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# The Use of Force against Terrorists: A Reply to Christian J. Tams<sup>†</sup>

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This article comments on Professor Tams's 'The Use of Force against Terrorists'.<sup>1</sup> Tams's study deals with the application of the *jus ad bellum* to the problem of terrorism and, in particular, the issue of extraterritorial or cross-border use of force against terrorists. Thus, it refers to *inter-state* relations. The author examined the developments which have occurred in the last 20 years and concluded that there is today an overall tendency to view exceptions to the ban on force more favourably than 20 years ago. If the international community is capable of maintaining a strong stance against terrorism, he wrote, then there is no reason to expect that the *jus ad bellum* should be immune from (further) change.<sup>2</sup>

This reply takes a less juridical and more political perspective. The basic idea is that the community of states, and consequently states' *jus ad bellum*, or the right

to wage war, is evolving, from a 'Grotian' model founded on common rules and institutions consolidated in the UN Charter, towards a 'Hobbesian' one, dominated by the obsession for security and some rules of prudence, in which agreements can be broken if it is expedient.<sup>3</sup> According to Hobbes, '[t]hough there had never been any time, wherein particular men were in a condition of warre one against another; yet in all times, Kings and Persons of Sovereigne authority, because of their Independency, are . . . in the state and posture of Gladiators'.<sup>4</sup> In Hobbes's thought, the *state of nature* among nations is a persistent condition. In the reality of the 20th century, there has been, however, a 'Grotian' tendency. But the new pattern has not replaced the old one. They coexisted throughout the whole century. The wave of unilateralism in the last 10 years possibly preludes a return to the prevalence of the 'Hobbesian' model, the consequence of

<sup>†</sup> Tams, 'The Use of Force against Terrorists', 20 *EJIL* (2009) 359, <http://ejil.oxfordjournals.org/cgi/reprint/20/2/359>.

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<sup>1</sup> Tams, 'The Use of Force against Terrorists', 20 *EJIL* (2009) 359.

<sup>2</sup> *Ibid.*, at 397.

<sup>3</sup> H. Bull, *The Anarchical Society. A Study of Order in World Politics* (1977), at 24. Bull foresees a third pattern, the Kantian outlook, which aims at a community of mankind, the most improbable of the three competing perspectives. On this topic see A. Cassese, *International Law in a Divided World* (1994), at 31–33.

<sup>4</sup> T. Hobbes, *Leviathan* (1651), Pt. I, Ch. 13.

which can be a more anarchic world. The prognosis for the next two decades foresees a pattern in which the ‘Hobbesian’ and ‘Grotian’ traditions compete.

## 1 Law among Nations

Tams provides an estimable reconstruction of the international regime governing recourse to force, using as the starting point for his analysis the late 1980s, when the paradigm based on the idea of limiting the availability of military force to the largest possible extent came to an end. A ‘restrictive analysis’ was arguably more dominant than ever before. Since the late 1980s international terrorism had been approached in a ‘contextual’ or ‘contingent’ way. It was interpreted mainly as a problem of criminal law not justifying the use of military force. In particular, the extraterritorial use of military force to combat terrorism would be inadmissible, as it would be a violation of the comprehensive ban – resulting from Article 2(4) of the UN Charter – of every use of force in international relations. A further limitation is derived from the ‘exclusivity thesis’: self-defence is the only admitted exception to the prohibition set out in Article 2(4).

It is beyond doubt today that the Security Council, acting under Chapter VII of the Charter, can *authorize* military measures against terrorists, and thereby justify the extraterritorial use of force by a state implementing that mandate. The recent activism of the Security Council on the matter – which some commentators define as even *legislative*<sup>5</sup> (*ref*) – makes possible to some extent the issue of *directives* (legally binding) on how to use military power to oppose terrorist threat.

<sup>5</sup> *Ibid.*

Under current international law, the use of coercive force, namely military force, even to enforce criminal law or rules of international law constitutes the exercise of jurisdiction, a core aspect of sovereignty. A state may not actually exercise jurisdiction on the territory of another without the latter’s consent, invitation, or acquiescence unless the former is an occupying state, whereas following military action (lawful or unlawful) it exercises effective control of an area outside its national territory. Extraterritorial or cross-border use of force against terrorists, against whomever conducted, entails a violation of sovereignty. When a state attacks safe havens hosting terrorists within the territory of another state without its consent, the defendant may in the immediate aftermath use its military force in self-defence against conduct which in fact violates its territorial integrity.

States are equal. It is mainly a formal equality, but it counts. Limitations on sovereignty are permissible only if freely accepted by the state on which the limitations are imposed. Territorial integrity is a core aspect of sovereignty. Alongside the principle of non-intervention, it constitutes one of the most significant tenets of the ‘Westphalia model’. According to Sean Murphy, *jus ad bellum* is generally viewed as a static field.<sup>6</sup> This fixity is now considered inadequate. However, if international law presents such narrow margins of mutation, the reason lies, banally, in the nature of sovereignty.

Sovereignty has been (and remains) in fact the founding concept of *inter-national*

<sup>6</sup> Murphy, ‘Protean Jus Ad Bellum’, George Washington University Law School Public Law and Legal Theory Working Paper no. 405 (2008), at 2, available at: <http://ssrn.com/abstract=1129315>.

law or law *among nations* since 1648, when the Treaties of Westphalia, which concluded the Thirty Years War, were signed. After World War II, subscribing to the UN Charter, but, more importantly, adopting behaviour consistent with its Article 2(4), states renounced their natural *ius in omnia*<sup>7</sup> and moved towards a 'Grotian' model, a model of (primitive) society governed by few basic rules granting coexistence and cooperation among *sovereigns* entities.<sup>8</sup> After 1989, this 'Grotian' pattern, driven by a wind of general optimism which theorized the 'end of history',<sup>9</sup> improved. After 9/11, this trend suddenly stopped. In some respect the world began anew on 11 September 2001.

## 2 A Wave of Unilateralism

The *unilateral* practice of the last decade shows that the approach seeking to minimize the availability of lawful force has come under pressure. It means also that pre-Charter law is returning fast. A protagonist of this pre-Charter revival is the concept of anticipatory self-defence and its evolution embracing any pre-emptive use of force. In some examples of the use of force, states amplified the scope of the self-defence exception.<sup>10</sup> For example, when John Negroponte notified the UN that 'in response to these [9/11] 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'.<sup>11</sup> However, as observed by A. Cassese, while the Charter has been violated on many occasions, states have always tried to justify their action by using and abusing Article 51.<sup>12</sup> Thus, self-defence has hitherto been perceived as the sole *unilateral* viable exception to Article 2(4).

Customary international law (antecedent to the Charter, which links self-defence to the fact that an attack *occurs*) permitted a state to prevent an *imminent* attack, giving it a right of *anticipatory self-defence*. Professor Yoram Dinstein uses the term 'interceptive' to signify that the attacker has embarked 'upon an irreversible course of action'.<sup>13</sup> Derek Bowett held that self-defence '[h]as, under traditional international law, always been "anticipatory"'. That is to say its exercise was valid against imminent as well actual attacks or dangers. Indeed, the *Caroline* case is itself the classical illustration of this. . .<sup>14</sup>

The *Caroline* was a US flagged private steamer which was attacked and destroyed by a British unit in 1837. The vessel furnished support to a group of

<sup>7</sup> In Hobbes *jus naturale* means the liberty of Man to use his own force for the preservation of his own nature. Liberty is understood as the absence of external impediments: see Hobbes, *supra* note 4, Pt I, Ch. 14, at 64.

<sup>8</sup> Bull, *supra* note 3, at 24.

<sup>9</sup> Fukuyama, 'The End of History' [1989] *The National Interest* 16.

<sup>10</sup> Tams, *supra* note 1, at 371.

<sup>11</sup> Letter from John Negroponte to the President of the Security Council, 7 Oct. 2001, emphasis added.

<sup>12</sup> Cassese, 'Ex Iniuria Ius Oritur; Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?', 10 *EJIL* (1999) 23, at 24.

<sup>13</sup> Y. Dinstein, *War, Aggression and Self-Defence* (2001), at 172.

<sup>14</sup> D. W. Bowett, *Self-Defence in International Law* (1958), at 189. See also the UN General Assembly's Sixth Committee, UN Doc A/2136 (1952) 7, UN GAOR Supp 11, at 278–295: 'Belgium, Greece, the United Kingdom, and the United States all considered that a state threatened with an impending attack might be justified in attacking first in self-defence.'

Canadian rebels who had occupied Navy Island, situated in the midst of the Niagara River. On 29 December, British commandos stormed the ship while it was docked on the US bank of the river and sent it rushing down to the waterfalls. The raid in the US was justified as an act of *preventive* self-defence. The British Plenipotentiary in Washington, Henry Fox, held at that time that the piratical character of the *Caroline* and the necessity for self-defence under which British troops acted to destroy the vessel would seem to have been sufficiently established. Webster, the US Secretary of State, responded that the action would be legitimate only in the case of a necessity for self-defence which was *instant, overwhelming, leaving no time to choice and moment for deliberation*.<sup>15</sup>

Beyond anticipatory self-defence, in which the imminence of the attack is evidence that force is necessary, stands the pre-emptive use of force, in which the lack of an imminent threat is evidence that the use of force may be unnecessary. According to Amos Guiora this sort of pre-emption took place in the 1967 Six Day War and in the attack on the Iraqi nuclear reactor Osirak in 1981.<sup>16</sup> The most egregious example of the concept lies however in the US National Security Strategy (2006), which sustains the possibility of using force 'before attacks occur, even if uncertainty remains as to the time and place of the enemy's attack'.<sup>17</sup> Peter Greenwood's opinion on a doctrine of pre-emption as the right to

respond to threats which may materialize some time in the future has been that such doctrine has no basis in law.<sup>18</sup>

Supposing a restrictive interpretation of Article 51 to be obsolete, the customary rule resulting from the *Caroline* case, which was reaffirmed by the Nuremberg Tribunal, will remain.<sup>19</sup> According to Thomas Franck, Webster's definition aimed at indicating what the right to self-defence actually was, but with the intent of limiting its scope and underlining its exceptional nature.<sup>20</sup>

Concerning self-defence against armed attacks by non-state actors,<sup>21</sup> Tams recalled stringent criteria laid down by the ICJ's judgment in *Nicaragua* case, which require there to be a relationship between a state and rebel forces, in terms of effective control.<sup>22</sup> In 2004 the Court held, in an inexplicably rigid way, that the use of force in self-defence is allowed 'if an armed attack *by another State* occurs'.<sup>23</sup> The consolidated jurisprudence of the Supreme Court of Israel lays down on the contrary that 'Israel finds itself in the middle of difficult battle against a furious wave of terrorism' and that 'Israel is exercising its right of self-defence'. The decision explicitly cites Article 51.<sup>24</sup> This

<sup>15</sup> Jennings, 'The Caroline and McLeod Cases', 32 *AJIL* (1938) 82, at 89.

<sup>16</sup> Guiora, 'Targeted Killing as Active Self-Defense', Case School of Law Research Paper Series in Legal Studies, Working Paper 05-14, July 2005, at 11.

<sup>17</sup> White House, *The National Security Strategy of the United States of America* (2006), at 23.

<sup>18</sup> 'The Legality of Using Force against Iraq', Memorandum by Professor Christopher Greenwood, CMG, QC, 24 Oct. 2002, available at: [www.parliament.the-stationery-office.com/pa/cm/cmcaff.htm](http://www.parliament.the-stationery-office.com/pa/cm/cmcaff.htm).

<sup>19</sup> Kirgis, 'Pre-emptive Action to Forestall Terrorism', *ASIL Insights*, June 2002.

<sup>20</sup> T. Franck, *Recourse to Force* (2003), at 98.

<sup>21</sup> Tams, *supra* note 1, at 368.

<sup>22</sup> ICJ, *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States*) (Nicaragua case) [1986] ICJ Rep 14.

<sup>23</sup> ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, [2004] ICJ Rep 131.

<sup>24</sup> HCJ 3451/02, at 9.

point of view is challenged by those who consider terrorism as a form of private violence.<sup>25</sup> Cassese and Gaeta retain this anachronistic approach.<sup>26</sup>

To summarize, according to the Charter regime a state can adopt unilateral forcible measures *against another state* when an attack *occurs*. The pre-Charter rule includes the right to respond to immediate menaces, acting in a regime of *anticipatory self-defence*. In the new perspective, which sees terrorists as capable of the crime of aggression, a state can also act in self-defence *against terrorists based on foreign soil*.

### 3 Prophecies

As Tams observed, '[r]e-adjustments of the *jus ad bellum* are not deduced from some legal principle, but borne out by the actual practice of states'.<sup>27</sup> If states are re-appropriating a right which they lost as a result of the creation of the UN, the consequence is a more 'Hobbesian' prescription for international conduct, which means that the state is freer to pursue its goals in relation to other states and, more importantly, that the conduct of states is circumscribed by self-asserted rules of prudence. So far, the anarchical trend seems dominant, as insecurity is a feature of time.

Predictions made by Tams range from a *return to the criminal law strategy to extraterritorial enforcement jurisdiction over*

*terrorists, passing through a more 'protean' jus ad bellum*. This last prediction strikes a new balance between the absence of force and the protection of common values, permitting states to disregard constraints of the Charter in defence of community goals.<sup>28</sup> The first prediction concerns instead the demilitarization of the fight against terrorism, which Tams evidently considers a fact. Finally, the perspective of *extraterritorial enforcement* 'may have drawn inspiration from long-established rules governing enforcement measures against pirates on the high seas . . . to allow for enforcement *on foreign soil*'.<sup>29</sup> Each option is problematic. The *return to criminal law* perspective requires a communal set of rules and, at its maximum extension, the creation of a centralized judicial function, already theorized by Hans Kelsen,<sup>30</sup> which today is unrealistic. The second approach, the *more protean* one, is intrinsically risky, and raises some difficult questions, for example whether it is permissible to devastate a country by air strikes on peaceable civilians to capture a gang of dangerous fanatical criminals, even if that struggle is supported by consent from much of Western public opinion. As Cassese wrote in 1999, '[o]nce a group of powerful states has realized that it can freely escape the strictures of the UN Charter and resort to force without any censure, except of that of public opinion, a Pandora's Box may be opened'.<sup>31</sup>

The third perspective, *extraterritorial enforcement*, is based on the application by analogy of measures against piracy on the high seas to terrorists on foreign soil.

<sup>25</sup> A comprehensive discussion is available at: [www.asil.org/insigh77.cfm](http://www.asil.org/insigh77.cfm). See, in particular, the addendum by Paust, 'War and Responses to Terrorism'.

<sup>26</sup> A. Cassese and P. Gaeta, *Le sfide attuali del diritto internazionale* (2008), at 120.

<sup>27</sup> Tams, *supra* note 1, at 394.

<sup>28</sup> *Ibid.*, at 395.

<sup>29</sup> *Ibid.*

<sup>30</sup> In H. Kelsen, *Peace Through Law* (1944, reissued 2000).

<sup>31</sup> Cassese, *supra* note 12, at 25.

Such a perspective ignores the fact that on the high seas there is no population to protect. This is mainly a question of *jus in bello*, but it should not be ignored.

Viewed contextually, those predictions can be read as a new tendency towards a ‘Grotian’ model of international relations, made of (prudent) cooperation, (few) common rules, and (attenuated) multilateral-

ism. However, their coexistence is highly problematic. Considering the present practice of the use of overwhelming power in defence of community goals and to improve the rule of law in disadvantaged areas dominated by warlords and marauders, the *more protean* is the most realistic outcome, in which the ‘Hobbesian’ and the ‘Grotian’ traditions compete.