



2003

War: Rhetoric and Norm-Creation in Response to Terror

Tawia Baidoe Ansah

Florida International University College of Law, tansah@fiu.edu

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Tawia Baidoe Ansah, *War: Rhetoric and Norm-Creation in Response to Terror*, 43 Va. J. Int'l L. 797 (2003).
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War: Rhetoric & Norm-Creation In Response To Terror

TAWIA ANSAH*

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INTRODUCTION

“Surprise. War Works After All.”¹ So declares one recent headline,

* Assistant Professor, New England School of Law. B.A., M.A., Columbia University; LL.B., University of Toronto; Ph.D., Columbia University; former Human Rights Officer, UN Centre for Human Rights & OSCE.

referring to the United States government's initial success in its "war on terrorism."² The article describes Americans' "astonishment at the rapid turn of events," from the trauma of September 11, to the quick routing of the Taliban government in Afghanistan, as being "palpable." It notes that in the post-Cold War world, following the examples of the Gulf War and Kosovo, "the military is only one instrument of national power. The war will be fought as much by bankers, accountants and F.B.I. agents as by commandos and fighter pilots."³ Not that wars have not always been fought on many different fronts; nevertheless, these questions arise: what do we mean by "war," and how has the language of war determined or affected the legal response to the attacks on September 11? What, if anything, does international law have to do with this war on terrorism?

Whatever war itself might mean, it is clear that for the United States after September 11, war talk was virtually inescapable. Professor Ruth Wedgwood, at a conference following the military action in Afghanistan and on the eve of the government's pronouncements on the planned military tribunals, speculated on the appropriate response of the U.S. government as between the criminal justice system, or a war or armed conflict model. She suggested that, "the scope of the damage caused on September 11th makes the language of war seem apropos."⁴ Serge Schmemmann, in a recent article, corroborates this view within the U.S.: "After the attacks of Sept[ember] 11, President Bush declared war on terrorism. In the immediate aftermath of the destruction of the twin towers, the concept seemed starkly simple: send out the Marines, rally the world, warn the slackers and fellow-travelers that America is really angry and crush the evildoers."⁵ President Bush himself, during those

1. Eric Schmitt, *Surprise. War Works After All*, N.Y. TIMES, Nov. 18, 2001, § 4, at 1.

2. *Id.*

3. *Id.*

4. Ruth Wedgwood, Keynote Address at the ILSA 2001 Fall Conference: Responding to Rogue States: From Smart Bombs to Smart Sanctions, (Nov. 9, 2001), in 36 NEW ENG. L. REV. 725, 727 (2002).

5. Serge Schmemmann, *After Months of War, Long Fights Still to Wage*, N.Y. TIMES, May 26, 2002, § 4, at 4. Schmemmann goes on to say:

Eight and a half months into the war, the biggest achievement is that the Taliban has been routed in Afghanistan, and the United Nations is trying to install something resembling a real government there. That may or may not prove beneficial for the long-suffering Afghan people. The problem is that this is not why the United States went into Afghanistan. The target of the operation, Osama bin Laden, is still at large, and his Qaeda network has been battered and disrupted, but not crushed. So more attacks remained a distinct and dismaying possibility, as the Bush administration's warnings made clear last week.

Id.

first weeks, “referred to the coming battle as a ‘crusade.’ He called for ‘revenge,’ called Osama bin Laden the ‘prime suspect’ and asked for him ‘dead or alive.’”⁶

“Everything is very simple in war,” said Carl von Clausewitz, “but the simplest thing is difficult.”⁷ This article will suggest that the resort to the language of war, as “natural” and “starkly simple” as it is, nevertheless has a profound impact on how the law’s intervention is shaped, or how the laws governing the transnational use of force are interpreted to accommodate a “war” on terrorism. I argue that although “war” is absent from the principal international legal instruments by which states are guided (and obligated) in their relations with other states, the concepts suppressed by this elision have an evocative power that, when revealed or excavated by the promulgation of a war against terror, shapes both the legal justifications for action as between states and the legal norms and standards themselves.

In the first part of the article, I will provide a rhetorical analysis of the word “war,” identifying the principal meanings ascribed to the term as it has been deployed in the response to terrorism. The rhetorical analysis lends itself to a categorization of theories of war, which in turn permits a structural examination of some principal interpretations of the international legal norms concerning the transnational use of force.

In Part II of the article, I will look closely at these interpretations in order to disclose the extent to which the language of war intersects with the legal justifications or condemnations of the use of force by the U.S. government, both against the Taliban and in its ongoing war on terrorism. Here, I will reflect on the consequences of observing this structural imbrication between language and norm-creation: that is, uncovering the law as a rhetorical enterprise enables one to observe the meaning of law as expressed through, or underwritten by, the war paradigm. This is not to justify or condemn the U.S. war effort; on the contrary, Schmemmann, in the same May 2002 article in which he suggests that war is the “starkly simple” response to terrorism, nevertheless warns that “the war on terrorism is only beginning to take shape,” and will require “forms of international cooperation, anticipation and interception yet to be devised.”⁸ In response to terror, the language of war must itself be exposed as a strategic, instrumental undertaking with specific consequences, and the meaning of law must

6. D.T. Max, *The Making of the Speech: The 2,988 Words That Changed a Presidency: An Etymology*, N.Y. TIMES, Oct. 7, 2001, § 6 (Magazine), at 32.

7. CARL VON CLAUSEWITZ, ON WAR 164 (Anatol Rapoport ed. 1968).

8. Schmemmann, *supra* note 5.

continue to evolve concomitant with “the very notion of national security.”⁹

In Part III, I conclude that despite the temptation to ascribe to the norm-creating faculties of the language of war the view that since it is the U.S. that deploys this language, and since the U.S. is the sole superpower, the effect of language is merely the index of what Professor Detlev Vagts calls the development of, or tendency toward, “hegemonic international law.”¹⁰ Nevertheless the rise of unilateralism—meaning, *inter alia*, the autonomous “right” of the principal power (hegemon) to intervene in the internal affairs of other states—is both assisted and constrained by the language that power uses to express and to justify itself. If U.S. hegemony were both celebrated and excoriated before September 11,¹¹ its insistence upon the rubric of war, as opposed to some other paradigm of intervention, suggests something about the nature of its hegemony. Even the hegemon, in other words, must resort to the various means of persuasion at its disposal. What the U.S. says about its deployment of the use of force both reflects and affects how it projects power across the globe. (Great Britain, for instance, at the height of empire, responded to terror not with “war” but with “police actions.”)

Thus, war and its rhetoric may indeed create norms, but politics is as much within the service of language as language is of politics. The meaning of law is always located at this intersection. To see this relation, and to clarify the motives and consequences that follow in the alternative legal and discursive responses to terror in the aftermath of September 11, this article begins with a rhetorical analysis of the word and its relationship to law.

I. *LEX RHETORICA*

A. *War as a Rhetorical Enterprise*

What is war? Not surprisingly, the dictionary definition leaves a lot

9. *Id.*

10. Detlev F. Vagts, *Hegemonic International Law*, Editorial Comment, 95 AM. J. INT’L L. 843 (2001).

11. The U.S. is celebrated as the new hegemon in such passages as Charles Krauthammer, *quoted in Vagts, supra* at 843: “America is no mere international citizen. It is the dominant power in the world, more dominant than any since Rome. Accordingly, America is in a position to reshape norms, alter expectations and create new realities. How? By unapologetic and implacable demonstrations of will,” *citing* TIME, Mar. 5, 2001, at 42. More negative views on hegemony appear in Lewis H. Lapham, *The American Rome: On the Theory of Virtuous Empire*, HARPER’S MAG., Aug. 2001, at 31.

of room for interpretation. Consider the first few entries in *Webster's Third New International Dictionary, Unabridged*: beginning with an etymology from Middle English, old French, Latin and Greek (from words meaning, among other things, "confusion, strife, to sweep, to go to ruin"), war is currently defined as:

1a (1): a state of usu. open and declared armed hostile conflict between political units (as states or nations) <~cannot exist between two countries unless each of them has its own government—E.D. Dickinson>—see CIVIL WAR, COLD WAR, LIMITED WAR; compare battle, riot (2): a period of armed conflict between political units <the neighboring countries fought a ~ war over the disputed territories...2a: a state of hostility, conflict, opposition or antagonism between mental, physical, social, or other forces....¹²

In a discussion of the various possibilities open to the U.S. government to try the members of the Al Qaeda network apprehended after the attack on Afghanistan, Ruth Wedgwood considers the use of international tribunals, such as those in the Hague¹³ and in Arusha,¹⁴ domestic federal courts (as was the case following the 1993 bombing of the World Trade Center), and wartime military tribunals. She settles upon the third option because it is clear that the U.S. is at war:

Bin Laden has announced his intention to wage war on the United States, in a 1998 fatwa,¹⁵ and the Congress has authorized

12. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY UNABRIDGED 2575 (1976).

13. The Security Council established the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 in Security Council Resolution 827: S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/Res/827 (1993). The Statute was also adopted by the same resolution on May 25, 1993.

14. The International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States Between 1 January 1994 and 31 December 1994 S.C. Res. 955, U.N. SCOR, 49th Sess., 3453rd mtg., U.N. Doc. S/1994/1168 (1994).

15. See *Osama bin Laden*, at http://www.adl.org/terrorism_america/bin_1.asp:

Bin Laden formed the terrorist Al-Qaeda ("the base") organization in 1988, and it is believed to have operatives in as many as twenty countries. In 1998 bin Laden announced the establishment of "The International Islamic Front for Holy War Against Jews and Crusaders," an umbrella organization linking Islamic extremists in scores of countries around the world, including Egypt, Bangladesh and Pakistan. The group issued a religious edict upon its establishment: "The ruling to kill the Americans and their allies, civilians, and the military, is an individual duty for every Muslim who can do it in any country in which it is possible to do it, in order to liberate al-Aqsa Mosque and the Holy Mosque from their grip and in order for their armies to move out of all the lands of Islam, defeated, and unable to

the use of the war power to protect the United States against al Qaeda [sic]. The attacks on the World Trade Center violated the fundamental rules of the laws of armed conflict and should be considered war crimes, for al Qaeda deliberately targeted civilians and deliberately caused disproportionate damage to civilians.¹⁶

This definition of a state of war, however “starkly simple” it may seem, is an interpretation of events and their consequences. For one thing, although it is true that Congress granted the president broad powers to respond to September 11 in its September 14, 2001, “Use of Force” Resolution,¹⁷ Congress authorized military action subject to Articles 5(b) and 8(a)(1) of the War Powers Act of 1973 (the War Powers Resolution).¹⁸ There was no formal declaration of war by Congress, as required under the War Powers Resolution. This was a matter of indifference to some, but not all, in Congress.¹⁹ President Bush

threaten any Muslim. This is in accordance with the words of Almighty G-d, and ‘fight the pagans all together as they fight you all together,’ and ‘fight them until there is no more tumult or oppression, and there prevail justice and faith in G-d.’”

16. Ruth Wedgwood, *Tribunals and the Events of September 11th*, ASIL NEWSLETTER, Jan.-Feb. 2002, at 4.

17. Authorization For Use of Military Force, S.J. Res. 23, 107th Congress (2001) [hereinafter Use of Force Resolution].

18. War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified at 50 U.S.C. §§ 1541-1548 (1973)). Section 5(b) reads:

Within sixty calendar days after a report is submitted or is required to be submitted pursuant to section 4(a)(1), whichever is earlier, the President shall terminate any use of United States Armed Forces with respect to which such report was submitted (or required to be submitted), unless the Congress, (1) has declared war or has enacted a specific authorization for such use of United States Armed Forces....

Id. Section 5(c) continues: “Notwithstanding subsection (b), at any time that United States Armed Forces are engaged in hostilities outside the territory of the United States. . .without a declaration of war or specific statutory authorization, such forces shall be removed by the President if the Congress so directs by concurrent resolution.” *Id.* It was thus important that President Bush, in accepting the Use of Force Resolution’s authority—Congress, after all, appropriates the funds for any war or military action upon which the President embarks—dismissed the relevance of the War Powers Resolution as an unconstitutional limitation of his powers, a position held consistently by presidents since the resolution was passed in 1973. The “specific statutory authorization” of the Use of Force Resolution, Sec. 2(b), is consistent with the requirement for such authorization under Article 8(a)(1) of the War Powers Resolution.

19. *See, e.g.*, 147 CONG. REC. S9413 (Sept. 14, 2001) (statement of Senator Russ Feingold): “If this is indeed to be a war, then the President should seek a declaration of war. We cannot allow our cherished Constitution to become a dead letter.” Also, see comments of Rep. Bob Barr, R-Ga., who drafted a declaration of war resolution on September 13, but it never came to the a vote on the House floor since the House chose instead the use-of-force resolution: “It would be a definitive statement by Congress of how it views this conflict and how the American people view this conflict.... The President has said we’re at war, so why would Congress not issue a declaration of war?” *Id.* at 4.

himself stated that, "In signing this resolution, I maintain the longstanding position of the executive branch regarding the president's constitutional authority to use force, including the armed forces of the United States and regarding the constitutionality of the War Powers Resolution."²⁰ Although the president questioned the constitutionality of the War Powers Resolution, a formal declaration of war against Afghanistan, for instance, would have superseded Congress' authorization, which was tailored to the terrorist attack. But the declaration of a "war on terrorism" was at once in keeping with the use of force authorization and sufficiently broad not to trump congressional authority to declare war under the War Powers Resolution.²¹

The lack of a formal Congressional declaration of war, however, came back to haunt Congress as the president, according to a recent article, began to consider extending his "war" into Iraq without first seeking congressional authorization.²² In other words, the lack of a declaration of war may be perceived as a blank check, notwithstanding the delimiting invocation by Congress of the War Powers Resolution, designed to constrain the president's powers to declare war (the Resolution was Congress' response to the expansive view of Congress' mandate to Lyndon Johnson taken by him during the 1964 Gulf of Tonkin incident²³).

If this conflict does lead to war, although it seems clear to

20. President George W. Bush, Statement by the President Upon Signing the Authorization for Use of Military Force Bill (Sept. 18, 2001), at <http://www.whitehouse.gov/news/releases/2001/09/20010918-10.htm>.

21. For an interesting articulation of the view that the Constitution grants to Congress, and not to the executive, the power to declare war, see Jack Rakove, *Who Declares a War?*, N.Y. TIMES, Aug. 4, 2002, § 4, at 13.

22. Jules Witcover, *What about the War Powers Act?* BALTIMORE SUN, May 1, 2002, at 15A. Witcover explains that Senator Russell Feingold, D-Wis.,

who recently held hearings on war powers before his Senate Judiciary Subcommittee on the Constitution, [said], "If the president does plan to take such action, it is time for the administration to initiate meaningful consultations with Congress over the authority that will be needed to launch such an expansive military campaign, if it should be undertaken at all." ... He noted that Congress had authorized Mr. Bush "to use appropriate force to respond to the attacks of Sept. 11," but it emphasized that "absent a clear finding that Iraq participated in, aided or otherwise provided support for" the attackers, "the president is constitutionally required to seek additional authority to embark on a new major military undertaking in Iraq." As of now, there is no indication that the administration has any interest in such discussions with Congress.

Id. See also Rakove, *supra* note 21: "An invasion of Iraq would amount to war in its fullest scope, in the extent of the preparations required and especially in its object, which involves crushing a regime and its army and liberating a nation."

23. See, e.g., President Johnson's Message to Congress and Joint Resolution of Congress H.J. Res. 1145, available at <http://www.yale.edu/lawweb/avalon/tonkin-g.htm>.

everyone—scholars, media, politicians, the general public—that it will, the lack of a declaration of war may be telling. For one thing, it suggests a certain diffusion, an insubstantiality, more symbol than reality. “We’re moving in bits and pieces,” says Joseph S. Nye Jr. Who and where is the enemy? What is the clearly defined aim of the war? Nye is skeptical: “What did we do? We toppled a weak government, the Taliban. We did not wrap up Al Qaeda, which has cells in 50 countries and threatens us still, and requires intense, civilian cooperation with other governments around the world to fight.”²⁴ Frederick S. Calhoun is cautious of declarations of war even when the circumstances are more apparent: “War too often seems the result of impatience or frustration, impetuous and unnecessary,” going on to describe the April 1812 declaration of war against Great Britain, which “ended as it began, ill-defined and clouded by emotion. In any war what is needed most is a clear, well-defined understanding of the uses of force.”²⁵

What is the policy behind the war on terrorism except, *mirabile dictu*, to “eradicate” terror? A “war against fear,”²⁶ as one columnist describes it following, perhaps, president Bush’s famous “Freedom and fear are at war”²⁷ speech, sounds perilously like a war against human nature *tout court*. The point is that the declaration of a “war on terrorism” may be analyzed rhetorically, as falling within the category of rhetoric known as deliberative speech. Speakers use the language for its hortatory qualities, and this both clarifies and distorts the reality of historical events. The president received authorization to use force, not to wage war, and he himself fell short of a formal declaration. The language of war has been deployed as a means rather than as an end. However, I hope to show that this relationship is more often perceived in the reverse with legal consequences. Speakers call on this language, in part, to engage the intense cooperation of friends abroad and at home for the long fight ahead. The use of the war paradigm, therefore, is in the first instance rhetorical.

As noted, the language of war has legal consequences, not least in its very elision in the conversation between the president and Congress. The silence here attests to its power: a constitutional stalemate at the center of the legal response to this threat to national security. The

24. Todd S. Purdum, *Getting More Than One Step Ahead of an Attack*, N.Y. TIMES, May 26, 2002, § 4, at 5 (quoting Joseph S. Nye, Jr.).

25. FREDERICK S. CALHOUN, USES OF FORCE AND WILSONIAN FOREIGN POLICY 128-29 (1993).

26. Elaine Sciolino, *Who Hates the U.S.? Who Loves It?* N.Y. TIMES, Sept. 23, 2001, § 4, at 1.

27. See, e.g., D.T. Max, *supra* note 6, at 37.

discourse of war, as Wedgwood has shown, has consequences for how the perpetrators of the acts will be tried. The war paradigm affects how others perceive U.S. actions abroad.

Let us return to the Wedgwood schema in defense of the war paradigm in order to parse further rhetorical elements of the language of war. Apart from the fraught issue of a non-declared but nevertheless “natural” war given the scope of the disaster (and, to be sure, the reality of the bombs dropped on the enemy), Wedgwood raises two other issues of note. She suggests that the U.S. is at war because the principal suspect, Osama bin Laden, has declared war on the United States (or at least on all its citizens), and that the U.S. response need be in kind. To the extent that bin Laden’s call to his cohorts is to engage in a “holy war” against the “infidel,” the conclusion of a *quid pro quo* would be that we too are engaged not just in a war, but in a holy war, against bin Laden. Indeed, bin Laden regularly invokes the words “crusade” and “crusaders”²⁸ to justify his position, or at least to suggest that his war has been dignified with a response. The *tu quoque* argument, I submit, may be somewhat dubious in its own terms as legal characterization, but perhaps rhetorically reveals more than intended, as Andrew Sullivan has argued.²⁹ As a riposte to bin Laden’s holy war, we may use this justification to analyze the language of war rhetorically. As addressed more fully below, the language may also fall within the rhetorical category of demonstrative (or epideictic) speech; i.e., its principal relevance is to the morality or justice of the action described.

The third point, regarding the interpretation of the attack on September 11 as an “armed attack,” has also been the subject of hot debate, the utility of which will be examined further in Part II. To be sure, the definition of the event as an “armed attack” would place it within the scope of the laws of war, the conclusion being that if there was no “armed attack,” then there was no violation of those laws. Thus, the situation—or terrorism as such, whether against the U.S. or another country—requires analysis under a different legal regime. Article 51 of the United Nations Charter, which inscribes the customary “inherent” right of self-defense, states the following:

28. See, e.g., *Osama bin Laden*, *supra* note 15:

After three months passed since the blessed attacks against the global infidelity, against America, the head of infidelity, and after almost two months passed since the beginning of the vicious crusade campaign against Islam, we would like to talk about some of the meanings of these events. These events revealed many issues that are significant to Muslims.

29. Andrew Sullivan, *This Is a Religious War*, N.Y. TIMES, Oct. 7, 2001, § 6 (Magazine), at 44.

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, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.³⁰

It would seem churlish, even perverse, to suggest that a state has a right to self-defense pursuant to an “armed attack” under Article 51 of the United Nations Charter, but not, presumably, pursuant to some other kind of attack, i.e., by a non-state actor, or an actor without the requisite indications of the typical “armed” combatant. Nevertheless, there is debate as to the extent of this right, and the article has been cited by states using force in the majority of cross-border conflicts since 1945. These claims have usually been rejected by other states and by organs of the United Nations. A British report notes that,

[a]mong the more tenuous claims to self-defence were the Soviet invasions of Czechoslovakia in 1968 and of Afghanistan in 1979. The USA has frequently cited the right in support of its behaviour in Latin America and the Caribbean, including references to its own defence and to that of its neighbours (‘collective self-defence’ in Article 51). The UK claimed the right in support of its actions in the Falklands War, and this is often cited as an example of the proper use of Article 51.³¹

The “armed attack” language, therefore, seems to act as a constraint against potential abuses of the use of force for “defensive” purposes. President Reagan identified the April 14, 1986, bombing of Libya in retaliation for a bomb blast outside a Berlin disco, which killed three persons (including two American servicemen), a few days before as terrorism. Administration and West German officials “suspected,” but

30. U.N. CHARTER art. 51, *available at* <http://www.yale.edu/lawweb/avalon/un/unchart.htm>. *See also*, Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, (June 27) (upholding the view that, “Article 51 of the Charter is only meaningful on the basis that there is a ‘natural’ or ‘inherent’ right of self-defence, and it is hard to see how this can be other than of a customary nature.”).

31. House of Commons Library: Research Paper 01/72, ch. IX, p. 82 (Oct. 3, 2001) *at* <http://www.parliament.uk>, *also available at* <http://usinfo.state.gov/topical/rights/law/hoc.htm> [hereinafter House of Commons Research Paper].

apparently had no evidence, of Libyan involvement, before the U.S. proceeded to bomb Colonel Qaddafi's compound, killing his daughter. Reagan's "self-defense against future attack" justification was widely condemned by the international community.³²

The point is that terrorism, integrating domestic and international dimensions, is fraught with problems when it comes to the Article 51 self-defense mechanism. As a result, each new and egregious act of terrorism since the 1960s has engendered a new UN counter-terrorism convention (there were twelve such conventions before September 11, and none of them would have covered the events on that day).³³ Despite the abuses of Article 51, a state's inherent right to self-defense is tied to this provision of international law by the member states' consent. The tension between self-defense and international law is at the center of my concerns regarding the language of war and the predictive shape it has given to legal justifications for the use of force. I return to the debates involving Article 51 and self-defense in Part II.

For the present, however, I suggest that each of the above premises extrapolated from Wedgwood's interpretation—a declaration of war by a non-state actor, an armed attack, the grant of powers under the War Powers Act—would *prima facie* lead to the conclusion that the U.S. is in a state of war. However, on closer inspection it appears that this war is more diffuse, more discursive, than singular: the non-state actor is waging a holy war, the attack may or may not be interpreted as "armed," depending upon one's purpose, and the non-declaration of war by Congress discloses a tenuous connection between waging war and a clearly defined and articulated policy under a theory of war as a rational and legal strategy. As such, I suggest that the war paradigm—an issue distinct from the military action in Afghanistan, to be addressed in the next part—represents the need for a vessel large enough to contain

32. See NOAM CHOMSKY, *NECESSARY ILLUSIONS* 272 (1989), available at <http://www.zmag.org/chomsky/ni/ni-c10-s04.html>. Chomsky goes on to note that,

Within weeks, it was published prominently in Germany—and in obscure publications here—that the West German police intelligence team investigating the bombing had no knowledge, and had never had any knowledge, of any "Libyan connection".... It was finally conceded quietly that the charges of Libyan involvement had little if any substance, though they continue to be presented as fact; thus, the *Business Week* Pentagon correspondent writes that "by ordering the 1986 bombing of a West Berlin disco in which two American servicemen were killed, Qaddafi provoked a violent response—a massive air raid."

Id. at 272-73. For the report of worldwide condemnation of this U.S. use of force and legal rationale, see MARK W. JANIS & JOHN E. NOYES, *INTERNATIONAL LAW: CASES AND COMMENTARY* 519 (2d ed., West Group 2001) (1997).

33. See, e.g., UN Office for Crime Control and Drug Prevention, *Convention Against Terrorism*, at <http://www.odccp.org/terrorism-conventions.html>.

massive grief and anguish, and the thirst for action on a scale comparable to the harm suffered. The war paradigm is a powerfully evocative rubric, with ancient and accreted associations. The call to war is a rhetorical address that, as noted, has consequences for the domestic juridical response to terror. In the next section, I will argue that the rhetoric of war has also effected profound changes under international law.

B. *Rhetorical Analysis & Theories of War*

Why a rhetorical analysis? The first the question that should be asked is: what do I mean by rhetoric? For a simple definition, one might resort to that provided by Aristotle in his treatise on the subject.³⁴ It should be noted that Aristotle's is but one of a myriad of definitions of rhetoric,³⁵ albeit an important and highly influential one. According to Aristotle, rhetoric is "the faculty of observing in any given case the available means of persuasion," and is divided into three parts: the speaker's (1) power of evincing a personal character which will make the speech credible (*ethos*); (2) power of stirring the emotions of listeners (*pathos*); and (3) power of proving a truth, or an apparent truth, by means of persuasive arguments (*logos*).³⁶ That is, any persuasive speech must take account of the speaker's character, the capacity of the audience, and the arguments themselves as they tend to "prove" a truth or an apparent truth. Hence, rhetoric, in its concern with ethics, emotions, and words, is both dialectical and political, and its subject matter involves "alternative possibilities within the sphere of human action."³⁷

Aristotle divides rhetoric into three kinds, and this will be the framework for my own rhetorical analysis of the discourse on war: (1) political (deliberative speech); (2) forensic (legal speech), and (3) epideictic (demonstrative speech, or the ceremonial oratory of display). There are further categorizations according to (1) division, (2) time, and (3) ends. For instance, political speech (1) may be divided into

34. ARISTOTLE'S RHETORIC AND POETICS, bk. I, ch. 3 (W. Rhys Roberts trans., 1954), available at <http://www.public.iastate.edu/~honeyl/Rhetoric/oneindex.html> [hereinafter ARISTOTLE'S RHETORIC].

35. See, e.g., PETER DIXON, RHETORIC I (1971):

In his essay "Rhetoric" and Poetic Drama' T.S. Eliot outlined a difficult task. Rhetoric, he said, 'is one of those words which it is the business of criticism to dissect and reassemble' (*Selected Essays*, p. 38). The critic may perhaps be excused for feeling that he is in the position of a man trying to dissect and reassemble a jellyfish—for the word, as Eliot went on to acknowledge, is notoriously slippery and imprecise.

36. ARISTOTLE'S RHETORIC, *supra* note 34, at 1356a.

37. *Id.*

exhortation and dehortation; (2) locates its temporal concern in the future; and (3) finds its ends with respect to the expediency or in expediency of the human action. Likewise, forensic speech, the second category, (1) is divided into accusation and defense; (2) locates its temporal concern in the past; and (3) finds its ends in the justice and the injustice of human action. Epideictic speech, the third category, (1) is divided into praise and censure; (2) locates its temporal concern in the present; and (3) finds its ends in the honor and dishonor of human action.³⁸

It is clear that in any given instance there will be categorical overlap. For example, hortatory language that charges the American people to gird themselves for a long war—“[f]reedom and fear are at war”—may also be in the grand style, alliterative and ornate, implying ends not just of political speech (exhortation to take up arms, future tense), but also epideictic speech (commemorating the historical importance of the moment, present tense). Still, the rhetorical divisions may be useful as a framework for examining the language of war, and thus, the theories of war encapsulated within that language.

In the introduction to his translation of Carl von Clausewitz's *On War*, Anatol Rapoport suggests that to apprehend the different conceptions of the nature of war, one may begin with the understanding that “the nature of war is itself to a large extent determined by how man conceives of it.”³⁹ That is, man-made phenomena, such as wars, “are influenced...by what we think or say about them.” Analyzing what we think and say about war is important for more than simply rhetorical purposes.

Thus the answer to the all-important questions (no longer philosophical ones) of whether civilization will be destroyed by a global war, or whether war will persist as a chronic or recurring condition in human affairs, or whether war will be eradicated, may depend in no small measure on how people think, talk, and write about war, i.e., on which philosophies of war prevail. We would be well advised to inquire into the way the acceptance or rejection of a particular philosophy of war is likely to influence the role of war in human affairs and so profoundly affect our lives.⁴⁰

38. *Id.* at 1358b, 1359a.

39. Anatol Rapoport, *Editor's Introduction* to CLAUSEWITZ 11, 12, *supra* note 7 [hereinafter Rapoport].

40. *Id.* at 12-13.

Rapoport considers the many theories and philosophies of war both before and after Clausewitz, and divides them into three categories, which he calls (1) political, (2) eschatological, and (3) cataclysmic.⁴¹ All three are represented in the contemporary discourse on war, but I analyze them for their reflection in the resulting legal justifications pursuant to the war on terrorism.

What Rapoport calls “the political theory of war” is the philosophy of war propounded most forcibly by Clausewitz. Words that characterize the theory are “rational,” “instrumental,” and “national.” In Clausewitz’s view, war ought to be—or in its conceptual essence *is*—rational:

[I]n the sense that it ought to be based on estimated costs and gains..., instrumental, in the sense that it ought to be waged in order to achieve some goal, never for its own sake; and also in the sense that strategies and tactics ought to be directed towards just one end, namely victory. Finally, war ‘ought’ to be national, in the sense that its objective should be to advance the interests of a national state and that the entire effort of the nation ought to be mobilized in the service of the military objective.”⁴²

The second principal theory of war outlined by Rapoport (which delimits or eliminates fundamental premises within Clausewitz’s view, such as “the *actor* in a real war is a perfectly defined entity called the State”⁴³), is the “eschatological” view of war.

The common element [among the variants] is the idea that history, or at least some portion of history, will culminate in a “final” war leading to the unfolding of some grand design—divine, natural, or human. Two main variants [of this philosophy] are the messianic—the agency destined to carry out the “grand design” is presumed already to exist, frequently as a functioning military organization.⁴⁴

In Rapoport’s second variant, the “global,” “the agency of the ‘design’ is presumed to arise from the chaos of the ‘final war.’”⁴⁵ An

41. *Id.* at 13.

42. *Id.*

43. *Id.* at 15.

44. *Id.*:

For example, in this view, crusades and holy wars are seen as means of unifying the known world under a single faith or a single ruler. In recent times the American doctrine of Manifest Destiny and the Nazi doctrine of the Master Race were expressions of a messianic philosophy of war.

45. *Id.*

example of the “global” variant is more typical of religious or ideological warfare. For instance, Rapoport notes that,

[i]n Christian eschatology, the agency of the design is sometimes represented by the forces which will rally around Christ in the Second Coming; in Communist eschatology the “world proletariat” is expected to convert the imperialist war into a class war and, after the victory [over] the bourgeoisie, to establish a world order in which wars will no longer occur.⁴⁶

The third general theory of war, the “cataclysmic,” holds the view of war as “a catastrophe that befalls some portion of humanity or the entire human race. Cataclysmic philosophy, like the eschatological, also appears in two variants, the ethnocentric and the global.”⁴⁷ In the former,

war is something that is likely to happen to *us*, specifically something that *others* threaten to do to us. We see ourselves as deriving no benefit from war, and our own defensive measures appear to us not as means of pursuing goals but merely as means of forestalling disaster or alleviating its effects.⁴⁸

One can see within the language used to describe the war effort, both here and in other instances, such as “strategic defense,” “collective self-defense” (the Nicaragua situation, as well as the Gulf War), intimations of the cataclysmic theory. The “inherent right of self-defense” doctrine under international law, as I hope to show in Part II, coupled with other instruments such as the interwar Kellogg-Briand treaty (an attempt to outlaw war as national policy), are also suggestive under this view of war as an anomaly. Under the cataclysmic view, war is considered a crime, whereupon the juridical mechanisms at the international level attempt to ban war as a whole (see Part II, *infra*).

As to the second variant of the cataclysmic view, the global version, “war is a cataclysm which afflicts *humanity*. No one in particular is held to be responsible for war and no one is expected to gain from it.”⁴⁹ Under this theory, war is attributed to “unknown historical forces,” and scientific theories of war have related conflict to “certain dynamic properties of an ‘international system’ which, like physical systems, may persist at times in a relatively stable equilibrium and at other times ‘break down’ or ‘explode,’ because the stresses and strains within the

46. *Id.*

47. *Id.* at 16.

48. *Id.* (emphasis in original).

49. *Id.* (emphasis in original).

system have passed beyond certain critical limits.”⁵⁰ Again, we see the juridical at play in such a theory of war, whereby the law attempts to order, manage, and constrain the systemic forces. Under this category, one encounters the thinking behind the concept of “wars of containment.”⁵¹

We can now connect the three kinds of rhetorical speech to the three theories of war, joining the deliberative to the political; the epideictic to the eschatological; and the forensic or juridical to the cataclysmic:

<i>Topics:</i>	<i>Ethos</i>	<i>Logos</i>	<i>Pathos</i>
Speech:	Deliberative	Forensic	Demonstrative
Time:	Future	Past	Present
Ends:	Expediency	Justice	Honor
War:	Political	Cataclysmic	Eschatological

For a clearer view of this linkage, I first look at the connection between the political theory of war and deliberative speech.

1. *Political War: Rational, Instrumental, National*

Clausewitz’s draws his political theory of war from the success of the Napoleonic campaigns, which subverted previous conceptions of war. As Rapoport puts it, “the ‘art of war,’ as it was conceived in the eighteenth century, was largely an art of manoeuvre [containing] important elements of aesthetics and protocol. An army was judged by its appearance on the battlefield as much as by its skill and prowess,” rather as a chess game.⁵² War was fought not “to the last man” but by decision, when one side proved its superior skill and prowess and the other side “conceded.”

According to Rapoport,

In the wars of the French Revolution and in the Napoleonic wars, armies took to the field and manoeuvred just as they had done in the eighteenth century. But the meaning of these events had

50. *Id.*

51. See, e.g., Dorothy Anne Scese, *Psycho-Terrorism: An Event in Progress* (Nov. 11, 2001), *available at* <http://www.tech.com.au:8080/flagship/servlet/story.servlet.ShowStory?categoryId=3&storyId=10>

69. Scese also calls them “limited wars, military incursions and bombardments.” *Id.*

52. Rapoport, *supra* note 39, at 19.

changed... The revolutionary French Army was composed not of professionals, nor of conscripts who had neither a stake nor an understanding of the war they fought, but of 'patriots'—a new concept in European politics. These people believed that they were fighting *for* something.⁵³

As such, "[b]y deeds and words (Napoleon had an impressive gift of eloquence), Napoleon taught one great lesson: the universal currency of politics is power, and power resides in the ability to wreak physical destruction."⁵⁴

Within this crucible of words and deeds was born a new form of warfare and a new discourse on war, from which Clausewitz theorized the essence of war as political: rational, instrumental, and national in the full sense. The theory held strongest sway in the nineteenth century, and although its apotheosis—the complete "democratization" of war—was carried out by the Nazis,⁵⁵ the legacy of this philosophy of war still haunts the way we think and speak of war today.⁵⁶ The "art of the manoeuvre" had, in effect, given way to the art of persuasion. And although there is a strong ideological dimension to the genesis of this change (viz. the French Revolution), political war—fighting *for* something—has a different rhetorical composition: a different divisional, temporal, and teleological structure as compared with eschatological warfare.

It is possible to see within the rhetorical category of deliberative speech—the exhortation or call to arms—a parallel to political war. A rhetorical analysis of the use of the language of war may enable a discovery of the philosophy of war to which the speaker alludes, even unwittingly. It will also permit us to see what lies behind and beneath the presumptions and dispositions that shape the actions, and their legal

53. *Id.* at 20 (emphasis in original). Napoleon's "objective in battle was not merely to outmanoeuvre but to annihilate the opposing force." *Id.* at 21.

54. *Id.*

55. *Id.* at 24.

56. See Schmitt, *supra* note 1. See also Secretary of Defense Donald H. Rumsfeld, *Transforming the Military*, FOREIGN AFF., May-June 2002, at 20, 30-31:

Of course, as the Pentagon transforms, we must not make the mistake of assuming that the experience in Afghanistan is a model for the next military campaign. Preparing to refight the last war is a mistake repeated through much of military history and one that we must and will avoid. But we can glean important lessons from recent experiences that apply to the future. Here are a few worth considering. First, wars in the twenty-first century will increasingly require all elements of national power: economic, diplomatic, financial, law enforcement, intelligence, and both overt and covert military operations. Clausewitz said, "War is the continuation of politics by other means." In this century, more of those means may not be military.

justifications, undertaken pursuant to those views and sentiments. In other words, how we talk about war reflects what we conceive war to be. Do we think in eschatological terms of a “final war”? Is our culture steeped in the discourse of war as a rational and inevitable extension of our political system and, therefore, rational policy? Is war, when it comes, an anomalous and catastrophic event?

I will provide two more examples to reflect this discursive link between rhetoric and theory, one with respect to juridical speech, the other in terms of encomiastic speech that tends toward the eschatological view of war. In a culture as multifaceted as ours, there will be as many ways to talk about war, and as many views on war, as there are people to express them.⁵⁷ Also, there will often be an amalgamation of complex and contradictory views harbored within the same instance of speech. But what I hope to show is that there are certain cultural strains within the discourse that predominate and tend toward certain ways of thinking about war.

2. *Cataclysmic War: War as Metaphor*

Most Americans would not articulate their self-conception as a people going to war with other nations on the basis of some Manifest Destiny,⁵⁸ but does our language nevertheless betray us? What, for instance, does “Operation Enduring Freedom” mean? On the other hand, “war” is virtually a linguistic banality; we speak of a “war on drugs,” a “war on crime,” even a “War of the Roses”⁵⁹—the name

57. See, e.g., Benjamin Schwarz, *The Post-Powell Doctrine: Two Conservative Analysts Argue that the American Military Has Become Too Cautious About War*, N.Y. TIMES BOOK REV., July 21, 2002, at 11. Schwarz provides some variations:

Inevitably, those [foreign and defense policy] commentators call for a new doctrine and force structure to fight what in the 1930's were called “banana wars” (in the Caribbean and Nicaragua) or “small wars” ([Max] Boot's preferred term, taken from the Marine Corps's 1940 training manual); “limited wars” in the 1950's (in the Philippines); “brush-fire wars” and “insurgencies” in the 1960's (in Latin America and Vietnam); “low-intensity conflicts” in the 1980's (in El Salvador and, again, in Nicaragua) and “military operations other than war” in the 1990's (in Somalia and Haiti).

Id.

58. But see, e.g., Robert Kagan, *Power and Weakness*, 113 POL'Y REV. 3, 26 (2002), available at http://www.policyreview.org/JUN02/kagan_print.html:

Americans are idealists, but they have no experience of promoting ideals successfully without power...[t]hey remain realists in the limited sense that they still believe in the necessity of power in a world that remains far from perfection. Such law as there may be to regulate international behavior, they believe, exists because a power like the United States defends it by force of arms. In other words, just as Europeans claim, Americans can still sometimes see themselves in heroic terms—as Gary Cooper at high noon. They will defend the townspeople, whether the townspeople want them to or not.

59. WAR OF THE ROSES (Twentieth Century Fox 1989), starring Kathleen Turner & Michael

(albeit a play on the monarchical struggles of 1400s England) of a movie about a heterosexual couple in the midst of a bitter divorce.⁶⁰ What does it say about us, culturally, when we quickly describe a disaster such as September 11 as an “act of war”?

Some commentators have recognized that, notwithstanding the banality of the language of war, the term is still powerfully suggestive, and advocated restraint. In an editorial piece for the *New Yorker* magazine shortly after September 11, Hendrik Hertzberg wrote:

With growing ferocity, officials from the president on down have described the bloody deeds as acts of war. But, unless a foreign government turns out to have directed the operation (or, at least, to have known and approved its scope in detail and in advance), that is a category mistake. The metaphor of war—and it is more metaphor than description—ascribes to the perpetrators a dignity they do not merit, a status they cannot claim, and a strength they do not possess. Worse, it points toward a set of responses that could prove futile or counterproductive. Though the death and destruction these acts caused were on the scale of war, the acts themselves were acts of terrorism, albeit on a wholly unprecedented level.⁶¹

Hertzberg’s acclamation of the metaphorical nature of the language of war requires that the acts in question be defined by an alternative paradigm. I have discussed above the difficulty presented to the

Douglas, dir. Danny DeVito. Based on the novel by Warren Adler (Stonehouse Press 2001) (1981).

60. But the pervasive use of the term “war” may also reflect the common threads linking the diverse forms of violence within society; see, e.g., ROBIN MORGAN, *THE DEMON LOVER: THE ROOTS OF TERRORISM* xvii (Washington Square Press 2001) (1989), in her discussion of the roots of terrorism (emphasis in original):

As I write this, the U.S. population is living in fear. Airplanes. Tall buildings. Anthrax. Smallpox rumors. Other populations know fear, of course. Terror is the norm for entire peoples trying to survive in acute poverty; or under military, theocratic, or totalitarian rule; or in refugee or displacement circumstances. But this is new for the U.S. The populace is exhibiting post-traumatic stress syndrome. People are sleeping badly; they have nightmares, appetite loss, or irrational hungers; they experience sudden flashbacks, burst into tears for no immediate reason, sink into depression, can’t seem to enjoy living, and—despite reassurances from authorities—keep obsessing about violence. Yet such symptoms aren’t new to *everyone* in the U.S. These are exact descriptions of the rape survivor’s condition, the battery survivor’s reality; the abused child’s experience. A terrified man isn’t as much a cultural fixture as a terrified woman or cowering child for a reason: the latter are familiar images. The spectrum of violence and terror ranges all the way from the fist in the face to the nuclear bomb. *It is the same spectrum, differing in degree but not in kind.* We can no longer afford to ignore it, dismiss it, or deal with it piecemeal.

61. Hendrik Hertzberg, *Comment: Tuesday, and After*, *THE NEW YORKER*, Sept. 24, 2001, at 27.

observer, at least for legal purposes, of defining the acts no further than as “terrorist.” It is true that we could define the acts alternatively as “crimes against humanity” or “grave breaches” under the Geneva Conventions.⁶² In any event, I suggest that once the language of war is seen as metaphorical, it takes one further into the realm of interpretation and adjudication. Thus, *qua* interpretation as other than “acts of war,” Hertzberg’s comments remove the events from the political or eschatological war paradigm and place them within a paradigm of war or conflict consistent with a juridical response. This is not to say that a legal interpretation of the acts as “acts of war” does not incorporate an overlap between the war and the juridical paradigms, an issue to be explored in the next section.

3. *Eschatological War: The “Just War” Doctrine*

Finally, I address the third category of rhetoric, the demonstrative, and its link to the eschatological view of war. That the language of war is often encomiastic is a trope of ancient pedigree and should not, in and of itself, lead to the conclusion that the language purports to express an eschatological view of war. Witness, as an oft-cited example of the panegyric, Pericles’ Funeral Oration: “I have no wish to make a long speech on subjects familiar to you all: so I shall say nothing about the warlike deeds by which we acquired our power or the battles in which we or our fathers gallantly resisted our enemies, Greek or foreign,”⁶³ proceeding to do just that, knowing how much his words will move and inspire his listeners.

Words have both practical and symbolic effects, and Secretary of State Colin Powell may have realized this when he said, in a television interview on September 12, 2001, that, “It’s a war not just against the United States. It’s a war against civilization. It’s a war against all

62. Convention with Respect to the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803, 1817-18 (1899); Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 3146, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 3250, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 3420, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 3618, 75 U.N.T.S. 287; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, art. 1, 1125 U.N.T.S. 3, 7 [hereinafter Geneva Conventions].

63. THUCYDIDES, HISTORY OF THE PELOPONNESIAN WAR 145 (Rex Warner trans., Penguin Books 1954).

nations that believe in democracy.”⁶⁴

The similarity between the words of Pericles and those of Powell (as emphasized by the media on this occasion) lies in their encomiastic, celebratory quality. The difference lies in the nuance of the words themselves as seen in their separate contexts: Pericles speaks of “warlike deeds” and “battles,” specifies “our power,” and categorizes the enemy, “Greek or foreign.” Powell’s language is much more sweeping and absolute, the words tending to divide the universe into them and us, the civilized and the barbarian. The language of war is thus cast in Manichaeic, apocalyptic terms, and it is in this sense that speech can express the idea of an absolute war.

Let us look at another example of this pressure within the language of war following September 11. In an article soon after the routing of the Taliban had commenced, Thomas Friedman commented on the lack of international support for the U.S. war on terrorism, and celebrated the new war heroes: “[T]hese young Americans know that Sept. 11 is our holy day—the first day in a just war to preserve our free, multi-religious, democratic society,” going on to conclude that, “the most respectful and spiritual thing we can do now is fight it until justice is done.”⁶⁵

Apart from the muscular and celebratory aspect here, there is also something of the abstract and monumental in the words of Powell and Friedman. This strain of the discourse relates to demonstrative speech: to war as ethnocentrism, colossal, holy, spiritual. It is an end in itself. It is this propulsion within the language of war that situates the discourse at the center of moral and global-messianic concerns. As Clausewitz writes, “[t]he greater and the more powerful the motives of a War, the more it affects the whole existence of a people.”⁶⁶

The attack on American soil catapulted into view the starkness of power’s isolation at the global level, and the magnitude of the conflict ahead. The language of war has exploited our sense of violation and vulnerability, wittingly and unwittingly.

The more violent the excitement which precedes the War, by so much the nearer will the War approach to its abstract form, so much the more will it be directed to the destruction of the enemy, so much the nearer will the military and political ends coincide, so much the more purely military and less political the War

64. Secretary of State Colin Powell, Interview on *Good Morning America* (ABC television broadcast, Sept. 12, 2001).

65. Thomas L. Friedman, *We Are All Alone*, N.Y. TIMES, Oct. 26, 2001, at 23.

66. CLAUSEWITZ, *supra* note 7, at 119.

appears to be.⁶⁷

So much the more, indeed, does war achieve its essence as pure reason whose instrumentality, as a will to death (*thanatos*),⁶⁸ defines the citizen's state of being. In the wake of September 11, living in a perdurable state of war could mean that we live to make war. That is, the "holy day—the first day in a just war," situates us in a permanent present where expediency and justice give way to honor.

4. *Post-9/11 War: the Rise of Pathos*

The language of war reflects the historical and cultural concerns and dispositions of any polity as it girds itself for the long fight. For the United States, war discourse also calls into relief both its predominance and its vulnerability in the international arena. Of the many meanings ascribed to war, a rhetorical analysis suggests that the primary discursive filaments coalesce around the view of war as, on a justificatory level, political and rational (e.g., senior policy makers quoting Clausewitz,⁶⁹ and the hortatory aspect of discussions around war), and at a deeper level, eschatological (passionate, spiritual, apocalyptic). In the next section, I examine the extent to which these views press against the juridical address to the use of force and complicate the story, pulling us back from the extremities of either paradigm of war: on the one hand, the totalization of the political view of war, whereby war becomes the state's *ratio essendi*; and on the other, the fulfillment of an apocalyptic view, the endless war to end war. I argue that both are restrained by the juridical paradigm, the rubric of an alternative to war. The law, in essence, will attempt to pull us back from the aridity of untrammelled reason, and from the vacuity of unbridled passion.

67. *Id.* at 119-20.

68. *See, e.g.,* Kagan, *supra* note 58, at 4:

The European caricature at its most extreme depicts an America dominated by a 'culture of death,' its warlike temperament the natural product of a violent society where every man has a gun and the death penalty reigns. But even those who do not make this crude link agree there are profound differences in the way the United States and Europe conduct foreign policy.

69. *See, e.g.,* Rumsfeld, *supra* note 56, at 31.

II. JUSTIFYING THE USE OF FORCE

A Introduction: Law as a Constraint upon the Language of War

In the first part of the article, I analyzed the language of war in order to derive three theories or philosophies of war. I argued that the three theories—political, eschatological, and cataclysmic—derived from the rhetorical categories of the demonstrative, deliberative, and forensic, respectively. The third term, inasmuch as it required a certain view of war, suggested an alternative to the war paradigm. In this section, I look more closely at this discourse, specifically, the laws regarding the use of force under international law. Although I have suggested that the law furnishes a constraint upon the discourse on war, it is also true that war has been justified on the basis of existing laws. That is, justifications—where the lexicon of war is invoked, in the absence of the word itself—are an interpretation of the laws governing the use of force. It is my contention that the language of war underwrites those legal justifications. Thus, how the use of force is defended or explained within the lexicon of war will determine the shape those justifications and, I insist, the norms themselves, ultimately take. It is in this sense that the law functions as a constraint.

The corollary, i.e., that the lexicon of war is predictive of the norms, is equally true. To the extent that the United States, in its justification of the use of force, defines the terms narrowly, it is engaged in a *defensive* war. The use of force will be limited to the actuality or the threat of an “armed attack,” which itself will be strictly interpreted. In that case, “war” will be reduced to mean something along the lines of “engagement,” “containment,” “intervention,” and so on. To the extent that its justification for military action defines the terms broadly, the U.S. will be engaged in an *offensive* war, and the use of force becomes unlimited. The right to self-defense would expand to include not only necessary and proportional self-defense, but also anticipatory or preemptive self-defense. In that case, the meaning of “war” approaches its abstract apotheosis, as discussed in Part I.⁷⁰

More significantly, the rhetoric of war within the context of justifications for the use of force is important, not only for its deliberative or hortatory qualities—preparing the citizens for a rational (limited), instrumental (with a specific aim) and national (collective) war—but also for its demonstrative qualities—mobilizing the citizens

70. Note, of course, that the self-defense rationale, employed in both instances, is the beginning of the inquiry rather than the end.

for the “final” war (unlimited, noninstrumental, and global), or war as an end in itself. The latter is characteristic of war in the service of large ideas or ideals, such as Truth, Freedom, Democracy, and so on, tapping into the *mythos* of redemption. Counter to these tendencies is the idea that the constraints of the law will promulgate, through their exercise, the viability of the rule of law within the context of international relations. *En passant*, this must inure to the favor of the domestic rule of law also, as exemplary or as paradigmatic.

Furthermore, by analogy, the law as a constraint upon war places limits on the rule of law as a vehicle for purely self-interested purposes (for instance, exporting the rule of law in order to open up markets⁷¹). In examining the legal justifications for the use of force and their relationship to the rhetoric of war, I want to suggest that we must include the rule of law within the lexicon of war, and include it substantively. If we do not, we will be left with only the rule of war.

This section traces the evolution of customary law on the use of force from the perspectives of both critics and supporters of recent U.S. action. Some point to the broadening of the law’s compass pursuant to the norms governing the use of force; others point to the status quo ante of U.S. justifications. Throughout, the use of the language and the lexicon of war show how these have shaped the present legal regime, whether this regime is interpreted as a radical change or shift from previous norms or the maintenance of the same legal regime. By observing how language affects legal norms, one can make some predictions about how language will, or may, continue to shape those norms, particularly when the talk is of war. And when the talk of war tends toward *pathos* (just war), it may be possible to prescribe a role for alternative paradigms, including the rule of law.

B. *The Use of Force Defined: “Just War” as “Metanarrative”*

Writing about the domestic criminal justice system, Robert Cover concludes his famous essay on violence and the law with the following: “Between the idea and the reality of common meaning falls the shadow of the violence of law, itself.”⁷² Within this formulation, Cover

71. See, e.g., Thomas Carothers, *The Rule of Law Revival*, FOREIGN AFF., Mar.-Apr. 1998, at 95:

Promoting the rule of law, some observers argue, advances both principles and profits. What will it take for Russia to move beyond Wild West capitalism to more orderly market economics? Developing the rule of law, many insist, is the key.... Indeed, whether it’s Bosnia, Rwanda, Haiti, or elsewhere, the cure is the rule of law, of course.

72. Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1629 (1986).

expresses the absence of what Barbara Stark calls—in the context of international law—a “metanarrative.”⁷³ A metanarrative is a common experience shared by the perpetrator of a crime, the victim of that crime, and the adjudicator whose judgment visits punishment (violence) upon the perpetrator on behalf of the community.⁷⁴ At the center of the law is pain and death,⁷⁵ notes Cover, and this—following Elaine Scarry’s analysis of pain in the body⁷⁶—means that each party to the legal event experiences it differently: the victim’s pain leads to “radical certainty” for herself and “radical doubt” for the perpetrator.⁷⁷

Despite this, however, Cover suggests an interesting symbiosis that takes place between the judge and the perpetrator. It is analogous to the relationship between the perpetrator and the victim (using the language of the criminal justice system). Its creative agency also appears relevant to the dynamic of states *inter se* at the international level:

For as the judge interprets, using the concept of punishment, she also acts—through others—to restrain, hurt, render helpless, even kill the prisoner. Thus, any commonality of interpretation that may or may not be achieved is one that has its common meaning destroyed by the divergent experiences that constitute it. Just as the torturer and victim achieve a “shared” world only by virtue of their diametrically opposed experiences, so the judge

73. Barbara Stark, *Book Review Essay: What We Talk About When We Talk About War*, 32 STAN. J. INT’L L. 91, 105 (1996): “the Charter regime is not grounded in any foundational belief system; it refers to no larger, coherent ‘story.’ There is no metanarrative. The only values promoted by the law on the use of force are ‘peace’ and ‘state autonomy.’”

74. Cover, *supra* note 72, at 1629. Immediately preceding the above quotation, Cover writes: The perpetrator and victim of organized violence will undergo achingly disparate significant experiences. For the perpetrator, the pain and fear are remote, unreal, and largely unshared. They are, therefore, almost never made a part of the interpretive artifact, such as the judicial opinion. On the other hand, for those who impose the violence the justification is important, real and carefully cultivated. Conversely, for the victim, the justification for the violence recedes in reality and significance in proportion to the overwhelming reality of the pain and fear that is suffered.

Id.

75. *Id.* at 1628:

As long as death and pain are part of our political world, it is essential that they be at the center of the law. The alternative is truly unacceptable—that they be within our polity but outside the discipline of the collective decision rules and the individual efforts to achieve outcomes through those rules.

76. ELAINE SCARRY, *THE BODY IN PAIN* 4 (1985).

77. Cover, *supra* note 72, at 1603 (quoting SCARRY, *supra* note 76, at 4):

Whatever pain achieves, it achieves in part through its unshareability, and it ensures this unshareability in part through its resistance to language....Prolonged pain does not simply resist language but actively destroys it, bringing about an immediate reversion to a state anterior to language, to the sounds and cries a human being makes before language is learned.

and prisoner understand “punishment” through their diametrically opposed experiences of the punishing act. It is ultimately irrelevant whether the torturer and his victim share a common theoretical view on the justifications for torture—outside the torture room. They still have come to the confession through destroying in the one case and through having been destroyed in the other. Similarly, whether or not the judge and prisoner share the same philosophy of punishment, they arrive at the particular act of punishment having dominated and having been dominated with violence, respectively.⁷⁸

As an analogy of this symbiotic relationship between individuals (perpetrator/victim, perpetrator/judge) under domestic law, to states under international law, as well as to account for the weaker legal mechanisms of enforcement under the latter, Stark says: “International law governs the use of force between states, just as domestic law governs the use of force between individuals, but in striking contrast to domestic law, international law is applied and interpreted by the parties themselves.”⁷⁹ Furthermore, the governance of the use of force is reflective of the dynamic described by Cover as between individuals. Destruction through violence is also productive of a “shared world,” notwithstanding that the actual experience of the same event by perpetrator and victim is radically different. It may not be accurate to suggest the absence of a common experience or a “metanarrative” between states concerning the governance of the use of force under international law if these terms describe a deeper story than the distinctions of violence and violation. For example, this includes a story of war, its mythos, and the limits of violence that pervades the law.

The common story of violence between states is the doctrine of “justifiable war.”⁸⁰ It is a doctrine that the major powers, first through

78. Cover, *supra* note 72, at 1609. See also *id.* at 1603:

The deliberate infliction of pain in order to destroy the victim’s normative world and capacity to create shared realities we call torture....The torturer and victim do end up creating their own terrible “world,” but this world derives its meaning from being imposed upon by the ashes of another. The logic of that world is complete domination, though the objective may never be realized.

The reverse is also true: to be completely dominated or swamped, as victim or perpetrator, by an idea, belief, or sensation. Hence, the similar destruction of language that takes place with both torture and ecstasy.

79. Stark, *supra* note 73, at 101.

80. *Id.* at 107:

The absence of metanarrative in the UN Charter is not an oversight. Rather, it represents a deliberate pre-emption of the metanarrative of “justifiable war.” The only public policy, the only relevant “intent,” the only goal is lasting peace for autonomous states. The law on the

the League of Nations and then, following World War II, through the United Nations, attempted to eradicate. The attempts before WWII, during WWII, and during the Cold War led to a doctrinal suppression. Since September 11, there has been a collective irrepression of the narrative of the just war, and with it, a glimpse into the “shared world” of death, pain, and domination between victim, perpetrator, and judge, as delineated by Cover.

Why should it matter whether there is a common or a master narrative⁸¹ under international law? It is important to recognize its existence and the conditions of its suppression within the interstices of the law because with this recognition, it becomes possible to address it and to see what states do at the very point at which they renounce violence. United Nations Secretary General Kofi Annan, for instance, couched the UN’s acclamation of the U.S. military response to September 11 in carefully pacific terms, attempting to fence in the tendency toward unlimited or extensive force (as suggested by the Security Council mandates) pursuant to the war on terrorism.⁸² One might extrapolate from Annan’s restraint that an alternative to de-repression of the war paradigm within the law—an acceptance of the law’s silence regarding the war narrative—is acquiescence (as Annan warned) to the prospect of an endless war outside the normative framework, or the contained boundaries, of the use of force. This would

use of force promotes this goal in two ways: first, by identifying it not only as legitimate but as paramount; and, second, by providing objective criteria.

81. *Id.* at 120, n.19: “‘Metanarrative’ is used by postmodernists to describe and distinguish the disconnected, ‘little’ stories of ‘postmodernism’ from the totalizing descriptions or theories of modernism” (citations omitted).

82. United Nations Secretary-General Kofi Annan, Message to Warsaw Conference of Heads of State from Central and Eastern Europe on Combating Terrorism (Nov. 6, 2001), *available at* http://www.yale.edu/lawweb/Avalon/sept_11/un_008.htm [hereinafter Annan]. Annan’s language is at times sweeping, as in, “We are in a moral struggle to fight an evil that is anathema to all faiths,” but also constraining, as in, “Every nation and every people have a responsibility to fight against terrorism by ensuring that differences and disputes are resolved through political means, and not through violence.” With respect to the use of force, Annan inserts the U.S.’s military action within the general mandate of Resolution 1368. The use of force is thus “contained” within the Security Council mandate, if not—as many have argued—explicitly authorized. The mandate points toward a juridical solution, a further level of containment for the use of force as a self-defense mechanism:

Following the 11 September attacks in the United States, both the Security Council and the General Assembly adopted strong resolutions condemning the attacks and calling on all States to cooperate in bringing the perpetrators to justice. The Security Council expressed its determination to combat, by all means, threats to international peace and security caused by terrorist acts. The Council also reaffirmed the inherent right of individual or collective self-defence in accordance with the Charter of the United Nations. The States concerned have set their current military action in Afghanistan in that context.

Id.

result in what Tom J. Farer describes as “increasingly norm-less violence, pitiless blows followed by monstrous retaliation in a descending spiral of hardly imaginable depths.”⁸³

Recognition of the grand narrative of a just war, suppressed within the cool and astringent language of the law, enables one to reflect on the ways we invoke its redemptive, heroic, and mythic qualities through the lexicon of war. If language involves a powerful imperative in relation to material events, then notwithstanding Cover’s warning that “as long as people are committed to using or resisting the social organizations of violence in making their interpretations [of the law] real, there will always be a tragic limit to the common meaning that can be achieved.”⁸⁴ Nevertheless, the proposition here is that language, like an empire of signs, may still project prescriptive change. The law’s language, an “idiom of refusal,”⁸⁵ might at least heuristically be juxtaposed against the language of war.⁸⁶

C. *The Use of Force Defined Through the Suppression of the Metanarrative*

In August 1928, the major powers met in Paris and signed a Treaty Providing for the Renunciation of War as an Instrument of National Policy.⁸⁷ Professor Jeremy Rabkin noted, during a recent talk,⁸⁸ that both before and after the Great War, the major powers signed many such treaties concerning armed conflict. Taking those signed in 1899 as a sample, we find the following: Hague IV: Prohibiting Launching of Projectiles and Explosives from Balloons; Declaration II: On the Use of Projectiles the Object of Which is the Diffusion of Asphyxiating or

83. Tom J. Farer, *Editorial Comment: Beyond the Charter Frame: Unilateralism or Condominium?*, 96 AM. J. INT’L L. 359, 364 (2002).

84. Cover, *supra* note 72, at 1629.

85. Stark, *supra* note 73, at 112 (quoting James Atlas, *Less is Less*, ATLANTIC MONTHLY, June 1981 (book review), at 96).

86. For an alternative to the “idiom of refusal,” see, for example, Stark, *supra* note 73, at n.179 (quoting Martti Koskenniemi, *The Future of Statehood*, 32 HARV. INT’L L.J. 397, 410 (1991)):

[The use of force] creates difficulties for an agnostic legal rhetoric, denying its reliance on any particular substance. Nonetheless, it challenges international lawyers to formulate and agree upon some very basic ideals of communal life, however tentative. Without this, it is hard to see how we might feel justified in looking beyond today’s crisis with any confidence in a shared future.

87. Treaty Providing for the Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, T.S. 796, 2 Bevans 732 [hereinafter Kellogg-Briand]. This treaty is also commonly referred to as the Kellogg-Briand Peace Pact, or Pact of Paris.

88. Jeremy Rabkin, *The Laws of War Since 9/11*, Syracuse University College of Law, Luncheon Seminar (Apr. 16, 2002) (notes on file with author).

Deleterious Gases; and Declaration III: On the Use of Bullets Which Expand or Flatten Easily in the Human Body.⁸⁹ Rabkin claims that only those treaties and declarations that involved “reciprocity” would become the norms that constitute the laws of war and the humanitarian laws concerning how civilians and captured belligerents are treated during and after conflict.⁹⁰ By reciprocity, Rabkin suggested that, given that “war is messy” and “any of the rules to which the high contracting parties agreed depended on a bargain,” the moral principle of restraint is naturally vague and interpreted within the given circumstances.⁹¹ “War,” he said, “tends to impose considerations of relativity because it’s a desperate situation.”⁹² In effect, any “rules” or “laws” of war are essentially, and should be, nugatory. Indeed, Rabkin excoriated those calling for ratification of the Rome Statute of the International Criminal Court because, in his view, it would merely be used by U.S. enemies “to inhibit unilateral action in self-defense; the court would put moral pressure to conform to international law even if this lends support to your enemies who do not conform to international laws of war.”⁹³

Professor Rabkin’s plea for fewer legal restraints in war echoes the sentiments of those who signed the Kellogg-Briand treaty, also known as the Pact of Paris. A contemporary commentator, Edwin Borchard, traced the rapid history of the negotiations. Between April and June, 1927, France and the United States agreed to a proposal “providing for a condemnation of ‘recourse to war’ and renouncing war...as an ‘instrument of their national policy.’”⁹⁴ The multilateral signing occurred barely a year later, and the treaty came into force a year after that. Borchard’s complaint centers on the extent to which the reservations introduced by the European powers essentially eviscerated the original proposal for a renunciation of war. For instance, Borchard quotes from the correspondence of Sir Austen Chamberlain of Great Britain who, in assenting to France’s subsequent reservations (to limit

89. For a listing of treaties and declarations that together constitute the laws of war, see, for example, <http://www.yale.edu/lawweb/avalon/lawofwar/lawwar.htm>.

90. See Geneva Conventions, *supra* note 62.

91. Rabkin, *supra* note 88.

92. *Id.*

93. *Id.* See also Kagan, *supra* note 58, at 17:

Even after September 11, when the Europeans offered their very limited military capabilities in the fight in Afghanistan, the United States resisted, fearing that European cooperation was a ruse to tie America down. The Bush administration viewed NATO’s historic decision to aid the United States under Article V less as a boon than as a booby trap.

94. Edwin Borchard, The Multilateral Pact: “Renunciation of War,” Address delivered at the Williamstown Institute of Politics (Aug. 22, 1928), *available at* <http://www.yale.edu/lawweb/avalon/kbpact/kbbor.htm>. (last visited Mar. 1, 2003).

the renunciation to “wars of aggression” only), added a new one:

There are certain regions of the world, the welfare and integrity of which constitute a special and vital interest for our peace and safety. His Majesty's Government have been at pains to make it clear in the past that interference with these regions cannot be suffered. Their protection against attack is to the British Empire a measure of self-defense. It must be clearly understood that *His Majesty's Government in Great Britain accept the new treaty upon the distinct understanding that it does not prejudice their freedom of action in this respect.* The Government of the United States have comparable interest, any disregard of which by a foreign Power they have declared they would regard as an unfriendly act.⁹⁵

Borchard notes that the words in italics “were repeated by the British note of July 18, 1928” a couple of months later.⁹⁶ Borchard's point is that on this rather broad definition of self-defense, i.e., on the basis of “freedom of action” with respect to “special and vital interests,” the Pact of Paris sanctions war. He says: “Considering these reservations, it would be difficult to conceive of any wars that nations have fought within the last century, or are likely to fight in the future, that cannot be accommodated under these exceptions. Far from constituting an outlawry of war, they constitute the most definite sanction of specific wars that has ever been promulgated.”⁹⁷ Borchard continues: “The mere renunciation of war in the abstract in the first article of the treaty has but little scope for application, in view of the wars in the concrete, which the accompanying construction of the treaty sanctions.”⁹⁸

As the High Contracting Parties (including the representative of “His Majesty the King of Great Britain, Ireland and the British Dominions beyond the seas, Emperor of India,”) signed the treaty, there was trouble in the colonies and dominions. The British police crushed a silent protest march in Lahore that same day. One of the protesters, Lala Lajpatrai, was beaten on the head with a “lathi” (bamboo stick) so severely and repeatedly that he “succumbed to the injuries” and died.⁹⁹ The protest expressed general anti-British feelings. However, particular grievances included the “Jalianwala Bagh Massacre” of 1919 and

95. *Id.* (emphasis in original).

96. *Id.*

97. *Id.*

98. *Id.*

99. Jyotsna Kamat, *The Martyrdom of Sardar Bhagat Singh*, (Mar. 23, 1999) (updated Dec. 4, 2001), available at <http://www.kamat.com/kalranga/itihhas/sbsingh.htm>.

proper representation in national administration. Sadar Bhagat Singh, whom the British hanged in 1931 for treason, later avenged Lajpatrai's death through various "terrorist" acts.

Although the reservations Borchard complained of involved the violence between sovereign states, violence visited upon Bhagat Singh and other "Indian patriots" (terrorists of their day) was exempt from a Pact renouncing war because it fell under sovereign police powers. Indeed, Michael Howard suggests that the language of war in reference to such incidents is inappropriate:

[T]he British in Palestine, in Ireland, in Cyprus and in... (modern day) Malaysia never called them wars; they called them "emergencies." This terminology meant that the police and intelligence services were provided with exceptional powers and were reinforced where necessary by the armed forces, but they continued to operate within a peacetime framework of civilian authority.

As such, "the terrorists were not dignified with the status of belligerents: they were criminals, to be regarded as such by the general public and treated as such by the authorities." Howard bemoans the fact that, "[t]o declare war on terrorists or, even more illiterately, on terrorism is at once to accord terrorists a status and dignity that they seek and that they do not deserve. It confers on them a kind of legitimacy."¹⁰⁰

Bhagat Singh, as a belligerent in a war, would have status equal to the sovereign, an untenable situation at the height of colonialism. The Pact barely mentions the colonial "emergencies," the precursors of today's terrorists (and of course they had their precursors in the instigators of "la Terreur," as the final phase of the French Revolution was called). This began what would become the contentious question of whether terrorism fell within the boundaries of the norms governing the use of force; that is, whether terrorism was war or simply an "emergency."

The laws of war and the norms governing the use of force in international relations are thus fraught with history and self-contradiction, with due consideration to Bochar'd's and Singh's critiques (using different media, of course) of the renunciation of war. That is, it is partly through the suppression of a metanarrative of just wars that a limbless use of force doctrine comes into being to, in effect, sanction

100. Michael Howard, *What's in a Name? How to Fight Terrorism*, FOREIGN AFF. Jan.-Feb. 2002, at 8.

variegations of war (including police actions). I shall return in a moment to the issue of terrorism as war, but for now I wish to concentrate on the development of the use of force doctrine as it evolved from Kellogg-Briand.

D. Elements of the Use of Force: Legitimacy

In the first place, the Second World War is often cited as a repudiation of Kellogg-Briand, in part, because that Pact was invoked at Nuremberg to declare the German war effort “illegal” as a “war of aggression.”¹⁰¹ That war was the Pact’s fulfillment, because German rearmament under the constraints of Versailles¹⁰² made war, the *assertion* of sovereignty implicitly defined by the Pact and understood as such by the High Contracting Parties (and the reason for Borchard’s displeasure), inevitable.

But if the language of war hinges on concepts of sovereignty, what part does sovereignty play in the legacy of the Pact, i.e., the attempt to eradicate war under the auspices of the UN Charter? Compare the broad, expansive and ornate language in the Charter’s Preamble with the substantive articles on the use of force:

WE THE PEOPLES OF THE UNITED NATIONS DETERMINED to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained,...AND FOR THESE ENDS to practice tolerance...by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest, and to employ international machinery....¹⁰³

The authors mention war only once here and nowhere else in the Charter. Instead, in Article 1 (the “Purposes” clause), the “suppression of acts of aggression and other breaches of peace” is introduced, almost as a superscript. Authors express the idea of the equality of states briefly in the Preamble, and again in Article 2, also known as the “Principles”

101. For citation of Treaty of Paris in Nuremberg judgment as defining “Nazi conspiracy and aggression,” see <http://www.yale.edu/lawweb/avalon/imt/imt.htm>.

102. Treaty of Versailles, June 28, 1919, 225 Consol. T.S. 188, 2 Bevens 43.

103. U.N. CHARTER pmbl., available at <http://www.yale.edu/lawweb/avalon/un/unchart.htm>.

clause, with the following language under 2(1): “The Organization is based on the principle of the sovereign equality of all its Members.” This Article joins the principle of equality to, *inter alia*, the ban on the use of force under international law under 2(4):

All Members shall refrain in their international relations 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.

As with Kellogg-Briand and the Preamble (“armed force shall not be used, save in the common interest and to employ...”), also here, force shall not be used if it is “inconsistent” with the purposes of the United Nations. The use of force to preserve any of the principles outlined in Article 2, such as the equality of states, is legitimate under the Charter.

But is the elision of the language of war the interjection, *pari passu*, of the aims and purposes of Kellogg-Briand? Is “the scourge of war” renounced under the Charter’s limited legitimation of the use of force? Once again the Charter seems to beg the question: what is “war,” or when is force (emergency, etc.) not war? Should one look again, as did Borchard, to the language that reserves the right of self-defense? In looking at the self-defense rationale more closely, several strains that were more latent in Kellogg-Briand will be seen as key to understanding the link between the astringent language of the law and its progressive (re)interpretation in light of associations with which the lexicon of war is invested.

E. Self-Defense: Sovereignty and Equality

Apart from the implicit exceptions to Article 2(4) under Articles 1 and 2(1), we find the traditional, or customary, exception to the Article 2(4) prohibition in Article 51, quoted above.¹⁰⁴ I have noted at various points that it is around the definition or interpretation of the “inherent right of self-defense” that much of the debate concerning the extension or contraction of the international law on the use of force collects. For instance, what is the meaning of an “armed conflict” and is it required to justify military action as self-defense? If so, what does it entail? Can self-defense be anticipatory? Is self-defense unilateral or must it be within the context of a Security Council authorization? Have the customary law requirements of necessity and proportionality been met by a state justifying its military action as self-defense?¹⁰⁵

104. See *supra* note 30 and accompanying text.

105. For an interesting, if tendentious, analysis of self-defense, see, for example, House of

This brings us back to the issue of terrorism and its relationship with the discourse on war, because the extension or contraction of the self-defense rationale for the use of force centers on the argument that terrorist attacks justify not “emergencies” or other police action, but military action under the self-defense argument. This argument essentially establishes the perpetrator as an enemy belligerent committing “acts of war” rather than a criminal subject to a police action (with or without the assistance of the military, as for instance in the apprehension of war criminals in Bosnia and Herzegovina). For the past two decades at least, the United States has been arguing not only for an extension of Article 51 to acts of terrorism, but also for an extension of Article 51 in an anticipatory or preemptive sense.¹⁰⁶

At this point, two things should come into view. First, the difference between the self-defense justification as argued by the British pursuant to reservations to the Pact of Paris and the self-defense justification as argued by the Americans pursuant to such actions as Nicaragua, Vietnam, Kuwait, and most recently, Afghanistan, is the exclusion in the former, and the inclusion in the latter, of the “emergency” situation. In other words, what the British called an “emergency,” a brush fire to be put out in the colonies (including Northern Ireland), the Americans

Commons Research Paper, *supra* note 31, at 80.

106. *Id.* at 83:

The USA has tended to argue that specific terrorist incidents are episodes within a larger, ongoing attack carried out sporadically over a long period of time. On this account the question of anticipation is nuanced. Many other states and commentators reject the whole notion, or at least contest it in specific cases. The right of anticipatory self-defense raises a problem: who judges that a threat is such as to justify defensive action? The nature of defensive actions are such that the assessment of their necessity must normally be made in the first instance by the state seeking to defend itself, and can be validated by others only after the event. Customary international law allows states this latitude to make their own assessment, which in the case of an actual attack is relatively straightforward, but it does not allow *carte blanche* discretion to excuse any use of force through a retrospective claim of self-defence. The use of force in self-defence must be notified to the Security Council under Article 51. The council might, if it so chose, consider the validity of the claim, as it has primary responsibility for international peace and security, and could, for instance, adopt a condemnatory Resolution if it considered the claim unfounded.

The House of Commons Research Paper goes on to quote from LASSA OPPENHEIM, *OPPENHEIM'S INTERNATIONAL LAW* 421-22 (Robert Y. Jennings & Arthur Watts eds., 9th ed. 1992):

while anticipatory action in self-defence is normally unlawful, it is not necessarily unlawful in all circumstances, the matter depending on the facts of the situation including in particular the seriousness of the threat and the degree to which preemptive action is really necessary and is the only way of avoiding that serious threat; the requirements of necessity and proportionality are probably even more pressing in relation to anticipatory self-defence than they are in other circumstances.

House of Commons Research Paper, *supra* note 31, at 84.

call war. Common to both, however, is the concern expressed by Borchard, that self-defense is another name for war, or that war is “sanctioned” by a renunciation of war that still reserved against the possibility of self-defense under the rather broad criteria outlined in Sir Chamberlain’s letter.

Second, norms regarding the use of force, just as with those regarding the renunciation of war, run up against the principle of state sovereignty. Although the Pact’s allegedly wholesale renunciation of war was predicated on a concern for peace, and although under the Charter we find language to the same effect (Article 1 speaks of “international peace and security”), there is in both an exception to the use of force as “self-defense” when the issue of state sovereignty, or state autonomy, is implicated. For the British, the skirmishes abroad did not at first, or ostensibly, involve her sovereignty. What is interesting, therefore, is the extent to which, as Howard notes, by going to *war* against terrorists, or refusing to call it war when confronting terrorists, the issues of legitimacy and sovereign equality come into focus.

What is it, then, that would require the U.S. to call such encounters wars? Why would American leaders wish to “legitimate” the terrorist as a belligerent, or accord him a status tantamount to sovereign equal? The answer lies somewhere in the gray zone, the shadow of the law’s violence between the idea and the reality of common meaning, or alternatively, between the ideal of a just order and the violence of its realization. At an elemental level, lost in the mists of time and mythology, sovereignty encompasses divinely ordained rule, the righteous cause, and the justice of eschatological war. Under the strain of extreme events, these traces percolate close to the surface, lending urgency and universality to the discourses of law, politics, and morality in the relations between states.

It is this propulsion from behind the law’s “idiom of refusal,” this sense of urgency and universality, that shapes the interpretation of acts of terror as acts of war. This, in turn, recasts self-defense as the final resort, or as a fundamentally moral concern.

In the following section, I examine the rhetoric of the war on terrorism as predicated on the legal justification of self-defense as a sort of inverted pyramid: from broad-based collective support, or condominium, to unilateralism; from the universality of pain and death to the singularity of power and domination. I will show that the rhetoric of war recovers a sense of legitimacy and sovereignty that projects a particular shape to the norms governing the use of force under international law.

F. *Self-Defense and the "Magnitude" Argument*

On September 28, 2001, the Security Council “unanimously adopted an American-sponsored resolution...that would oblige all 189 member states to crack down on the financing, training and movement of terrorists, and to cooperate in any campaign against them, including one that involves the use of force.”¹⁰⁷ So reports journalist Serge Schmemmann. Michael Byers, on the other hand, is uncertain that the resolution, known as Security Council Resolution 1373,¹⁰⁸ necessarily involves an authorization to use force, although he concedes that it “could be argued to constitute an almost unlimited mandate to use force.”¹⁰⁹ Resolution 1373 follows on Security Council Resolution 1368,¹¹⁰ that had “stopped short of authorizing the use of force” and “instead expressed ‘its readiness to take all necessary steps,’ thus implicitly encouraging the U.S. to seek authorization once its military plans were complete.”¹¹¹ Indeed, Schmemmann notes in the same article that several governments have indicated that they would prefer to participate in a campaign that was sanctioned by the United Nations.¹¹²

Here, we begin with the broad-based support throughout the world for combating terrorism in general and responding to the terrorist attack on America specifically. Nevertheless, for the U.S., there is still the decision of whether to justify a military response under Article 2(4) or under Article 51. The tension, as Byers brilliantly points out, is whether the U.S. government will use the UN resolutions to justify its military action or disregard the use of force mandate implied in both resolutions in favor of an explicit self-defense justification under UN Charter Article 51. Both resolutions reiterate the “inherent right of self-defense” as inscribed in Article 51.

Ultimately, as Byers points out, of the four possible legal justifications for its action in Afghanistan—under “Chapter VII of the UN Charter [which would require authorization to use force by the UN Security Council], intervention by invitation [e.g., Kuwait’s to the Alliance following the Iraqi invasion], humanitarian intervention [e.g., NATO’s rationale for bombing the FRY in 1999], and self-

107. Serge Schmemmann, *U.N. Requires Members to Act Against Terror*, N.Y. TIMES, Sept. 29, 2002, at A1 [hereinafter Schmemmann, *U.N. Requires Members to Act*].

108. S.C. Res. 1373, U.N. SCOR, 56th Sess., 4385th mtg., U.N. Doc. SC/7158 (2001).

109. Michael Byers, *Terrorism, The Use of Force and International Law After 11 September*, 51 INT’L & COMP. L.Q. 401, 401-02 (2002).

110. S.C. Res. 1368, U.N. SCOR, 56th Sess., 4370th mtg., U.N. Doc. SC/1368 (2001).

111. Byers, *supra* note 109, at 401.

112. Schmemmann, *U.N. Requires Members to Act*, *supra* note 107.

defense”¹¹³—the U.S. government chose the last. Its choice is informed not only by the more immediate exigencies of the war rhetoric circulating within the popular culture at the time—President Bush, for instance, noted that “the coming campaign against those believed responsible for the Sept[ember] 11 terrorist attacks would be a ‘guerrilla war’”¹¹⁴—but also, as I hope to show, by the ripening of this discourse on war over the previous two decades.¹¹⁵

Howard, in the same article previously mentioned, suggests that “[w]hen, in the immediate aftermath of the September 11 attacks... Secretary of State Colin Powell declared that the United States was ‘at war’ with terrorism, he made a very natural but terrible and irrevocable error,” and that “Administration leaders have been trying to put it right ever since.”¹¹⁶ On the contrary, we find President Bush, in his State of the Union address some months after Powell’s statement, making repeated references to the war on terrorism. At one point, Bush says: “What we have found in Afghanistan confirms that, far from ending there, our war against terror is only beginning.”¹¹⁷ As noted, Howard argues this language is in “error,” in part because the British encounter with terrorism has been different, at least discursively, from the U.S. encounter that has evolved and taken shape over the last two decades.

And yet, Howard also draws attention to a subtle distinction in the way the U.S. and Britain deal with terrorists, such that it may not seem quite so “illiterate” to address the terrorist as enemy rather than as criminal.

Do they qualify as belligerents? If so, should they not receive the protection of the laws of war? This protection was something that Irish terrorists always demanded, and it was quite properly refused. But their demands helped to muddy the waters and were given wide credence among their supporters in the United States.¹¹⁸

Here, Howard touches on the different conceptions of war and its

113. Byers, *supra* note 109, at 401.

114. Schmemmann, *U.N. Requires Members to Act*, *supra* note 107, at B7.

115. Byers notes that the decision to justify the military action in Afghanistan as self-defense arose “out of the interaction of international politics and international law,” Byers, *supra* note 109, at 401.

116. Howard, *supra* note 100, at 8.

117. President George W. Bush, Address Before a Joint Session of the Congress on the State of the Union (Jan. 29, 2002), 38 WEEKLY COMP. PRES. DOC. 133, 134 (Feb. 4, 2002) [hereinafter State of the Union 2002], available at <http://frwebgate4.access.gpo.gov/cgi-bin/waisgate.cgi?WAIISdocID=30415324757+15+0+0&WAIISaction=retrieve>.

118. Howard, *supra* note 100, at 8.

distinction from the criminal justice system of each country. Howard seems to imply here that for the American supporter of the IRA, the distance from the site of conflict may lend “credence” to the terrorist as a belligerent within a war of terror.

When one considers the mythology of war in the United States as compared with Europe, for instance, much of the criticism for calling the present engagement a “war on terrorism” becomes less “illiterate.” The language of war has less to do with what Howard calls a “war psychosis,” understandably engendered following September 11, and more to do with a sort of romance with the simulacrum of war—its idea and its representation—hinted at by our traditional and largely historical distance from the site of conflict. In another context, Amanda Nicholson noted that, “‘virtual stuff seems to be very popular with the American psyche. It’s getting in touch with reality,’ she added. ‘But not really.’”¹¹⁹

Through the many and varied armed conflicts abroad, from Korea to Kosovo, the U.S. has fostered a sense of war as “cold,” or at arm’s length. Briefly, on September 11, America was confronted with what one character in a recent movie called “the desert of the real.”¹²⁰ “The attacks,” says Howard, “were outrages against the people of America, far surpassing in infamy even the Japanese attack on Pearl Harbor.”¹²¹ With this in mind, Joan Fitzpatrick suggests at least four ways to understand the language of war in the context of terrorism:

The legal character of the post-September 11 “war” and the identity of the warring parties are confused and changeable. Four possibilities exist: (1) a metaphorical “war on terrorism,” which is essentially a multinational police action against organized, politically motivated, transnational criminal syndicates, of worldwide scope and indefinite duration; (2) an international armed conflict against Al Qaeda as a kind of quasi state, establishing a dramatic new paradigm in the law of armed conflict, with uncertain consequences; (3) an international armed conflict in Afghanistan (although not *against* Afghanistan), which may be extended to additional states such as Somalia and Iraq; and (4) a proxy war in the context of the quarter-century-

119. Dan Barry, *Syracuse Dreams of a Mall to Rival a Magic Kingdom*, N.Y. TIMES, June 24, 2002, at A1, available at <http://www.nytimes.com/2002/06/24/nyregion/24MALL.html>, at 3-4 (quoting Amanda Nicholson).

120. THE MATRIX (Warner Bros. Studios 1999), directed and written by Larry & Andy Wachowski (line spoken by Morpheus, played by Laurence Fishburne). The quotation in full is: “Welcome to the desert of the real.” *Id.*

121. Howard, *supra* note 100, at 9.

old internal armed conflict in Afghanistan.¹²²

Fitzpatrick suggests the intelligibility of (1) and (4), whereby the metaphorical “war” is really a juridical response to the attacks. She also indicates that the “proxy war” is really not a war in the strict sense between the U.S. and another belligerent. The second and third possible meanings of the war on terrorism as outlined by Fitzpatrick, which she calls “incoherent,” nevertheless make sense in the context of the resort by the U.S. government to the self-defense rationale, whereby terrorism is war and the terrorist is a belligerent.

At this juncture, we encounter the dichotomy between terrorism as war and self-defense as preserving the principle state sovereignty above all other purposes and ideals, as adumbrated by both the Pact of Paris and the UN Charter. In short, the rhetoric of war meets the doctrine of self-defense. This doctrine, in turn, taps into and uncovers the master narrative of “justifiable war,” making this rationale for military intervention in Afghanistan as an element of a larger “war on terrorism” virtually inevitable.

Fitzpatrick notes the separation between the international laws of armed conflict and the international norms concerning terrorism. The latter “are international crimes” that “may be subject to universal jurisdiction, and [terrorism] treaties may impose an obligation to extradite or prosecute (*aut dedere aut judicare*).”¹²³ Fitzpatrick wonders, despite the distinction between armed conflict and criminal justice, how “[h]ave the attacks of September 11 resulted in a shift from metaphorical war/actual crime control to actual armed conflict? The suggestion that international terrorists pose a criminal threat is met with impatience in some quarters, as if it somehow diminishes the magnitude of the events of September 11.”¹²⁴

Two things come to the fore in this passage. The first is the universality, or the universal applicability, of international criminal jurisdiction. The other is the question of the scope of the events themselves. As to the first, one indication of U.S. reluctance to acquiesce in a universal criminal jurisdiction is the Bush Administration’s recent unsigning of the Rome Statute, which had created the International Criminal Court:

122. Joan Fitzpatrick, *Jurisdiction of Military Commissions and the Ambiguous War on Terrorism*, 96 AM. J. INT’L L. 345, 346 (2002).

123. *Id.* Fitzpatrick further notes that “[t]he large body of international instruments on terrorism has not heretofore been regarded as an aspect of the international law of armed conflict. Terrorist crimes do not generally violate the laws of war.” *Id.*

124. *Id.* at 346-47.

The “unsigned” of the treaty...will be a decisive rejection by the Bush White House of the concept of a permanent tribunal designed to prosecute individuals for genocide, crimes against humanity and other war crimes. The administration has long argued that the court has the potential to create havoc for the United States, exposing American soldiers and officials overseas to capricious and mischievous prosecutions.¹²⁵

The question is also important because of questions of state sovereignty.

John R. Bolton, the under secretary of state for arms control...argued that the court would force the United States to forfeit some of its sovereignty and unique concept of due process to a foreign and possibly unrestrained prosecutor. He said that it was not just American soldiers who would be in the most jeopardy, but “the president, the cabinet officers who comprise the National Security Council, and other senior civilian and military leaders responsible for our defense and foreign policy.”¹²⁶

The criminal justice paradigm impinges on state sovereignty, and that may be one reason for defining the attack as an act of war rather than as an international crime. As to the second index noted in the above passage, Fitzpatrick returns to the theme of the magnitude of the attack, repeating it in her subsequent discussion of the second category, the war on Al Qaeda.

Do the magnitude of the attacks and the resulting national emergency require that they be regarded as an act of war? Can Al Qaeda be seen as a quasi state engaged in international armed conflict with the United States? Can sovereignty be divorced from territoriality? Does the rhetoric of jihad accompanying Al Qaeda’s attacks amount to a declaration of war with legal effects?¹²⁷

125. Neil A. Lewis, *U.S. to Renounce its Role in Pact for World Tribunal: Signing Was Mistake*, *Bush Official Says*, N.Y. TIMES, May 5, 2002, at 18 (International Section).

126. *Id.* The alternative view is also expressed in the article—c.g., the views of Harold Hongju Koh:

“The result is that the administration is losing a major opportunity to shape the court so it could be useful to the United States.... Now that the court exists, it’s important to deal with it. If the administration leaves it unmanaged, it may create difficulties for us and nations like Israel.”

Id.

127. Fitzpatrick, *supra* note 122, at 348. Fitzpatrick also notes that Dr. Ayman Al-Zawahiri

And again: “Al Qaeda must be distinguished from other criminal gangs,” Fitzpatrick hypothesizes on behalf of the government’s arguments for its preference for the war rather than the criminal paradigm, “perhaps by the attribution of some type of quasi sovereignty, or perhaps simply by its capability to launch terrorist attacks of a yet undefined magnitude. Al Qaeda depicts itself as the army of the Islamic *umma*, the ‘nation’ of believers,” and so on. Fitzpatrick notes, of course, that in strictly legal terms, including the Charter and the Security Council resolutions, there is little support for the proposition that “the struggle is an international armed conflict between the United States and Al Qaeda.”¹²⁸

For Fitzpatrick, these indexes of an armed conflict (sovereignty, legitimacy [of Al Qaeda], and magnitude) make defining the instant case as an “armed conflict” ambiguous, leaving it unclear “whether this characterization is rhetorical or legal.”¹²⁹ The consequences of extending a rhetorical war into real or material armed conflict against terrorism are very real—for instance, attributing to Al Qaeda the same status as a sovereign state would throw into some doubt the status of the myriad other terrorist organizations,¹³⁰ not to mention the possibility that “[s]uch a broad conception exceeds accepted definitions of international armed conflict, and may lead the United States to violate Charter prohibitions on the use of force.”¹³¹ Nevertheless, something interesting is going on between the rhetoric and the legality of this conflict, centering on the definition ascribed to self-defense.

Farer suggests that the U.S. government’s definition of self-defense

describes Al Qaeda’s 1996 declaration of war on the United States, on behalf of the Muslim “nation,” in his book *Knights Under the Prophet’s Banner*. Excerpts from the book, translated from Arabic into English from a serial version published in London by Al-Sharq Al-Awsat in December 2001, are available at http://www.fas.org/irp/world/para/ayman_bk.htm (last visited June 27, 2002).

128. Fitzpatrick, *supra* note 122, at 349.

129. *Id.* at 347.

130. *See id.*:

If the war on terrorism is now to be conceived of as an international armed conflict, it is one of startling breadth, innumerable “combatants,” and indefinite duration. The United States considers a wide variety of groups to be engaged in international terrorism, as reflected in the lists of foreign terrorist organizations adopted by the secretary of state. These groups include Aum Shinrikyo, Basque Fatherland and Liberty, the Kurdistan Workers’ Party, the Liberation Tigers of Tamil Eelam, the Real IRA, and the Shining Path. The U.S. military provides support to some governments engaged in internal armed conflicts against listed groups, notably the Revolutionary Armed Forces of Colombia and the Abu Sayyaf Group in the Philippines. This war on terrorism will endure until all these groups, and others similar to them, are eradicated.

131. *Id.*

under the Charter is already overbroad, especially in its preemptive capacity. The inherent right to self-defense, affirmed (superfluously, in Farer's view) in the Security Council resolutions,

[P]lainly does not encompass the overthrow of regimes with records of aggressive behavior. Nor does it legitimate the use of force against states deemed unfriendly in order to deny them weapons systems already deployed by other sovereign states or to enforce compliance with treaty obligations. At this point, there is simply no cosmopolitan body of respectable legal opinion that could be invoked to support so broad a conception of self-defense.¹³²

Farer thus goes farther than Fitzpatrick in maintaining that the war on terrorism (the "Bush Doctrine") may already, rather than potentially, be illegal, saying, "The Bush Doctrine, *to the extent it implies unilateral action*, cannot be contained within the UN Charter norms that have served as the framework of international relations for the past half century. It challenges a root principle of the Charter system—namely, the formal equality of states."¹³³

However, W. Michael Reisman, in another editorial comment, does not worry about the tendency toward unilateralism. On the contrary, with reference to terrorist bombs in Belfast, London, Madrid, and Moscow, he states,

Those unlawful acts were designed to change a particular policy, but not to destroy a social organization. The ambition, scope, and intended fallout of the acts of September 11 make them an aggression, initially targeting the United States but aimed, through these and subsequent acts, at destroying the social and economic structures and values of a system of world public order, along with the international law that sustains it. Not just the United States, but all peoples who value freedom and human

132. Farer, *supra* note 83, at 359.

133. *Id.* at 360 (emphasis in original). Farer continues:

For this Bush Doctrine purports among other things to concede to some states (e.g., Israel, France, and India) but not others (e.g., Iran) the right to provide for their defense in whatever manner they deem fit. It also implies the erosion of other core features of national sovereignty, including exclusive authority to exercise police and judicial powers within recognized frontiers. It seemly arrogates to the United States an unfettered discretion to decide to whom other states can give asylum and whom they are obligated to prosecute or extradite. And it claims a right to intervene preemptively.

Id.

rights have been forced into a war of self-defense.¹³⁴

The scope of the acts means that the world is at war: “[T]he enemy has chosen a form of warfare that makes it inaccessible to many current weapons and practices,” he warns. As such, and given America’s military supremacy, “the efficiency of forceful unilateral action can sometimes outweigh the political advantages and moral strengths of multilateralism.”¹³⁵ Reisman not only disagrees with Farer’s reservations about unilateralism, he also suggests its appropriateness given the magnitude of the acts, which define the encounter as a “war of self-defense.”

Reisman’s endorsement of unilateralism posits morality against efficiency (practicality), intimating a distinction between the criminal justice and the armed conflict (war) paradigms. This dichotomy is suggested to the extent that the doctrine of “justifiable war” has been elided under the Charter, as discussed above, whereby the repository for the moral under international relations is no longer the recourse to war but to the pacific means afforded by the law, i.e., the criminal justice system. Again, the magnitude of the event suggests the primacy of the efficient over the moral model, or alternatively, the resuscitation (cooptation) of the moral within the efficiency model, or the return of the just war narrative.

Recalling Cover’s analysis of the violence of the law itself, this transfer of the moral from the criminal justice system to the war paradigm simply means that unilateralism represents either the reallocation of law’s violence to extra-legal instrumentalities, such that a war on terrorism is either potentially or actually illegal, as alleged by Farer, or the recalibration of the law through the lexicon of war. The efficiency model presupposes the latter.

With respect to his second concern, that of unilateralism’s challenge to the “root principle of the Charter system—namely, the formal equality of states,” Farer notes with regret that the condominium model of international norm-creation, wherein there would be, amongst the consequential international actors a “shared hegemony...with the United States *primus inter pares* with respect to the rest of the small

134. W. Michael Reisman, *Editorial Comment: In Defense of World Public Order*, 95 AM. J. INT’L L. 833 (2001).

135. *Id.* at 834, continues on an atypically sanguine note with respect to the issue of unilateralism at the international level: “This is why executive committees operate at every level of social organization as unilateral instruments for the implementation of multilateral policy. What is now clear, however, is that the executive committee, whatever its membership, will operate with wide international authority and broad support.”

group of owners,"¹³⁶ has not been robust, and as such may not provide a strong enough bulwark against the seductions of unilateralism.

Yet there is at least a theoretical basis for coherence between unilateralism and equality. Recall Fitzpatrick's speculations on the possibility that if "war on terrorism" meant "war on Al Qaeda," the war paradigm would bestow sovereign equality on a non-state actor or entity, obviating the territoriality principle. Intuitively it may seem strange, but it would certainly not be unprecedented for the international community to recognize the sovereignty of an entity divorced from a claim of specific territory. Two examples are the UN recognition of the sovereignty of Palestinians over their natural resources (Palestine is not yet a state),¹³⁷ and the repeated bid for recognition as a sovereign state by the Sovereign Military Order of Malta (SMOM), with increasing success despite the SMOM's lack of any present-day territorial claims.¹³⁸ The Canadian federal government has also recognized the sovereign status of "First Nationals" to varying degrees. It recognizes self-government and continues to engage in negotiations with over three hundred and fifty national groups. The Supreme Court of Canada and international tribunals, such as the Human Rights Committee, have offered increasing support for sovereign rights.¹³⁹

In short, it is not fanciful for the U.S. to suggest that its war on terrorism is a war on terrorists who maintain a certain quasi-sovereign status as equals (equal belligerents). The danger, as Fitzpatrick points out, is that recognizing even limited sovereignty opens up the possibility that groups can engage in legitimate military acts according to the laws of war. The U.S. and allied military installations would then become fair game.¹⁴⁰ On the other hand, it also allows the U.S. government to

136. Farer, *supra* note 83, at 360.

137. See, e.g., G.A. Res. 230, U.N. GAOR, 54th Sess., Agenda Item 103 (1999), available at http://www.palestine-un.org/res/54_8.html (last visited June 28, 2002).

138. Formerly the Sovereign Military Order of Saint John of Jerusalem. There are several websites devoted to the SMOM bid for recognition as a state, although some claim that their sovereignty has been recognized. See, e.g., <http://www.chivalricorders.org/orders/smom/maltasov.htm> (last visited June 28, 2002). My thanks to Jason Kovacs, Syracuse University College of Law, for this observation.

139. There are various websites devoted to this issue. For a quick overview, see, for instance, http://www.state.gov/www/global/human_rights/1998_hrp_report/canada.html (last visited June 28, 2002). For an interesting analysis of the changing character of statehood and sovereignty in light of the new power of the "international business class," as well as the "transnational crime... transnational firms, the world network of communications, supernational organizations, and the influx of foreigners," see Oschar Schacter, *The Decline of the Nation-State and its Implications for International Law*, 36 COLUM. J. TRANSNAT'L L. 7 (1997).

140. See, e.g., Fitzpatrick, *supra* note 122, at 348-49: "Characterizing the struggle to eradicate Al Qaeda as an international armed conflict should logically make U.S. military installations

engage in specific strategies of war, such as preemptive strikes. The war paradigm legitimates the extension of the self-defense rationale to anticipatory and preemptive self-defense.¹⁴¹

An important consequence of the rhetoric of war is the extension *in principle* of the concept of sovereignty beyond territoriality, the concept of legitimacy beyond morality¹⁴² (the efficiency model), the concept of terror beyond criminality, and the doctrine of self-defense beyond the customary law's ontological elements (i.e., immediacy, necessity, and proportionality).¹⁴³ These indexes together suggest the triumph of realism, or positivism, over moralism under international law. Recall Borchard's complaint about the reservations under the Pact of Paris, which focused on the contention that the renunciation of war should be absolute, i.e., "the outright and unconditional renunciation of war and the solution of disputes by pacific means only."¹⁴⁴ Borchard argued that renunciation with such reservations would likely do nothing to prevent war.¹⁴⁵ The Pact's compromises of the Pact might be said to have achieved a certain fulfillment a decade later, as Europe entered another "great" war.

But the apparent triumph of positivism over moralism is chimerical, because the "beyond" to which sovereignty, legitimacy, and moral authority tend, is always and already originary, ontological (beyond both positive and customary law), and moral. The same "triumph" is

legitimate targets for Al Qaeda, using lawful methods of warfare. The result would be to decriminalize violent conduct that can now be treated as terrorist or common crimes."

141. House of Commons Research Paper, *supra* note 31, at 83.

142. For a discussion of the elements of legitimacy under international law, see Martti Koskenniemi, Book Review, 86 AM. J. INT'L L. 175 (1992) (reviewing THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* (1990)) (legitimacy associated with "contextual justice and...pragmatic (legal) validity"). For a discussion generally of the reassertion of moral versus practical considerations under international law encapsulated within the ongoing competition between natural law theories (underwriting the *jus cogens* doctrine) and consensual law theories (i.e., no law beyond that to which states have consented, i.e., positive law theories), see Gennady M. Danilenko, *International Jus Cogens: Issues of Law-Making*, 12 EUR. J. INT'L L. 1 (2001), available at <http://www.ejil.org/journal/Vol2/No1/art3.html> (last visited Jan. 23, 2003). For the opposing view, i.e., in support of the supremacy of natural law theories, see JANIS & NOYES, *supra* note 32, at 133.

143. The *Caroline* case, JANIS & NOYES, *id.* at 510, and the test for the use of force—"a necessity of self-defense instant, overwhelming, leaving no choice of means, and no moment for deliberation"—as part of customary law. *But see* Thomas M. Franck, *Terrorism and the Right of Self-Defense*, 95 AM. J. INT'L L. 839, 840 (2001): "The assertion that self-defense requires 'immediate' action comes from a misunderstanding of the *Caroline* decision, which deals only with *anticipatory* self-defense." The element of "proportionality" comes from the *Naulilaa* case; see JANIS & NOYES, *supra* note 32, at 507.

144. Borchard, *supra* note 94.

145. *Id.*

evident in the analysis of the doctrine of self-defense as inherent, as I will show in the next section. In effect, to say that the doctrine of self-defense is “beyond” teleology is merely to suggest that self-defense as a legal argument has recently entailed the acquiescence of the world community in the meaning of self-defense as war, as argued by the U.S. in the recent decades. And it is also to say that the debate is ultimately a moral debate about war.

G. Self-Defense as War: The Moral Debate

Thomas Franck argues the case for a new meaning of self-defense within the lexicon of war (without, however, actually calling it such) in the strongest terms.¹⁴⁶ It is interesting to contrast his arguments with those of Jonathan Charney. In the context of the security architecture envisaged by the UN Charter, Charney looks behind positive law, analyzing its failure to discover the continued relevance and viability of the law’s moral underpinnings as a constraint against the use of force.¹⁴⁷ Franck also looks behind positive law and its failure to discover the pure consensual or “bargain theory” concept of custom that is more permissive and unconstrained than Charney’s alternative. As such, Charney might see the progressive argumentation, contrary to the opinion or sentiment of the international community, for liberalizing the doctrine of self-defense in favor of certain actions taken by the U.S. over the past twenty years. Franck, however, will instead see the U.S. position as intuitive, continuous (coherent) and rational, with the international community finally acquiescing in the true statement of customary law as interpreted by the U.S. posture pursuant to the events of September 11. What the conflict between a moralist and a consensualist position in the first instance, and the interpretation of history as radical shift or as radical fulfillment in the second, leads to is the discovery of a trajectory with respect to the meaning of self-defense, and of the use of force in the larger debate. And it is, in fact, a moral debate.

As noted, Byers suggests that Resolution 1373 “stops short of” authorization. Byers continues:

The point, therefore, is not that the resolution *should* be read as authorizing the use of force—indeed, in my view it does not—but that it *could* provide the US with an at-least-tenable

146. See generally Franck, *supra* note 143.

147. Compare Jonathan I. Charney, *The Use of Force Against Terrorism and International Law*, 95 AM. J. INT’L L. 835 (2001) with Franck, *supra* note 143.

argument whenever and wherever it decides, for political reasons, that force is necessary to “prevent the commission of terrorist acts.”¹⁴⁸

It should be noted in this instance that the U.S., according to some commentators, explicitly decided against seeking authorization: “A sign of Washington’s insistence that its hands not be tied was its rejection of United Nations Secretary General Kofi Annan’s entreaties that any American military action be subject to Security Council approval, administration officials said.”¹⁴⁹ In the event, the U.S. chose the self-defense rationale, which Byers describes as “an area of international law that is particularly contentious and difficult to analyse.”¹⁵⁰

Both Charney and Franck recognize that the self-defense rationale allows for unilateral U.S. action, but interpret the meaning or significance of unilateralism in different ways.¹⁵¹ First, Charney notes the stringency of the right of self-defense and how U.S. action might have breached the boundaries: “The Security Council has not adopted a decision under Chapter VII to authorize the use of force in this situation; and whether all the U.S. uses of force taken so far in response to the attacks of September 11 meet the requirements of self-defense is debatable.”¹⁵² This is because; “[t]he use of force is limited to situations where the state is truly required to defend itself from serious attack. In such situations, the state must carry the burden of presenting evidence to support its actions, normally before these irreversible and irreparable measures are taken.”¹⁵³ The U.S., Charney suggests, failed to disclose

148. Byers, *supra* note 109, at 402 (emphases in original). Byers continues:

But the US is not the only State that could benefit from this. In the future, China and Russia could invoke Resolution 1373 and block any attempts to clarify or rescind it. This may explain why the resolution was adopted unanimously, though time pressures might also have played a role. As the *Financial Times* reported: “Diplomats who drafted the text, which was passed surprisingly quickly, now admit they did not take into consideration all the possible consequences of the resolution.”

Id. Byers adds:

The fact that China and Russia could also argue that Resolution 1373 authorizes the use of force probably explains why the US has not done so. Washington may, after further reflection, have decided that it was contrary to its interests to establish precedent by relying on a resolution that could strengthen the arguments in favour of subsequent actions by other States.

Id. at 402-03.

149. Elaine Sciolino & Steven Lee Myers, *Bush Says ‘Time is Running Out’; Other Nations in Limited Roles*, N.Y. TIMES, Oct. 7, 2001, at A1.

150. Byers, *supra* note 109, at 405.

151. Compare Jonathan I. Charney, *The Use of Force Against Terrorism and International Law*, 95 AM. J. INT’L L. 835 (2001) with Franck, *supra* note 143.

152. Charney, *supra* note 147 at 835.

153. *Id.* at 836.

the factual bases for its claim of self-defense against the terrorist attacks before engaging in military action, which “makes it easier for others to take unjustifiable military actions based on unsupported assertions of self-defense.”¹⁵⁴

In any event, Charney maintains that U.S. military action, taken “without the Security Council’s authorization and without legally binding other states to support such actions through Council decisions” would, in effect, give states “freer rein to oppose long-term efforts to suppress international terrorism and military actions outside Afghanistan, especially since all the commitments of support were solely political and made only to the United States, sometimes secretly.” The net result is that unilateralism, by failing to use the resources of the Security Council, “undermines the view that the Council, and the United Nations as a whole, should be the primary vehicle to respond to threats to and breaches of the peace, which strengthens the belief that states may freely act outside the United Nations system.”¹⁵⁵

As such, Charney suggests that,

Over the long term the interests of the United States and the international community will be best served by the Charter-based system of world order. If international terrorists have a coherent goal, it is to undermine this system an objective the United States is perhaps unwittingly promoting by its actions.¹⁵⁶

On the contrary, Franck argues that U.S. action is not contradictory

154. *Id.* Charney also notes an intention here:

But the resolutions also clearly demonstrate that the United States decided not to seek Security Council sanction of its use of force, preferring to take its own military actions without disclosing the factual basis for them. When the United States did deliver a letter to the Security Council in support of its military actions in self-defense, as required by Article 51, it continued its unfortunate policy of providing conclusory reasons only, although the Council did discuss the issues raised by the letter.

Id. See Letter dated 7 October 2001 from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council, UN Doc. S/2001/946 (2001), available at <http://www.un.int/usa/s-2001-946.htm>.

155. Charney, *supra* note 147, at 837. See also, Thomas L. Friedman, *The End of NATO?* N.Y. TIMES, Feb. 3, 2002 (Week in Review), at 15: “The U.S. has become so much more technologically advanced than any of its NATO allies that America increasingly doesn’t need them to fight a distant war, as it demonstrated in Afghanistan, where it basically won alone, except for small but important contributions from Britain, Canada and Australia.” *But cf.* Byers, *supra* note 109, at 401:

The United States response to the terrorist attacks of 11 September 2001 was encouraging for those who worry about a tendency towards unilateralism on the part of the single superpower. The US deliberately engaged a number of international organizations and built an extensive coalition of supporting States before engaging in military action.

156. Charney, *supra* note 147, at 838.

to, but is in fact the fulfillment of, “the world order system embodied in the United Nations” (as Charney puts it¹⁵⁷).¹⁵⁸ Franck disputes five principal arguments cited by critics of the U.S. military action in Afghanistan. He lists the criticisms as follows:

[The military action] violates the Article 2(4) of the Charter prohibition against use of force except when authorized by the Security Council under Chapter VII.

Self-defense is impermissible after an attack has ended; that is, after September 11, 2001.

Self-defense may be exercised only against an attack by a state. Al Qaeda is not the government of a state.

Self-defense may be exercised only against an actual attacker. The Taliban are not the attacker.

Self-defense may be exercised only “until the Security Council has taken measures necessary to maintain international peace and security.” Since the Council took such measures in Resolution 1373 of September 28, 2001, the right of self-defense has been superseded.

The right of self-defense arises only upon proof that it is being directed against the actual attacker. The United States has failed to provide this proof.¹⁵⁹

To the first concern, Franck answers in the negative, citing Article 43 of the Charter. This article should have enabled the Security Council to be the sole organ or instrument to use force in international relations by creating “the system of standby collective security forces...to be deployed by the Security Council.”¹⁶⁰ The inherent right to self-defense, according to Franck, “was included in the Charter because the drafters feared that the [Article 43 standby system] might not come into being and that, accordingly, states would have to continue to rely on their ‘inherent right’ of self-defense.”¹⁶¹ Franck continues: “That concern was well founded. Article 43 languished and no standby force was ever created, let alone deployed against any of the approximately two hundred armed attacks that have taken place since 1945, leaving states’

157. *Id.*, at 839.

158. See Franck, *supra* note 143 at 839-40.

159. *Id.* at 839.

160. *Id.*

161. *Id.*

security in their own hands and that of willing allies.”¹⁶²

This interpretation of the Charter, the crux of Franck’s argument, “accords with Charter practice,” whereupon he cites to the recent resolutions that recognized on record the inherent right of self-defense. He elaborates further on the meaning of self-defense. First, the resolution “does not—and legally cannot—authorize its exercise since that right is ‘inherent’ in the victim.”¹⁶³ Second, self-defense “is a right exercisable at the sole discretion of an attacked state, not a license to be granted by decision of the Security Council. How,” he asks, “could it be otherwise? Were states prohibited from defending themselves until after the Council had agreed, assuredly there would not now be many states left in the United Nations organization.”¹⁶⁴

To Charney’s concern regarding the provision of evidence (Charney maintains that it should be before “these irreversible and irreparable measures” are taken), Franck notes that “while the production of such evidence is essential to sustaining the right, that emphatically is not a condition precedent to its exercise.”¹⁶⁵ False claims of self-defense pursuant to an armed attack can then be adjudicated and determined to be “aggression,” by the attacked state, under Article 39 of the Charter.

Franck addresses the next three criticisms listed above with equal dispatch. He says, “immediate” action is an element of self-defense only with respect to the argument for anticipatory action. The Security Council’s competence to “act” against Al Qaeda under Articles 41 and 42 as being “a threat to international peace and security” surely secures for an attacked state the same interpretive authority as to the perpetrator. Although the Taliban were not the attackers, they do fall under draft articles on state responsibility prepared by the International Law Commission, which make it clear that “a state is responsible for the consequences of permitting its territory to be used to injure another state” (Franck also cites Resolution 1368, which condemned the “sponsors of these terrorist attacks’ including those ‘supporting or harbouring the perpetrators’”).¹⁶⁶

As to point five, that the state’s inherent right to self-defense is superseded once the Security Council takes measures, Franck recalls the Gulf War for the proposition that Resolutions 661 and 678 pursuant to that war “clearly impl[ie]d that Chapter VII measures taken under

162. *Id.*

163. *Id.* at 840.

164. *Id.*

165. *Id.*

166. Franck, *supra* note 143, at 841.

Council authority could supplement and coexist with the ‘inherent’ right of a state and its allies to defend against an armed attack.” That is, the right to self-defense is “autonomous.”¹⁶⁷ Finally, Franck rebuts Charney’s argument concerning the provision of proof by reiterating that “self-defense is a right exercisable at the sole discretion of an attacked state, not a license to be granted by decision of the Security Council.”¹⁶⁸

Moreover, because this right is inherent, the attacked state has “the sole judgment” to “determin[e] whether an attack has occurred and where it originated.”¹⁶⁹ Furthermore, Franck notes, “Resolutions 1368 and 1373, while deliberately expanding the definition of what constitutes an attack and an attacker, in no way tried to take this discretion away from the victim state.”¹⁷⁰ As such,

The law does have an evidentiary requirement, but it arises *after*, not *before*, the right of self-defense is exercised.... Any other reading of Article 51 would base the right of self-defense not on a victim state’s “inherent” powers of self-preservation, but upon its ability, in the days following an attack, to convince the fifteen members of the Security Council that it has indeed correctly identified its attacker.¹⁷¹

Franck, in short, gives enormous weight to a state’s autonomous power to decide whether and when it has been attacked and when to defend itself, independent of the Security Council. Charney, on the other hand, would require that any use of force, notwithstanding the “failure” of Article 43, be within the purview of the United Nations. Charney worries if the inherent right were unconstrained, it would lead to the irrelevance of the United Nations and the post-1945 world order it has maintained despite Article 43 and numerous armed conflicts.

Although Franck’s arguments seem to make intuitive sense, even he concedes that the Security Council Resolutions following September 11 “deliberately expand[ed] the definition of what constitutes an attack and

167. *Id.* Franck continues: “It is a *reductio ad absurdum* of the Charter to construe it to require an attacked state automatically to cease taking whatever armed measures are lawfully available to it whenever the Security Council passes a resolution invoking economic and legal steps in support of those measures.” *Id.* at 842. His comments are, of course, corroborated by the Secretary-General’s comments that situate the U.S. action within the context of the Security Council measures. See Annan, *supra* note 82.

168. Franck, *supra* note 143, at 841; see also *id.* at 842.

169. *Id.* at 842.

170. *Id.*

171. Franck, *supra* note 143, at 842-43 (emphasis in original).

an attacker.”¹⁷² The resolutions did not “specifically authorize action against either Al Qaeda or the Taliban.” Coupled with a state’s inherent right to self-defense, privileging a state’s absolute right to exist above all other values that do not comport with international norms,¹⁷³ the meaning of self-defense has broadened from mere containment of the use of force under international law. Franck suggests that an attacked state will very likely, “[a]s a matter of strategic practice,” make “an intense effort to demonstrate the culpability of its adversary,”¹⁷⁴ but this is a political or, more to the point, an efficient constraint rather than a legal one.

Furthermore, Franck notes a continuity between the Gulf War and the Afghan military intervention in terms of the right of self-defense and the Security Council measures, suggesting that notwithstanding the expansion of “attack” and “attacker” under 1368 and 1373, there are no substantive difference between states’ norms with regard to the rationales underlying either the use of force or self-defense. Byers, however, as Fitzpatrick and others discussed above, suggests that “[t]oday, the question arises as to whether the right of self-defence extends to military responses to terrorist acts, particularly since most such responses will violate the territorial integrity of a State that is not itself directly responsible.” Byers adds that, “[f]or decades, the US, Israel and apartheid South Africa promoted such a claim.”¹⁷⁵

Byers quotes Secretary of State George Shultz’s 1986 words:

[T]he Charter’s restrictions on the use or threat of force in international relations include a specific exception for the right of self-defense. It is absurd to argue that international law prohibits us from capturing terrorists in international waters or airspace; from attacking them on the soil of other nations, even for the purpose of rescuing hostages; or from using force against states that support, train, and harbor terrorists or guerrillas.”¹⁷⁶

Byers then goes through an analysis of such invocations, e.g., the

172. *Id.*

173. The right of a state to exist may conflict with the right of self-determination that may accrue to some groups within the state; the right of a state to exist may also involve questions of secession, succession and recognition. See, e.g., JANIS & NOYES, *supra* note 32, at 400ff.

174. Franck, *supra* note 143, at 843.

175. *Id.*

176. Byers, *supra* note 109, at 406 (quoting George Shultz, *Low-Intensity Warfare: The Challenge of Ambiguity*, Address to the National Defense University, Washington, D.C. (15 Jan. 1986), reprinted in 25 I.L.M. 204, 206 (1986)). The so-called “Shultz Doctrine” was first articulated on October 25, 1984. See *Excerpts From Shultz’s Address on International Terrorism*, N.Y. TIMES, Oct. 26, 1984, at A12.

1985 Israeli claim of self-defense in the attack on the Tunisian Palestine Liberation Organization headquarters, an action “strongly condemned” by the Security Council. Byers notes that with respect to terrorism, “[e]ven when the State concerned is directly implicated in terrorism, acts of self-defence directed against it have in most instances received at best a mixed response,”¹⁷⁷ citing to the above-mentioned bombing of Tripoli and other such instances.

But there are those events that do change customary norms, including those governing the use of force and self-defense. Byers cites the 1976 example of the Israeli commandos storming a hijacked plane in Entebbe, Uganda, killing the pro-Palestinian hijackers and rescuing most of the passengers and crew. He says,

[a]lthough many of the passengers were Israeli, Israel itself had not been attacked. Nor had it sought Uganda’s permission for the raid. But most States tacitly approved of what Israel had done. The requirements of necessity and proportionality were, as a result, loosened somewhat with regard to the rescue of nationals abroad.¹⁷⁸

Likewise, Byers notes that,

As a result of the legal strategies adopted by the US, coupled with the already contested character of the rule and a heightened concern about terrorism world-wide, the right of self-defence now includes military responses against States which actively support or willingly harbour terrorist groups who have already attacked the responding State.

As such,

Although previous attempts to establish a right to engage in self-defence against terrorists proved largely unsuccessful due to a lack of international support, the situation in the aftermath of 11 September was considerably more conducive. Having seized the opportunity to establish self-defence as an accepted basis for military action against some terrorist attacks, the [U.S.] will now be able to invoke it again—even when the circumstances are less grave. It is thus plausible to regard the choice of justification as, in part, a strategic decision directed at loosening the legal constraints on the use of force to the *ongoing* advantage of the

177. Byers, *supra* note 109, at 407.

178. *Id.* at 406.

[U.S.].¹⁷⁹

Byers analyses the changes in customary law as a result of the actions of states and their acceptance or rejection by the majority of interested members of the international community. It is true that neither Franck nor Charney use the language of war as such; the latter, in fact, puts the word in inverted commas, cordoning it off from his argument for a collective and legal, rather than a unilateral and political, response to the attack. However, I have moved through their arguments to suggest that at a deeper level there is a grammar at play that has shaped the norms governing the use of force under international law, and that grammar or, if you will, inflexion, is the war paradigm. As Byers points out, the change in the meaning of self-defense as a result of the international community's acquiescence is "strategic." This once more affirms the triumph of the practical, the "realist" perspective.

Looking at Franck's argument, it is apparently as paradigmatic of the practical, law-as-politics or "Lotus presumption,"¹⁸⁰ as one might wish. There is something deeply moral about the entrenched inherency of the right of self-defense. It is virtually unassailable. The detail of a failed Article 43 security architecture is incidental and irrelevant. At its core, international law preserves these *a priori*, natural law-seeming rights that precede the positivist reduction of custom to written form within the Charter. "How," Franck asks rhetorically, "could it be otherwise?" And yet the interpretation of the right of self-defense has been otherwise, as the many attempts by states to achieve this normative extension of the self-defense rationale to terrorist acts amply attest.

Not only are the naturalness, the inevitability of the right redolent (in far subtler terms than if Franck had simply trotted out the "magnitude" argument in reference to September 11) of the just war theories that append the eschatological or divine in terms of the war paradigm discussed in Part I. Also, the naturalness and inevitability of the theory of an inherent right have created a new norm of international law, to the extent that the world community has raised no objection to it (as Byers argues). The world community has submitted itself to the myths that would reference such an inherent or natural right at the center of the norms governing the use of force under international law.

Two things must then take place. First, these norms govern violence, and thus for the world community to acquiesce in a particular story of

179. *Id.* at 410 (emphasis in original).

180. The Lotus presumption holds that "the fundamental principle in international law is that all states' actions are presumptively legal. States are only bound to norms by consent." S.S. Lotus (France v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7).

inherency is also to submit to its valorization as an authorizing strategy (that is, if the U.S. can do this, so can other states). Second, the consequence of acquiescence in the norm of inherency, or the reimbrication of natural law theories within an ostensibly “realist” interpretation of the law, is that the idea of self-defense according to a specific war paradigm projects that paradigm, possibly at the expense of others.

The extension of the definition of self-defense according to a war paradigm premised, to return for a moment to the rhetorical categories, on the *pathos* (eschatological war) as opposed to the *ethos* or *logos* (rational or juridical models) will mean a shift from rational/legal to emotional criteria for determining the consensual or positive creation of norms under international law. So it is that law and language meet with either redemptive or devastating consequences, depending upon where you are along the moral divide.¹⁸¹

III. CONCLUSION

Rhetoric:...“that sea of communicative transactions—the impersonal drama of what occurs among us, unnoticed and without deliberation or grandeur—the dense tangle of our triviality.”¹⁸²

This article has argued that the language of war shapes and creates the international legal norms governing the use of force, and that this much has been reflected not only in the last century’s various attempts to ban war, but also under the rationale of the right of self-defense under the UN Charter. I have argued that the language of war, within the contexts of the Pact of Paris, the Charter, and the present war on terrorism, reflects at a deeper level an eschatological view of war, falling under the rhetorical category of epideictic speech, or speech that

181. On the domestic level, “[The war on terrorism] has provoked a sprawling legal battle, now being waged in federal courthouses around the country, that experts say has begun to redefine the delicate balance between individual liberties and national security.” The moral divide, apparently along ideological lines, is largely between lower courts that have “pushed” the government back, while “Federal judges have, however, allowed the government to hold two American citizens...incommunicado and without a road map for how they might even challenge their detentions.” Adam Liptak et al., *After Sept. 11, a Legal Battle On the Limits of Civil Liberty*, N.Y. TIMES, Aug. 4, 2002, § 1, at 1. See also Neil A. Lewis, *Ruling on Detainees*, N.Y. TIMES, Aug. 4, 2002, § 4, at 2 (“Federal judges have ruled both for and against the Bush Administration’s war on terrorism.”).

182. *Some Definitions of Some Rhetoric*, at <http://www.stanford.edu/dept/english/courses/sites/lunsford/pages/defs.htm> (last visited July 26, 2002); John Bender & David E. Wellbery, *Rhetoricity: On the Modernist Return of Rhetoric*, in *THE ENDS OF RHETORIC: HISTORY, THEORY, PRACTICE* (John Bender & David E. Wellbery eds., 1990).

appeals primarily to the emotions (*pathos*) at the expense of legal and rational/political speech (*logos* and *ethos*). On the basis of a rhetorical analysis, we can predict that the norms governing the use of force will continue to be molded in a certain direction to the extent that we talk of war with this inflection.

Any piece of rhetoric, and particularly language such as the war on terrorism that has far-reaching consequences, must be an interpellation of the categories in order to be effective as persuasion. That is, it is not a criticism to suggest that our view of the present war rhetorically recuperates the just war doctrine, but rather a critique of the discourse's failure to persuade because it is striated, given over to an univocal narrative. Wars are always undertaken with a complex set of motives, aims, and rationales. I might argue that our view of the present war would not be fundamentally altered—but our philosophical and psychological predispositions might be clarified—if we called it instead a “crusade” or a “jihad.” But there would be a fundamental alteration if the war were thought of as, or called, an “emergency,” for instance.

The point is that the presuppositions underwriting the just war doctrine have always connoted the crusade, the war of religion, passion, and messianism, a departure from the view of war as police action, contained (ideally) by legal and, as I hope to show in the following, ethical considerations. This is not to suggest that one jettison the “pathic” elements of war. On the contrary, it was the denial of just such human investments as expressed by the doctrine of the just war, under the Pact of Paris and of the UN Charter, that allowed those attempts at “eliminating” war to remain haunted and, because denied, compromised by the ancient view of war as morally justifiable.

The proposal is to integrate the three rhetorical views adumbrated here as they relate to the three theories of war. The language of war, to be persuasive, must not only emphasize the pathic rationale for war, but also the juridical and the instrumental/rational war paradigms, or the *logos* and the *ethos*. This would mean that the shape given to the norms of international law by the language of war, to the extent that this were the case, would be persuasive or, put another way, rational and instrumental in terms of the kind of world order the legal instruments have aspired to create within the last century following various wars. It would mean that the legal regulation of the use of force would incorporate both the passion with which men and women launch wars, as well as the political and juridical constraints that limit them. In the following, I suggest why the integration of the rhetorical/theoretical categories, and thereby the constraints upon them, is necessary, both

domestically and in terms of the international norms that are created, and how this “dense tangle of our triviality”¹⁸³ might be achieved.

The idea of just wars, as Friedman’s article suggests,¹⁸⁴ is continuous with a cultural strain, notwithstanding the attempt, through legal means, to eradicate it. But the war talk within which the doctrine is revived fails, as rhetoric, to persuade. Consider, for instance, recent references to the war on terrorism within the media in light of the current domestic concern with corporate responsibility and malfeasance. Frank Rich, for example, suggests that, “Wagging the dog no longer cuts it.”¹⁸⁵ Here, it is evident that the administration’s references to the war on terrorism are perceived as a cynical deflection from the travails it has experienced on the domestic front. “If the Bush administration wants to distract Americans from watching their 401(k)’s [sic] go down the toilet, it will have to unleash the whole kennel. Maybe only unilateral annihilation of the entire axis of evil will do.”¹⁸⁶

Rich’s point has to do with the importance of rhetoric as an art of persuasion, and reflects what happens when rhetoric fails: in the context of the war on terrorism, persuasion has curdled into propaganda.¹⁸⁷ Take, for instance, Rich’s further comments about the deployment of the discursive war on terrorism barely a year after the events of September 11:

Though the fate of John Walker Lindh was once a national obsession, its resolution couldn’t knock Wall Street from the top of the evening news this week. Neither could the president’s White House lawn rollout of the homeland security master plan. When John Ashcroft, in full quiver, told Congress that the country was dotted with Al Qaeda sleeper cells “waiting to strike again,” he commanded less media attention than Ted Williams’s corps.¹⁸⁸

Rich notes that the administration’s plans to extend the war on

183. *Id.*

184. Friedman, *We Are All Alone*, *supra* note 65.

185. Frank Rich, *The Road to Perdition*, N.Y. TIMES, July 20, 2002, at A25.

186. *Id.*

187. For a discussion on the movement from persuasion to propaganda, see Vinay Menon, *The Art of Persuasion: Propaganda Machines Go Into Overdrive During Times of Strife*, TORONTO STAR, Oct. 3, 2001, at D1: “If Bush wants to maintain and sustain the effort, the emotional propaganda will be okay for a short war, but in the long term he needs to deliver persuasion. He needs to form consensus and argue with substance, not slogan” (quoting Anthony Pratkanis, professor of psychology at the University of California in Santa Cruz and the author of *AGE OF PROPAGANDA: THE EVERYDAY USE AND ABUSE OF PERSUASION* (1991)).

188. Rich, *supra* note 185.

terrorism to Iraq are not without consequences for the domestic debate on corporate malfeasance at the highest levels of the current administration. After discussing questions about President Bush's investments during his father's administration, Rich notes that, "[t]hese questions, like the companion questions about Halliburton's dealings with Iraq on Mr. Cheney's watch, are not ancient history but will gain in relevance in direct proportion to the expansion of the war on terrorism and the decline of the Dow."¹⁸⁹ The issues are interrelated, and the rhetoric of war is not an innocent or discrete phenomenon within the larger debate.

One can speak of the predictive nature of the discourse not only in terms of the continued shaping of international norms, but also of both local and international expectations engendered by the language of war. One can also, therefore, speak of the prescriptive alternatives to the discourse in terms of other paradigms, both juridical and political, including military alternatives. That the war on terrorism (already) accrues a certain cynicism is no accident. I believe it has to do with the appeal of the language itself (to the *pathos*) and the extent to which this appeal is at the expense of alternative rhetorical strategies.

This brings me to the reasons for a rhetorical analysis of the contribution that language makes to the creation and the shaping of legal norms at the international level. Regarding the categories of the *logos*, *pathos*, and *ethos*, if we think of the *logos* as the juridical war paradigm, its absence from the current invocation of just wars within the language of war (*pathos*) might seem obvious. But what of the *ethos*? What does its absence connote, and how might its inclusion shift the discourse on the war on terrorism? In other words, what (as the *ethos*) is lacking from the rhetoric of war that eviscerates its persuasive force both at the local (see Rich, *supra*) and at the international levels, notwithstanding its impact on international and domestic norms in the short term?

Here is an interpretation of the *ethos* that I think underlines the view that a rhetorical analysis is both a rigorous and a useful element in the response to terror, situating terror as in part a discursive phenomenon. Citing the shift in Kenneth Burke's *A Rhetoric of Motives*¹⁹⁰ from a rhetoric grounded in persuasion to one based instead upon identification, Michael Halloran offers the following characterization of the *ethos* within the context of modern rhetoric:

189. *Id.*

190. KENNETH BURKE, *A RHETORIC OF MOTIVES* (1950).

[W]hen both speaker and audience are assumed to inhabit the same world, it is sufficient that both attend to the argument. But when speaker and audience inhabit different worlds, it becomes possible for both to hear without listening.... For the ancients, *ethos* consisted in the degree to which the speaker embodied the virtues most revered by the culture, the degree to which he had apparently internalized all that was best in the tradition that defined the shared world of speaker and audience.... In our time of fragmentation and isolation, *ethos* is generated by the seriousness and passion with which the speaker articulates his own world, the degree to which he is willing and able to make his world open to the other, and thus to the possibility of rupture. If...rhetoric is the means whereby the self and its world are constituted, *ethos* is the measure of one's willingness to risk one's self and world by a rigorous and open articulation of them in the presence of the other (337-339).¹⁹¹

Halloran essentially offers a definition of the ethical requirement of rhetoric, and if we relate this to the theory of war under the category of deliberative speech it is easy to see why. War as rational, instrumental, and national grounds the view of human action as ethical in terms of the extension of the self as "a rigorous and open articulation...in the presence of the other." The *ethos*, or the ethical as a dimension of the language of war as a response to terror, must then incorporate the means by which the human action, the use of force, is underwritten by an authority (*auctoritas*) inclusive of, but beyond, the *pathos*, that is, the speaker's "seriousness and passion" constrained by reason.

And as I have argued in terms of the constraints of the law upon the war paradigms, the ethical constraints are equally important. Philip B. Heymann, a former deputy attorney general under President Clinton, notes the following:

But while this is a more dangerous terrorism than we've ever know[n], it isn't war as we've known it. To say that under these new circumstances, the president can, as if at war, do everything without Congressional consent, that civil rights and liberties have to take a back seat and that this will go on, not for five years, like World War II, but as long as terrorism goes on, seems to me to

191. S. Michael Halloran, *On the End of Rhetoric, Classical and Modern*, 36 COLLEGE ENGLISH 621, 621-31 (1975), quoted in Collin Gifford Brook, *The Fate of Rhetoric in an Electronic Age*, 1 ENCULTURATION 1, 3 (1997), at http://enculturation.gmu.edu/1_1/brooke.html (last visited July 29, 2002).

be quite frightening.¹⁹²

Heymann notes further that, “by labeling the United States’ fight against terrorism a war...it has already put pressure on the society to abandon its traditional standards of rights, liberties and basic fairness.”¹⁹³ And so the rhetoric of war, to the domestic “self” described by Heymann, is banal, compartmentalized, and, as suggested by Rich, cynical, precisely through its removal from a sense of “basic fairness,” by its fundamental elision of a constraining ethical ground.

Similarly, international norms are shaped by a number of factors. These include the way we construe meaning, tell stories, and identify the contexts for human action. Michael Ignatieff, arguing for a more full-fledged program of nation building following the military action in Afghanistan (rather than the current “nation building lite” that is an attempt to obtain empire “on the cheap”¹⁹⁴) notes that the American Special Forces in Afghanistan “aren’t social workers”:

They are an imperial detachment, advancing American power and interests in Central Asia. Call it peacekeeping or nation-building, call it what you like—imperial policy is what is going on in Mazar [-i-Sharif]. In fact, America’s entire war on terror is an exercise in imperialism. This may come as a shock to Americans, who don’t like to think of their country as an empire. But what else can you call America’s legions of soldiers, spooks

192. Alison Mitchell, *A War Like No Other: The Perilous Search for Security at Home*, N.Y. TIMES, July 28, 2002 (Week in Review), at 4.

193. *Id.* On the delimitation of domestic liberties and security, see also Adam Clymer, *Worker Corps To Be Formed To Report Odd Activity*, N.Y. TIMES, July 26, 2002, at A26 (criticizing Attorney General Ashcroft’s TIPS [Terrorism Information and Prevention System] program as a “snitch system”). For an interesting argument on the counterproductive effects of TIPS on security, see Michele Kayal, *The Societal Costs of Surveillance*, N.Y. TIMES, July 26, 2002, at A21:

Many have objected that such a program would violate civil liberties and basic American principles. But stoking people’s fear to set neighbor upon neighbor, service worker upon client, those who belong against those who don’t, does something more: it erodes the soul of the watcher and the watched, replacing healthy national pride with mute suspicion, breeding insular individuals more concerned with self-preservation than with society at large. Ultimately it creates a climate that is inherently antithetical to security.

194. Michael Ignatieff, *Nation-Building Lite*, N.Y. TIMES, July 28, 2002, § 6 (Magazine), at 28:

These garrisons are by no means temporary. Terror can’t be controlled unless order is built in the anarchic zones where terrorists find shelter. In Afghanistan, this means nation-building, creating a state strong enough to keep Al Qaeda from returning. But the Bush administration wants to do this on the cheap, at the lowest level of investment and risk. In Washington they call this nation-building lite. But empires don’t come lite. They come heavy, or they do not last. And neither does the peace they are meant to preserve.

and Special Forces straddling the globe?¹⁹⁵

Ignatieff argues, in effect, that the discourse on the war on terrorism would change in meaning if its ultimate aims and purposes and its underwriting imperialist intentions were acknowledged and clarified. The change in the parameters of meaning would lead to a change in policy, as the U.S. would pursue a more complete and, in the context of Afghanistan, responsible imperial effort.¹⁹⁶ Only then would its war on terrorism have any hope of success; only then, in other words, would the sense of the war, as garnered from the discourse as endless or apocalyptic, be constrained and rendered nugatory.

The vehicle by which this shift in meaning would occur is the juridical paradigm. War and law are not, therefore, inherently antithetical, despite the premise under the juridical paradigm that war is a cataclysm or an affliction, something to be eradicated. This is as much as to reiterate the view already seen in the other war paradigms outlined in Part II. That is, the overemphasis of the eradictory premise here would be unsustainable, leading to the aforementioned evisceration of the legal instruments in their suppression of just war theories (as well, of course, as rational war theories). That is, just as untrammelled reason, under the political war paradigm, leads to aridity, and unbridled passion under the global war paradigm leads to endless war, so also the legal model divorced from the reality of war as an aspect of power and passion would result in empty rhetoric and effete, irrelevant norms and standards.

Together, all three rhetorical categories and the theories of war they reflect ultimately shape the norms governing the use of force as balanced between political necessity, juridical restraint, and the will to annihilatory violence that is every bit a part of the human narrative as the hunger for peace and security. Should this mean, in the short term, that the rationale for using force as a function of a state's "inherent right of self-defense" be abandoned? Should the U.S., in other words, have sought United Nations Security Council authorization before attacking

195. *Id.*

196. Ignatieff, *supra* note 195, at 59-60:

Nation-building is the kind of imperialism you get in a human rights era, a time when great powers believe simultaneously in the right of small nations to govern themselves and in their own right to rule the world. Nation-building lite is supposed to reconcile these principles: to safeguard American interests in Central Asia at the lowest possible cost and to give Afghanistan back a stable government of its own choosing. These principles of imperial power and self-determination are not easy to reconcile. The empire wants quick results, and that means an early exit. The Afghans want us to protect them and at the same time help them back on their feet. That means sticking around for a while.

and routing the Taliban in Afghanistan in the beginning of its war on terrorism? Is the linkage between the “war on terrorism” and “self-defense” indefensible?

The debate around the war on terrorism is linked to concerns regarding the recent U.S. “unsigning” of the Rome Statute. Both narratives subtend a story of the U.S. tendency toward unilateralism. But considering that self-defense, as discussed in Part II, has been a rationale for the unilateral use of force against terrorism long before the events of September 11, I would suggest that the inherent right of self-defense has been co-opted by a specific rhetoric of war. That is, the self-defense rationale is a rationale for going to war, in the eschatological sense, against terrorism. It is the linkage between war, terrorism, and self-defense that has shaped the norms governing the use of force under international law. And it is the linkage, invested with the meaning of “justifiable” or moral warfare at the expense of alternative paradigms that portends a certain discursive rubric, lending a specific complexion to the coterminous debate about the U.S. unilateral tendencies in the international arena.

As noted in Part II of this article, the world has repeatedly rejected a doctrine of self-defense that links self-defense and terrorism in part, at least, because the very states that deploy the linkage themselves on occasion support terrorist organizations and regimes on the basis of the self-defense rationale. But the language of war with a global and apocalyptic inflection taps into an emotional mythos that was highly persuasive in the immediate aftermath of September 11. Since then, there have been criticisms concerning this linkage and the consequences it has had in shaping the rules.

Although the criticism is often couched in terms of impatience with U.S. unilateralism, I argue that this misses the important element of the persuasive power of the rhetorical linkage itself. As William C. Wohlforth, an associate professor of government at Dartmouth put it, “You hear Europeans say Bush is a cowboy from Texas.... But when the Europeans were at the top of the international heap, they were hard-bitten realists about using power, and it was the United States that was trying to outlaw war.”¹⁹⁷ That is, few “blame [the U.S.] for trying to control the international rules of the road,”¹⁹⁸ as this is nothing new to the power game.¹⁹⁹ What is new, I suggest, is the extent to which

197. James Dao, *One Nation Plays the Great Game Alone*, N.Y. TIMES, July 7, 2002, § 4 at 1.

198. *Id.*

199. *But see, e.g.,* Kagan, *supra* note 58, at 1, on the controversial question of the divergence of views between Europe and America concerning power:

acquiescence in the new norm of self-defense, or the linkage, is on the basis of a jejune rhetorical and philosophical rationale for war, lacking analytical clarity and political rigor. Indeed, the “war on terrorism,” invested as such, might contribute to the much-feared parting of ways, or “decoupling,” between the United States and Europe, as September 11 clarifies the disparities in power and interests (the conflict between unilateralism [U.S.] and international law [Europe]) between them.²⁰⁰

War, self-defense, and terror have been linked for at least twenty years, with little persuasive effect until September 11. After September 11, the world community, at least as represented by the UN Security Council, was moved to extend the parameters of the self-defense doctrine as it acquiesced in the U.S. unilateral military action and its war on terrorism. The emotional aftermath of September 11, fear, vengeance, and punishment, invested the terms “war” and “self-defense” with meanings that delimited the rational, political and juridical constraints with which those terms might still be imbued.

But moving beyond *pathos* is always at risk to the self in its confrontation with the enemy, the other.²⁰¹ Yet, to the extent that the world community, through its national leaders, UN representatives, and

Europe is turning away from power, or to put it a little differently, it is moving beyond power into a self-contained world of laws and rules and transnational negotiation and cooperation. It is entering a post-historical paradise of peace and relative prosperity, the realization of Kant’s “Perpetual Peace.” The United States, meanwhile, remains mired in history, exercising power in the anarchic Hobbesian world where international laws and rules are unreliable and where true security and the defense and promotion of a liberal order still depend on the possession and use of military might.

For a defense of the necessity for multilateralism for both Americans and Europeans (i.e., and not simply “for the weak”), see Steven Erlanger, *America the Invulnerable? The World Looks Again*, N.Y. TIMES, July 21, 2002, § 4, at 3 (discussing the views of Francois Heisbourg of the Foundation for Strategic Research in Paris):

Multilateralism is not for the weak, but also for the strong, he [Mr. Heisbourg] said. “America became a superpower through multilateralism and the Atlantic Charter in 1941. It is a superpower not by its military and economic weight but by virtue of sustaining permanent alliances, and multilateralism is at the heart of those alliances.”

Erlanger also quotes Josef Joffe, editor in chief of *Die Zeit*:

“It is also true...that multilateralism is the weapon of the weak, and that there is an unarticulated power game going on, with the Europeans trying to restrain the United States like the Lilliputians did Gulliver, through international regimes.” But this is an old theme, dating to the 60’s.

Erlanger, *supra* note 199.

200. *Id.* (quoting Jeffrey Gedmin, director of the Aspen Institute Berlin): “‘They need us less in relative terms after the cold war and in relative terms, after 9/11, we need them less, too,’ Mr. Gedmin said of the Americans. ‘And Kagan says, ‘Maybe that’s O.K.,’ but I don’t know if it’s O.K. I have a real fear of decoupling.’”

201. “‘This war will be a challenge for democracy itself,’ Pratkanis predicts. ‘Because democracy thrives when everything is in the light of day. Now democracy in the United States will require a high degree of trust.’” Menon, *supra* note 180.

their constituents at home, is committed to peace and security, which includes the concerted, cooperative fight against terrorism both at home and abroad, the accreted and variegated language of war—acknowledging war as both passionate, as instrumental, and just as often as law’s violence—must be continuously and rigorously examined.