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International Law and the War on Terror
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V

Panel I
Commentary—Jus ad Bellum

William Dalton[1]

I note with interest and some curiosity that the two presenters for this panel employ a UN Charter paradigm when discussing the war on terrorism. The inherent right of collective and individual self-defense embodied in customary international law might well be a more appropriate analytical starting point when discussing Operation ENDURING FREEDOM, however. This seems to be a fundamental question worthy of debate and discussion. Many of the questions raised by Rear Admiral Rempt this morning are also of a fundamental nature. Such questions as what is the nature of terrorism, are terrorists lawful combatants, do terrorists comply with the law of armed conflict; do they wear a distinctive uniform, are they under military command, are all questions of great import as the United States prosecutes this Global War on Terrorism.

In my view, terrorists do not qualify as lawful combatants. Instead, they are unlawful combatants and international thugs. Given this starting point, why are nations constrained in pursuing and eliminating international terrorists? Why are preemptive strikes not routinely taken? One basic reason states operate within the framework of international law is the existence and strength accorded state sovereignty. The UN Charter prohibits states from engaging in

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aggressive wars against one another.[2] Numerous mutual agreements exist pursuant to this same charter that recognize, with the exception of variations of self-defense, that the Security Council is the only organization that may authorize the aggressive use of force. This inability to use aggressive force, properly or improperly, constrains how states respond to international terrorism. This is quite an interesting dilemma; one almost certainly not considered when the Charter itself was written.

When looking at the *Caroline* Case, Secretary Webster was really applying a domestic concept of self-defense—the defender having his back to the wall and having to respond immediately.[3] Groups engaging in terrorist acts against the United States need time to plan, to organize, to mount such attacks. When applying the imminency requirement necessary for anticipatory self-defense to international terrorism, there must be a lessening of the immediacy of the threat. In other words, the requirement to have an immediate threat before anticipatory self-defense can be invoked must be moderated.

On a different matter, in looking at the close relationship between the Taliban and al Qaeda, it is clear that a mutual dependency existed between the two organizations. Each of these organizations enjoyed a mutual benefit from the other. The Taliban enjoying the purchasing power of al Qaeda funds and al Qaeda enjoyed the safe haven of Afghanistan provided by the Taliban. In order to allay the threat presented by al Qaeda it was necessary to prosecute the Taliban as well because as long as the Taliban provided safe haven to al Qaeda, al Qaeda continued to be an imminent threat to the coalition partners. So it was as a matter of military necessity in applying anticipatory self-defense that action was undertaken against the Taliban. In my mind, this made the Taliban a perfectly legitimate target. Note also, that this analysis applies to the current situation with Iraq. The key here is that of necessity. At some point, it will become necessary to respond to the Iraqi regime. At some point the threat will be so imminent and so serious that the international community will have to respond. Clearly then, the key to the overall war on terrorism is this notion of imminency and the exercise of the extraordinary right of self-defense.

2. Article 2(4) of the United Nations Charter prohibits the aggressive use of force by member states; Article 51 recognizes the customary international law right of self-defense.
3. *See* R.Y. Jennings, *The Caroline and McLeod Cases*, 32 AM. J. INT'L L. 82 (1938).