



2006

New Paradigms for the Jus ad Bellum?

Jane E. Stromseth

Georgetown University Law Center, stromset@law.georgetown.edu

This paper can be downloaded free of charge from:
<https://scholarship.law.georgetown.edu/facpub/1682>

38 Geo. Wash. Int'l L. Rev. 561-575

This open-access article is brought to you by the Georgetown Law Library. Posted with permission of the author.
Follow this and additional works at: <https://scholarship.law.georgetown.edu/facpub>



Part of the [International Law Commons](#)

NEW PARADIGMS FOR THE JUS AD BELLUM?

JANE E. STROMSETH*

I am delighted to be here today to honor Ed Cummings, a wonderful colleague and a source of great wisdom for so many of us. I first worked with Ed in the Legal Adviser's Office in the late 1980s. More than fifteen years later, Ed is still the person I turn to for insight on the most difficult issues in the law of armed conflict. Most memorably of all, while serving at the National Security Council in 1999, I worked closely with Ed in achieving an important treaty milestone: the Protocol restricting the use of child soldiers in armed conflict (the Child Soldier Protocol).¹ Ed was the person who first saw the potential for a diplomatic compromise that became the essence of the treaty: namely, allowing voluntary recruitment of seventeen year olds into national armed forces (an important equity for the United States) but barring their deployment into active participation in hostilities prior to the age of eighteen.² This compromise allowed for an international agreement that put the spotlight where it ought to be—on prohibiting the *forced* recruitment and deployment of underage kids—while also setting a clear age-eighteen standard for participation in hostilities.

Ed's efforts over many years to achieve this result illustrate several characteristics of his work as a lawyer that I admire most: his savvy understanding of how legal rules work in complex and difficult circumstances; his appreciation for how sensible legal

* Professor of Law, Georgetown University Law Center. D. Phil. 1988, Oxford University; J.D. 1987, Yale Law School; B.A. 1978, Swarthmore College.

1. See Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, G.A. Res. 54/263, Annex I, U.N. Doc A/RES/54/263 (May 25, 2000) (entered into force Feb. 12, 2002) [hereinafter *Optional Protocol*]. The United States is a party to the *Optional Protocol*.

2. More precisely, Article 1 of the *Optional Protocol* requires states parties to "take all feasible measures to ensure that members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities." *Id.* art 1. Article 2 prohibits states parties from compulsory recruitment into their armed forces of those under eighteen, while Article 3 provides that the age for *voluntary* recruitment into national armed forces must be above age fifteen. See *id.* arts. 2–3; see also *id.* pmb. Article 4 provides that "[a]rmed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years" and requires states parties to "take all feasible measures to prevent such recruitment and use . . ." *Id.* art. 4.

frameworks can safeguard U.S. security interests and advance U.S. values (such as humanity in warfare) in a dangerous world; and his diplomatic skill in finding reasonable common ground that protects U.S. equities while taking into account the perspectives and legitimate concerns of others.

These virtues (practical savvy, appreciation of the value of sensible legal rules, and a capacity to find reasonable common ground) are just what we need today for thinking through the current challenges to the *jus ad bellum*—the legal framework governing the resort to force.

I will argue that the existing UN Charter framework is under considerable stress; that neither highly restrictive nor highly permissive interpretations of the UN Charter are wise or compelling; that updated understandings rather than completely new paradigms are needed; and that finding some common ground, particularly concerning anticipatory self-defense in response to terrorism, is desirable and should be possible—but it will not be easy.

The UN Charter has been the centerpiece of the *jus ad bellum* since 1945. With the overarching purpose of protecting international peace and security, the Charter establishes principles limiting the use of force, including the core non-intervention norm set forth in Article 2(4), which provides that states “shall refrain . . . from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”³

But the Charter’s drafters also clearly understood that rules governing the use of force were insufficient without an enforcement mechanism that could draw upon the military and economic resources of the great powers, whose forces together had been necessary to defeat Hitler. Thus the Charter gave a body of states—the Security Council—primary responsibility for maintaining international peace and security and empowered it, in Chapter VII, to respond, with force if necessary, not only to breaches of the peace and aggression but also to threats to the peace. These terms were deliberately left undefined so that the Council could respond flexibly to concrete circumstances.⁴ The Charter also clearly affirmed the right of states to take immediate action in self-defense, confirming, in Article 51, that: “Nothing in the present Charter shall

3. U.N. Charter art. 2, para. 4.

4. See *id.* art. 39. For a discussion of the history of Chapter VII, see RUTH B. RUSSELL, A HISTORY OF THE UNITED NATIONS CHARTER 464–65, 669–72 (1958).

impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations”⁵ The Charter, in short, provides for the lawful use of force in two clear situations: when authorized by the Security Council or in self-defense.

Although a product of its time, the UN Charter was expected to be a living document that could endure and adapt in new and unforeseen circumstances. Britain’s Lord Halifax perhaps put it best in 1945, when he stressed that:

[I]nstead of trying to govern the actions of the members and the organs of the United Nations by precise and intricate codes of procedure, we have preferred to lay down purposes and principles under which they are to act. And by that means, we hope to insure that they act in conformity with the express desires of the nations assembled here, while, at the same time, we give them freedom to accommodate their actions to circumstances which today no man can foresee. . . . We do not want to lay down rules which may, in the future, be the signpost for the guilty and a trap for the innocent.⁶

Yet despite its ambitious goals, the UN Charter system is under great stress today. To be sure, Cold War antagonisms limited the Security Council’s effectiveness for much of its history. But during the 1990s, effective U.S. diplomacy following Iraq’s 1990 invasion of Kuwait—and the Security Council’s role in authorizing a collective response to that and subsequent conflicts—deepened public and official support in many states for working within the UN Charter system to respond to a diverse array of threats to international peace and security. Likewise, after the 9/11 terrorist attacks, the United States worked effectively to build international support for the U.S. military response against Al Qaeda and the Taliban regime in Afghanistan, and for counter-terrorism efforts more generally, and the Security Council rose to the occasion, condemning the terrorist attacks, affirming the right of self-defense, and imposing far-reaching counter-terrorism duties on all states.⁷ But strains in the UN system were also evident during these years, as the Security Council’s inability to agree on effective action in Rwanda and

5. U.N. Charter art. 51.

6. Lord Halifax, *Verbatim Minutes of First Meeting of Commission I, June 14, 1945*, U.N. Doc. 1006 (June 15, 1945), in UNITED NATIONS CONFERENCE ON INTERNATIONAL ORGANIZATION: SELECTED DOCUMENTS 529, 537 (1946).

7. Security Council Resolution 1368 affirmed the inherent right of self-defense, as did Resolution 1373, which also imposed significant counter-terrorism duties on all states. See S.C. Res. 1368, U.N. Doc. S/RES/1368 (Sept. 12, 2001); S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001).

Kosovo made clear. Moreover, the U.S.-led intervention in Iraq in 2003, following a bruising failure to achieve consensus in the Security Council, left a particularly deep and bitter divide, which, in the face of ongoing turmoil in Iraq, has undermined confidence in U.S. global leadership, even among close allies.

What is striking today, regarding the *jus ad bellum*, is the intensity of feeling at two sides of a wide gulf. At one end of the chasm are those who argue for an extremely restrictive interpretation of the UN Charter's rules: namely, that in the absence of Security Council authorization, states can use force in self-defense if and only if an armed attack occurs. Proponents of this view generally reject any conception of anticipatory self-defense under the UN Charter—that is, the use of force to thwart an imminent attack⁸—or any claim of legal authority for humanitarian intervention without express Security Council approval even in the most exceptional of circumstances. While most proponents of this position defend strict rules as necessary to protect the peace—and criticize states harshly for failing to live up to them—other advocates of strict interpretation argue that the law of the UN Charter is in fact “dead” because it does not reflect how states actually behave in the world.⁹ Either way, the Charter's rules are interpreted in an extremely restrictive manner that is too narrow in the face of new threats and that takes insufficient account of the system's capacity to adapt.

On the other side of the current chasm are those who argue for an extremely permissive interpretation of the UN Charter or, at the far end, those who reject the idea of international law as a legitimate constraint on the use of force altogether. There is certainly a wide range of views within the U.S. government today, and some interpretations of “preemptive” self-defense, especially in response to terrorism, fall within a reasonable conception of anticipatory self-defense; but other interpretations, spelled out in Bush Administration speeches and the 2002 U.S. National Security Strategy, are couched in such broad terms as to suggest a willingness to use force to prevent “rogue” states from acquiring weapons of mass

8. For a discussion of different views on anticipatory self-defense, see ANTHONY CLARK AREND & ROBERT J. BECK, *INTERNATIONAL LAW AND THE USE OF FORCE* 71–79 (1993); Terrence Taylor, *The End of Imminence*, WASH. Q., Autumn 2004, at 57, 63–65; Sean D. Murphy, *The Doctrine of Preemptive Self-Defense*, 50 VILL. L. REV. 699 (2005).

9. See, e.g., Michael J. Glennon, *How International Rules Die*, 93 GEO. L.J. 939 (2005) [hereinafter *Rules*]; Michael J. Glennon, *Why the Security Council Failed*, FOREIGN AFF., May/June 2003, at 16, 16–18, 24. Glennon argues that even if an international norm is no longer law, it may “still influence state conduct.” *Rules*, *supra*, at 961.

destruction¹⁰ and to preempt “emerging threats before they are fully formed.”¹¹ This conception of the preemptive use of force is open-ended and difficult to reconcile with longstanding interpretations, including by the United States itself, of the scope of the right of self-defense.¹² An expansive preemption doctrine is potentially destabilizing and in tension with the UN Charter framework.

But do the UN Charter’s rules, reasonably interpreted, still serve a valuable purpose? And does continued commitment to that framework serve U.S. interests in the dangerous post-9/11 world? I would strongly argue yes to both questions for three reasons:

First, the non-intervention default rule at the heart of the UN Charter is a force for stability in a dangerous world. Despite disagreements around the edges, Article 2(4)’s central core makes it clear that wars of territorial expansion and conquest are unlawful. Beyond this, the Charter framework puts a high burden of justification on those who would use force—a burden that encourages states to seek to resolve disputes without resorting to armed conflict in a world chock full of grievances. Such a regime provides a positive force for global stability as part of a broader array of pressures, such as alliances and security arrangements.

Second, the Charter framework provides a basis for mobilizing international support for effective responses to serious threats, such as terrorism. At a time when terrorist networks, such as Al Qaeda, deliberately target civilians and challenge the very foundation of international law and order, the Charter provides a framework of agreed international rules that can help forge unified responses that enjoy broad legitimacy. Other states are more likely to cooperate in countering terrorism through actions including the use of force if they are convinced such actions rest on a solid

10. See NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 13–14 (Sept. 17, 2002) [hereinafter NATIONAL SECURITY STRATEGY], available at <http://www.whitehouse.gov/nsc/nss.pdf>; President George W. Bush, Commencement Address at the United States Military Academy in West Point (June 1, 2002), in 38 WEEKLY COMP. PRES. DOC. 944 (June 10, 2002).

11. NATIONAL SECURITY STRATEGY, *supra* note 10, intro.

12. For a more extended discussion, see Jane E. Stromseth, *Law and Force After Iraq: A Transitional Moment*, 97 AM. J. INT’L L. 628, 635–36 (2003) [hereinafter *Law and Force*]. See also Miriam Sapiro, *Iraq: The Shifting Sands of Preemptive Self-Defense*, 97 AM. J. INT’L L. 599 (2003). The newly-released 2006 U.S. National Security Strategy has a somewhat different tone than the 2002 version and emphasizes a “strong preference” for “address[ing] proliferation concerns through international diplomacy in concert with key allies and regional partners.” NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 23 (March 16, 2006), available at <http://www.whitehouse.gov/nsc/nss/2006>. The 2006 strategy also states, however, that “[t]he place of preemption in our national security strategy remains the same.” *Id.*

legal basis; thus, pursuing U.S. objectives within the Charter framework can be a “force multiplier” that enhances access to additional resources and support. Working within an agreed legal framework also helps to bolster a global consensus that de-legitimizes and stigmatizes terrorist violence.

A third reason why continued commitment to the UN Charter framework is in U.S. interests is the capacity of the framework to adapt and evolve in the face of new threats and challenges, just as Lord Halifax envisioned back in 1945. In recent years, for example, the Security Council has determined that “threats to the peace” include: humanitarian emergencies; overthrow of democratically-elected leaders; extreme repression of civilian populations and cross-border refugee flows threatening regional security; and failure to hold perpetrators of major atrocities accountable. Another example is the Security Council’s unanimous affirmation of the right of self-defense in the immediate aftermath of the 9/11 attacks and the invocation of collective self-defense by U.S. allies.¹³ Article 51, after all, refers to “armed attacks” broadly, without limiting what these might look like or who might perpetrate them.¹⁴

The real challenge is whether UN member states can agree on how to interpret the Charter’s rules in a context in which non-state terrorist actors seek weapons of mass destruction with the aim of committing devastating attacks on civilian populations, and also in a context in which many individuals and groups suffer gross atrocities at the hands of repressive state leaders and rebel groups.

In the Child Soldier Protocol,¹⁵ Ed Cummings managed to find reasonable common ground, protecting U.S. equities while constructively taking the perspectives of others into account. Is it possible to do this regarding the *jus ad bellum*, despite the great divide between those at the far ends of the spectrum? I think it is.

Rather than pressing an open-ended and controversial preemption doctrine, the United States should work with friends and allies to forge greater consensus on a robust right of self-defense

13. See S.C. Res. 1368, U.N. Doc. S/RES/1368 (Sept. 12, 2001). In addition, members of the North Atlantic Treaty Organization (NATO) and the Rio Pact, as well as Australia under the Australia, New Zealand, and United States Security Treaty (ANZUS), invoked the collective self-defense provisions of their respective alliances in response to the September 11th attacks. See North American Treaty Organization (NATO), *Statement by the North Atlantic Council* (Sept. 12, 2001), 40 I.L.M. 1267 (2001); Organization of American States (OAS), *Resolution on Terrorist Threat to the Americas* (Sept. 21, 2001), 40 I.L.M. 1273 (2001); *Howard Government Invokes ANZUS Treaty* (Sept. 14, 2001), <http://www.australianpolitics.com/new/2001/01-09-14c.shtml>.

14. U.N. Charter art. 51.

15. Optional Protocol, *supra* note 1.

(including anticipatory self-defense) in response to terrorism. Al Qaeda's horrific attacks of 9/11, and the organization's determination to attack again with even more deadly effect, make the right to defend against and thwart future attacks clear and compelling.¹⁶ Even regarding other terrorist groups not directly involved in 9/11, the United States can expect considerable support from friends and allies for a reasonably defined right of anticipatory self-defense. The Report of the High-Level Panel on Threats, Challenges, and Change—a diverse group from a wide range of countries—embraced anticipatory self-defense to imminent attacks as consistent with international law, as have a number of key U.S. allies.¹⁷

This is for good reason. Although scholars have long debated the scope of the right of self-defense, the stronger argument, in my view, is that Article 51 preserved the pre-existing customary law right of anticipatory self-defense in the face of imminent attacks.¹⁸ Moreover, subsequent practice—including responses of Security Council members to various uses of force—indicates considerable acceptance, at least in principle, of the *Caroline* standard, with its emphasis on imminent harm.¹⁹ Furthermore, if the law is to be respected and taken seriously by those who face grave threats, it must permit reasonable responses to those threats in light of the often difficult circumstances in which decision-makers make tough choices—something the law of armed conflict has long sought to do.

But the meaning of “imminent” attack that is central to accepted understandings of anticipatory self-defense needs greater clarifica-

16. See Jack M. Beard, *America's New War on Terror: The Case for Self-Defense Under International Law*, 25 HARV. J.L. & PUB. POL'Y 559 (2002) (discussing the 9/11 attacks and the U.S. and international response).

17. See Report of the Secretary-General's High-Level Panel on Threats, Challenges, and Change, *A More Secure World: Our Shared Responsibility*, ¶ 188 (2004) [hereinafter High-Level Panel Report] (“[A] threatened State, according to long established international law, can take military action as long as the threatened attack is *imminent*, no other means would deflect it and the action is proportionate.”), available at <http://www.un.org/secureworld>.

18. See Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1634–35 (1984) (arguing that a right of anticipatory self-defense to imminent attack is consistent with Article 51 of the UN Charter).

19. See Christopher Greenwood, *International Law and Pre-Emptive Use of Force: Afghanistan, Al-Qaida, and Iraq*, 4 SAN DIEGO INT'L L.J. 7, 12–15 (2003). In the case of the *Caroline*, U.S. Secretary of State Webster defended a right of anticipatory self-defense when there was “a necessity of self-defense, instant, overwhelming, leaving no choice of means and no moment for deliberation.” *Id.* at 13 (discussing the *Caroline* case and Webster correspondence).

tion in the context of terrorism, and the United States should work with allies to build agreed understandings. The key point to keep in mind here is that the UN Charter aimed to strike a balance: to limit pretextual and open-ended claims of self-defense that threatened the very idea of limits on the use of force, on the one hand, while affirming the “inherent right” of states to defend themselves effectively from attack, in full recognition that collective action by the Security Council would not always be timely.

Among the factors to consider in determining whether a terrorist attack is sufficiently imminent to justify forcible action in self-defense are: (1) the intent of the terrorist group and the probability of attack (have they made clear their determination to attack and is there reliable intelligence to suggest they are planning to attack?); (2) capacity (what is their capacity to attack, and are they on the verge of acquiring weapons of mass destruction?); (3) methods of attack (terrorists use deception and stealth and there will likely be no advance warning; thus waiting until an attack is underway will be too late for effective self-defense); (4) gravity of likely harm (given what is known about the terrorists’ intent and capacity, what is the likely harm expected from an attack?); and (5) urgency of the threat (is there good reason to believe that the likelihood of attack is increasing, and that acting now is critical to thwarting an attack?). Legal scholars have begun to discuss these and other factors in helpful ways²⁰—including the limiting principles of necessity and proportionality of response—but more effort is needed by lawyers, both in and out of government, in countries around the world. The United States should be working with its allies to lead the way.

One particularly challenging issue that arises in using force in self-defense against terrorists is the question of state responsibility. State involvement in terrorist acts can fall on a wide spectrum ranging from active state sponsorship and support, at one end, to state toleration of the presence of terrorist bases of operation, to a lack of state complicity but an inability to effectively stop terrorist attacks from its territory at the other end of the spectrum. The greater the degree of state involvement, the more international support is likely for using military force in self-defense. In the case of Afghanistan, for instance, the Taliban regime’s refusal to comply with the Security Council’s repeated resolutions calling for Bin

20. See, e.g., *id.* at 16 (discussing “gravity of the threat” and “the method of delivery of the threat”); Taylor, *supra* note 8, at 66 (discussing “the explicit intent of those posing the threat”).

Laden to be turned over, and the regime's continued allowance of the use of its territory as a base for Al Qaeda attacks, made the resort to force necessary in self-defense. Even in cases where a state is not itself complicit but is unable to halt terrorist attacks against another state mounted from its territory, military action in self-defense might be necessary if cooperative law enforcement means are unable to thwart terrorist attacks.²¹ The question of "necessity" of use of force in the face of anticipated terrorist attacks will depend very much on the particular factual circumstances and the prospects for preventing attacks through cooperative law enforcement.

In short, rather than pressing an expansive and open-ended pre-emption doctrine, the United States should work with friends and allies to find common ground on the contours of a robust right of self-defense (including anticipatory self-defense) focused especially on the threat of terrorism. Regional self-defense alliances, such as ANZUS and NATO, would be good places to start this diplomacy.²² These alliances involve both a normative commitment to collective self-defense and an institutional structure to implement and enforce this commitment. Moreover, allies such as Australia and Britain, who have themselves experienced terrorist attacks, are likely to be interested in forging agreed understandings on self-defense in response to terrorism. Finding common ground with key allies in self-defense alliances could be a first step in reinforcing the *jus ad bellum* at a difficult and critical time, and would not depend on achieving complete agreement among far more disparate states.

Of course, military means are only one part of a larger strategy to counter terrorism. The United States must pursue a multi-faceted approach that includes intelligence and law enforcement cooperation, political pressure, economic and other reforms. In addition, the United States should work to reinforce the duty of all states to combat terrorism and to prevent terrorists from acquiring weapons

21. See YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENSE* 194–96 (3d ed. 2001).

22. As mentioned earlier, the members of NATO, and Australia under ANZUS, invoked their respective collective self-defense provisions following the 9/11 attacks. See *supra* note 13. The ANZUS security alliance originally involved Australia, New Zealand, and the United States. Today, however, it involves active defense commitments only between Australia and the United States. In 1986, following disagreements between the United States and New Zealand over New Zealand's stance on nuclear warships in its ports, the United States suspended its obligations to New Zealand under the treaty. New Zealand's role is therefore best described as "dormant." Luke Peter, *New Zealand's Dormant Role in ANZUS Unchanged Since 80s-PM*, CHRISTCHURCH PRESS, Sept. 20, 2001, at 3.

of mass destruction. States have a clear legal duty not to allow terrorists to use their territory as a base for attacking other states, and Security Council Resolution 1373, adopted after the 9/11 attacks, imposed additional far-reaching counter-terrorism duties upon all states. That resolution obligates all states to:

Refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts. . . . Take the necessary steps to prevent the commission of terrorist acts. . . . Deny safe haven to those who finance, plan, support, or commit terrorist acts. . . . [and] Prevent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other States or their citizens. . . .²³

More should be done to build upon Security Council Resolution 1373, which requires states to “eliminat[e] the supply of weapons to terrorists,” and also to strengthen the capacity of the Counter-Terrorism Committee to monitor and enforce these duties.²⁴

Efforts to find common ground on state duties—despite some differences over the *jus ad bellum* rules governing the resort to force—are also evident in the area of humanitarian intervention. The legality of humanitarian intervention—the use of force by a state or group of states to protect the population of another state from atrocities or other severe human rights abuses—was sharply contested in 1999 when NATO intervened in Kosovo. Again, a stark divide developed between those who criticized NATO’s intervention as a violation of the Charter’s non-intervention rules and those who contended that, under the exceptional factual circumstances at the time, the intervention was lawful or at least legitimate. By a vote of twelve to three, the UN Security Council soundly rejected a resolution condemning the intervention,²⁵ and many members concluded, as NATO did, that force was necessary and justified in these exceptional circumstances.²⁶

In the aftermath of the Kosovo intervention, the status of humanitarian intervention without prior Security Council authori-

23. S.C. Res. 1373, ¶¶ 2(a)–(d), U.N. Doc. S/RES/1373 (Sept. 28, 2001).

24. *Id.* ¶ 2(a); Jane E. Stromseth, *The Security Council’s Counter-Terrorism Role: Continuity and Innovation*, 97 AM. SOC’Y INT’L L. PROC. 41 (2003). For a more recent development, see S.C. Res. 1540, U.N. Doc. S/RES/1540 (April 28, 2004).

25. The meeting record describing the Security Council’s rejection of U.N. Doc. S/1999/328 on March 26, 1999 is contained in U.N. Doc. S/PV.3989. Both documents are available at <http://www.un.org/Depts/dhl/resguide/scact1999.htm> (last visited Feb. 5, 2006).

26. For a more detailed discussion, see Jane Stromseth, *Rethinking Humanitarian Intervention: The Case for Incremental Change* [hereinafter *Rethinking*], in HUMANITARIAN INTERVENTION: ETHICAL, LEGAL, AND POLITICAL DILEMMAS 232, 234–40 (J.L. Holzgrefe & Robert O. Keohane eds., 2003).

zation remains deeply contested. Still, there are some signs of normative evolution. For one thing, states are increasingly recognizing that they have a responsibility to protect their citizens from severe atrocities and human rights abuses. The Heads of State gathered at the United Nations in September 2005 agreed that “[e]ach individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity” and that “[t]his responsibility entails the prevention of such crimes.”²⁷ Recognizing an international responsibility to protect people from these atrocities, the Heads of State also indicated willingness to take collective action, including Security Council action under Chapter VII of the UN Charter, “should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.”²⁸

But what if the Security Council is unable or unwilling to take effective action in response to such atrocities? In such a case, many states would dispute the legality of military action by regional organizations or a coalition of willing states. But other states might well contend—bolstered by precedents such as Kosovo, the 1991 action to protect Iraqi civilians in the aftermath of the Persian Gulf War, and the Economic Community of West African States (ECOWAS) interventions in Sierra Leone and Liberia—that, in exceptional factual circumstances, a regional organization or group of states may lawfully use force for humanitarian purposes to protect victims of severe atrocities if the Security Council is unable or unwilling to act. At the very least they may contend that such action, depending on the circumstances, should be considered an “excusable breach” of the Charter.²⁹ Certainly the UN Charter’s rules should be understood in light of growing commitments to human rights and clear international legal prohibitions against genocide and other heinous atrocities. Thus, in this area, as in self-defense, there may be some gradual, incremental movement in the *jus ad bellum*.

An evolutionary approach to the *jus ad bellum* will, no doubt, be criticized by some legal scholars and lawyers. Advocates of the strict interpretation of the UN Charter will likely view it as too expansive,

27. G.A. Res. 60/1, ¶ 138, U.N. Doc. A/RES/60/1 (Sept. 15, 2005).

28. *Id.* ¶ 139.

29. See *Rethinking*, *supra* note 26, at 244–55 (arguing that a norm in support of humanitarian intervention in exceptional factual circumstances may gradually be emerging); see also Sean D. Murphy, *The Intervention in Kosovo: A Law-Shaping Incident?*, 94 AM. SOC’Y INT’L L. PROC. 302, 304 (2000) (suggesting that a new gloss on the meaning of Article VIII of the UN Charter governing regional organizations may be developing).

while advocates of the highly permissive approach will regard it as too limited. But, in my view, neither of those alternatives strikes the correct balance between legal stability and clarity, on the one hand, and flexibility in response to new and emerging threats, on the other.

Still, it is worth asking—as some on both ends of the spectrum do—whether an entirely new paradigm is needed for the *jus ad bellum* today, given the new threats we face and the tensions and disagreements over the Charter's rules. If we were starting from scratch today, could we come up with something better than an updated UN Charter framework that could enjoy wide acceptance among states?

For the reasons I mentioned earlier, we could probably agree that some baseline non-intervention rule is stabilizing and beneficial. Perhaps we could write a clearer version of Article 2(4)—at least the core of it; but disagreements would no doubt persist around the edges. We would certainly agree that a right of self-defense exists and that states clearly can organize themselves in self-defense alliances. States facing the most immediate threat from terrorism would certainly argue for a right of anticipatory self-defense. Many other states would be worried about other kinds of aggression—including from other states—and would strongly resist open-ended concepts of preventive self-defense to future threats. So we would end up, I think, at a place similar to where I have argued we are under the UN Charter today.

More complex would be the question of humanitarian intervention—the use of force by a state or group of states to protect the population of another state from atrocities or severe human rights abuses. Some would argue for a right of humanitarian intervention in exceptional circumstances and there might be a decent amount of support for this in situations of genocide or widespread crimes against humanity. But others would argue strongly that decisions to intervene should only be taken collectively.

And there's the rub. If we were designing a *jus ad bellum* regime today, most states likely would want an international body capable of acting effectively and collectively in response to "threats to the peace" and acts of aggression—probably with authority quite similar to that of the Security Council. The problem is not so much the scope of authority, but rather the composition of such a body. Article 23 of the UN Charter would be a decent place to start, with its emphasis on a state's contribution to maintaining international peace and security, its contribution to the other purposes of the

United Nations (including protection of human rights and self-determination), and “equitable geographical distribution.”³⁰ Certainly, major powers that contribute significantly to peace and security in their region, or globally, should be included in this body, particularly if they are also committed to human rights and to democracy. But agreement on permanent members (particularly if with veto power) would be extraordinarily difficult to achieve. The United States would likely insist on veto power as the price of its participation, just as it did in 1945, and other states might do so as well.

Agreeing on the ultimate composition of a global body would be an enormous struggle. While some states would be obvious candidates for inclusion because of their military and/or economic contributions to peace and security and their dedication to human rights and democracy, many different regional powers would be potential contenders for membership on a Security Council-like body. In a number of regions, two or three major powers might demand membership, and, unless the body were to be extremely large, it might be necessary to alternate between them on a regular basis. Also, today we should—and probably would—place greater priority on including democratic states that are strongly committed to the “responsibility to protect” human beings from atrocities and to the duty to prevent terrorism. It might be possible to use the carrot of membership as an incentive for positive behavior, just as the European Union has sought to do in its neighborhood. But agreeing on membership would likely be just as deeply contentious as the current debates over Security Council expansion, unless clear criteria could be agreed upon for membership with a rotation system for non-permanent members ample enough to permit wide participation of eligible countries over time.

Assuming we could eventually agree on the ground-rules and composition of a new international body (and that’s a huge “if”), my guess is that we might still decide that regional organizations ought to have somewhat greater authority to protect peace and security in their regions, so long as they respect human rights and democracy. We might, for instance, encourage treaty-based frameworks such as that of ECOWAS, which has established a

30. Article 23 of the UN Charter provides that, in addition to the five permanent Security Council members, the General Assembly shall elect ten non-permanent members for two-year terms with “due regard being specially paid, in the first instance to the contribution of Members of the United Nations to the maintenance of international peace and security and to the other purposes of the Organization, and also to equitable geographical distribution.” U.N. Charter art. 23, para. 1.

Mediation and Security Council with authority to intervene in internal conflicts within member states that “threaten[] to trigger a humanitarian disaster,” or in the “event of serious and massive violation of human rights and the rule of law.”³¹ But, at the same time, we would likely be concerned, just as the Charter’s founders were, to make sure a global body could respond to threats to the peace on behalf of the international community based on agreed *international* rules and procedures. Striking the right balance between regional and international action in situations other than self-defense would not be easy.

My point is that creating a dramatically better alternative to the present system, warts and all, would be extremely challenging. However, thinking this through helps illuminate some of the serious problems in the current system, such as a Security Council whose composition fails to include states that make a significant contribution to peace and security and a consistent failure to weigh respect for human rights and self-determination heavily enough in electing members to the Council. Reforming the Security Council to make it more effective, representative, and seriously committed to the Charter’s multiple purposes is a critical, if daunting, priority.³² Further, coming up with ways to discourage veto-holding permanent members from blocking action when a strong consensus otherwise exists requires innovation: the idea of “indicative voting,” for instance, whereby states would indicate and explain their vote in a preliminary way—giving other states and organizations more chance to persuade them—may be useful.³³ Finally, much greater effort is needed to find agreed ways to enforce the responsibility to

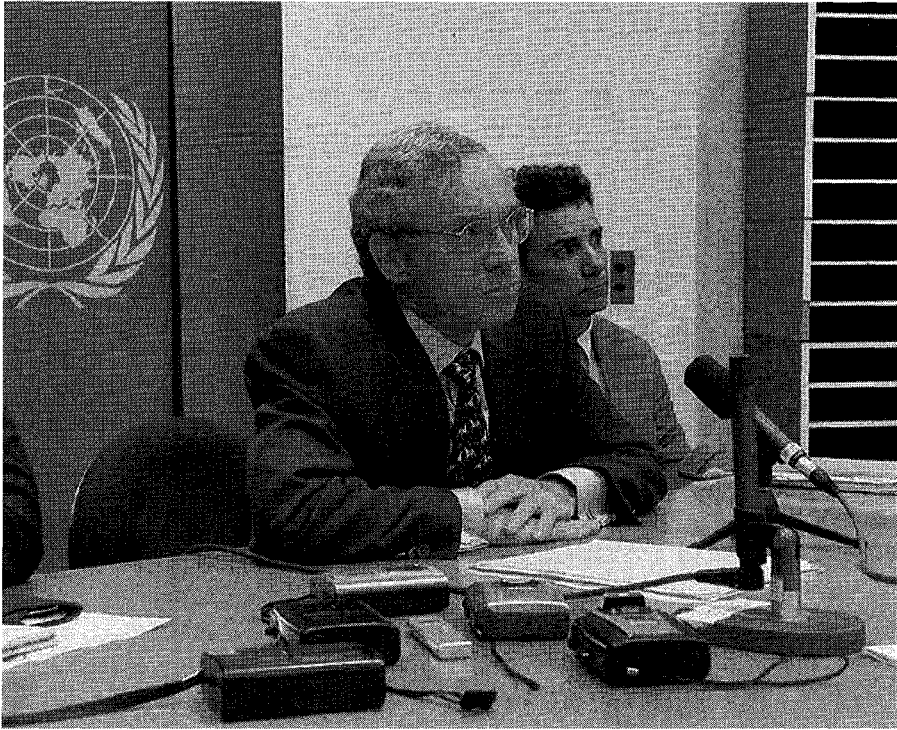
31. Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-Keeping and Security arts. 10, 25, Dec. 10, 1999, available at http://www.iss.co.za/af/regorg/unity_to_union/pdfs/ecowas/ConflictMecha.pdf. The Protocol also provides for intervention in “cases of aggression or conflict in any Member State or threat thereof”; in “case of conflict between two or several Member States”; in an internal conflict “that poses a serious threat to peace and security in the sub-region”; in “the event of an overthrow or attempted overthrow of a democratically elected government”; and in “[a]ny other situation as may be decided by the Mediation and Security Council.” *Id.* art. 25.

32. For some proposals on this extremely difficult challenge, see High-Level Panel Report, *supra* note 17, ¶¶ 244–60; *Law and Force*, *supra* note 12, at 641–42; Princeton N. Lyman, *Saving the UN Security Council—A Challenge for the United States*, in 4 MAX PLANCK Y.B. OF U.N. L. 127 (J.A. Frowein & R. Wolfrum eds., 2000); Edward C. Luck, *Rediscovering the Security Council: The High-Level Panel and Beyond*, in REFORMING THE UNITED NATIONS FOR PEACE AND SECURITY 126 (2005), available at http://www.ycsg.yale.edu/core/forms/Reforming_un.pdf.

33. For a discussion of indicative voting, see High-Level Panel Report, *supra* note 17, ¶ 257.

protect against atrocities and the clear counter-terrorism duties of all states.

In the meantime, the United States can and should work with friends and allies to forge a reasonable understanding of the right of self-defense in the face of new and urgent threats—a conception that can protect our security while preserving the important benefits of an agreed framework governing the use of force. Such an effort, together with a renewed commitment to the protection of human rights, can help forge reasonable common ground of the kind to which Ed Cummings devoted his inspiring life and work.



Edward R. Cummings, Head of the U.S. Delegation, Group of Governmental Experts of States Parties to the 1980 Convention on Certain Conventional Weapons, in Geneva, 2003. Ed led the U.S. Delegation in successful negotiation and adoption of Protocol V on Exploding Remnants of War. To his left: Steven A. Solomon, Deputy Legal Adviser to the U.S. Mission in Geneva.

