan, must disable the enabling environment of terrorism.”⁵³ It is also, however, necessary to use military and/or law-enforcement measures against terrorists and their accomplices as it is impossible to appease terrorists and hopeless to try to meet their demands believing this would end their terrorist acts.⁵⁴ Terrorists understand strength and power even if they do not necessarily respect (or may even hate) that power. Terrorists also despise weakness and see it in every concession and moderation.

Successful domestic societies use both criminal justice and social programs in efforts to lower the crime rate. Similarly, in international society it would be inadequate to resort to only one category of measures. Conditions conducive to terrorism have to be addressed and terrorists and those who support them must be arrested and tried. Moreover, where necessary, military force, as a measure of self-defense or collective security, must be used against them.

Richard Falk correctly distinguishes between two fallacies: “just as the pacifist fallacy involves unrealistic exclusion of military force from an acceptable response, the militarist fallacy involves excessive reliance on military force in a manner that magnifies the threat it is trying to diminish, almost certain to

53. Cronin, *supra* note 36, at 133.

54. In a way, terrorists act counterproductively to the content of their demands since to meet their demands, even if these demands were justified if not made by terrorists, would encourage further terrorism. For example, Palestinian terrorists demand the end of the Israeli occupation and dismantlement of the settlements in the occupied territories. Ending this occupation would be seen by terrorists, however, as a victory of their means. Surrendering to their demands then would only tempt them to increase their demands underpinned by terrorist threats.

intensify and inflame anti-Americanism.”⁵⁵ Only when these fallacies combine can they become mutually supportable and achieve success.

Post-Modern Societies and Pre-Modern Threats

The post September 11th world reveals another unfortunate and widening rift related to the gap between liberals and conservatives, the gap between the United States and Western Europe in their attitudes towards the war against terrorism and terrorists. One explanation for the different visions on terrorism may be the huge difference in their military capabilities. Robert Kagan puts it only as a rhetorical question: “If Europe’s strategic culture today places less value on power and military strength and more value on such soft-power tools as economics and trade, isn’t it partly because Europe is militarily weak and economically strong?”⁵⁶ However, these differing visions are not only due to the gap in military capabilities on both sides of the Atlantic. Kagan insightfully notes that along with natural consequences of the transatlantic power gap, there has also opened a broad ideological gap:

Europe, because of its unique historical experience of the past half-century—culminating in the past decade with the creation of the European Union—has developed a set of ideals and principles regarding the utility and morality of power different from the ideals and principles of Americans, who have not shared that experience. If the strategic chasm between the United States and Europe appears greater than ever today, and grows still wider at a worrying pace, it is because these material and ideological differences reinforce one another.⁵⁷

Although by their internal characteristics European states and the United States belong to the same category of liberal democratic states with highly developed market economies, their place and role in the international system are rather different indeed. As international actors they belong not only to different weight categories but also even to different worlds.

55. Richard Falk, *Defining a Just War*, THE NATION, Oct. 29, 2001, at 3–4.

56. Kagan, *supra* note 38, at 9.

57. *Id.* at 3.

Robert Cooper, a senior British diplomat, writes of pre-modern, modern and post-modern states that co-exist side-by-side in today's world.⁵⁸ He speaks of the existence of:

two new types of state: first there are now states—often former colonies—where in some sense the state has almost ceased to exist: a “premodern” zone where the state has failed and a Hobbesian war of all against all is underway (countries like Somalia and, until recently, Afghanistan). Second, there are post imperial, postmodern states that no longer think of security primarily in terms of conquest. And thirdly, of course there remain the traditional “modern” states who behave like states always have, following Machiavellian principles and *raison d'état* (one thinks of countries such as India, Pakistan and China).⁵⁹

In the post-modern world—the world of the European Union—there are no security threats in the traditional sense (at least threats that would originate from within this world) and instead of power (or balance of power), law prevails. In this world, the traditional distinctions between domestic and foreign affairs have broken down; there is not only the legal promise not to use force but the use of such force between post-modern states has become almost unthinkable as their security is based on transparency, mutual openness, interdependence and mutual vulnerability. This is a new paradigm of international relations, which Western European nations have created only recently after centuries of wars, anarchy and the traditional struggle to balance power. The two World Wars served as the main catalyst for the creation of this new Kantian world, albeit in one region only. “Within the confines of Europe,” writes Robert Kagan, “the age-old laws of international relations have been repealed. Europeans have stepped out of the Hobbesian world of anarchy into the Kantian world of perpetual peace.”⁶⁰

It is, of course, debatable to what extent this peace is perpetual but Kagan is right in emphasizing: “Consider again the qualities that make up the European strategic culture, the emphasis on negotiation, diplomacy, and commercial ties, on international law over the use of force, on seduction over coercion, on multilateralism over unilateralism.”⁶¹ These are admirable qualities indeed

58. See generally ROBERT COOPER, *THE POST-MODERN STATE AND THE WORLD ORDER* (2nd ed., 2000) [hereinafter *WORLD ORDER*]; Robert Cooper, *The New Liberal Imperialism*, *OBSERVER*, (Apr. 7, 2002); Robert Cooper, *The Post-Modern State* in *RE-ORDERING THE WORLD*, *supra* note 29, at 12.

59. Robert Cooper, *The Post-Modern State* in *RE-ORDERING THE WORLD*, *supra* note 58, at 12.

60. Kagan, *supra* note 38, at 11.

61. *Id.* at 10.

and hopefully they may serve as an example for other states and other regions of the world. Kagan may be right that “the transmission of the European miracle to the rest of the world has become Europe’s new *mission civilatrice*.”⁶² There is nothing wrong with such a mission as the expansion of human rights ideas, economic aid, assistance in state-building and other similar policies as well as the very lessons of European experience (negative and positive) may help other societies avoid disasters that the Europeans experienced, without necessarily repeating all the mistakes made in Europe.

No society can or should repeat the development or evolution of other societies, especially if their historic, cultural and religious traditions are rather different. Nevertheless if countries like Rwanda or Burundi of today do not learn something from the past experience of countries like Sweden or Finland, the Rwandas and Burundis of tomorrow will not be much different from those of 1994. Some aspects of the European experience, for example, its painful and long process of secularization, may be especially important in the context of today’s major terrorist threats. Chris Brown insightfully writes that:

the subjection of all accounts of the ultimate ends of life to the same rationality, which has induced a self-consciously ironic dimension to even deeply held religious and social beliefs; the notion that representative forms of democracy are the only legitimate basis for political power; the spread of a human rights culture in which the privileges once extended only to rich and powerful white males are understood as legitimate only if universally available—this actually rather disparate set of ideas and propositions has come to be seen not as disparate, and thereby separable, but as a package that, taken as such, gives meaning to the notion of modernity within Western society and, with the onset of globalisation, within a nascent global society.⁶³

However, fundamentalists of various kinds “want a world with modern technology, but with scientific rational confined to the technical.”⁶⁴ It may not be accidental that amongst terrorists, especially Islamist terrorists, there are many young men educated either in madrasas or technical institutions (not necessarily in flight schools).

Today there are huge differences between the realities of Europe and the situation in most other parts of the world. Still it happens that in their dealings with actors from different parts of the world, the Europeans often try to use

62. *Id.* at 12.

63. C. Brown, *Narratives of Religion, Civilization and Modernity*, [hereinafter Brown] in *WORLDS IN COLLISION*, *supra* note 47, at 299.

64. *Id.*

post-modern rules of the game that (even amongst each other) are of recent origin. Europeans too often follow their newly acquired post-modern mindset when confronting modern or even pre-modern actors. These standards may not apply.

The United States, because of its unique position in the world, Cooper believes, combines characteristics of modern and post-modern society. Defining the United States as a “partially post-modern” state, he writes:

Outside Europe, who might be described as postmodern? Canada certainly; the USA up to a point perhaps. The USA is the more doubtful case since it is not clear that the US government or Congress accepts either the necessity and desirability of interdependence, or its corollaries of openness, mutual surveillance and mutual interference to the same extent as most European governments now do. . . . The knowledge that the defence of the civilised world rests ultimately on its shoulders is perhaps justification enough for the US caution.⁶⁵

A recent film⁶⁶ captures the essence of a post-modern society. In it violence was unthinkable, everybody was terribly polite and political correctness had reached quite absurd levels. A villain (played by Wesley Snipe) from the earlier “modern” age returns to help the leader of the city deal with some difficult problems left over from previous times. When the “villain,” quite predictably acts like a villain, the authorities must bring a “modern” police officer (played by Sylvester Stallone) back to deal with the “modern” villain. Using physical force and all necessary means, he succeeds in eliminating the “modern” threat to the benevolent “post-modern” world.

By analogy, what was Europe when facing President Milosevic, Radovan Karadjic or General Mladic? Ultimately, Europe was forced to rely on the United States to face real (and not fictional) villains in its own backyard. At the same time many Europeans continued to criticize the United States for not being nice enough towards such “modern” and “pre-modern” villains for not treating them in accordance with European post-modern rules. Is there not some truth then in the notion that post-modern values can flourish in places of the world today where societies are at different levels of development because the United States has performed for the Europeans the role of a modern cop? As Kagan points out, “Europe’s new Kantian order could flourish only under the umbrella of American power exercised according to the rules

65. WORLD ORDER, *supra* note 58, at 27.

66. DEMOLITION MAN (Warner Brothers 1996).

of the old Hobbesian order” and that “most Europeans do not see the great paradox: that their passage into post-history has depended on the United States not making the same passage.”⁶⁷ Though the Vietnam and Mogadishu syndromes seriously affected the US ability to act adequately and decisively in some pre-modern situations (e.g., in Rwanda or Haiti) there is nevertheless the ring of truth in Kagan’s words.

It is also not by chance that al Qaeda and many other terrorist organizations have been able to operate freely in Western European countries (and in the United States) exploiting in their fight against modern (or post-modern) liberties and freedoms, the very same liberties and freedoms, using technological achievements of the West to undermine its cultural achievements (democracy, human rights, tolerance) that have made these technological achievements possible.⁶⁸

In the world that is far from post-modern, post-modern states must have to retain and rely upon not only some of their modern capabilities (police, prisons, military power) but also some of the norms of the modern world based on power politics. Adequate armed forces and intelligence services combined with the readiness to use them are necessary even for post-modern states. Robert Cooper is absolutely right that “in the coming period of peace in Europe, there will be a temptation to neglect our defenses, both physical and psychological. This represents one of the great dangers for the post-modern state.”⁶⁹ Chris Brown, observing that fascism and national socialism did not collapse of their own contradictions, emphasizes that “the opponents of Islamo-fascism have to be prepared to fight for what they believe in, and the intelligent use of military force will, inevitably, be one component of the struggle.”⁷⁰

67. Kagan, *supra* note 38, at 16.

68. Bassam Tibi has written that:

Muslim fundamentalists very much favour the adoption of modern science and technology by contemporary Islam. But they restrict what may be adopted to select instruments, that is, to the products of science and technology, while fiercely rebuffing the rational worldview that made these achievements possible. The late great Berkeley scholar Reinhardt Bendix showed that ‘modernisation in some sphere of life may occur without resulting in [a full measure of] modernity,’ and added that ‘more or less ad hoc adoption of items of modernity [actually] produces obstacles standing in the way of successful modernisation.’

Tibi, *supra* note 33, at 74.

69. WORLD ORDER, *supra* note 58, at 39.

70. Brown, *supra* note 63, in WORLDS IN COLLISION, *supra* note 47, at 300.

A dangerous side of European reliance on its post-modern values in the wider world is illustrated by the disastrous standoff between the post-modern Dutch peacekeepers and pre-modern Mladic thugs at Srebrenica in 1995, which ended with thousands of Muslim men dead. This is not to criticize the young Dutch soldiers but instead the softness of Western and especially European leaders and societies as a whole when confronting pre-modern villains.

Therefore, is not there some truth in Robert Cooper's words when he emphasizes that "when dealing with more old-fashioned kinds of states outside the post-modern continent of Europe, we need to revert to the rougher methods of an earlier era—force, pre-emptive attack, deception, whatever is necessary to deal with those who still live in the nineteenth century world of every state for itself?"⁷¹ Among ourselves, he continues, "we keep the law but when we are operating in the jungle, we must also use the laws of the jungle," emphasizing the need to get used to the idea of double standards.⁷²

The language used by Cooper may be too provocative and should not be taken literally. International law and not the law of the jungle has to play a role even in dealings with modern and post-modern states and other actors from that world. However, double standards, or even treble standards for that matter, may be acceptable if we openly recognize, for example, that certain categories of weapons are much more dangerous in the hands of regimes like Saddam Hussein's than in the hands of more responsible and civilized actors, or that not all ideologies are of equal value (we have already made exceptions for fascism and recently for communism too), that some of them are so intolerant that they constitute a threat to international peace and security. The principles and rules of international law applicable in the non-Kantian world must be different from those applicable in the post-modern environment. It follows then that contemporary *jus ad bellum* cannot be based on the values and principles applicable in the post-modern Kantian world where the usefulness and applicability of *jus ad bellum* is unthinkable. What then is the contemporary *jus ad bellum* and what should it be? As further discussed *infra*, the sovereignty of those states that massively violate human rights or failed states that are unable to guarantee a minimum of order and justice and especially those states that are unwilling or unable to prevent their territory from being used for carrying out terrorist attacks against other states and their nationals cannot be respected in the same way as the sovereignty of other states. As Kofi

71. Robert Cooper, *The New Liberal Imperialism*, OBSERVER, Apr. 7, 2002, at 3.

72. *Id.*

Annan, the UN Secretary General, said during the NATO operation in Kosovo: “[T]here is emerging international law that countries cannot hide behind sovereignty and abuse people without expecting the rest of the world to do something about it.”⁷³

The Charter Paradigm and the Use of Force at the Turn of the Century

The question of the current state of the law on the use of force is approachable from different angles:

- (a) What does the text of the UN Charter say?
- (b) What did the drafters of the Charter mean in 1945?
- (c) What may be reasonable or plausible interpretations of the Charter principles and rules concerning the use of force?
- (d) What do the current circumstances require?
- (e) What is the prevalent (if any) consensus on use of force today?

Different authors have used in their study of the use of force all of these approaches. States have also relied, in various degrees and combinations depending on circumstances, on all these possible interpretations of *jus ad bellum*.

Today, however, we have a rather schizophrenic situation in *jus ad bellum*. The more one thinks of it, the less one seems to understand it. The more one tries to understand it, the less certain one becomes about what it requires. Therefore, it is wise in many cases to avoid definitive conclusions like “international law certainly allows it,” or vice versa, that “it certainly prohibits it.” Most conclusions of that nature are not only vulnerable to convincing criticism but also cannot be verified as correct.

It would be equally wrong to say either that there have been no changes whatsoever in the legal regime regulating the use of force, or, on the contrary, to interpret too creatively certain tendencies in the rather confused international practice in order to conclude, for example, that there undoubtedly is a right to use force to save lives in foreign countries. Today, there are not many areas in

73. Tim Burton & Robert Anderson, *UN Warns Yugoslavia Over Human Rights*, FINANCIAL TIMES, May 26, 1999, at 2.

jus ad bellum where the word “undoubtedly” is used. Instead, it is better to speak of trends, legitimization and more justifiable or less justifiable practices. It follows that it is better to avoid definitive terms such as lawful or illegal.

For some, the UN Charter seems to have acquired certain characteristics of the Holy Books—either the Bible or the Koran. One cannot change it, one has to believe in it and even swear allegiance to it, but at the same time, one can hardly live by it. However, a Charter fundamentalism may be almost as dangerous as Biblical or Koranic fundamentalisms. Literal and non-contextual interpretation of any text—be they religious or secular texts—is bound to lead to social impasse. If in the case of holy texts such interpretation sometimes guides towards and justifies violence, in the case of the UN Charter, it may be one of the causes of the inability to adequately respond to violence.

However, it is often said that the prohibition on the use of force [Article 2(4) of the Charter] is a jus cogens norm⁷⁴ and therefore treaties and practice not only cannot deviate from it but even when such practice is widespread, it does not undermine or change the fundamental norm. In such a case, how can one question what the Charter says on the use of force?

Many things might be said about jus cogens in support of this concept as well as by way of criticism.⁷⁵ It is necessary here to emphasize what Oscar Schachter has written about principles of international law. He distinguishes between the core and penumbra of applicability of such principles.⁷⁶ While the core may be jus cogens, the penumbra need not necessarily be of such a character.

If we take by way of comparison and illustration, for example, one of the basic human rights norms—the right to life—we see that the core of it—the prohibition of arbitrary deprivation of life and especially the prohibition of genocide (e.g., Article 6 of the International Covenant on Civil and Political Rights)—is undoubtedly jus cogens in the sense that no deviation from it is permitted under any circumstances. When deviations do occur, they do not undermine the basic prohibition since there is strong and general *opinio juris* supporting this core of the norm. However, when considering, for instance, the issue of the death penalty it is much less clear. Contradictory practices as well as contradictory opinions (including *opinio juris*) exist on this matter. Sensitive areas such as abortion and euthanasia—both hotly debated right to life issues—make the problem of the jus cogens character of the right to life

74. See, e.g., 1966 Y.B. OF THE INT’L L. COMM 247–48 (1966).

75. See, e.g., REIN MÜLLERSON, ORDERING ANARCHY 156–61 (2000).

76. OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 20 (1991) [hereinafter SCHACHTER].

(its absolute and non-derogable character) as a whole uncertain and complicated.

Similar situation exists in the legal regulation of the use of force. Of course, there are areas of jus ad bellum where legal rules are rather certain. The Charter and customary international law prohibition against the use of force, for example, for territorial aggrandizement or political subjugation of other states (as well as the affirmative right to use force in self-defense) remain valid and relatively non-controversial. The Iraqi aggression against Kuwait and the world community's responses to it have confirmed and reinforced these aspects of the prohibition on the use of force. As Anne-Marie Slaughter and William Burke-White, referring to the numerous resolutions of the General Assembly and the Security Council, write, "when interstate aggression happens, the vast majority of the world's nations routinely and automatically condemn it as illegal."⁷⁷ However, when considering issues like the use of force for humanitarian intervention different practices and conflicting views exist. Michael Glennon's point that "there is, today, no coherent international law concerning intervention by states. States disagree profoundly on fundamental issues—issues on which consensus is necessary for a treaty or customary rule to work."⁷⁸ Though consensus does not exist in some domains of jus ad bellum, it is somewhat difficult to accept this negative evaluation of the role of the UN Security Council in the changes that are taking place in jus ad bellum.

Glennon writes:

By intervening in the internal affairs of states, the Security Council itself contributed to the erosion of the Charter's constraints on use of force, beginning with Southern Rhodesia and continuing with legally questionable interventions in South Africa, Iraq, Somalia, Rwanda, and Haiti. Governments that have come to justify humanitarian intervention by states acting in the face of Security Council paralysis rely on the Council's own record.⁷⁹

Glennon believes that "there can be little doubt that the Security Council has acted in a manner inconsistent with the limits placed on its authority by Article 39 and Article 2(7) of the Charter."⁸⁰ In support of this thesis he quotes Sean

77. Anne Slaughter & William Burke-White, *An International Constitutional Moment*, 43 HARV INT'L L. J. 1 (2002) [hereinafter Slaughter & Burke-White].

78. MICHAEL GLENNON, *LIMITS OF LAW, PREROGATIVES OF POWER. INTERVENTIONISM AFTER KOSOVO 2* (2001).

79. *Id.* at 114.

80. *Id.* at 120.

Murphy who wrote: “by considering essentially internal human rights violations and deprivations to be “threats to the peace,” the Security Council is expanding the scope of its authority beyond that originally envisioned in Chapter VII of the Charter.”⁸¹

However, these are two rather different statements. Murphy’s understanding corresponds to Schachter’s explanation that “no text adopted by governments can or should foreclose choices imposed by changing conditions and by new perceptions of ends and means. The Charter is a living instrument. It is, like every constitutional instrument, continuously interpreted, moulded and adapted to meet the interests of the parties.”⁸² Had not the Security Council reacted to changing circumstances, had it continued to apply the interpretation of the Charter held by its drafters in 1945, the Council would have remained completely inadequate. As the Permanent Court of International Justice observed in 1923, “the question whether a certain matter is or is not solely within the jurisdiction of a state is an essentially relative question; it depends upon the development of international relations.”⁸³ The Council has not yet come close to intervening in any state’s internal affairs. While the Council, using its wide discretionary powers, have found threats to international peace and security (e.g., Haiti) where no such threat seemed to exist, given the egregious behavior of these states towards their people, their behavior could not be viewed as within the “internal affairs of the state” any longer.

Michael Schmitt is correct when emphasizing that:

Professor Glennon’s thoughtful analysis exaggerates the *de jure-de facto* divide. In fact, what has been happening over the past half-century is a regular evolution in the global community’s understanding of the use of force regime. This evolution has been, as it always is and always must be, responsive to the changing circumstances in which international law operates. Practice does not contradict law so much as it informs law as to the global community’s normative expectations.⁸⁴

81. SEAN MURPHY, *HUMANITARIAN INTERVENTION: THE UNITED NATIONS IN THE EVOLVING WORLD* 196 (1996).

82. SCHACHTER, *supra* note 76, at 118–19.

83. See *Nationality Decrees in Tunis and Morocco Case*, P.C.I.J., Series B, No. 4, at 24, 2 I.L.R. 349 (1923).

84. Michael Schmitt, *Counter-Terrorism and the Use of Force in International Law*, *supra* Chap. II this volume.

Although the end of the Cold War and the accelerating pace of events have required more changes in the law of jus ad bellum⁸⁵ than in the previous fifty years, neither the existing Charter interpretation nor a completely new set of rules is either possible or even desirable. International lawyers, be they in the service of their governments or academics, must avoid extreme choices between, using the words of Ronald Dworkin, “the dead but legitimate hand of the past and the distinctly illicit charm of progress.”⁸⁶ Past decisions have to be interpreted and reinterpreted in the light of current needs and tendencies.

Terrorism: Jus ad Bellum or Jus in Bello?

Since terrorism is basically about means and methods and not about the purpose for the use of force⁸⁷ why is it a jus ad bellum issue at all? Should not it be,

85. Slaughter and Burke-White even write that “[T]o respond adequately and effectively to the threats and challenges that are emerging in this new paradigm, we need new rules. Just as in 1945, the nations of the world today face an international constitutional moment.” Slaughter & Burke-White, *supra* note 77, at 2.

86. RONALD DWORKIN, *LAW’S EMPIRE* 348 (1998). While Dworkin writes that judges have to choose between these extremes, his whole book seems to indicate that the proper choice has to be somewhere in between and not always either the legitimate hand of the past or the illicit charm of progress.

87. Granville Byford draws our attention to the fact that many historical figures who today are admired (at least, but not exclusively, by their own people) have committed acts that today would be defined as terrorism or crimes against humanity. He, for example, refers to Henry V who killed his prisoners before the Battle of Agincourt but was still lionized by Shakespeare. Byford, *supra* note 39, at 36. Tamerlane enjoyed building huge pyramids from human skulls but today on his monument in the centre of Uzbek capital Tashkent the following words are ascribed to him: “Power is in Justice.” Even in the second half of the twentieth century (the UN Charter period) several future Israeli leaders used terror tactics in their fight for Israeli statehood and even the accusations of terrorism against Nelson Mandela’s ANC were not all groundless. The Irish Republican Army has had sympathizers in various US governments and the list can be continued. Byford, therefore, proposes, in order to untangle the knot, “to think of a graph with the morality of means running along one axis and the morality of the ends running along the other.” (*Id.* at 38). Byford correctly observes that even in today’s world in certain conditions noble aims cannot be achieved without the recourse to violence. However, what was acceptable or even heroic in the past may well be criminal today, and secondly, if violence (even considerable) may be necessary and acceptable for the achievement of even noble aims, this does not mean that terrorism is acceptable too. No graph that would justify terror violence depending on the high morality of pursued aims should be acceptable. We have had it enough already and it is called: one man’s terrorist is another man’s freedom fighter.

as some argue,⁸⁸ an issue of criminal justice, or if it has anything to do with the legal regulation of use of force at all, then a jus in bello topic only? However, something cannot be a jus in bello issue without first coming under jus ad bellum and terrorism belongs to the domain of jus ad bellum as terrorist attacks may constitute a specific, non-traditional (i.e., what the drafters of the UN Charter did not have in mind in 1945) form of an armed attack that gives rise to the right of self-defense and/or collective security measures involving use of force under Chapter VII of the UN Charter.

Of course, if a terrorist attack is covered by jus ad bellum, if it constitutes an armed attack or a threat to international peace and security against which Chapter VII collective security measures involving use of force are applied, it is automatically also contrary to jus in bello. Such a conclusion follows from the very definition of terrorism as a crime.⁸⁹ Note here that not every terrorist attack is contrary to jus ad bellum (either because it does not have any foreign element or because of the relatively insignificant nature of the attack). However, every terrorist attack that comes under jus ad bellum, by definition violates jus in bello. For terrorists, attacks against civilians and civilian objects are not collateral to the recourse to military force but one of the necessary elements of it. Jason Vest notes that a defining characteristic of fourth-generation warfare is “the emphasis on bypassing an opposing military force and striking directly at cultural, political, or population targets.”⁹⁰ This is what terrorists do and this kind of tactic is, *ab initio*, contrary to jus in bello and (as discussed *infra*)

88. Abdullahi Ahmed An-Na'im, for example, writes that “the answer is simply that the attacks were international crimes of the utmost seriousness that must be vigorously investigated in order to hold those responsible accountable under the law. . . . If there is the political will to treat the attacks as a matter for law enforcement, not military retaliation, I believe there are enough normative and institutional resources to begin the process of criminal accountability under international law.” See Abdullahi An-Na'im, *Upholding International Legality against Jihad*, *WORLDS IN COLLISION*, *supra* note 47, at 169. It is interesting that though An-Na'im writes that in the case of the 9/11 attacks pursuing extradition would have been unrealistic, he nevertheless accuses the United States of failing to do so. This is like asking the current Iraqi regime to extradite Saddam Hussein. Such a request does not correspond with the seriousness of the matter. Moreover, in the case of crimes of that magnitude, history since the Nuremberg trials have shown, that military and criminal justice measures are almost necessarily interlinked.

89. One may ask whether those who commit acts of terror in armed conflicts are terrorists or war criminals. They are both, of course. In time of war, acts of terror (e.g., deliberately attacking civilians, killing POWs, using indiscriminate force etc.) are either grave breaches under the Geneva Conventions or other acts defined as war crimes. See, e.g., Article 130, Geneva Convention (III) Relative to the Treatment of Prisoners of War, 1949, *reprinted in THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS* 435 (D. Schindler & J. Toman eds., 3rd ed., 1988).

90. Jason Vest, *Fourth-Generation Warfare*, 288 *THE ATLANTIC MONTHLY* 5, at 2–3 (2001).

necessarily changes some modalities of defensive responses. Still, Caleb Carr has ably demonstrated in his book *The Lessons of Terror* that terror tactics were historically used as a supposedly effective method of waging wars (however, Carr convincingly argues that even in the past, though such tactics may have provided some short-term tactical advantages, they have always been counter-productive in the long run).⁹¹

Of course, a direct armed attack by armed forces of state A against state B may be also committed as a terrorist attack if the attack is carried out in flagrant violation of jus in bello requirements and if at least one of the purposes of the use of such modalities of attack is spreading terror among the population of the victim state or forcing the government to change its policies or surrender.

Terror Attacks and the Necessity of Self-Defense

Terrorism has different causes and circumstances exist that may enhance or diminish its likely emergence and flourishing. These circumstances must, of course, be addressed. However, leaving terrorist attacks without a tough and physical response, addressing only the so-called “underlying causes” demonstrates weakness thereby only encouraging new attacks. The use of force as a law-enforcement measure or as a military response, though not the only or even perhaps the most important means of dealing with terrorism, is nonetheless necessary as both a special and general deterrent. Authorization for military responses to terrorist attacks may combine both the element of self-defense and that of necessity. Of course, these two are closely linked any way as the seminal *Caroline case* speaks of the “necessity of self-defense.”⁹² In fact, though the *Caroline case* is often used in the practice and teaching of international law as a self-defense precedent that clarifies issues such as necessity, immediacy and proportionality, the International Law Commission (ILC) has dealt only with the case as one dealing with the concept of necessity.⁹³ The 1980 Report of the ILC, for example, observes that:

91. See CALEB CARR, *LESSONS OF TERROR. A HISTORY OF WARFARE AGAINST CIVILIANS—WHY IT HAS ALWAYS FAILED, AND WHY IT WILL FAIL AGAIN* (2002).

92. R. Y. Jennings, *The Caroline and McLeod Cases*, 32 AM. J. INT’L. L. 82 (1938) [hereinafter Jennings].

93. See International Law Commission *Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts*, para. 5, UN GAOR, 56th Sess., Supp. No. 10, UN Doc. A/56/10 (2001) [hereinafter *Commentaries*].

in the past, there has been no lack of actual cases in which necessity was invoked precisely to preclude the wrongfulness of an armed incursion into foreign territory for the purpose of carrying out one or another of the operations referred above. To cite only one example of the many involving situations of this kind, there was the celebrated “Caroline” case.”⁹⁴

Unlike in the first half of the 19th century when the *Caroline* incident occurred, the right to self-defense today includes measures undertaken against non-state entities.⁹⁵ Accordingly, a situation can exist today when self-defense against terrorist attacks may be carried out, by necessity and under certain circumstances, in the territory of a third state even without the latter’s consent. Hence, the concept of self-defense characterizes the use of force vis-à-vis a terrorist organization, while the concept of necessity characterizes the use of such force in the territory of another state. Necessity, unlike the inherent right to self-defense, is not a right (though both are considered as circumstances precluding wrongfulness), but as a justification used in exceptional circumstances, or as the ILC comments, “under certain very limited conditions.”⁹⁶

When terrorists operate from the territory of a state and that state is unable or unwilling to end the terrorist acts, military action by other states directed at the terrorists within the state where the terror operations are originating from can be justified as a state of necessity. This is what Roberto Ago’s comment to the draft article in the ILC Report called “the existence of conduct which, although infringing the territorial sovereignty of a State, need not necessarily be considered as an act of aggression, or not, in any case, as a breach of an international obligation of jus cogens.”⁹⁷ This is instead a self-defense operation against the terrorist organization that is by necessity carried out in the territory of a third state; preferably, of course, with the latter’s consent. However, if the territorial state, which has itself been unable to prevent terrorists

94. 1980 Y.B. INT’L L. COMM. Vol II, Part 2 at 44 (1980), U.N. Doc. A/CN.4/SER.A/1980/Add. 1.

95. In the *Caroline* incident, the British in 1837 crossed the Niagara River and destroyed the steamship *Caroline* which was being used by private persons to help rebels fight the British. The British were not attacked by the United States or by irregulars acting on behalf of the United States. Therefore, the ensuing discussion between US Secretary of State Daniel Webster and UK Envoy Lord Alexander Ashburton might as well have been about the actions of non-state entities in the territory of another state. See generally Jennings, *supra* note 93.

96. See *Commentaries*, *supra* note 93 at para. 14.

97. See 1973 Y.B. INT’L L. COMM. Vol II, at 249 (1973), U.N. Doc. A/CN.4/SER.A/1973/Add. 1.

attacking other states or their nationals and interests, resists the victim-state (or its allies) in their efforts to eliminate the terrorists, it itself becomes an accomplice to the terrorist organization. The Entebbe raid in 1976 illustrates this point nicely. When Ugandan forces attacked the Israeli commandos attempting to liberate the hostages (something the Ugandan authorities had failed to do), Ugandan forces became legitimate targets of Israeli counter-measures.

Once again, of course, the requirements of necessity and proportionality play an important role in determining the character of self-defense measures. Indeed, the character of terrorist attacks themselves, often of uncertain origin and magnitude, puts an even higher emphasis on the need to observe the principles of necessity and proportionality in the use of military force in response to such attacks. They are especially important in helping to avoid escalation of terrorist related conflicts.

This portion of this article concentrates only on the self-defense paradigm response to terrorists attacks—leaving for another day the discussion of the collective security paradigm. These two paradigms are not exclusive and ideally, responses to terrorist attacks should involve the use of force across both paradigms.

An armed attack, in the form of a terrorist attack or not, is an *erga omnes* violation of international law and the victim state is not the only injured state.⁹⁸ A terrorist act(s) that is tantamount to an armed attack concerns the entire international community and therefore any such attack should ideally trigger the UN collective security mechanism at the same time as the right of the victim state to use force, either alone or together with its allies, in self-defense occurs. Indeed, although dealing primarily with terrorists and support for such terrorists, Security Council Resolution 1373 states that all states shall “take the necessary steps to prevent the commission of terrorist acts.” While different from, and falling short of authorizing the “use of all necessary means,” the interpretation of this language may well lead to similar conclusions.

Interestingly, the Security Council, while taking measures necessary to maintain international peace and security, at the same time recognized in its Resolution 1368 and reaffirmed in Resolution 1373 the inherent right to

98. International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, Report of the International Law Commission on the Work of its Fifty-third Session, Art. 48(1b), U.N. GAOR, 56th Sess., Supp. No. 10, U.N. Doc. A/56/10 (2001) [hereinafter *Draft Articles*].

individual and collective self-defense.⁹⁹ Accordingly, though the Council was acting within the collective security paradigm in these resolutions, it did not consider that these measures in any way interfered with or superceded the right to use force in individual or collective self-defense.

In the current fight against terrorism the use of military force in self-defense in Afghanistan by the United States, United Kingdom, Canada and other allies is combined with collective security such as those that are the basis for the International Security Assistance Force (ISAF).¹⁰⁰ These are not the only collective security measures being used by the Security Council. As an example, it has also used financial measures against al Qaeda, other terrorist organizations and individuals linked to them. Chapter VII non-military measures are beyond the scope of this article and will not therefore be addressed. However, their use does help make the point that only combinations of various means and methods of fighting terrorism can lead ultimately to success.

Specific Characteristics of Self-Defense Against Terrorist Attacks.

Terrorist attacks have some characteristics which traditional armed attacks, as a rule, do not have: (i) attacks are usually carried out not by a state's armed forces but by non-state groups which may or may not have links with some states (except that terrorist groups have to operate on the territory of at least some states and this is one of the essential differences between piracy and terrorism, though in some respect they may be comparable); (ii) the identity of the attackers and their affiliation with other entities (including states) is usually not clear; and, (iii) the means and methods used by terrorists are, by definition, contrary to international humanitarian law since they intentionally

99. Myjer and White point to the fact that references to the right to self-defense were only in the Preambles of the Security Council Resolutions 1368 and 1373 and therefore, in their opinion, the Council did not unequivocally determine that there had been an armed attack against the United States on 11 September 2001. They believe that "at an early stage therefore the Security Council should have made it clear without a shadow of doubt whether it was of the opinion that there solely is an article 39 situation, or a Chapter VII self-defence situation." See Myjer & White, *supra* note 31, at 10. However, on 12 September when the Security Council passed Resolution 1368 it may not yet have been clear who was behind these attacks (e.g., had they been committed by a US terrorist group, then such an attack would not have given rise to the right to self-defense under international law notwithstanding the magnitude of the attack). Therefore, the Security Council could not have used such specific language. Moreover, a reference to the right to self-defense in the preamble of a resolution wholly devoted to a terrorist attack is a sufficient indication that the Council believed that there was at least a *prima facie* self-defense situation.

100. S. C. Res. 1386 U.N. SCOR, 56th Sess., U.N. Doc. S/1386/(2001).

target non-combatants and attack prohibited objects. These particular features of terrorist attacks condition the character of responses to them.

First, what is the status of terrorist organizations in international law? Does Article 51 apply to attacks carried out by non-state entities? Michael Byers writes that “it will probably be argued that the atrocities of 11 September did not constitute an armed attack since they did not involve the use of force by a state, and that the relevant framework of analysis is instead international criminal law.”¹⁰¹ Eric Myjer and Nigel White write that “the categorization of the terrorist attacks on New York and Washington as an “armed attack” within the meaning of article 51 is problematic to say the least. . . . Self-defence, traditionally speaking, applies to an armed response to an attack by a state.”¹⁰² Pierre-Marie Dupuy writes that “the shock of 11 September should cause a re-examination of norms conceived solely on the basis of relations between states.”¹⁰³ However, such a re-examination has already been ongoing for some time and international law is no longer as state-centric as it was, for example, in 1945 when the UN Charter was adopted. Not only are individuals held criminally responsible directly under international law for genocide, war crimes and crimes against humanity, but the Security Council has gone so far as to impose sanctions against non-state entities such as the Ian Smith regime in Southern Rhodesia, UNITA in Angola and Bosnian Serbs.¹⁰⁴

There is little doubt that the drafters of Article 51 contemplated armed attacks committed only by states even though the article itself does not explicitly say so. However, it is not only the absence of any direct reference to an armed attack by a state in Article 51 but more importantly, the need to interpret the Charter in the context of current realities that indicates that the right of self-defense may arise also in the case of attacks by non-state entities.¹⁰⁵ As Yoram Dinstein writes:

101. Michael Byers, *Terrorism, the Use of Force and International Law after 11 September*, 51 ICLQ 411 (2002).

102. Myjer & White, *supra* note 31, at 7.

103. Pierre-Marie Dupuy, *The Law After the Destruction of the Towers*, EUR J. INT'L L. DISCUSSION FORUM at 1 (2002) available at http://www.ejil.org/forum_WTC/ny-dupuy.html (Nov. 30, 2002).

104. For example, Security Council Resolution 924 imposed sanctions against Bosnian Serbs. See S. C. Res. 924, U.N. SCOR, 49th Sess., U.N. Doc. S/924/(1994). Similarly, Resolution 864 found that “as a result of UNITA’s military actions, the situation in Angola constitutes a threat to international peace and security.” An arms embargo was imposed against a non-state entity—UNITA. See S. C. Res. 864, U.N. SCOR, 48th Sess., U.N. Doc. S/864/(1993).

105. See, e.g., Ruth Wedgwood, *Responding to Terrorism: The Strikes against bin Laden*, 24 YALE J. INT'L L. 559 (1999).

[I]t should be pointed out that, for an armed attack to justify countermeasures of self-defence under Article 51, it need not be committed by another state. Ordinarily, the perpetrator of the armed attack is indeed a foreign state as such. Yet, in exceptional circumstances, an armed attack—although mounted from the territory of a foreign state—is not launched by that state.¹⁰⁶

Referring to the case when the Security Council had employed the term “armed attacks” characterizing raids by mercenaries from the territory of Angola and condemning Portugal for not preventing these raids, Dinstein emphasizes that “armed attacks by non-state actors are still armed attacks, even if commenced only from—and not by—another State.”¹⁰⁷

Giorgio Gaja, analyzing the 11 September attacks against the United States in light of the references to the right to self-defense in Security Council resolutions and the NATO decision activating Article 5 of the Washington Treaty, cautiously opines that “depending on the factual circumstances, the definition of the terrorist acts of September 11th as “armed attack” may not necessarily imply that the concept actually refers to acts that are not attributable to a state.”¹⁰⁸ However, the US demands addressed to the Taliban (which itself was a non-recognized authority that various Security Council resolutions had called “the Afghan faction known as the Taliban, which also calls itself the Islamic Emirate of Afghanistan”)¹⁰⁹ to surrender Osama bin Laden and other al Qaeda terrorists seem to indicate that the United States, at least initially, did not consider that Afghanistan (or even the Taliban for that matter) was directly responsible for the attacks.¹¹⁰ Only the refusal of the Taliban regime to comply with the US demands and their active defense of the Qaeda network led to the use of force in self-defense against both al Qaeda and the Taliban.

106. See DINSTEIN, *supra* note 6, at 192.

107. *Id.* at 214.

108. Giorgio Gaja, *In What Sense was There an “Armed Attack?”*, EUR J. INT’L L. DISCUSSION FORUM at 1 (2002), available at http://www.ejil.org/forum_WTC/ny-gaja.html (Nov. 30, 2002).

109. See, e.g., S. C. Res. 1267, U.N. SCOR, 54th Sess., U.N. Doc. S/1267/(1999).

110. The United States insisted that the Taliban: “Deliver to United States authorities all the leaders of Al Qaeda who hide in your land. Release all foreign diplomats, including American citizens, you have unjustly imprisoned. Protect foreign journalists, diplomats, and aid workers in your country. Close immediately and permanently every terrorist training camp in Afghanistan, and hand over every terrorist and every person in their support structure to appropriate authorities. Give the United States full access to terrorist training camps, so we can make sure they are no longer operating.” President George W. Bush, Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11, 37 WEEKLY COMP. PRES. DOC. 1347 (Sep. 20, 2001).

The current war against terrorism, of course, differs from previous wars in the sense that though there was a clear victim of the attack—the United States (or rather several victims because, e.g., hundreds of British and other nationals were also attacked), there was no *prima facie* perpetrator. This is one of the peculiarities of 21st century wars, that is not without precedent. Acts of so-called indirect aggression¹¹¹ do not always have an obvious author since it may be difficult to attribute acts of paramilitary or irregular forces to a specific state. However, indirect aggression, as enshrined in the 1974 Definition of Aggression, presumes the existence of an aggressor state, which instead of using its regular armed forces perpetrates acts of aggression through irregular armed bands, guerrilla forces, etc. In such a case, irregulars are agents of an aggressor state.

Contemporary terrorism is even more complicated. Acts of indirect aggression are usually, though not necessarily always, carried out against neighboring states and notwithstanding that there may be difficulties in attributing acts of irregulars to the state from the territory of which these attacks are launched, the identity of the state is not, as a rule, in question (what may be questioned is whether that state is an aggressor or not). Attacks like those of September 11th may not even have a *prima facie* culprit, state or non-state.

However, this does not mean that an aggressor does not exist. Such a conclusion would not only be contrary to common sense, it is not one required by contemporary international law.

In a sense, military responses to terrorist attacks do not raise legal, philosophical, moral or even political issues as complicated as, for example, humanitarian intervention does. First of all, notwithstanding its specific and even non-traditional features, terrorist attacks originating from abroad can still be qualified as armed attacks giving rise to the inherent right to self-defense. Together with military operations to rescue one's nationals abroad, such anti-terrorist operations may be qualified as special (non-traditional) self-defense operations. Secondly, military responses to terrorist attacks are today politically less controversial than, for example, the use of force to protect human rights in foreign countries. Although some states still refuse to condemn specific terrorist attacks and even try to find justifications for some of them

111. See Article 3(a) of the Definition of Aggression of 1974 which states that “the sending by or on behalf of a state of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another state of such gravity as to amount to the acts listed above, or its substantial involvement therein,” is an act of aggression. See 1974 U.N. Definition of Aggression, 29 U.N. GAOR, Supp. 31, art. 3(a), U.N. Doc. A/RES/3314 (XXIX) (1975) [hereinafter Definition of Aggression].

(e.g., most Arab states still refuse to condemn, without any qualification, Palestinian terrorism), the traditional support for the idea that a just cause (e.g., national-liberation struggle) justifies the use of terrorist methods is becoming weaker.¹¹²

If the right to the use of force in self-defense is dependent on the existence of an armed attack (or arguably in the case of so-called anticipatory or interceptive self-defense in anticipation of such an attack), the modalities of the exercise of this right depend on the characteristics of the armed attack.¹¹³ Therefore, we have to consider the specific and distinctive features of terrorist attacks that would condition specific methods and means of defensive responses.

In the case of responses to terrorist attacks, the question of immediacy may have to be addressed differently. As the source of attacks may not be immediately obvious and preparations for responses that often have to be secret may take time (gathering intelligence data, building coalitions etc.), the period between the attack and responsive measures may be rather substantial. In that respect, the situation may be compared to one that existed, for example, after the Iraqi invasion of Kuwait. Although for almost half a year there were no active military operations going on after the Iraqis had occupied Kuwait, the right by Kuwait and its allies to use force in self-defense was not extinguished (maybe only suspended for a while due to the active involvement of the Security Council). The Gulf War did not start on January 15th, 1991 when the Coalition launched Operation DESERT STORM. It started on August 1st, 1990 when the Iraqi troops attacked and occupied Kuwait. Similarly, the war against terrorist attacks started on September 11th at 8:45 when the first aircraft hit the World Trade Center, if not earlier had the United States been able to use its right to anticipatory or interceptive self-defense.

112. In 1978 the statement by Ambassador Harriman of Nigeria, who was Chairman of the Ad Hoc Committee on the Drafting of an International Convention Against the Taking of Hostages, disputed the use of the word 'terrorist' describing the Palestinian struggle against Israel: "Here I wish to reiterate that my Government does not believe that any liberation movement should damage its prestige by taking hostages, and that the noble fights for liberation should be based on very high values. I believe that the PLO at no stage in its war for liberation has abused privilege; at no stage has it terrorised; it is at war." Ambassador Harriman is *quoted in* William O'Brien, *Reprisals, Deterrence and Self-Defense in Counterterror Operations*, 30 VA. J. INT'L L. 449 (1990). If at that time, the Soviet Union, a permanent member of the Security Council, wholeheartedly subscribed to this statement, today Russia, which is facing separatist terrorism in Chechnya, as well as Central Asian successor states to the Soviet Union, adamantly reject such assessments of 'liberation' movements.

113. DINSTEIN, *supra* note 6, at 192–221.

The question of immediacy is close also to two other issues: use of force in anticipation of an attack and defensive reprisals. Often military responses to terrorist attacks have to draw a fine balance between two controversial modalities of the use of military force in self-defense—the Scylla of anticipatory self-defense and the Charybdis of reprisals. As Gregory Travalio writes, “if the anticipated action by terrorists is not sufficiently imminent, the right to use force is not available for purposes of deterrence. On the other hand, if past terrorist actions by a group are too remote in time, the response by force is likely to be characterized as an illegal reprisal.”¹¹⁴ Because terrorist warfare usually consists of a series of relatively small-scale attacks that often need to be prevented by measures that combine some elements of retaliation (since a response comes after the attack) and anticipation (since a response comes in anticipation of a new attack), the exercise of the right to self-defense against terrorist attacks requires at least some (sometimes quite considerable) practical use of concepts of a anticipatory self-defense and defensive reprisals.

The need to use preventive force against terrorists becomes even more obvious when we take into consideration the fact that terrorists do not attack military targets that are usually well defended and that, at least in principle, should be ready to defend themselves when attacked. Anne-Marie Slaughter and William Burke-White observe that “in our previous understanding of war, it was possible to attack the vital life within a nation by first destroying the army that protected it.”¹¹⁵ Today, terrorists avoiding military objectives intentionally target defenseless civilians and civilian objects, i.e., non-combatants; they choose soft targets that would be almost inevitably destroyed if attacks were not prevented. Therefore, in many cases preventive, anticipatory or interceptive self-defense is the only effective method of preventing terrorists from achieving their goals.

Interceptive self-defense seems to indicate that only when an attack is already launched is it legitimate to intercept (e.g., intercepting missiles on their boost trajectories but not destroying them in their launching silos). In the case of traditional inter-state conflicts this is probably a prudent interpretation of the right to self-defense. However, today and in the context of self-defense against terrorist attacks (especially if the latter have access to WMD), preventive or anticipatory measures seem justified. As terrorism is usually a continuous process being carried out in the murky underworld, it would be too late or

114. Gregory Travalio, *Terrorism, International Law, and the Use of Military Force*, 18 WIS. INT’L L. J. 165 (2000) [hereinafter Travalio].

115. Slaughter & Burke-White, *supra* note 77, at 3.

risky to rely only on the interception of individual attacks that have been already irrevocably launched without attempting to destroy terrorist bases, supply lines, training camps and other similar facilities.

The necessity to use military force in self-defense against terrorist attacks shows that the dividing line drawn, for example, by the International Court of Justice in the *Nicaragua Case* between armed attacks and “less grave forms” of the use of force,¹¹⁶ is no longer tenable, if it ever was.¹¹⁷ Dinstejn, referring to J.L. Hargrove and J.I. Kunz, has rightly emphasized that “in reality, there is no cause to remove small-scale armed attacks from the spectrum of armed attacks. Article 51 in no way limits itself to large, direct or important armed attacks.”¹¹⁸ The same criticism also applies to Article 3(g) of the Definition of Aggression, which emphasizes that actions by armed bands, groups, irregulars or mercenaries “sent by or on behalf of a state,” which carry out acts of armed force against another state “of such gravity as to amount to an actual armed attack conducted by regular forces” could be considered as acts of aggression.¹¹⁹ Why only attacks of such gravity? Why this difference? It is the requirement of proportionality between a legitimate purpose for the use of force and the character and scale of force necessary to achieve that purpose that has to take care that relatively minor incidents involving the use of military force do not escalate (sometimes unintentionally) into whole-scale wars.

Antonio Cassese recently observed that:

As to the specific question of how to react to terrorist attacks, some states (notably Israel, the United States and South Africa) argued in the past that they could use force in self-defence to respond to such attacks by targeting terrorist bases in the host country. This recourse to self-defence was predicated on the principle that such countries, by harbouring terrorist organisations, somehow promoted or at least tolerated terrorism and where therefore “accomplices”: they were responsible for the so-called indirect armed aggression. However, the majority of states did not share let alone approve this view. Furthermore, armed reprisals in response to small-scale use of force short of an “armed attack” proper, have been regarded as unlawful both against states and against terrorist

116. Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. US*), Merits, I.C.J. Reports 1986, para. 191 [hereinafter *Nicaragua*].

117. Many authors have criticized this distinction drawn by the ICJ between armed attacks and “mere border incidents.” See, e.g., ROSALYN HIGGINS, PROBLEM AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT, 250–51, (1994); DINSTEIN, *supra* note 6 at 192.

118. DINSTEIN, *supra* note 6 at 192.

119. Definition of Aggression, *supra* note 112, art. 3(g).

organisations. The events of 11 September have dramatically altered this legal framework.”¹²⁰

This traditional attitude that may have been prevailing before 9/11 was predicated on the paradigm of traditional state-to-state conflicts but today it does not correspond to the character and seriousness of terrorist threats.

In the case of terrorist attacks the immediate gravity of a single attack may not be very significant indeed either because this is a link in a chain of attacks, or even more importantly, because in the case of a terrorist attack the immediate target is not the only and even the most important objective. As Michael Reisman writes:

terrorism, like any other act of unauthorised violence, has three expanding circles of effects including: an immediate effect of killing or injuring people, who are deemed, either for all purposes or in that context, to constitute an internationally prohibited target; an intermediate effect of intimidating a larger number of people and thereby influencing their political behaviour and that of their government; and an aggregate effect of undermining inclusive public order.¹²¹

This means that legal frames of responses to terrorist attacks cannot be tailored on the basis of the experience of the World Wars (or even the Gulf War for that matter) only.

In order to provide for effective responses to terrorist attacks, international law cannot prohibit the use of military force in self-defense in cases that the ICJ may have defined as “less grave forms.”¹²² At the same time, responses to terrorist attacks may combine significant elements of deterrence, anticipation and reprisal. The changing character of *jus ad bellum*, it seems, will most probably lead in the short run towards the emergence of a kind of flexible (soft) *jus ad bellum*—*jus ad bellum* in which the concept of legitimacy instead of legality is central, where the impact of a few specially interested states (or their organizations such as NATO, G8 or G9) is crucial, where the legitimizing role of the Security Council (especially its P5) remains noticeable, where the practice of some states and *opinio juris* of other states may considerably differ and where

120. Antonio Cassese, *Terrorism Is also Disputing some Crucial Categories of International Law*, 12 EUR. J. INT'L L. 996 (2001).

121. W. Michael Reisman, *International Legal Responses to Terrorism*, 22 HOUS. J. INT'L L. 1, 6–7 (1999).

122. Nicaragua, *supra* note 118, at para. 191.

the frontiers between interstate and intrastate conflicts is becoming more and more blurred. Such a flexible set of guidelines enjoying consensus of the majority of states and being supported by the world public opinion creates relative predictability and is therefore preferable to “hard,” definitive and clear rules that are not observed in practice.

Terrorist Organizations and States Supporting Them

Another specific feature of military responses to terrorist attacks arises from the link between terrorist organizations and states in the territory, or from the territory, of which they operate. Somewhat different is the situation when a state supports terrorists (e.g., financially, logistically, politically, ideologically or otherwise) but its territory is not used as a basis for launching terrorist attacks. Differences, however, do not mean that the latter can eschew responsibility for its support of terrorists.

The fact that non-state entities are directly responsible under international law for armed attacks and that states have the right to use force in self-defense against such entities does not mean that the states from which these terrorists operate are not themselves responsible under international law. Depending on the degree of support given to, or control exercised by, a state over a terrorist organization such a state may be directly responsible for armed attacks carried out by terrorists.

It has been argued, however, that a mere tolerance of the presence of terrorist groups in the territory of a state or even encouragement of their activities is an insufficient connection to constitute an armed attack by that state.¹²³ It has been asserted that the state must exercise actual control over a terrorist organization to have the latter’s acts attributed to the state.¹²⁴

In the *Nicaragua* Case the ICJ held, for example, that assistance in the form of providing weapons, logistical or other support did not amount to an armed attack.¹²⁵ The Court found that by training, arming, equipping, financing and supplying the Contra forces or otherwise encouraging, supporting and aiding military and paramilitary activities in and against Nicaragua” the United States had been “in breach of its obligation under customary international law not to intervene in the affairs of another state.”¹²⁶ The Court also said that only “by

123. See, e.g., RICHARD ERICKSON, LEGITIMATE USE OF FORCE AGAINST STATE SPONSORED TERRORISM, 134 (U.S. Air War College 1989).

124. Francis A. Boyle, *Military Responses to Terrorism: Remarks of Francis A. Boyle*, 81 PROC. AM. SOC’Y INT’L L. 288 (1987).

125. *Nicaragua*, *supra* note 119, at para. 195.

126. *Id.*, para. 292 (3).

those acts of intervention referred to in subparagraph (3) (i.e., aiding the contras and otherwise encouraging and supporting military and paramilitary activities in and against Nicaragua),” which involved “the use of force,” had the United States acted “in breach of its obligation under customary international law not to use force.”¹²⁷ Here the Court clearly made a distinction between the breach of the non-use of force principle and the concept of armed attack since it did not consider that any support by the United States to the Contras constituted an armed attack. However, it is not clear at all as to the kind of force (used by whom?) the Court spoke of in paragraph 292 (4). If it is force used by the Contras against the Sandinista government then should not it be quite obvious that the US support as a whole should have been in breach of the non-use of force principle?

Judge Stephen Schwebel in his dissenting opinion concluded that “the Judgement of the Court on the critical question of whether aid to irregulars may be tantamount to an armed attack departs from accepted—and desirable—law.”¹²⁸ Judge Sir Robert Jennings expressed a similar view stating that:

it may be readily agreed that the mere provision of arms cannot be said to amount to an armed attack. But the provision of arms may, nevertheless, be a very important element in what might be thought to amount to armed attack, where it is coupled with other kinds of involvement. Accordingly, it seems to me that to say that the provision of arms, coupled with logistical or other support is not armed attack is going much too far.¹²⁹

Although it seems that during the Cold War, state practice did not consider assistance in the form of arming and financing armed groups that operated in other countries as armed attacks by supporting states (because both parties of the Cold War used to support financially and militarily their proxies), today there are rather strong arguments in favor of reconsidering such a condescending posture towards states that support terrorist groups. That international law has not always had such a complacent attitude towards attributability to states of acts of non-state entities was recently reinforced by the International Criminal Tribunal for the Former Yugoslavia (ICTY).

The Appeals Chamber of the ICTY in its Judgement of 15 July 1999 in the *Dusco Tadic* case found that “a first ground on which the *Nicaragua* test as such may be held to be unconvincing is based on the very logic of the entire

127. *Id.*, para. 292 (4).

128. *Nicaragua*, *supra* note 119, at Dissenting Opinion of Judge Schwebel, para. 155.

129. *Nicaragua*, *supra* note 119, at Dissenting Opinion of Judge Jennings, para. 543.

system of international law on State responsibility.”¹³⁰ The Chamber stated that under this logic

States are not allowed on the one hand to act *de facto* through individuals and on the other to disassociate themselves from such conduct when these individuals breach international law. The requirement of international law for the attribution to States of acts performed by private individuals is that the State exercises control over the individual. The degree of control may, however, vary according to the factual circumstances of each case. The Appeals Chamber fails to see why in each and every circumstance international law should require high threshold for the test of control.¹³¹

The Chamber found that “the “effective control” test propounded by the International Court of Justice is at variance with international and State practice.”¹³² References to state practice collected over many years, *inter alia*, in various ILC reports on the Draft Articles on State Responsibility seem to support the position of the Appeals Chamber of the ICTY.

Although one of the important features of the changing international landscape is the increasing role (both positive and negative) of non-state actors, the world still is, and in the foreseeable future will remain, divided between sovereign states. Therefore, terrorists necessarily act (preparing for their attacks, training, receiving financial and other support) from the territory of some states even when they do not act on behalf of, or are not even supported, by any state. Such states are either unable or unwilling¹³³ to prevent non-state terrorist organizations using their territory for the purposes of carrying out attacks against other states. Thereby they are committing, using the language of the Draft Articles on State Responsibility recently adopted by the ILC,¹³⁴ internationally wrongful acts either by action (condoning or supporting terrorists)

130. See Prosecutor v. Tadic, Judgement of 15 July 1999 in the Appeals Chamber, at para 116, (ICTY Appeals Chambers, Jul. 15, 1999).

131. *Id.*, para. 117.

132. *Id.*, para. 124.

133. The term ‘unwilling’ should here include not only tolerance of the presence of terrorist organizations and sympathy for their cause but also active support, assistance as well as various degrees of control.

134. See generally *Draft Articles*, *supra* note 99.

or by omission (not preventing attacks from its territory against another state).¹³⁵ At the same time, as Gregory Travalio writes,

although this may not necessarily preclude the use of military force in response to a terrorist attack emanating from such a state, the impotence of a state to control international terrorist organisations would not be an armed attack against another state, and, therefore the use of force in response is not expressly sanctioned by Article 51.¹³⁶

However, this only means that the use of force is not sanctioned against such an impotent state. This does not mean that use of force would be unlawful against the terrorist group which is present and operates in the territory of that state. If a state is impotent to prevent the presence of terrorist groups in its territory and their attacks against third states it must not prevent a victim state or its allies from exercising their right to individual or collective self-defense in response to armed attacks by terrorists. In such a case, the state from the territory of which a terrorist group operates is under the obligation not to hinder the victim state in the exercise of its right to individual or collective self-defense in the territory that it is unable to control. If such a state tries to prevent the exercise of the right to use force in self-defense against the terrorist organization, it becomes an accomplice of the terrorist organization and in that case it is not important whether the state supports terrorists, or vice versa the latter, as it seems to have been the case with al Qaeda in Afghanistan, control the state. Otherwise, the impotence of territorial states would lead to impunity of terrorist organizations.

Conclusion

Simplifying a bit, the law of self-defense has, at least until recently, corresponded to the strictly inter-state nature of international society mostly in its bilateral manifestation. The law of collective security corresponds to rather feeble shoots of the supra-state elements in international society. But what about uses of force against terrorists or to protect fundamental human rights? These seem to be contrary to the very nature of a strictly inter-state system. However, the contemporary international system itself is less and less strictly

135. Article 2 of the Draft Articles states “there is an internationally wrongful act of a State when conduct consisting of action or omission’ is attributable to the State and constitutes a breach of an international obligation of the State.” *Id.* at art. 2.

136. See Travalio, *supra* note 115, at 153.

an inter-state one. One of the consequences of such a change in the international system is the impossibility of seeing states as “black boxes.” If states traditionally collided as “billiard balls” (from the point of view of international law) in the “armed attack—self-defense” paradigm they could eventually disengage and continue, at least for a while, to co-exist more or less peacefully (often until the next conflict) without changing their internal, or even external, characteristics. Historically, this is what usually happened. The relatively recent Iraq-Iran war, for example, ended in such a way. However, even in the inter-state “armed attack—self-defense” paradigm it may be necessary, in order to break the cycle of violence, to change internal characteristics of some of the participants in the conflict. The de-nazification of Germany or demilitarization and democratization of Japan after WW II may serve as examples of such necessary changes. Even today there are potential, simmering or actual conflicts between states that could find peaceful and durable solution only if participating states (all or some) radically change their policies, including internal ones. For example, Iraq was defeated in 1991 as a result of Operation DESERT STORM but notwithstanding measures requested from, and sanctions undertaken against it, the regime in power in Iraq is the same as it was in 1990 and the threats it constitutes to the regional and world security are therefore the same too. To fight against terrorists without addressing circumstances conducive to the rise of terrorism or intervening for the sake of human rights without being ready to undertake considerable efforts focused on state-building will be in most cases simply a Sisyphean toil. As Dmitri Trenin, writing on the future place and role of Russia in the world and referring, *inter alia*, to the Russian problems with Islamic militants, observes,

there is no acceptable alternative to fighting Islamic terrorism. At the same time, cultural and humanitarian dialogue across that divide is a must, and the development of economic links, including new communications along both East-West and North-South axes, is one of the few instruments available to encourage modernization and help resolve or manage the various conflicts.¹³⁷

I prefer to discuss the use of force against terrorists and not against terrorism. Fighting terrorism or waging a war against terrorism (which in any case is a non-legal concept) goes far beyond *jus ad bellum* or *jus in bello*, for that matter. Fighting terrorism implies, besides fighting terrorists through military, financial or law-enforcement means, also addressing the conditions conducive

137. DIMITRI TRENIN, *THE END OF EURASIA. RUSSIA ON THE BORDER BETWEEN GEOPOLITICS AND GLOBALIZATION*, 196 (2002).

to the emergence and flourishing of terrorism. One of the peculiar features of the fight against terrorism is that tough military or, depending on circumstances, law enforcement measures, practically always have to be paralleled by the search for political solutions to problems exploited by terrorists or by changes in the social and economic conditions that are conducive to terrorism.

Looking at the character and causes of some of the most violent contemporary conflicts, states, and the societies they represent, have to become in some important respects more similar to each other than they are today. Cultural diversity is, of course, a source of the rich tapestry of the world. However, when huge developmental gaps are taken for cultural differences, denying at the same time, that certain cultural factors condition the existence of these gaps, that such factors may be also a serious source of the wealth of some societies and the poverty of others, serious sources of conflicts cannot be ignored. If people, for example, in Saudi Arabia or other Islamic states have only two choices—the corrupt and authoritarian regimes or Islamic fundamentalism—these societies will remain a fertile soil for terrorism. Of course, all religions have always had and many still have this totalitarian exclusivist trend. As Hamid Enayat has written, “if Islam comes into conflict with certain postulates of democracy it is because of its general character as a religion. . . . An intrinsic concomitant of democracy . . . involves a challenge to many a sacred axiom.”¹³⁸ And Rabbi David Hartman writes: “[a]ll faiths that come out of the biblical tradition—Judaism, Christianity and Islam—have the tendency to believe that they have the exclusive truth.”¹³⁹ However, in contradistinction to Christianity, Islam has not gone through what Francis Fukuyama has called the Protestantisation of Catholicism¹⁴⁰ or the secularization of religious worldviews. Bassam Tibi writes:

[i]n the Middle East as well as in other parts of the World of Islam, there has never been a process of structural change underlying a substantive shift in worldview from a religious one to a secular one, as did occur in the historical process that took place in Europe. Given the community and dominance of the Muslim’s worldview there has never been a genuine process of secularisation in the Middle East underlain by secular ideologies.¹⁴¹

138. HAMID ENAYAT, *MODERN ISLAMIC THOUGHT*, 126 (1982).

139. *Id.*

140. FRANCIS FUKUYAMA, *TRUST: THE SOCIAL VIRTUES AND THE CREATION OF PROSPERITY*, 41 (1995).

141. Tibi, *supra* note 33, at 97.

Secularization of religious worldview has helped Western societies to change (modernize) in response to natural and social challenges. Returning to basics is never an adequate response to any new challenge and only adequately responding to constant challenges are societies able to develop and flourish. Modernization, including democratization, the development of human rights, including freedom of expression, and equality between sexes, is a *conditio sine qua non* of the development of Islamic and other societies in the so-called developing world. Karim Raslan, a Malaysian lawyer, writes that:

[t]he moral bankruptcy of militant Islam as embodied by the Taliban, as well as its abject failure in socio-economic terms, should embolden the leaders of moderate, predominantly Muslim nations such as Turkey, Indonesia and Malaysia in their struggle against religious obscurantism and backwardness. Needless to say, Saudi Arabia, as an absolute monarchy with no concern for civil liberties, does not constitute a model Islamic polity.¹⁴²

He also correctly points out that reforms must be driven from within the Islamic world. It is doubtful whether those Islamic scholars who, as Karim Raslan writes, try to “extract the prophetic truths from the Koran to show the inherent compatibility of modern-day concerns with sacred texts,”¹⁴³ can do what Christian scholars failed in doing. Bassam Tibi has written that:

[t]he predicament of Islamic fundamentalists vis-à-vis modernity has in fact become an expression of their ambiguity: on the one hand they seek to accommodate instrumentally all or most of the material achievements of modernity (that is, science and technology) into Islamic civilisation; on the other hand, they reject vehemently the adoption of the man-centred rationality that has made these achievements possible.¹⁴⁴

As a result of that we have post-modern weapons in pre-modern hands. Bassam Tibi further writes that “secular cultural modernity is worth defending against the predations of religious fundamentalisms,” and he and Ernest Gellner share the conviction that “reason and enlightenment need also be protected from the intellectual adventures of postmodernism.”¹⁴⁵ I agree.

142. Karim Ralsan, *Now a Historic Chance to Welcome Muslims into the System*, INT'L HERALD TRIBUNE, Nov. 27, 2001, at 8.

143. *Id.*

144. Tibi, *supra* note 33, at 118.

145. *Id.* at 47.

Western political correctness that is not unrelated to the post-colonial sense of guilt and shame for injustices committed against non-Western peoples sometimes reminds of the ostrich who, facing a threat, hides its head in sand. Something like that happens when some Western liberals discuss, or face, threats from culturally and religiously different sources. It is correct, (and also politically correct), to say that poverty and injustice are conducive to terrorism (whether they are root-causes or not, is another matter). However, it is also correct (but politically incorrect), to say that often poverty and injustice are due not only and not so much to the colonial or neo-colonial inheritance, but are of endogenous, and not exogenous, origin. Chris Brown writes that:

the West's handling of the religious dimension of the current conflict has been based on a rather irritating, if perhaps politically understandable, double standard. Christians such as Tony Blair and George W. Bush—undeniably sincere in their beliefs, but living in a world where religious conviction is tinged with irony—cannot express their own deeply held convictions in explicitly Christian terms for fear of alienating the decidedly un-ironic beliefs of their coalition partners in Pakistan and the Arab world. The sensibilities of the latter—however irrational—have to be respected; and, indeed, respect in this case seems to mean actually pandering to irrational. The implicit assumption seems to be that it would be both unfair and unsafe to subject Muslim beliefs, attitudes and behaviour to the kind of robust criticism common in Western societies.¹⁴⁶

Brown calls it “reverse racism” that is expressed, for example, in the words of British correspondent of *The Independent* Robert Fisk who, as a Westerner, was beaten up in Afghanistan, but who seemed to understand and justify the behavior of his tormentors “given the indignities and violence to which they had been subjected.”¹⁴⁷ As New Yorkers seem not to be justified in beating up Muslims, the obvious explanation, writes Brown, is that Muslims as individuals cannot be held morally responsible for their acts in the way New Yorkers can.¹⁴⁸ Politicians and diplomats may be justified (naturally not always lest it become a bad habit) in avoiding straight talk when building shaky but necessary coalitions but journalists and especially academics have to try to uncover truths however unpleasant or inconvenient they may be. Pretending that religious

146. Brown, *supra* note 63, in *WORLDS IN COLLISION*, *supra* note 47, at 295.

147. Robert Fisk, *My Beating by Refugees is Symbol of the Hatred and Fury of the Filthy War*, *THE INDEPENDENT*, Dec. 10, 2001, at 1.

148. Brown, *supra* note 63, in *WORLDS IN COLLISION*, *supra* note 47, at 295.

fundamentalism has nothing to do with the religion of which it is one of the trends does not help.

The war against terrorism requires moral clarity, intellectual sophistication and military toughness—qualities that are not always in harmonious relationship. This makes that war especially difficult. However, only addressing all the conditions that are conducive to the emergence and flourishing of terrorism, searching for solutions to political situations and crises that are exploited by terrorists but that often are real and serious, using available and creating new criminal justice mechanisms and, finally, when necessary intelligently resorting to military coercion, is it possible to control terrorism.