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WAR AND TERRORISM: LAW OR METAPHOR

Louis Henkin*

Some years ago, I achieved a measure of fame—or notoriety—by proclaiming: *Away with the S Word*.¹ I had found that the word “sovereignty,” the “S” word, was being used, widely and carelessly, without regard to its authentic mean-

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1. Louis Henkin, *The Mythology of Sovereignty* (notes from addresses delivered at the Annual Meeting of the Canadian Council on International Law, Oct. 1992, and the International Law Weekend in New York, Nov. 1992), reprinted in *Notes From the President*, ASIL NEWSLETTER, Mar.-May 1993, at 1. For an earlier expression, see Louis Henkin, *International Law: Politics, Law and Functions*, 216 Rec. Des Cours 24-28 (1989-IV).

ing and its significance in contemporary international law.²

Perhaps, a small measure of success in the battle against the "S" word has encouraged me to "take on" two other words: the "W" word, "war," and the "T" word, "terrorism." I have concluded that their careless and metaphoric overuse threatens to confuse and dilute their significance in international law today.

Hence, this article, my second attempt to "cleanse" our discussions of international law.

I. "WAR" AS LAW OR METAPHOR

My resistance to metaphorical overuse of the word "war" is even more radical than my strictures against the loose use of the "S" word. I suggest the need to avoid metaphorical overuse of the word "war" in particular: a term that was at the heart of traditional international law;³ that appears in the United States Constitution;⁴ that is the subject of debate and

2. I was particularly troubled by the invocation of "state sovereignty" in argument against an international law of human rights. Such law, it was argued, sought to regulate how a state behaved towards its own inhabitants, in derogation of the state's sovereignty. I urged that an international law protecting individual human rights in fact promoted important "sovereign interests" of the state—"freedom, justice and peace"—as recognized in the preambles to the Universal Declaration of Human Rights, acclaimed by virtually all states, and the many international covenants and conventions that have been adhered to by many states. I had concluded that wide, and careless, and metaphoric, invocation of the "S" word threatened to dilute its authentic meaning in international law, and that a state properly exercised "sovereign rights" when it adhered to international human rights law. In fact, an international law of human rights, both in treaties and in customary law, seems firmly established.

3. I am particularly concerned for the integrity of the term "war." War was near the heart of traditional international law. The word appears in the Constitution of the United States in the enumeration of the powers of the United States Government; it is central to controversy as to the separation of powers of "Congress and the President" and their respective "war powers." It is the subject of major U.S. legislation defining their respective powers. See 50 U.S.C. § 1541 (2000). The entire War Powers Resolution is codified in 50 U.S.C. §§ 1541-1548 (2000). See also, O'CONNELL, *INTERNATIONAL LAW AND THE USE OF FORCE* (2004); HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION*, Conclusion, ch. X (2d ed. 1996). See also HENKIN, *RIGHT V. MIGHT* (2d ed. 1991); HENKIN, *INTERNATIONAL LAW: POLITICS AND VALUES* 125-28 (1995); George W. Bush, Remarks following a meeting with the National Security Team, 37 WEEKLY COMP. PRES. DOC. 1302 (Sept. 12, 2001), referring to the attacks of September 11 as constituting acts of war.

4. U.S. CONST. art. I, § 8, cl. 11 (giving Congress the power "to declare war"). The Constitution grants Congress the power also "to provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions," U.S. CONST. art. I, § 8, cl. 15, and "[t]o make all Laws which

controversy as to the powers of the political branches of the U.S. government—as in discussion of “War-Powers” —and in major U.S. legislation—as in the War Powers Resolution of 1973.⁵

War is referred to, but is not defined, in the U.S. Constitution.⁶ It is mentioned when the Framers granted to Congress the power “[t]o declare War.”⁷ By clear implication, they referred to “war” as it was understood in international politics and in international law in the eighteenth century.

My suggestion that we avoid the word “war” is serious, even if some may deem it quixotic. In 1945, I am persuaded, international law sought to eliminate the word “war,” the legal status of war, the institution of war, and the concept of war. But, the United States has not removed the word from the U.S. Constitution, or sought to eliminate it from discussion of U.S. Constitutional authority, from important U.S. legislation, or eliminated it from the daily press or from wide popular use.

Recently, we have again heard innumerable references to “war,” often with the implication that “war” is not governed by law. There have been frequent invocations of the Latin adage “*inter arma silent leges.*”⁸ In fact, we know, the Latin phrase does not suggest that there can be no law during military “hostilities” (the term that Congress used in the War Powers Resolution).⁹

“Hostilities” is a colloquial description without agreed legal implication. In fact, there is a branch of international law pertaining to inter-state hostilities, which we now call “humanitarian law.” There are also references to “war-crimes” in recent international agreements, such as the Charter of the new International Criminal Court.¹⁰ Perhaps none of these documents use the term “war” strictly, in the sense of war be-

shall be necessary and proper for carrying into execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.” U.S. CONST. art. I, § 8, cl. 18.

5. 50 U.S.C. § 1541 (2000).

6. See *supra* note 4.

7. U.S. CONST. art. I, § 8, cl. 11.

8. Literally, “among arms, law is silent.”

9. 50 U.S.C. § 1541 (2000).

10. Rome Statute of the International Criminal Court, July 1, 2002, 2187 U.N.T.S. 90.

tween states, as in traditional international law. (The term “war” also remains in other colloquial usages, and in special contexts, such as “internal war” or “civil war.”)

After decades of peace, or at least “non-war,” the concept of “war” again impinges on life in the United States, as in the conflicts in Iraq and Afghanistan, preoccupying all levels of government and punctuating the daily press. In these contexts, it is not always clear whether the invocations and the references to “war” are rhetorical, metaphorical, constitutional, legal, or some combination of these.

II. WAR IN INTERNATIONAL LAW

It is not necessary to dwell on the age of war (or the age of wars)—the Age that included two World Wars, Korea, Vietnam; and now, Iraq, where thousands have fought and are fighting; or what President George W. Bush has declared as *war against terrorism*.¹¹ In these pages, I attempt to clarify, briefly, the international law of war.

I refer to the international law of war in the twenty-first century. “War” is a term that has been known throughout, and prior to, recorded history, specifically with regard to relations between nations, states, or tribes. It was known in ancient and modern languages. It had a prominent place in the history of international law and international relations. For centuries, there was an agreed international law of war: law on the impact of war on relations between nations, and law on the conduct of war (which we now call “humanitarian law”). There have been standards for when war was legal and justified, and what weapons may lawfully be used. There has also been law distinguishing between soldiers and civilians, and law regarding the treatment of prisoners. International law had an elaborate and complex body of law, applicable in times of war or peace. The United States Constitution gives Congress the power to declare war, and during more than 200 years, Congresses and presidents have struggled to define their respective authority to bring the United States into war, to govern the conduct of war, and to end war.

11. President’s Address to a joint session of Congress and the American People, *available* at <http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html> (last visited July 30, 2005) (on file with the *Santa Clara Law Review*).

Modern international law divided relations between states during peace from relations during times of war. International law, both customary law and treaty law, addressed and generally distinguished between law that applied during times of peace and law that pertained during times of war.¹²

In my view, the traditional concept and status of war between states was intended to end in 1945, when the nations of the world adopted the United Nations Charter and established the United Nations Organization. (The only law that is applicable to hostilities today is “humanitarian law” —*ius in bello*.)¹³

The U.N. Charter is not a blueprint for war. The Charter does not contain the word “war,” except in its preambular rhetorical justification for adopting the Charter (“to save succeeding generations from the scourge of war”).¹⁴ In my view, the U.N. Charter was designed to abolish war, both as a concept in international law, and as a legal institution. Before the U.N. Charter, war was a lawful international activity, and a state could convert, virtually at will, from a regime of peace to a regime of war. As a matter of law, however, the U.N. Charter eliminated that option. The international law of the U.N. Charter replaces “war” and law of war with an international regime for maintaining—or restoring—international peace and security. And the Charter vests responsibility for accomplishing that objective in the United Nations Security Council.¹⁵

As an “exception,” the Charter recognizes and reserves the right of a state, which has been the victim of an armed attack, to exercise its “inherent right of self-defense” until such time as the Security Council has taken measures to restore and maintain international peace and security. The inherent right of self-defense contemplates and permits necessary resort to hostilities. It does not, however, contemplate and move toward a traditional “state of war,” with its traditional implications and legal consequences for the states involved (and for other states). In sum, there was to be no “war” under

12. This is now known as humanitarian law.

13. Literally, “law during war.”

14. U.N. CHARTER, pmb., para. 1.

15. See U.N. CHARTER, arts. 39-51.

the Charter.¹⁶

III. TERRORISM

The word “terrorism”—the “T” word—has no strict, established, historical meaning in international law. Although, in some circumstances, acts which we may denominate “acts of terrorism” may breach or threaten international peace and security and thus invite the concern and responsibility of the U.N. Security Council, the word “terrorism” does not appear in the U.N. Charter. And the Security Council may authorize measures which might be described, colloquially, as “war against terrorism.” But “war against terrorism” is a colloquial use of the term “war.” There was terrorism before September 11, 2001, and doubtless there will be terrorism in the future. If there is now an “age of terrorism,” we do not know how long it will last, in what forms, or with what intensity. But nothing in the U.N. Charter, or elsewhere, suggests that the Charter is not to apply or that it must be applied differently with respect to “terrorism.”

Then came September 11, 2001. On September 12, an address by President George W. Bush included the following: “The deliberate and deadly attacks which were carried out yesterday against our country were worse than acts of terrorism. They were acts of war.”¹⁷

Shortly thereafter, the President of the United States declared that September 11 was an act of war¹⁸ and that the United States was at war against terrorism.¹⁹

When President George W. Bush speaks of war against terrorism,” a question arises as to whether he is referring to law, as when the U.S. Constitution gives Congress the power to declare war, or whether the “war against terrorism” is a metaphor, similar to “war against poverty?” Is the authority of the president of the United States as Commander in Chief of the armed forces the same with respect to the “war against

16. Unless the U.N. Security Council should decide to establish it, an unlikely hypothesis.

17. George W. Bush, Remarks following a meeting with the National Security Team, 37 WEEKLY COMP. PRES. DOC. 1302 (Sept. 12, 2001).

18. President’s Address to a joint session of Congress and the American People, available at <http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html> (last visited July 30, 2005) (on file with the *Santa Clara Law Review*).

19. *Id.*

terrorism” and against particular acts of terrorism, like the president’s accepted authority to defend the United States against military attack?

Our times have been described as the Age of Rights.²⁰ However, at least since September 11, 2001, our times also have been characterized as the Age of Terrorism. Both the Age of Rights and the Age of Terrorism have earned their characterizations. But can the Age of Rights and the Age of Terrorism co-exist? Civilized societies have sought to address both the Age of Rights and the Age of Terrorism through law. Some national societies have chosen to address them through national law (e.g., the United States through the U.S. Constitution and U.S. legislation). Some states have sought to cooperate with other states by promoting norms of international law and international organizations.

Wars, hostilities between organized societies, have bedeviled mankind since prehistoric times. Contrary to ancient maxims, law exists and is not silent during times of hostilities and of war. The Constitution of the United States addresses war and hostilities by giving Congress power to declare war and by designating the president as Commander in Chief.²¹ In our times, cooperating states have addressed the scourge of war by establishing treaties and organizations, implemented primarily through the United Nations (and regional organizations). Through such international cooperation, nations have agreed to prevent war or, at least, redress its horror. During the same periods, states have also agreed to promote human rights, individual rights, and group rights.²²

On that occasion and in other recent statements to Congress, to the American public, and to the world, President Bush spoke of “war,” or of the “war against terrorism.”²³ Was he speaking metaphorically, as presidents have sometimes spoken of “war against poverty”? Or did he use that locution to suggest reference to the constitutional law of war, and to the international law of war? If so, was he asserting, promising, or announcing the intention to pursue earlier presidential pronouncements asserting public policy and authority to take active action to prosecute that war?

20. See HENKIN, *THE AGE OF RIGHTS* (1990).

21. U.S. CONST., Art. 1, § 8, cl. 11; Art. 2, § 2, cl. 1.

22. See, e.g., HENKIN ET AL., *HUMAN RIGHTS* 426 (1999).

23. See *supra* notes 17-19 and accompanying text.

War is not defined authoritatively in international law. It is understood in international law today, if only by negative implication, from the U.N. Charter created by the United Nations.

If, as I have suggested, the Charter intended to abolish war as a legal concept in international law, it would contribute to clarity and understanding if we could do away with that "W" word, eliminating it from contemporary legal discourse.

If the word "war" cannot be eradicated, it must be used carefully, cautiously. Otherwise, the effects of its misuse could be compounded when used in conjunction with other "difficult" and often misused words. One phrase that has become increasingly popular in recent years is "the war against terrorism."

Like "war," the word "terrorism"—the "T" word—also needs to be used cautiously. In our day, because its use is so common, its use as a legal concept also needs great care. I am learning to use it with care, and trepidation. We would do better to eschew it, and address instead specific forms of terrorism, such as "hijacking" of airplanes.

What are some of the difficulties with "terrorism" in legal parlance? It has no official, legal definition. It has been used to refer to various unlawful uses of force, whether the unlawful use violates the law of the country in which it takes place, or from which it emanates. Sometimes, colloquially, it seems to refer to uses of force by a state, or with state complicity, against targets in other states. In various contexts, force is illegal because it violates the domestic law of one or more countries, the international law of the U.N. Charter, or other accepted norms of international law.

Although the international law against terrorism needs clarification, there are some principles that are not in dispute. For example, a state may not use force against the political independence or territorial integrity of another state.²⁴ Also, under other principles of international law, a state may not encourage such uses of force by its citizens or by other persons acting from its territory. A state may not tolerate, or fail to prevent, "terrorist" actions from within its territory, or by persons subject to its authority, against the territory of

24. See U.N. CHARTER, art. 2(4).

another state. A state may invite a target state to help address the issue of terrorism by taking measures to prevent terrorists and terrorist activities on its territory directed against other states. If a state cannot, or will not, prevent its territory from being used by “terrorists” for acts against other states, a state may invite other states to enter its territory to help prevent actions against a target state. But what recourse does a neighboring state have against a state that either cannot, or will not, prevent its territory from harboring terrorists, or serves as a base for terrorist activities against it? May the target state enter by force “to attend to” would-be terrorists?

The subject is large and complex. It becomes larger and more complex when international norms are invoked to address issues of self-defense by target states. The U.N. Charter does not prohibit action in self-defense “if an armed attack occurs.”²⁵ The language of the U.N. Charter seems clear. In my view, Article 51 permits measures in self-defense “if an armed attack occurs;” it does not permit use of force in self-defense on the ground that an armed attack might occur, or is feared, however reasonable the fear. Thus measures of preventive, preemptive self-defense are not permitted under the U.N. Charter, however reasonable the fear—except if authorized by the U.N. Security Council. And are uses of force by “terrorists” “armed attacks?”

International law and existing international institutions—notably the United Nations—are not perfect, perhaps not even adequate. They may be inadequate against the danger of wars we have known, as well as against terrorist activities emanating from foreign states. But they are all we have, or are within reach. They must be improved.

Against terrorism, and terrorists, in particular, they need radical strengthening. That will require cooperative efforts – cooperation between potential, and probable, targets. That will depend on you, and me, especially on you.

The law of the U.N. Charter has applied and governed us since 1945. It has survived the advent of nuclear weapons and the Cold War. It survived the Cuban missile crisis, hostilities in Vietnam, the end of empires and of colonialism, and the elimination of the “Second World” and the Soviet Empire.

25. See U.N. CHARTER, art. 51.

I believe that it must continue to govern all states and governments, including the United States.

The U.N. Security Council is hardly a perfect institution, and its imperfections are in newspaper headlines every day. The Security Council needs to organize and prepare itself for new tasks, including response to terrorism. In my view, it would benefit from important changes in its composition. Furthermore, the Security Council needs to limit the uses, or the implications, of the “veto.”

Unfortunately, there is no quick easy way—politically—of getting from where we are now to where we need to be.

IV. THE U.N. CHARTER IS U.S. LAW

The U.N. Charter is the law of, and in, the United States. It has been “the Law of the Land” since it was “made” as a treaty by President Truman in 1945 (with the consent of the U.S. Senate by an overwhelming vote, 88-2).²⁶

The U.N. Charter remains “supreme Law of the Land” in the United States.²⁷ In my view, war, not as a metaphor, but as an international legal status, is no longer part of the Law of the United States. That the U.S. Constitution conferred upon Congress the power “to declare war” does not require, or imply, that Congress must remain free to declare war in the traditional sense, or that the United States could not, or should not, by treaty, agree to an international system from which the traditional concept of war is excluded.

The U.N. Charter, as law of the United States, survived attacks by terrorists. I think it should, and will, survive any new “age of terrorism.”

The regime of the U.N. Charter governs us, and should continue to govern us, with respect to maintaining international peace and security in the age of terrorism.²⁸

The Security Council performance, however, has not been impeccable. The Security Council needs to organize itself—thoughtfully and deliberately—to prevent, deter, or respond to acts of terrorism, as to other acts of aggression and threats to the peace, of whatever origin. Such a restructuring would

26. See U.S. CONST., art. 2, § 2, cl. 2.

27. See U.S. CONST., art. 6, § 1, cl. 2.

28. The Security Council, I remind you, acted promptly in response to September 11, 2001. U.N. SCOR, 56th Sess., 4370th mtg. at 1, U.N. Doc. S/Res/1368 (2001).

require commitment and leadership, as well as financial, political, and moral support, principally from the United States.

The Constitution of the United States governs us, and must continue to govern us, with respect to addressing terrorism as to other revolutionary disturbances. That requires us to address with caution, and even skepticism, alleged security justifications for threats to individual rights, whether in the United States or by acts under U.S. authority abroad, whether by U.S. citizens, or residents, or by other persons who come under our jurisdiction, in the United States or elsewhere. It requires Congress to reexamine the authority of the president and executive agencies. It is time to rethink the War Powers Resolution and to revise it for a new day. Such governance requires guidance and control by Congress, not a blank check to the president and the executive branch.

The rule of law in relations between nations is a big subject, and universities need to educate themselves and others in the commitment to the rule of law, including international law, even in the age of terrorism.

Constitutional law as well should, and will, survive and govern us in the age of terrorism, however long it lasts. The Age of Terrorism cannot, should not, be allowed to supersede the Age of Rights. Respect for our Constitution and its values depends on us, on you and me, especially on you.
