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# 'War'? Legal Semantics and the Move to Violence

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## Abstract

*The use of the word 'war' to describe the anti-terrorist efforts in the wake of the 11 September attacks has gone virtually unchallenged. The term, however, is not innocent and carries far-reaching implications for international law. The article examines how its use can be said to fit into a broader strategy of legitimization of armed violence. 'War', it is argued, prepares the ground for what is basically an ideal-typical state of exception, that which portrays the sovereign as the ultimate saviour of liberalism at home. But the domestic implications of the 'war rhetoric' are probably less important than the international ones, where 'war' can be manipulated to provide an escape route from the constraints of international law. This it does by reframing both the temporal and spatial coordinates of self-defence in a way that fundamentally loosens the framework of collective security. By the time the term's use has been ratified by law, it will have served to exclude or distort alternative ways of understanding and dealing with the problem of terrorism, namely, as a criminal and political issue. Whatever else military action against terrorist targets may achieve, it is far from clear that placing such action under the banner of 'war' will serve the cause of suppressing terrorism.*

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The essence of all power is the right to define with authority, and the major stake of the power struggle is the appropriation or retaining of the right to define.<sup>1</sup>

What I do know is the standard words jangle in my head when I hear them, and then I put them onto the subject they're relating to . . . and I think to myself, 'Gee, that isn't really as good a word as we ought to be able to find.'<sup>2</sup>

## 1 Introduction

It is an intriguing aspect of the current crisis that some of those involved in or commenting on it are at times so ingenuous about highlighting the existence of a 'propaganda war'.<sup>3</sup> After all, surely the point of propaganda is that it does not speak its name, and there would seem to be something slightly self-defeating about presenting one's own value-laden talk as the assertion of more or less self-serving truths.<sup>4</sup> Yet perhaps this is just one more example of something that is not quite what it seems since 11 September. As critics might point out, it may not be the propaganda that is being waged as a war, so much as the 'war' itself that is a by-product of the propaganda.

To be sure, if events or eras take their meaning through the words used to describe them,<sup>5</sup> then few seem to have captured imaginations as much as the *meme* of 'war'.<sup>6</sup> 'WAR', it seems, is omnipresent: in Presidential declarations,<sup>7</sup> in the mainstream media<sup>8</sup> and even in the writings of some legal commentators.<sup>9</sup> So much so, in fact, that even those opposed to the idea of a 'war against terror' have formulated their critique under the familiar banner of anti-war protests — in a (perhaps not so uncommon) case of nodding precisely at what one purports to oppose.

<sup>1</sup> Zygmunt Bauman, *The Individualized Society* (2001) 208.

<sup>2</sup> Donald Rumsfeld, Department of Defense news briefing, 20 September 2001. See [www.defenselink.mil/news/Sep2001/t09202001\\_t920ruma.html](http://www.defenselink.mil/news/Sep2001/t09202001_t920ruma.html).

<sup>3</sup> See, for example, 'The Propaganda War', *Economist*, 4 October 2001. Asked on several occasions whether he was satisfied with the current course of the 'propaganda war', Secretary of Defense Donald Rumsfeld declared that he was not, thus at least implicitly conceding that the qualification had merit. See, for example, Brokaw, 'Rumsfeld Counsels Patience in War', NBC News, 30 October 2001.

<sup>4</sup> Although, for a characteristic display of ambiguity, see Snow, 'Secretary Rumsfeld Interview with Fox News Live', Fox News, 8 October 2001, [www.defenselink.mil/news/Oct2001/t10082001\\_t1008fox.html](http://www.defenselink.mil/news/Oct2001/t10082001_t1008fox.html) (making the point that 'You know, ultimately, it's not propaganda; it's the truth').

<sup>5</sup> For a recent — and probably, since 11 September, already outdated — exercise in defining the new era, see 'Naming a New Era', 119 *Foreign Policy* (2000) 29.

<sup>6</sup> See Hancock, 'A War of Words', *The Recorder*, 3 October 2001.

<sup>7</sup> After an initial and short-lived reaction that branded the 11 September acts as 'criminal', 'war' became the standard White House term. See, for example, Bush, 'Address to the Nation', 11 September 2001, [www.whitehouse.gov/news/releases/2001/09/20010911-16.html](http://www.whitehouse.gov/news/releases/2001/09/20010911-16.html).

<sup>8</sup> It has, for example, become CNN's standard banner headline when dealing with the attacks.

<sup>9</sup> Kanner, 'It's War, No Time for Courtrooms', *National Law Journal*, 24 September 2001.

At the most basic rhetorical level, of course, the term serves to denote magnitude: put simply, the problem of terrorism must be a big one since it is one worth going to war about. To declare war on terror, as one would declare war on drugs (or perhaps, more inoffensively, on poverty), is to signify resolve.<sup>10</sup> But, as a somewhat dismayed Michael Walzer remarked, 'military action is what everybody wants to talk about — not the metaphor of war, but the real thing'.<sup>11</sup> And, indeed, with every CNN viewer in the world invited to become his own virtual chief-of-staff, few events in recent history have solicited to such a degree the morbid adrenaline of our societies' feeble pulse.<sup>12</sup> Assuming it comes to that, however, is 'war' really the most appropriate term to describe the current crisis, and indeed will its use help the urgent efforts to deal with terrorism?

From the international lawyer's perspective, 'war', as has often been remarked,<sup>13</sup> is a bit of a misnomer. Of course, international law is haunted by its shadow, and one is always a bit more dependent on one's negative image than one would like to admit. The discipline, after all, once owed its *summa divisio* to the distinction between a law of peace and a law of war, still the distinguishing mark of Oppenheim's classic volumes on many an international lawyer's shelf.<sup>14</sup> But 'war' is supposed to have vanished long ago, with the League of Nations and the outlawing of aggression. In the UN Charter itself, 'war' remains almost unmentioned, except where it is referred to negatively.<sup>15</sup> Even when it comes to the 'laws of war', international lawyers prefer to speak of '*armed conflicts*' of an 'international' or 'non-international' nature — and 'international humanitarian law', with its soothing, almost effete touch, has gone a long way to becoming the favoured expression. And then, a puzzle to lawyers of all persuasions, is the vexing problem that war is supposed to be waged against *states*, not against social phenomena, so that none of the unfolding events would seem to fit into law's neat categories.

So why use the term at all? The obvious explanation is that it is not used in any legal sense at all, but as a kind of general and politically aesthetic metaphor. How typically conceited of international lawyers to think that the word is used with them in mind. And, indeed, Tony Blair has insisted, referring to the problem of a hypothetical war

<sup>10</sup> This is the more sophisticated understanding of the use of the word among Washington policy-makers. As Colin Powell put it, '[we are] speaking about war as a way of focusing the energy of America and the energy of the international community'. See 'Powell Very Pleased with Coalition-Building Results', 13 September 2001, [usinfo.state.gov/topical/pol/terror/01091366.htm](http://usinfo.state.gov/topical/pol/terror/01091366.htm).

<sup>11</sup> Walzer, 'First, Define the Battlefield', *New York Times*, 21 September 2001.

<sup>12</sup> See, generally, on the media's approach to the war, Der Derian, '9–11: Netwar and Mime-Net (II)', INFOinterventions, 4 November 2001, [www.watsoninstitute.org/infopeace/911/jdd\\_netwar2.html](http://www.watsoninstitute.org/infopeace/911/jdd_netwar2.html).

<sup>13</sup> Slaughter, 'A Defining Moment in the Parsing of War', *Washington Post*, 16 September 2001; Pellet, 'Non, ce n'est pas la guerre!', *Le Monde*, 20 September 2001; Pellet, 'No, This is Not War!', EJIL Discussion Forum, [www.ejil.org/forum\\_WTC/ny-pellet.html](http://www.ejil.org/forum_WTC/ny-pellet.html).

<sup>14</sup> See A.W. Watts and R. Jennings, *Oppenheim's International Law*, vol. I ('Peace') (1996) and vol. II ('Disputes, War and Neutrality') (1955). Interestingly, the forthcoming edition of volume II will switch to the title 'Armed Conflict'.

declaration, that: ‘*Whatever the technical or legal issues . . . the fact is that we are at war with terrorism.*’<sup>16</sup>

Certainly, this is the accepted rationale, and even some of those lawyers who rightly identify the technical glitch fail to see what the legal fuss is about and instead underline the extent to which the word sends, essentially, the wrong political message.<sup>17</sup> But the coincidence is probably a bit too fortuitous to be innocent. If one appreciates the power that is in words, the fact is that, for all intents and purposes, ‘war’ as a word is likely to influence legal debate on the use of force — and statesmen know this better than any.<sup>18</sup> In view of the previous care taken not to use the ‘W’ word, one cannot help thinking that there is more than simply a quantitative difference between the loosely and variously labelled skirmishes of the past, and the embracing of a word that belongs more to history books than to legal ones. Indeed, ‘war’ as a term of art is so conspicuously absent from the Charter<sup>19</sup> that those not convinced of the absolute purity of the anti-terrorism coalition’s intentions might well be inclined to think that it was trying to make a point precisely about the extra-Charter character of its response.

This article proposes to explore some of the dangers of what is fast becoming the new orthodoxy. It takes as its starting point the idea that, long after the fall of the Taliban regime and whatever else the strikes on Afghanistan may bring about, some of the semantic constructions used in the process will remain part of international law, as lingering shreds of the violence that was. The article does *not*, therefore, propose to add yet another comment to the debate on whether taking armed action against Al-Qaida is advisable or not. Indeed, this author is quite willing to concede, for the sake of argument, that a cleverly targeted military response snatching Bin Laden from his hideout in the Afghan mountains (although it has become only too obvious that this is not what was contemplated in Afghanistan) would have been desirable — after all no one shed many tears over Argentina’s sovereignty after the capture of

<sup>16</sup> Quoted in Nelson, ‘A Questionable Right to Declare that Britain Has Gone to War’, *Scotsman*, 25 September 2001 (emphasis added).

<sup>17</sup> See Pellet, ‘No, This is Not War!’, *supra* note 13 (noting that ‘it would be disastrous to use, in the name of our values, the very same methods as the despicable adversary uses’).

<sup>18</sup> Asked a few hours after the attacks whether the acts in question constituted war, Donald Rumsfeld had the following characteristic comment: ‘There is no question but that the attack against the United States of America today was a vicious, well-coordinated, massive attack against the United States of America. *What words the lawyers will use to characterize it is for them.*’ (emphasis added). The implicit importance of the lawyers’ role only receded later on, as the magnitude of the crisis unfolded. Donald H. Rumsfeld, Secretary of Defense news briefing on Pentagon attack, The Pentagon, 11 September 2001.

<sup>19</sup> The Charter refers to ‘threats and breaches to international peace and security’, ‘aggression’, ‘action by air, sea, or land forces’, ‘armed force’, ‘international’ and ‘local’ ‘disputes’, ‘threats and use of force’ and ‘enforcement action’, but not ‘war’.

Eichmann. Rather, the article's central hypothesis is that there is a *rhetoric* of war,<sup>20</sup> distinct and almost floating above the question of military action (and indeed from that of war proper, whatever that may be) — whose thick textuality is worthy of study in itself for what it reveals about the profound ambiguity of international law's current predicament.

The use of the term 'war', it is argued, is indistinguishable from a broader strategy of violence legitimization that permeates many psychological and collective responses to the 11 September attacks.<sup>21</sup> The article begins by sketching the larger usage of war as preparing the ground for what is, essentially, a kind of ideal-typical state of exception on both the domestic and the international planes (Section 2). It then goes on to show how the use of the term 'war' is indistinguishable from a broader strategy of legal justification of self-defence as the US's preferred option for a response to the terrorist attacks (Section 3). The legal legitimization of the use of violence then eases the way for 'war' to exclude or distort alternative ways of responding to terrorism (Section 4). The article concludes that, if anything, Security Council authorization rather than self-defence should be the appropriate ground to frame the international community's military responses to terrorism, although it is unlikely that either will go a long way towards dealing with the problem of terrorism (Section 5).

## 2 War as Exception

As it happens, 'war' is rather a dual-use term that can be enlisted for the mildly spurious exercise of steering patriotic libido on the one hand, and as the ingredient to build up what is basically an explosive and lethal cocktail on the other. The semantic response to the attacks, the way it was framed in the immediate aftermath of the tragedy and then gradually confirmed and consolidated, is basically indistinguishable from the very unexpectedness of the assault on the World Trade Center and attempts to grapple with it. In fact, the response *expresses* that very unexpectedness.<sup>22</sup>

### A War and the Enemy

To invoke a war, in this context, is to invoke what is a remarkably familiar, if depressing, pattern of human history. That familiarity is the familiarity of the exception, the sepulchral familiarity of the absolutely unforeseen/unforeseeable event *par excellence*, in a context where political delinquency otherwise threatens. By enlisting the lexicon of the warrior, one can conjure up all the fantasized register of battles and campaigns, heroes and traitors, victory and defeat.

<sup>20</sup> On the similar theme of the 'narrative' in the context of the 11 September aftermath, see Ross, 'The Political Psychology of Competing Narratives: September 11 and Beyond', [www.ssrc.org/sept11/essays/ross.htm](http://www.ssrc.org/sept11/essays/ross.htm). See also, on the concept of 'terrorism discourse', Zalman, 'Review Essay: Ruminations on Political Violence', 216 *Middle East Report* (2000), [www.merip.org/mer/mer216/216\\_zalman.html](http://www.merip.org/mer/mer216/216_zalman.html).

<sup>21</sup> For a particularly unrestrained expression of rage in the mainstream media, see Morrow, 'The Case for Rage and Retribution', *Time Magazine*, 12 September 2001 (suggesting that the US 'explore the rich reciprocal possibilities of the *fatwa*').

<sup>22</sup> For a particularly illuminating study of the impact of cataclysmic events on American historical conscience see A.G. Neal, *National Trauma and Collective Memory: Major Events in the American Century* (1998).

It was Carl Schmitt — so-called Reich ‘crown-jurist’, but also arch-critic *extraordinaire* of liberalism — who bequeathed us one of the most strident visions of the state in extreme circumstances.<sup>23</sup> Could it be that Schmitt, now more than ever, ‘implicitly tells us [something] about the sad state of twentieth-century politics’<sup>24</sup> and its enduring legacy — a critique that liberalism would ignore at its own peril?

To speak of war against the background of 11 September is to engage, analytically speaking, in an eminently Schmittian exercise of enemy designation<sup>25</sup> that simultaneously seeks to bind the political community within<sup>26</sup> and points to its enemy without, thus filling that most unintelligible and traumatizing gap: the attacks’ lack of an explicit signature as the ultimate depoliticization, even depriving the victim of the possibility of ascribing responsibility for her suffering. The enemy, according to Schmitt, is one with whom it may be ‘advantageous to engage in a business transaction’ (perhaps an arms delivery to the mujahedin, or even a run on a Florida flight simulator), but who nevertheless remains ‘the other, the stranger’, since ‘he is, in a particularly intense way, existentially something different and alien’ and ‘the negation of our existence, the destruction of our way of life’<sup>27</sup> (Bush: ‘These terrorists kill not merely to end lives, but to disrupt and end a way of life’.<sup>28</sup>) Enemy designation takes an all the more frantic turn since the enemy without is perceived as coming partly from within. Hence the pressure to externalize enmity in an effort to purge the state from its ‘other’ and restore patriotic unity and homogeneity.<sup>29</sup> The sporadic targeting of persons of Arab appearance on the one hand, and the summoning of states around the world to solemnly take a position on whether they support the anti-terrorism coalition on the other,<sup>30</sup> are but two aspects of a phenomenon that uneasily straddles porous borders and relentlessly challenges the liberal polity’s homeostasis.

<sup>23</sup> Schmitt has had something of a renaissance in Anglo-American legal circles in the past decade. See, among the most recent, ‘Carl Schmitt: Legacy and Prospects; An International Conference in New York City’, 21 *Cardozo Law Review* (2000) 1469; and Telman, ‘Should We Read Carl Schmitt Today?’, 19 *Berkeley Journal of International Law* (2001) 127.

<sup>24</sup> W.E. Scheuerman, *Between the Norm and the Exception: The Frankfurt School and the Rule of Law* (1994) 14.

<sup>25</sup> For a timely and fascinating exploration of this theme, see V. Harle, *The Enemy with a Thousand Faces. The Tradition of the Other in Western Political Thought and History* (2000).

<sup>26</sup> The uniquely strong bi-partisan thrust (only one out of 421 Congress members voted against granting the President war powers), and the fact that Bush has the highest approval rating for a President since Gallup started to monitor such things (above 90%), are obvious indicators.

<sup>27</sup> C. Schmitt, *The Concept of the Political* (G. Schwab trans., 1976) 26.

<sup>28</sup> Address to a Joint Session of Congress and the American People, Office of the Press Secretary, 20 September 2001, [www.whitehouse.gov/news/releases/2001/09/20010920-8.html](http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html).

<sup>29</sup> On the oddity of such a move for a nation such as the US, see Rodriguez, ‘Disunited We Stand’, *Salon*, 23 October 2001, [www.salon.com](http://www.salon.com) (noting that ‘[t]he jingoistic cries of unity since September 11 are disturbing — and fundamentally un-American’).

<sup>30</sup> ‘Every nation, in every region, now has a decision to make. Either you are with us, or you are with the terrorists.’ Bush, *supra* note 28.

## B War and Sovereign Exception

Here, then, perhaps is what we are asked to believe represents, in Schmitt's stygian view, the ultimate test for a nation and its leader,<sup>31</sup> calling on the sovereign-as-demiurge to 'decide on the exception'<sup>32</sup> by reaching out for a primordial friend — foe antithesis. At a time when the state's very statehood is being challenged,<sup>33</sup> the attack, even as it undermines the sovereign's hold, provides it with a unique opportunity to performatively reassert its centrality along the lines of the *protego ergo oblige*,<sup>34</sup> perhaps by exacting the ultimate blood sacrifice.<sup>35</sup> In that sense, the aftermath of the attacks, in the lugubrious dawn of this century, presents itself as a stylized sketch of a Schmittian 'moment', down to the 'real possibility of killing' (gruesomely illustrated by the display of military force and the 'dead or alive' posters against the background of downtown Manhattan's fuming ruins)<sup>36</sup> which Schmitt deemed the only true measure of the 'concept of the political'. The actualization of the possibility of combat, thus, is what allows the sovereign to rejuvenate its constituent power: perhaps, on the heroic altar of sacrifice, liberalism can be saved from itself and its inherent meekness, and the way paved for the banal functioning of technocratic rules.

The effects of this state of emergency<sup>37</sup> are already being felt in — and are indistinguishable from — the evolution of the legal order. At the domestic level, there is the familiar danger, under the all-encompassing banner of 'security',<sup>38</sup> of a

<sup>31</sup> Interestingly, the US Congress has gone out of its way to demonstrate its trust in the executive in granting it war powers that conflate the power to wage war and that of defining its goals, thereby making the President the principal, if not the sole, judge of when the war 'against terrorism' will be over. On the particular characteristic of the consensus between the legislative and executive resulting from the terrorist threat generally, see Hendrikson, 'American War Powers and Terrorists: The Case of Usama Bin Laden', 23 *Studies in Conflict and Terrorism* (2000) 161; and, in the context of the present attacks, see 'The Imperial Presidency', *Economist*, 3 November 2001; and Milbank, 'In War, It's Power to the President', *Washington Post*, 20 November 2001.

<sup>32</sup> C. Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (1985) 5. See also Gross, 'Exception and Emergency Powers: The Normless and Exceptionless Exception: Carl Schmitt's Theory of Emergency Powers and the "Norm-Exception" Dichotomy', 21 *Cardozo Law Review* (2000) 1825.

<sup>33</sup> The subtheme of Western meekness in the face of violent challenges runs strongly in Islamic fundamentalism since at least the Somalia debacle. A. Taheri, *Holy Terror: The Inside Story of Islamic Terrorism* (1987).

<sup>34</sup> The elements of gender bias underlying the turn to violence and much of the posturing that flows from it are only too apparent. See Lerner, 'Feminists Agonize Over War in Afghanistan', *Village Voice*, 31 October–6 November 2001.

<sup>35</sup> See Bush Presidential Address to the Nation, Office of the Press Secretary, 7 October 2001, [www.whitehouse.gov/news/releases/2001/10/20011007-8.html](http://www.whitehouse.gov/news/releases/2001/10/20011007-8.html): 'We ask [our armed forces] to leave their loved ones, to travel great distances, to risk injury, even to be prepared to make the ultimate sacrifice of their lives.'

<sup>36</sup> Schmitt, *supra* note 27, at 4.

<sup>37</sup> A state of national emergency was decreed by President Bush the same day that war powers were granted to him. See Proclamation 7463, 'Declaration of National Emergency by Reason of Certain Terrorist Attacks', *Public Papers of the Presidents*, 17 September 2001.

<sup>38</sup> See Agamben's remarkable 'Über Sicherheit und Terror', *Frankfurter Allgemeine Zeitung*, 20 September 2001; and Shapiro, 'All in the Name of Security', *The Nation*, 22 October 2001.

militarization of the polity<sup>39</sup> and a reduction in civil liberties, including proposals for increased wire-tapping, indefinite detention for those suspected of terrorism, racial profiling,<sup>40</sup> various forms of censorship,<sup>41</sup> and the lifting of the taboo — albeit only in the media — on torture.<sup>42</sup> Somewhere on the precarious fault lines of the domestic and the foreign, a long-held ban on the assassination of foreign leaders is overturned<sup>43</sup> and immigration is being ever more strictly controlled,<sup>44</sup> in a desperate attempt to sanctuarize the ‘homeland’ cocoon.

Although it remains to be seen whether, once all is said and done, this will be the ‘divine surprise’<sup>45</sup> of the authoritarian right<sup>46</sup> — allowing it to implement a political agenda that it would not have dreamt of discussing openly only a few weeks before — it is at the least worrying that some of the clearest recent intellectual precursors to the current efforts to wage a homefront ‘security war’ were the Latin American juntas of the 1970s.<sup>47</sup>

Whether this is what liberalism needs to survive in times of crisis, or whether it contains its own downfall (as, arguably, the fate of Weimar shows), is of course a considerable debate in itself, but not the one which interests us here.<sup>48</sup> Indeed, chances are that domestic liberalism in the West, which is built on profoundly embedded societal strands, will find enough energy in its long history of struggling with its own demons to fight off *la tentation du pire*.<sup>49</sup> It is to the credit of American authorities, for example, that they have unequivocally condemned attacks against

<sup>39</sup> For a recent overview of that debate, see Chalk, ‘The Response to Terrorism as a Threat to Liberal Democracy’, 44 *Australian Journal of Politics and History* (1998) 373.

<sup>40</sup> See, for example, American Bar Association Task Force on Terrorism and the Law, ‘Comments on Pending House and Senate Anti-Terrorism Legislation’, 8 October 2001. Comprehensive anti-terrorism packages have also been passed with unprecedented speed in the UK, France and Germany for example.

<sup>41</sup> ‘Networks Agree to US Request to Edit Future Bin Laden Tapes’, *New York Times*, 11 October 2001.

<sup>42</sup> Rutenberg, ‘Torture Seeps Into Discussion by News Media’, *New York Times*, 5 November 2001.

<sup>43</sup> Gellman, ‘CIA Weighs “Targeted Killing” Missions’, *Washington Post*, 28 October 2001.

<sup>44</sup> Mailman and Yale-Loehr, ‘As the World Turns: Immigration Law Before and After September 11’, *New York Law Journal*, 22 October 2001.

<sup>45</sup> The ‘divine surprise’, an expression coined by French nationalist theorist Charles Maurras, is the specific expression used to describe the mood of the French extreme right after the Nazi invasion which saw in the launching of Pétain’s ‘national revolution’ a unique opportunity for the advancement of its political ideas. It should, of course, not be interpreted literally in the present article as suggesting that there is anything transcendental about the attacks.

<sup>46</sup> For an early intuition that the attack ‘is a gift to the hard jingoist right, those who hope to use force to control their domains’, see Chomsky, ‘A Quick Reaction to the Attack on America’, *Counterpunch*, 12 September 2001.

<sup>47</sup> Negretto and Aguilar Rivera, ‘Liberalism and Emergency Powers in Latin America: Reflections on Carl Schmitt and the Theory of Constitutional Dictatorship’, 21 *Cardozo Law Review* (2000) 1797.

<sup>48</sup> For a recent exploration of that theme in the context of ‘permanent states of exception’, see Scheuerman, ‘Globalization, Exceptional Powers, and the Erosion of Liberal Democracy’, 93 *Radical Philosophy* (1999) 14.

<sup>49</sup> Indeed, some of the alarmist views associated with fears of a new ‘McCarthyism’ (see, for example, Monbiot, ‘The New McCarthyism’, *Guardian*, 16 October 2001) may miss the larger point. The focus on domestic dangers as the horizon of perils obscures how the West’s failure to live up to its own ideals often has a demultiplier effect on the rest of the world.



citizens of Arab origin, and have strenuously emphasized liberal democracy's capacity to thrive on diversity.

Rather, what is interesting from the point of view of international law is to understand how Schmittian posturing might be simultaneously — and quite logically according to the Schmittian mystique — redirected onto the international legal order. It is there that one of the first casualties of the 'new war' may well be the pretence of international liberalism, perhaps — in a not always explicit but undoubtedly perilous trade-off reminiscent of the Cold War's darkest hours — as a price for the maintenance of liberalism at home.

### C *War and State Survival*

Schmitt may have formulated more tersely than any other the idea that conflicts with the 'enemy' 'can neither be decided by a previously determined norm nor by the judgment of a disinterested and therefore neutral third party'.<sup>50</sup> In the international realm — the political realm *par excellence* — 'each participant is in a position to judge whether the adversary intends to negate his opponent's way of life and therefore must be repulsed or fought in order to preserve one's own mode of existence'.<sup>51</sup> Hence, no system of collective security can forever impose the kind of restraint that its continued existence posits because it is guilty of a fundamental misunderstanding about the nature of relations between states — relations that do not derive from an innate sociability but rest on a profoundly Hobbesian equilibrium.<sup>52</sup> When it comes to ultimate issues of power, therefore, international law is dismissed as at best irrelevant, and at worst an indeterminate generality providing a convenient façade for a use of power that does not say its name.<sup>53</sup> The move to a 'discriminatory concept of war',<sup>54</sup> which Schmitt saw as arising from the criminalization of war, could thus only carry with it the promise of unprecedented levels of violence.

It would seem at first sight that it is here, in the crucible of political and legal theory written a long time before the events that interest us — and in a world profoundly distinct from the contemporary but still linked to us by many invisible threads — that an investigation into the effects of the rhetoric of 'war' on international law must begin. Could it be that, behind the use of the word, lies a colossally itchy urge to turn international law inside-out by making 'the exception' into 'the rule'? Do times of crisis such as this indeed weaken, discredit or destroy liberalism's programmatic ambition for an international rule of law? Will the 11 September attacks somehow

<sup>50</sup> Schmitt, *supra* note 27, at 27.

<sup>51</sup> *Ibid.*, at 27.

<sup>52</sup> *Ibid.*, at 28. See also C. Schmitt, *The Leviathan in the State Theory of Thomas Hobbes: Meaning and Failure of a Political Symbol* (Schwab and Hillstein trans., 1996).

<sup>53</sup> Martti Koskenniemi has recently made a strikingly plausible case that a direct thread runs from Schmitt through Hans Morgenthau down to contemporary calls for the deformalization of international law in the US. Koskenniemi, 'Carl Schmitt, Hans Morgenthau, and the Image of Law in International Relations', in M. Byers (ed.), *The Role of Law in International Politics: Essays in International Relations and International Law* (2000) 28.

<sup>54</sup> Quoted in Ulmen, 'Just Wars or Just Enemies', 109 *Telos* (1996) 99, at 101.

show, in Schmittian parlance, that the legitimacy of the pluriverse's irreducible existential decisions do and should overcome the legality of the universe's theoretical norms?

Except, of course, that it is not quite that easy, and the particular drama unfolding before our eyes is not simply a replay of the old debate between the *konkrete Ordnung* of the state and the abstract demands of universalism. Of the many differences between Schmitt's world and the contemporary globalized magma, there would seem to be one that adds a crucial layer of complexity to the conundrum of law and power. For Schmitt, there was little doubt that the state's will to survive would and should be redirected essentially against another *sovereign*. Indeed, Schmitt insisted that 'an enemy exists only when, at least potentially, one *collectivity of people* confronts a *similar collectivity*. The enemy is solely the *public enemy*.'<sup>55</sup> Nor was this a trivial part of the theoretical background of the author of *The Concept of the Political*. The recognition of the ultimate equality of states was what made it possible to view one's relation to the 'enemy' as an essentially agonistic (*hostis*) rather than antagonistic (*inimicus*)<sup>56</sup> one, that duly circumscribed the war within an overarching order. Thus Schmitt's conservative inclinations naturally led him to consider the 'state as the greatest achievement of Western civilization because, as the main agency of secularization, it ended the religious civil wars of the Middle Ages'.<sup>57</sup>

But — and this is the crucial question — what happens to the international legal order when there is no state against which to go to war and the only adversary one finds are phenomenally dangerous yet ultimately amorphous networks of fanaticism — what is more sustained by aspirational visions of a grand *Umma* which have little to do with Western concepts of sovereignty? How do theories of state survival fare in an age of non-state actors? Is reconnecting with a word that was all but eliminated from the legal lexicon more than half a century ago really the best way to connect with the problems of the present and the future it holds? Might 'war' not serve, under the ill-understood cover of the 'radical-novelty-of-the-post-11-September-world',<sup>58</sup> to change that which need not be changed, while not changing (and perhaps in order not to) what is in urgent need of change?

### 3 War as Self-Defence

Nothing could be more remote from the reality of the events following the 11 September attacks than the idea of legal norms that rule political acts from above, *a fortiori* when the fundamental interests of the US are perceived as being at stake. The starting point in understanding the complex sequence of events that unfolded in the build-up to the strikes against Afghanistan is that of an administration — following on

<sup>55</sup> Schmit, *supra* note 27, at 28 (emphasis added). In addition, throughout his career, it was clear that Schmitt had specific states (the USSR, the US, France and the UK) in mind.

<sup>56</sup> Kennedy, "'Hostis not Inimicus": Towards a Theory of the Public in the Work of Carl Schmitt', 10 *Canadian Journal of Law and Jurisprudence* (1997) 92.

<sup>57</sup> Ulmen, *supra* note 54, at 99.

<sup>58</sup> See Hoffmann, 'On the War', *The New York Review of Books*, 8 November 2001.

the heels, it should be noted, of many similar ones — that does not think of law as a framework but as an instrument.<sup>59</sup> No more will be said on this until the conclusion of this article, but the basic dilemma for the United States is that of a state that has, for better or worse, already decided that domestic public opinion demands (among other things, but clearly as a matter of priority) armed retaliation,<sup>60</sup> and is determined not to disappoint (Bush's 'whipping terrorism').

The initial problem of course — although this was largely forgotten in the huge swell of information and comments surrounding 11 September — is that retaliation is not normally permitted under international law. *Pour mémoire*, Article 2(4) of the United Nations Charter normally enjoins Member States 'to refrain from the threat or use of force against the territorial integrity or political independence of any State'. This basic prohibition structures states' understanding of international law sufficiently so that even a government that might otherwise be described as intent on eventually bypassing it can only acknowledge its existence. This is in a sense liberal international lawyers' 'claim to fame': shared basic standards force states (and perhaps — here the liberal holds his breath in expectation — liberal states even more so) to argue their claims in the commonly accepted language of law. And, indeed, the US case for self-defence is precisely *not* a claim about (although it may rely on) law's indeterminacy. Hence the need to at least try to assess the argument in favour of the use of force in its own proclaimed terms, that is as a possibly value-oriented, even 'soft', but ultimately validity-based discourse.

The use of force is only 'normally' prohibited, of course, because the UN Charter knows of two exceptions to the rule. The first is states' 'inherent right of self-defence' under Article 51 of the UN Charter. The second is Security Council authorization.

The US had already in the past defended its anti-terrorist strikes on Libya, Sudan and Afghanistan on the basis of self-defence<sup>61</sup> and had received the backing of a part of American legal academia in doing so.<sup>62</sup> The current administration has made it clear that it bases its armed reaction to 11 September on the right to self-defence,<sup>63</sup> and it

<sup>59</sup> The role the US administration has in mind for the UN is strikingly conveyed by the following quote from one who is often hailed as its most 'multilateral' representative: 'We will be going to the UN for additional expressions of support through UN resolutions but, at the moment, should the President decide that there are more actions he has to take, he will make a judgment as to whether he needs UN authority or whether he can just act on the authority inherent in the right of self-defence and consistent with our own laws and regulations and constitutional powers.' See Secretary Colin L. Powell, Remarks with His Excellency Brian Cowen, Minister of Foreign Affairs of Ireland, 26 September 2001.

<sup>60</sup> According to one Gallup poll, 90 per cent of Americans support some kind of retaliatory military action. See Newport, 'Americans Remain Strongly in Favor of Military Retaliation', *Gallup News Service*, 27 September 2001.

<sup>61</sup> Letter to the Security Council, 20 August 1998, [www.fas.org/man/dod-101/ops/docs/98082015\\_tpo.html](http://www.fas.org/man/dod-101/ops/docs/98082015_tpo.html).

<sup>62</sup> See Wedgwood, 'Responding to Terrorism: The Strikes against Bin Laden', 24 *Yale Journal of International Law* (1999) 559; and Reisman, 'International Legal Responses to Terrorism', 22 *Houston Journal of International Law* (1999) 3.

<sup>63</sup> See, for example, Office of the Press Secretary, Press Briefing by Ari Fleischer, 31 October 2001 (noting that 'we're acting in self-defense in the finest traditions that set our nation apart from most other nations').

seems to enjoy fairly widespread support from US legal commentators.<sup>64</sup> Surely, however, it must be inherent in, or at least essential to, the idea of international law that national qualifications, however forceful and heart-felt, do not prejudice the operation of international law.

Note in addition that, even if a right of self-defence can somehow be squeezed out of the Charter in the present circumstances, the question remains — despite the prevailing reductionist view of legality as a black-and-white process — whether this is the most legally opportune way to tackle the problem of terrorism in the multichromatic reality of today's world. The question, in other words, may be less *whether* self-defence is legal than what it *means* to say that it is legal in terms of law's systemic sustainability.

With these words of caution in mind, the exercise of the right to self-defence is generally held to be subject to two express conditions in the Charter: the existence of an 'armed attack against the state' and the absence of Security Council intervention.

### *A The Existence of an 'Armed Attack against the State'*

This is, in a sense, the easier of the two preconditions to satisfy, at least if one considers it in isolation.<sup>65</sup> The ICJ had an opportunity in the *United States v. Nicaragua* case to define the threshold of what constitutes an armed attack, and held that such an attack must 'occur on a significant scale'.<sup>66</sup> Surely, if the storming of the US embassy in Teheran could be described as amounting to an armed attack,<sup>67</sup> then so must the murderous attack on the World Trade Center. Even if only boxcutters were used as 'arms', it is difficult to see what more than the transformation of an airliner into a fuel-laden precision-guided missile would be needed to make the attack an armed one.<sup>68</sup> As to the question whether the attacks were directed at the US state, they were certainly directed at US territory and at least partly if not entirely at the US *qua* state, as shown by the targeting of its military heart and possibly some of its political decision-making centres. Clearly, the 11 September attacks qualify, to use an expression coined by Professor Henkin, as an 'actual armed attack, which is clear, unambiguous, subject to proof, and not easily open to misinterpretation or fabrication'.<sup>69</sup>

<sup>64</sup> For a veritable cascade of arguments largely to the effect that self-defence is legal in the circumstances, see [www.asil.org/insights/insigh77.htm](http://www.asil.org/insights/insigh77.htm).

<sup>65</sup> On the issue of whether the 'armed attack' has to be the result of state action, see Gaja, 'In What Sense Was There an "Armed Attack"?', *EJIL Discussion Forum*, [www.ejil.org/forum\\_WTC/ny-gaja.html](http://www.ejil.org/forum_WTC/ny-gaja.html). This problem is treated further in section 4.B below.

<sup>66</sup> *Military and Paramilitary Activities (Nicaragua v. US)*, ICJ Reports (1986) 4, at 104.

<sup>67</sup> *Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, ICJ Reports (1980) 3, at paras 57 and 91.

<sup>68</sup> Although the Security Council prudently qualified the attacks as 'terrorist attacks', this of course does not and should not preclude a finding that they were both terrorist *and* armed.

<sup>69</sup> L. Henkin, *How Nations Behave* (1979) 142.

## B The Absence of Security Council Intervention

The second and more crucial condition imposed by the Charter is, implicitly, that the Security Council must not have 'taken measures to restore international peace and security'. This, as the average mainstream international lawyer knows, is consistent with the general economy of the Charter as a collective security system designed to replace the previously existing *jus ad bellum*. Although the Charter order may, by way of reassurance and somewhat paradoxically, envisage the Security Council's inefficiency as a concession to states' sensitivity, it is clear that to claim otherwise would bring the entire system tumbling down.<sup>70</sup> Self-defence can at best qualify as an interim measure.<sup>71</sup>

With the site of the bombings only a few blocks away from the East River building, the Security Council rushed to discuss the terrorist attacks and unanimously adopted a resolution (Resolution 1368) in less than half an hour on 12 September. Two weeks later, the Security Council adopted another, longer resolution, Resolution 1373, on the 'threats to international peace and security caused by terrorist acts'. Has the Security Council thereby taken 'measures necessary to maintain international peace and security'?

Read together, the two resolutions leave a lingering feeling of doubt. On the one hand, the Council has undeniably adopted measures of sorts. Although Resolution 1368 was particularly weak on effective operative clauses, the same cannot be said of Resolution 1373, which contemplates a whole series of immediately applicable measures, including requests that states freeze terrorist assets and step up anti-terrorist cooperation, and even calls for the creation of a committee to monitor its implementation. These fall short of military measures, but nothing in the Charter suggests that only *military* measures are adequate to deal with threats to international peace and security. Some have argued that, to qualify as 'necessary', the 'measures' must retrospectively demonstrate by their results that they were indeed the right ones to re-establish international peace and security.<sup>72</sup> Such an interpretation, however, seems to run against both the plain wording of Chapter VII<sup>73</sup> and its underlying

<sup>70</sup> There is a potentially interesting subtext to the current debate that has so far been little explored. In matters of self-defence, international law is never far from meeting its old (and, as of late, fashionable) nemesis: the 'very survival of the State'. Tellingly, this argument (which would require much more serious legal justification than has so far been given) has not been raised by the US. Independently of the question of whether that would preclude the US from invoking it at a later stage, it shows that the current response is meant to fit well within the bounds of international constitutional normality.

<sup>71</sup> See, generally, D.W. Bowett, *Self-Defence in International Law* (1985).

<sup>72</sup> Rostow, 'Until What? Enforcement Action or Collective Self-defence?', 85 *AJIL* (1991) 506; Halberstam, 'The Right to Self-defence Once the Security Council Takes Action', 17 *Michigan Journal of International Law* (1996) 229.

<sup>73</sup> Malvina Halberstam's suggestion (Halberstam, *supra* note 72, at 239), that the inclusion in Article 51 of the expression 'measures necessary' is indicative of a clear will by the drafters that the measures be considered necessary by the state exercising self-defence, is discredited by the fact that 'necessary' is the standard expression used non-normatively in Article 49. If anything, 'adequate' (as used in Article 41) or even 'appropriate' (as used in Article 48(2)) are the expressions which semantically convey the sense of opportunity. 'Necessary' is therefore not to be understood as 'right' in an absolute sense but rather as 'considered adequate by the Security Council to the best of its judgment'.

philosophy: to allow each state concerned to pass judgment on whether the measures were necessary would lead to the sort of anarchy that the Charter was clearly trying to avert.<sup>74</sup>

### *C Security Council Recognition of the Right to Self-Defence?*

In the preambles to both resolutions, the Council, on the other hand, bizarrely refers to the right to self-defence, as if it were trying to pre-empt the effect that its own putative actions would have on states' claims to act in self-defence. This has led the US to claim that the Council explicitly recognized its right to exercise self-defence, an interpretation that has been reiterated by many an incautious commentator. Self-defence can of course, all other things being equal, be used without Council authorization, but the point is that such an authorization would significantly buttress the case for its use. It is important, however, to distinguish between several known ways the Security Council might validly be said to recognize *ex ante* that a right to self-defence exists in a particular case.

First, the Security Council can explicitly *mandate* the use of self-defence. It has been argued, for example, that, following Iraq's invasion of Kuwait, the UN authorized the coalition to use 'all necessary means to uphold and implement' a previous resolution recognizing a right to self-defence.<sup>75</sup> Self-defence here is not so much of the 'inherent' sort as a transformed and instrumentalized version of it for the purposes of combating a breach of international peace and security. Whatever one thinks of that option — which has been criticized as an abdication by the UN of its responsibilities — it requires the sort of operative language that clearly did not find its way into either Resolution 1368 or Resolution 1373.<sup>76</sup>

Secondly, there is the case where the Security Council targets for 'actualization' a specific right to self-defence. This is something that the Security Council did, for example, immediately after the invasion of Kuwait by recognizing the existence of a right of self-defence 'in response' to the invasion.<sup>77</sup> Resolutions 1368 and 1373, however, fall short of even that weak version of self-defence recognition. The existence of a right of self-defence is noted in their preambles, but in rather general and abstract terms: one is merely *reminded*, as it were, that a right to self-defence exists. Although such a reminder gives a definite connotation to the resolution by highlighting the existence of a particular article, it does not add much to what anyone reading the UN Charter might find out for themselves. Moreover, as has been cogently remarked, the

<sup>74</sup> H. Kelsen, *The Law of the United Nations* (1950) 800.

<sup>75</sup> See S/RES/678 (1990); and Schachter, 'United Nations Law in the Gulf Conflict', 85 *AJIL* (1991) 452.

<sup>76</sup> Taken in isolation Article 2(b) of Resolution 1373 which authorizes states to '[t]ake the necessary steps to prevent the commission of terrorist acts' and Article 2(d) which asks states to '[p]revent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other States or their citizens' might conceivably be interpreted as fairly wide-ranging. Their place in Resolution 1373 and the fact that the 'provision of early warning to other States by exchange of information' is quoted as the only illustration in Article 2(b), however, make it clear that these provisions were not intended as anything close to the authorization of 'all necessary measures' which is the standard euphemism for use of force.

<sup>77</sup> S/RES/661 (1990).

Council refers to a 'threat to international peace and security' and not to an 'armed attack', which would presumably have pointed more directly to Article 51.<sup>78</sup>

This means, in short, that, while states were not precluded from using their right to self-defence by Security Council action following the terrorist attacks, nor were they explicitly authorized to do so. Plainly speaking, Resolutions 1368 and 1373 do not dispose of the issue once and for all, and the picture that emerges is more that of a Council stumbling in the dark than of it signing a blank cheque to the anti-terrorism coalition.

#### 4 Self-Defence as War

A 'possibility' of self-defence thus triggered does not thereby become severed from all international law, to be exercised in some kind of normative void. Whether one believes the right to self-defence should then be interpreted in accordance with general customary international law or, more ambitiously, in accordance with the UN Charter as the 'constitution of the international community',<sup>79</sup> the point is, essentially, that self-defence comes with many strings attached.

In this context, the media and many legal commentators have insisted that the least one can expect of any military attack launched against a foreign power is that it should respect international humanitarian law.<sup>80</sup> This is a point well taken and, despite what looks like a number of textbook violations,<sup>81</sup> the US has made it abundantly clear that it is bound if not by the letter at least by the spirit of Protocol I to the Geneva Conventions. But this is really less a point about self-defence specifically than about the use of force in general. In fact, this no doubt well-meaning humanizing rush may well end up unwittingly legitimizing its use. If international lawyers have nothing to say on the legality of the use of force *per se*, however, the profession might as well capitulate as a historical enterprise. This is particularly the case when the US's justification of its use of force would seem to entail a thorough redefinition of both the temporal and spatial coordinates of self-defence.

<sup>78</sup> Cassese, 'Terrorism Is Also Disrupting Some Crucial Categories of International Law', EJIL Discussion Forum, [www.ejil.org/forum\\_WTC/NY-Cassese.pdf](http://www.ejil.org/forum_WTC/NY-Cassese.pdf).

<sup>79</sup> Fassbender, 'The United Nations Charter as Constitution of the International Community', 36 *Columbia Journal of Transnational Law* (1998) 529. As already noted, nothing so abstract underlies the current American concept of international law. However, an interesting spin-off from the argument that the UN Charter is a global constitution, is whether the US might not also portray itself as accomplishing for the rest of the world and the UN Charter a decentralized version of what the executive may see itself as doing for the US and the American Constitution, namely, breaching the 'constitution' (or at least going against its spirit) in order to better defend its ordinary functioning. Infinitesimal traces of such a 'making the world safe for international law' reasoning are in fact discernible among the many layers of US rhetorical justifications, at least to the extent that one considers the so-called defence of civilization as entailing elements of a defence of international law.

<sup>80</sup> Roberts, 'Apply the Law of War in an Anti-Terror War, Too', *International Herald Tribune*, 4 October 2001; Ignatieff, 'It's War, But It Doesn't Have to Be Dirty', *The Guardian*, 1 October 2001.

<sup>81</sup> ICRC, *ICRC warehouses bombed in Kabul*, Press Release 01/43, 16 October 2001.

## A Self-Defence and Time

Self-defence, to begin with, must be used to *repel* an attack that cannot be repelled by any other means (otherwise known as the necessity requirement). From that requirement follows implicitly another one, which is that the defensive action must be reasonably immediate — in much the same way, even allowing for the intrinsic deficiencies of the domestic analogy, as the concept of self-defence is understood in domestic criminal law. As has often been remarked in commentaries on the US response to 11 September, it was the US itself, in a famous statement in the *Caroline* case, that pointed out that a claim of self-defence requires a ‘necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation’.<sup>82</sup>

### 1 Self-Defence and Chronology

Self-defence which takes place a few weeks or a few months after the attack, therefore, can look dangerously like reprisals.<sup>83</sup> But lawyers know that reprisals — which can be assimilated to forcible counter-measures — are forbidden.<sup>84</sup> Furthermore, self-defence which occurs an indeterminate time before an unknown attack — anticipatory self-defence — is not really self-defence at all, and looks dangerously like aggression. But — the reasoning comes full circle — aggression is forbidden.

Hence the need to find a means to circumvent this temporal paradox. This is the first way in which ‘war’ comes in particularly handy. The idea of war projects durability, the kind of ‘consistent pattern of violent terrorist action’ which Antonio Cassese described as a basic precondition to the contemplation of recourse to self-defence against terrorism.<sup>85</sup> There is self-defence because that self-defence in fact occurs as part of a continuous process of war. The war started a few years ago<sup>86</sup> — no one really knows when: perhaps after the bombings of the US embassies in Tanzania and Kenya, or even after the first bombing of the World Trade Center in 1993 — and it will continue for as long as the ‘enemy’ is not ‘defeated’.<sup>87</sup> The attacks on the US are battles (here, the analogy with Pearl Harbor is particularly illuminating)<sup>88</sup> that form part of a larger ongoing conflict. There is a self-defence, therefore, because as one is in the

<sup>82</sup> J. Bassett Moore, *A Digest of International Law* (1906) 412.

<sup>83</sup> It is paradoxical that, in this age of ubiquitous and instantaneous communications, the response to the attacks may take many weeks longer than it took to seize a schooner and precipitate it down the Niagara Falls in the eighteenth century.

<sup>84</sup> ‘Report of the International Law Commission to the General Assembly’, 35 UN GAOR Supp. (No. 10), at 125–127, UN Doc. A/35/10 (1980).

<sup>85</sup> Cassese, ‘The International Community’s “Legal” Response to Terrorism’, 38 *ICLQ* (1989) 589, at 589.

<sup>86</sup> Central to the war rhetoric, in particular, is the rewriting of recent history in the light of 11 September. As one ‘senior Defense Department official’ reportedly put it: ‘I wish we’d recognized it then [that the United States was at war with Bin Laden] and started the campaign then that we’ve started now. That’s my main regret. In hindsight, we were at war.’ Woodward and Ricks, ‘CIA Trained Pakistanis to Nab Terrorist But Military Coup Put an End to 1999 Plot’, *Washington Post*, 4 October 2001.

<sup>87</sup> Bush, *supra* note 28 (‘Our war on terror begins with al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated’).

<sup>88</sup> ‘A Terrorist Pearl Harbor’, *Wall Street Journal*, 12 September 2001.



process of sanctioning the attacks that were, one is simultaneously protecting oneself from the attacks that be.<sup>89</sup>

This obsession with time manifests itself in the warnings about a '*lengthy* campaign unlike any other we have ever seen'<sup>90</sup> and down to the unfortunate use of the term '*infinite* justice' and its subsequent replacement with the notion of '*enduring* freedom' (the use of codenames for military operations would be worthy of an article in itself), both of which seek to metaphorically stretch political actors' temporal horizons. Joint Resolution 64 passed on 14 September by the US Congress, which authorizes the President 'to use all necessary and appropriate force . . . in order to prevent any further acts of international terrorism against the United States'<sup>91</sup> is open-ended in scope in a way that is perhaps reminiscent only of the 1964 Tonkin resolution which was used to justify the Vietnam War.<sup>92</sup>

The danger of such open-endedness is obvious. The problem with the recasting of what were previously described as terrorist acts into acts of war is that it is neither true nor false because it is, in a real sense, a pure intellectual construction: one is at war because one feels one is at war and because one says so. Most importantly, it is an assertion that is not legally verifiable according to recognized criteria since it is, at a safe distance from the repertoire of all legal axiology, an *extra-legal* term.<sup>93</sup>

## 2 *Self-Defence and the Infinite*

If the subterfuge is transparent, its implications are perhaps only slightly less so. The construction that allows one to claim self-defence in the first place by, as it were, 'tinkering with the clock' — however legitimate it may seem at a time of high emotion — is also one that may well eventually justify the war's indefinite prolongation (and if anything history cautions against misplaced optimism). Once one has effectively done away with the requirements of necessity and immediacy, there is no reason why the use of self-defence should stop in the weeks or months that follow the attacks; clearly

<sup>89</sup> The US ambassador to the UN, for example, left no doubt that: 'In response to these attacks, and in accordance with the inherent right of individual and collective self-defence, United States armed forces have initiated actions designed to prevent and deter further attacks on the United States.' See J.D. Negroponte, 'Letter Dated 7 October 2001 from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council', S/2001/946, 7 October 2001.

<sup>90</sup> Bush, *supra* note 28 (emphasis added).

<sup>91</sup> House Joint Resolution 64, *Congressional Record*, 14 September 2001 (House), at H5638, section 2(a).

<sup>92</sup> What determines when the end of the war is reached is uncertain, and, as President Bush put it, '[s]o long as anybody's terrorizing established governments, there needs to be a war'. Quoted in 'Bush Foresees a War Longer Than 2 Years', *International Herald Tribune*, 18 October 2001. As for Donald Rumsfeld, he has made it clear that one should 'forget about exit strategies. We are looking at sustained engagement that carries no deadlines.' Rumsfeld, 'Creative Coalition Building for a New Kind of War', *New York Times*, 28 September 2001.

<sup>93</sup> In fact, the term's normative connotations are virtually interchangeable. See, for example, Department of State, 'Report on the Taliban's War Against Women', 17 November 2001.

one can sense that there will be no shortage of ‘future attacks that were prevented by past ones being punished’ in a kind of endlessly self-confirming vicious circle.<sup>94</sup>

There may still be a valid right to self-defence to the extent that it can be proved that further attacks are imminent. But, in seeking to justify the contours of a continuous right to self-defence beyond such specific attacks, there exists a real danger that, in a world of increasingly complex security dilemmas, one can end up justifying a permanent recourse to armed violence that is the precise antithesis of what self-defence was supposed to be. In the process, the Charter risks being subverted to the point of being turned upside down. Perhaps the most appalling aspect of the use of the word ‘infinite’ is not that it offends Islam as was officially argued (after all, most religions are based on a concept of ‘an’ infinite), but that it seems tailored to subliminally circumvent one of international law’s few long-standing and reasonably self-explanatory prohibitions. That particular justice, as it were, can only be infinite because it is designed to meet a challenge that has no temporal boundaries.

By the time the self-defence straitjacket (or at least what is left of it) is pulled and stretched in all directions, it will not shrink back to its original size any time soon. Hawks in Russia, Turkey, Iran, India, or Israel are already looking on with delight. One may favour a strike against Bin Laden’s camps, yet still be chilled by the legal price that may have to be paid — by the rest of the world as much as by the US itself — sooner than one cares to think.

## B *Self-Defence and Space*

If that were the only concern, however, there would not be much that is novel. In various ways, the US has been trying to develop such an interpretation of the Charter since at least 1986 after the raids against Libya.<sup>95</sup> What is new, however, is that this time the ‘war’ is not just infinite by rhetorical decree or *fiat*: there is also a very specific and real sense in which it is infinite, which is that it is perhaps the first proposed war in the history of international law where it is far from clear who the enemy is (hence, perhaps, the compulsive need to give it — almost literally — a face). This leads us to the truly novel problem: self-defence has to be directed against *someone*; but the question here is, *against whom?*

### 1 *Self-Defence and the Providential State*

The Security Council’s reaction, as already noted, is symptomatic. In 1991, the Council had little doubt about ‘the inherent right of individual or collective self-defence, in response to the armed attack *by Iraq against Kuwait*’.<sup>96</sup> But in both Resolution 1368 and Resolution 1373, the recognition of the right to self-defence unsurprisingly falls short of any finger-pointing. The initially announced target of the strikes against Afghanistan was the Al-Qaida terrorist network. But the idea of

<sup>94</sup> It is also probably worth mentioning in passing the disastrous effect that a lengthy action can have on the computing of the proportionality requirement (i.e. that self-defence must be proportionate to a specific event).

<sup>95</sup> See ‘Military Responses to Terrorism’, 81 *American Society of International Law Proceedings* (1987) 287.

<sup>96</sup> SC Res. 661 of 2 August 1990 (emphasis added).

exercising a right of self-defence against a terrorist group is as powerful a rhetorical conceit as it is a conceptual nonsense, for at least two reasons, one exegetic and the other analytical.

First, although Article 51 is ambiguous on the point, self-defence was clearly only ever meant to be against *states*. Article 50 of the Charter specifically talks of 'preventive or enforcement measures against any *state*'. The General Assembly's definition of 'aggression' (the trigger for self-defence) describes self-defence as 'the use of armed force by a *state* against the sovereignty, territorial integrity, or political independence of another State'.<sup>97</sup> The International Law Commission has long held that self-defence may only be invoked where the 'danger [was] caused by the *State* acted against and [was] represented by that *State's* use of armed force'.<sup>98</sup>

Nor, more importantly, is this state-centred aspect of self-defence simply the result of our historical incapacity (or that of the Charter's drafters) to understand a world where states no longer rule absolutely. The second and more compelling reason why self-defence has to be directed against a state is, quite simply, that, whether one wants it to or not, *it will be*. Even if it is not claimed that a particular terrorist action was sponsored by a state, most if not all actions undertaken in self-defence will (unless occurring in the high seas or in outer space) effectively be undertaken against states. This is because any exercise of *puissance publique* on foreign soil without the sovereign's consent, even if it is only designed to kidnap one man — and it will often entail much more than that — is a violation of that state's sovereignty. Hence, beyond the loose talk about a 'war against terrorism', *the very practical need to have as a substitute a good old-fashioned inter-state conflict on which one might more firmly anchor a claim to self-defence*.

This brings us to the second rhetorical use of the term 'war', which is to suggest an enemy, and preferably — to use one traditional definition of the state — one with a 'fixed population, territory and government'. It is not difficult to see how, in this context, the idea of a 'war' allows one to repatriate a threatening uncertainty into the conventional and reassuring language of inter-state relations.<sup>99</sup> The rise of war as a concept in Western political thought is, after all, intrinsically linked to the emergence of the nation-state, where it served the specific role of distinguishing between legal (and no longer simply 'just') public wars from illegal private feuds.<sup>100</sup>

To use the term 'war', even a 'new kind of war', therefore, is to invite an imperceptible shift, in a world whose land mass is literally covered with states, from a self-defence against terrorism to a 'self-defence' against all states suspected of sympathizing with terrorists. The *reductio ad mare liberum* of the territory of rogue states and the portrayal of terrorists as *hostis humani generis* pirates, then, are what

<sup>97</sup> A/RES/3314 Resolution (XXIX), 14 December 1994.

<sup>98</sup> 'Report of the International Law Commission to the General Assembly', 35 UN GAOR Supp. (No. 10), at 34 (emphasis added).

<sup>99</sup> See Dilling, 'Does "Infinite Justice" Lead to Enduring War?', 2 *German Law Journal* (2001), [www.germanlawjournal.com](http://www.germanlawjournal.com).

<sup>100</sup> For a sociological account, see C. Tilly, *The Formation of National States in Western Europe* (1975), and, for a normative account, see M.H. Keen, *The Laws of War in the Late Middle Ages* (1965).

allows the vessels of US air power to roam freely in their search for offenders against the law of nations.<sup>101</sup> The fact that it was only a matter of hours before the word ‘terrorists’ came to be systematically associated with the expression ‘and those who harbour them’ reveals what is likely to become an obsessive quest for the traceability of terrorist actions to their state sponsors.<sup>102</sup>

Here, it is important to note that paradox abounds. On the one hand, there is much talk of terrorist groups being increasingly sophisticated, a kind of apocalyptic discourse that sees non-state actors as a disproportionately powerful fifth column infiltrating the sovereign world in order better to corrode it. That discourse is in a sense no different from the stereotypical one that is being produced daily on capital flows, hackers, drug trafficking, epidemics and so forth. It is the discourse of a world adept at popularizing its fears, and fascinated by them. On the other hand, there is the idea that the attacks were so sophisticated and well organized that, according to the popular *doxa*, ‘surely, this could only have been achieved by a state’. The truth, in fact, is that things are likely to be murkier and that Western-rationalist projections of the state as basically a command-and-control outfit fail to portray accurately the tangled network of ideological allegiances that make up the Islamic nebula.

The formula that equates state and non-state actors, however, in its deafening simplicity, is in itself an indication of some of the dangers to come. The use of the term ‘war’, even if it were otherwise justified, is what allows one to presume what would otherwise have to be proved, namely, *that it is a state that is responsible for the attacks*. Long before it started dropping bombs on it, the US was already rhetorically at war with Afghanistan for hosting Bin Laden, as if it went without saying that Afghanistan was responsible for the attacks. But this formula raises both a procedural and a substantive problem.

### *a Self-Defence and Proof*

At the procedural level, the onus is clearly on the US to prove the responsibility for the attacks. In the recent past, the Clinton administration had been content with sending its UN Ambassador to the Security Council claiming that US intelligence had ‘compelling evidence’ that such or such state was responsible for an armed attack (the ‘act now and talk later’ policy).<sup>103</sup> While this might have passed unnoticed when only a few missiles were involved, a sustained campaign should clearly be backed by hard evidence.

<sup>101</sup> For a fascinating study (among many to have noticed the parallel) of the current crisis as mimicking the young American Republic’s pacification of the Barbary Coast, see Atkinson, ‘How Wars Are Won’, *Washington Post*, 16 September 2001.

<sup>102</sup> President Bush, in particular, has made it clear that he was intent on conflating the categories of state and non-state actors. Bush, *supra* note 35 (‘In this conflict, there is no neutral ground. If any government sponsors the outlaws and killers of innocents, they have become outlaws and murderers, themselves.’).

<sup>103</sup> Typically, the nature of such evidence was never fully disclosed and the US, for example, resisted any attempts by Sudan to create a fact-finding mission to determine whether the pharmaceutical plant that was bombed in 1998 had indeed been part of a terrorist network. See Lobel, ‘The Use of Force to Respond to Terrorist Attacks: The Bombing of Sudan and Afghanistan’, 24 *Yale Journal of International Law* (1999) 537.

Although a presentation to the Security Council probably allows one to use evidence that would not be considered credible in a court, and although the Council's decision remains for most practical purposes a political one (rather than one based on a 'beyond reasonable doubt' standard),<sup>104</sup> clearly the onus of proof is likely to be high<sup>105</sup> (the presumption of innocence, as regards individuals but also states, arguably takes it to the level of a 'general principle of law recognized by civilized nations').<sup>106</sup> Indeed, it would be hugely counter-intuitive to say that a state could be bombed (a dire consequence, needless to say) on the basis of evidence that would be substantially weaker than that required, for example, to engage its international responsibility before an international tribunal.<sup>107</sup> This is all the more so in light of previous intelligence failures by the CIA<sup>108</sup> (not the least of which is the failure to avert the 11 September tragedy itself).<sup>109</sup>

It is discomfiting in this context that the Bush administration has so far disclosed relevant evidence only to a friendly head of state (the UK Prime Minister), and then to the head of a regional security organization (NATO); the rest of the world is asked to take it at face value. At the same time, the US Ambassador to the UN has merely notified the Organization that it had 'compelling information that the Al-Qaeda organization, which is supported by the Taliban regime in Afghanistan, had a central role in the attacks'.<sup>110</sup> Surely, however, the need to guarantee the security of one's sources — one official argument for not disclosing the proof allegedly held by US authorities — cannot extend to withholding crucial evidence used to justify the massive bombing of a state.

### *b Self-Defence and State Responsibility*

It is in the nature of the obsessive concentration on the question of Al-Qaida's responsibility, furthermore, that it conveniently obscures the extent to which Bin Laden's guilt is only a part of the problem — and possibly the least important one for the purposes of bombing Afghanistan. Indeed the all-important substantive issue is that it is not clear that a state can be targeted in self-defence merely for *harbouring* terrorists. It is important to distinguish here between, say, one's repulsion for the Taliban regime and the reality of international law as we know it. The law of state

<sup>104</sup> B. Fassbender, *Security Council Reform and the Right of Veto: A Constitutional Perspective* (1998) 330.

<sup>105</sup> For a recent treatment of the issue, see Scheideman, 'Standards of Proof in Forcible Responses to Terrorism', 50 *Syracuse Law Review* (2000) 249. One is reminded here, for example, that, during the Cuban missile crisis, the US ambassador to the Council had brought U2 pictures directly into the Council meeting room. Clearly, that was an exemplary precedent for the US to set.

<sup>106</sup> For an interesting argument, in a subtly different context, see Sealing, 'State Sponsors of Terrorism Are Entitled to Due Process Too: The Amended Foreign Sovereign Immunities Act is Unconstitutional', 15 *American University Law Review* (1999) 395.

<sup>107</sup> In that respect, see Anthony Scrivener's well-taken point that 'it is a sobering thought that better evidence is required to prosecute a shoplifter than is needed to commence a world war'. Scrivener, 'Evidence Would Not Stand Up in Court', *The Times*, 5 October 2001.

<sup>108</sup> 'Sudan Target Made Only Pharmaceuticals', *Agence France Presse*, 29 August 1998.

<sup>109</sup> See 'Why Was Russia's Intelligence on Al-Qaeda Ignored?', *Jane's Intelligence Digest*, 5 October 2001.

<sup>110</sup> Negroponte, *supra* note 89.

responsibility and of collective security are of course two different regimes,<sup>111</sup> but it seems elementary that one should only have to answer for attacks for which one is responsible.

In this context, it is true that the prohibition against harbouring terrorists could not be clearer. The General Assembly, for one, has held, in its Declaration on ‘Principles of International Law Concerning Friendly Relations and Cooperation Among States’, that:

Every State has a duty to refrain from organizing, instigating, assisting, or participating in . . . terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts.<sup>112</sup>

Afghanistan, therefore, by failing to prevent the planning of terrorist activities on its territory and then failing either to try or to extradite the terrorists, has clearly failed in some of its most basic international duties.

But state responsibility for harbouring terrorists per se (say, an international delict) and state responsibility for an armed attack on another state by these same terrorists (reaching the level of a crime — or at least a ‘breach of a peremptory norm of general international law’) are not the same thing. In order validly to invoke self-defence against Afghanistan, one would have to prove not only that Bin Laden was the mastermind behind the bombing plot (something which is becoming increasingly obvious), but also that the Afghan state was *responsible for Al-Qaida*.

Clearly, states are responsible for the acts of their agents. This is what led, for example, to talk about the responsibility of Libya for the bombing of Pan Am Flight 103 over Lockerbie, since the two individuals suspected of being responsible for the attack turned out to be working for Libyan intelligence services. As regards aggression specifically, the General Assembly’s definition refers to ‘groups’ (i.e. agents), as long as these are sent by or on behalf of a state and their attack is the functional equivalent of one carried out by regular forces.<sup>113</sup> In the case of Afghanistan, however, it has not been contended — and it would no doubt be hazardous to do so without evidence<sup>114</sup> — that the suicide bombers were *agents* of the Afghan state.

Alternatively, a state may be held responsible for an attack launched by non-state agents which it subsequently endorses, even tacitly. The ICJ found, for example, that public statements of approval by Iranian authorities following the takeover of the US embassy in Teheran in 1979 created a liability of that state.<sup>115</sup> But

<sup>111</sup> See Vera Gowlland-Debbas’s treatment of the issue in Gowlland-Debbas, ‘The Limits of Unilateral Enforcement of Community Objectives in the Framework of UN Peace Maintenance’, 11 *EJIL* (2000) 361, at 364–366.

<sup>112</sup> GA Res. 2625, UN GAOR, 25th Sess., Supp. No. 18, at 339, UN Doc. A/8018 (1970).

<sup>113</sup> GA Res. 3314 (XXIX), UN GAOR, 6th Comm., 29th Sess., 2,319th Plenary Meeting, Supp. No. 31, at 142, UN Doc. A/9631 (1974). See also Schachter, ‘The Lawful Use of Force by a State Against Terrorists in Another Country’, in H.H. Han (ed.), *Terrorism and Political Violence* (1993) 250.

<sup>114</sup> Article 4(2) of the ILC Articles on the Responsibility of States seems to anticipate a specifically legal link. See Report of the International Law Commission on the Work of its Fifty-Third Session, A/56/10, November 2001, Chapter IV.E.1.

<sup>115</sup> *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, ICJ Reports (1980) 3, at 31–34. See also Article 11 of the ILC Articles on the Responsibility of States, *supra* note 114.

the Taliban have been careful in their response to the terrorists' acts, and offered to negotiate with the US if incontrovertible evidence of Bin Laden's implication was presented. The sheltering of Bin Laden, which began long before 11 September, is a typically ambiguous move that might well indicate support, but can also be interpreted simply as insistence on Afghani sovereignty. Certainly, the refusal to extradite Bin Laden<sup>116</sup> cannot by itself suffice to impute his acts to the Taliban, any more than daily refusals to extradite by states all over the world are deemed an endorsement by refusing states of criminal's wrongdoing.

Somewhere in between these alternatives, international law (which likes to think of itself as non-formalistic) anticipates that a state can be liable for the acts of those over whom it can be proved that it had, in the words of the ICJ, 'effective control'.<sup>117</sup> The timely adoption by the International Law Commission of its Articles on State Responsibility makes it equally clear that a state incurs responsibility for the acts of those who are under its 'direction or control'.<sup>118</sup> The threshold, however, is likely to be a high one. As the ICJ found in the *US v. Nicaragua* case — to the not negligible benefit of the US at the time — merely financing, organizing and assisting non-state actors does not 'warrant the conclusion that these forces [were] subject to the United States to such an extent that any acts they have committed are imputable to that State'.<sup>119</sup> What seems necessary, therefore, is at the very least some kind of advance knowledge of the attacks, and the reference in the ILC Articles to 'instructions' seems to reflect precisely that kind of minimal link. Whether the Taliban actually ordered, instigated, or at least knew of the planning of the attacks is of course precisely what is not known. It suffices to note, here, that there are enough plausible reasons why they would not, that one should be sceptical of allegations that Al-Qaida and the Taliban regime are virtually interchangeable. It is very possible, for the sake of argument, that Bin Laden, if he is responsible for the attacks, would have kept his hosts — who may well have been busier with the overwhelmingly domestic agenda of oppressing women, destroying Buddhas and combating NGO proselytism than launching an all-out war on the 'occupiers' of Saudi-Arabia's holy sites — in the dark.<sup>120</sup>

The mere tolerance of the presence of terrorist groups on a state's territory, however, is otherwise insufficient under the present state of international law to allow a state victim of a terrorist attack to impute that attack to the state which tolerates the

<sup>116</sup> For a pre-11 September elaboration of the 'terrorist attack + refusal to extradite = aggression + self-defence' equation, see, for example, Sharp, 'The Use of Armed Force Against Terrorism: American Hegemony or Impotence?', 1 *Chicago Journal of International Law* (2000) 37.

<sup>117</sup> *Military and Paramilitary Activities (Nicaragua v. US)*, ICJ Reports (1986) 4, at 14, para. 86.

<sup>118</sup> Article 8 of the ILC Articles on the Responsibility of States, *supra* note 114.

<sup>119</sup> *Military and Paramilitary Activities (Nicaragua v. US)*, ICJ Reports (1986) 4 (emphasis added).

<sup>120</sup> This idea, that terrorists such as Bin Laden are not strictly dependent on states, is in fact at the heart of the — controversial — idea of the 'new terrorism', central to expert debates on the issue in the 1990s. See Simon and Benjamin, 'America and the New Terrorism', 42 *Survival* (2000) 59.

presence of the terrorists.<sup>121</sup> Indeed, the Afghan case illustrates in extreme form the dilemmas of contemporary collapsed statehood and efforts to suppress terrorism. To the extent that Bin Laden and his troops are effectively hijacking Afghanistan, the concept of ‘effective control’ would almost seem to be in need of being reversed. But even the view of Al-Qaida as a shadow state in Afghanistan may over-inflate the importance of the state in what had essentially become an institutional no-man’s land: Al-Qaida is not so much an aspiring sovereign actor taking over a state as a non-state actor that neither speaks nor wants to speak the political grammar of statehood, preying on what is itself the collapsed semblance of a sovereign.

## 2 *Self-Defence and the ‘Ubiquitous Foe’*

The problem, again, is not merely with the Taliban but has to be seen within the broader context of the idea of a sustained campaign against all ‘sponsors’ of terrorism, an idea that is becoming increasingly popular in Washington.<sup>122</sup> The Bin-Laden-Mollah Omar alliance, marked as it was by close consultation, military imbrication and clannish endogamy, may prove in the end to be the easy case. But if a right to self-defence were exercisable on the basis of half-disclosed evidence against any country that had at one time or other been lax on ‘terrorism’ (assuming, of course, that one could agree on a definition of terrorism),<sup>123</sup> it is not difficult to see how one might be confronted with a war that is not only infinite in time, but also risks being infinite in space, extending potentially to all corners of the earth. Indeed, President Bush’s declaration that ‘[o]ur war on terror begins with al-Qaida, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped, and defeated’, is hardly made more reassuring by his comment that ‘[t]here are thousands of these terrorists in more than 60 countries’.<sup>124</sup> Joint Resolution 64 of the US Congress, in what must surely be one of the most general military empowerments in American legal history,<sup>125</sup> promises a deluge of force ‘against those

<sup>121</sup> Certainly, this has been the practice of the Security Council so far, particularly in condemning (or at least, in recent years, not approving) a number of Israeli (southern Lebanon, Tunisia) or American operations (Afghanistan). For an earlier overview of the Israeli arguments and the Security Council’s response to them, see O’Brien, ‘Reprisals, Deterrence, and Self-defence in Counterterrorism Operations’, 30 *Virginia Journal of International Law* (1990) 421, at 426–463.

<sup>122</sup> Grand planners of the new world order are already lining up those states that are next on the list of the regimes that will have to be ‘cleansed’ of (as the prevalent metaphor goes) the ‘cancer’ of terrorism. See Safire, ‘Liberating Oppressed Iraqis Ought to Be Among the War Aims’, *New York Times*, 9 October 2001; Sciolino and Tyler, ‘Team of Defense Experts Maps Ouster of Saddam’, *New York Times*, 13 October 2001; and Ottaway and Ricks, ‘Somalia Draws Anti-Terrorist Focus’, *Washington Post*, 4 November 2001. Conservative columnist Charles Krauthammer has also outlined in a series of articles how future rounds of the war should include Syria, Iran and Iraq. See, for example, Krauthammer, ‘It’s Time to Change Regimes’, *Washington Post*, 28 September 2001. That this talk is not merely journalism is made clear by the tenor of the US Letter to the Security Council, *supra* note 61 (noting laconically that ‘[w]e may find that our self-defence requires further actions with respect to other organizations and other States’).

<sup>123</sup> For an early description of terrorism as ‘Humpty-Dumpty’, see W.R. Farrell, *The US Government Response to Terrorism: In Search of an Effective Strategy* (1982) 6.

<sup>124</sup> Bush, *supra* note 28.

<sup>125</sup> Paust, ‘Fighting Back; Law is with US’, *National Law Journal*, 8 October 2001.



nations, organizations, or persons [the President] determines planned, authorized, committed, or aided the terrorist attacks'.<sup>126</sup>

If such a 'war' were fought, however, then the coalition would have to in many cases turn its weapons against itself, its fiscal paradises, its alliance with terrorism's theocratic middle-powers, its one-time support for today's incarnation of evil, and its many pockets of hypocrisy.<sup>127</sup> Of course, it may be that some negligences are more 'criminal' than others, but by the time one has reached that kind of hair-splitting, one should be ready to contemplate that one has provided a blueprint for intervention that goes against all of the Charter's essentially prudential safeguards. That some believe the US as a liberal democracy makes a uniquely benevolent hegemon will be of little reassurance to those who think that the problem is not with the US as a polity but with the phenomenon of extreme concentration of power. The discretion, at any rate, is destined to be used by others.

## 5 War as Camouflage

The idea here is not to advocate a *crispation* on what are perhaps partly worn-out positivistic concepts. It may be for example, that the international regime governing the use of force is in urgent need of fundamental revision. Rather, the point is to warn against the danger of changing the existing regime without properly arguing for it, or of changing it by stealth. But, if the history of the past weeks is any lesson that may be precisely the idea. It is at this stage that law and politics mesh in a tangled semiotic web, with law dutifully preparing the ground for the free-wheeling rhetoric of war. To understand the fundamental appeal of 'war', it is necessary to return to the central dilemma which arose in the immediate aftermath of the 11 September attacks: If not war, what then?

Here we come to the third and perhaps most all-encompassing rhetorical use of the term. The routinization of 'war talk', the mixture of barely repressed excitement and morbid fascination it generates, function like a police perimeter on a crime scene, warning onlookers to keep their distance, carefully cautioning against thinking against or beyond it. Suggesting a predominantly military response is also part of a larger process: one which not so much rules out as conveniently distorts alternative ways of defining the issue.

### A War and the Perversion of Justice

It is perhaps too easily forgotten, to begin with, that this could have been a problem of crime and punishment before it became a matter of special forces and bombardment.<sup>128</sup> Of course, justice is being pursued, and in some ways relentlessly so (by

<sup>126</sup> Section 2(a). See also Curl, 'US Can Go to War with Any Enemies. No Requirement to Specify Country', *Washington Times*, 13 September 2001.

<sup>127</sup> See Scheer, 'Who Do We Bomb Next?', *Salon*, 17 October 2001, [www.salon.com](http://www.salon.com).

<sup>128</sup> Evidence that for many commentators war is seen as an alternative to justice abounds. See Krauthammer, 'To War, Not to Court', *Washington Post*, 12 September 2001.

'armies' of FBI agents conducting 'campaigns' of arrests). But the least one can say is that the rhetoric of war and the rhetoric of justice do not intermingle happily. On the one hand, the entrustment of a 'justice' mandate to the military,<sup>129</sup> talk of 'punishing countries' and the idea that Bin Laden should be captured 'dead or alive', have contributed to blurring the line between justice and revenge.<sup>130</sup> On the other hand comes a symmetrical temptation to 'martialize' the judiciary: what might, before 11 September, have appeared as marginal policy proposals<sup>131</sup> have come to be taken seriously, culminating with the controversial executive order allowing the trial of 'terrorists' by military courts.<sup>132</sup>

If anything, as has been remarked by several commentators,<sup>133</sup> this lack of serenity<sup>134</sup> should make the case for some form of international judicial solution even stronger. Because the prospects of convincing the current US administration of the merits of such a solution look as remote as ever,<sup>135</sup> however, one may well be witnessing the emergence of what has already been referred to as a 'third way' to combat terrorism:<sup>136</sup> one that is neither quite justice nor quite war, but a thoroughly opaque mix of the two. Beyond certain political temperatures, it seems, the scale and the sword can be melded into pantocratic thunderbolts for would-be dispensers of justice to strike the guilty from the skies.

## B *War and the Waning of Politics*

It is this hybridization of war and justice, in turn, which obscures the nature of the current crisis — long before one reaches the pathological dramaturgy of 'politics as survival' — as a problem of 'ordinary politics'. Here, there is a deep ambiguity at the heart of the war rhetoric. On the one hand, 'war' would seem to 'elevate' the enemy from the private sphere of ordinary domestic punishment to the public sphere of

<sup>129</sup> The following extract from a propaganda leaflet being dropped over Afghanistan by US aircraft speaks mountains about the (no doubt intended) confusion of semantic registers: 'Attention Taliban! You are *condemned*. Did you know that? The instant the terrorists you support took over our planes, you *sentenced yourselves to death*. The Armed Forces of the United States are here to seek *justice* for our dead.' Emphasis added. Quoted by Borger, McCarthy and Norton-Taylor, 'The US Message to the Taliban', *Guardian*, 20 October 2001.

<sup>130</sup> See Bush's ambiguous statement that 'Whether we bring our enemies to justice, or bring justice to our enemies, justice will be done' (Bush, *supra* note 28).

<sup>131</sup> See Richardson and Crona, 'Let Military Panels Punish Terrorists', *Los Angeles Times*, 23 September 2001; Lacovara, 'How We Punish Saboteurs', *Legal Times*, 15 October 2001; and Goldsmith and Meltzer, 'Swift Justice for Bin Laden', *Financial Times*, 6 November 2001.

<sup>132</sup> Bumiller and Johnston, 'Bush to Subject Terrorism Suspects to Military Trials', *New York Times*, 15 November 2001. Characteristically, the US President will be the one in charge of defining who qualifies as a 'terrorist' to fall under the exception.

<sup>133</sup> Robertson, 'Lynch Mob Justice or a Proper Trial: The Government Statement Does Not Add Up to Conclusive Proof', *Guardian*, 5 October 2001; Slaughter, 'Terrorism and Justice', *Financial Times*, 11 October 2001.

<sup>134</sup> One might point out, for example, that, if the CIA has qualms about showing evidence linking Bin Laden to the attacks to the Security Council, it is unlikely to be more ready to do so in an open court of law.

<sup>135</sup> Rovella, 'Feds Want Terrorist Trials Held in the US', *National Law Journal*, 15 October 2001.

<sup>136</sup> Glennon, 'Forging a Third Way to Fight: "Bush Doctrine" for Combating Terrorism Straddles Divide Between Crime and War', *Legal Times*, 24 September 2001.

international conflict. If not on the basis of responsibility, war would at least settle scores on the basis of power. Yet, at the same time, precisely because it is being waged as an operation of criminal repression,<sup>137</sup> 'war' also excludes the political except in its thinnest of forms by reducing it to a battle of life-and-death.

The debate over the causes of war becomes the first casualty of the war itself. In an atmosphere of presumed guilt, mob excitement, and *union sacrée* around the providential leader, 'war' serves to stifle debate over its own existence. This is where the paradox of war reaches its paroxysm and exposes its aporia. Either the terrorists are simply hypnotically self-induced psychopaths, in which case elevating them to the status of enemies of the 'free world' (according to the common phraseology) makes no sense because there is nothing remotely political about their acts. Or they *are* the monstrous outgrowth of something that transcends them, in which case 'war' merely serves to delude us into believing that the problem can be 'defeated' rather than solved. In either case, serious political debate is marginalized as an appendix to the war effort — a ratification chamber rather than any remotely illuminating prism.

Indeed, 'war' has an inherent tendency to construct the political debate in its own image. A polemic is already raging, for instance, between those who argue that the West is reaping the fruits of a policy of malevolent negligence and structural inequality<sup>138</sup> and those who claim that it is 'obscene' — in a language already designed to excommunicate dissent — to say so.<sup>139</sup> The opposition, in simplistically pitting know-better materialists against the would-be guardians of moral indignation, dovetails nicely with the war buzz. At the same time, however, it also risks reducing the debate to a series of neat but ultimately sterile oppositions.

One way of transcending this dichotomy would be to say that the two sides of the debate are not speaking the same language. Few would dream of suggesting that the US, even less the victims of the attacks, somehow deserved what befell them. By the same token, those who see good and evil as suspended in the ethereal thin air of our *libre-arbitre*, can be seen as essentially guilty of the same religious obliviousness to the real world that they denounce in their enemies.<sup>140</sup> That is to say, there is indeed a difference between the language of normative merit and that of political causality. It should hardly need to be said that one can believe that terrorism is absolutely unacceptable, *and* still see how, in raw sociological terms, it might be the product of historically produced and politically motivated circumstances. For the sake of

<sup>137</sup> See Hawkes, 'When a War is Really a Pirate Hunt', *The Times*, 17 September 2001; and Howard, 'It's Not So Much "War" — It's More Like a Hunt', *The Times*, 2 October 2001.

<sup>138</sup> See Sassen, 'Guerre totale contre un péril diffus: au Sud, l'argent ou les bombes?', *Le Monde Diplomatique*, October 2001; and Ramonet, 'L'adversaire', *Le Monde Diplomatique*, October 2001.

<sup>139</sup> See Bruckner, 'Tous coupables? Non', *Le Monde*, 25 September 2001; and Friedman, 'Don't Blame America for Sowing the Seeds of Terror', *New York Times*, 6 October 2001. See also 'Treason of the Intellectuals?', *Economist*, 6 October 2001.

<sup>140</sup> Criss-crossing references to the 'Almighty' and various forms of religious allegiance are of course in themselves an interesting and not entirely surprising subtheme of the response to 11 September, from early and ill-advised calls for a 'crusade' to the omnipresent references to God in President Bush's speeches.

argument, if such comparisons are to be imported into our vocabulary, the evil of Nazism made Versailles no less of an inept failure.

At this junction, the debate branches off again into two schools. On the one hand, there is the idea of a ‘clash of civilizations’<sup>141</sup> and the idea of millenarian strands in Islam driving legions of fundamentalist kamikaze into the hated symbols of the open society. On the other hand, there are those who see the terrorists as the new freedom fighters of the Arab world and perhaps, in some non-confessable and distorted way, worthy heirs to the 1970s PLO hijackers, or even the rightful defenders of Iraqi children. But, again, the problem is badly posed and each underestimates the extent to which the political and the cultural are intertwined. One argumentative strategy for circumventing this opposition might consist, for example, in pointing out that it is impossible to understand the political except through the cultural medium through which it expresses itself and which provides it with its mystique, its subjects and its language.<sup>142</sup> The hijackers were indeed probably more obsessed by what they saw as the sacrilegious occupation of Islam’s holy sites than by the lack of progress of a Middle East peace process, which, in all likelihood, they abhorred. The very violence of the attacks, as distinct from the general defiance of, say, the man in the street in Cairo or Damascus, is indistinguishable from a view, once popularized by Khomeini, of the United States as the ‘great Satan’. Ample evidence has surfaced since 11 September of the peculiarly sectarian ideological brew in which the terrorists were immersed. Even if one reduces the concept of the political to the friend–foe antithesis, the categories of the political are mediated in practice by those of the cultural.<sup>143</sup>

By the same token — but probably more importantly in terms of causality — even if there are millenarist strands in Islam, this does not explain why these remained dormant throughout most of the region’s convoluted history in the second half of the twentieth century. Above all, it does not explain what the triggering element was for their sudden awakening. That triggering element, it is submitted, was most likely political, and has its roots, put simply, in a profound sense of historical humiliation in the region and in the persistent failure to find a lasting and equitable solution to the Israeli-Palestinian problem (whoever’s fault that is), against the background of dismal prospects for the young, booming demographics, lack of education and rising inequalities. To these endogenous factors should be added what must surely count as a supremely aggravating factor: the international community’s own disregard for its word (as expressed, notably, in numerous Security Council resolutions), and the

<sup>141</sup> S. Huntington, *The Clash of Civilizations and the Remaking of World Order* (1997).

<sup>142</sup> See Ranstorp, ‘Terrorism in the Name of Religion’, 50 *Journal of International Affairs* (1998) 41.

<sup>143</sup> This commands, in particular, that political correctness not prevent one from taking seriously the embeddedness of certain oppressive strands in Islam. See Redeker, ‘Le discours de la cécité volontaire’, *Le Monde*, 21 November 2001; and Taheri, ‘Islam Cannot Escape Blame’, *Wall Street Journal*, 27 October 2001.

mixture of over-<sup>144</sup> and under-involvement that has become such a hallmark of external efforts to bring a solution to the region's problems.<sup>145</sup> This is the terrain upon which the political manipulation of Islam thrives, turning the alienated sons of a disenfranchised Arab middle class into high-tech fundamentalists.

Even if it were the case that those particular terrorists on board the four hijacked aircraft were simply millenarists, therefore, a kind of savage nihilist equivalent of, say, the Aum sect, the Solar Temple Order, or the Branch Davidians, chances are that much of their political support is not, and that the behaviour of many of their supporters can only be explained by a *mixture* of religious perversion and social alienation. There are even those who have argued, a long way from the simplifying discourse of the 'clash of civilizations',<sup>146</sup> that a more radical critique of modernity, not unfamiliar to the West's own political theology, is struggling to surface behind the attacks.<sup>147</sup> Indeed, even if the terrorists by definition do not know it and would be the first to deny it, it is probable that they would never have reached the kind of dismal

<sup>144</sup> One obvious example is the legacy of the Cold War and the US's own financing of the Mujaheddin and its cosiness with the Islamabad-backed Taliban, perceived initially as a guarantee of stability for what might have been a Turkmenistan–Pakistan pipeline pumping ever more gas to satisfy the West's voracious appetite for energy. See L.P. Goodson, *Afghanistan's Endless War: State Failure, Regional Politics, and the Rise of the Taliban* (2001).

<sup>145</sup> That if anything is the reason why the terrorists 'hate' the US, and it is *not* the case (at least in any useful explanatory way), as Bush has suggested to a chorus of applause in the US Congress, that: 'They hate what we see right here in this chamber — a democratically elected government. Their leaders are self-appointed. They hate our freedoms — our freedom of religion, our freedom of speech, our freedom to vote and assemble and disagree with each other.' Bush, *supra* note 28. It is of course true that the terrorists come mostly from authoritarian regimes (which, however, they may disapprove of and have suffered at the hands of), but there is little or no evidence that they have any particular interest in the domestic organization of the American polity. Indeed, the Mujaheddin fought Brezhnev's authoritarian Soviet Union with as much zeal as the Taliban now purport to take on the West. Bin Laden, although he would probably disapprove of many aspects of the American way, has himself hardly ever been in the West, and has been consistent in describing US involvement in the Muslim world as the exclusive cause of his wrath. The point here is that, although Islamic fundamentalism may not be particularly sympathetic to parliamentary democracy, this is not *essentially* what it is against and what the attacks are about. That the terrorists should have targeted the World Trade Center (and, possibly, either the White House or the Capitol or both) merely shows that they understood enough about Western politics to know where to hurt America most, although that does not necessarily reflect a high level of assimilation of the West's own self-understanding. Note in addition that, although some of the targets or potential targets can be seen as a symbol of American vigour or democracy from within (e.g. the World Trade Center and the White House), they are likely to be seen merely as various sources of power by the terrorists (e.g. where the money and the bombing orders come from). As for targets such as the Pentagon, they clearly have no particularly immediate positive role in the internal functioning of democracy, and could not be clearer attempts to attack the instruments of America's *foreign and military policy*. Although the US can be easily forgiven for 'taking it personally' as it were, to claim that it is primarily US democracy that was targeted is only one further way in which the real problems are concealed from the public eye; it also suggests a liberalism that is deeply, delusively even, infatuated with itself.

<sup>146</sup> For a particularly vigorous critique of Huntington's thesis, see Said, 'Le choc de l'ignorance', *Le Monde*, 26 October 2001.

<sup>147</sup> See R.L. Leuben, *Enemy in the Mirror: Islamic Fundamentalism and the Limits of Western Rationalism* (1999). Also, in the aftermath of 11 September, Ignatius, 'See the Bin Ladenites as Excrescence of a Painful Transition', *International Herald Tribune*, 29 October 2001 (comparing Al-Qaida's political culture, despite its opportunist use of Islam, to nineteenth-century European anarchism).

reading of Islam that led them to murderous immolation, were it not against the background of their political, economic and social circumstances.<sup>148</sup>

### *C War as Its Own End*

The language of total war, then, by ritually projecting the kind of larger-than-life enemy it feels it needs to sustain its cleansing fantasy, belies the West's proclaimed intention of waging a circumscribed fight against a few select groups. As that language gathers its own momentum, there is little doubt that it will produce new targets and in the process cover ever more 'enemies' under the same indiscriminate mantle of opprobrium. By constructing an enemy akin to 'fascism, Nazism and totalitarianism'<sup>149</sup> that must be defeated or eradicated physically, and by focusing obsessively on Al-Qaida rather than Al-Qaida's immense breeding ground, the rhetoric prevents one from paying serious attention to the political circumstances that have led to terrorism.<sup>150</sup>

Whatever positive results military action may otherwise achieve in disabling terrorist networks, it is easy to see that one will not exactly be receptive to radical demands for change in the status quo precisely as an all-fronts war is being waged — and certainly the language of war is not that of one who has made up his mind to begin sketching the broader regional and global solutions that would be necessary. Indeed, that language, by reaffirming 'our innocence' (Bush: 'freedom and justice') vs. 'their guilt' (Bush: 'fear and cruelty'), also serves to psychologically block any awareness of 'our' own (the US and Europe's) responsibilities. This at a time when there would seem to be no more urgent question for the international community than that of understanding how Afghanistan was ever allowed to become what it became.

Instead of dictating the course of a limited war, there is thus a very pressing danger that the political will be subordinated to the warlike.<sup>151</sup> Under the tyrannical pressure of the 'spectacle society', war gradually distils its own essence.<sup>152</sup> Characteristically, those political efforts that have been deployed so far have been directed to obtaining military and intelligence support or the use of airspace, rather than to

<sup>148</sup> See Khan, 'A Memo to Americans', *Salon*, 23 October 2001, [www.salon.com](http://www.salon.com).

<sup>149</sup> Bush, *supra* note 28. It is not clear what is gained by using these historically located terms, except to provoke a kind of knee-jerk reaction in public opinion. Indeed, one of the interesting aspects of the 'new terrorism' is precisely its lack of an element of massive societal following that was an integral part of totalitarianism. To say so in no way diminishes terrorism's evil, but underlines the slowness with which our mental categories are adapting to the phenomenon.

<sup>150</sup> As Stanley Fish put it: 'If we reduce that enemy to "evil", we conjure up a shape-shifting demon, a wild-card moral anarchist beyond our comprehension and therefore beyond the reach of any counterstrategies.' Fish, 'Condemnation Without Absolutes', *New York Times*, 15 October 2001.

<sup>151</sup> In this context, Rumsfeld's comment that 'In this war the mission will define the coalition, not the other way around' can pass as one of the most explicit rejections of Clausewitzian logic to date. See Rumsfeld, *supra* note 92. See also Gordon, 'US Military Campaign in Afghanistan Outpaces Political Plan', *New York Times*, 16 October 2001. This of course is consistent with Schmitt's idea that war is not the continuation of the political, but its very condition. See Schmitt, *supra* note 27, at 34.

<sup>152</sup> See, more generally, Baudrillard, 'L'esprit du terrorisme', *Le Monde*, 2 November 2001.

relaunching the Middle East peace process. It is a worrying fact that the possibility of greater diplomatic activism in the region seems to depend principally on the need to woo Arab partners into the coalition — and one can only speculate as to what extent promises made in such circumstances will be kept. Certainly, the US has not put itself in a situation where it could usefully urge restraint in Chechnya, Kashmir, the occupied territories and Kurdistan even if it intended to, precisely as it has provided some of its allies — and some not so friendly states in the process as well — with the kind of ready-made justification for the use of violence which had eluded them for so long. As the war busily prepares the next crisis, the need to fight one network and one state may even blind the 'coalition' to the danger of enrolling states (Saudi Arabia, Sudan and Pakistan come to mind) which form the backbone of terrorism in the first place.

Indeed, according to the inflexible logic of the new warriors, to deal with root causes might even render one vulnerable to the accusation of going soft on terrorism by implicitly accepting they have a point. It is in fact exactly the contrary that is true: it is precisely by declaring an all-out war that one falls into the terrorists' trap, since one simply follows them in their scorched-earth policy of burning bridges between civilizations and driving civilian populations with them over the precipice. To be politically responsible, on the contrary, is probably to recognize that, even as terrorists do their best to convince us of the contrary in the hope of luring the West into a crusade it does not want and certainly does not need, there is, plainly speaking, a political problem underlying terror.<sup>153</sup> Even more painfully, it is to recognize that, just because terrorists are guilty of the worst of crimes, this does not mean that 'we' do not have our share in the chain of events that triggered them.<sup>154</sup>

## 6 Conclusion: Of War and Roads Not Taken

This article began by outlining the hypothesis that the rhetoric of war is a subject of study in itself. I hope to have shown how 'war' is inseparable, both domestically and internationally, from the expression of an urge to carve out an exception in the fibre of international law; to make law, perhaps, *into* a bottomless exception.<sup>155</sup> Although that will to exception cannot do without the semblance of legality, it does so at the price of a substantial distortion of law's categories.

In the process, the foundations are laid for a complete restructuring of the international community's regime concerning the use of force. Not susceptible to being channelled against any specific sovereign, states' use of violence risks degenerating into a shoot-out more reminiscent of the Wild West than the kind of reasonably orderly action anticipated by the Charter. Anarchy risks being replaced by

<sup>153</sup> See, for example, Wilcox Jr, 'The Terror', *New York Review of Books*, 18 October 2001 (noting that '[t]he most important deficiency in US counterterrorism policy has been the failure to address the root causes of terrorism'). The author was US Ambassador-at-Large for Counterterrorism between 1994 and 1997.

<sup>154</sup> C. Johnson, *Blowback: The Costs and Consequences of American Empire* (2000).

<sup>155</sup> G. Agamben, *Homo Sacer: Sovereign Power and Bare Life* (1998).

chaos. It is here, arguably, that law, morality and politics most vividly intersect to produce a sort of reconstructed ‘total legitimization’ of violence.

This restructuring also implies a redrawing of the geopolitical map between what has been described as the ‘post-modern’ world and its loosely defined ‘outer periphery’ of ‘pre-modern’ states where low-intensity anti-terrorist violence will be tolerated, perhaps as part of a ‘defensive’ pacification<sup>156</sup> of the Empire’s troublesome outskirts.<sup>157</sup> Indeed, even as the West insists adamantly and rightly that this is not a ‘clash of civilizations’, the systematic downgrading of the South’s sovereignty implicit in the ‘new war’ risks *de facto* making it into one.<sup>158</sup>

An intolerable liberal restraint on the state’s will to survive or a case of indeterminate liberalism providing a ready-made justification for all-out war? The ‘Allied position’ as regards the role of international law is ambiguous at best and displays elements of both. On the one hand, such was the political support for retaliation that a military response would probably have gone ahead even if international law unquestionably prohibited it. There is a tendency to reach behind the law for a kind of moral absolute (the ‘free world’) by emphasizing the ‘inherence’ of the right to self-defence<sup>159</sup> rather than its rootedness in the Charter, that is characteristic of a sovereign that has made up its mind to exercise violence, even before it asked itself whether it was legal in the circumstances. Indeed, at times, those in charge do not even bother to speak of self-defence,<sup>160</sup> and talk of ‘retaliation’ or even ‘reprisals’ is never far below the surface.<sup>161</sup>

On the other hand, law would be wrongly dismissed as just an afterthought, and the legitimization of violence is formulated at least superficially within its language. Perhaps because the US can only frame what might otherwise be its existential response as a state as the crusading thrust of an ideal, the anti-terrorist cause must and can only have — in addition to morality, consensus, and bigger and smarter guns — international law on its side. Afghans, in addition to being bombed for the survival

<sup>156</sup> According to the influential theory propounded by one of Tony Blair’s lead foreign policy advisers. See R. Cooper, *The Postmodern State and the World Order* (2000).

<sup>157</sup> See D. Tucker, *Skirmishes at the Edge of Empire: the United States and International Terrorism* (1997); Pasquino, ‘Il centro e la periferia dell’Impero’, 67 *Reset* (October 2001) ([www.reset.it](http://www.reset.it)); Wolf, ‘The need for a new imperialism’ *Financial Times*, 10 October 2001; Steinberg, ‘Barbarians at the gate’, *The Jerusalem Post*, 12 September 2001.

<sup>158</sup> This is also reflected semantically in the ambiguous return of such expressions as ‘civilized nations’ or ‘civilization’ in speeches of President Bush and others. See, for example, G. Bush, Address to the Nation, World Congress Center, Atlanta, GA, Office of the Press Secretary, 8 November 2001 (declaring that ‘We wage a war to save civilization itself’). See also Riddell, ‘Just What is This “Civilisation”?’ *Observer*, 28 October 2001.

<sup>159</sup> See, for example, Maxon, ‘Nature’s Eldest Law: A Survey of a Nation’s Right to Act in Self-defence’, 25 *Parameters: US Army War College Quarterly* (1995) 55.

<sup>160</sup> Seymour, ‘The Legitimacy of Peacetime Reprisal as a Tool Against State-Sponsored Terrorism’, 39 *Naval Law Review* (1990) 221.

<sup>161</sup> See Waldmann, ‘Revenge Without Rules: On the Renaissance of an Archaic Motif of Violence’, 24 *Studies in Conflict and Terrorism* (2001) 435 (written before 11 September).



of the free world (not to mention their own good<sup>162</sup> and the imminent rescue of the Afghan woman<sup>163</sup>), must endure being bombed as part of international law's great unfolding master plan.

This may not amount to more than a rhetorical insurance policy, but it does add an important layer of legitimacy in a context where such legitimacy has become crucial. It risks transforming the upcoming struggle accordingly from what might have been a stern fight for predominance into the kind of war 'in the name of humanity' which Schmitt considered was a unique recipe for imperialism. As has become almost surreally clear during the strikes against Afghanistan, the line between cluster bombs and food rations is sometimes a thin one.<sup>164</sup> In that sense, the terrorists — truly the enemies of mankind — may well have precipitated the reconciliation of the otherwise irreconcilable: the animal survival instinct of the Kissingerian realist and the urban missionary zeal of the Wilsonian idealist, under the reassuring auspices of the technocratic legalist.<sup>165</sup>

Is it international law's manipulation or international law itself that is responsible for precipitating that fusion of horizons? The opposition probably fails to capture international law's peculiar role. The question is not so much whether the law is determinate as whether it can, through the discipline it exercises on its various locutors, serve as a revelator of some of the cruder forms of interest that lie behind the move to violence. This is the international lawyer's chance and it is a slim one, but the point is that law as an intellectual discipline structuring doctrinal oppositions can at least compel actors to come out in the open with the world view that propels them to action. Law is less constraining of politics than it is revealing of it. It can, if one takes it seriously and submits one's reasoning to the kind of outside scrutiny that its existence posits, tease out raw, unprocessed prejudices.<sup>166</sup>

If not legally, at least politically and morally, then, states cannot have it both ways: that is, to be both within and without the exception; to circumvent the law and to receive its unction. Although law may not be able to compel actors to call things by their name (e.g. reprisals, forcible countermeasures), law can force states to take *responsibility* for whatever violence they inscribe in the law — which is perhaps, after all, another way of defining the political.

<sup>162</sup> See Bush, *supra* note 35 ('the oppressed people of Afghanistan will know the generosity of America and our allies'). See also T. Blair, 'The Power of Community Can Change the World', Speech by Tony Blair, Prime Minister, Labour Party Conference, Brighton, 2 October 2001, [www.labour.org.uk](http://www.labour.org.uk).

<sup>163</sup> Bumiller, 'First Lady to Speak About Afghan Women', *New York Times*, 16 November 2001. The announcement was made a few days after the fall of Kabul, as it became clear that the Taliban regime was crumbling.

<sup>164</sup> Zabarenko, 'US Offers Lesson on How to Tell Cluster Bombs from Food Packs', *Washington Post*, 30 October 2001.

<sup>165</sup> See T. Blair, 'Speech by the Prime Minister at the Lord Mayor's Banquet', 12 November 2001 (noting that 'In the war against terrorism the moralists and the realists and the realists are partners, not antagonists'), [www.pm.gov.uk/news.asp?newsID=2996](http://www.pm.gov.uk/news.asp?newsID=2996).

<sup>166</sup> See, on this point more generally, Martti Koskeniemi's unsurpassed, 'The Place of Law in Collective Security', 17 *Michigan Journal of International Law* (1996) 455.

These considerations, whether in their more recognizably ‘legal’ or ‘political’ versions, should matter to international lawyers because this is, after all, what they are asked to ratify *in toto* by lending the discreet patina of their expertise. Refusing to give their blessing might not exactly grip the war machine, but nor will it help it, and there is nothing inevitable about international lawyers being the major-domo of their statesmanlike masters, especially when the latter are acting in a spate of anger. Perhaps now more than ever, for those arguing within the bounds of formalism, this also implies taking responsibility for the fact that their epistemology is inevitably rooted in a concept of ‘an’ international order (and lawyers’ role within it) that is political (and therefore probably ultimately groundless but not inevitably indefensible) — lest that ground be left to those who would only define it to destroy what was built upon it.<sup>167</sup> In that sense, this article’s ‘political’ closing section might as well have been its ‘legal’ starting point.<sup>168</sup>

Could a more cogent response to the problem have been found? To drop the word ‘war’ altogether would already have been evidence enough of a certain aspiration to change, although this is probably too much to hope for. The usual and somewhat tired recipes for better, quicker and smarter freezing of assets, however, will never provide more than a superficial remedy if they are not combined with a reflection on globalization’s paradoxes and the complex redistributive impacts of free financial flows. Criminal justice itself, often presented as a panacea,<sup>169</sup> will one day have to confront seriously the extent to which it is capable of generating a discourse that can be as much a prolongation of war as it is an alternative to it.

But the irony, of course, is that, by the time the word ‘war’ has been pronounced, it has acquired a momentum of its own. The rhetoric of war feeds into its logistics. The will to war, as a sort of quintessentially self-realizing prophecy, *creates* the war: the minute the US started to bomb Afghanistan, it was effectively at war with that state,<sup>170</sup> even had its quarrel only been (which it turned out it was not) with one of its guests.<sup>171</sup> The elimination of the Taliban, then, becomes the logical solution to a problem which, by the time it has been allowed to degenerate into an imminent security threat, can only be treated militarily. In that context, the war against Afghanistan can almost pass for the exception that is needed to achieve a clean slate: the one event that will

<sup>167</sup> This is a transposition to the international plane of the idea, first mooted in the context of Weimar constitutional debates, that groundless ultra-positivism leaves itself debilitated to fight off the will-to-power’s onslaught, if it cannot find in itself a legitimacy that is extra-legal. In contemporary Weimar studies, Herman Heller is often associated with the middle way between the nihilist dangers of Schmitt and the moral arbitrariness of Kelsenianism. See D. Dizenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar* (1997).

<sup>168</sup> For a superbly synthetic elaboration of a similar point of view in the context of Kosovo, see Koskenniemi, ‘“The Lady Doth Protest Too Much”. Kosovo, and the Turn to Ethics in International Law’, *Modern Law Review* (2002, forthcoming).

<sup>169</sup> ‘Seek Justice, Not War’, *Observer*, 16 September 2001; Danaher, ‘Justice, Not War’, *Washington Post*, 29 September 2001.

<sup>170</sup> Rasperry, ‘When Did the Target Become the Taliban?’, *Washington Post*, 5 November 2001.

<sup>171</sup> See Pfaff, ‘The War on Terror Turns into War on Afghanistan’, *International Herald Tribune*, 3 November 2001.

reinstate the normality that is international law's most auspicious environment. Some of the war's successes may even allow us to forget the fact that it should never have occurred in the first place: but the penumbral intuition that violence is as much the cause as the solution to its own quandary can never entirely be dispelled.

In the medium term, this means that the possibility of a prolongation and escalation of the use of force in a world where the entanglement of state and non-state *problématiques* makes, for example, the system of overlapping alliances preceding the First World War look eerily formal, arguably dwarfs all other problems. This should urge, if the minimal conditions for change are to be preserved, a course of action that has damage control and the precautionary principle at its core. Under the relentless pressure of globalization, the issue of the international regime regulating the use of violence has rarely been posed with so much force.

The arguments are familiar. On one side are those who deplore that the Security Council was bypassed and flatly condemn the strikes against Afghanistan as illegal. This is the dignified position of the righteous liberal positivist, one ever prone to amazement at — but never put off by — the extent to which state behaviour does not match the law in the books. On the other side are those who say that the Security Council is basically outdated by social forces that have overpowered it, that it has outlived its usefulness, except for rubber-stamping decisions that are better taken elsewhere. This is the cold-blooded realism of those who would reduce law's relevance to its capacity to mimic power. Each owes more to the other than either would probably ever be ready to concede, but both live comfortably in mutual exclusion.

The challenge, by contrast, may be to conceive a role for the Security Council that acknowledges it simultaneously as part of the solution and as part of the problem. In view of all the arguments that militate against an invocation of self-defence, it is indeed disappointing that the US administration, which has otherwise been involved in so much legitimacy-seeking, should not have given more prominence to its own (National) Security Council than the UN's.<sup>172</sup> For all the talk about the US warming to the UN in the wake of 11 September, old habits seem there to stay and an accumulation of bilateral initiatives can hardly pass for multilateralism.<sup>173</sup> This is all the more regrettable since it would probably not have taken much effort to take the Security Council one step further in the direction of properly authorizing the use of force. An explicit Security Council authorization of the use of force on the basis of a threat to international peace and security would have done away with the more extravagant and surreptitious constructions that come with the invocation of

<sup>172</sup> See, by the Department of State's Director of Policy Planning during the Clinton administration, Halperin, 'Collective Security', *American Prospect*, 22 October 2001.

<sup>173</sup> See, notably, Brzezinski, 'A New Age of Solidarity? Don't Count on It', *Washington Post*, 2 November 2001.

self-defence.<sup>174</sup> Failure to engage with the Security Council more actively — as one of the international order's few and meagre restraints in times of crisis — has become precisely one of the ways in which law is circumvented and prevented from playing its part.

At the same time, if the Council were to mandate the use of force more explicitly, would this not simply be more of the same under a different name? It may well be, for example, that in due course the Council will 'authorize the international security presence in Afghanistan' as it did in respect of Kosovo.<sup>175</sup> It is difficult, however, to be over-enthusiastic about the prospect of the Council legitimizing *ex post facto* what it could not bring itself to authorize *ex ante*. It is difficult, in fact, to see how the Council's indebtedness to power could not be repaid by being ultimately subservient to it: the Security Council was not so much bypassed, as it scuttled itself in the midst of a wave that could easily have made it capsize had it resisted it.

An alternative to both these conceptions requires treading a fine line between the rival domains of law and power. With the multiplication of exceptions to its practice, the Council has entered a zone of turbulence that could precipitate it into decay. After a while, honesty commands that one see that multiplication not merely as so many instances of the unscrupulousness of the hegemon, but also as a symptom of a larger divorce between the legal order and the conditions of what passes for the 'real' world. Since presumably it is easier to change the Security Council than the world at large, that particular item should be higher than ever on the international community's agenda.

By the same token, it would be tragic if a problem of insufficient restraint by the Council were mistaken for an excess of it. True enough, appeals by lawyers to respect forms can at times be tinged with just a touch of self-interested professional anxiety flowing, maybe, from a sense of imminent historical obsolescence. But perhaps what is at stake is more in the manner of a permanent misunderstanding of the nature of the restraint that the Council *can* exercise. That restraint is not so much the top-down sort that traditional compliance models have in mind as the horizontal variety generally associated with various forms of social control. As a price for its full support, the Council is well positioned to specify, more clearly than any state left to its own devices is ever likely to do, the operational parameters of further deployments. Most crucially, it can set the future goals of the use of force and thus restrict the potential for escalation. Even if the emerging unholy alliance between liberal states with a vengeance<sup>176</sup> and illiberal states with an eye to their own suppressive programmes

<sup>174</sup> The Council might have been inclined, for example, to base itself on its Resolution 1333, and the fact that, more than a year after requiring the extradition of Bin Laden, Afghanistan had still not complied, to authorize action on the basis of the existence of a 'breach of international peace and security'. Note that, under the broad heading of Chapter VII, there is no need for an attack to be imminent or for the attack to be attributed to Bin Laden: it suffices that the Taliban regime has been grossly negligent in tackling a threat to international peace and security it had been specifically asked to deal with.

<sup>175</sup> See S/RES/1244, 10 June 1999.

<sup>176</sup> For a cautionary analysis of the 'anti-terrorism industry', see Zulaika and Douglass, *Terror and Taboo: The Follies, Fables and Faces of Terrorism* (1996).

might otherwise lead to the repression of groups that have little to do with terrorism,<sup>177</sup> the geostrategic checks and balances that the key players exercise on each other could at least ensure that the violence does not spiral out of all proportion.<sup>178</sup> The prudential and precedential impact of such a course might be significantly different.<sup>179</sup>

Of course, social control can only work to the extent that there is a will to live in and abide by the rules of international society. The US and its allies can probably, if they decide to push through with it, get away with loosening the definition of self-defence by overriding the rest of the world with the *fait accompli* of their assembled military might and political resolve. It would not be the first time that international law has witnessed a stark reversal of long-held views. No doubt there will be no shortage of international lawyers to sanctify that choice with ever more elaborate apologetic theories on instant custom, persistent objectors, and states of necessity,<sup>180</sup> mistaking in the process the — no doubt — fluid nature of international law for a licence to do away with lawyers' ethical responsibilities.

But the last thing international law needs at this stage is more exceptions to the principle that less not more war is the best way to achieve international peace and security. The 'radical change' purportedly introduced by 11 September cannot be an uncritically accepted starting point freeing up the resources of foundational decisionism in a great flurry of self-flagellation by lawyers keen not to be seen as outdated. Because it is inevitably a construct that involves a reading of *what* it is that has changed, it can only — if at all — be the conclusion of a long intersubjective thought process.<sup>181</sup> 'Normality' itself, as a concept whose complexity is exceptionally underrated, involves, more often than not, a keen element of self-deception. It would be ironic if the dangers associated with non-state actors were used as a pretext to pry open the corpus of inter-state rules, without replacing these rules with anything more sensible.

A Security Council mandate backed by negotiations and the printed word will always be a more powerful show of force than a loosely assembled coalition that is likely to come under severe strain in the months to come.<sup>182</sup> It makes sense that the Security Council should take responsibility collectively for what may befall the world

<sup>177</sup> See Pfaff, 'Would-Be Allies Use US War on Terrorism for Their Own Ends', *International Herald Tribune*, 24 September 2001; DeYoung, 'Definitions of Terrorism Dog US Officials', *Washington Post*, 25 October 2001; and Richardson, 'Asian Regimes Appear to Use War on Terror to Stem Dissent', *International Herald Tribune*, 21 November 2001.

<sup>178</sup> So, for example, whereas Russia might be delighted that the general enthusiasm about combating terrorism is freeing its hand in Chechnya, it would probably be less than pleased by the prospects of further bombings of Iraq. On Russia's contradictions, see, in particular, Hughes, 'Russia and the "Counter-Terrorism" Campaign', 2 *German Law Journal* (2001), [www.germanlawjournal.com](http://www.germanlawjournal.com).

<sup>179</sup> Garton Ash, 'World's Fate Hangs on US', *The Age*, 19 September 2001.

<sup>180</sup> Romano, 'Combating Terrorism and Weapons of Mass Destruction: Reviving the Doctrine of a State of Necessity', 87 *Georgetown Law Journal* (1999) 1023.

<sup>181</sup> Held, 'Violence and Justice in a Global Age', *Open Democracy*, 14 September 2001, [www.opendemocracy.net](http://www.opendemocracy.net).

<sup>182</sup> Kissinger, 'Where Do We Go from Here?', *Washington Post*, 6 November 2001.

after Afghanistan, thereby giving a concrete political expression to the notion of solidarity.<sup>183</sup> It is in edging the US position towards more consultation and a more nuanced appreciation of the stakes that Europe, at a safe distance from naïve Atlanticism and crude anti-Americanism, could find its true role.<sup>184</sup>

It is perhaps a sad reflection on our times that the Security Council, an organ that is a relic of former times (as the shifting geopolitics of the fight against terrorism may soon emphasize), whose reform is long overdue, and which is otherwise woefully unsuited to responding to the problem of non-state actors, should stand as a precarious bulwark against an even worse scenario. But then again, these are not the best of times, and at least the Security Council can exercise a minimal restraint against the risk of unilateralism let loose.<sup>185</sup> After all, it is in the nature of the emerging paranoia to forget a little too easily that, on the way to the war of all against all, there is perhaps only one thing that is more dangerous than suicidal terrorists: an all-out war by states against non-state actors and, quite possibly, against other states as well. Put succinctly and lest proportions be overlooked, the danger of anthrax should not blind us to the dangers of plutonium.

Beyond that lies what must surely be described as the unknown, although a number of inspired proposals have already been made to rejuvenate international law<sup>186</sup> in an age where it will be increasingly accepted that non-state actors can be forces for good, as well as some of the worst agents of harm. Clearly, the formalism of collective security restraints can bring some temporary relief, but liberal formalism alone cannot in the long term avert the catastrophe that it has itself contributed to bringing about. Military action, even if it were conducted under the Security Council's aegis, will only ever be a small part of what needs to be done to make the world safe from terrorism.<sup>187</sup> Perhaps what will be needed is a collective awakening to the reality that, to the extent that international law and international society are mutually constitutive,<sup>188</sup> it may matter less to 'respect' the rules that international society

<sup>183</sup> Interestingly, from a purely realist point of view, Security Council authorization would not only make the coalition stronger but would also, by spreading responsibility for the response, defuse some of the terrorist threats that will otherwise continue to bear intensely against the US. Such an 'instrumental' conception of the UN seems partly to underlie Robert Keohane's *The United Nations: An Essential Instrument Against Terror* (2001), [www.duke.edu/web/forums/keohane.html](http://www.duke.edu/web/forums/keohane.html).

<sup>184</sup> Europe's own history of dealing with terrorism makes it well placed to understand the limits of a purely repressive agenda. For a good analysis of Europe's more pragmatic approach, see Hoffmann, 'Is Europe Soft on Terrorism?', *Foreign Policy* (1999) 62.

<sup>185</sup> For an interesting early exploration of that theme, see Frulli, 'Is There Still a Chance of Revitalizing the United Nations Security Council?', 2 *German Law Journal* (2001), [www.germanlawjournal.com](http://www.germanlawjournal.com).

<sup>186</sup> See, in particular, Hoffmann, 'Watershed or Phoenix from the Ashes? — Speculations on the Future of International Law after the September 11 Attacks', 2 *German Law Journal* (2001), [www.germanlawjournal.com](http://www.germanlawjournal.com).

<sup>187</sup> See Wallerstein, 'September 11, 2001 — Why?', *Comment*, 15 September 2001; and Falk, 'Defining a Just War', *The Nation*, 29 October 2001.

<sup>188</sup> The idea that society and its rules are not only consubstantial but also mutually constituting has perhaps been put most forcefully by Philip Allott. See, for example, Allott, 'The Concept of International Law', 10 *EJIL* (1999) 31.

'dictates' than to devise the rules that will yield an international society that one can aspire to.

It is in times like this that the global legal order can take a turn for the better, and for the worse. It is perhaps not too much to hope that some of the real problems can be addressed, and that there will be sufficient vision to take law — although in all likelihood not international law as we know it — onto some of the alternative paths it should have taken long ago. Otherwise, when anomia<sup>189</sup> threatens, the only solution may be to brace public opinion for permanently diminished expectations, in a world again at one with its propensity for the tragic.

It would be monstrous indeed if the attacks on the World Trade Center were to lead to something even more monstrous.

<sup>189</sup> Anomia here is used both in Durkheim's sense of a deficit of norms in a period of rapid change, and as the specific pathological condition consisting in the inability to name objects.

