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BOOK REVIEW

The Ambiguity of “Megaterrorism”

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The Great Terror War. By Richard Falk.†† New York: Olive Branch Press, 2003.

Introduction

The horrendous attacks by al-Qaeda on September 11, 2001 were quickly followed by an unparalleled military campaign unleashed against al-Qaeda headquarters in Afghanistan and the Taliban regime. While the initial air and ground campaign in Afghanistan has lessened, questions linger regarding the nature of the attack against the United States as well as the legality of the response. Does the emergence of terrorist attacks of such magnitude and scope signal a new form of threat to state security? Are restraints upon the use of force created under a statist framework applicable to prevent military responses to terrorism by global networks? What are the outer boundaries of a permissible war against terrorism?

In his latest book, *The Great Terror War*, Richard Falk urges international law scholars and practitioners, as well as state leaders and citizens, to contemplate the hard questions raised in the aftermath of September 11 about the relevancy of modern international law’s restraints upon the use of force in response to “megaterrorism.” *The Great Terror War* is a collection of essays in which Falk clarifies his position on the use of force—a position he originally tested on the pages of *The Nation* in the year following the attack. Although this book does not attempt to provide a highly technical legal, philosophical, or international relations analysis, it provides an elegant view of the normative significance of the relationship between the events surrounding September 11 and the shifting structure of the world order. Falk stands out as one of the few outspoken opponents of the United States’ empire-building project who argued that, in light of the exceptional security threat created by al-Qaeda, an early *limited* military response in Afghanistan was justified, reasonable, and necessary. He maintains that such a use of force could have provided the substantive and

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procedural guidance for understanding when modern international law should adapt to incorporate new security threats as a basis for self-defense.

By emphasizing the limited nature of the military response, Falk addresses both those who advocate for an expansive military response to terrorism and those who remain staunchly opposed to any use of force. His challenge is to construct a postmodern framework of restraint upon the use of force that is adequate to address the unique nature of emerging threats to state security. In this endeavor, he revives the relevancy of international law norms embodied in the modern Westphalian world order to the current needs of an evolving postmodern geopolitical reality based upon international relations and authority amongst globally organized networks rather than territorial sovereigns. The validity of his postmodern framework of restraint rests upon the distinction between “megaterrorism” and “terrorism,” a differentiation which some may find ambiguous. *The Great Terror War* also insufficiently attends to nonmilitary responses to September 11. Despite these concerns, *The Great Terror War* offers an inspiring analysis of normative context prior to September 11, explores the broad implications of the attack for a postmodern international law framework and human rights project, and envisions a future of global governance that is “safer, fairer, and more sustainable . . . than now seems in the offing.”¹

I.

The Great Terror War provides a comprehensive, accessible overview of the factors that led to the diplomatic and legal quagmire which surrounded the possibility of a preemptive war against Iraq. As an influential international law scholar whose writings are widely read outside of legal academia, Falk offers a particularly beneficial analysis for those who are attempting to place the pertinent legal dilemmas within a larger political, moral, or spiritual context. While much scholarship has been written addressing the question of how to legally define the attack or the permissibility of the United States’ response under the UN Charter and customary international law, few have positioned these narrow legal questions within the larger context of the global civic society project. Falk’s examination of the dynamic interaction between law, society, and public policy raises meaningful questions about the impact of international law doctrines upon citizenry and the aspiration for humane global governance. With poignant examples, Falk illustrates the historical relationship between the reemergence of the United States’ military ambitions and the growing opportunities and exploitations of globalization. Throughout the book, Falk describes the ways in which humane global governance may someday be actualized. In this time of global instability, Falk has actively sought dialogue with the public, particularly those individuals engaged in civic society and striving to balance security and humanity. *The Great Terror War* continues this effort.

1. RICHARD FALK, *THE GREAT TERROR WAR* 190 (2002).

In *The Great Terror War*, Falk argues that the potency of nonstate actors such as al-Qaeda requires the development of a postmodern framework of restraint that addresses the inapplicability of modern international law. The main argument is dispersed throughout the chapters as a result of the books' organization as a collection of related essays on a general theme. Although this format may create a slightly disjointed presentation of Falk's visionary thinking, this review highlights several major arguments that are revisited throughout the chapters, with an emphasis upon Falk's postmodern right of self-defense framework. His starting point is that the attacks on September 11 constituted megaterrorism, and gave rise to a limited right of self-defense directed towards al-Qaeda and its headquarters in Afghanistan, as well as the Taliban regime. After delineating this narrow exception to modern prohibitions on the use of force, Falk engages in a vigorous analysis of the substantive and procedural failure of the United States to stay within the bounds of any justifiable right to self-defense through its expansive "Great Terror War." This, Falk argues, has done as much damage to the normative world order that seeks to secure global stability as the harm caused by the threat of megaterrorism.

Key to Falk's thesis is the distinction between megaterrorism and terrorism. Falk enumerates a host of now-familiar factors differentiating transnational megaterrorism from modern forms of terrorism and making September 11 a norm-shattering event. He notes that the attacks caused "damage on a scale once associated with large-scale military attacks under state auspices, and thus threatening to target society in a warlike manner."² In addition to the unparalleled "magnitude, scope, and ideology" of the assault, the perpetrators demonstrated tactical ingenuity, "daring method," the "selection of prime targets of power and wealth," and an "astonishing degree of success."³ The United States and the international community suffered "extraordinary shock effects," as well as an "acute sense of continuing danger and vulnerability" in the wake of the attacks.⁴

Most significantly, Falk argues that the visionary or pathological nature of Osama bin Laden's threat is not open to diplomatic accommodation nor deterred by containment or threats. Falk apocalyptically describes the aims of al-Qaeda as representing a "serious effort to transform world order as a whole, and not merely change the power structure of one or more sovereign states."⁵ Unlike bin Laden's call for a reconstituted caliphate, modern terrorism is most often associated with a legitimate internal struggle for self-determination and is "part of a specific interactive cycle of violence by enemies engaged in a conflict over territory or governance structures."⁶ Groups that may engage in such terrorism are generally susceptible to deterrence efforts, and their underlying regional grievances are reasonably open to the possibility of diplomatic resolution. While the

2. *Id.* at 8.

3. *Id.* at 39.

4. *Id.* at 38.

5. *Id.* at 39.

6. *Id.* at 56.

threat from modern terrorism may be addressed without destroying the underlying self-determination movement, Falk argues that the danger of megaterrorism may only be lessened by the complete elimination of organizations such as al-Qaeda and by relying, in part, upon the use of force in self-defense when megaterrorist threats are imminent.

In debates about how to define legally the megaterrorist attacks and identify an appropriate response, Falk argued from the outset that September 11 gave rise to a new limited and narrowly focused adaptation of the right of self-defense based upon just-war thinking and the rule of reason. In his view, September 11 was one of a number of recent structural challenges which revealed normative cracks in the modern Westphalian world order: an “encounter between the new and the old that partially disables international law and the United Nations from providing authoritative guidance, on the basis of the UN Charter and prior state practice, as to defensive rights and limits on the use of force.”⁷ Falk cites the “puzzling phenomena of ‘humanitarian war,’”⁸ transnational drug and arms cartels, environmental degradation, predatory economic globalization, and international banking as additional examples of postmodern challenges, highlighting gray areas in international law and sovereign authority. In these situations, as with September 11, the United Nations, for various reasons, has not been in the forefront of providing guidance, and the concerns raised by these phenomena are outside the regulatory authority of any one state. Despite this absence of positive law applicable to September 11, Falk emphasizes the continuing vitality and availability of principles restraining the use of force.

To be clear, Falk endorses a recourse to war only with respect to the initial military campaign in Afghanistan. Early in the book, he enumerates three primary goals of a properly conceived war against megaterrorism. The immediate short-term goal of the action in Afghanistan was to destroy the al-Qaeda headquarters and remove the Taliban regime. Provisional results indicate that this was effectively achieved through the bombing of al-Qaeda’s infrastructure and the assistance given to turn the tide of the internal war in favor of the Northern Alliance. Now that the military campaign has reduced the organization’s capabilities, the on-going effort to eliminate al-Qaeda as a global network can be reasonably accomplished, according to Falk, by relying upon and strengthening existing international law enforcement efforts, paramilitary actions, and intelligence sharing. Finally, Falk urges that the war on terror cannot be won without addressing the roots of terrorism and the global democratic deficit, a decidedly non-military project. After briefly arguing that modern international law and the UN Charter fail to provide definitive guidance concerning the use of force in Afghanistan, Falk relies upon “a flexible interpretation of just-war doctrine, combined with a rule of reason” to assess the legality of the military strikes.⁹ Falk argues that the just-war tradition reemerges whenever

7. *Id.* at 10.

8. *Id.* at 90.

9. *Id.* at 66.

the statist framework is strained by a novel challenge, such as when the nation-states and international institutions dealt with the question of the permissibility of nuclear weapons. The fundamental principles of just-war thinking involve the doctrines of discrimination, proportionality, humanity, and necessity in the recourse and conduct of war. Under this doctrine, Falk determines that "the necessity for war in the context of Afghanistan seemed at the time compelling" in light of "the specific setting of urgency, with credible dangers of further attacks."¹⁰ Although Falk concedes that "commentators will disagree on the application of just-war principles, the mere discussion of such guidelines acknowledges that even in the absence of an adapted international law framework, there are limits that apply to the way in which a state conducts its military operations in a postmodern war."¹¹

Falk also finds support for a right of self-defense under the rule of reason, often relied upon to fill the gaps in international law. Here, he queries whether the means of force chosen are reasonably connected to the ends pursued. Falk relies upon a "subtle and imaginative assessment of reasonableness in a context without direct precedent, generating new claims to use force and the need for new limits."¹² The early retaliatory strikes are appropriately viewed as "an adaption of international law to fit circumstances arising from transnational terrorism that made it reasonable to loosen the seemingly rigid prohibition on the use of force in international affairs."¹³ Falk argues that the recourse to war was inevitable and "it seemed reasonable to regard the Taliban as indirectly responsible for the attacks."¹⁴ Further, "stretching the international law doctrine of self-defense to include a non-state actor seemed reasonable and necessary" in light of the massive September 11 attack, the prospect of repetition, and the harm inflicted upon densely populated urban centers.¹⁵ This conclusion is bolstered by the implausibility of a negotiated resolution with al-Qaeda. Falk also surveys the effectiveness of the military campaign and the degree to which the United States reasonably attempted to prevent civilian deaths. His general assessment of the campaign is one of cautious optimism: "[b]eyond [the] change of governing regime, the American strategy seems to have been a reasonably effective set of moves designed to ensure that the country will not serve as a future haven for transnational terrorism as it had during the Taliban years of rulership."¹⁶

Equally important as these substantive grounds for deviation from existing use-of-force law are the procedural requirements Falk describes for states seeking to act in nonconformity with modern restraints upon the use of force. He emphasizes the need for transparency of government deci-

10. *Id.* at 67.

11. *Id.* at 71.

12. *Id.* at 93.

13. *Id.* at 96.

14. *Id.* at 101.

15. *Id.* at 102.

16. *Id.* at 105.

sion-making, either through public explanation, or at a minimum, through confidential review of information sensitive to national security interests. Falk argues that each instance of state military force “needs to be assessed as to the character of its goals, the degree to which peaceful methods have been tried in the past, and the extent to which the scale and tactics relied upon seek to redirect harm to non-civilian targets.”¹⁷ This process further permits the international community to engage in essential clarification of the circumstances under which such deviation is permissible.

The point of departure for Falk from other critics of the United States’ response to September 11 is quite narrow. Falk draws a “red line” between “the legitimate grounds for stretching international law to enable an effective response” to September 11 given the threat of further megaterrorist attacks, and the “degree to which the restraining of ideas embodied in international law, the UN system, and the just-war doctrine have been treated without proper respect by the US government” in its scope and execution of the war on terror.¹⁸ Falk faults the United States for its unilateral expansion of the self-defense rationale beyond a focus on the al-Qaeda headquarters and Taliban regime in Afghanistan as exceeding the substantive justification for the use of force. Falk describes the scope of the United States’ undertaking as “grandiosely (mis)conceived.” He emphasizes that the war against terrorism has been exploited to justify an increase in repression of revolutionary forces engaged in legitimate struggles over self-determination or governance issues. These groups, he argues, “posed no threat, lacked any pretense of global reach, and were as much, or more, victims of unacceptable states violence as they were perpetrators.”¹⁹ Similarly, Falk shares in the criticisms of the inclusion of “rogue states” targets of the war against terrorism as a consequence of the United States’ geopolitical ambitions.

Moreover, Falk denounces the failure of the United States to articulate a “principled rationale” for deviation from the modern normative order set forth in international law and the UN Charter because it has set a danger precedent. Falk maintains that prior to, during, and after the military campaign in Afghanistan, the “US government has not identified reasonable limits that would govern in response to September 11, and has failed to fulfill its responsibilities as a hegemonic lawmaker under circumstances where it seems necessary to act beyond limits of international law in order to protect threatened fundamental national interests.”²⁰ This lack of accountability and unilateralism on behalf of the United States has created “considerable damage to the normative dimensions of global governance—that is, to international law, morality, and collective procedures.”²¹

Falk asserts that these substantive and procedural deficiencies in the Great Terror War waged by the United States are a direct result of merging

17. *Id.* at 109.

18. *Id.* at 82.

19. *Id.* at 108.

20. *Id.* at 187.

21. *Id.* at 11.

the "megaterrorism challenge with preexisting geopolitical ambitions to exert global dominance."²² The United States' empire-building project, according to Falk, seeks to deviate from the statist world order, and seeks instead one in which the hegemonic geopolitical leader exercises military and political power over other nation-states whose sovereign rights have become subordinated. This project has also shifted the power structure away from the de-territorialized "economistic framing" of globalization back to an emphasis upon "'war' and 'security,' a revived and altered statist framing."²³ Domestically, the drive is fed by the patriotic fervor which "allows such an aggressive and dangerous foreign policy to be put forward by Washington without hardly a whimper of protest or doubt expressed either by the opposition party or prime time television."²⁴

Provocatively, Falk submits that the United States' empire-building project creates as detrimental a structural threat to the normative world order as al-Qaeda's megaterrorism. Like the fundamentalism of al-Qaeda, Falk warns of the "fundamentalist logic of the Great Terror War" as the "embrace of secular fundamentalism in the form of hyper-nationalism and the portrayal of adversaries as 'evil.'"²⁵ He describes these clashing postmodern threats as:

the transnational networked power base of al-Qaeda combined with the visionary goal of a reconstituted Islamic *umma* that would supersede the destructive barriers on Muslim community erected on the model of the Western secular state; and the global empire-building response of the United States, with its disregard for sovereign rights and territorial boundaries in its complementary resolves both to wage war wherever al-Qaeda has a foothold and to informally dominate the earth as a whole via space-based weaponry and an overwhelming control over innovations in military technology that render futile efforts of armed resistance by rival states.²⁶

As a consequence of this disregard for the international system's norms and procedures, the Great Terror War is astutely described as being overly broad by justifying the use of force against any form of terrorism, even that conduct associated with traditional movements for self-determination rather than the megaterrorist threat presented by al-Qaeda. It is simultaneously too narrow because it defines terrorism as "anti-state" violence, but sanctions state political violence as "counterterrorism," "retaliation," or "self-defense." By condemning revolutionary groups to the status of "terrorists" and sanctioning reactive state violence—even that which results in high civilian casualties—this narrow aspect of the definition of terrorism runs the risk of "serious, possibly decisive, interference in many long-standing struggles between states and oppressed people fighting for a right of self-determination."²⁷

22. *Id.* at 83.

23. *Id.* at 32.

24. *Id.* at 132.

25. *Id.* at 33.

26. *Id.* at 160.

27. *Id.* at 77.

Falk begins and concludes *The Great Terror War* by considering the nature of winning and losing the war against terrorism as well as the impact of this war upon the broader effort to create humane global governance. The war on terror, Falk argues, can only be won through a principled refocusing upon the megaterrorist threat created by al-Qaeda as well as a clarification of the limited role of military force in this war. In exploring how losing the war against megaterrorism could occur, Falk considers issues beyond the obvious danger that al-Qaeda could unleash further attacks. He cautions that losing the war on terror could also emerge from embracing either of two very different perspectives that each fail to acknowledge the inability of the modern framework of international law to address megaterrorism: the United States' hegemonic empire-building that fails to recognize any applicable doctrines of restraint upon its use of force or critics who denounce any use of force and ignore the United States' inability to protect its security against megaterrorist threats using pre-existing positive law and law enforcement efforts.

More broadly, Falk invokes the visionary ambitions of humane global governance in response to the postmodern changes in the normative world order. In place of the hyper-patriotism aroused by September 11, Falk calls for "cosmopolitan patriotism," the reconciliation "of love of country with responsibility to humanity" that "accepts the right of people and a country to defend their fundamental existence in accordance with international law" while at the same time seeing oneself "from without, as well as within, and welcomes criticism while seeking to live by the rule of law and a geopolitics of mutuality."²⁸ He sets forth the criteria for a constitutive postmodern human rights framework, reviving the global human rights project that has fallen to the wayside after September 11. Against the background of increasing isolation of the United States, which has resulted of its disregard for fundamental tenets of the international system, Falk urges the world to push forward with "utopian realism":

[T]he ethos of global civil society is increasingly guided by what might be called 'utopian realism,' the political understanding that the only realistic way to provide the people of the world and their descendants with a viable future is by institutionalizing power and authority within frameworks of law and governance that now appear situated beyond horizons of attainability. Looking beyond these horizons in the spirit of engagements is the only 'realistic' escape from geopolitical despair!²⁹

II.

Falk articulates a position few scholars have been willing to state with respect to September 11. In *The Great Terror War*, he clarifies the extent and nature of a right to self-defense within a postmodern use-of-force framework. He admonishes those who "asked the legalistic or moral questions about whether the Westphalian and [UN] Charter rules have been

28. *Id.* at 145.

29. *Id.* at 189.

violated in the course of the American response" for ignoring "the problems arising from their inapplicability to the security challenge posed by transnational megaterrorism in the first place."³⁰ Simultaneously, he warns that to rely upon the novelty of megaterrorism to "exempt[] the response from normative accountability and critical scrutiny would set and is setting a dreadful world-order precedent, suggesting the renewed vitality of the cynic's view that in international relations might makes right."³¹

Noticeably absent from the book, however, is lively engagement with the significant counterarguments that have arisen in response to Falk's challenge. For instance, some argue contrary to Falk, that September 11 should be legally defined as a criminal attack subject to law enforcement measures. Others insist that the assault was reasonably characterized as an act of war or "armed attack."³² Granted, Falk's failure to address these views may be a product of Falk's effort to not "reignite the early debate" over the recourse war, but merely to "clarify what [he] believe[s] to have been an appropriate response to September 11."³³ By avoiding such engagement, however, Falk sidesteps the important discussions concerning whether nonstate organizations engaging in transnational political violence should be subject to the laws of war or to the emerging institutions of international criminal law. Further, a weighing of these alternative measures is inherent in just-war thinking as well as an assessment of reasonableness. Falk's argument, by definition, returns the reader to the question of whether recourse to war was truly necessary in light of other measures for reducing the al-Qaeda threat.

In particular, Falk discusses too briefly the law enforcement measures available for disabling the al-Qaeda headquarters in Afghanistan. He appears to reject such an approach on practical grounds:

[I]f law enforcement could work, it is far preferable to war as an approach to the restoration of security for the American people. Unfortunately, my answer is that law enforcement would almost certainly have *not* worked, as was apparent by its prior failure to prevent a series of megaterrorist incidents involving American targets during the 1990s and its inability to detect and prevent September 11.³⁴

Falk rejects enforcement measures, even measures combined with paramilitary activity analogous to that seen in the "war on drugs," as a means of effectively destroying al-Qaeda headquarters. This is all the more baffling in light of his recognition that from the outset of the Afghanistan War on October 7, 2001, the United States expressed no intention to abide

30. *Id.* at 94.

31. *Id.*

32. For examples of scholarship that explores in depth the complexity of the question of properly classifying the attack, see Mark A. Drumbl, *Victimhood in Our Neighborhood: Terrorist Crime, Taliban Guilt, and the Asymmetries of the International Legal Order*, 81 N.C. L. REV. 1 (2002) and Joan Fitzpatrick, *Sovereignty, Territoriality, and the Rule of Law*, 25 HASTINGS INT'L & COMP. L. REV. 303 (2002).

33. FALK, *supra* note 1, at xxii.

34. *Id.* at 99.

by any of the substantive or procedural requirements embodied in Falk's postmodern framework of restraint.

Two aspects of Falk's reasoning result in a failure to sufficiently compare war to international criminal enforcement measures. First, he considers the ideal, his postmodern framework of restraint, against the pragmatic, the nascent state of international criminal law and policing. Second, he reasonably separates the long-term and short-term effectiveness of each approach, rather than the totality of the approach's impact upon state security and the international system. While Falk demonstrates inspiring imagination when championing humane global governance, he declines to apply that vision to advance an international criminal law enforcement effort in response to September 11 that would have legitimately strengthened global institution building. An international criminal law approach, while certain to have failings, would have been no less practical than his aspiration that the United States, the world's unquestioned hegemon, would accept self-imposed limits upon its use of force.

The effort by Falk and others to distinguish September 11 from other acts of terrorism also raises concerns about U.S. "exceptionalism." This reviewer, while harboring no doubt that the events of September 11 were horrendous, questions whether they were "norm shattering" in ways cognizable within the international legal system. One cannot help but sense throughout Falk's description of megaterrorism that the considerations he cites as distinguishing September 11 from modern terrorism are reflective not of a form of megaterrorism, but of the insulation and privilege the United States has historically enjoyed with respect to incidents of widespread political violence against civilians.³⁵ The trauma suffered by people in the United States was significant in large part because the United States, as a nation, has not experienced such violence against civilians. In discussing the distinct symbolic harm of September 11, for example, Falk points to modern technology, including instant broadcasts, recorded cell phone conversations, and mass media, as "giving an anguishing concreteness to the personal pain of the survivors, which prevented the experience of loss from being reduced to a statistical, impersonal body count."³⁶ This personalized connection stands in contrast, presumably, to the depersonalized perception of victims of political violence throughout other regions of the world. Granted, the magnitude and scope of the attacks was unprecedented, but does that give rise to justification for departing from the existing norms of the international legal system? Professor Mark A. Drumbl, citing the atrocities in Kosovo, Rwanda, Bosnia, East Timor, and Cambodia, raises the concern that the "U.S. responses to the attacks may prompt an ad hoc and checkerboard enforcement of international criminal law: namely, as applying abstractly to poor victims in mysterious places, but not to wealthy victims in familiar places."³⁷ Drumbl argues that inter-

35. For a similar perspective, see Abdullahi Ahmed An-Na'im, *Is This a New Kind of War?*, (Nov. 11, 2001), at <http://www.crimesofwar.org/expert/paradigm-annaim.html>.

36. FALK, *supra* note 1, at 39.

37. Drumbl, *supra* note 32, at 104.

national law must counter this U.S. exceptionalism by applying international criminal law "equally to all in a diversified and pluralist manner" that prevents such law from being "built upon the travails of the disempowered objects of international institutions while the masters of those same institutions pursue the sort of self-help forbidden to others."³⁸ September 11 presented just such a historical moment, in which we must rely upon dispassionate rules and institutions of international law to provide reasoned guidance,³⁹ rather than turn to imaginative, yet self-protective, solutions concerning the use of force that may jeopardize the entire international law system.

One facet of September 11 that Falk discusses which does not fall into the exceptionalism trap, is the pathological vision underlying al-Qaeda's plan. Falk asserts persuasively that, unlike groups associated with legitimate self-determination movements, al-Qaeda must be eliminated to lessen the threat of future attacks. Assuming, *arguendo*, that al-Qaeda is undeterrable,⁴⁰ we are left with a choice between eradicating the global network through a use of force that violates the sovereignty of other states, or incapacitating it through international criminal law measures. Falk acknowledges that disabling the al-Qaeda network can be sufficiently accomplished by international law enforcement. Indeed, this approach has proven provisionally effective in light of post-September 11 arrests of alleged al-Qaeda members in various countries. Yet, this raises again the questions of the precise nature or circumstances of "megaterrorism," and whether such characteristics justify recourse to warfare under a postmodern adaptation of self-defense.

In the end, Falk's creative efforts to give novel international legal significance to the concept of megaterrorism are not persuasive. Rather than creating precedent for a loosening of the modern prohibitions upon the use of force, the Afghanistan War is more appropriately understood as raising difficult and exquisitely unique questions of attribution and retaliation within a statist framework. A number of international scholars have reasoned that the attacks constituted an "armed attack," triggering familiar principles of the law of war. Along these lines, Falk states that the often "dubious" doctrine of attribution was reasonably applied in the case of the Taliban and al-Qaeda. If we can satisfactorily draw upon this principle to justify and limit the use of force in Afghanistan, no need arises to develop a

38. *Id.*

39. See Harold Hongju Koh, *The Spirit of the Laws*, 43 HARV. INT'L L.J. 23 (2002). Professor Koh states:

We must respond to the September 11 tragedy in the spirit of the laws: seeking justice, not vengeance; applying principle, not merely power. We must respond according to the values embodied in our domestic and international commitments to human rights and the rule of law. If we are at war, that war will affect our children's future, and that future-I submit-is far too important for us, as lawyers, to leave to the politicians and the generals.

Id. at 38.

40. Some commentators have suggested that al-Qaeda's political goals are not as apocalyptic as Falk describes them, and that the organization's threat might be lessened by a shift in the United States' policy towards the Middle East, particularly Saudi Arabia.

postmodern framework at this time. The phenomena of September 11 may be most notable not for its magnitude or ambitious targeting, but for the entrenchment of al-Qaeda in a statist territorial headquarters located in Afghanistan. Such circumstances are unlikely to be replicated in the near future because few states possessed the extraordinary rogue status of the Taliban government at the time of the

attacks, and would have a sovereignty with similar vulnerabilities as the Taliban. Indeed, it is questionable whether an organization with the capabilities of al-Qaeda could have arisen to such power if it lacked a territorial base such as Afghanistan. As Falk himself argues, now that al-Qaeda headquarters in Afghanistan have been destroyed, the effort to eliminate the group as a global network is adequately accomplished through intelligence sharing, international law enforcement activity, and, at times, paramilitary measures.

Falk's assessment of September 11 as a norm-shattering event, at least in this regard, may be exaggerated. Perhaps rather than elevating September 11 to the status of megaterrorism, the law can seek to calm passions and recognize that the attacks could fall, if somewhat uncomfortably, within modern use-of-force law and emerging international criminal law institutions. If we accept Falk's comments concerning the reasonableness of attributing to the Taliban government at least some degree of responsibility for the September 11 attacks, the circumstances of the attack and the response may be assessed within modern international law as found in the UN Charter, decisions of international courts, and customary international law. Such an analysis raises an abundance of further issues concerning the legality of retaliation, the imminency of the attack, the scope of attribution, proportionality, and so on. The ability to draw upon modern international use-of-force law, however, calls into question the need to develop a novel, precedential loosening of restraints upon warfare as a means of accommodating the unilateral expansion of the right of self-defense by the United States. Any expansion of international law resulting from September 11, if needed, should be a more narrow adaptation of the laws governing the accountability of a state for the acts and conduct of terrorist organizations operating within its borders—a doctrine that permits the breadth of international diplomatic and political measures to be exercised against a noncompliant state prior to any recourse to war.

Yet despite these concerns, Falk may present the strongest argument for limiting the role of force in the global war on terror in light of the near universal acceptance among governments of the use of force against Afghanistan, the international tolerance of the views of the United States on the responsibility of governments who "harbor" terrorists, and, as Falk notes, the inevitability of the Afghanistan War.⁴¹ By attempting to set Sep-

41. See, e.g., Steven R. Ratner, *Jus Ad Bellum and Jus In Bello After September 11*, *AM. J. INT'L L.* 905 (2002). Ratner describes what he refers to as the "Eiffel Tower Factor" that risks making international law irrelevant to government decision-making:

[T]here is a] tolerance of U.S. views on harboring as reflecting the acceptance by leading governmental officials, as well as civil society, that any nation that

tember 11 and megaterrorism apart from modern terrorist activity, Falk provides a rational basis under international law for limiting the expansion of the right to defense which was unilaterally created by the United States and then seized upon by other nations, including India, Israel, China, and Russia, as justification for repressive measures against organizations engaged in domestic terrorism as part of a larger struggle. His postmodern framework of restraint maintains the relevancy of centuries-old norms restraining the use-of-force, norms which otherwise may be, and are being, disregarded with ease.

III.

Falk is a passionate scholar deeply invested in the well-being of humanity, rather than abstract principles, who has willingly acknowledged the "unstable aspects" of his assessment of the Afghanistan War in light of the "changing perceptions of the proportionality of means and ends as it related to the use of force."⁴² He concludes in *The Great Terror War* that, in the end, the bombing campaign in Afghanistan was just both in its initiation and conduct, as it was a means reasonably related to legitimate ends. When all of the presently-available information is considered, he finds that the war satisfied the discrimination, proportionality, humanity, and necessity principles of just-war thinking. He carefully explains, however, that the expansive war on terror as defined by the United States cannot be justified on similar grounds, and offers a postmodern legal framework for containing the United States' imperialistic ambitions. In this respect and others, Falk's intellectual honesty, manifested in his willingness to share the shifts in his thinking throughout the September 11 debate, has been commendable. Falk's engaging series of articles in *The Nation* as well as *The Great Terror War* provides a catalyst for dialogue at time when the public suffers from stifling hyper-patriotism and gives little thought to the development of appropriate principles to guide the global war against terrorism led by the United States.

underwent the sort of attack that took place on the United States—against major national landmarks in its most important cities, leading to thousands of death and permanent scarring of the urban landscape—would have done the same thing if it had the capacity to do so. It is simply unimaginable that France, Russia, China, or India, each of which spars with the United States in numerous foreign policy issues, would have responded otherwise had al Qaeda crashed planes into the Eiffel Tower, the Kremlin, the Forbidden City, or the Taj Mahal. In such a situation, the view of state responsibility proffered by the ICJ, the ICTY, and the ILC—and by many international lawyers—becomes, in effect, instantly anachronistic as a limitation on self-defense.

Id. at 919 (footnote omitted).

42. Richard Falk, *In Defense of 'Just War' Thinking*, THE NATION, Dec. 24, 2001, at 23.

