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The War in Afghanistan: A Legal Analysis
Michael N. Schmitt (Editor)

II

Terrorism and Afghanistan

Yoram Dinstein*

I. Terrorism as an Armed Attack

A. The "War on Terrorism"

The expression "war on terrorism" is merely a figure of speech or a metaphor: it is not different in principle from the parallel phrases "war on drugs" and "war on poverty." The reason is that the expression "war" is not used in either context as a legal term of art. This is easily grasped by anyone who knows international law. But the trouble with a catchy phrase is that it is apt to catch its users in a net: in time, they (especially if they are laypersons and not international legal experts) tend to believe that the figure of speech which they have coined actually reflects reality.

Metaphors aside, there are two types of war pursuant to international law: inter-State (international armed conflicts) and intra-State ("civil wars" or non-international armed conflicts). In an international armed conflict, two or more belligerent States are locked in combat with each other. Large numbers of States are currently engaged in the global "war on terrorism." Yet, the strife qualifies as war in the international legal sense only when hostilities are raging against an enemy State that has joined hands with the terrorists. As we shall see, this is true only in the case of Afghanistan.[1]

* Professor Emeritus, Tel Aviv University, Israel.

A "civil war" is an armed conflict between the central government of a State and a group (or groups) of domestic insurgents, or (absent a central government) between various factions vying for power in the State. Whether an internal disturbance crosses the threshold of a non-international armed conflict is a matter of gravity of scale and intensity. The United States, which has gone through the throes of a genuine "civil war" in its history, should know one when it sees it. In any event, the notion that the cross-border, worldwide "war on terrorism" is a non-international armed conflict—a notion that seems to have met with favor in the US Supreme Court, in the *Hamdan* case of 2006[2]—is manifestly incongruous.

B. Internal Terrorism

In any analysis of the struggle against terrorism, the point of departure must be a bifurcation between terrorism that is purely internal in character and that which is launched from a foreign country and perhaps warrants action in or against that foreign country. It is often forgotten that, until September 11, 2001, some of the most nefarious acts of terrorism were actually local in character. The mega-bombing in Oklahoma City as well as the lethal activities of terrorists in Europe (such as Irish Republican Army terrorists in the United Kingdom, Basque terrorists in Spain, the "Red Brigades" in Italy and the Baader-Meinhof gang in Germany) and in Asia (e.g., the Tamil "Tigers" in Sri Lanka, Moslem separatists in the Philippines and sarin gas–wielding terrorists in the Tokyo subway) were all products of domestic terrorism. Even when the atrocity of 9/11 occurred, it is symptomatic that for a while nobody knew for sure whether it was an external or an internal attack. Thus, when the NATO Council on September 12 decided for the first time ever to invoke Article 5 of the 1949 North Atlantic Treaty—whereby an armed attack against one or more of the allies in Europe or North America "shall be considered an attack against them all"[3]—this was qualified by a caveat that it be determined that the attack was directed from abroad against the United States.[4] Such a factual determination was made only subsequently, on the basis of additional information gathered.[5]

The answer to internal terrorism lies in law enforcement. In other words, domestic law enforcement agencies are expected to cope with the crime by searching for the terrorists (if they are not killed or captured in the act and are in hiding), arresting them, collating the necessary evidence, issuing an indictment, holding a trial (based, of course, on due process of law), securing a conviction, seeking a punishment that fits the crime and ensuring that the court's sentence is in fact carried out (so that a convicted terrorist is not pardoned or otherwise released from jail before the prescribed time). The law enforcement agencies—the police (in all its incarnations, embracing an agency like the FBI in the United States) and

the judiciary—may act on the national (or federal) or local (including state, city or rural) level.

Even when terrorism is a matter of domestic law enforcement there may be a dire need of foreign cooperation. This may be the case either because some material witness or evidence is located abroad, or—if a terrorist manages to flee to a foreign country—because extradition (based on a treaty in force) or some other (less formal) means of rendition is required in order to bring the fugitive to justice. Success in the extradition of a terrorist may be contingent on the requested country not considering his/her act as "political" in character. Stripping terrorism of a political mantle is the thrust of the 1977 European Convention on the Suppression of Terrorism[6] and the bilateral 1985 US-UK Supplementary Extradition Treaty,[7] which has blazed the trail for a whole series of similar bilateral treaties concluded by the United States in later years.

International cooperation is also required in a concerted effort to stop or at least impede the financing of terrorism. This is the subject of the 1999 International Convention for the Suppression of the Financing of Terrorism.[8] More significantly, it is also the fulcrum of Security Council Resolution 1373 (2001),[9] an unprecedented landmark decision, whereby all UN member States (whether or not parties to the Convention) are obligated to suppress the financing of terrorism,[10] under the supervision of a special body (the Counter-Terrorism Committee) that monitors implementation.

C. Armed Attacks by Non-State Actors

The crux of the issue is whether an act of terrorism, launched from abroad by non-State actors, can be subsumed under the heading of an armed attack in the sense of Article 51 of the Charter of the United Nations (namely, as a trigger to the target State's exercising counterforce in self-defense). When a terrorist act originates outside the borders of the target State, a foreign State must somehow be implicated. The reason is that it is indispensable for the terrorists to have a base of operations as a springboard for their attack. Needless to say, such a base is not likely to be situated on the high seas, in outer space or in an unclaimed and uninhabited part of Antarctica.

Article 51 of the Charter opens with the following words: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations." As can be seen, Article 51 talks about an armed attack occurring against a State (a member of the United Nations), but it does not say that the attack must be launched by another State. This is particularly notable given the comparable phraseology of Article 2(4) of the Charter, which mandates that all members (*i.e.*, States) shall refrain from the

use of force in international relations.[11] It follows that, under Article 51, an armed attack need not be launched *by* a foreign State; it can also be launched by non-State actors *from* a foreign State. I have always (even prior to 9/11) pursued this line of thought,[12] but many other commentators were not convinced in the past.[13] These scholarly disagreements should now be regarded as moot, inasmuch as—since 9/11—the general practice of States has become crystal clear.

The international response to 9/11 was unequivocal. Preeminently, both in Resolution 1368 (2001)[14]—adopted a day after 9/11—and in the aforementioned Resolution 1373 (2001),[15] the Security Council recognized and reaffirmed in this context "the inherent right of individual or collective self-defence in accordance with the Charter." The NATO stand has already been referenced.[16] It may be added that in the September 2001 meeting of the Ministers of Foreign Affairs, acting as an Organ of Consultation, in application of the 1947 Inter-American Treaty of Reciprocal Assistance, it was resolved that "these terrorist attacks against the United States of America are attacks against all American States."[17] This must be understood in light of Article 3 of the Rio Treaty, which refers specifically to an armed attack and to the right of self-defense pursuant to Article 51.[18]

It is true that, in the 2004 advisory opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the International Court of Justice (ICJ) enunciated: "Article 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State."[19] However, as correctly observed by Judge Higgins in her separate opinion: "There is, with respect, nothing in the text of Article 51 that *thus* stipulates that self-defence is available only when an armed attack is made by a State."[20] Similar criticism was expressed in the separate opinion of Judge Kooijmans[21] and in the declaration of Judge Buergenthal.[22] Indeed, the court itself noted without demur Security Council Resolutions 1368 and 1373, drawing a distinction between the situation contemplated by these texts (cross-border terrorism) and occupied territories.[23]

II. Action against Terrorists within a Foreign Territory

When terrorists perpetrate an armed attack against one State from within the territory of another State, there are three alternative scenarios of counteraction by the target State.

A. Action by Consent of the Foreign State

The first possibility is that the foreign State completely dissociates itself from the terrorists, who operate within its territory against its will. However, lacking the

military wherewithal to eliminate the terrorist bases by itself, the local State invites the target State to send in its forces to accomplish (or assist in accomplishing) that mission. In such circumstances, the armed forces of the target State will deploy and operate against the terrorists on foreign soil with the consent of the government in charge. There is no doubt about the legality of such action, as long as the target State's expeditionary force carries out its mandate within the terms of the consent as granted. Article 20 of the 2001 Draft Articles on Responsibility of States for Internationally Wrongful Acts, as formulated by the International Law Commission (ILC), sets forth clearly: "Valid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent."[24]

B. Action against the Foreign State

The second scenario is the antithesis of the first. The terrorists may act with the full approval and even instigation of the foreign State itself, which uses them as an irregular or paramilitary extension of its armed forces. In that case, the armed attack is deemed to have been launched by the foreign State itself. In the *Nicaragua* case of 1986, the ICJ pronounced that "it may be considered to be agreed that an armed attack must be understood as including not merely action by regular armed forces across an international border," but also the dispatch of armed bands or "irregulars" into the territory of another State.[25] "The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State" is specifically branded as an act of aggression in Article 3(g) of the General Assembly's consensus Definition of Aggression adopted in 1974.[26] In the *Nicaragua* judgment, the ICJ took paragraph (g) of Article 3 "to reflect customary international law."[27] In the post-*Nicaragua* period, the ICJ has come back to rely on Article 3(g) in its opinion in the 2005 Congo/Uganda *Armed Activities* case.[28] Interestingly, thus far, Article 3(g) is the only clause of the Definition of Aggression expressly held by the ICJ to be declaratory of customary international law.

The linkage between terrorists and a foreign State may be entangled and not easy to unravel. The cardinal question is whether the terrorists act as the de facto organs of that State. In the *Nicaragua* judgment, it was categorically proclaimed that, when the "degree of dependence on the one side and control on the other" warrant it, the hostile acts of paramilitaries can be classified as acts of organs of the foreign State.[29] Yet, the ICJ held that it is not enough to have merely "general control" by the foreign State. What has to be proved is "effective control"—in the sense of close operational control—over the activities of the terrorists.[30]

The ICJ's insistence on "effective control" by the foreign State over the local paramilitaries can hardly be gainsaid. However, the proposition that "general control" does not amount to "effective control"—and that a close operational control is always required—is not universally accepted. Indeed, in 1999, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY), in the *Tadic* case, sharply assailed the *Nicaragua* prerequisite of close operational control—as an absolute condition of "effective control"—maintaining that this is inconsonant with both logic and law.[31] The ICTY Appeals Chamber pronounced that "overall control" would suffice and there is no need for close operational control in every case.[32] The doctrine of overall control has been consistently upheld in successive ICTY judgments (both at the trial and the appeal levels) following the *Tadic* case.[33]

Article 8 of the ILC 2001 Draft Articles on Responsibility of States reads: "The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct."[34] From the commentary one can draw the conclusion that the ILC endorsed the *Nicaragua* test of "effective control," although it conceded that the degree of control may "vary according to the factual circumstances of each case."[35]

The ICJ returned to the topic in the *Genocide* case of 2007, where the previous (*Nicaragua*) position was upheld and the *Tadic* criticism rejected.[36] Nevertheless, the ICJ set forth that the "overall control" test of the ICTY may be "applicable and suitable" when "employed to determine whether or not an armed conflict is international" (which was the issue in Tadic), but it cannot be presented "as equally applicable under the law of State responsibility for the purpose of determining . . . when a State is responsible for acts committed by paramilitary units, armed forces which are not among its official organs."[37] The ICJ added that

> the degree and nature of a State's involvement in an armed conflict on another State's territory which is required for the conflict to be characterized as international, can very well, and without logical inconsistency, differ from the degree and nature of involvement required to give rise to that State's responsibility for a specific act committed in the course of the conflict.[38]

It is doubtful whether the last word has been said on this theme.

C. "Extra-Territorial Law Enforcement"

There is a third scenario, intermediate between the two situations discussed so far. While the foreign State is not backing the terrorists (who cannot be regarded as its

de facto organs, under either the *Nicaragua* test or even the *Tadic* test), it withholds consent from the target State to the dispatch of troops with a view to the eradication of the terrorists. The question is whether the target State is at an impasse—unable to act against the terrorists (absent consent) and having no ground to act against the foreign State (absent complicity with the terrorists)—or there is some other avenue open for action in conformity with international law.

As a rule, under international law, as per the 1949 ICJ judgment in the *Corfu Channel* case, every State is under an obligation "not to allow knowingly its territory to be used for acts contrary to the rights of other States."[39] Accordingly, a State must not allow knowingly its territory to be used for terrorist attacks against another State. The premise, of course, is that the local State is capable of rooting out the terrorists who are targeting another State. If the local State is incapable of doing that (for military or other reasons), the target State—invoking the right of self-defense—is entitled to respond to the terrorist armed attack. In other words, the target State is allowed to respond to the armed attack mounted from within the territory of the local State by doing what the local State should have done in the first place but failed to do. The emphasis is on the fact that, in these circumstances, the target State can employ force against the terrorists (in self-defense) within the territory of the local State, even without the consent of the government in charge. I call this exceptional state of affairs "extra-territorial law enforcement,"[40] but the nomenclature is not of major import: it is the normative substance that counts. The *fons et origo* of the norm in question is a famous dictum formulated by US Secretary of State Daniel Webster in resolving the *Caroline* incident of 1837.[41]

A paradigmatic illustration of the application in practice of "extra-territorial law enforcement" is the recent expedition of Turkish troops into northern Iraq, with a view to the elimination of Kurdish terrorists operating from that area against Turkey. Nobody is suggesting that the Iraqi government in Baghdad—or even the authority in control of the Kurdish enclave of northern Iraq—is in complicity with the terrorists, who belong to a renegade group. Nevertheless, since the terrorists are using Iraqi territory as their base of anti-Turkish operations, and the rather fragile government of Iraq is incapable of coming to grips with the problem at this time, Turkey has the right to do what the Iraqi government should have done but failed to do. There is no armed conflict between Turkey and Iraq. What we do have is "extra-territorial law enforcement" by Turkey in Iraq.

I am glad to note that in the ICJ 2005 decision in the *Armed Activities on the Territory of the Congo* case (Congo/Uganda), although the majority judgment glossed over the issue, two judges in their separate opinions—Judge Kooijmans and Judge Simma—cited my position on the subject.[42] In doing so, Judge Kooijmans said: "It would be unreasonable to deny the attacked State the right to self-defence merely

because there is no attacker State, and the Charter does not so require."[43] And Judge Simma concurred.[44]

As for the majority position, all that I can say is that—in the past quarter of a century—the ICJ addressed the issue of self-defense four times, starting with the 1986 *Nicaragua* case[45] and going through the *Oil Platforms* case of 2003,[46] the *Wall* advisory opinion of 2004[47] and the 2005 *Armed Activities* case.[48] Self-defense was also mentioned on a fifth occasion (the *Nuclear Weapons* advisory opinion of 1996[49]). Is it merely a coincidence of bad luck that in all these separate proceedings the ICJ made serious blunders in the interpretation of the law of self-defense? In the *Nicaragua* judgment there were a number of flagrant flaws, e.g., as regards the distinction between more and less grave forms of use of force, the differentiation between an armed attack and mere frontier incidents, the non-mention of immediacy as a condition of self-defense, the denial of the right of a third State to act in collective self-defense on the basis of its own assessment of the situation and the ramifications of failure to report to the Security Council.[50] In the *Oil Platforms* case, apart from repeating uncritically earlier rulings, the court added some dubious new dicta about the need for an armed attack to be aimed specifically at a target State (as if indiscriminate but deliberate mine-laying in international shipping lanes is not enough).[51] In the *Wall* advisory opinion, we have the untenable brief statement on the need for an armed attack to be mounted by one State against another State.[52] In the *Armed Activities* case, the court ignored the issue of "extra-territorial law enforcement."[53] And in the *Nuclear Weapons* advisory opinion, the mention of self-defense comes in the most awkward fashion, in a notorious *dispositif* in which the court wrongly meshed the *jus in bello* with the *jus ad bellum*.[54]

The paradox is that, in 1986, scholars who critiqued the *Nicaragua* judgment (like me) thought that the ICJ plummeted to a nadir. But the *Nicaragua* judgment at least gave commentators an opportunity to chew on some juicy morsels of prime beef. A quarter of a century later, with decisions that are much more lean—to the point of being cryptic and even mystifying—we tend to think of the *Nicaragua* judgment, in retrospect, as the acme of the ICJ contribution on the subject.

III. The War in Afghanistan

A. Armed Attack and Self-Defense

Initially, Taliban-led Afghanistan was not directly involved in the armed attack unleashed by al Qaeda against the United States on 9/11. The Taliban regime in Kabul became tainted due to its subsequent behavior. In its judgment of 1980 in the *Tehran* case, the ICJ held that if the authorities of one State are required under international law to take appropriate acts in order to protect the interests of another State,

and—while they have the means at their disposal to do so—completely fail to comply with their obligations, the inactive State bears international responsibility toward the other State.[55] By offering a haven to al Qaeda, in disregard of its obligations under international law—and disdaining binding Security Council resolutions adopted even before 9/11[56]—the Taliban regime assumed responsibility for the armed attack against the United States and opened the way to the exercise of forcible US response in self-defense.

Once the Taliban's brazen refusal to take the required steps against al Qaeda following 9/11 became evident, the United States issued an ultimatum, imperatively demanding that the al Qaeda bases be closed down and that its leaders be handed over.[57] When the Taliban ignored the ultimatum, the United States (with several allies) went to war on October 7, 2001. At that juncture, the Taliban regime—despite its failure to gain wide recognition—constituted the de facto government of Afghanistan because it was in actual control of more than 90 percent of the country.[58] A non-international armed conflict had independently flared up in Afghanistan long beforehand. This conflict was waged between the Taliban regime, on the one hand, and the Northern Alliance, on the other. Once the inter-State war (the United States and its allies versus Taliban-led Afghanistan and its al Qaeda ally) broke out, it was prosecuted simultaneously with the intra-State war (the Taliban versus the Northern Alliance) that went on until the fall of Kabul. The two wars (inter-State and intra-State), although connected, must be analyzed separately.

B. International and Non-International Armed Conflicts

Contrary to conventional opinion, I believe that the inter-State war in Afghanistan that started on October 7, 2001 continues unabated to this very day, despite the transformation in the status of the Taliban (who no longer form the de facto government of Afghanistan). When American and allied troops are fighting the Taliban (and their al Qaeda ally) on Afghan or adjacent (Pakistani) soil, this is a direct sequel to the hostilities that led to the ouster of the Taliban from the seat of power in Kabul. Both segments (past and present) of the hostilities are consecutive scenes in the same drama unfolding in Afghanistan. The inter-State war will not be over until it is over. And it will only be over once the Taliban are crushed.

We still have in Afghanistan—side by side with the inter-State war (the United States et al. versus the Taliban)—an intra-State war (the Taliban versus the Karzai government in Kabul). Except that, in terms of the intra-State war, the shoe is now on the other foot: the Karzai government is installed as the *de jure* government of Afghanistan, whereas the Taliban—originally the central government (if only de facto)—are the insurgents. For the credentials of the Karzai government, it is advisable to go back to Security Council Resolution 1386, adopted on December 20,

2001, which—acting under Chapter VII (i.e., in a binding manner)—(i) endorsed the Bonn Agreement, concluded earlier that month between various Afghan political factions, and (ii) gave its approval to the deployment of the International Security Assistance Force (ISAF) in consultation with the Afghan Interim Authority established by the Bonn Agreement.[59]

As long as the international armed conflict goes on in Afghanistan, the *jus in bello* in all its manifestations is applicable to the hostilities there. The singular feature of the inter-State war in Afghanistan is that it is conducted on Afghan soil with the consent of the Karzai government. This means that, at any point in time, the Karzai government (or, in the future, a successor Afghan government) may withdraw that consent and pull the rug out from under the feet of the United States and ISAF. The latter are fully conscious of the need to avert such an unwelcome development. If the United States (as heard at the conference) is applying in the field unusual constraints relating to collateral damage—compared to the general strictures imposed by the *jus in bello*—this is not an indication that the *jus in bello* is undergoing a metamorphosis. It simply shows that the United States is responsive to the concerns of the Afghan government, in whose territory the combat takes place. The government of Afghanistan is fully entitled to insist on the fighting against the Taliban (and al Qaeda) being conducted with minimal civilian casualties from among its citizenry.

Due to the special circumstances of the hostilities in Afghanistan—primarily, the intimate relationship characterizing the alliance between the Taliban and al Qaeda—US and allied combat operations against both (as long as they are conducted in and around Afghanistan, including in particular the lawless tribal lands of Pakistan), are clearly fused in a single inter-State armed conflict.

The differences from the vantage point of the *jus in bello* between the parallel international and non-international armed conflicts in progress in Afghanistan should not be exaggerated. Despite the profound disparity between the two types of armed conflicts from the angle of the *jus ad bellum*, there is a growing tendency to apply much of the *jus in bello* to both categories equally.[60] Apart from issues of semantics (exemplified by inappropriate usage of terms such as "belligerent parties" or even "combatants"), there are only three components of the *jus in bello* in international armed conflicts that—intrinsically—defy application in non-international armed conflicts. These are the entitlement to the status of prisoners of war, the law of neutrality and belligerent occupation.

Even in the last three respects, there may be some analogies or similarities. The rule of non-intervention on behalf of the insurgents by foreign States takes the place of the norms of neutrality. Detention of captured personnel in accordance with minimal requirements of human rights comes in lieu of the treatment of

prisoners of war. But there is no avoiding the fact that—in the absence of recognition of belligerency—captured insurgents can be indicted and convicted for treason. In countries maintaining capital punishment, upon conviction defendants may be sentenced to death. In other jurisdictions, they may languish in jail for life.

Recognition of belligerency, issued by the central government in the face of large-scale rebellion (as happened in the American Civil War), denotes that a non-international armed conflict will be governed by exactly the same rules that are applicable in international armed conflicts.[61] It is occasionally alleged that recognition of belligerency has fallen into disuse and that, even if it were to occur, only "common Article 3 and not the [Geneva] Conventions as a whole will apply to the conflict."[62] However, Common Article 3 applies anyhow to any "armed conflict not of an international character occurring in the territory of one of the High Contracting Parties,"[63] and this is not contingent on any recognition of belligerency. Should such recognition be granted, it would undoubtedly signal that the conflict has to be treated as if it were an international armed conflict and that all the norms of the *jus in bello* (including those relating to the status of prisoners of war, neutrality and belligerent occupation) will become applicable.

The dilemma of recognition of belligerency is for the present Afghan government to wrestle with and resolve as it deems fit. This does not affect the United States, since—in any event, as stated[64]—its armed conflict with the Taliban (as well as their al Qaeda ally) has been and remains international in nature. When Taliban personnel are captured by American troops, they have to be treated in accordance with the *jus in bello*. These captives cannot be considered guilty of treason against the United States (although the Afghan perspective may be different). In principle, they would have been entitled to prisoner of war status. However, they may be denied that privilege due to the fact that they are unlawful combatants. I addressed in some detail the meaning and consequences of unlawful combatancy at the 2002 Newport conference on terrorism (shortly after the outbreak of the Afghan War),[65] and I do not wish to repeat here what I said there. I also do not wish to pursue the domestic-constitutional issue of the rights of unlawful combatants to *habeas corpus* within the American judicial system. I merely want to emphasize that Taliban internees held on Afghan soil in a US detention center (e.g., in Bagram) can be kept there only as long as the Afghan government allows the United States to maintain such facilities within Afghan territory.

C. Action against Terrorists outside Afghanistan

Action taken by the United States and numerous other countries against al Qaeda and diverse groups of terrorists in far-flung parts of the globe, beyond the borders

of Afghanistan and its environs, do not constitute an integral part of the inter-State war raging in Afghanistan.

Al Qaeda has been active in many parts of the world, ranging from Mesopotamia to Somalia, from Hamburg to Madrid. In each instance, a discrete dissection of the legal situation is required. However, there is one common denominator, namely, the absence of any built-in nexus between the measures taken for the suppression of the local version of terrorism and the inter-State war in Afghanistan. In Iraq there is another war which, hopefully, is drawing to a close. In other places, the measures taken against the terrorists must be seen in the context of law enforcement,[66] leavened with sporadic injections of judicial and extrajudicial assistance and cooperation by foreign States.

IV. A New Paradigm?

I cannot resist adding a few words in response to a plea heard at the conference to come up with a new paradigm regarding the law of armed conflict. This is by no means the first occasion on which I have heard such an exhortation, and I am no longer surprised when it comes up. While all international wars are alike, no two wars are truly similar to each other. After every major war, it is perhaps natural that the international law of armed conflict is weighed and found wanting given the novel challenges specific to that war. When the challenges accumulate, it is frequently suggested that a new paradigm is required. After World War I, the international community was reeling from the carnage of trench warfare and the widespread use of gas warfare. After World War II, humankind was shocked by the horrors of the extermination camps and compelled to take into account the impact of atomic weapons. In both world wars it was contended that they were a category unto their own, since they constituted "Total Wars." Then came the Vietnam War, which was supposedly unique for it consisted of guerrilla warfare. Kosovo was singular, because it was exclusively an air campaign. And so it goes: each war leaves its special footprints in the sand of time.

As a matter of fact—and of law—I do not see any pressing need for a new paradigm. Of course, there are always new technologies, new weapons and new methods of warfare. What these novelties convey is that the law of warfare lags behind the actualities of the battleground. Yet, this is not an exclusive hallmark of the *jus in bello*. To a greater or lesser degree, all law lags behind reality. Lawyers always have to trail events, trying to close gaps that have opened up between real life and the law.

There is a great deal of reluctance on the part of most States today to close any such gap—when it becomes readily apparent—by means of a formal treaty, if only

because most treaty making today in the field of the *jus in bello* is controversial. However, recent restatements[67] show that informal texts (if properly structured and formulated) may prove almost as effective as formal treaties.

In any event, the very difficulty of adopting new treaties only reinvigorates the argument against the practicability of setting up a new paradigm. With an old paradigm—even if it is far from perfect—at least we know where we stand. The need to have a *quid pro quo* of rights and obligations has been accentuated at this conference, and indisputably this is the rub. The advantage of the present law of both international and non-international armed conflicts is that, by and large, we stand on *terra firma*: we know who is bound or entitled to do what. Admittedly, the nuclei of legal clarity are surrounded by patinas of ambiguity and controversy. But this is the inevitable state of all legal norms. The trouble with an innovative legal paradigm is that it unbalances the existing paradigms. It is prone to plunge the entire legal system into a chaotic transition period in which legal certainty is eroded. Where the *jus in bello* is concerned, what is liable to happen is that the notorious "fog of war" will become the "fog of the law of war."

Notes

1. *See infra* p. 51.
2. Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2796 (2006), *reprinted in* 45 INTERNATIONAL LEGAL MATERIALS 1130, 1153–54 (2006) (opinion of Stevens, J.).
3. North Atlantic Treaty, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243.
4. Press Release, North Atlantic Treaty Organization (NATO), Statement by the North Atlantic Council (Sept. 12, 2001), *reprinted in* 40 INTERNATIONAL LEGAL MATERIALS 1267 (2001).
5. *See* Jack M. Beard, *America's New War on Terror: The Case for Self-Defense under International Law*, 25 HARVARD JOURNAL OF LAW AND PUBLIC POLICY 559, 568 (2001–2002).
6. European Convention on the Suppression of Terrorism, Jan. 27, 1977, 1137 U.N.T.S. 93.
7. Supplementary Extradition Treaty, June 25, 1985, US-UK, *reprinted in* S. EXEC. REP. No. 17, 99th Cong., 2d Sess. 15 (1986).
8. International Convention for the Suppression of the Financing of Terrorism, 1999, 39 INTERNATIONAL LEGAL MATERIALS 270 (2000).
9. S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001).
10. Eric Rosand, *Security Council Resolution 1373, the Counter-Terrorism Committee, and the Fight against Terrorism,* 97 AMERICAN JOURNAL OF INTERNATIONAL LAW 333, 334 (2003).
11. *Id.* at 332.
12. *See* YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 213–15 (3d ed. 2001).
13. *See, e.g.,* Oscar Schachter, *The Lawful Use of Force by a State against Terrorists in Another Country,* 19 ISRAEL YEARBOOK ON HUMAN RIGHTS 209, 216 (1989).
14. S.C. Res. 1368, U.N. Doc. S/RES/1368 (Sept. 12, 2001).
15. S.C. Res. 1373, *supra* note 9.
16. *See supra* p. 44.
17. Organization of American States (OAS), Resolution: Terrorist Threat to the Americas (Sept. 21, 2001), *reprinted in* 40 INTERNATIONAL LEGAL MATERIALS 1273 (2001).

18. Inter-American Treaty of Reciprocal Assistance, Sept. 2, 1947, 62 Stat. 1681, 121 U.N.T.S. 77, 95.

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31. Prosecutor v. Tadic, Case No. IT-94-1, Judgment (July 15, 1999), *reprinted in* 38 INTERNATIONAL LEGAL MATERIALS 1518, 1540–45 (1999).

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33. For details, see EVE LA HAYE, WAR CRIMES IN INTERNAL ARMED CONFLICTS 19 (2008).

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35. *Id.* at 106–08.

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41. Letter from Mr. Webster to Mr. Fox (Apr. 24, 1841), 29 BRITISH AND FOREIGN STATE PAPERS 1129, 1138 (1840–41).

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48. *Supra* note 28.

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64. *See supra* p. 51.
65. Yoram Dinstein, *Unlawful Combatancy, in* INTERNATIONAL LAW AND THE WAR ON TERROR 151 (Fred Borch & Paul Wilson eds., 2003) (Vol. 79, US Naval War College International Law Studies).
66. *See supra* pp. 44–45.
67. The archetypical model is the *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (L. Doswald-Beck ed., 1995), *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 63, at 573.