

Prof. dr. sc. Davorin Lapaš,
Faculty of Law, University of Zagreb

“THE WAR AGAINST TERRORISM” – A NEW *BELLUM IUSTUM*?

The paper deals with the problem of the so-called “war against terrorism” in the context of the traditional concept of “just war” (bellum iustum), a concept believed to belong to the history of international law. Thus, the paper analyses, through the works of various authors, how the theoretical concept of just war evolved over the centuries. On the other hand, nowadays, i.e. after the September 11 attacks on New York and Washington, the use of the word “war” seems to be omnipresent in political declarations, in world media, and even in the writings of some legal commentators, when referring to the unilateral use of force by some States, targeted not only at terrorist organizations (e.g. Al-Qaida) and their members, but also at States “accused” to support terrorism. However, in contemporary international law there is no legal basis for the unilateral use of force, except in self-defense. For that reason, the just war doctrine is sometimes used as a meta-juridical basis for such action.

Keywords: “war against terrorism”, “just war” (*bellum iustum*), terrorism, terrorist organizations, United Nations, use of force

I. INTRODUCTION

In March 2003 on the eve of the American attack on Iraq, American President George W. Bush declared in his state of address: “[T]he US is completely certain Saddam has a nuclear weapon and God forbids he uses one.”¹ Shortly afterwards, Saddam Hussein was deposed after military intervention of the US and its allies, Iraq was subjugated and occupied, just like Afghanistan had been earlier. Admittedly, the international community’s fear of the so-called “nuclear terrorism” was instituted in subsequently adopted International Convention for the Suppression of Acts of Nuclear Terrorism of 2005. Needless to say, the nuclear weapon the American President referred to was never found in Iraq, and nowadays no end seems to be in sight for the so-called “war against terrorism” embodied in the American fight against Al-Qaeda predominantly, but also against the States the American President indicates as the “*axis of evil*”.²

¹ See: <http://www.whitehouse.gov/news/releases/2003/03/20030319-17.html>; (21 June 2003). President Bush uttered almost the same words before, in September 2002, in his speech to the UN General Assembly. See: <http://www.whitehouse.gov/news/releases/2002/09/20020912-2.html>; (20 November 2006).

² President Bush speaks about the so-called “axis of evil”, which, completely arbitrarily deter-

The military occupation of Iraq by the United States and its allies, seen through the prism of millennial history of international law, would certainly not account for any novelty, but the activity of this sort may not find its legal foundation easily in the current international community, whose foundations are laid on the cogent prohibition of unilateral threat or the use of force against any state, its territorial integrity or political independence inconsistent with the UN Charter, as it is provided by peremptory international legal norms.³ This being so, if the legal foundation of such acting would exist at all, then it would undisputedly lie at the level of secondary international legal norm which should even *per se* unlawful response to terrorism – outlawed by primary norms of international law – “bring back” to the sphere of legally admissible. However, does such a secondary international legal norm exist in reality? For centuries international law scholars have been searching for such a norm upon which to establish “the right to wage war” (*ius ad bellum*). Thus it was long before the prohibition against aggressive war became a constituent of positive international law.⁴ It may well be so because *to attack another*, almost like the “general principle of law recognized by civilized nations”, has long been conceived as *malum in se*. However, *malum* is not merely a legal category at this point. Primarily, the *evil* exists as an antipode to the good, and the latter, it is believed, becomes complete in the “absolute”, which, in turn, by definition, is undisputable “fullness of good”. Therefore, throughout history it was perhaps always easier for “the stronger” to prove its actions “correct” by way of reference to the eschatological absolute observed through its own eyes, rather than to legal norms which, owing to their more specific content, subject the “argument” of force to impersonal regulation of social relations. American President’s calling upon “divine authority” in his speech, just like Ancient Roman *fetiales* once used to do in their prayers,⁵ in general represents a certainly much

mined, also includes over 60 countries that “support terrorism”. Comp. e.g. Pellet, A., Tzankov, V., “Can a State Victim of a Terror Act Have Recourse to Armed Force?”, *Humanitäres Völkerrecht*, Vol. 17, No. 2, 2004, p. 71.

³ Probably the most important provision of the UN Charter, contained in Article 2, paragraph 4, sets out: “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.”

⁴ The beginnings of unconditional prohibition against aggressive war in international law are associated with the Paris Pact (the so-called Kellogg-Briand Pact) of 1928. Article 1 of the Paris Pact provides: “The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it, as an instrument of national policy in their relations with one another.” For the wording of the Pact see in: La Pradelle, A. de, *La paix moderne*, Paris, Les éditions internationales, MCMXLVII, pp. 330-331.

⁵ The declaration of war in Ancient Rome fell within the competence of priests – *fetiales*. They would, as recounted by Titus Livius (Livy), call upon their Gods as witnesses of „injustice“

simpler justification for the use of force than the one that should be sought at the level of secondary norms of the international legal system. Hence, the concept of "just war" (*bellum iustum*), as an institute established by secondary international legal norms, and focused on justification for the use of force against another state, also entered into the system of international law by means of theology. Nevertheless, just like international law struggled to include equity (as a genuine *meta-juridic* category) in the content of its norms throughout its development, efforts were likewise made to provide a positive legal framework for the concept of "just war", on which, after all, the entire regulation of the use of force in contemporary international legal order rests upon. However, the so called "war against terrorism" – an expression constructed particularly after the terrorist attacks on New York and Washington on September 11, 2001, was only seemingly a novelty, but essentially it often leaves an impression of merely a new manifestation of requirements of the "stronger" for the unilateral use of force in contrast with the positive international legal system that was primarily established by their own efforts. This paper, therefore, if anything seeks to touch upon the relationship between the force and law in the mentioned context, naturally, having in mind that it is always more than mere antagonism. Indeed, only the secondary norm turns force from sheer violence into a social response to a wrongful act. After all, Aristotle would also say: "Nobody chooses to make war or provokes it for the sake of making war..."⁶

II THE CONCEPT OF "JUST WAR" (*BELLUM IUSTUM*) IN THE DOCTRINE (OF INTERNATIONAL LAW)

The use of force in international relations is undisputedly as old as the concept of international community. However, the regulation of the use of force lies at the core of any organized community, including the international one, for functional imperative of common life requires overcoming the "natural state" of anarchy

inflicted upon them by another country, justifying the attack by words: „Audi Iuppiter, et tu Iuno, Quirine diique omnes caelestes vosque terrestres vosque inferni audite! Ego vos testor populum illum (...) iniustum esse neque ius persolvere ...“ Nonetheless, even at this point a distinction needs to be made: fetiales would call upon such an eschatological authority more like a "judge" than like an immediate "executor" of one's own "justice". Although in this respect the victory in war also implied a certain "verdict", the serious wording at the end of the fetiales' prayer somehow bears witness to a *a priori* impartiality of the divine "tribunal": "Si ego iniuste impieque illos homines illasque res dedier mihi exposco, tum patriae compotem me numquam siris esse." Titus Livius *Ab Verbe Condita*, Vol. 1, Lipsiae, Hertz, Tauchnitz, MDCCCLVII, Book 1, para. 32:6-14, pp. 36-37. See also: Bederman, D.J., *International Law in Antiquity*, Cambridge, Cambridge University Press, 2002, p. 232.

6 Aristotle, *Nicomachean Ethics*, London, Penguin, 1976, 1177b, p. 329.

– *bellum omnium contra omnes*.⁷ Therefore, with the establishment of the first, at the time only isolated ancient international communities (e.g. in the territory of Mesopotamia, Ancient India, Ancient Greece or Ancient China for that matter) the use of force must have risen from the level of mere “subjective law” (or better to say, factual possibility) to the level of secondary norm of the normative system that regulates the relations in such a community. The use of force thus becomes determined by assumptions that render it admissible for the respective system, and in turn separate from mere violence. Consequently, the force needs to establish its justification and foothold in the secondary norm, adopting the role of response to the infringement of the primary norm of a given normative – legal, but equally moral or religious system, at any rate.⁸ Hence, the category of “just”, needless to say with potential relativity of its content, easily becomes “an intersection” of secondary norms of all normative systems that regulate relations between entities of a given community, including admissibility of the internal use of force.⁹ It is a small wonder, then, that the concept of “just war” (Lat. *bellum iustum*; Gr. *Polemos dikaios*; Sanskr. *dharma yuddha*) may be found in almost all latitudes and throughout almost all historical periods, incorporated in religious, moral, or legal, for that matter – and hence international legal secondary norms.

Thus, in Ancient Greece e.g. efforts were made to constrain the right of the use of force, sometimes also through compulsory means of pacific settlement of disputes between city-states, polises.¹⁰ Some polis leagues, such as e.g. the

⁷ For Hobbes and Spinoza the non-regulated (or better to say, pre-regulated) status of social relations is manifested in the so-called “natural state” (*status naturae*) of anarchy, incorporated in the principle *bellum omnium contra omnes*. See: Hobbes, Th., *Leviathan*, Cambridge, New York, Port Chester, Melbourne, Sydney, Cambridge University Press, 1991, Chapter XIII, pp. 86-90; Spinoza, B., *Tractatus theologico-politicus*, in: *Benedicti de Spinoza Opera quae supersunt omnia*, Vol. III, Lipsiae, Ex officina Bernhardi Tauchnitz, 1846, Chapter XVI, pp. 206-220.

⁸ Namely, the legal theory in general makes a distinction between two levels in legal (and normative, in principle) systems: the levels of primary and secondary norms. Primary norms directly or indirectly impose a specific obligation on States, its addressees, whereas Secondary norms provide for legal consequences of a failure to fulfil the obligations established by Primary norms. See: Zemanek, K., “The Legal Foundations of the International System, General Course on Public International Law”, *Recueil des cours de l’Académie de droit international de La Haye*, Vol. 266, 1997, p. 233; Zemanek, K., “The Unilateral Enforcement of International Obligations”, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, Vol. 47, No. 1, 1987, pp.32-33. See also: Report of the International Law Commission (ILC) on the work of its 25th session, 7 May – 13 July 1973, A/9010/Rev.1, para.40; and A/CN.4/SER.A/1973/Add.1, *Yearbook of the International Law Commission*, Vol. II, 1973, pp.167-170.

⁹ For more details on interpenetration of secondary norms in the international community, see: Lapaš, D., “Uloga metajuridičkih sankcija u zaštiti međunarodnopravnih norm”, *Pravni vjesnik*, Vol. 21, No. 1-2, 2005, pp. 197-211.

¹⁰ See: Calogeropoulos-Stratis, S., *Ius ad bellum – Le droit de recourir à la guerre*, Athènes, L’Institut des Hautes Etudes Internationales de l’Université de Paris, 1950, p. 17.

Corinth League, prohibited the war between its polis members before their dispute had been submitted to arbitration whose decisions were binding.¹¹

In Ancient Israel, the Jews made a distinction between two types of wars: those waged as Lords' "tools" and those waged "on one's own accord". In the former, the "justification" was taken for granted – "covered" by divine authority,¹² but the idea of justice often served as "justification" for the latter type of wars as well.¹³ For instance, the wars against "idolatrous peoples" were considered admissible by Jews, even in terms of, nowadays called, "preventive strike".¹⁴

In Ancient Rome the regulations for the right to wage war (*ius ad bellum*) were constituents of the "sacred right" (*ius sacrum*), and thus in the hands of the priests- fetiales. Four reasons were considered to be reasons of the "just war": infringement of a Roman state, offence of a representative, breach of a contract, and support to Roman enemies.¹⁵ Subsequently, Cicero puts forward three conditions for a "just war": a just cause, formal announcement by the sovereign, and proper war waging¹⁶ (in turn, *ius ad bellum* also becomes stipulated by compliance with *ius in bello* to a certain extent).

In trace of Cicero, St. Augustine introduces a "just cause" (*iusta causa*) to just requirements, i.e. the admissibility of war, but also a just intention (*iusta intentio*) – the requirements that were to become a foundation of the doctrine of just war in centuries to come. Moreover, he also stipulates admissibility of war by authorization (and in turn, legal announcement of war), then by the proportionality between the used force and the previously mentioned "just intention", and by its significance as *ultima ratio* instrument in the fulfilment of the intention.¹⁷

¹¹ *Ibid.*, p. 18. Hence, the Greek thought considers the just war to be the result of: revenge, self-defence, and aid to allies. For more see: Taghi Karoubi, M., *Just or Unjust War? International Law and Unilateral Use of Armed Force by States at the Turn of the 20th Century*, Hants, Burlington, Ashgate, 2004, p. 59.

¹² Calogeropoulos-Stratis, *op. cit.*, (ft. 10), p. 20. The Biblical description of destruction of Ajath by Israel may also be used to illustrate the above-mentioned; see: The Biblical description of destruction of A-'I by Israel may also be used to illustrate the above-mentioned; see: *The Holly Bible*, Joshua 8:18-29, London, New York, Collins' Clear-Type Press, p. 153.

¹³ See: Calogeropoulos-Stratis, *op. cit.*, (ft. 10), pp. 20-21.

¹⁴ See: Wilkes, G., „Judaism and Justice in War“, in: Robinson, P. (ed.), *Just War in Contemporary Perspective*, Hampshire, Burlington, Ashgate, 2003, p. 17.

¹⁵ See: Taghi Karoubi, *op. cit.* (ft. 11), p. 60. For more, see also: Bederman, *op. cit.* (ft. 5), pp. 208-242.

¹⁶ Cicero makes a distinction between four types of war: “[I]ustum, iniustum, civile et plus quam civile. Iustum bellum est quod ex praedicto geritur de rebus repetitis aut propulsandorum hostium causa. Iniustum bellum est quod de furore, non de legitima ratione initur...” See: Cicero, M. T., *Libri politici – De re publica*, Vol. 1, Zagreb, Demetra, 1995, Book II, p. 100; Book III, p. 162. For more details on non-punitive purpose of the war by Polybius, see: Przetacznik, F., “The Illegality of the Concept of Just War under Contemporary International Law”, *Revue de droit international*, Vol. LXX, 1992, p. 252.

¹⁷ For more, see: Calogeropoulos-Stratis, *op. cit.*, (ft. 10), p. 26; Przetacznik, *op. cit.* (ft. 16), p.252.

Similarly, St. Thomas Aquinas also refers the concept of “just war” to the requirement of authorization of the sovereign to wage war, and to the “just cause” and “just intention”. Moreover, he insists that the war be waged as a response to the inflicted unlawfulness exclusively, and its scope to be commensurable to unlawfulness.¹⁸

Francisco Suarez also puts forward almost the same requirements for “just war”, in an effort, just like his predecessors, to incorporate “just war” into the idea of Christianity. He thus draws the war closer to the concept of sanction, pointing out that the one who wages a “just war” does not act in contradiction with Christian teaching for he does not hate the enemy, but merely sanctions his actions.¹⁹ In that respect, Suarez follows the teaching of his great predecessor, de Vitoria, who clearly excludes religious wars, wars of conquest, wars “for personal glory of the sovereign”, and wars waged for “negligible injustice” from the concept of “just war” – i.e. wars that are disproportionate to the inflicted unlawfulness.²⁰

Albericus Gentilis, a great scholar of international law at the turn of the 17th century bequeaths to us one of the most invaluable deeds in history of the doctrine of international law – *De iure belli* (1588). In his teaching, Gentilis clearly singles out self-defence as a “just war”, putting it a par with an inherent right. Moreover, in so doing he distinguishes between “necessary defence” (*necessaria defensio*), collective – “honest defence” (*honestia defensio*) and also anticipatory self-defence (*utilis defensio*), to a certain extent.²¹

Hugo Grotius in his work *De iure belli ac pacis* (1625), in line with Gentilis, lays foundations for contemporary doctrine of international law, providing the first, so to speak, systematic outline of international law in a contemporary sense of the word. Nonetheless, it seems he does not go any further than his great predecessors in terms of justification of the use of force. Grotius deems “just war” to be primarily a defence war, a war to rectify the unlawfulness (for instance, the return of ownership), but also a punitive war, considering it in the sense of international legal sanction.²²

In that respect, in his great work “*Esprit des Lois*” Montesquieu considers the concept of “just war” as an instrument of justice.²³

¹⁸ For more, see: Aquinas, Th., *Summa theologiae*, Vol. 18, II-II, quaestio LXIV, art. VII, Heidelberg, München, Graz, Wien, Salzburg, F. H. Kerle, A. Pustet, 1953, p. 175.

¹⁹ For a more detailed overview of Suarez’s teaching, see: Truyol y Serra, A., *Histoire du droit international public*, Paris, Economica, 1995, pp. 53-55. See also: Przetacznik, *op. cit.* (ft. 16), p.255.

²⁰ For more, see: Przetacznik, *op. cit.* (ft. 16), p. 254. See also: Truyol y Serra, *op. cit.* (ft. 19), pp. 50-52.

²¹ For more, see: Przetacznik, *op. cit.* (ft. 16), p. 263; Truyol y Serra, *op. cit.* (ft. 19), pp. 56-57.

²² See: Grotius, H., *De Jure Belli ac Pacis Libri Tres, in quibus Jus Naturae & Gentium, item Juris Publici praecipua explicantur*, Vol. I, Buffalo, New York, William S. Hein & Co. Inc., 1995, p.75.

²³ See: Montesquieu, Ch.-L. de S., *O duhu zakonâ*, Vol. 1, Zagreb, Demetra, 2003, Book X, p. 147.

Finally, another significant scholar of international law – Emmerich de Vattel – considers the causes of “just war” to be preservation of personal right, self-defence, but also sanction against the aggressor.²⁴

Recently, the first significant attempts to restrict the use of force at the level of positive international law, primarily focused on reprisals with the use of force, and then also on the war, on the one hand, are related to the Calvo, i.e. the Drago Doctrine the content of which is incorporated in Article 1 of the Second Hague (the so-called Porter) Convention of 1907,²⁵ and on the other hand, to the establishment of the League of Nations in 1919, i.e. to the adoption of its Covenant. However, none of these two documents excludes the war as an international legal “sanction”, but rather, in a way, merely approves it as such – the Pact considers it to be a *ultima ratio* instrument,²⁶ and the Porter Convention similarly considers the unilateral use of force to be an ultimate measure for non-acceptance of arbitration by a debtor State, or for non-fulfilment of its obligations according to the arbitration award.

For the first time, the above-mentioned Paris (the so-called Kellogg-Briand) Pact of 1928 explicitly prohibited the war as an instrument of national politics (Art. 1), thus denying its centennially recognized significance of emanating national sovereignty.²⁷ However, this prohibition was not general either. It was merely an obligation, and then also a privilege of the State Parties to the Pact, and in turn, by this Pact the war remained not only recognized outside the circle of its Parties, but it also executed the punitive function, so to speak, for the sake of compliance with the Pact’s provisions. The State Party that did not comply with the Pact would place itself outside the international legal “subsystem” established by this Pact, and then the war against it would be allowed at the level of general international law.²⁸

²⁴ For more, see: Vattel, E. de, *The Law of Nations, or Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns*, London, Robinson, Paternoster-Row, 1797, Book III, pp. 291-193 and 301-314.

²⁵ For the wording of the Convention, see in: La Pradelle, *op. cit.* (ft. 4), p. 172.

²⁶ Article 12 of the Covenant of the League of Nations provides: “The Members of the League agree that, if there should arise between them any dispute likely to lead to a rupture they will submit the matter either to arbitration or judicial settlement or to enquiry by the Council, and they agree in no case to resort to war until three months after the award by the arbitrators or the judicial decision, or the report by the Council. In any case under this Article the award of the arbitrators or the judicial decision shall be made within a reasonable time, and the report of the Council shall be made within six months after the submission of the dispute.” For the text of the Covenant of the League of Nations, see in: *ibid.*, pp. 225-233.

²⁷ See: *supra*, ft. 4; see also Briand’s speech of 27 August 1928 in: Ministère des Affaires Étrangères (ed.), *Le Pacte général de renonciation à la guerre comme instrument de politique nationale*, Paris, Imprimerie des Journaux officiels, 1928, pp. 56-59.

²⁸ See: Brück, O., *Les sanctions en droit international public*, Paris, A. Pedone, 1933, pp. 188-

The prohibition of war, as well as the prohibition of any unilateral use of force other than self-defence, entered into general, currently also peremptory international legal norms only after the Second World War, primarily owing to the Charter of the United Nations, primarily owing to its above mentioned provision of Article 2, Paragraph 4.²⁹ Thereby, the aggressive war, as well as the reprisals with the use of force in peace, become inadmissible not only *per se*, but also, it seems, left out from the potential content of the secondary international legal norm. However, neither the Covenant of the League of Nations nor the Charter did completely abandon the use of force despite the first constraint, and subsequently prohibition. On the contrary, indeed, the Pact (subsequently amended by the Geneva Protocol of 1924, and Locarno Treaties of 1925),³⁰ and the Charter to an even greater extent, merely pursued to funnel such a decentralized power. The provisions of Chapter VII of the Charter –Article 41 to begin with, and especially the provisions of Articles 42 and 43 – are considerably more definitive and challenging than the provisions of Article 16, paragraph 2 of the Covenant.³¹ In this respect Fischer singles out five important distinctions: while the admissible

189. Likewise, it is set out in the preamble of the Pact: "... any signatory Power which shall hereafter seek to promote its national interests by resort to war should be denied the benefits furnished by this treaty; (...)." For the text of the Pact, see: *supra*, ft. 4.

²⁹ See: *supra*, ft. 3.

³⁰ For the texts of the Agreement, see in: La Pradelle, *op. cit.*, (ft. 4), pp. 300-329.

³¹ Article 41 of the Charter sets out: "The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations."

Article 42 of the Charter sets out: "Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations." Furthermore, Article 43 of the Charter sets out:

1. All Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security.
2. Such agreement or agreements shall govern the numbers and types of forces, their degree of readiness and general location, and the nature of the facilities and assistance to be provided.
3. The agreement or agreements shall be negotiated as soon as possible on the initiative of the Security Council. They shall be concluded between the Security Council and Members or between the Security Council and groups of Members and shall be subject to ratification by the signatory states in accordance with their respective constitutional processes.

unilateral use of force in the form of self-defence is in fact an exception in the Charter, it is a stipulation in the Covenant; in accordance with the Covenant the use of force is left to the Member States of the League, but in compliance with the recommendation of the Council, while in accordance with the Charter the enforcement action is initiated and governed by the Security Council; in that respect the League Council could merely offer a recommendation to Member States, while the Security Council makes a decision on such an action, which becomes a binding decision for the Organization Members; according to the Charter the enforcement action is taken by armed forces of the Organization, while by the Covenant it was left to *ad hoc* established contingent armed forces of Member States; finally, the reason for the use of force is set out to a considerably larger extent in the Charter, while according to the Covenant the enforcement action may be taken merely in the event of war inconsistent with the provisions of the Covenant; in accordance with Article 39 of the Charter it may follow in the event of any "threat to the peace, breach of the peace or act of aggression," established by discretionary decision of the Security Council.³² In this way, the collective secu-

Article 16 of the Covenant of the League of Nations provides:

- “1 Should any Member of the League resort to war in disregard of its covenants under Articles 12, 13 or 15, it shall *ipso facto* be deemed to have committed an act of war against all other Members of the League, which hereby undertake immediately to subject it to the severance of all trade or financial relations, the prohibition of all intercourse between their nationals and the nationals of the covenant-breaking State, and the prevention of all financial, commercial or personal intercourse between the nationals of the covenant-breaking State and the nationals of any other State, whether a Member of the League or not.
- 2 It shall be the duty of the Council in such case to recommend to the several Governments concerned what effective military, naval or air force the Members of the League shall severally contribute to the armed forces to be used to protect the covenants of the League.
- 3 The Members of the League agree, further, that they will mutually support one another in the financial and economic measures which are taken under this Article, in order to minimise the loss and inconvenience resulting from the above measures, and that they will mutually support one another in resisting any special measures aimed at one of their number by the covenant-breaking State, and that they will take the necessary steps to afford passage through their territory to the forces of any of the Members of the League which are co-operating to protect the covenants of the League. Any Member of the League which has violated any covenant of the League may be declared to be no longer a Member of the League by a vote of the Council concurred in by the Representatives of all the other Members of the League represented thereon.” For the text of the Covenant, see in: *supra*, ft. 26.

³² See: Fischer, G., “Article 42”, in: Cot, J.-P., Pellet, A. (ed.), *La Charte des Nations Unies – Commentaire article par article*, Paris, Bruxelles, Economica, Bruylant, 1985, p. 706. Article 39 of the Charter as a prerequisite for the application of measures referred to in Articles 41 and 42 provides: “The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.” For the text of the Charter, see: *supra*, ft. 3.

rity provided by Article 11 of the Covenant³³ is established much more broadly in the Charter. Nevertheless, Article 43, set out as a specific *pactum de contrahendo*, remained “a dead letter”. “The international armed forces” therein provided were never established, and the Military Staff Committee they were to be commanded by remained without any function. A bold conception of almost complete centralization of power within the system of the United Nations did not get any further than mere aspirations of the founders of the League of Nations.³⁴ The entire system of collective security, in the form of a general conception put forward in the Charter, remained without any “superstructure” owing to a lack of political willingness of Member States to put it into practice. Not only did the centralization of power fail, points out Franck, but also the presumptions of its application were not legally specified.³⁵ Thus, not only the qualification in a specific event (which would be in accordance with Article 39 of the Charter), but also the legal determination of the concepts “threat to the peace”, “breach of the peace” and “act of aggression” was subject to *ad hoc* interpretation of the Security Council as a political, and not a legal organ. Moreover, the so-called “fact finding” mechanism also failed to take its hold, and consequently, it is a small wonder that in the event of an armed conflict all parties most frequently refer to self-defence. The result of this condition in the doctrine, but also in practice, was utter disagreement in terms of the “party authorized” for the use of force as provided by the Charter. The opinions ranged from completely stipulated use of force through the action of “armed forces of the United Nations” referred to in Article 42,³⁶ through views

³³ Article 11 of the Covenant of the League of Nations provides: “...Any war or threat of war, whether immediately affecting any of the Members of the League or not, is hereby declared a matter of concern to the whole League, and the League shall take any action that may be deemed wise and effectual to safeguard the peace of nations.” For the text of the Covenant, see in: *supra*, ft. 26.

³⁴ For some ideas concerning the establishment of a permanent international armed force within the League of Nations, see e.g.: Royal Institute for International Affairs, *International Sanctions*, London, New York, Toronto, Oxford University Press, 1938, pp. 122-123; Frowein, J. A., “Article 43”, in: Simma, B. (ed.), *The Charter of the United Nations – A Commentary*, München, C. H. Beck, 1994, p. 637. When the League of Nations was established, Hadjiscos wrote: “...[I] peut être nécessaire de faire appel aux sanctions militaires. Celles-ci ne seraient pas conçues, dans l’ordre international nouveau, comme un acte de guerre et retour à un passé aboli, mais comme un acte de force accompli au service du droit par la collectivité des nations.” Hadjiscos, D. N., *Les Sanctions Internationales de la Société des Nations*, Vol. 1, Paris, Maracel Giard, 1920, p. 101. It should be mentioned, however, that in 1992, in “An Agenda for Peace”, Secretary-General Boutros Boutros-Ghali recommended that the Security Council initiates negotiations in accordance with Article 43 of the Charter. See: An Agenda for Peace, A/47/277-S/24111, 17 June 1992, para. 43.

³⁵ See: Franck, Th. M., “Who Killed Article 2(4)? Or: Changing Norms Governing the Use of Force by States”, *American Journal of International Law*, Vol. 64, No. 5, 1970, p. 811.

³⁶ See e.g.: Castañeda, J., “Valeur juridique des résolutions des Nations Unies”, *Recueil des cours de l’Académie de droit international de La Haye*, Vol. 129, 1970, pp. 265-268.

regarding Article 42 independent of Article 43,³⁷ (confirmed in the practice of peace-keeping operations) to argumentation contributing to subsidiary authorisation of Member States, and their regional agencies to take the use of force into their own hands, owing to a lack of centralized power provided by the Charter.³⁸ During the "Cold War" (which began shortly after the establishment of the United Nations) the balance of opposing super powers, largely paralyzing the application of Chapter VII of the Charter, concealed hazardous defects of this concept of centralization of power within the Organization, which, for that matter, mostly resulted from such a state of affairs. After the War the issue of the use of force within the system of the United Nations and in turn also at the level of general international law, lapsed into general insecurity, whether in terms of stipulation of admissibility and authorization to its use, or in terms of its purpose, and general legal nature and form.

The appearance of the above mentioned phrase "war against terrorism" in the sense of a requirement to legalize the unilateral use of force outside the framework of positive international law, but also broadening of the concept of self-defence, and the use of force at all – starting with an attempt to broaden the content, as well as temporal constraints of self-defence (primarily through efforts to legalize preventive, anticipatory self-defence) to bringing quasi-legal institutes such as "humanitarian intervention" or "pro-democratic intervention" at the door of international legal system – have brought this system today to the brim of anarchy, trying to "restore" the use of force to the level of primary norm – that is, to establish it as a subjective "right" of the one who may in fact use it, which is always the "stronger" against the "weaker".

III. "WAR AGAINST TERRORISM" AND CONTEMPORARY INTERNATIONAL LAW

On 14 January 2006 many world media broadcast the news about the tragic US air strike on a village of Damadola in north-west Pakistan. The strike was

³⁷ See e.g.: Seyersted, F., "United Nations Forces, Some Legal Problems", *British Year Book of International Law*, Vol. XXXVII, 1961, pp. 359-362 and 438-439; Higgins, R., *Problems and Process – International Law and How We Use It*, Oxford, Clarendon Press, 1995, p. 266. Kelsen's conclusion, however, is also interesting: "Article 42 refers to 'air, sea, or land forces' without providing that these forces must be armed forces placed at the disposal of the Security Council by the Members." Kelsen, H., *The Law of the United Nations*, London, Stevens & Sons Limited, 1950, p. 756.

³⁸ Some of these views are mentioned in the article by Lobel and Ratner; see: Lobel, J., Ratner, M., "Bypassing the Security Council: Ambiguous Authorizations to Use Force, Cease-Fires and the Iraqi Inspection Regime", *American Journal of International Law*, Vol. 93, No. 1, 1999, p. 130; see also: Detter, I., *The International Legal Order*, Aldershot, Brookfield, Singapore, Sydney, Dartmouth, 1994, p. 547.

targeting to murder (!) Ayman al-Zawahiri – one of the leading Al-Qaeda men. The strike did not bring the expected result, but in the event 18 people, Pakistani nationals – including women and children – lost their lives. Naturally, Pakistani authorities protested of course, but the US responses were mostly reduced to a mere explanation that the strike was targeting the terrorists, and not against Pakistan on any account.³⁹

Does contemporary international law, based on the provision contained in the above mentioned Article 2 paragraph 4 of the Charter of the United Nations, leave any space for such “separability”?

The current norms of international law (especially under protection of the United Nations), undisputedly incriminate terrorism implicating, moreover, immediate international legal responsibility of terrorist organizations, but concurrently imposing upon states the obligation to fight against terrorism and the obligation to deny any support, and especially safe haven to terrorists.⁴⁰ “The war against terrorism”, as some indicate, also challenges the classical state-centric conception of international law (and in turn the concept of war), turning it into a trans-national concept. In any case, the Security Council points out in its Resolution 1456(2003) of 20 January 2003: “[I]t has become easier, in an increasingly globalized world, for terrorists to exploit sophisticated technology, communications and resources for their criminal objectives (...)” Hence, it may be concluded that nowadays a strictly “interstate” concept of “*ius ad bellum*” does not correspond to modified circumstances in the international community in which non-state actors play an increasingly more important role. New “wars” include trans-national networks that comprise of non-state entities, but sometimes also the states that support them (actively or passively). After all, terrorist organizations (unlike e.g. pirates) operate on or at least from a territory of a state, which may, on the other hand, support their activities financially, logistically, etc., or simply tolerate them passively, but sometimes may also have no power to prevent them. Therefore, “the war against terrorism” in the sense of the use of force by other states (or even an international organization) unfailingly affects the national territory of a state the terrorists are located in. The attempts of legal argumentations of

³⁹ For more, see e.g.: “U.S. air strike targeting Ayman al-Zawahiri leaves 18 dead in Pakistani village”; http://en.wikinews.org/wiki/18_killed_in_U.S._air_strike_on_village_in_Pakistan (19 March 2006). See also: “Pakistan protests airstrike”; <http://www.cnn.com/2006/WORLD/meast/01/14/alqaeda.strike/> (20 March 2006).

⁴⁰ Thus, e.g. Resolution of the Security Council 1624 (2005) binds all countries, besides full cooperation in fight against terrorism, also to deny safe haven to any person involved in terrorism: “(...) [A]ll States must cooperate fully in the fight against terrorism, in accordance with their obligations under international law, in order to find, deny safe haven and bring to justice (...) any person who supports, facilitates, participates or attempts to participate in the financing, planning, preparation or commission of terrorist acts...”

such strikes (like the afore-mentioned American strike in Pakistan, or American strikes on Sudan and Afghanistan following terrorist attacks on the American embassies in Kenya and Tanzania in 1998, and leading up to the American military occupation of Afghanistan in 2001) may basically assume two directions: the direction of indictment of the related state for the so-called "indirect aggression" interpreted in the sense of providing support and safe haven to terrorists (the so-called *harbouring of terrorists*), or in the direction of "emancipation" with the country of parallel or even exclusive direct international legal responsibility of terrorist organizations themselves.

However, both argumentations, in an effort to remain within the frameworks of positive international law, primarily aim to activate the provision of Article 51 of the UN Charter which declares the inherent right of a state to individual or collective self-defence. However, the mentioned provision recognizes self-defence if an "armed attack occurs",⁴¹ which brings us back again to anyhow insufficiently explicated concept of the act of aggression in international law.

Namely, the argumentation that is exclusively based on international responsibility of a state from whose territory a terrorist organization operates or which provides it with a safe haven, considers the relational state as an aggressor, or more precisely, as a perpetrator of the so-called "indirect aggression" provided, admittedly, by the United Nations General Assembly Resolution 3314(XXIX) of 14 December 1974 on the definition of aggression. The mentioned Resolution, namely, Article 3(g) also considers aggression to be: "The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above [acts of aggression, *the author's remark*], or its substantial involvement therein."⁴² Although in that respect some authors consider such acts as a direct aggression even when committed by non-state actors such as terror-

⁴¹ Article 51 of the Charter provides: "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." For the text of the United Nations Charter, see: *supra*, ft. 3.

⁴² However, it should be put forward that the mentioned Resolution A/3314(XXIX) after having defined aggression by general definition and enumerated particular acts that constitute aggression (Article 1 and Article 3), in Article 4 sets out: "The acts enumerated above are not exhaustive and the Security Council may determine that other acts constitute aggression under the provisions of the Charter." For the text of the Resolution in Croatian, see: Lapaš, D., Šošić, T. M. (ed.), *Međunarodno javno pravo – izbor dokumenata*, Zagreb, Pravni fakultet u Zagrebu, 2005, pp. 60-62.

ist organizations, at the same time they are unwilling to recognize the status of a hostile party to members of such an organization, or the war prisoner, for that matter.⁴³ On the other hand, attributing related acts to a state even in the sense of “indirect aggression” indicates essential credibility gaps in this respect. First of all, if a terrorist attack is “indirect aggression” of a state from whose territory they operate, how can it then be explained that the attack on terrorists, like the one in Pakistan, was “separable”, i.e. the war against terrorists, and not concurrently the war against the relational state? Furthermore, if we follow the standpoint of the International Court of Justice in the well-known dispute between Nicaragua and the United States of America in 1986, the acts of such paramilitary, and likewise non-state entities may be attributed to a state merely under an assumption of its effective control of them,⁴⁴ which in terms of terrorist organizations and their international networks need not be the case at all. However, even if the circumstance of effective control should exist as an assumption of attributing terrorist acts to a state with a qualification of its “indirect aggression”, then it should definitely not be subject to final evaluation of a “stronger” state in the role of *index in causa sua*, but to objective investigation (e.g. since it also implies the use of force, the investigation should be conducted by the UN Security Council at least), in which – as a general principle of law – the evidential burden would lie upon the accusing state.⁴⁵ At any rate, in the event of self-defence the mentioned provision in Article 51 of the Charter gives the authority (even if it is *post factum*) to the Security Council precisely. Similarly, if we continue to reason in the same direction, the mere tolerance towards the presence of terrorists on the territory of a state, and its denied extradition could even less find any place in the definition of aggression, even in its “indirect” form.

On the other hand, the argumentation that goes in the direction of immediate, isolated international legal responsibility of terrorist organizations for aggression also has its deficiencies. Thus, for instance, the existence of a subjective element – an intention to wage war (*animus belligerendi*) in terrorist attacks in general does not seem convincing, which was used traditionally in international law to make a distinction between a war and other similar forms of the use of force

⁴³ E.g. Brown, D., “Use of Force Against Terrorism After September 11th: State Responsibility, Self-Defence and Other Responses”, *Cardozo Journal of International and Comparative Law*, Vol. 11, No. 1, 2003, p. 24.

⁴⁴ See: Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, *I.C.J. Reports* 1986, pp. 64-65, para. 115.

⁴⁵ On the contrary, following the American strike on Afghanistan in 2001, the American UN Ambassador merely notified that the United States are aware of the Taliban responsibility for the terrorist acts on September 11; see: Mégret, F., “War? Legal Semantics and the Move to Violence”, *European Journal of International Law*, Vol. 13, No. 2, 2002, p. 381.

(for instance, currently prohibited forced reprisals).⁴⁶ Likewise, the intensity is also dubious. In order to constitute aggression the terrorist attack should, in accordance with the mentioned definition of aggression, be an armed act of such gravity that it could amount to other forms of aggression committed by a state, i.e. its regular armed forces. Since terrorist acts are mostly of a smaller scale and isolated, and by no means continuous military operations, it is possible to suspect the fulfilment of this criterion. Hence, in the mentioned argumentation the weakest point of such utterly extensive interpretation of aggression would indisputably be to apply its definition to terrorist organizations as perpetrators of "direct" aggression. The authors who advocate this argumentation are supporters of the mentioned extended definition of aggression, and then, in turn also of extending the institution of self-defence in international law to the acts of such non-state entities.⁴⁷

On the contrary, however, many authors are still inclined to a more traditional interpretation of aggression and, in turn, of self-defence. Thus, as pointed out by Pellet and Tzankov, since the Fall of the Berlin Wall terrorism has started to be qualified by the United Nations as a threat to international peace and security in accordance with Article 39 of the Charter (which, in theory, also facilitates potential application of collective measures of the Organization, including those involving the use of armed force). Some states (such as, for instance, Libya, Sudan or Afghanistan) have even been affected by the UN sanctions, indicted of their reference to terrorism.⁴⁸ Nevertheless, terrorist acts have never been declared aggression by the United Nations! Since self-defence is connected with aggression by Article 51 of the Charter, as above demonstrated, the mentioned authors draw a conclusion that reference to self-defence in the context of terrorist attacks is unfounded.⁴⁹ The United Nations, it seems, are not inclined to such a wide-ranging extension of the definition of aggression. However, Resolution of the

⁴⁶ See e.g. Andrassy, J., *Međunarodno pravo*, Zagreb, Školska knjiga, 1990, p. 555 and 565. On the contrary, an act of terrorism is characterized by an intention to create a state of fear in the general public (*animus terrendi*, so to speak). In that sense, the UN General Assembly in its Resolution A/55/158 of 30 January 2001 specifies terrorism as "criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes (...)" Terrorism is similarly specified by Guillaume: "[L]e terrorisme implique l'usage de la violence dans des conditions de nature à porter atteinte à la vie des personnes ou à leur intégrité physique dans le cadre d'une entreprise ayant pour but de provoquer la terreur en vue de parvenir à certains fins." Guillaume, G., "Terrorisme et droit international", *Recueil des cours de l'Académie de droit international de La Haye*, Vol. 215, 1989, p. 306.

⁴⁷ See e.g. Brown, *op. cit.* (ft. 43), pp. 19-32.

⁴⁸ For more details, see: Lapaš, D., *Sankcija u međunarodnom pravu*, Zagreb, Pravni fakultet u Zagrebu, 2004, pp. 219-220, 225-228.

⁴⁹ See: Pellet, Tzankov, *op. cit.* (ft. 2), p. 71.

Security Council 1368(2001) of 12 September 2001 does seem a bit confusing, which, declaring the terrorist attacks on New York and Washington (a day before) a threat to international peace and security, already in the next paragraph refers to “the inherent right of individual or collective self-defence in accordance with the Charter”. The Security Council, probably under the impact of the United States, and certainly under the impression of a completely unexpected disaster a day earlier – as we are more inclined to believe – merely clumsily “slightly opened” the door of the unilateral use of force as a response to a terrorist act, rather than made any more resolute progress at the level of secondary international legal norm, which it may have truly desired in the first place. Pellet and Tzankov would possibly agree with this, indicating that the subsequent, and probably the most important Resolution of the Security Council in the context of the “war against terrorism” Resolution 1373(2001) does not aim to authorize any state for the unilateral use of force in the fight against terrorism, that is to say without any prior special authorization by the UN Security Council,⁵⁰ although admittedly, in its preamble it reaffirms “the inherent right of individual or collective self-defence as recognized by the Charter of the United Nations.” Needless to say, an objection may be raised in this respect, as well. Namely, the right of self-defence, if we follow the wording of the Charter of the United Nations, is an *inherent* right merely proclaimed by its Article 51. Why would then the reference to self-defence depend on the *prior* authorization of the Security Council (or any other international body for that matter)? On the contrary, the right of self-defence (if recognized in this context) would become active “automatically” by the act of a (terrorist) attack, while duration of self-defence would be determined alternatively: by deterrence of attack (aggression), or taking of collective measures of the Security Council for “the maintenance of international peace and security” – which is provided by Article 51 of the Charter anyway.

Nonetheless, we are prone to accept the traditional standpoint against all odds, but starting from the concept of aggression and not from self-defence as its effect. Aggression is an act of war by which the state of war usually begins. Besides the mentioned subjective element, adopted by customary international law – *animus belligerendi* – the war is also a *state*,⁵¹ which implies specific duration and continuity of war operations. Terrorist acts, regardless of their intensity, and level of organization, are sporadic acts of violence. Their intention, therefore, is not to wage war (*animus belligerendi*), but to create a state of fear in the general public (a specific *animus terrendi*, as it may be called) “in exchange for” the achievement of specific, mostly political aims, which renders them significantly

⁵⁰ *Ibid.*, p. 70.

⁵¹ See: Andrassy, *op. cit.* (ft. 46), p. 564.

distinct from aggression as an act of war. The so-called "war against terrorism" thus, in our opinion, despite the gravity of the issue it is fought against, does not deserve to be qualified as "war" (or "armed conflict", as designated by a contemporary euphemism) in international legal sense of the word.⁵² By its secondary norms, international law also takes a stand against terrorism, raising its perpetrators, even as non-state entities, to the level of immediate addressees of relational norms. For instance, however, just like any life taking does not constitute a murder in criminal law, so in international law any use of force (whether by a state or a non-state entity against it) does not necessarily constitute war. Therefore, seeking international legal justification for the use of force against terrorist organizations among some other secondary norms of international law seems to be far more convincing than clumsy and arbitrary interpretations of classical international legal institutes like aggression, or self-defence for that matter.

IV. CONCLUSION

Finally, what conclusion may be drawn about the so-called "war against terrorism" as a requirement for admissible unilateral use of force by a state, against terrorists on the territory of another state? Is it indeed a new "*bellum iustum*" brought to the "threshold" of international legal system by modern times? In order to search for an answer, we should, first of all, wonder about the nature of this equity which, outside secondary norms of positive international law, turns war into a "just" war. However, even if we made an effort to believe in such equity as "*praeter legem*", that is supplementary to positive law, it would be difficult not to notice its inconsistency with the mentioned provision of Article 2, paragraph 4 of the Charter of the United Nations⁵³ – one of the rare peremptory norms of contemporary international legal system. Likewise, the mentioned "equity", therefore, is not merely *praeter* (supplementary to law), but *contra legem*, and thus its contradiction.

In the system of the United Nations the unilateral use of force is admissible only as individual or collective self-defence, i.e. as a response to aggression – and, as we have seen, the terrorist act is not aggression. The activation of the

⁵² Naturally, if the "war against terrorism" should assume characteristics of armed conflict between states such as, for instance, in the case of the American strike on Afghanistan in 2001 and its military occupation, then it becomes a classical war in which deposition of allegedly pro-terrorist authority turns out to be a completely irrelevant motive for the existence of the state of war, as well as for compulsory application of the regulations of the law of armed conflicts, and particularly humanitarian law.

⁵³ See: *supra*, ft. 3.

mentioned mechanism as set out by Chapter VII of the Charter,⁵⁴ and also collective measures of the Organization within its framework, seems to be at the level of secondary norms of the UN law, in fact the only form of admissible use of force in the fight against terrorism and terrorist organizations on the territory of another state, but as a response to *the threat to peace* as established by the Security Council in terms of the provision of Article 39 of the Charter of the United Nations, and not as a response to “the act of aggression”. Such measures should then, naturally, be aimed against terrorists exclusively, and utilized as assistance to the state from whose territory the terrorists operate.⁵⁵ In fact the recognition of direct international legal responsibility of terrorist organizations concurrently also opens up the possibility of the afore-mentioned “separability,”⁵⁶ but merely in the context of a collective response of the international community admissible by international law, and not as a “private war,” which merely remains an arbitrary unilateral use of force based on the “right of the stronger”. Any other attempt to justify the unilateral use of force by a state (with or without “allies”), except perhaps hardly conceivable reference to the institute of “the state of necessity” at this point,⁵⁷ undisputedly remains outside the framework of positive

⁵⁴ See: *supra*, ft. 31.

⁵⁵ It is important to put forward that the implementation of the mentioned measures, the application of regulations of the law of armed conflicts, and particularly humanitarian law is not disputable on any account. Moreover, this UN obligation is especially pointed out by the Secretary-General, see: Observance by United Nations forces of international humanitarian law, Secretary-General Bulletin, ST/SGB/1999/13, 6 August 1999.

⁵⁶ See: *supra*, after ft. 39. However, if a state declines to take measures against terrorists on its territory on its own, or on the other hand, despite a lack of power to resist them on its own, declines the UN action, it will inevitably also “activate” its own parallel co-responsibility, if not as an “indirect” aggressor (in the absence of effective control of terrorists on its own territory), then as a co-instigator of the threat to international peace – thus, the same circumstances stipulated by Article 39 of the Charter for the application of the just mentioned measures of the Organization, whether with or without the use of force.

⁵⁷ In some legal dictionaries the “state of necessity” is specified as “*an excuse for committing what would otherwise be a criminal offence if the act or omission which is in question was necessary to prevent the execution of an illegal purpose.*” Rutherford, L., Bone, Sh. (ed.), *Osborn’s Concise Law Dictionary*, London, Sweet & Maxwell, 1993, p. 226. Some authors see the potential unilateral use of force in the “state of necessity” resulting from a threatening terrorist act; see e.g. Müllerson, R., “*Jus ad bellum* and International Terrorism”, *Israel Yearbook on Human Rights*, Vol. 32, 2002, p. 33. However, the mentioned institute requires an utterly restrictive approach at all times, not only owing to an immanent unlawfulness of such an activity, but also owing to the fact that the relational institute, just like all forms of self-help, is always accessible only to the stronger, i.e. to the one who in fact can independently protect its right. Thus, the UN International Law Commission, although in its Draft Articles on State Responsibility for Internationally Wrongful Acts “necessity” may not be invoked by a State unless it is “*the only way for the State to safeguard an essential interest against a grave and imminent peril; (...)*” (Art. 25); the use of force, however, is omitted from this context; see: A/CN.4/L.602/Rev.1, 26 July 2001.

international law, condemned to seek its "justification" in some other *metajuridic* or even eschatological equity, i.e. mostly in vague spheres which those whose conduct cannot be supported by legal norms resort to. After all, contradicting legal regulation of the use of force to one's own conception of equity *contra legem*, would imply proving antinomy of the legal with the moral or the religious system. In such a conflict the legal system in general does not fare well, but any legal system, including the international legal system, knowingly strives to absorb this *metajuridic* equity into its norms. In this respect by regulation of the use of force international law does not only protect the "weaker" from autocracy of the "stronger", but also separates *the use of force* from *violence*, and consequently a regulated international community from anarchy. It is, therefore, hard to believe that moral or religious normative systems would aspire to the contrary. Thus, reference to God from the beginning of this paper may rather be replaced by a paraphrase of the biblical proverb: "To do (...) law is more acceptable to the Lord than sacrifice."⁵⁸

(Translated by Hrvoja Heffer)

Sažetak

"Rat protiv terorizma" – novi *bellum iustum*

Rad se bavi problemom dopustivosti jednostrane upotrebe sile uobličene u suvremenoj sintagmi „rata protiv terorizma“, posebice kada je takva sila uperena protiv terorističke organizacije koja djeluje na području druge države. Kako suvremeno međunarodno pravo, počevši od Povelje Ujedinjenih naroda svojim, čak kogentnim normama zabranjuje jednostranu upotrebu sile protivnu teritorijalnoj cjelovitosti i političkoj nezavisnosti druge države, zagovornici dopustivosti takvog „rata protiv terorizma“ pokušavaju naći uporište u konceptu „pravednog rata“ (*bellum iustum*).

Rad, stoga donosi pregled razvoja tzv. „doktrine pravednog rata“, počevši od antičkih pisaca, skolastike, pa sve do novovjekovnih shvaćanja, prateći istodobno i tendencije ka ograničenju jednostrane upotrebe sile na razini pozitivnoga međunarodnog prava.

S druge pak strane, međunarodno pravo svojim se ne samo primarnim, već i sekundarnim normama suprotstavlja terorizmu, izdižući njegove počinitelje, čak i kao nedržavne entitete, na razinu neposrednih adresata odnosnih normi. Time, međunarodno pravo omogućuje borbu protiv terorizma primjenom čak i mjera s upotrebom sile predviđenih glavom VII. Povelje, no kao odgovor na prijetnju

⁵⁸ *The Holly Bible*, Prov. 21:3, (ft. 12), p. 626.

miru, ili eventualno čak i tzv. „indirektnu agresiju“ države koja ostvaruje efektivni nadzor nad nekom terorističkom organizacijom, no takva ocjena, kao ni upotreba sile nipošto ne mogu biti prepušteni „pravu jačega“, već naprotiv, moraju svoje mjesto naći u spomenutim sekundarnim normama međunarodnoga prava, posebice prava Ujedinjenih naroda.

Pritom, posezanje za pravičnošću, ovdje, kao ni inače, međunarodnom pravu nije strano, no zagovornici oživljavanja koncepta „pravednog rata“ zaboravljaju da pravičnost može biti tek nadopuna pravu, a ne njegoa negacija.

Ključne riječi: „rat protiv terorizma“, pravdan rat (*bellum iustum*), terorizam, terorističke organizacije, Ujedinjeni narodi, uporaba sile