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# WHEN WAR MAY JUSTIFIABLY BE WAGED: AN ANALYSIS OF HISTORICAL AND CONTEMPORARY LEGAL PERSPECTIVES\*

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## I. INTRODUCTION

War is one of the most destructive phenomena in the contemporary world. Its potential to inflict damage had always been considerable, but modern technology has greatly magnified its consequences. Therefore, the need to prevent the occurrence of armed conflict is more apparent than ever.

At the same time the complete eradication of war continues to be an unrealistic goal. The use of force by international actors is a symptom of deep-seated forces that are likely to remain a potent factor in shaping world events. These forces cannot be neutralized, let alone eliminated. Thus, even the limited objective of regulating war poses a considerable challenge to the international community. Yet, while more ambitious aspirations reflect legitimate concerns and should not be dismissed, it is arguably more productive to be guided by a measure of realism.

Throughout this century, the relatively modest attempts by the international community to contain the phenomenon of war have been unsuccessful. These attempts have invariably stopped short of totally banning the use of force and have resulted in compromise formulas that permit resort to armed coercion under certain circumstances. Furthermore, states have liberally interpreted these formulas, demonstrating the gap that separates even limited norms from reality.

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In fact, the international community has not been particularly successful in enforcing its own norms concerning war. Effective collective action within an international institutional framework has been the exception rather than the rule, and it is arguable that the capacity to undertake such action has diminished over time because of the multipolar nature of the emerging international system. Collective enforcement remains a possibility, but the formidable difficulties encountered in foregoing international consensus serve to illustrate that war, however objectionable in principle and harmful in practice, is an inescapable feature of international relations.

This is not to say, of course, that efforts to control armed conflict need to be abandoned altogether. Between the two extremes of seeking to ban war and adopting a completely passive attitude toward it,<sup>1</sup> there is a middle course of endeavouring to qualify the use of force and impose limits upon it. Such a middle course finds an expression in the approach favored by those who attempt to draw a viable distinction between just and unjust wars.

Admittedly, the distinction between just and unjust wars is not the only feasible one. One could, for instance, differentiate between "moral" and "immoral" wars, "offensive" and "defensive," "rational" and "irrational" types. It appears, however, that the just versus unjust dichotomy has withstood better the test of time and has, by definition, been found more useful.

The distinction between just and unjust wars has also spawned an elaborate set of criteria that render it an attractive analytical tool. Although these criteria have originated in a multitude of historical and intellectual sources, they have evolved into a coherent whole. Taken together, the criteria form a comprehensive cluster of normative yardsticks that may be employed to determine the justifiability of war in a wide range of contexts.

The just war criteria may be divided into two broad categories: those pertaining to *jus ad bellum*,<sup>2</sup> the conditions under which force may be justified; and those pertaining to *jus in*

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1. For a discussion of these extreme positions, see Mushkat, *Is War Ever Justifiable? A Comparative Survey*, 9 LOY. L.A. INT'L & COMP. L.J. 227-317 (1987) [hereinafter Mushkat, *Is War Ever Justifiable?*].

2. *Jus ad bellum* is defined as the right to wage war. BLACK'S LAW DICTIONARY 770, 141 (5th ed. 1979).

*bello*,<sup>3</sup> the restraints and limits on the conduct of war. The following criteria relate to *jus ad bellum*: legitimate authority; right intention; just cause, including probability of success and last resort; and possibly, a formal declaration of war. *Jus in bello* focuses on "just means" which, in turn, are assessed in terms of proportionality, discrimination, chivalry, and a number of more specific prohibitions.

Legitimate authority under the *jus ad bellum* relates to the question of *who* may wage war. The other three criteria — right intention, just cause, and declaration of war — relate to the question of *when* war may be waged. This Article examines historical and contemporary legal perspectives on when war may be justifiably waged. It then synthesizes reflections by theorists on the subject and evaluates, within a single overall framework, parallel international legal norms and practices. It concludes the justifiability of war depends upon the particular circumstances leading up to the conflict.

## II. ANALYTICAL HISTORICAL SUMMARY

### A. Right Intention

The criterion of "right intention," which was first introduced by St. Augustine in the fourth century, was principally directed at preventing any resort to war from motives such as hatred, ambition, vengeance, cruelty, personal glory, or greed.<sup>4</sup> St. Augustine stated that wars waged by the "true followers of God" were not those "made for greed or out of cruelty, but from desire of peace, to restrain the evil, and assist the good."<sup>5</sup> He believed that war should be conducted "with a loving, Christian disposition since the guilty nation was only being punished for its own good."<sup>6</sup> The right intention criterion was further elaborated nine centuries later by Thomas Aquinas. Aquinas proposed that the condition of right intention was a necessary one and had to be satisfied before a war could be considered just.<sup>7</sup> The corollary to Aquinas' theory was that wars declared by legit-

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3. *Jus in bello* is defined as the limited right to wage war. *Id.*

4. ST. AUGUSTINE, *DE CIVITATE DEI* XXXIX, at 6 (Dods trans. 1948) [hereinafter ST. AUGUSTINE].

5. ST. AUGUSTINE, *supra* note 4.

6. ST. AUGUSTINE, *supra* note 4.

7. See T. AQUINAS, *SUMMA THEOLOGIAE* ch. II-II, quae. 40, art. 1 (Fathers of the English Dominican Province trans. 1919) [hereinafter T. AQUINAS].

imate authority and waged for just causes might be "rendered unlawful through wicked intention."<sup>8</sup>

Three valid interpretations of the concept of right intention emerge from the writings of the principal thinkers that examined the issue. St. Augustine and his followers, for instance, emphasized the essential element of peace as the ultimate objective or end of war.<sup>9</sup> They perceived war not as an end in itself but as a means to achieving another end; namely a just or better peace.<sup>10</sup> By implication belligerent acts, which unnecessarily increased the destructive nature of war, thereby undermining the prospects of a true and lasting peace, were liable to condemnation as violations of the right intention criterion.

Another interpretation stressed the limited objectives of just wars. Right intention allegedly restricted the belligerent to the pursuit of just causes. For instance, if a belligerent waging a war of self-defense was presented with the opportunity to conquer its opponent, such a conquest would indicate the absence of right intention. This would change the status of the war from that of a just war to an unjust one, or a mere instrument of expansion.

The definition of right intention as a commitment to support or advance just cause characterized discussions by writers such as Aquinas,<sup>11</sup> de Victoria,<sup>12</sup> Ayala,<sup>13</sup> von Pufendorf,<sup>14</sup> and de Vattel.<sup>15</sup> A compelling argument was put forth by von Pufendorf with respect to the unjustifiability of wars fought for reasons grounded in avarice, ambition, fear prompted by wealth and power of neighbors, a wish to gain an undeserved advantage, or a mere desire to acquire better lands.<sup>16</sup> Similarly, de Vattel hailed as "proper and commendable motives" the promotion of

8. T. AQUINAS, *supra* note 7.

9. ST. AUGUSTINE, *supra* note 4.

10. ST. AUGUSTINE, *supra* note 4.

11. T. AQUINAS, *supra* note 7.

12. F. DE VICTORIA, *ON THE LAW OF WAR, DE INDIS ET DE IURE BELLI REFLECTIONES* ¶ 20, 173 (J. Bate trans. 1917) [hereinafter F. DE VICTORIA].

13. B. AYALA, *DE IURE ET OFFICIIS BELLICIS ET DISCIPLINA MILITARI LIBERI* bk. III, ch. II, 3, 4, at 8 & 10, at 10 (J. Bate trans. 1912) [hereinafter B. AYALA].

14. S. VON PUFENDORF, *DE OFFICIO HOMINIS ET CIVIS JUXTA LEGEM NATURALEM LIBERI DUO* ch. XVI, 2 & 4, at 138 (F. Gardner trans. 1927) [hereinafter S. VON PUFENDORF].

15. E. DE VATTEL, *LES DROIT DES GENS OU PRINCIPES DE LA LOI NATURELLE, APPLIQUES A LA CONDUITE ET AUX AFFAIRES DES NATIONS ET DES SOUVERAINS* bk. III, ch. III, ¶ 28 (C. Fenwick trans. 1916) [hereinafter E. DE VATTEL].

16. S. VON PUFENDORF, *supra* note 14.

the welfare and safety of the state or the common good of its citizens.<sup>17</sup>

A third interpretation of right intention imposed restraints on the conduct of war rather than the circumstances of its initiation.<sup>18</sup> An obligation to act charitably toward one's enemies was thus understood to apply, stemming from a prescription of right intention, which assumed that charity and love prevailed among belligerents.<sup>19</sup>

Apart from the three interpretations espoused by traditional thinkers, many authorities support other contentions. One commonly held view was that the right intention requirement was only relevant in determining the culpability of the warring ruler and did not affect the justice or injustice of the war itself.<sup>20</sup> A similar proposition was advanced by Cajetan who regarded the application of right intention as merely reflecting the personal morals and religious commitments of the ruler.<sup>21</sup> Specifically, the ruler, in assuming improper intentions, might be considered to have committed a sin while executing an otherwise just war.<sup>22</sup> Another interpretation deemed a belligerent — who fought a properly authorized war for a just cause while harboring evil intentions — as a "bad soldier" rather than a brigand.<sup>23</sup> It was also argued that since it was difficult to draw a clear line between the interior moral disorder of a sinful ruler and the public manifestations of his wicked intentions, just cause and legitimate authority were the only conditions necessary for a lawful war.<sup>24</sup> The notion of the right intention was even dismissed by one writer as redundant. This author believes that it was an integral part of the very idea of just cause.<sup>25</sup>

The belief that right intention was conceptually indistinguishable from just cause may account for the lack of references to right intention in writing since the nineteenth century. An-

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17. E. DE VATTEL, *supra* note 15.

18. See *supra* notes 10-17.

19. The significance of "right intention" in the context of *jus in bello* is discussed in R. Mushkat, *The Concept of Just War in International Law* ch. 4 (LL.D. Thesis, UNISA, 1986) [hereinafter R. Mushkat, *The Concept of Just War*].

20. See E. MIDGLEY, *THE NATURAL LAW TRADITION AND THE THEORY OF INTERNATIONAL RELATIONS* 62 (1975) [hereinafter E. MIDGLEY].

21. E. MIDGLEY, *supra* note 20.

22. E. MIDGLEY, *supra* note 20.

23. See E. MIDGLEY, *supra* note 20.

24. See E. MIDGLEY, *supra* note 20, at 45.

25. See Newman, *Modern War and Pacifism*, 28 *IRISH THEOLOGICAL Q.* 193 (1961).

other possible explanation is that the growing emphasis in that period on the sovereign right of states to wage war resulted in a shift of focus from the rulers to the war itself. Indeed, early twentieth century authorities indicate that attention was increasingly accorded to the objective circumstances of war rather than the subjective motives of individual sovereigns.<sup>26</sup> Nonetheless, the criterion of right intention has arguably been expressed in the rules requiring humanity in warfare.

### B. *Just Cause*

An indispensable ingredient of the just war legacy is the criterion of just cause. Almost every text written by traditional war theorists contains references to "just," "legitimate," or "sufficient and valid" causes as prerequisites for overcoming the presumption against the use of force.<sup>27</sup> While specific just causes varied from one period to another, three general circumstances have consistently been regarded as justifiable grounds for recourse to war: protecting innocents from an unjust attack; restoring rights wrongfully denied; and obtaining vindication against an offense.

Under medieval and natural law theories of *bellum justum*, self-defense was the most important reason for a just war.<sup>28</sup> Historically, it has been recognized that states, in order to ensure survival, should be allowed to protect their territory, their people, and their rights against attack.<sup>29</sup> The concept of "defense" took on different meanings at various junctures and in various contexts. Interestingly, the concept was not limited to self-defense in the strict sense of the term.<sup>30</sup> It is worth emphasizing

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26. See R. Mushkat, *The Concept of Just War*, *supra* note 19.

27. See generally ST. AUGUSTINE, *supra* note 4.

28. In the period leading up to World War I, during which the right of states to go to war was seen as inherent in their sovereignty, the concept of self-defense lost some of its relevance (since in such a system the right to use force in self-defense could not be doubted.) Yet, self-defense as a concept continued to play a prominent role in state practice and international legal theory. Thus, despite the general acceptance of a sovereign right to go to war, this right was scarcely invoked in practice, and governments justified war to national and international audiences in terms of self-defense (or self-help).

29. T. AQUINAS, *supra* note 7, at ch. II-II, quae. 188, art. 3.

30. Aquinas, for instance, acknowledged as legitimate, in addition to defense from external enemies, the defense of the poor and the oppressed as well as the defense of the whole "commonwealth" while Suarez deemed the defense of innocent people anywhere in the world as a just cause of war. Included within Gentili's category of "human" just causes were defense for the sake of honor, assistance to nations against unjust oppressors, and coming to the aide of other states subjects in the fight against their own sover-

that apart from a wide variety of reasons that states could invoke in self-defense, states were also entitled to a great deal of freedom with respect to the nature of the action of self-defense. Thus, a defensive action was thought to encompass an anticipatory attack,<sup>31</sup> defense in anticipation of probable danger,<sup>32</sup> a preventive measure to right a balance of power,<sup>33</sup> and a response to a threat of attack.<sup>34</sup>

The notion of restitution was also featured in early writings. Thus, retaking what had been unjustly appropriated was regarded by most writers as justifying war. While later articulations of restitution referred to the denial of rights in general, classic scholars such as St. Augustine,<sup>35</sup> Aquinas,<sup>36</sup> de Victoria,<sup>37</sup> and Ayala<sup>38</sup> alluded to the restoration or recovery of property rights. Other vague formulations — like Grotius' "obtaining what is owed,"<sup>39</sup> Wolff's "attainment of one's own or that which ought to be one's own,"<sup>40</sup> or de Vattel's "obtaining of what belongs to one or that which is due"<sup>41</sup> — might nonetheless lend support to a wider interpretation of the concept of "rights" in this context. The Covenant of the League of Nations recognized as legitimate the redress of "properly validated legal claims,"<sup>42</sup> and thus, reflects a more cautious attitude.

The third justification for war under the traditional theory was retributive justice. A strong punitive element characterized

eign. A similarly broad interpretation of "defense" was imposed by Henry Wheaton (nineteenth century) who listed amongst the just causes of war the defense of territory, vital interests, honor and dignity of state, as well as self-preservation. See *infra* note 51 and accompanying text. See T. AQUINAS, *supra* note 7, at ch. II-II, quae. 188, art. 3; A. GENTILI, *DE IURE BELLI LIBRI TRES* bk. I, ch. X, ¶ 110, at 68-69 & bk. I, ch. XVI, ¶ 121, at 75 (J. Rolfe trans. 1933) [hereinafter A. GENTILI]; F. SUAREZ, *De Bello, De Triplici Virtute Theologica Fide, Spe et Charitate*, in SELECTIONS FROM THREE WORKS BY SUAREZ ch. V, ¶¶ 5, 7 & 8 (J. Scott ed. 1944) [hereinafter F. SUAREZ]; von Elbe, *The Evolution of the Concept of the Just War in International Law*, 33 AM. J. INT'L L. 665, 686-87 (1939).

31. B. AYALA, *supra* note 13, ch. II, at 9.

32. A. GENTILI, *supra* note 30, bk. I, ch. XIX, at 61.

33. E. DE VATTEL, *supra* note 15, bk. III, ch. III, §§ 44-50, at 248-53.

34. T. BATY, *THE CANONS OF INTERNATIONAL LAW* 99 (1930).

35. ST. AUGUSTINE, *supra* note 4, ch. XIX, at 7.

36. T. AQUINAS, *supra* note 7, at ch. II-II, quae. 40, art. 1.

37. F. DE VICTORIA, *supra* note 12, ¶ 16, at 171.

38. B. AYALA, *supra* note 13, ch. II, § 11, at 11.

39. H. GROTIUS, *DE IURE BELLI AC PACIS LIBRI TRES* bk. II, ch. I, § II, ¶ 2, at 171 (F. Kelsey trans. 1925) [hereinafter H. GROTIUS].

40. C. WOLFF, *JUS GENTIUM METHODO SCIENTIFICA PERTRACTATUM* ch. VI, ¶ 620, at 316 (J. Drake trans. 1934) [hereinafter C. WOLFF].

41. E. DE VATTEL, *supra* note 15, bk. III, ch. III, ¶ 23, at 244.

42. LEAGUE OF NATIONS COVENANT art. 8.

discussions of just causes of war by St. Augustine,<sup>43</sup> Aquinas,<sup>44</sup> de Victoria,<sup>45</sup> Ayala,<sup>46</sup> Suarez,<sup>47</sup> Gentili,<sup>48</sup> Grotius,<sup>49</sup> de Vattel,<sup>50</sup> and Wheaton.<sup>51</sup> The punitive element was also preserved in early twentieth century works justifying war in response to egregious violations of international law.<sup>52</sup>

Within the three general types of legitimate causes outlined above, other specific causes were often advanced, reflecting the concerns of the time. Cicero's list of specific causes,<sup>53</sup> for instance, was tinged with the formalism that characterized ancient Rome. Similarly, the strong religious convictions prevalent in the Middle Ages were used to justify wars against infidels and heretics.<sup>54</sup> Moreover, the development of commercial interests and trade ties among nations in the fifteenth and sixteenth centuries might explain the prominence accorded to just causes concerning rights of passage, trade rights, or freedom of the seas in the works of de Victoria,<sup>55</sup> Suarez,<sup>56</sup> and Gentili.<sup>57</sup>

43. St. Augustine asserted that just wars were those "[that] avenge injuries, when the nation or city against which warlike action is to be directed has neglected either to punish wrongs committed by its own citizens or to restore what has been unjustly taken by it." See ST. AUGUSTINE, *supra* note 4, bk. XIX, at 7.

44. Aquinas cited two venerable offenses by the enemy that justified a war: failure by a government to "punish what has been done wickedly by its own [citizens];" or to "give back what was unjustly carried away." T. AQUINAS, *supra* note 7, at ch. II-II, quae. 40, art. 1.

45. de Victoria basically embraced the general causes put forth by St. Augustine and Aquinas, including punishment. See F. DE VICTORIA, *supra* note 12, at ch. XIX, ¶ 7.

46. Ayala also accepted the "trilogy" of general just war causes, including punishment "for some wrong [that] has been unjustifiably inflicted." See B. AYALA, *supra* note 13, ch. II, § 11, at 11.

47. Suarez also considered as "just" wars of punishment aimed at redressing wrongs done to one's allies and friends. See F. SUAREZ, *supra* note 30, ch. IV, at 3.

48. Gentili listed as an "expedient" cause of war the "right of taking vengeance for a wrong [that] one has suffered." See A. GENTILI, *supra* note 30, bk. I, ch. XVIII, ¶ 135, at 83.

49. Grotius endorsed the just cause of punishment of crimes committed anywhere in the world. See H. GROTIUS, *supra* note 39, bk. II, ch. I, § II, ¶ 2, at 171.

50. de Vattel laid down as one object of a lawful war: "to provide for our future security by punishing the aggressor or the offender." See E. DE VATTEL, *supra* note 15, bk. III, ch. III, § 28, at 244.

51. Wheaton reflected prevailing sentiments when discussing the right to wage war for "avenging of injured rights." See WHEATON'S ELEMENTS OF INTERNATIONAL LAW 404 (5th ed. 1916).

52. See, e.g., W. HALL, A TREATISE ON INTERNATIONAL LAW 56 (7th ed. 1917) [hereinafter W. HALL].

53. See Z. PHILLIPSON, THE INTERNATIONAL LAW OF ANCIENT GREECE AND ROME 182 (1911).

54. See F. RUSSEL, THE JUST WAR IN THE MIDDLE AGES (1975).

55. F. DE VICTORIA, *supra* note 12, ch. III, ¶ 19, at 173; ch. III, ¶¶ 2 & 3, at 151, 152.



Notwithstanding the wide range of causes perceived as just in the traditional literature, certain basic issues pertaining to this question were generally agreed upon. It was thought that causes must be of sufficient seriousness and weight to override the presumption against war. References to the "gravity" and "necessity" of causes thus pervade the writings of Suarez,<sup>58</sup> Gentili,<sup>59</sup> Rachel,<sup>60</sup> Textor,<sup>61</sup> de Vattel,<sup>62</sup> and Hall.<sup>63</sup> The tests for evaluating the substance of causes, however, varied from the subjective<sup>64</sup> to the objective.<sup>65</sup>

Most traditional writers were also favorably disposed toward the requirement of proportionality between the good to be accomplished through war and the harm expected to be suffered by all parties.<sup>66</sup> There were also ample references in classical

56. See A. VANDERPOL, *LA DOCTRINE SCHOLASTIQUE DU DROIT DE LA GUERRE* 379 (1925).

57. A. GENTILI, *supra* note 30, bk. I, ch. XIX, ¶ 138, at 86.

58. F. SUAREZ, *supra* note 30, ch. IV, at 1-2.

59. A. GENTILI, *supra* note 30, bk. I, ch. XIII, ¶ 96, at 60; bk. I, ch. XIV, ¶ 104, at 65.

60. S. RACHEL, *DE JURE NATURAE ET GENTIUM DISSERTIONES* ¶ XL, at 183 (J. Bate trans. 1916) [hereinafter S. RACHEL].

61. J. TEXTOR, *SYNOPSIS JURIS GENTIUM* ch. XVII, ¶¶ 1 & 3, at 167-68 (J. Bate trans. 1916) [hereinafter J. TEXTOR].

62. E. DE VATTEL, *supra* note 15, bk. III, ch. III, § 37, at 246.

63. W. HALL, *supra* note 52, at 53.

64. For example, "subjective" tests included: Aquinas' reference to the culpability of the wrongdoer rather than to the injury itself, T. AQUINAS, *supra* note 7, at ch. II-II, quae. 40, art. 1; Ayala's emphasis on culpability and subjective guilt, B. AYALA, *supra* note 13, ch. II, § 11, at 11; and Grotius' insistence on the additional factor of evil intention, H. GROTIUS, *supra* note 39, bk. II, ch. XXIII, § XIII, ¶ 3, at 565-66.

65. For example, "objective" tests included: de Victoria's "standard of a wiseman's judgment," F. DE VICTORIA, *supra* note 12, ¶ 20, at 173; Gentili's and Suarez's rejection of evidence of culpable state of mind of the enemy, A. GENTILI, *supra* note 30, bk. I, ch. XXI, ¶ 163, at 100; F. SUAREZ, *supra* note 30, ch. VI, at 2; Textor's proposals for a diligent inquiry into the causes, J. TEXTOR, *supra* note 61, ch. XVI, ¶ 12, at 161; and Wolff's suggestion of an obligatory arbitration in case of doubtful causes, C. WOLFF, *supra* note 40, ch. VI, ¶ 631, at 232.

66. Aquinas, for instance, asserted that offenses should be overlooked if punishing the offender would cause more harm than the offense itself. Similarly, de Victoria maintained that punishment correspond to the measure of the offense and Grotius urged that the benefits involved should outweigh the costs. The latter criterion was reiterated in the early twentieth century by Hall. See T. AQUINAS, *supra* note 7, ch. II-II, quae. 108, art. I, at 5; F. DE VICTORIA, *supra* note 12, ¶ 14, at 171; H. GROTIUS, *supra* note 39, bk. II, ch. XXIV, § V, ¶ 2, at 572; W. HALL, *supra* note 52, at 56. It has been argued, however, that de Victoria — as well as Suarez — distinguished between defensive wars and wars initiated for the purpose of repressing or correcting "injurious actions" other than armed attack (e.g., infringement of rights, customs of laws) and that the requirement of proportional grave reason applied only to the latter case and not to the case of defense against armed aggression. It has also been contended that de Victoria and Suarez did not believe that "defensive war" required moral justification or was subject to legitimate limitation.

writings to the need to ensure due proportion between causes and the means employed in their pursuit.<sup>67</sup>

Another element of just cause that led to opinions which tended to converge was probability of success. In this context Suarez proposed that the expectation of victory should precede the launching of an offensive war.<sup>68</sup> Wolff was equally adamant that war should not be resorted to unless a reasonable degree of success could be assumed.<sup>69</sup> Later writers, however, postulated that such a requirement was a dictate of prudence rather than a factor in the justness of the cause.<sup>70</sup>

The last component of just cause, which was generally endorsed, was the requirement that war should be employed only as a last resort, after exhausting all peaceful alternatives. Thus, only strict necessity could legitimize recourse to war,<sup>71</sup> and every peaceful means of obtaining redress had to be explored.<sup>72</sup>

### C. Formal Declaration of War

The perception that war ought to be "a last effort to end the dispute without the shedding of blood,"<sup>73</sup> has enlightened some scholars to suggest that war "should be publicly declared, and in fact proclaimed so publicly that the notification of this declaration be made by one of the parties to another."<sup>74</sup> The initial purpose of such a declaration was to indicate to the potential enemy

"It was rather 'an involuntary act' forced upon an innocent political community, which was not then required to justify or limit its response as it should do in the case of 'voluntary' taking up arms to repair some previous violation of justice." P. RAMSEY, *THE JUST WAR* 205 (1968) [hereinafter P. RAMSEY].

67. For a complete discussion of this issue, see R. Mushkat, *The Concept of Just War*, *supra* note 19.

68. F. SUAREZ, *supra* note 30, ch. IV, at 10 (wars of self-defense were excluded on the assumption that they are embarked upon irrespective of the prospects of success since self-defense is not a matter of free will but of necessity).

69. C. WOLFF, *supra* note 40, ch. VI, ¶ 622, at 316-17.

70. See, e.g., E. DE Vattel, *supra* note 15, bk. II, ch. III, ¶ 29, at 244.

71. See, e.g., ST. AUGUSTINE, *supra* note 4, bk. XXXIX, at 6; B. AYALA, *supra* note 13, ch. II, § 11, at 11; F. DE VICTORIA, *supra* note 12, ¶ 60, at 187; A. GENTILI, *supra* note 30, bk. I, ch. XIII, ¶ 96, at 60; bk. I, ch. XIV, ¶ 104, at 65.

72. See, e.g., H. GROTIUS, *supra* note 39, bk. II, ch. XXIII, §§ VII-IX, at 560-63; S. VON PUFENDORF, *ELEMENTORUM JURISPRUDENTIAE UNIVERSALIS LIBRI DUO* v. II, at 145 (W. Oldfather trans. 1931) [hereinafter S. VON PUFENDORF, *JURISPRUDENTIAE*] (indeed, it was von Pufendorf's view that failure to submit a dispute to peaceful settlement amounted to an unjust cause); see also C. FENWICK, *INTERNATIONAL LAW* 382 (1924); S. RACHEL, *supra* note 60, ¶ XLI, at 183-84; J. TEXTOR, *supra* note 61, ch. XVII, ¶ 29, at 176; E. DE Vattel, *supra* note 15, bk. III, ch. III, § 37, at 246.

73. E. DE Vattel, *supra* note 15, bk. III, ch. IV, § 51, at 254.

74. H. GROTIUS, *supra* note 39, bk. III, ch. III, § V, at 633.

the conditions under which a settlement could be reached.<sup>75</sup> The secondary purpose of a declaration of war was to provide formal evidence of the public nature of the war and to signal that the war enjoyed the support of the people.<sup>76</sup> The tertiary purpose was to inform neutral powers so that they could assess the justice of the cause and conduct themselves accordingly.<sup>77</sup> A declaration of war was also intended to serve internal or domestic purposes such as the "instruction and guidance" of the subjects themselves.<sup>78</sup>

The degree of formality attached to a declaration of war, however, has varied in practice throughout history.<sup>79</sup> While post-sixteenth century state practice suggests that attack without prior warning had become the rule rather than the exception,<sup>80</sup> the parties to the Hague Convention of 1907 for the Pacific Settlement of International Disputes<sup>81</sup> sought to restrict the right to resort to war by making it dependent on a prior delivery of a reasoned declaration of war or an ultimatum with a specified time limit.<sup>82</sup> Indeed, forty-seven declarations of war were made during World War I, but the prohibition of war in the Kellogg-Briand Pact<sup>83</sup> led again to "wars in disguise," which by their very nature, were initiated without a formal declaration of war.<sup>84</sup>

75. H. GROTIUS, *supra* note 39, bk. III, ch. III, § VI, at 634-35. Grotius argued that even though under the law of nature no declaration was required when an attack was being warded off, or penalty demanded from the very person who had done wrong, or when the owner wished to seize what belonged to him, it was nonetheless "honourable and praiseworthy" to make such a declaration in order that an offense might be avoided or that the wrong be atoned for by repentance and compensation. *Id.*

76. H. GROTIUS, *supra* note 39, bk. III, ch. III, § XI, at 639.

77. E. DE VATTEL, *supra* note 15, bk. III, ch. IV, § 64, at 262.

78. E. DE VATTEL, *supra* note 15, bk. III, ch. IV, § 64, at 262.

79. Indeed, even according to Grotius, war under the law of nations could be waged simultaneously with its declaration although he emphasized that "by the law of nature some time may be required, as when restitution or punishment for a guilty person has been sought, and this has not been refused." H. GROTIUS, *supra* note 39, bk. III, ch. III, § XIII, at 640.

80. It has been expertly estimated that of 117 wars that took place between 1700 and 1870 only 10 were declared wars. See Eagleton, *The Form and Function of the Declaration of War*, 32 AM. J. INT'L L. 19, 20 n.5 (1938) [hereinafter Eagleton].

81. Hague Convention of 1907 for the Pacific Settlement of International Disputes, Oct. 18, 1907, 36 Stat. 2199, 2 Malloy 2220 [hereinafter Hague Convention].

82. Hague Convention, *supra* note 81.

83. General Treaty for Renunciation of War as an Instrument of National Policy (Kellogg-Briand Pact), *opened for signature* Aug. 27, 1928, 46 Stat. 2343, T.S. No. 796, 94 L.N.T.S. 2137 [hereinafter Kellogg-Briand Pact].

84. Kellogg-Briand Pact, *supra* note 83.

### D. Application of the Criteria

The preceding survey of the conditions under which recourse to war was deemed just by traditional theorists leaves unanswered the question of the relative weight and interrelationships of the criteria they proposed. Specifically, were all the conditions highlighted absolutely necessary? Did each one have to be satisfied at all times for a war to be deemed just? Or, would the inability to meet any single requirement render a war unjust? Similarly, should all criteria be given equal weight or, conversely, ranked according to some order of priorities?

It appears that the key thinkers in early periods failed to address these important issues. It is legitimate to conclude that each criterion was deemed necessary for a just war and all were collectively sufficient.<sup>85</sup> This conclusion is supported by the occasional references to wars that were considered unjust because of the lack of right intention,<sup>86</sup> pursuit of unjust cause,<sup>87</sup> or failure to exhaust all peaceful means of redress.<sup>88</sup> That no distinctions among these criteria were drawn by traditional writers further supports this conclusion. This conclusion also dovetails with the presumption against war that necessitated a fulfillment of all just war conditions in order to be overcome.<sup>89</sup> Moreover, early theorists perceived just war conditions as equally important, although the relative emphasis placed on each tended to shift in response to changing times and circumstances.<sup>90</sup>

### III. CONTEMPORARY CRITERIA

The criteria examined in the preceding section provide a framework in which the question of when war is justified may be addressed in the contemporary context. Given the transformation in the fabric of international relations and corresponding changes in perceptions of international reality, however, the criteria have not all survived intact or some have become irrelevant. The following discussion seeks to establish the extent to

85. See Johnson, *Just War Theory: What's the Use?*, 19 *WORLDVIEW* 41-42, 46 (July-Aug. 1976).

86. T. AQUINAS, *supra* note 7, at ch. II-II, quae. 40, art. 1.

87. F. DE VICTORIA, *supra* note 12, ¶ 10, at 170; H. GROTIUS, *supra* note 39, bk. II, ch. XXII, § II, at 547; C. WOLFF, *supra* note 40, ch. VI, ¶¶ 645, 646, at 331, 332.

88. S. VON PUFENDORF, *JURISPRUDENTIAE*, *supra* note 72, at 145.

89. See W. O'BRIEN, *THE CONDUCT OF JUST AND LIMITED WAR* 35 (1981) [hereinafter W. O'BRIEN].

90. W. O'BRIEN, *supra* note 89, at 36.

which they still constitute useful yardsticks when assessing whether a particular war is just.

### A. *Right Intention*

#### 1. The Relevance of Intention

The classical requirement that belligerents waging a just war be motivated by right intention does not appear to have found explicit expression in contemporary international law. Nonetheless, it is significant in analyzing the use of force in international relations. Thus, for instance, the question of intention, albeit in the negative form of wrong intention of an unjust warrior, was the subject of numerous debates during the deliberations of the Special Committee on the Question of Defining Aggression (Special Committee).<sup>91</sup>

Some United Nations Representatives took the position that in determining aggression, due consideration should be given not only to the illegality of the act committed but also to the intent on the part of the aggressor.<sup>92</sup> Specifically, they argued that certain illegal acts might be committed accidentally without any intention of aggression or that acts, which seem to present all the physical characteristics of force, might in fact constitute an exercise in self-defense.<sup>93</sup> The implication was that the element of intent was essential in the determination of an act of aggression. Various delegates further contended that including intent in the definition of aggression was required by the United Nations Charter (Charter), which distinguished between acts of aggression and other illicit uses of force.<sup>94</sup> Intent, they stressed, appeared to be the only adequate criterion for that purpose.

During the deliberations, the United Nations Representatives emphasized the importance of intent as an element of criminal responsibility.<sup>95</sup> It was claimed that since aggression

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91. The following discussion is based on the *Report of the Special Committee on the Question of Defining Aggression*, 26 U.N. GAOR Supp. (No. 19) at 11-13, U.N. Doc. A/3419 (1971) [hereinafter *Report of the Special Committee*]. For a detailed consideration of the positions of the various states, see J. STONE, *CONFLICT THROUGH CONSENSUS: UN APPROACHES TO AGGRESSION* ch. 4, §§ III-IV (1977) [hereinafter J. STONE].

92. *Report of the Special Committee*, *supra* note 91.

93. *Report of the Special Committee*, *supra* note 91.

94. *Report of the Special Committee*, *supra* note 91 (such as "threat to the peace" or "breach of the peace"). See also U.N. CHARTER.

95. *Report of the Special Committee*, *supra* note 91.

was to be defined as an international crime giving rise to international criminal responsibility, the element of intent could hardly be ignored.<sup>96</sup> This argument was based on the principle that criminal responsibility is inextricably interwoven with intent.<sup>97</sup> As a corollary, it would be unacceptable if those accused of an act involving responsibility were unable to exonerate themselves by proving that they had no culpable intent.<sup>98</sup>

Arguments against the inclusion of intent in the definition of aggression were advanced before the Special Committee with equal vigor.<sup>99</sup> It was asserted that making intent a constituent element of the definition might lead to abuse, since aggressors would be provided with the convenient excuse that they had no intent of inflicting harm through an act of aggression.<sup>100</sup> The proposal to include intent in the definition of aggression was also said to conflict with article 51 of the United Nations Charter, which stipulates that should an armed attack occur, the victim is free to exercise the right of self-defense.<sup>101</sup> Furthermore, given the considerable difficulties in ascertaining an aggressor's

96. *Report of the Special Committee, supra* note 91.

97. *Report of the Special Committee, supra* note 91.

98. *Report of the Special Committee, supra* note 91. Clearly, if intent was not considered as an element of the offense, the absence of intention could not lead to an acquittal. Relevant in this respect are the Nuremberg Principles that define as a "punishable crime under international law" the "(1) planning, preparation, initiation, or waging of a war of aggression . . . ." (Principle VI), *reprinted in* L. HENKIN, R. PUGH, O. SCHACTER & H. SMIT, *INTERNATIONAL LAW* 906 (2d ed. 1980). The principles were affirmed in 1946 by the United Nations General Assembly (General Assembly). See G.A. Res. 95(1), *reprinted in* D. OJONOVICH, *1 UNITED NATIONS RESOLUTIONS* 175 (ser. 1 1946-48). Also relevant is the Draft Code of Offenses Against the Peace and Security of Mankind prepared by the International Law Commission in 1954 that listed the following as "an offense against the peace and security of mankind" in article 2:

(1) Any act of aggression, including the employment by the authorities of a state of armed force against another state for any purpose other than national or collective self-defense . . . .

(2) Any threat by the authorities of a state to resort to an act of aggression against another state.

(3) The preparation . . . for the employment of armed force against another state for any purpose other than national or collective self-defense or in pursuance of a decision or recommendation by a competent organ of the United Nations . . . .

9 U.N. GAOR Supp. (No. 9) at 9-12, U.N. Doc. A/2693, ¶¶ 41-50 (1954).

Evidently, ascribing international responsibility under the above prescriptions without due regard to the intention of the perpetrators of the alleged acts would be contrary to basic principles of criminal law.

99. *Report of the Special Committee, supra* note 91.

100. *Report of the Special Committee, supra* note 91.

101. *Report of the Special Committee, supra* note 91; U.N. CHARTER art. 51.

motives, the facts and circumstances surrounding the commission of the act were deemed more valuable criteria in determining whether the act was aggressive.<sup>102</sup> Some confusion appeared to prevail among the representatives with respect to overlapping terms such as "intent," "motive," "objective," "purpose," and "*animus aggresionis*."<sup>103</sup> Proponents of the inclusion of intention in the definition of aggression sought to remove ambiguity by stressing that they did not equate intention with motive.<sup>104</sup> They argued that if the motive for a state's use of force was to liberate citizens of another state from an oppressive government, and if its intention was to deprive the other state of its political independence, the state resorting to force in such circumstances would be considered an aggressor.<sup>105</sup>

The outcome of the "priority versus intention"<sup>106</sup> debates was a somewhat oblique reference to intent in the 1974 Definition of Aggression (Definition of Aggression),<sup>107</sup> which was an attempt to reconcile the two basically inconsistent views. Article 2 thus stipulates:

The first use of armed force by a state in contravention of the Charter shall constitute prima facie evidence of an act of aggression although the [United Nations] Security Council may, in conformity with the Charter, conclude that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances including the fact that the acts concerned or their consequences are not of sufficient gravity.<sup>108</sup>

102. *Report of the Special Committee, supra* note 91.

103. *Report of the Special Committee, supra* note 91.

104. *Report of the Special Committee, supra* note 91.

105. Five examples of "intention" were listed by the working group as explicitly "aggressive:" the elimination of another state; the annexation of another state or the alteration of the borders of another state; the changing of an existing political or social regime in another state; the suppression of national liberation movements in colonies or dependent territories and the keeping of people in colonial dependence; and the receipt of economic and other advantages from another state. *Report of the Special Committee, supra* note 91.

106. Controversy surrounded the question whether the existence of an act of aggression should be determined exclusively on the basis of "who fired the first shot," that is, overt action by states, or whether account should be taken of the intent of the parties. *See Report of the Special Committee, supra* note 91.

107. *Definition of Aggression*, G.A. Res. 3314, 29 U.N. GAOR Supp. (No. 31), U.N. Doc. A/9531, at 42 (1974) [hereinafter *Definition of Aggression*]. *See also* Norton, *Between the Ideology and the Reality: The Shadow of the Law of Neutrality*, 17 HARV. INT'L L.J. 249 (1976).

108. *Definition of Aggression, supra* note 107, at art. 2.

The reference to "other relevant circumstances" served to circumvent the thorny issue of whether intent and purpose should be considered in the determination of aggression. Nevertheless, those who favored the inclusion of intent continued to insist that intent was implicitly included in the general language of the clause.<sup>109</sup> Indeed, the divergent interpretations surrounding article 2 suggest that the delegates did not agree on the meaning of the words finally adopted. Presumably, the underlying substantive disagreements over the concept of intent still persist.

Priority cannot be dismissed lightly as wholly irrelevant to determinations as to whether the use of force is permissible. No mechanical rule may be applied when characterizing force as impermissible without reference to intention or other contextual factors. After all the international community has not prohibited all recourse to force; rather, it explicitly permits use of force for certain purposes such as self-defense.<sup>110</sup>

The importance of *mens rea* in the determination of aggression may indicate that certain defensive actions are legitimate. Thus, an armed coercion induced, for instance, by provocation, mistake of fact, or bona fide misguided discretion should not constitute aggression and hence should not carry international responsibility. Such use of force, which has been termed "deviated self-defense," might be considered an international offense, but its gravity would be less than that of an international crime and, therefore, would not justify the triggering of the mechanism

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109. See, e.g., *Report of the Special Committee*, 29 U.N. GAOR Supp. (No. 19), U.N. Doc. A/9619 (1974).

110. It should also be noted that while an aggressor should not be allowed to escape responsibility by simply claiming some obscure legitimate intention, rational reconstruction of the "subjectivities of a participant" can, according to McDougal and Feliciano, be "appropriately inferred from acts and the effects of acts, the totality of a participant's operations, verbal and nonverbal considered in a detailed content." McDougal & Feliciano, *Legal Regulation of Resort to International Coercion: Aggression and Self-defense in Policy Perspective*, 68 *YALE L.J.* 1057, 1100 (1959) [hereinafter McDougal & Feliciano]. An illuminating discussion follows that outlines factors that feature in the process of distinguishing actual from publicly declared purposes of a belligerent and in the consideration of the concordance of actual purposes with the fundamental policies of the United Nations Charter (Charter). Included are factors such as consequentiality of objectives, their extension or conservation, participants' expectations, the modalities of coercion, dimensions of coercion, and the acceptance or rejection of community procedures. *Id.* at 1108-58.



of international coercion under chapter VII of the Charter.<sup>111</sup>

## 2. Right Intention as Applied in the Distinction Between Self-Defense and Reprisals

The concept of right intention in the sense of pursuing just aim or purpose, may also underlie the Charter's distinction between lawful self-defense and prohibited reprisals. The punitive aim of reprisals is "to impose reparation for the harm done, or to compel a satisfactory settlement of the dispute created by the initial illegal act, or to compel a delinquent state to abide by the law in the future."<sup>112</sup> These alternative aims do not comply with the right intention requirement and should therefore be considered unjust wars. In contrast, acts in self-defense aimed at "protecting the security of the state and the essential rights — in particular the rights of territorial integrity and political independence — upon which the security depends,"<sup>113</sup> clearly exhibit the right intention necessary for a war to be regarded as just or permissible under contemporary international law.<sup>114</sup>

## 3. Right Intention in the Sense of Limited Objectives in Limited Wars

Another contemporary application of the right intention criterion could be observed in the context of "limited wars" as advocated and practiced in international relations in recent years. The limited war theory has incorporated certain principles that may be viewed as the contemporary expression of traditional just war criteria. These stem from modern political realism, evolution of the institutions of collective security and collective defense, reaction against total war as characterized by World War II, search for strategic alternatives to nuclear war, and a revival of the just war doctrine.<sup>115</sup>

Insofar as the requirement of right intention is concerned, two limited war guidelines are particularly relevant, namely "political primacy and control over the military instrument" and

111. See, e.g., Z. Tamir, *Extra Legal Self-defense in International Law* (unpublished Ph.D. dissertation, Hebrew University of Jerusalem, 1970).

112. Bowett, *Reprisals Involving Recourses to Armed Force*, 66 AM. J. INT'L L. 1, 3 (1972) [hereinafter Bowett].

113. Bowett, *supra* note 112, at 3.

114. Bowett, *supra* note 112, at 3.

115. For an illuminating discussion of these sources and others, see W. O'BRIEN, *supra* note 89, at 220-21.

"limited objectives." The former, which has come to be regarded as the "first and foremost guideline of limited war,"<sup>116</sup> views war as not an end in itself but as an instrument of policy. By extension the use of armed force is permissible only to the extent that it advances the political purposes of war.<sup>117</sup> This perception of war as an instrument of politics and justice — and not as a "vendetta driven by hatred,"<sup>118</sup> to borrow St. Augustine's phrase — may be viewed as the modern day equivalent of the earlier condition of right intention. The requirement of "limited objectives" is yet another example of the contemporary application of the right intention criterion that reflects the objective rooted in traditional writings of creating a sound basis for a just and lasting peace while rejecting temptations to totally defeat and destroy the enemy.<sup>119</sup>

Other self-imposed rules of limited conflict are similar to the classic condition of right intention. For instance, the requirement of "restraint with the psychological instrument" ("painting the enemy as the embodiment of evil and depravity"<sup>120</sup>) aims at keeping a balanced perspective even toward a bitter enemy. Another rule is the principle of "fight and negotiate," which embodies the traditional spirit of preparing for peace while war is in progress.<sup>121</sup>

The latter notion of preparing for reconciliation even as one wages war finds additional expression in contemporary discourse concerning the use of force on humanitarian grounds. Concurrent initiation of the decision-making machinery of appropriate regional organizations, immediate reporting to the Security

116. W. O'BRIEN, *supra* note 89, at 224.

117. The Yom Kippur War of 1973 provides an illustration of this aspect given the rejection for political reasons of an airforce proposal to strike first in view of an imminent Arab attack, at a cost of grave injury to Israel. See, e.g., C. HERZOG, *THE WAR OF ATONEMENT, OCTOBER 1973*, at 452-54 (1975) [hereinafter C. HERZOG].

118. See ST. AUGUSTINE, *supra* note 4.

119. The Korean War provides a case in point. See S.C. Res. S/1588, *reprinted in* D. OJONOVICH, 2 UNITED NATIONS RESOLUTIONS 85 (ser. 2 1946-48) ("to repel the armed attack and to restore international peace and security in the area"); G.A. Res. 376(V), 5 U.N. GAOR Supp. (No. 20) at 9, UN Doc. A/1775 (1950) ("to bring about a cessation of hostilities in Korea and the achievement of [United Nations] objectives in Korea by peaceful means"). The limited objectives pursued by Israel in the Yom Kippur War furnish another example. It was evident that Israel did not aspire to the total defeat and/or destruction of its Arab enemies. Rather, it wanted to defend its territory and achieve a limited military victory to provide a position of strength for negotiations. See C. HERZOG, *supra* note 117, at 128-29.

120. W. O'BRIEN, *supra* note 89, at 232.

121. W. O'BRIEN, *supra* note 89, at 232-33.

Council, prompt disengagement consistent with the purposes of the action, and minimizing the effects on authority structures, are among the actions proposed by present-day international jurists.<sup>122</sup>

#### 4. Right Intention in the Sense of Peace as the Object of War

The aspect of right intention emphasizing peace as the object of war has also retained its traditional significance insofar as the conduct of war is concerned. It is thus generally accepted that war should not be waged in a manner likely to militate against future peace. A war entailing a disproportionate use of force and the infliction of unnecessary suffering would, for instance, breach the peace-keeping aim of right intention.<sup>123</sup>

#### 5. Concluding Observations on the Contemporary Relevance of the Right Intention Criterion

In concluding this discussion concerning the relevance of the traditional just war criterion of right intention in contemporary international relations, a few additional observations are offered. To begin with, Hoffmann's contention that the requirement of right intention is not applicable in the contemporary context is unwarranted.<sup>124</sup> Hoffmann asserts that the just war doctrine was elaborated "for a world in which the Princes were sufficiently Christian to have 'right intention' required, or in which the [c]hurch was sufficiently strong in authority and power to define and interpret morality — not for a world in which the right intention becomes a matter of self-righteous and self-serving self-interpretation."<sup>125</sup> His view reflects an overly restrictive interpretation of right intention and ignores contemporary application of the criterion.

122. See J. MOORE, *Toward an Applied Theory for the Regulation of Intervention*, in *LAW AND CIVIL WAR IN THE MODERN WORLD* 25 (J. Moore ed. 1974) [hereinafter J. MOORE]; Fonteyne, *The Customary International Law Doctrine of Humanitarian Intervention: Its Current Validity Under the UN Charter*, 4 *CAL. W. INT'L L.J.* 203, 258-68 (1974) [hereinafter Fonteyne].

123. For a discussion of the relationship between the purposes of war and the limitations on its conduct, see I. CLARK, *LIMITED NUCLEAR WAR: POLITICAL THEORY AND WAR CONVENTIONS* (1982) [hereinafter I. CLARK].

124. S. HOFFMANN, *DUTIES BEYOND BORDERS: ON THE LIMITS AND POSSIBILITIES OF ETHICAL INTERNATIONAL POLITICS* 50 (1981) [hereinafter S. HOFFMANN].

125. S. HOFFMANN, *supra* note 124.

A more valid and appealing interpretation is put forth by O'Connor who asserts that "the requirement of 'right attitude' is relevant to present moral judgments in war."<sup>126</sup> After all, the claim that war was undertaken with a restricted intention to repel enemy attack and establish a just peace has been made by countries throughout the ages, including the contemporary era.<sup>127</sup> In fact, states appear to share the view that the pursuit of motives other than defense and just settlement is undesirable. Furthermore, right intention is one of the principal criteria by which nations tend to be judged in practice.<sup>128</sup>

126. O'Connor, *A Reappraisal of the Just War Tradition*, 84 ETHICS 187, 170 (1974) [hereinafter O'Connor].

127. Compare, for example, United States claims in 1912 concerning a military response to attacks by Mexican marauders on American villages near Texas that "in no circumstances will [United States troops] be suffered to trench in any degree upon the sovereignty of Mexico or develop into intervention of any kind into the internal affairs of our sister republic." (Letter from the United States Secretary of State to a representative of the Mexican Government of Mar. 13, 1916, *reprinted in* 20 G. HACKWORTH, *DIGEST OF INTERNATIONAL LAW* 292 (1941)), with Israel's protestation of its lack of territorial designs in Lebanon as expressed by Prime Minister Begin in his announcement to the Israeli Knesset on May 7, 1979: "I hereby announce in the name of the [g]overnment of Israel that our state does not have any territorial demands on Lebanon. We support the territorial integrity and national sovereignty of Lebanon." Quoted in Ambassador Blum's speech to the Security Council on May 31, 1979, 34 U.N. SCOR (2146th mtg.) at 2116, U.N. Doc. S/PV.2146 (1979). The statement by Ambassador Goldberg in relation to United States action in Vietnam provides another clear illustration of the importance attached by states to right intention:

Our aims in giving this assistance to South Vietnam are strictly limited. We are not engaged in a 'holy war' against communism. We do not seek to establish an American empire or a sphere of influence in Asia. We seek no permanent military bases, no permanent alliances, no permanent American presence of any kind in South Vietnam. We do not seek to impose a policy of alignment on South Vietnam. We do not seek to overthrow the government of North Vietnam. We do not seek to do any injury to mainland China nor to threaten any of its legitimate interests. We do not ask of North Vietnam an unconditional surrender or indeed the surrender of anything that belongs to it.

Meeker, *Vietnam and International Law of Self-defense*, 56 DEP'T ST. BULL. 54, 60 (1967).

128. The United States, for instance, was charged with a clear violation of the right intention requirement during World War II because arguably its aim was that of an "unconditional surrender." See Murray, *Theology and Modern War*, in W. NAGEL, *MORALITY AND MODERN WARFARE* 69, 83 (1960) [hereinafter Murray]. Similarly, some of the most scathing criticisms of United States involvement in Vietnam were on grounds of right intention. The specific argument was that the United States had been committed to containment of communism regardless of the consequences for the Vietnamese people, and as such its motive stemmed from immoral and hence wrong intentions. In a similar vein, critics asserted that since a factual error was involved in estimating the danger to world security posed by communist insurgency in Vietnam, a wrong attitude of fear and hostility was needlessly encouraged. See O'Connor, *supra* note 126, at 170. The criticisms levelled against Israel's actions in Lebanon provide another example of a judgment based

Finally, the requirement that the intentions of a state engaged in a just war should encompass the establishment of a fair peace may seem utopian under present circumstances for the wars of this century have invariably released a torrent of hatred and desire for vengeance. Moreover, it is very hard to envision the establishment of a just peace following an all-out nuclear war. Be that as it may, this should not in itself constitute a reason for rejecting the relevance of the criterion of right intention, particularly in the light of past experiences that saw the "greatest enemies of the modern era . . . brought round in the cyclical process of international politics to become trusted allies against former friends who are now viewed with fear and distrust."<sup>129</sup>

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on the criterion of right intention, reflecting in this instance the requirement that war should not extend beyond the pursuit of the just cause of defense. Specifically, it was contended that even if one conceded the justifiability of Israel's move against Palestine Liberation Organization (PLO) forces in Southern Lebanon, an extension of the action by Israel revealed evil intentions as the war had no longer a strictly preventive nature and hence was unjust. One may, however, query whether a just war or, in its contemporary form, a legitimate war of self-defense must be limited to repelling the immediate danger or can be directed toward removing the danger. Authorities may be cited in this respect to support the view that:

Permissible objectives of [self-defense] against massive military attack and invasion, for instance, need not necessarily be limited to stopping and repelling or punishing back invading enemy troops to their own side of the frontier; realistically, the necessity to which the target-claimant is responding may not, in the circumstances of a particular case be wholly terminated merely by repulsion of the enemy invasion, and may reasonably require counter-invasion of the enemy's own territory.

See McDougal & Feliciano, *supra* note 110, at 1136. See also Schwarzenberger, *The Fundamental Principles of International Law*, 87 *HAGUE RECUEIL* 195, 335 (1955) [hereinafter Schwarzenberger]; W. O'BRIEN, *supra* note 89, at 26. At the same time, it is arguable that a license to remove the danger can be abused. On the other hand, an action limited to repelling a danger may lose its purpose if circumstances permit the danger to reappear (indeed, such a danger developed after the 1978 Israeli incursion into Lebanon). It seems, therefore, that in the context of the Lebanon imbroglio, some support could be mustered for the contention that the destruction of the PLO did constitute a "legitimate" end given the PLO's open commitment to destroy Israel and the activities undertaken by it in pursuit of this aim. See *id.*

129. W. O'BRIEN, *supra* note 89, at 35. O'Brien uses the performance of the Western allies in World War II to highlight the difference between subjective desires and intentions and actual behavior. In his view, by forming the United Nations, the Western allies subsequently limited themselves to their original just cause and "made the most serious effort in history to establish a just and lasting peace through a world organization." *Id.* at 76.

## B. *Just Cause*

### 1. Nature of the Cause

#### a. *The Notion of Justice*

In the context of contemporary international law, consideration of the central condition of just war, namely just cause, has been generally limited to questions relating to self-defense as stipulated in article 51 of the Charter.<sup>130</sup> It is within the parameters of this clause that nations have tended to justify war or reject the use of force by others. This apparent restriction on the range of traditionally permissible just causes has prompted writers like Johnson and O'Brien to conclude that modern international law has sacrificed justice in its attempt to virtually eliminate the competence of states to unilaterally engage in war.<sup>131</sup>

Nonetheless, this conclusion should be qualified for a number of reasons. First, it assumes a rather narrow meaning of justice in the international domain. An international standard of justice is a compound concept expressing a variety of common interests and values that bind members to the world community of states. This complex notion encompasses values such as freedom, sovereignty, self-determination, democracy, equality, tolerance, and peace.<sup>132</sup> "Peace" is but one component of "justice." Therefore, it is not entirely accurate to speak of a subordination of justice as a criterion for justifying the use of force. In addition, the Charter does not necessarily compel states to view unilateral recourse to force in an overly restrictive manner. Whether this has resulted from a liberal interpretation of article 51<sup>133</sup> or a broad interpretation of customary international law, various notions of justice have consistently entered into consid-

130. Article 51 of the Charter states that:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a [m]ember of the United Nations, until the [United Nations] Security Council has taken measures necessary to maintain international peace and security. Measures taken by [m]embers in the exercise of this right of self-defense shall be immediately reported to the [United Nations] Security Council and shall not in any way affect the authority and responsibility of the [United Nations] 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.

U.N. CHARTER art. 51.

131. See Johnson, *Ideology and the Jus Ad Bellum: Justice in the Initiation of War*, 41 J. AM. ACAD. RELIG. 212, 221 (1973); W. O'BRIEN, *supra* note 89, at 23.

132. See H. Kelsen, *Foundations of Democracy*, 66 ETHICS 27, 38 (1955).

133. U.N. CHARTER art. 51. See also *supra* note 130.

erations pertaining to the permissibility and justifiability of resort to force.

It is also highly probable that forcible interventions in the name of justice will continue to occur, and any normative formulation, which fails to acknowledge this factor, would not be operationally viable.<sup>134</sup> As Stone has aptly observed:

"[I]t is because a definition of aggression, which systematically ignores demands sincerely made in the name of justice, is not operationally viable, while an agreed definition that is precise enough to guide us and yet flexible enough to take these demands into account is beyond our reach, that the hope of basing peace enforcement on a definition of aggression has gradually faded."<sup>135</sup>

Finally, United Nations resolutions endorsing wars of national liberation in pursuit of self-determination may be cited as further evidence of the relevance of the notion of justice to the use of force in international relations.<sup>136</sup> These resolutions clearly suggest that justice has not become completely subservient to the twin objectives of peace and security.

An examination of the scholarly debate concerning the permissibility of humanitarian intervention may also demonstrate to what extent the use of force in the name of justice is still prevalent. Protection of human rights is as much a value of the Charter as is the avoidance of war.<sup>137</sup> For this reason the Charter should be interpreted to permit forcible actions or sanctions by individual states to protect human rights. This is particularly true since the United Nations lacks effective enforcement machinery.

During certain points in history, characterized by international turbulence, peace and security arguably assumed a more prominent position in the hierarchy of international values. Recent experience suggests, however, that considerations of justice

134. J. STONE, *AGGRESSION AND WORLD ORDER: A CRITIQUE OF UN THEORIES OF AGGRESSION* 182 (1958) [hereinafter J. STONE, *AGGRESSION AND WORLD ORDER*].

135. J. STONE, *AGGRESSION AND WORLD ORDER*, *supra* note 134.

136. See, e.g., G.A. Res. 2105 (XX) (1965); G.A. Res. 2181 (XXI) (1966); G.A. Res. 2270 (XXII) (1967); G.A. Res. 2708 (XXV) (1970); G.A. Res. 3070 (XXVIII) (1973). For an account of these and other relevant resolutions, see W. VERWEY, *Decolonization and Jus ad Bellum: A Case Study on the Impact of the United Nations General Assembly on International Law*, in *DECLARATIONS ON PRINCIPLES: A QUEST FOR UNIVERSAL PEACE* 121-40 (R. Akkerman ed. 1977) [hereinafter W. VERWEY].

137. For a discussion of humanitarian intervention, see *supra* note 47 and accompanying text.

have been accorded great weight, possibly because of fairly long periods without a major war.<sup>138</sup>

In today's decentralized world the concept of justice may be interpreted subjectively and the meaning that it is given often hinges on the sociopolitical values of a particular political entity. Notwithstanding the common interests accepted as binding by the international community, viewpoints on how to resolve conflicts differ. The just cause principle, therefore, entails a determination of relative justice, a process that is uncertain at best. It does not, however, fundamentally differ in this respect from other moral judgments, all of which require the reconciliation of conflicting values. As O'Connor indicated, these inherent difficulties notwithstanding, it may be legitimately argued that the allied forces fought for a just cause in World War II.<sup>139</sup>

At the same time a distinction must be drawn between the "justness" and the "righteousness" of a cause. The righteousness of a cause pertains to problematic situations in which the parties conclude — by virtue of their ideology, race, or religious beliefs — that their cause is just.<sup>140</sup> The justness of a cause, on the other hand, is measured by rational criteria and is further qualified by conditions other than the perceived worth of the cause itself.<sup>141</sup> The application of such criteria is bound to be inexact. Nonetheless, it enables one to distinguish one-sided claims from justifiable causes of war and to ascertain whether the boundary between proper and improper use of force has been crossed.

Today, however, the evaluation of the substance of a just cause is a far more challenging task. In classical just war theory a specific incident or unjust action provided the impetus for waging a war.<sup>142</sup> In contrast, the modern approach views international conflict as a long-term process in which the specific "cause" leading to an outbreak of hostilities may be less important than the sociopolitical circumstances underlying the relationships between the warring nations.<sup>143</sup> One is, therefore, inev-

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138. See, e.g., Claude, Jr., *Just Wars: Doctrines and Institutions*, 95 *Pol. Sci. Q.* 83, 95-96 (1980).

139. O'Connor, *supra* note 126, at 169.

140. Mushkat, *Is War Ever Justifiable?*, *supra* note 1, at 232-33.

141. Mushkat, *Is War Ever Justifiable?*, *supra* note 1, at 230-31.

142. See *supra* notes 4-90 and accompanying text.

143. The official views expressed in response to the 1973 Arab-Israeli war provides a case in point. In the debate conducted in the United Nations Security Council (Security Council) in October 1973, the representatives of several countries took the position that the military action resorted to by Egypt and Syria was justified in view of the overall



itably led into a comparative analysis of the political characteristics inherent in a warlike confrontation. As O'Brien vividly stated: "[I]n our time the substance of the just cause condition of just war has been essentially the issue of being Red or Dead."<sup>144</sup> It is, in fact, often a question of survival in comparison to which substantive just causes found in traditional theories may appear "almost insignificant."<sup>145</sup>

### b. *Permissible Forms of Just Causes*

The forms of pursuing just causes are, however, on the whole more restricted in today's legal doctrines. Under positive international law wars of vindictive justice, in which the belligerent endeavors to right error and evil as a matter of principle, are no longer condoned.<sup>146</sup> Thus, for example, wars to free the Soviet people from Communist rule would not be permitted. On the other hand, some might insist that saving part of the Soviet population from genocide or enslavement would be justifiable.

It is generally maintained that the only form of offensive war legally permissible under contemporary international law is a United Nations enforcement action to suppress threats to peace under chapter VII of the Charter.<sup>147</sup> The distinction, however, between "offensive" and "defensive" wars may be blurred at times. As suggested by Aron, for example, it is possible for a country to conduct an offensive foreign policy that may put it into a defensive position in the context of a war.<sup>148</sup>

Considerable confusion surrounds the characterization of a forcible action as self-defense or reprisal.<sup>149</sup> Notwithstanding

situation in the Middle East. See UN MONTHLY CHRON. 3 (Nov. 1973).

144. W. O'BRIEN, *supra* note 89, at 21.

145. W. O'BRIEN, *supra* note 89.

146. Kellog-Briand Pact, *supra* note 83.

147. See U.N. CHARTER art. 42. In addition, there is of course the theoretical possibility of military action against "enemy states" under articles 53(1) or 107 of the Charter, or joint action of the five Permanent Members of the Security Council under article 106. But, as noted by Farer, expectations about the possibility of such action would appear to be very low and the relevant provisions might reasonably be characterized as the "Charter analogue of the vermiform appendix." T. FARER, *Law and War*, in III THE FUTURE OF THE INTERNATIONAL LEGAL ORDER 15, 27 n.50 (C. Black & R. Falk ed. 1971) [hereinafter T. FARER, *Law and War*].

148. R. ARON, *PEACE AND WAR: A THEORY OF INTERNATIONAL RELATIONS* 85 (1966).

149. For a discussion concerning United States bombing raids against military positions in North Vietnam following the Gulf of Tonkin attacks on United States destroyers in August 1964, see *Resort to War and Armed Force*, in DIGEST OF UNITED STATES PRACTICE OF INTERNATIONAL LAW ch. 14, § I (1980) [hereinafter *Resort to War and Armed*

this confusion, one salient feature that accords a defensive character to a cause pursued through force can be identified. This feature is the action's direct relationship to rights previously violated, although the wrongdoing that gives rise to such wars may be "less visible than a blitzkrieg sweeping across international boundaries."<sup>150</sup> Thus, a "war of intervention to correct a flagrant and persistent denial of justice may . . . be justified as a defense of the innocent."<sup>151</sup> It is also arguable that governments are often constituted "in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty;"<sup>152</sup> if these purposes are not served a right devolves to the people to reconstitute the political organs of their society and reassert violated rights by force if necessary.<sup>153</sup>

Despite the emphasis on the restoration of rights wrongfully denied, the punitive motives behind many old just wars are not legitimate under contemporary international law. Thus, the just warring power may no longer exercise the judicial function its traditional counterpart used to perform in punishing a wayward nation. Today, it is generally believed that all sanctions in international relations must assume the form of acts undertaken or authorized by the United Nations. Nonetheless, a similar objective may be accomplished through a liberal interpretation of the right of self-defense resembling that suggested by O'Brien.<sup>154</sup> According to O'Brien, as long as the measures are necessary, proportionate, and closely related to the sources of illegal armed coercion, a positive result may be achieved. This result is devoid of the pitfalls of reprisals and at the same time effectively fulfills

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*Force*]. The attacks were justified by the Department's Legal Adviser Stevenson as "self-defense" but were referred to in the Senate Hearings by Senator Fulbright and Secretary of Defense McNamara as "retaliation." *Id.* Similarly, United States air strikes and bombing raids that followed the North Vietnamese attack at Pleiku in February 1965 were characterized by the White House as "appropriate reprisal action" and defended in the United Nations as "measures of self-defense." *Id.*

150. R. POTTER, *WAR AND MORAL DISCOURSE* 10 (1969) [hereinafter R. POTTER].

151. R. POTTER, *supra* note 150, at 10.

152. U.S. CONST. preamble.

153. R. POTTER, *supra* note 150, at 11. The recent events in Grenada may be relied upon to illustrate this point, for the Governor-General there, seeking to protect the constitution, presumably exercised his reserved powers under it, (see *The Const. of Grenada*, in III *THE CONSTITUTIONS OF THE WORLD* 57-58 (A. Blaustein & G. Flanz eds. 1974)), to invite the forcible assistance of external forces. Thus, subject to factual verification, the intervention that followed may perhaps be regarded as justified on this ground.

154. W. O'BRIEN, *supra* note 89, at 25-27.

the intended role of such measures.<sup>155</sup>

c. *Defensive Causes*

i. Self-Defense Under the United Nations Charter

While the issue of the legitimacy of offensive wars is subject to considerable controversy, no reservations exist as to the justness of defensive wars. The legitimacy of defense in the face of unjust attack is axiomatic. Yet, the conditions and details of the cause of self-defense are by no means agreed upon. Through the plethora of scholarly assessments and erratic state behavior, at least one specific requirement has been agreed upon: namely that self-defense must be preceded by an event consisting of a breach of legal duty owed to the state claiming a right of self-defense. There is, however, much doubt as to what rights a state is entitled to defend or what are the delicts that would provide belligerents with the just cause of self-defense.

The common view is that a broad understanding of self-defense, often understood to be identical with self-preservation, has given way to a much narrower concept of self-defense as a restricted exception to the general prohibition of the use of force in a system of collective security. Indeed, a literal reading of article 51 of the Charter suggests that self-defense is permissible only in the case of armed attack.<sup>156</sup> Although the core meaning of an "armed attack" is the armed violation of the territorial integrity and political independence of another state, there is a residual category of cases that defy easy classification. Even if the terms armed attack and aggression are assumed to be identical, the efforts of the United Nations General Assembly to define aggression have left many questions unanswered.<sup>157</sup>

155. W. O'BRIEN, *supra* note 89, at 25-27. For Falk's discussion of "reasonable" reprisals, see Falk, *The Beirut Raid and the International Law of Retaliation*, 63 AM. J. INT'L L. 415-43 (1969) [hereinafter Falk].

156. U.N. CHARTER art. 51. For expositions of such a construction, see, e.g., Henkin, *Force, Intervention and Neutrality in Contemporary International Law*, PROC. AM. SOC. INT'L L. 147, 149, 165 (1963); P. JESSUP, A MODERN LAW OF NATIONS 166 (1948) [hereinafter P. JESSUP]; H. KELSEN, THE LAW OF THE UN 797-98 (1950); Kunz, *Individual and Collective Self-Defense in Article 51 of the Charter of the UN*, 41 AM. J. INT'L L. 872, 878 (1947) [hereinafter Kunz, *Individual and Collective Self-Defense*]; G. SCHWARZENBERGER, REPORT ON SELF-DEFENSE UNDER THE CHARTER OF THE UN AND TOPICS COVERED BY THE DUBROVNIC RESOLUTION 617 (1958).

157. This assumption has not gone undisputed despite the fact that the term "aggression armée" in the French version of article 51 of the Charter appears as the equivalent of armed attack. On the meaning of "armed attack" and its relationship to

For instance, it is unclear whether a state's support of armed bands committing acts of violence in another state justifies the use of force in self-defense.<sup>158</sup> It is well established in international law and practice that a state harboring armed bands incurs responsibility for acts of aggression committed by these groups.<sup>159</sup> Support may be similarly marshaled for the contention that a victim state possesses a right of forceful abatement under customary international law. Oppenheim and Lauterpacht maintain that on failure of the host state to prevent, or on notice to abate, attacks by armed bands, "a case of necessity arises and the threatened state is justified in invading the neigh-

aggression, see generally D. BOWETT, *SELF-DEFENSE IN INTERNATIONAL LAW* 187-93 (1958) [hereinafter D. BOWETT]; I. BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 365-68 (1968) [hereinafter I. BROWNLIE]; R. HIGGINS, *THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UN* 199-205 (1963); M. McDUGAL & F. FELICIANO, *LAW AND MINIMUM WORLD PUBLIC ORDER: THE REGULATION OF INTERNATIONAL COERCION* 232-41 (1961); J. STONE, *AGGRESSION AND WORLD ORDER*, *supra* note 134, at 72-76.

158. *Definition of Aggression*, *supra* note 107, at art. 3(g).

159. These propositions are well documented in a long series of proposals and international instruments including article 4 of the Draft Declaration on Rights and Duties of States, 1949 Y.B. INT'L L. COMM'N 287; and article 2(6) of the Draft Code of Offenses Against the Peace and Security of Mankind, 1951 Y.B. INT'L L. COMM'N 135. Article 2(4) of the same code, as extended by the commission in 1954, condemned as an international crime under the principles consecrated at Nuremberg:

[T]he organization, or the encouragement of the organization by the authorities of a state, of armed bands within its territory or any other territory for incursions into the territory of another state, or the toleration of the organization of such bands in its own territory, or the toleration of the use by such armed bands of its territory as a base of operations or as a point of departure for incursions into the territory of another state, as well as direct participation in or support of such incursions.

*Id.*

A further aspect of the illegality of countenancing this kind of activity is stressed in the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty, which forbids states to "organize, assist, foment, finance, incite, or tolerate subversive, terrorist, or armed activities directed toward the violent overthrow of the régime of another state." G.A. Res. 2131, 20 U.N. GAOR Supp. (No. 14) at 11, U.N. Doc. A/6014 (1965). The Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations of 1970 (Declaration on Friendly Relations), moreover, proscribes the "acquiescing [by states] in organized activities within its territory" aimed at fomenting civil war or omitting terrorist acts in another state. G.A. Res. 2625, 25 U.N. GAOR Supp. (No. 28) at 121, U.N. Doc. A/8028 (1970) [hereinafter Declaration on Friendly Relations]. Finally, the 1974 Definition of Aggression in its "compromise" formula terms as "aggression," *inter alia*, "the sending by or on behalf of a state of armed bands, groups, irregulars, or mercenaries [that] carry out acts of armed force against another [s]tate of such gravity as to amount to the acts [of aggression] listed above, or its substantial involvement therein." *Definition of Aggression*, *supra* note 107, at art. 3(g).

boring country and disarming the intending raiders."<sup>160</sup>

Some doubts have been raised, however, with regard to the legality of the victim state's recourse to measures of abatement under article 51 of the Charter. It is García-Mora's opinion, for instance, that the Charter has excluded the remedial license of forceful abatement previously permitted under customary international law.<sup>161</sup> Nonetheless, García-Mora fails to explain convincingly why article 51 should not apply to a type of armed attack clearly conceived by the international community as "aggression" and "an escalating threat to all nations."<sup>162</sup>

In this regard much, of course, depends on whether one is inclined to give a narrow or broad interpretation to the expression "if an armed attack occurs." According to Brownlie only a "co-ordinated and general campaign by powerful bands of irregulars, with an obvious or easily proven complicity of the government of the state from which they operate" would constitute an "armed attack."<sup>163</sup> Kunz also views the approval of a state as a precondition for a "legitimate" armed attack.<sup>164</sup> On the other hand, one may question why government complicity or approval should be determinative of an armed attack. More convincing is the accumulation of events theory, whereby a series of terrorist acts reveals a distinct pattern that would qualify as an armed attack.<sup>165</sup> United Nations Security Council (Security Council) practice in relation to Israeli counter-terrorist activities does not, however, lend support to this proposition. An examination of relevant Security Council resolutions enacted between 1968 and 1978<sup>166</sup> distinctly suggests that no aggregation of terrorist

160. L. OPPENHEIM, 1 *INTERNATIONAL LAW* ¶ 130 (H. Lauterpacht 7th ed. 1944). See also Kunz, *Sanctions in International Law*, 54 *AM. J. INT'L L.* 324, 331-32 (1960) [hereinafter Kunz, *Sanctions in International Law*]; J. STONE, *AGGRESSION AND WORLD ORDER*, *supra* note 134, at 92-103; J. STONE, *OF LAW AND NATIONS* ch. I (1974).

161. M. GARCÍA-MORA, *INTERNATIONAL RESPONSIBILITY FOR HOSTILE ACTS OF PRIVATE PERSONS AGAINST FOREIGN STATES* 118-29 (1962) [hereinafter M. GARCÍA-MORA].

162. M. GARCÍA-MORA, *supra* note 161.

163. I. BROWNIE, *supra* note 157, at 731.

164. Kunz, *Sanctions in International Law*, *supra* note 160, at 878.

165. See, e.g., Blum, *State Response to Acts of Terrorism*, 19 *GER. Y.B. INT'L L.* 223, 233 (1976). It may be of interest to note that patterns of attacks or infiltration can rise to the level of an "armed attack" thus justifying the use of force in the exercise of the right of self-defense. The United States made this determination both in its legal defense of American participation in the Vietnam War and in the Cambodian incursion of May 1970. See *Resort to War and Armed Force*, *supra* note 149.

166. These include:

S.C. Res. 262, U.N. Doc. S/RES/262 (1968).

S.C. Res. 270, U.N. Doc. S/RES/270 (1969).

attacks, as long as they remained merely the activities of armed bands, could legitimize an Israeli response. It is apparent that the Security Council considered each case of use of force individually and refused to consider political and military justifications.<sup>167</sup>

From a practical standpoint this restrictive approach ignores the problems inherent in counter-insurgency self-defense. As Falk has pointed out, states confronted with attacks consisting of small cross-border raids have limited options.<sup>168</sup> They can seek out and destroy the guerrillas in their sanctuaries or convince the sanctuary state to undertake the task itself.<sup>169</sup> In exercising either option the target state is likely to be condemned by the international community for responding disproportionately given the large, overt nature of the operation and the possible involvement of regular forces of one state in the territory of another.<sup>170</sup> A refusal to consider all the circumstances surrounding an asserted right of self-defense is unrealistic and particularly unsuited for a world lacking an impartial and effective Security Council. In fact, it "aggravates the frustration generated by inhibitions on recourse to full scale war."<sup>171</sup>

In any event by restricting the right of self-defense to cases of armed attack, article 51 leaves an uncomfortable gap between acts illegally violating rights of states and acts against which self-defense is permitted. Several attempts have been made to bridge this gap, the most notable being the claim that there is a customary right of self-defense in addition to article 51. Emphasizing the declaration in article 51 that nothing in the Charter shall impair the "inherent right of individual or collective self-

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S.C. Res. 279, U.N. Doc. S/RES/279 (1970).

S.C. Res. 280, U.N. Doc. S/RES/280 (1970).

S.C. Res. 285, U.N. Doc. S/RES/285 (1970).

S.C. Res. 313, U.N. Doc. S/RES/313 (1972).

S.C. Res. 316, U.N. Doc. S/RES/316 (1972).

S.C. Res. 332, U.N. Doc. S/RES/332 (1973).

S.C. Res. 337, U.N. Doc. S/RES/337 (1973).

S.C. Res. 347, U.N. Doc. S/RES/347 (1974).

S.C. Res. 425, U.N. Doc. S/RES/425 (1978).

167. Events not immediately preceding the Israeli recourse to force simply do not enter into the equation when examined by the Security Council.

168. Falk, *supra* note 155, at 426.

169. Falk, *supra* note 155, at 426.

170. Falk, *supra* note 155, at 426.

171. T. FAREB, *Law and War*, *supra* note 147, at 74.

defense,<sup>172</sup> one may infer that the drafters intended to preserve the existing natural right of states to utilize force in self-defense.<sup>173</sup> Support for this argument was offered by Stone, who contends that:

[I]n reserving a license limited to the case of armed attack against a member the draftsmen were delimiting the reserved powers of members as against [United Nations] organs. For other purposes, for instance, where the Security Council is not acting, the broader license of self-defense and self-redress under customary international law must surely continue to exist as far as the positive prohibitions of the Charter do not exclude it. Article 51 itself in reserving as against the Security Council's powers a narrow range of self-defense, can surely not have destroyed the broader area of the license of self-defense and self-redress where the Security Council is not acting and there is no inconsistency within the purposes of the [United Nations].<sup>174</sup>

This interpretation dovetails with the Charter's *travaux preparatoires*<sup>175</sup> and, if accepted, would render any significant limitation on the right of self-defense doubtful.<sup>176</sup> Even before the United Nations was founded, however, state practice restricted the right of self-defense to cases of armed attack. Therefore, the customary right of self-defense and self-defense under article 51 have been identical from the outset.<sup>177</sup> It is nonetheless questionable whether a clearly established state practice to that effect could be demonstrated at such an early stage.

At the same time the determination of the contents of the customary right of self-defense is by no means a simple task. According to Bowett, self-defense may be exercised to protect rights essential to the security of the state.<sup>178</sup> These are the rights of territorial integrity, political independence, protection

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172. U.N. CHARTER art. 51.

173. According to Brierly the object was to eliminate possible doubts regarding the impact of the powers of the Security Council upon the right of states to have individual or collective recourse to force in self-defense. J. BRIERLY, *THE LAW OF NATIONS: INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE* 417 (Sir H. Waldock 6th ed. 1963) [hereinafter J. BRIERLY].

174. J. STONE, *AGGRESSION AND WORLD ORDER*, *supra* note 134, at 43-44.

175. The French phrase, *travaux preparatoires*, refers to the Charter's preparatory drafts.

176. See J. BRIERLY, *supra* note 173, at 417-18.

177. See I. BROWNLIE, *supra* note 157, at 298-300.

178. See generally D. BOWETT, *supra* note 157.

of nationals, and certain economic rights.<sup>179</sup> As a basis of the customary right of self-defense, this multifaceted concept of "security" has been subjected to criticism on the grounds that it places self-defense on a par with a general claim of "self help," which is no longer legitimate under the Charter.<sup>180</sup> In fact, it is arguable that if the right of political independence is broadly interpreted,<sup>181</sup> it may result in the widening of the scope of self-defense to a point where it could be difficult to distinguish it from the older political doctrine of "self-preservation."<sup>182</sup> Nor, for that matter, could a "meaningful distinction be drawn between a principle of political morality establishing 'vital interests' as the criterion of resort to force and an allegedly legal principle requiring that force used in self-defense must follow the violation or threatened violation of rights."<sup>183</sup>

Attempts by Bowett and others to circumscribe the scope of the rights by which self-defense might be exercised to protect have been criticized. Some argue that Bowett's position falls short of establishing that the customary right of self-defense indeed encompasses the protection of rights essential to the state.<sup>184</sup> While requirements such as necessity and proportionality may affect the exercise of the right of self-defense, the requirements still leave "largely unaffected and undetermined" the issue of which rights support forcible measures of self-defense.<sup>185</sup> This argument, however, overlooks the effects of proportionality of ends and necessity on the justness of the cause itself.

Theorists' debates notwithstanding, states continue to interpret the right of self-defense as encompassing the protection of interests that they consider vital to their existence. Under the guise of article 51 the superpowers, for instance, have sought to further ideological objectives in a manner totally oblivious to the question of whether under article 51 a state can employ force in

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179. D. BOWETT, *supra* note 157, at 9, 24, 29, 270-71.

180. See H. KELSEN, *PRINCIPLES OF INTERNATIONAL LAW* 73-74 (R. Tucker 2d ed. 1966) [hereinafter H. KELSEN].

181. The right of political independence is broadly interpreted in the sense, for instance, of freedom of decision-making. H. KELSEN, *supra* note 180, at 79.

182. That is, it may not be the response to some other state's action at all, or if it is, that state's action may be entirely legal. H. KELSEN, *supra* note 180, at 79.

183. H. KELSEN, *supra* note 180, at 79.

184. H. KELSEN, *supra* note 180, at 74.

185. H. KELSEN, *supra* note 180, at 80.



self-defense in situations other than against an armed attack.<sup>186</sup> It is conceivable, of course, that the respective behavior of the superpowers merely reflects regional relaxation of criteria or developments of special criteria governing relations between the United States and the Soviet Union.<sup>187</sup> There is, however, ample historical evidence to demonstrate that claims of self-defense have been advanced by all states since 1945 without particular regard to the restriction to cases of armed attack.<sup>188</sup> Additionally, states have not taken notice of the legal constraints that might endanger the very existence of a state.<sup>189</sup>

It is indeed the post-Charter behavior of states that provides the key to the interpretation of the contemporary international law of self-defense. As McDougal has observed,

[i]t is not the preliminary negotiations and not the words of the Charter only that create contemporary expectations about the prescriptions of the Charter, but the words of the Charter, the words that preceded it, and *the whole subsequent flow of words and interpretations by conduct [that is] relevant to the interpretation of what the law is today.*<sup>190</sup>

186. For a discussion of the Brezhnev doctrine and its Western Hemisphere analogue as well as relevant references, see Mushkat, *Is War Ever Justifiable?*, *supra* note 1, at 227-317.

Perhaps the most candid expression of state sentiments in this respect was provided by former Secretary of State Dean Acheson who boldly asserted:

I must conclude that the propriety of the Cuban quarantine is not a legal issue.

The power, position, and prestige of the United States had been challenged by another state and the law simply does not deal with such questions of ultimate power — power that comes closer to the sources of sovereignty. . . . The survival of states is not a matter of law.

PROC. AM. SOC'Y INT'L L. 13, 14 (1963) (remarks of the Honorable Dean Acheson).

187. See, e.g., T. FARER, *Law and War*, *supra* note 147, at 64.

188. A large number of states have invoked the protection of nationals abroad as justification for military intervention: for example, Great Britain in the course of the Suez Crisis (1956); the United States in Lebanon (1958); Belgium in the Congo (1960); Belgium and the United States in the Congo (1964); the United States in the Dominican Republic (1965); Israel in Uganda (1976); Egypt in Cyprus (1978); the Federal Republic of Germany in Somalia (1978); and the United States in Iran (1980).

189. See W. LEVI, *CONTEMPORARY INTERNATIONAL LAW* 317 (1979). Viscount Kilmiur, in his address to the House of Lords on November 1, 1956, in justification of the Suez campaign, seemed to express a prevalent state view when he declared:

Article 51 must be read in the light that it is part of [c]hapter VII of the [C]harter and concerned with defense against grave breaches of the peace. It would be an entire misreading of the whole intention of [a]rticle 51 to interpret it as forbidding self-defense in resistance to an illegal use of force not constituting an armed attack.

199 H. HANSARD cols. 1348-59 (1956).

190. McDougal, *Authority to Use Force on the High Seas*, 20 NAVAL WAR C. REV.

Recent state practice supports the conclusion that certain forms of self-help short of response to armed attack, may constitute legitimate just causes of self-defense under contemporary international law.

## ii. Special Cases

Even those theorists who are generally inclined to strictly construe the Charter's provisions proscribing the use of force admit that "given the present stage in the development of international society, there will be instances where the resort to force would be difficult to condemn in certain circumstances."<sup>191</sup> This attitude is also reflected in the International Court of Justice's *obiter dictum* in the *Case Concerning United States Diplomatic and Consular Staff in Teheran*<sup>192</sup> where the court referred to a balancing of understanding for, and concern over, the United States Government's action.

### (a) *Rescue of Nationals Abroad*

Various reasons for the use of force by states have been regarded by large parts of the international community as particularly compelling and have attracted considerable sympathy and approval.<sup>193</sup> Raids to free hostages held in gross violation of international law are cases in point.<sup>194</sup> Justifications for such use

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19, 20 (1967) (emphasis added).

191. B. BRYDE, *Self Help*, in 4 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 215 (1982).

192. *Case Concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, 1980 I.C.J. 3, 43, 52 (Judgment of May 24). While expressing its "concern" regarding the United States incursion into Iran, the Court noted the:

[U]nderstandable preoccupation of the United States Government with respect to the well-being of its nationals held hostage in the [e]mbassy for over five months and the understandable feelings of frustration at Iran's long-continued detention of the hostages, notwithstanding two resolutions of the Security Council as well as the court's own [o]rder of 15 December 1979 calling expressly for their immediate release.

*Id.*

193. One may cite in this connection the dissenting opinion by Judge Azavedo and the individual opinion by Judge Alvarez in the *Corfu Channel Case (U.K. v. Alb.)*, 1949 I.C.J. 4, 34-35, 100 (Judgment of April 9), which recognized the right of a state to intervene and use force in another state in the event of an "emergency" or in "exceptional circumstances," respectively. The Entebbe hostage-taking crisis might, for example, fit in with these putative exceptions to a general international rule against the use of force across state lines.

194. One example is the operation in 1976 carried out by an Israeli command unit to rescue hostages held in Uganda following the hijacking of an Air France airplane. For a

of force have been made on four grounds.

Perhaps the most extreme argument is the contention that forcible missions to rescue nationals abroad are not inconsistent with the terms of article 2(4) of the Charter since they aim neither at the territorial integrity nor at the political independence of the target state.<sup>195</sup> The most common argument is based on self-defense under article 51 of the Charter. Some writers broadly interpret the expressions "armed attack" and "against a [m]ember of the [United Nations]." <sup>196</sup> In the opinion of these writers an armed attack perpetrated on nationals abroad is tantamount to an armed attack on the state itself, since population is an essential ingredient of statehood.<sup>197</sup> This application of the doctrine of self-defense, however, has been challenged on the ground that the underlying assumption of absolute identity between a national and state is not viable.<sup>198</sup> This broad interpretation of article 51 is also flawed because it contravenes the principle that exceptions to the Charter should be strictly construed.<sup>199</sup>

Another argument based on self-defense endeavors to circumvent the difficulties involved in the armed attack stipulation by relying on a customary right of protection that has either *sur-*

brief account of the incident and relevant United Nations resolutions, see E. McDowel, *Introductory Note*, 15 I.L.M. 1224-25 (1976); see also excerpts from Security Council Debates on July 9, 1976, in 15 I.L.M. 1228-34 (1976). Another example pertains to the American attempt on April 24-25, 1980 to rescue American nationals held hostage in Iran. For an account of the operation, see Case Concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3, 18, at ¶ 32 (Judgment of May 24).

195. See D. BOWETT, *The Use of Force in the Protection of Nationals*, in 43 THE GROTIUS SOCIETY TRANSACTIONS FOR THE YEAR 1957 ch. III, at 112-14 (1959); J. STONE, *AGGRESSION AND WORLD ORDER*, *supra* note 134, at 43.

196. U.N. CHARTER art. 51. See, e.g., Akehurst, *The Use of Force to Protect Nationals Abroad*, 5 INT'L REL. 3, 4 (1977); Nanda, *The U.S. Action in the 1965 Dominican Crisis: Impact on World Order, Part I*, 43 DEN. L.J. 439, 459 (1966) [hereinafter Nanda]. See also Letter from the Permanent Representative of the United States to the United Nations addressed to the President of the Security Council referring to the Iranian armed attack on United States Embassy, U.N. Doc. S/13908 (Apr. 25, 1980).

197. See Nanda, *supra* note 196.

198. See Fairley, *State Actors, Humanitarian Intervention and International Law*, 10 GA. J. INT'L & COMP. L. 29, 54 (1980).

199. See Fawcett's statement that "to regard the mistreatment of nationals . . . as an armed attack within the scope of [a]rticle 51 would be to empty that expression of all real meaning and is plainly inadmissible." Fawcett, *Intervention in International Law: A Study of Some Recent Cases*, 103 HAGUE RECUEIL 347, 404 (1961) [hereinafter Fawcett]. This argument assumes that article 2(4) is the rule and article 51 the exception. *Id.*

viewed the introduction of articles 2(4) and 51,<sup>200</sup> or was revived after discovering that the collective security mechanisms originally envisioned by article 51, did not work.<sup>201</sup> It is thus contended that article 51 perceives self-defense as an "interim right" to be exercised pending the assumption by the Security Council of the responsibility for resolving the dispute and restoring the peace.<sup>202</sup> In view of the obvious failure and ineffectiveness of the Security Council, this task devolves upon the individual members of the United Nations.<sup>203</sup>

While the survival argument has elicited a favorable response from members of the "realist" school of international relations, it has been questioned on the ground that it lacks *opinio juris* in the present community of states.<sup>204</sup> Nonetheless, this criticism is based on a subjective appraisal of relevant events and is not entirely consistent with a large number of scholarly analysis.<sup>205</sup>

A fourth argument is based on the universally-accepted obligation of the state to ensure the human rights of its citizens abroad.<sup>206</sup> A rescue operation to protect nationals abroad may

200. See D. BOWETT, *supra* note 157, at 87-105; A. THOMAS & A. VAN WYNEN THOMAS, *THE DOMINICAN REPUBLIC CRISIS 1965*, at 14 (1966) [hereinafter THOMAS & THOMAS]; Fawcett, *supra* note 199, at 404; Waldock, *The Regulation of the Use of Force by Individual States in International Law*, 81 HAGUE RECUEIL 455, 466-67 (1952). See also statement by United States Ambassador Scranton in response to the Israeli rescue of hostages in Entebbe, 74 DEP'T ST. BULL. 185 (Aug. 2, 1976). This assumes the qualification of self-defense as an "inherent right" encompassing a right to protection of nationals. *Id.*

201. See W. REISMAN, NULLITY AND REVISION: THE REVIEW AND REINFORCEMENT OF INTERNATIONAL JUDGMENT AND AWARDS 850 (1971) [hereinafter W. REISMAN]; Lillich, *Forcible Self Help to Protect Human Rights*, 53 IOWA L. REV. 325, 335 (1967) [hereinafter Lillich]. See also Schwarzenberger, *supra* note 128, at 338.

202. See Schwarzenberger, *supra* note 128, at 338.

203. See Schwarzenberger, *supra* note 128, at 338.

204. See, e.g., Schweisfurth, *Operations to Rescue Nationals in Third States Involving the Use of Force in Relation to the Protection of Human Rights*, 23 GER. Y.B. INT'L L. 159, 165 (1980) [hereinafter Schweisfurth].

205. See Schweisfurth, *supra* note 204, at 165. Schweisfurth cites, for example, the Congo rescue missions to illustrate that "the alleged customary right to protect nationals abroad was no longer generally accepted as justifying the missions." *Id.* It must be noted, however, that the objections raised by several states (African countries and the Soviet Union) were largely in terms of encroachment upon domestic jurisdiction; the Security Council did not condemn the action; and the majority of scholars who have appraised the operation have concluded that it was permissible. *Id.* See, e.g., J. BRIERLY, *supra* note 173, at 340; W. REISMAN & M. McDUGAL, *Humanitarian Intervention to Protect the Ibos*, in HUMANITARIAN INTERVENTION AND THE U.N. 185-86 (R. Lillich ed. 1973) [hereinafter W. REISMAN & M. McDUGAL].

206. Schweisfurth, *supra* note 204, at 166-80.

thus be considered justifiable where the obligation to protect human rights outweighs the obligation to refrain from the use of force.<sup>207</sup> This approach arguably possesses the advantage of clearly identifying the values at stake as well as reflecting the present emphasis in international law on the preservation of human rights.

(b) *Humanitarian Intervention*

When appraising just causes for the use of force one must also consider two recent important legal and political developments. These developments are the growing international concern for human rights and decolonization. Both developments have significantly affected the accepted interpretation of the limits of the right of self-defense and, more generally, the scope of the prohibition on the use of force.

Growing international concern for the protection of human rights has led to a narrowing of the scope of nonintervention.<sup>208</sup> There are basic human rights, such as the rights to life and liberty, that transcend the limits of the state. Hence, the outside

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207. In this connection, see Gordon, *Use of Force for the Protection of Nationals Abroad, The Entebbe Incident*, 9 CASE W. RES. J. INT'L L. 117, 131 (1977); Schweisfurth, *supra* note 204, at 166-80.

208. It should be noted, however, that the Socialist doctrine persists in holding that, as a general rule, human rights continue to belong to the internal affairs of any state in which no other state may interfere. There is, therefore, no universal agreement as to whether "a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms," E.S.C. Res. 1503 (XLVIII) of ECOSOC, May 27, 1970, is to be recognized as a subject of international concern. It can be said at the same time that the scope of domestic jurisdiction in human rights matters is narrowing, and the protection of fundamental human rights in situations involving grievous infractions or consistent pattern of infringement appears to be no longer essentially within the domestic jurisdiction of states. See W. REISMAN & M. McDUGAL, *supra* note 205, at 171, 189, 190-91; Wright, *Domestic Jurisdiction as a Limit on National and Supra National Action*, 56 NW. U.L. REV. 11, 15, 24, 35, 37 (1961). These conclusions are based: first, on the variety of activities in the human rights area undertaken by the United Nations and other international organizations or agencies as exemplified by the host of conventions, declarations, and resolutions that have been adopted on the subject in recent years, see BASIC DOCUMENTS ON HUMAN RIGHTS (I. Brownlie ed. 1971); second, the daily involvement of the United Nations and other international agencies with human rights matters, see generally J. CAREY, U.N. PROTECTION OF CIVIL AND POLITICAL RIGHTS (1970); A. DEL RUSSO, THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS (1970); third, the position of both the Security Council and the General Assembly that article 2(7) does not bar consideration by the United Nations of serious cases of human rights violations, see Fonteyne, *supra* note 122, at 206-09; fourth, the world community's concern with such extreme cases of denial of human rights as Biafra, South Africa, and Bangladesh, see THOMAS & THOMAS, *supra* note 200, at 375; Lillich, *supra* note 201, at 338; McDougal & Bebr, *Human Rights in the U.N.*, 58 AM. J. INT'L L. 603, 629 (1964).

intervention in cases of genocide or other large scale atrocities committed by a regime against its people may be legitimate. The legality of the use of force in such circumstances, however, has generated considerable controversy and rekindled the debate concerning humanitarian intervention. The significance of such a debate lies in the absence of the link of nationality. A justification for the use of force on purely humanitarian grounds, unrelated to a threat to one's own nationals, would require a legal basis beyond the recognized right of self-defense.

Attention has thus been drawn to customary international law under which a right of humanitarian intervention was said to exist prior to the Charter. Given the small number of pre-Charter precedents a customary rule based on state practice is somewhat difficult to identify.<sup>209</sup> The validity of humanitarian intervention under traditional international law might be enhanced by views of leading scholars who concurred with Lauterpacht's statement that there is:

A substantial body of opinions and practice in support of the view that there are limits to the discretion of states in the treatment of their own nationals and that when a state renders itself guilty of cruelties against and persecutions of its nationals in such a way as to deny their fundamental human rights and to shock the conscience of mankind, intervention in the interest of humanity is legally permissible.<sup>210</sup>

Opinions clearly differ with respect to the circumstances under which unilateral humanitarian intervention is legally permissible. The form that such action might assume is also debated. Nonetheless, humanitarian intervention was generally accepted as an integral part of customary international law.<sup>211</sup> The focus of the recent debate has largely shifted to the issue of the

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209. Cases such as the Syrian intervention (1860), the intervention in Bosnia, Herzegovina, and Bulgaria (1876-1878), and the Macedonian intervention (1903-1908), did reflect clear underlying concerns of the intervening states over the oppressive and inhuman treatment suffered by the religious and other minorities at the hands of the target state. For surveys of these and other cases, see M. GANJI, INTERNATIONAL PROTECTION OF HUMAN RIGHTS 22-37 (1962); Behuniak, *The Law of Unilateral Humanitarian Intervention by Armed Force: A Legal Survey*, 79 MIL. L. REV. 157, 159-64 (1978) [hereinafter Behuniak]; Fonteyne, *supra* note 122, at 205-07.

210. L. OPPENHEIM, INTERNATIONAL LAW 312 (H. Lauterpacht 8th ed. 1955).

211. Even Brownlie, who ultimately goes on to reject the existence of customary international law of humanitarian intervention, concludes that "[b]y the end of the [19th] century the majority of publicists admitted that a right of humanitarian intervention . . . existed." I. BROWNLIE, *supra* note 157, at 338.

compatibility of humanitarian intervention with the Charter.

Three approaches have been adopted in support of humanitarian intervention under contemporary international law. One approach emphasizes the congruity of such intervention with article 2(4). It is argued that article 2(4)'s prohibition extends to threats or attacks upon the territorial integrity or political independence of a state, and does not extend to actions that are not directed to this end but which are necessary.<sup>212</sup> The corollary is that measures taken in pursuit of specific humanitarian objectives, without having adverse effects on the sovereignty or basic interests of the target state, cannot run afoul of the Charter's proscription against the use of force.

Furthermore, it is contended that humanitarian intervention, far from being inconsistent with the purpose of the United Nations, promotes a primary purpose of the United Nations, namely, the protection of human rights.<sup>213</sup> It is postulated, for instance, that the Security Council, which is required under article 2 of United Nations Resolution 3314<sup>214</sup> to take account of relevant circumstances and sufficient gravity, would be unlikely to regard humanitarian intervention as aggression.<sup>215</sup> This is particularly true in light of the Charter's purpose "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women . . . , and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained."<sup>216</sup>

The inability or unwillingness of the United Nations to take effective measures to rectify cases of human rights violations is

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212. For such a construction of article 2(4), see, e.g., R. LILICH, *Humanitarian Intervention: A Reply to Ian Brownlie and a Plan for Constructive Alternatives*, in *LAW AND CIVIL WAR IN THE MODERN WORLD* 229, 237 (J. Moore ed. 1974) [hereinafter R. LILICH, *Humanitarian Intervention*]; J. STONE, *AGGRESSION AND WORLD ORDER*, *supra* note 134, at 95; Green, *Humanitarian Intervention — 1976 Version*, 24 *CHITTY'S L.J.* 217, 222 (1976); and Green, *Rescue at Entebbe — Legal Aspects*, 6 *ISRAEL Y.B. ON HUM. RTS.* 312, 324 (1976). Green supports his contention by reference to inter-war definitions of aggression, all of which had envisaged an attack on, or threat to, a state's independence or territorial or political integrity. Green also cites to the Montevideo Convention on the Rights and Duties of States clarifying that the convention condemned the attempt of one state to impose its will on another. *Id.* at 219, 317-18.

213. J. STONE, *AGGRESSION AND WORLD ORDER*, *supra* note 134, at 95-96; R. LILICH, *Humanitarian Intervention*, *supra* note 212, at 236; W. REISMAN & M. McDUGAL, *supra* note 205, at 177.

214. *Definition of Aggression*, *supra* note 107, at art. 2.

215. *Definition of Aggression*, *supra* note 107, at art. 2.

216. U.N. CHARTER preamble.

also emphasized as pertinent to the interpretation of article 2(4). As stated by Reisman, "article 2(4) suppresses self-help insofar as the organization can assume the role of enforcer. When it cannot, self-help prerogatives revive."<sup>217</sup>

This point may be extended further by arguing that those who build the case for humanitarian intervention around article 2(4) stop short of adequately recognizing the development of human rights in recent years. In particular, they do not acknowledge that while humanitarian intervention might have a far-reaching impact on the political process of the target state, such an intervention could nonetheless be considered legitimate, provided it closely conformed to international norms governing the use of force.

Another approach to the issue reflects the opinions of scholars who are even more reluctant to advocate a right of humanitarian intervention grounded solely in human rights law, yet are prepared to concede the unworkability of a total ban on the use of force in cases of flagrant fundamental human rights violations. The proponents of this approach assert that "in circumstances of extreme gravity, the world community, by its lack of adverse reaction, in practice condones conduct which, although a formal breach of positive legal norms, appears 'acceptable' because of higher motives of a moral, political, humanitarian, or other nature."<sup>218</sup> Thus, they argue that the lack of express condemnation in a given case is tantamount to conferring upon a humanitarian intervention a sub-legal or quasi-legal characteristic.<sup>219</sup> This "moral choice" perspective introduces a strong element of uncertainty into the debate, particularly since certain

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217. W. REISMAN, *supra* note 201, at 850. Reisman cites several examples of international practice to substantiate his construction of article 2(4). *Id.* at 850-51.

218. *Debates of the Charlottesville Conference on Humanitarian Intervention*, reprinted in HUMANITARIAN INTERVENTION AND THE U.N. 3, 64, 107-08, 114 (R. Lillich ed. 1973) [hereinafter *Debates*]. See also I. Brownlie, *Thoughts on Kind-Hearted Gunman*, in HUMANITARIAN INTERVENTION AND THE U.N. 139-48 (R. Lillich ed. 1973). Franck and Rodley state:

Undeniably there are circumstances in which the unilateral use of force to overthrow injustice begins to seem less wrong than to turn aside. Like civil disobedience, however, this sense of superior necessity belongs in the realm not of law but of moral choice which nations, like individuals, must sometimes make, weighing the costs and to their cause, to the social fabric, and to themselves.

Franck & Rodley, *After Bangladesh: The Law of Humanitarian Intervention by Military Force*, 67 AM. J. INT'L L. 275, 304 (1973).

219. See *Debates*, *supra* note 218, at 61-62, 68-69, 118.



conduct may be considered both prohibited and morally justifiable at the same time.<sup>220</sup>

A more candid decision-making process is envisaged by those who subscribe to the third approach, which explicitly acknowledges the conflicting obligations inherent in situations giving rise to humanitarian intervention.<sup>221</sup> These commentators depart from the assumption that human rights provisions impose binding obligations upon states.<sup>222</sup>

The obligatory character of human rights clauses is evidenced by the practice of the United Nations and its member states.<sup>223</sup> Various conventions have also established legal obligations with respect to human rights.<sup>224</sup> These obligations are said to possess a special quality. As stated in the holding by the International Court of Justice in the *Case Concerning the Barcelona Traction, Light, and Power Company Limited*,<sup>225</sup> the principles and rules concerning the basic human rights belong to the category of obligation *erga omnes*; they are not simply obligations of a state arising vis-a-vis another state but are obligations of a state toward the international community as a whole.<sup>226</sup>

By the same token members of the United Nations are obligated "to take joint and separate action in cooperation with the organization for the achievement of ['universal respect for and observance of human rights and fundamental freedoms for

220. For other criticisms of this approach relating to the opportunities for abuse and toleration of impermissible breaches that may endanger the structures of international law, see Behuniak, *supra* note 209, at 182-83.

221. See Lord, *Individual Enforcement of Obligations Arising Under the U.N. Charter*, 19 SANTA CLARA L. REV. 195, 205 (1979) [hereinafter Lord].

222. Lord proposed that this assumption is "no longer a matter of dispute." Lord, *supra* note 221, at 205.

223. For a brief survey of the subject, see Schwelb, *The International Court of Justice and the Human Rights Clause of the Charter*, 66 AM. J. INT'L L. 337, 341 (1972).

224. See, e.g., International Covenant on Economic, Social, and Cultural Rights, adopted Dec. 16, 1966, G.A. Res. 2200 (XXI), 21 U.N. GAOR Supp. (No. 16) at 44, U.N. Doc. A/6316 (1966) (entered into force Jan. 3, 1976) [hereinafter International Covenant on Economic, Social, and Cultural Rights]; International Covenant on Civil and Political Rights, adopted Dec. 16, 1966, G.A. Res. 2200 (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966) (entered into force Mar. 23, 1976) [hereinafter International Covenant on Civil and Political Rights]. The preambles to both covenants contain the statement, "[c]onsidering the obligation of states under the Charter . . . to promote universal respect for and observance of, human rights and freedoms." International Covenant on Economic, Social, and Cultural Rights, *supra*, at preamble; International Covenant on Civil and Political Rights, *supra*, at preamble.

225. Case Concerning the Barcelona Traction, Light and Power Co. Ltd. (Belg. v. Spain), 1970 I.C.J. 3.

226. *Id.* at 32.

all']".<sup>227</sup> Hence, they must take concrete measures against a country infringing these rights and freedoms.<sup>228</sup>

At the other end of the value spectrum is the obligation to preserve the territorial integrity and political independence of sovereign states. The intervening state is thus confronted with the task of reconciling these conflicting obligations. Ideally, balancing these duties should be resolved through a "careful contextual scrutiny, appraising many features of the particular context"<sup>229</sup> including perspectives,<sup>230</sup> situations,<sup>231</sup> base values,<sup>232</sup> strategies,<sup>233</sup> participants,<sup>234</sup> and outcomes.<sup>235</sup>

It is postulated that this process of value reconciliation is likely to prevent a hasty use of force. Restraint on the use of

227. U.N. CHARTER arts. 54 & 55.

228. *Id.* See McDougal & Reisman, *Response*, 3 INT'L LAW. 438, 444 (1969).

229. M. McDUGAL, H. LASSWELL & L. CHEN, HUMAN RIGHTS AND WORLD PUBLIC ORDER 246-47 (1980) [hereinafter M. McDUGAL, H. LASSWELL & L. CHEN].

230. On this issue, one must ask: "[a]re both manifest and genuine objectives related to the preservation of human rights? Is the action being taken to save lives, to rescue from arbitrary incarceration or torture? How are the actions of the intervening state related to the aggregate interests of all states?" M. McDUGAL, H. LASSWELL & L. CHEN, *supra* note 229, at 246-47.

231. Here, one must scrutinize: "[h]ow intense are expectations of irremedial loss in the absence of the immediate use of the military instrument? With regard to what values are deprivations threatened and to what degree of intensity and magnitude? Are those deprivations systematic and of long duration, or sporadic and occasional?" M. McDUGAL, H. LASSWELL & L. CHEN, *supra* note 229, at 246-47.

232. One must appraise: "[w]hat are the disparities in relative strength of the intervening state and the target state? Do differing degrees in strength suggest duress for nonhumanitarian purposes?" M. McDUGAL, H. LASSWELL & L. CHEN, *supra* note 229, at 246-47.

233. In a careful analysis of "strategies," one must question: "[h]ave the diplomatic, ideological and economic instruments been mobilized and employed prior to the use of the military instruments? Has recourse to available remedies through organized collective action been exhausted?" M. McDUGAL, H. LASSWELL & L. CHEN, *supra* note 229, at 246-47.

234. In this context, one must determine:

Is the intervention by or against a recognized government, or by or against segments of a community? Is it on behalf of a substantial segment of an oppressed population? Is it on behalf of nationals or [nonnationals] of the intervening state? How many states participate in the intervention? Is the general community (collectively) represented in the action?

M. McDUGAL, H. LASSWELL & L. CHEN, *supra* note 229, at 246-47.

235. Finally, one must look at the "outcomes:"

With what intensity and destruction has the military instrument been used? What values were conserved? Was the use of the military instrument in proportion to the intensity of the threats of deprivation? Did the host state or segments of the host state invite military intervention? Has the military intervention terminated as soon as its manifest objectives were accomplished?

M. McDUGAL, H. LASSWELL & L. CHEN, *supra* note 229, at 246-47.

force is greater when the decision-makers are conscious of the need to act only after a well-reasoned case is made for a necessary and proportional action to protect fundamental human rights. This is distinct from an easier decision to use force based on the existence of an alleged right to act forcibly.

One may of course contend that the kind of analysis envisaged belongs to the realm of moral choice. The fact remains, however, that international law may compel nations to engage in moral choices that entail the balancing of costs and benefits to their cause, to the social fabric, and to themselves. The just cause requirement — with its proportionality, probability of success, and last resort elements — may provide relevant criteria in a comprehensive calculus of this type.

### (c) *Struggles for Self Determination*

Decolonization and the concern of the United Nations with the objective of self-determination is another development that may have a significant bearing on the contemporary perception of just causes. Thus, the prohibition on the use of force against the territorial integrity or political independence of any state appears to be seriously challenged by the claim adopted by various United Nations organs, and particularly, by countries of the nonaligned and Eastern European blocs that under the United Nations Charter, national liberation movements in non-self-governing territories are entitled to employ force against colonial and white minority regimes. Further, foreign states are entitled to support their armed struggle by all necessary means.<sup>236</sup> While it is argued that those who struggle for self-determination, national liberation, and against colonial, alien, or racist domination are waging a just war, article 2(4) remains an absolute prohibition against those who would suppress these liberation efforts. Force is therefore exculpated or inculpated depending on whether it is perceived as conducive or obstructive to the "just cause of self-determination."<sup>237</sup>

The common claim put forth in support of the legitimacy of wars of national liberation is grounded in the right of self-de-

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236. For a discussion of some aspects of the latter part of this claim, see Mushkat, *Who May Wage War? An Examination of an Old/New Question*, 2 AM. U.J. INT'L L. & POL'Y 97, 107-18, 144-45 (1987) [hereinafter Mushkat, *Who May Wage War?*].

237. See Mushkat, *Who May Wage War?*, *supra* note 236.

fense under article 51 of the Charter.<sup>238</sup> The argument is that colonial domination and oppression, irrespective of its origins, constitutes a clear case of aggression against the people subject to it. Alternatively, a continuing armed attack upon the insurgent people's political independence vests them with a right to self-defense.<sup>239</sup> Proponents of such a reading of article 51 have relied on an analogous use of this article in the various cumulative declarations of the United Nations General Assembly since the 1960 Resolution on the Granting of Independence to Colonial Countries.<sup>240</sup> Recent references to an expansive reading of article 51 rest on several textual points in the 1974 Definition of Aggression, including the provisions of paragraphs 6 and 8 of the preamble,<sup>241</sup> and explanatory note (a), which is attached to article 1<sup>242</sup> and article 7.<sup>243</sup> The main objection to a rationale based

238. U.N. CHARTER art. 51.

239. See, e.g., *Report of the 1966 Special Committee on Principles of International Law Concerning Friendly Relations and Co-Operation Among States*, G.A. Res. 2181 (XXI), 21 U.N. GAOR Supp. (No. 16) at 96, U.N. Doc. A/6230, ¶¶ 136-37 (1966).

240. See 1960 Resolution on the Granting of Independence to Colonial Countries, G.A. Res. 1514, 15 U.N. GAOR Supp. (No. 16) at 4, U.N. Doc. A/4684 (1960) (stating that "all armed action . . . against dependent peoples" should cease); see also Declaration on Non-Intervention, G.A. Res. 2131, 20 U.N. GAOR Supp. (No. 14) at 3, U.N. Doc. A/6014 (1965) (stipulating that "the use of force to deprive peoples of their national identity constitutes a violation of their inalienable rights and of the principle of non-intervention"); Declaration on Friendly Relations, *supra* note 159 (affirming the applicability of the principles of self-determination within existing states). It was such a reasoning by analogy that characterized the justification offered by India in support of its attack on the Portuguese colony of Goa in 1961. This reasoning, however, was rejected by the majority of the Security Council, see 16 U.N. SCOR (988th mtg.) Supp. (Oct.-Dec. 1961) at 205, U.N. Doc. S/5030 (1961), although a resolution that would have deplored the Indian use of force against Goa, which called for a cease-fire and withdrawal of Indian forces from the territory, failed to be adopted because of a Soviet veto.

241. The preamble to the 1974 Definition of Aggression states in part:

Reaffirming the duty of states not to use armed force to deprive peoples of their right of self determination, freedom and independence . . . . Reaffirming also the provisions of the [Declaration on Friendly Relations] . . . .

*Definition of Aggression*, *supra* note 107, at preamble. See also U.N. CHARTER art. 51.

242. According to the explanatory note: "In this [d]efinition the term "[s]tate:" (a) Is used without prejudice to questions of recognition or to whether a [s]tate is a [m]ember of the United Nations." U.N. CHARTER art. 1 (explanatory note (a)).

243. Article 7 states that:

Nothing in this [d]efinition, and in particular [a]rticle 3, could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right and referred to in the [Declaration on Friendly Relations], particularly peoples under colonial and racist regimes or other forms of alien domination; nor the right of these peoples to struggle to that end and to seek and receive support, in accordance with the principles of the Charter and in conformity with the above-mentioned [d]eclaration.

on a broad construction of article 51 is that the article does not apply to entities other than states. Summarizing the legal position supporting this view, Dugard has asserted:

Self-defense is the right of one state acting individually, or the right of several states acting collectively, to resort to force as a result of an attack on one of them by an aggressor. A *sine qua non* of such a right is an "aggressor state" and a "victim state." In the case of self-defense against colonial domination this necessary requirement is absent. It is possible to identify the aggressor state (the colonial power) but it is not possible to identify the victim state. The victim of colonial or racist aggression is not a state, but the nationals of the aggressor state. Lamentable as this may be, it does not constitute an unlawful use of force in terms of [a]rticle 2(4) of the Charter, which only prohibits the use of force against states. As there is no unlawful use of force against another state by the colonial aggressor the question of self-defense does not arise.<sup>244</sup>

Nor is Dugard's statement affected by note (a) to article 1 of the Definition of Aggression; article 1 stipulates that the term "state" is used in the definition "without prejudice to the question of recognition or to whether a state is a [m]ember of the [United Nations]"<sup>245</sup>

It is also argued that an interpretation treating people and states in a like manner would require the assumption that every aspiration to self-determination of a people living under the sovereignty of an existing state be deemed to have matured into a separate new state, displacing or breaking away from the old state.<sup>246</sup> This is an assumption that none of the proponents of a theory equating people with states were ready to accept.<sup>247</sup>

Elimination of the state-to-state requirements incorporated in articles 2(4) and 51 of the Charter is thus seen as legally unjustified and politically unwise. In his discussion Arangio-Ruiz

U.N. CHARTER art. 7 (explanatory note).

244. Dugard, *SWAPO The Jus Ad Bellum And The Jus In Bello*, 94 S. AFR. L.J. 144, 149 (1976) [hereinafter Dugard].

245. This note, as Ferencz observes, is closely related to the provision in paragraph two of the Six-Power Draft, indicating that if the territory of a state is delimited by international boundaries or internationally agreed lines of demarcation, it could be an aggressor or a victim of aggression within the definition, despite nonrecognition of it as a state (or of its government) by other states. See Ferencz, *Defining Aggression: Where it Stands and Where It's Going*, 66 AM. J. INT'L L. 491, 498 (1972).

246. See J. STONE, *AGGRESSION AND WORLD ORDER*, *supra* note 134, at 73.

247. J. STONE, *AGGRESSION AND WORLD ORDER*, *supra* note 134, at 73.

points out the pitfalls involved in the "dangerous theory" of the "indiscriminate extension of the scope of [a]rticle 51 . . . to any 'liberation movement.'<sup>248</sup> He cautions:

[t]o apply [a]rticle 51 to the struggle of the 'liberation movement' before the attainment of that minimum of stability without which statehood is still in question, would mean not only to throw overboard any doctrine condemning premature recognition but also to stretch the meaning of [a]rticle 51 beyond any reasonable wide interpretation and open the way — insofar as the law of nations is concerned — to a dangerous instability.<sup>249</sup>

Supporters of the legitimacy of wars of national liberation based on the right to self-defense appear to want contradictory outcomes. On the one hand, they seek to avoid labeling groups employing force in their struggle for self-determination as aggressors. Thus, they insist that "state" should not be interpreted as including such groups. On the other hand, with respect to the victims of aggression, they are adamant that "state" should be read as encompassing peoples engaged in wars of national liberation.<sup>250</sup>

An alternative claim suggests that the use of force by national liberation movements is beyond the purview of article 2(4) since it does not constitute an armed attack upon the territory of any state. Proponents of this argument assert that colonial governments are illegally present in the territories in which national liberation movements operate.<sup>251</sup> Clearly, the Charter is not specifically concerned with the issue of how effective jurisdiction over territory was established. Rather, the Charter's reference to territorial integrity, as Wright observed, is confined to "de facto presence not de jure title."<sup>252</sup>

248. Arangio-Ruiz, *The Normative Role of the General Assembly of the U.N. and the Declaration of Principles of Friendly Relations*, 137 HAGUE RECUEIL 569 (1972-73) [hereinafter Arangio-Ruiz].

249. Arangio-Ruiz, *supra* note 248, at 569. To the same effect, see also *Remarks of the Argentinean Representative in the Special Committee on Friendly Relations*, U.N. Doc. A/AC.125/SR. 70, 17 (1967).

250. See Stone, *Hopes and Loopholes in the 1974 Definition of Aggression*, 71 AM. J. INT'L L. 224, 231 (1977) [hereinafter Stone, *Hopes and Loopholes*].

251. See, e.g., Blischenko & Solutsvena, *The Struggle Against Portuguese Colonialism in the Light of International Law*, 17 INT'L AFF. 60 (Moscow 1977). See also *Czechoslovakian Draft Proposal to the Special Committee on Friendly Relations*, U.N. Doc. A/AC.125/L.16, Part VI (1966).

252. Wright, *The Goa Incident*, 56 AM. J. INT'L L. 617, 623 (1962) [hereinafter

Contrastingly, Ronzitti argues that reliance on article 51 is totally superfluous since the use of force by liberation movements is legal in all circumstances. Thus, Ronzitti asserts there is no need to justify the use of force by reference to self-defense.<sup>253</sup> He argues instead that the recourse to arms by peoples under colonial or alien domination is lawful by an ad hoc rule that developed through custom as a result of a process initiated by the Declaration on the Granting of Independence to Colonial Peoples and culminated in the adoption by the United Nations General Assembly (General Assembly) of the Declaration on Friendly Relations.<sup>254</sup> Another theorist assumes that "it is simply not possible to derive the right to use and support armed force against colonial administration from the Charter as it was originally conceived" and proceeds to infer such a right from the "flexible process of supplementary and de facto amending of the Charter" through the "law-creating activity of the [United Nations] General Assembly."<sup>255</sup> Specifically, this theorist argues that "the series of resolutions on decolonization has contributed to new state practice and this, in turn, has contributed to the coercive effect of the resolutions [that] have to all intents and purposes developed into rules of customary international law."<sup>256</sup>

While the fine details of the ongoing debate on the law-creating powers of the Generally Assembly need not be of concern in this instance, it is nonetheless worth examining the nature and extent of the evidence adduced to substantiate the norm claimed above in order to establish postulates and priorities of the existence of a global consensus for overturning the original Charter. First, the major pronouncements by the General Assembly and those that have enjoyed the widest measure of support in the United Nations, do not mirror the position adhered to by Third World states with respect to the relationship between the use of force and the right to self-determination. Thus,

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Wright].

253. See N. RONZITTI, *Resort to Force in Wars of National Liberation*, in CURRENT PROBLEMS OF INTERNATIONAL LAW 318, 350-53 (A. Cassesse ed. 1975) [hereinafter N. RONZITTI].

254. N. RONZITTI, *supra* note 253, at 350-53. The Declaration on Friendly Relations imposes on every state "the duty to refrain from any forcible action which deprives peoples of the right to self-determination, freedom, and independence." Declaration on Friendly Relations, *supra* note 159, at ¶ 1.

255. W. VERWEY, *supra* note 136, at 121, 131, 136.

256. W. VERWEY, *supra* note 136, at 136.

United Nations Resolution 1514 (Resolution 1514)<sup>257</sup> did not endorse the use of force by states in pursuit of self-determination objectives. The Declaration on Friendly Relations, which contains no reference to Resolution 1514, left much ambiguity in its stipulation that "such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter."<sup>258</sup> This uncertainty is further compounded by article 7 of the Definition of Aggression, which confirms the "right of peoples to struggle . . . and to seek and receive support in accordance with the principles of the Charter."<sup>259</sup>

Another major consideration in determining the existence of a new rule of international law is that the colonial powers, and a number of states supporting them, have not accepted the basic proposition that all forms of colonialism are illegitimate. Nor have they recognized that people under colonial rule are entitled to exercise their right of self-determination with independence as the predominant goal. The debates surrounding the preparation and adoption of the Definition of Aggression serve to further highlight the division of opinion among states on this subject. Specifically, intense conflicts pervaded the preconsensual stage concerning proposals to reserve a people's right to employ force and to receive assistance from third states in pursuit of self-determination objectives.<sup>260</sup> Nor did the conflicts subside

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257. Declaration of Colonial Independence, G.A. Res. 1514 (XV), 1 U.N. GAOR Supp. (No. 16), U.N. Doc. A/4684 (1960). Nine states including the United States, Great Britain, France, Portugal, and Australia abstained even in the vote that brought unanimous adoption of the centrally important Resolution 1514 (XV) of 1960. Negative votes and abstentions were also registered with respect to General Assembly Resolution 2105, G.A. Res. 2105, 20 U.N. GAOR Supp. (No. 14) at 3, U.N. Doc. A/6014 (1965), and to General Assembly Resolution 2189, G.A. Res. 2189, 21 U.N. GAOR Supp. (No. 16) at 5, U.N. Doc. A/6316 (1966), which introduced the denunciation of colonial rule and apartheid as a threat to the peace and a crime against humanity. In addition, in explaining their affirmative votes on some occasions, certain states took great pains to emphasize that they considered the provisions of the resolutions nothing more than statements of political will by the General Assembly devoid of any legal force. With regard to General Assembly Resolution 2160 (XXI), see, e.g., the explanations by the United States and France of their affirmative votes, 21 U.N. GAOR (1482d plen. mtg.) at 194-96 (Nov. 1966), and of Japan in U.N. Doc. A/AC.125/SR.69, at 16 (1967).

258. Declaration on Friendly Relations, *supra* note 159. See also W. VERWEY, *supra* note 136, at 123.

259. *Definition of Aggression*, *supra* note 107, at art. 7.

260. Objections to these proposals were expressed by many states including the Soviet bloc states, which were keen to reject anything in the definition that might affect a state's right to take "police action" against dissident movements. See *Report of the Special Committee on the Question of Defining Aggression*, 28 U.N. GAOR Supp. (No. 19) at 19, U.N. Doc. A/9019 (1973). The ensuing conflicts prompted the drafting committee



following the drafting of article 7 of the Definition of Aggression, which contained, as noted earlier, a vague reference to the "right . . . to struggle."<sup>261</sup> Indeed, the preconsensual confrontation became an acute conflict of interpretation between states which insisted that the "struggle" deemed as lawful under article 7 of the definition encompassed armed struggle and others that denied this.<sup>262</sup>

State practice and the practice of the political organs of the United Nations offer little assistance in removing the uncertainty. *Status of Goa*,<sup>263</sup> for instance, is often considered as a turning point in the United Nations approach to the use of force in colonial situations. *Goa*, however, has merely established that any action by the Security Council favorable to the colonial power would be vetoed by the Soviet Union, while the colonial power itself could not count on the General Assembly's support because of the anticolonial majority present in that body. At most, *Goa* suggests that a state resorting to arms in such circumstances could expect a passive attitude on the part of the United Nations.

In view of the considerable doubt and opposition, which appear to prevail in relation to the use of force in pursuit of self-determination objectives, the existence of a rule of customary international law can hardly be accepted uncritically.<sup>264</sup> Although it is clear that the general climate of opinion has turned sharply against colonialism, the use of force in national liberation struggles has by no means obtained the status of *opinio juris* and the sense of legal obligation required for the establishment of a new rule of international law.<sup>265</sup>

There are even greater barriers to a recognition of the validity of claims to employ force in pursuit of self-determination

to report that "there [is] no general agreement as to the text to be adopted." *Id.*

261. *Definition of Aggression*, *supra* note 107, at art. 7.

262. *See* Stone, *Hopes and Loopholes*, *supra* note 250, at 234.

263. The case concerned the 1961 Indian attack, occupation, and annexation of Goa, formerly under Portuguese control. *See* *Status of Goa*, 16 U.N. SCOR (987th mtg. 10-11) (988th mtg. 7-8) (1961). *See also* Wright, *supra* note 252, at 617.

264. On the importance of the presence of an international consensus to the legality of a contested claim to employ force in international society, see, e.g., Falk, *On the Quasi-Legislative Competence of the General Assembly*, 60 AM. J. INT'L L. 782 (1966).

265. This is not to deny that the United Nations General Assembly can employ its resolutions effectively in political battles and that it can always bring the weight of its majority to bear against specific target states and on behalf of specific favored "selves" and "liberation movements." *See* M. POMERANCE, *SELF DETERMINATION IN LAW AND PRACTICE: THE NEW DOCTRINE IN THE UN* 61 (1982) [hereinafter M. POMERANCE].

goals, the most critical of which are the difficulties involved in defining the "self" entitled to self-determination or the holder of the right to self-determination.<sup>266</sup> Does self-determination apply, for instance, only to people located within a colonial territory or does it also extend to ethnic or religious groups seeking to secede from an established country? Neither the Definition of Aggression nor the Declaration on Friendly Relations provides any objective guidance in this respect.<sup>267</sup> States thus remain free to claim for themselves and their favored selves absolute legitimacy and exemption from the restriction on the use of force, as well as to deny all rights to competing "selves."<sup>268</sup>

266. On the scope of this issue, see the instructive discussion in Emerson, *Self-Determination*, 65 AM. J. INT'L L. 459 (1971), and in M. POMERANCE, *supra* note 265, at 14-23.

267. See generally *Definition of Aggression*, *supra* note 107; Declaration on Friendly Relations, *supra* note 159.

268. Bowett, who concludes that "as a basis for intervention, support for self-determination is unacceptable so long as the decision that self-determination is denied remains subjective to the would be intervenor," draws attention, for example, to the disparaging claims of denial of self-determination made by: the Western states with respect to the Soviet occupation of the Baltic states of Estonia, Latvia, and Lithuania; those of North Vietnam vis-a-vis Saigon and the United States; and similar claims by the Somalia Republic concerning the Ethiopian occupation of land and the Ogaden as well as the Kenyan occupation of the former Northern Frontier District of Kenya. See D. Bowett, *The Interrelation of Theories of Intervention of Self-defense*, in LAW AND CIVIL WAR IN THE MODERN WORLD 38, 43-44 (J. Moore ed. 1974). In a similar vein, Stone raises the spectre of such claims being advanced by:

[T]he Welsh and the Scots in the [United Kingdom], the Indians and blacks of the [United States], the aborigines of Australia, the Chinese in Malaya, the French in Canada, the Walloons in Belgium, the Bretons in France, Basques and Castillians in Spain, the Kurds in Iraq and Iran and many other identified peoples in Europe, Asia and the Americas.

See J. STONE, ISRAEL AND PALESTINE: ASSAULT ON THE LAW OF NATIONS 93-94 (1981) [hereinafter J. STONE, ISRAEL AND PALESTINE].

In fact, there are hardly any states that do not contain groups that could be described as "peoples" claiming the right to self-determination. As noted by Stone, *id.* at 94, the qualifying phrase in article 7 of Resolution 3314, "peoples under colonial and racist regimes or other forms of alien domination" which is itself subject to diverse interpretations, (see Gros Espiel, *Special Rapporteur, Implementation of the UN Resolutions Relating to the Rights of Peoples Under Colonial and Alien Domination to Self-Determination, Study for the Sub-Commission on Prevention of Discrimination and Protection of Minorities of the Commission on Human Rights*, U.N. Doc. E/CN.4/Sub.2/390, at 38 (1977)), has not dispelled the doubts. Nor has the issue been settled by the Final Act of the Conference on Security and Co-operation in Europe, the Helsinki Declaration, 14 I.L.M. 1292 (1975). Indeed, the range of views procured by the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities attests to the prevailing ambiguity. See H. GROS ESPIEL, *The Right to Self-Determination*, in IMPLEMENTATION OF UN RESOLUTIONS, NEW YORK, UNITED NATIONS 6-7 (1980). Thus, for instance, while Mexico emphasized the "occupation through the use of armed force in contravention of the Charter or in which neo-colonialism has prevented

An additional complication arises when one considers that self-determination claims do not generally conflict with non-self-determination claims but with competing claims of different selves to self-determination with respect to the same territory. On what objective basis are the claims of these rival "selves" then to be weighed?<sup>269</sup> Notably, article 7 of the Definition of Aggression is directed solely to people oppressed by states and overlooks struggles of people against people.<sup>270</sup> This problem is not accorded sufficient attention in the various reports on the implementation of the right to self-determination.<sup>271</sup> The difficulties are further compounded "where the competing claims and accompanying military activities punctuated by actual wars, armistices and ceasefire agreements, have been made over long historical periods."<sup>272</sup> This is particularly true "when in the course of such a long time span later developing nationalism arises, like the Palestinian that claims to override retrospectively the sovereign statehood already attained by the competing people."<sup>273</sup>

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the people or country concerned from following a course of its own," *id.*, Afghanistan focused on "all forms of domination, both direct and indirect, regarded or declared alien" by peoples of any area and that constitutes an impediment or a suppressive factor in the realization of their fundamental freedoms and human rights as enshrined in the Charter and the Universal Declaration of Human Rights. *Id.* According to the view of the German Democratic Republic, the beneficiaries of the right to self-determination are "nations and peoples that are prevented by a foreign imperialist power employing political, economic, or military coercion from exercising their right to self-determination, or where the right to self-determination is impaired otherwise . . . in particular peoples or larger groups of peoples whose territory has been illegally occupied or annexed by an aggressor." *Id.* Iraq, on the other hand, chose to highlight the "foreign elements which leads to economic exploitation," *id.*, whereas the Philippine government limited the right of self-determination to "peoples residing in territories or areas who have not attained sovereign status and who are within the jurisdiction of the [United Nations] trusteeship system as enumerated in [a]rticle 77 of the Charter, as well as the non-self-governing people within the purview of [a]rticle 73 of the Charter." *Id.* Another limitation was stressed by the representative of Pakistan who excluded peoples seeking secession "unless the association in question had been accomplished illegally against the wishes of the peoples concerned." *Id.* The Special Rapporteur added his own version of the latter aspect by specifying that if the national unity claimed and the territorial integrity invoked are merely legal fictions that cloak real colonial and alien domination resulting from actual disregard of the principle of self-determination, the subject people or peoples are entitled to exercise, with all the consequences thereof, their right to self-determination. *Id.* at 14, ¶ 90.

269. See generally J. STONE, ISRAEL AND PALESTINE, *supra* note 268, at 94-96.

270. *Definition of Aggression*, *supra* note 107, at art. 7.

271. See Stone, *Hopes and Loopholes*, *supra* note 250, at 236.

272. Stone, *Hopes and Loopholes*, *supra* note 250, at 236.

273. Stone, *Hopes and Loopholes*, *supra* note 250, at 236. The time limit on the act of forcible deprivation that gives rise to the right to engage in a struggle in pursuit of

Finally, a rational process of balancing conflicting values similar to the one suggested in relation to humanitarian intervention cannot be used to assess the use of force by national liberation groups. This is because the essential characteristic of revolutionary wars is that the ends justify the means deemed instrumental to realize those ends. It is evident that a requirement of proportion does not feature either in the *jus ad bellum* or *jus in bello* of contemporary revolutionary movements. It is thus hardly practical to refer to a "temporary" violation of territorial integrity and political independence or to a short term use of armed force on a small scale or the restoration of infringed values upon completion of the operation.<sup>274</sup>

(d) *Recovery Of That Which Was Unjustly Taken*

Another controversial just cause, which received attention in contemporary contexts, is one that is analogous to the classical repossession of what was unjustly taken. Three main arguments have been made in support of the claim that recourse to arms is justifiable if directed toward recovering territories wrestled by force.

One argument is that article 51 applies if unlawful occupation of territory is regarded as a "prolonged armed attack," justifying action in self-defense.<sup>275</sup> It appears, however, that such a broad interpretation of article 51 cannot be sustained. After all, the rationale of a defensive action under article 51 lies in its prevention of an actual or anticipated peril. An action against an alleged attacker, after the attack has taken place and formally ended by means of intervention by an international body, cease

self-determination objectives has not been addressed earnestly in any international document concerning self-determination. Stone legitimately queries, "[d]oes it embrace all such deprivations that have occurred, at however remote time, in the establishment of a state now existing?," or "does a peaceable settlement in a territory, decades or even centuries ago, become forcible deprivation of self-determination of the original inhabitants when the latter, at a later time, come to a group consciousness that regards the presence of the long-settled community as an oppression or even demands exclusive repossession of the whole territory for itself?" J. STONE, *ISRAEL AND PALESTINE*, *supra* note 268, at 96-97.

It seems that the scope of potential claims could be vast and most probably incompatible with the development of "friendly relations amongst nations based on respect for the principle of equal rights and self-determination of people and the taking of other appropriate measures of universal peace." U.N. CHARTER art. 1, para. 2.

274. Stone, *Hopes and Loopholes*, *supra* note 250, at 233-34.

275. See, e.g., Shihata, *Destination Embargo of Arab Oil: Its Legality Under International Law*, 68 AM. J. INT'L L. 591, 607-08 (1974) [hereinafter Shihata].

fire, or an armistice agreement, would clearly not repulse the attack. As a corollary, no legitimate claim of self-defense intervention can be made since the aggressor has already ceased hostilities.<sup>276</sup> Indeed, a forcible action of this type would itself constitute an armed attack that might warrant recourse to lawful measures of self-defense.<sup>277</sup>

Another argument for justifying the recovery of territory by force is based on territorial integrity. It has been claimed that the right to employ arms to regain occupied territories is an essential aspect of a state's right to territorial integrity. "Without such a right," it is asserted by Shihata that "state jurisdiction, let alone sovereignty would be nothing but a sham."<sup>278</sup> This argument, however, does not appear to be supported by the Charter's provisions, which authorize the unilateral use of force only in cases of individual and collective self-defense or in circumstances that do not constitute a breach of article 2(4).<sup>279</sup> The implication of the Charter is that a forcible action to occupy territory in de facto possession of another state would result in infringement of the territorial integrity of the latter even if the attackers had reason to believe that they had a legal title to that territory. "If this were not true . . . attacks would be permissible in every boundary dispute and the barriers by which the Charter seeks to protect territorial integrity would be broken down."<sup>280</sup>

Although the subject is generally accorded little attention in literature, other views have occasionally been expressed. Jennings, for instance, contends that a state, which has legal title to territory actually in the possession of another state, is entitled to use force in order to recover its possession since this does not constitute an employment of force contrary to the provisions of article 2(4) of the Charter.<sup>281</sup> According to Jennings, "[i]t cannot

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276. In this connection, see S.C. Res. S/2322 (Sept. 1, 1951), which states that given the existence of an "armistice regime," "neither party can reasonably assert that it is actively a belligerent or requires to exercise the right of visit, search and seizure for any legitimate purpose of [self-defense]." *Id.*

277. See K. SKUBISZEWSKI, *Use of Force by States. Collective Security: Law of War and Neutrality*, in *MANUAL OF PUBLIC INTERNATIONAL LAW* 739, 808 (M. Sorensen ed. 1968).

278. Shihata, *supra* note 275, at 608.

279. U.N. CHARTER art. 51.

280. Wright, *supra* note 252, at 623.

281. R. JENNINGS, *THE ACQUISITION OF TERRITORY IN INTERNATIONAL LAW* 72 (1963) [hereinafter R. JENNINGS].

be force used against territorial integrity or political independence of another state because the actor state is merely occupying its own territory. The matter is one within its domestic jurisdiction."<sup>282</sup>

Evidently, Jennings's conclusion would be rejected by exponents of the "restrictionist view" who interpret article 2(4) *stricto jure* as a categorical interdiction from which there is no possibility of derogation.<sup>283</sup> Jennings's conclusion also appears to conflict with paragraph 5 of the Principle of Non-Use in the Declaration on Friendly Relations, which stipulates that: "[E]very state . . . has the duty to refrain from the threat or use of force to violate international lines of demarcation such as armistice lines, established by and pursuant to an international agreement to which it is a party or which it is otherwise bound to respect."<sup>284</sup> Thus, the prohibition on the use of force is extended to violations of territorial frontiers regardless of whether they are internationally fixed boundaries or demarcated following an armed confrontation. In these circumstances the use of force "cannot be justified by a claim that the territory beyond belongs to the sovereignty of the acting state."<sup>285</sup>

Moreover, this third argument, which is based on an independent right of "liberation" of occupied territories, is not supported by contemporary international law and practice despite its popularity with certain states.<sup>286</sup> This is because the utilization of the Declaration on Friendly Relations, by advocates of such a right, is misplaced. The stipulation in the preamble that

282. R. JENNINGS, *supra* note 281, at 72.

283. See, e.g., Arangio-Ruiz, *supra* note 248, at 431, 534. Arangio-Ruiz stated that: The prohibition contained in [a]rticle 2(4) is a general one . . . . Any . . . use of force is condemned as illegal wherever it took place and whatever the nature of the dispute or conflict of interest with regard to which the test of force (or threat of force) was applied. The dispute may be legal or political, territorial or economic, financial or ideological.

*Id.* See also De Arechaga, *International Law in the Past Third of a Century*, 159 HAUW REUEN 1, 91 (1978) [hereinafter De Arechaga] (" . . . any use of force, except in self-defense, is inconsistent with the basic purposes of the Charter and thus forbidden by [a]rticle 2(4)").

284. Declaration on Friendly Relations, *supra* note 159, at para. 5 (Principle of Non-Use).

285. De Arechaga, *supra* note 283, at 319 n.167.

286. In this connection, see statements made in the United States Security Council following the Yom Kippur War by Yugoslavia, the Syrian Arab Republic, Sudan, Guinea, the Soviet Union, and China, in UN MONTHLY CHRON. 8, 9, 14, 17, 20, 31 (Nov. 1973). For similar statements in the General Assembly debates by United Arab Emirates, Kuwait, and Pakistan, see *id.* at 93, 130, 146.

"the territory of a state shall not be the object of military occupation resulting from the use of force in contravention of the provisions of the Charter"<sup>287</sup> merely restates the principle of *ex injuria non oritur ius*<sup>288</sup> as applied to unauthorized use of force. No reference is made to permissibility of military countermeasures to recover territory illegally occupied, even though a refusal to withdraw from such territory may provoke the enforcement measures provided in chapter VII of the Charter. Furthermore, a clear distinction is drawn in the Declaration on Friendly Relations between "occupation of territory" and "acquisition of territory," the former being forbidden only if carried out illegally or, as stipulated in the tenth paragraph of the preamble, "in contravention of the Charter."<sup>289</sup> A similar distinction may be found in the Definition of Aggression, which strictly limits the invalidity of acquisition of territory to "acquisition by aggression by and in contravention of the Charter," and thus excludes acts of self-defense.<sup>290</sup> It is also interesting to note that, as suggested by Feinberg, the Soviet doctrine of international law postulates that a state, which has been attacked and won a war waged in self-defense, has the right to demand part of the territory of the aggressor in order to secure itself against the renewal of aggression.<sup>291</sup>

Support for a contended right to the possession of occupied territories is found in the preamble of General Assembly Resolution 2396 (XXVIII) on the Non-Use of Force in International Relations and Permanent Prohibition of the Use of Nuclear Weapons (Preamble). The Preamble refers to "the inadmissibility of acquisition of territory by force and the inherent right of states to recover such territories by all means at their disposal."<sup>292</sup> This presumably includes military measures.

287. U.N. CHARTER preamble.

288. This phrase implies that injury alone does not provide a cognizable legal right of compensation.

289. For example, see statements by the Syrian Republic, in U.N. Doc. A/7326, at 48 (1968).

290. Indeed, according to Higgins, "[t]here is nothing in either the [C]harter or general international law [that] leads one to suppose that military occupation pending a peace treaty is illegal . . ." See Higgins, *The Place of International Law in the Settlement of Disputes by the Security Council*, 64 AM. J. INT'L L. 8 (1970).

291. See Feinberg, *The Legality of the Use of Force to Recover Occupied Territory*, 15 ISR. L. REV. 160, 176 n.61 (1980).

292. General Assembly Resolution 2396 (XXVIII) on the Non-Use of Force in International Relations and Permanent Prohibition of the Use of Nuclear Weapons, G.A. Res. 2396 (XXVIII), 27 U.N. GAOR (2093rd plen. mtg.) Supp. (No. 30), U.N. Doc. A/8730, at

Without subjecting the legal status of the resolution to close scrutiny, however, it is legitimate to conclude that its political significance should not be overestimated.<sup>293</sup> The above proposition is an exception rather than the rule in the context of General Assembly pronouncements and later resolutions on the same subject, that include the phrase "in accordance with the Charter."<sup>294</sup> It is in any event a dubious practice to base a customary legal right on a single resolution of the General Assembly. Moreover, there are solid grounds for inferring that the use of force to recover occupied territory has not been recognized as a just cause in modern international law.

Finally, attempts to justify recourse to arms on breach of an international agreement that permits a counter use of force by the aggrieved state are also unlikely to find support. Even under a broad construction of article 51, the concept of the sovereign right of self-defense enshrined therein cannot be extended to such forms of international behavior.<sup>295</sup>

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5 (1972).

293. Note should be taken that none of the permanent members of the Security Council (with the exception of the Soviet Union) nor the European states (except for Finland) voted in favor of the resolution. Furthermore, the supporters of the resolution explained their subjective position by reference to the specific need to guarantee the right of Arabs to use force in order to recover the territories occupied in June 1967.

294. See, e.g., G.A. Res. 3236 (XXIX) that recognized the "right of Palestinian people to regain its rights by all means *in accordance with the purposes and principles of the Charter* of the [United Nations]" and appealed "to all states and international organizations to extend their support to the Palestinian people in its struggle to restore its rights *in accordance with the Charter*." G.A. Res. 3236 (XXIX), 29 U.N. GAOR (2296th plen. mtg.) (1974) (emphasis added).

295. In this connection, see D. BOWETT, *supra* note 157, at 189; A. McNAIR, *THE LAW OF TREATIES* 577 n.1 (1961). The perceived limits on the sovereign right of self-defense were duly reflected in the response of the international community to the Suez Crisis and the Korean War. In the former case, Britain and France justified their limited attack on Egypt by claiming, *inter alia*, that the Egyptian nationalization of the Suez Canal violated its international obligations. In the latter case, the invasion was justified on the grounds that Korea had not yet been unified by political means although the Korean people had been assured independence and reunification at Cairo and Potsdam and in the succession of General Assembly resolutions thereafter. One exception appears to be allowed in cases involving the violation of an important arms control or disarmament treaty. As suggested by the United Nations Atomic Energy Commission in its first report issued in 1946, if the members concluded an atomic arms control treaty, "a violation might be of grave character as to give rise to the inherent right of self-defense recognized in [a]rticle 51." U.N. Doc. AEC/18/Rev.1, at 24 (1946). Conclusions and recommendations of the report were overwhelmingly endorsed by the General Assembly. See G.A. Res. 191 (III), 3 U.N. GAOR (157th plen. mtg.) (1948).



(e) *Concluding Observations on Contemporary Just Causes*

What emerges from the survey of causes deemed by the international community as justifying the use of force reaffirms the earlier observation that just causes tend to reflect historical circumstances and prevailing values.<sup>296</sup> At present both the emphasis placed on the quality of the social system and the internationalization of domestic concerns have found expression in the causes considered by actors in the international arena as permitting recourse to arms. It may be said that legitimate just causes in the contemporary context are basically defensive, often at the cost of producing inconsistencies that arise from determined attempts to force politically inspired positions into generally acceptable categories of legal principles.

2. Proportionality

a. *Meaning*

As indicated in the analytical history summary in the beginning of this Article,<sup>297</sup> meeting the criterion of just cause is not merely a matter of seeking an end that is unmistakably just. Other requirements must be complied with as well, including proportionality. Proportionality is a concept that has different meanings in different contexts. In the context of the initial resort to force, proportionality pertains to the magnitude of the cause or the use of extreme means of war only for the protection of important values. Proportionality also requires that the use of force in self-defense does not threaten destruction of values disproportionate to the values initially threatened.<sup>298</sup> Proportionality acquires a different meaning in the context of the conduct of hostilities, where it is postulated that only minimum force necessary for the effective defense of values threatened is permitted.<sup>299</sup>

b. *Applicability to Self-Defense Under the Charter*

Before analyzing the values accepted under international law as sufficiently important to justify recourse to arms, the question of whether the requirement of proportional grave cause

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296. See Mushkat, *Is War Ever Justifiable?*, *supra* note 1, at 227-35.

297. See *supra* notes 4-90 and accompanying text.

298. Kunz, *Sanctions in International Law*, *supra* note 160, at 333.

299. Kunz, *Sanctions in International Law*, *supra* note 160, at 333.

applies to or affects just wars of self-defense shall be addressed.<sup>300</sup> Kunz believes that "necessity or proportionality [is no condition] for the exercise of self-defense under [a]rticle 51."<sup>301</sup> To Kunz an "'armed attack' means . . . any illegal armed attack."<sup>302</sup> A different opinion is expressed by Higgins who suggests that "[a]rticle 51 has in no way impaired the traditional requirement of proportionality and reasonableness in the exercise of the right of self-defense."<sup>303</sup> He stressed that "this is clearly shown by [United Nations] practice."<sup>304</sup> Similarly, Schwarzenberger concludes that self-defense is limited "to action in protection of *vital, or at least important rights or interests and precludes such action in cases of merely formal or trivial breaches of international law.*"<sup>305</sup> In the less severe cases "proper reciprocities, retaliations, and remedies other than high level coercion are called for."<sup>306</sup> By implication this recognizes the pronouncement in article 2 of the Definition of Aggression that a use of force must be of sufficient gravity to constitute an act of aggression.<sup>307</sup> A claim of self-defense to justify a war in support of secondary interests or against threats that may be contained effectively without the use of force is, therefore, unacceptable.

c. *Proportionality in the Sense of Consistency with:*

i. International Values

To assess compliance with the proportionality requirement, it must be determined whether the goals pursued through military means are consistent with the fundamental values of the international community. In order to establish such consonance, Farer suggests: the study of sources such as treaties; the practice of states, including tacit agreements; the prevalence of certain norms in domestic law; the writings of scholars and propagan-

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300. As noted in the analytical historical summary, medieval theorists drew a distinction in this respect between defensive wars and resorts to force in which one took the initiative. See *supra* notes 4-25 and accompanying text.

301. Kunz, *Sanctions in International Law*, *supra* note 160, at 872, 878.

302. Kunz, *Sanctions in International Law*, *supra* note 160, at 872, 878.

303. Kunz, *Sanctions in International Law*, *supra* note 160, at 872, 878.

304. Higgins, *The Legal Limits to the Use of Force by Sovereign States: UN Practice*, 37 BRIT. Y.B. INT'L L. 269, 303 (1961) [hereinafter Higgins].

305. Schwarzenberger, *supra* note 128, at 195, 333 (emphasis added).

306. McDougal & Feliciano, *supra* note 110, at 1139.

307. *Definition of Aggression*, *supra* note 107, at art. 2.

dists; public declarations of foreign policy decision-makers; articles in the press and popular journals; and resolutions of the various organs of the United Nations.<sup>308</sup> From the above sources Farer concludes that the values of self-determination, maintenance of basic human rights, minimum public order, and the promotion of modernization are the priorities of the contemporary international community.<sup>309</sup> The same values have also been identified as typical of those enshrined in the Charter.<sup>310</sup>

More traditional values are emphasized by McDougal and Feliciano. These theorists characterize proportionate coercion as a response to a threat or attack on rights, interests, or values, the loss or destruction of which "will substantially impair the functioning of the territorially organized community or preclude its continued existence as a distinct polity."<sup>311</sup> McDougal and Feliciano argue that territorial integrity and political independence constitute the "main bases of community power" and that any threat to those indispensable values would therefore warrant a "high-level coercion."<sup>312</sup> Walzer takes this theory a step further by asserting that territorial integrity and political independence are infeasible rights of all political communities that are derived from the fundamental rights possessed by the citizens of those communities. Thus, any act of a country that violates the territorial integrity and political independence of another country, justifies the full measure of forceful resistance. Put another way, a state that responds to a violation of these fundamental rights is embarking on a "just war."<sup>313</sup>

The high value placed on the inviolability of interests or rights directly connected with its territorial and political security by the international community finds ample expression in contemporary international law.<sup>314</sup> This accords with the general

308. Farer, *Harnessing Rough Elephants: A Short Discourse on Foreign Intervention in Civil Strife*, 82 HARV. L. REV. 511, 513 (1969) [hereinafter Farer].

309. Farer, *supra* note 308, at 513.

310. For a detailed discussion of these values, see Moore, *The Control of Foreign Intervention in Internal Conflict*, 9 VA. J. INT'L L. 205 (1969) [hereinafter Moore].

311. McDougal & Feliciano, *supra* note 110, at 1140.

312. McDougal & Feliciano, *supra* note 110, at 1140.

313. M. WALZER, *JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS* 53-55 (1977) [hereinafter M. WALZER].

314. Article 1 of the Definition of Aggression states: "Aggression is the use of armed force by a state against the sovereignty, territorial integrity, or political independence of another [s]tate . . ." *Definition of Aggression*, *supra* note 107, at art. 1.

Article 3 lists the following as illustrations of aggressive acts:

(a) The invasion or attack by the armed forces of a [s]tate of the territory of

assumption that "the state is an absolute institutional value and that its security is the one immutable imperative for state action."<sup>315</sup> The rights of territorial integrity and political independence are, however, not absolute and may have to give way when the use of force is required to rescue people threatened with massacre or other acts by their own government that "shock the moral conscience of mankind."<sup>316</sup>

Indeed, as noted earlier, the Charter, numerous United Nations resolutions, and many international agreements have consistently elevated the value of human rights in the hierarchy of international values.<sup>317</sup> A careful balancing process is arguably called for when the protection of human rights comes into conflict with the important values of territorial integrity and political independence. A situation may consequently be envisioned in which a military action for the preservation of fundamental

another [s]tate, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another [s]tate or part thereof;

(b) Bombardment by the armed forces of a [s]tate against the territory of another [s]tate . . . ;

(c) The blockade of the ports or coasts of a [s]tate by the armed forces of another [s]tate;

(e) The use of armed forces of one [s]tate which are within the territory of another [s]tate with the agreement of the receiving [s]tate, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;

(f) The action of a [s]tate in allowing its territory, which it has placed at the disposal of another [s]tate, to be used by that [s]tate for perpetrating an act of aggression against a third [s]tate;

(g) The sending by or on behalf of a [s]tate of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another [s]tate of such gravity as to amount to the acts listed above, or its substantial involvement therein.

*Id.*

315. Coplin, *International Law and the Assumption about the State System*, 17 *WORLD POL.* 615, 618 (1965).

316. M. WALZER, *supra* note 313, at 107.

317. Article 60(5) of the Vienna Convention on the Law of Treaties (Vienna Convention), for example, is a reflection of the high value accorded in the international legal order to human rights. Vienna Convention on the Law of Treaties, *done* May 23, 1969, U.N. Doc. A/CONF. 39/27 (1969) (*entered into force* Jan. 27, 1980). The following states are parties to the Vienna Convention: Argentina, Australia, Austria, Barbados, Canada, the Central African Republic, Chile, Colombia, the Congo, Cyprus, Denmark, Egypt, Finland, Greece, Haiti, Holy See, Honduras, Italy, Jamaica, Japan, the Republic of Korea, Kuwait, Lesotho, Liberia, Malawi, Mauritius, Mexico, Morocco, Nauru, the Netherlands, New Zealand, Niger, Nigeria, Panama, Paraguay, the Philippines, Rwanda, Spain, Sweden, Syria, Tanzania, Togo, Tunisia, the United Kingdom, Uruguay, Yugoslavia, and Zaire.

human rights would be deemed justifiable, even if it entails a temporary infringement of territorial integrity and political independence.

More problematic, however, is the reconciliation of self-determination with other international values. As might be expected, the General Assembly has not provided any real guidance in this respect. Countless resolutions beginning with the famous Declaration on Colonialism,<sup>318</sup> have merely restated the "territorial integrity versus self-determination" problem.<sup>319</sup> The Declaration on Friendly Relations does negate one type of territorial integrity claim, namely that which a state administering a "colony" might wish to present with respect to that dependency<sup>320</sup> but reinforces the prevailing uncertainty regarding "noncolonial" situations.<sup>321</sup> The Definition of Aggression did not seek to resolve the problem when it reaffirmed "the duty of states not to use armed force to deprive peoples of their right to self-determination, freedom, and independence or to disrupt ter-

318. Declaration on the Granting of Independence to Colonial Territories and Peoples, G.A. Res. 1514 (XX), 15 U.N. GAOR Supp. (No. 16) at 66, U.N. Doc. A/4684 (1960) [hereinafter Declaration on the Granting of Independence to Colonial Territories and Peoples].

319. Declaration on the Granting of Independence to Colonial Territories and Peoples, *supra* note 318. Paragraph 6 provides that "[a]ny attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter." *Id.* at para. 6. Paragraph 7 calls on all states to observe the Charter, the Universal Declaration, and the Declaration on Colonialism "on the basis of . . . respect for the sovereign rights of all peoples and their territorial integrity." *Id.* at para. 7.

320. The Declaration on Friendly Relations provides:

The territory of a colony or other [non-self-governing] [t]erritory has, under the Charter, a status separate and distinct from the territory of the state administering it; and such separate and distinct status under the Charter shall exist until the people of the colony or [non-self-governing] [t]erritory have exercised their right of self-determination in accordance with the Charter and particularly its purposes and principles.

Declaration on Friendly Relations, *supra* note 159, at preamble, para. 6.

321. The uncertainty regarding "[noncolonial]" situations is reinforced by providing: Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity and political unity of sovereign and independent states conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed, or color.

Declaration on Friendly Relations, *supra* note 159, at preamble, para. 7. In addition, "[e]very state shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other [s]tate or country." *Id.* at preamble, para. 8.

ritorial integrity."<sup>322</sup> By the same token no attempt has been made to strike a balance between self-determination and inherently conflicting values such as sovereign equality and nonintervention, which are erroneously bracketed together.<sup>323</sup>

Interjected into the conflict between self-determination and the value of protection of human rights is what Emerson calls "major ethnic cleavages."<sup>324</sup> According to Emerson, since this "divide[s] the people of a state, the principle that self-determination underlies all human rights may well be found incompatible with the principle that no continuing right of self-determination for any part of the population survives once independent statehood has been achieved."<sup>325</sup> Insistence on self-determination may result in an overall erosion of human rights in yet another respect. Rostow asserts that "a strong international movement for self-determination would force many states to suppress liberty in the name of security, as the only alternative they perceive to anarchy. And it would grievously weaken the safeguards of peace."<sup>326</sup>

Members of the United Nations have acknowledged to some extent the relative nature of the principle of self-determination but, as noted by Pomerance, such acknowledgement is "selective;" that is, "it is reserved for oneself and those with whom one sympathizes."<sup>327</sup> Indeed, recent developments have rein-

322. *Definition of Aggression, supra* note 107.

323. A sentiment is thus expressed, for example, in the preamble of the Declaration on Friendly Relations that "the principle of equal rights and self-determination of peoples constitutes a significant contribution to contemporary international law that its effective application is of paramount importance for the promotion of friendly relations among [s]tates, based on respect for the principle of sovereign equality." Declaration on Friendly Relations, *supra* note 159, at preamble. The prevailing ambivalence is exemplified by juxtaposing the Declaration on Inadmissibility of Intervention adopted by the General Assembly in 1965, G.A. Res. 2131 (XX), 20 U.N. GAOR (1408th plen. mtg.), U.N. Doc. A/6220 (1965) (which provides that "[n]o state shall . . . tolerate subversive terrorist or armed activities"), with resolutions of the General Assembly (such as G.A. Res. 2107, U.N. Doc. A/6209 (1965), G.A. Res. 2151, U.N. Doc. A/6482/Add.1 (1966), and G.A. Res. 2465, U.N. Doc. NL.560/Rev.1, A/L.561/Add.1, A/L.563 (1968)), urging support for insurgents in South Africa. Such contradictory impulses are often emitted from the international arena. For example, African states regularly condemn foreign intervention in their domestic affairs while openly supporting Southern African liberation movements.

324. Emerson, *The Fate of Human Rights in the Third World*, 27 *WORLD POL.* 201, 207 (1975) [hereinafter Emerson].

325. Emerson, *supra* note 324, at 207.

326. Rostow, *Review of J. Moore, Law and the Indo-China War*, 82 *YALE L.J.* 829, 848 (1973).

327. M. POMERANCE, *supra* note 265, at 72.

forced the dichotomous character conferred upon claims to self-determination by according legitimacy on the basis of a subjective assessment of whose cause is deemed to be just.<sup>328</sup>

Even more ambiguity surrounds other values on the list of generally acknowledged international values. For instance, "minimum world public order" is characterized by Friedman as "Humpty-Dumpty like, [in that it means] what the policy-makers want it to mean, a catch-all phrase to justify whatever action the writer wishes to justify."<sup>329</sup> Friedman is just as critical of the value of "modernization." In his view,

even if one were to accept "modernization" as a generally acceptable value of world order — a proposition made doubtful by man's recent preoccupation with environment and his discovery of the devastating effects of much of his "modernization" — the ambiguity of the criterion is only too obvious. Does it mean compulsory democratization, conversion of an agricultural to an industrial economic structure, the redistribution of land or total socialization?<sup>330</sup>

## ii. Legitimate National Interests

An appraisal of the "proportionality" of a forcible action must be undertaken with regard not only to the common interests of the global community but also to the consistency of the action with national interests.<sup>331</sup> Hence, a weighing of competing interests may be necessary in order to clarify the values at stake in a decision to use force. For instance, given the General Assembly's recognition of a nation's control over its natural resources, states are free to dispose of their natural wealth subject to the award of "appropriate compensation" in case of expropriation.<sup>332</sup> Such an exercise of this fundamental right may, however, be viewed by another state as a grave threat to its security which would, in turn, justify a forceful response. An assessment of the justifiability of such a response would depend, therefore, on the weight given to each of the values involved.

328. M. POMERANCE, *supra* note 265, at 72.

329. W. FRIEDMAN, 1 *LAW AND POLITICS IN THE VIETNAMESE WAR: A COMMENT, THE VIETNAM WAR AND INTERNATIONAL LAW* 298 (R. Falk ed. 1968).

330. Friedman, *Intervention and International Law*, in L. HENKIN, R. PUGH, O. SCHACHTER & H. SMIT, *INTERNATIONAL LAW* 924-25 (2d ed. 1980).

331. See J. MOORE, *supra* note 122, at 5.

332. See J. MOORE, *supra* note 122, at 5.

Some form of distributive justice is advocated in a conflict involving a leading status quo power and a minor state. According to Boyle, for instance, a violation of an international legal rule by a weaker state against a leading status quo power should not justify the use of interstate coercion and violence by the leading power.<sup>333</sup> In a system of unequally distributed power, it is unacceptable for policy-makers in a major status quo power to insist on fulfilling the principles of rectificatory justice while at the same time ignoring the distributive and rectifiable claim advanced by a major adversary.<sup>334</sup> A similarly broad conception of international justice would arguably require an exploration of fundamental national values in order to arrive at a balanced decision concerning the existence of a just cause. One must thus examine factors such as the degree to which a belligerent represents a repressive, unjust, or dehumanizing regime as well as the prospects for creating a better social order.<sup>335</sup> As pointed out by O'Brien, "a responsible just war analysis of just cause can[not] avoid the character of the societies in conflict and the implications for human rights and dignity if one side subjugates the other."<sup>336</sup> A strong *jus ad bellum* is created, for instance, when a just, free, self-correcting polity, responsive to the population, finds itself threatened by aggression from an unjust and totalitarian polity. The prospect of a military defeat or surrender without war would probably result in an unjust social order and an alien system of values being imposed upon the just regime.

#### d. Proportionality as a Cost-Benefit Analysis

A more common manner of viewing proportionality is in terms of a calculus of the good to be accomplished through war and the harm predictably to be suffered by all parties. The principle of proportionality here requires that the good resulting from the use of force must outweigh, or be proportional to, the evil attending recourse to arms. Alternatively, the evil resulting from the use of force ought to be less than the evil resulting

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333. Boyle, *International Law as a Basis for Conducting American Foreign Policy: 1979-1982*, 8 YALE J. WORLD PUB. ORD. 103, 110-11 (1983) [hereinafter Boyle].

334. Boyle, *supra* note 333, at 110-11.

335. This does not mean that a military action, to be justified, must immediately usher in a new and better era. Rather, the implication is that it must create conditions under which there is a good prospect for greater order, justice, and freedom than there was before.

336. W. O'BRIEN, *supra* note 89, at 335.



from a failure to employ it. This is an indispensable requirement. As emphatically stated by Ramsey:

It can never be right to resort to war, no matter how just the cause, unless a proportionality can be established between military/political objectives and their price, or unless one has reason to believe that in the end more good will be done than undone or a greater measure of evil prevented.<sup>337</sup>

Indeed, where the existence of such proportionality is seriously challenged,<sup>338</sup> this fact in itself often leads to a condemnation of a war deemed just on other grounds.<sup>339</sup>

At the same time the process of balancing evil effects against salutary effects is highly complex and entails considerable uncertainty. As Falk conceded, "we have no adequate way to qualify, or otherwise render precise, the relation between the cost and the benefit from the use of force."<sup>340</sup> Be that as it may, "our moral agency leads us to make intuitive distinctions that emphasize the continuing need to justify force by some sense of cost-benefit relationship."<sup>341</sup>

### i. Proportionality of Values

The relationship between the costs and benefits resulting from the use of force is analyzed by moralists in terms of "proportionality of values."<sup>342</sup> Osgood and Tucker maintain that it is incumbent upon the proponents of this view to engage in a comparison "between realities of the moral order and not merely between two sets of material damage and loss."<sup>343</sup> The relevant standard is not only "utilitarianism of materialist origin" that would avoid war merely because its repression would be

337. P. RAMSEY, *supra* note 66, at 195.

338. The existence of such proportionality was seriously challenged, for example, in the destruction of Vietnam during the Vietnam War and the starvation of Biafran children during the Biafran War.

339. Such considerations may be contributed to a change of attitude amongst Americans from "hawkish" to "dovish" that prompted reevaluation amongst early supporters of Biafra.

340. R. FALK, *LAW, MORALITY AND WAR IN THE CONTEMPORARY WORLD* 40-41 (1963) [hereinafter R. FALK, *LAW, MORALITY AND WAR*].

341. R. FALK, *LAW, MORALITY AND WAR*, *supra* note 340, at 40-41.

342. The concept "proportionality of values," as used by Osgood and Tucker, is distinguishable from "proportionality of effectiveness." See E. OSGOOD & W. TUCKER, *FORCE, ORDER AND JUSTICE* 301-02 (1967) [hereinafter E. OSGOOD & W. TUCKER].

343. Murray, *supra* note 128, at 80.

costly.<sup>344</sup> Rather, the issue of proportionality must be assessed more rigorously from the standpoint of a comprehensive hierarchy of strictly moral values. There are greater evils than physical death and destruction wrought in war. Realistically, the existence of a high order of human good may also require that immense sacrifices may have to be borne in the defense of good.<sup>345</sup>

Moralists and others who approach the subject from an ethical perspective propose that a similar balance sheet of good and evil be estimated for each belligerent and that it encompass the effects on individual third parties as well as the international common good.<sup>346</sup> An illustration of what may be envisaged under a calculus of values can be found in a statement by the former Defense Minister of the People's Republic of China, Marshall Lin, who affirmed the inevitability and justice of people's wars in the following terms:

We know that war brings destruction, sacrifice, and suffering on the people. But the destruction, sacrifice, and suffering will be much greater if no resistance is offered to imperialist armed aggression and the people become willing slaves. The sacrifice of a small number of people in revolutionary wars is repaid by security for whole nations, whole countries and even the whole of mankind; temporary suffering is repaid by lasting or even perpetual peace and happiness.<sup>347</sup>

There is little doubt about which of the acknowledged values the Chinese cherish most. Revolutionaries and counter-insurgents are likely to be equally adamant that their wars do not lead to a greater evil. More often than not, however, priorities are not immediately apparent. A difficult choice, for instance, may present itself in the context of determining the permissibility of humanitarian intervention where the dangers posed to self-determination and the maintenance of world order by permitting such intervention have to be balanced against the dangers to human rights by not permitting it.<sup>348</sup> One is inclined to invoke the sanc-

344. Murray, *supra* note 128, at 80.

345. Murray, *supra* note 128, at 80.

346. See W. O'BRIEN, *supra* note 39, at 27.

347. N.Y. Times, Sept. 4, 1965, at 2.

348. See J. MOORE, *supra* note 122, at 25, regarding the requirement of proportionality of values in interventions for humanitarian purposes ("a proportional use of force which does not threaten greater destruction of values than the human rights at stake . . ."). For a similar guideline, see R. LILICH & F. NEWMAN, INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW AND POLICY 538-39 (1979).

tity of human life as the supreme value, but it is clear that the preservation of life is not the only — nor necessarily the highest — value at stake in war, and how people live has frequently been considered more important a value than whether some continue to live at all.

## ii. Quantitative Factors

Whatever significance one may attach to other values, these values cannot be divorced from the level of physical destruction that war entails. It is argued that quantitative factors have a critical influence on political and moral judgments for after all, numbers ultimately affect the way people live.<sup>349</sup> Political scientists, for instance, single out a number of more concrete and potentially quantifiable factors that may play a part in a calculus of proportionality employed by states before embarking on war.<sup>350</sup> They contend that any formal analysis of the expected utility of military action would have to take account of the costs and benefits of such an action arising from each of these factors and aggregate them in some explicit fashion.

Political scientists pay particular attention to three sets of factors: (a) the structural and contextual characteristics of the prevailing international system; (b) the internal political processes of the actor-state; and (c) the internal political processes of the target-state. The first category includes factors such as the degree of competitiveness of an interventionary situation,<sup>351</sup> ideological politics,<sup>352</sup> side effects,<sup>353</sup> interactive effects,<sup>354</sup> technological factors,<sup>355</sup> system-wide sanctioning procedures,<sup>356</sup> and worldwide public opinion.<sup>357</sup> Factors in the second category relate to effects coercive actions have on domestic polit-

349. See E. Osgood & W. TUCKER, *supra* note 342, at 237.

350. For a typical analysis, see J. MOORE, *supra* note 122, at 11.

351. That is, this first category inquires to what extent military action is likely to invite counteraction or intervention by others.

352. The ideological politics category scrutinizes how much value an actor places on achieving certain goals.

353. Since interactions are part of a complex web, an actor should also consider probable effects of its action on simultaneous interaction with other states.

354. Interactive effects refer to the effects of the current action on future interactions.

355. Technological advancement and technological superiority may reduce the cost of military action.

356. These procedures must be analyzed even though their impact is difficult to estimate with great precision.

357. This refers to the likelihood of either formal or informal communal sanction.

ics<sup>358</sup> and on a state's economy.<sup>359</sup> The third category encompasses factors that pertain, for instance, to whether the target-state is united politically and mobilized to resist oncoming military action, or whether it is experiencing civil strife. In the former case, the cost of military action would be higher.

In practice, of course, one should aim at combining value considerations with the narrower and more tangible factors in order to provide a comprehensive appraisal. Exclusive reliance on one set of criteria would conceivably lead to a conception of proportionality that is either too abstract or too heavily oriented towards transient phenomena. It is unrealistic to think that a universal formula will be applicable in each instance of recourse to arms. Nevertheless, persistent efforts to produce a comprehensive formula and to apply it to concrete situations may facilitate the development of reasonably workable criteria.

### iii. Proportionality in a Nuclear War

Special considerations arise in the context of nuclear wars. It is asserted that the condition of proportionality in itself is sufficient to rule out the justifiability of a total nuclear war for it does not appear that any resultant good could justify the eradication of whole societies. The argument that one should choose the death of millions rather than accept survival at the price of subjugation to tyranny is not a very compelling one.<sup>360</sup> Indeed, a large number of people have become nuclear pacifists by concluding that no political ends, not even the preservation of freedom and democracy, are worth a possible extinction of the human race resulting from a nuclear holocaust. While the criterion of proportionality rules out the use of total nuclear war, it does not imply that the threat of such a war or even a limited nuclear exchange is unjustifiable.<sup>361</sup>

358. For example, the possibility of upheavals must be considered.

359. Diversion of scarce resources from other domains will obviously impose significant opportunity costs on the action.

360. In this connection, see the Russel-Hook debate in 1958 concerning whether it would be better to be "red than dead" in the event a United States-Soviet nuclear confrontation came down to the alternatives of surrender or death. Professor Sidney Hook felt that death was preferable to life under Communism, while Bertrand Russell argued that almost any kind of political or military regime could be tolerated if the alternative was the end of the human race or a large segment of it. The most significant of these exchanges are reprinted in *ETHICS AND METAETHICS* 158-79 (R. Abelson ed. 1963).

361. See C. JOYNT & P. CORBETT, *THEORY AND REALITY IN WORLD POLITICS* 15 (1978). On the concept of "limited nuclear war," see I. CLARK, *supra* note 123. The question of

*e. Proportionality of Effectiveness*

Contemporary international law appears to be more concerned with proportionality in the third sense: namely the condition of refraining from the use of more force than is required by the legitimate military necessity to achieve a specific war objective. Referred to by Osgood and Tucker as "proportionality of effectiveness,"<sup>362</sup> it is distinguished from "proportionality of values" in that it pertains to the extent of force employed in relation to the effective protection of endangered interests. Proportionality of values, as seen earlier, entails the balancing of the values preserved through force with values sacrificed through force.<sup>363</sup>

Thus, proportionality of effectiveness does not directly relate to the question of whether a state has a compelling reason to wage war, which is the subject of this Article, but pertains to the issue of whether a state conforms to the *jus in bello* in its conduct of war.<sup>364</sup> Nonetheless, political analysts tend to overlook this distinction, and judgments concerning proportionality of effectiveness are often colored by considerations of the calculus of values. The 1982 war in Lebanon serves as a recent case in point. Strong criticism was levelled at Israel on the ground that the resulting death and disruption had been disproportionate in its effects in relation to the ends sought. By focusing exclusively upon the "means versus ends" question,<sup>365</sup> critics arguably failed to subject the war to an informed and reasoned test of proportionality of values.

A proper calculus should have taken into account the values at stake, such as the security of the state of Israel,<sup>366</sup> and the

proportionality and the use of nuclear weapons will be further discussed in connection with the *jus in bello*. See *infra* notes 364-63 and accompanying text.

362. See E. OSGOOD & W. TUCKER, *supra* note 342.

363. See *supra* notes 342-48 and accompanying text.

364. A discussion of proportionality in this respect is undertaken in R. Mushkat, *The Concept of Just War*, *supra* note 19.

365. Commentators such as Robert W. Tucker and Conor Cruise O'Brien are, however, of the opinion that Israel acted in accordance with the principle of proportionality both in terms of the calculus of values and the effectiveness of means. See O'Brien, *A Review of The Longest War: Israel in Lebanon* by J. Timmerman, 60 *ENCOUNTER* 49-54 (Jan. 1983); Tucker, *Lebanon: the Case for the War*, 74 *COMMENTARY* 19-30 (Oct. 1982); *N.Y. Times*, July 15, 1982, at A23. A different conclusion is drawn by another commentator who purports to subject the war in Lebanon to a calculus of values. See Mack, *Israel's Lebanon War*, 37 *AUSTL. OUTLOOK* 1 (1983).

366. The PLO maintained a large and fairly sophisticated war machine on Israel's northern border whose *raison d'être* was the achievement of the strategy enshrined in

values actually gained through the war that, from Israel's point of view, included removal of a threat to the security of Northern Israel; the undermining of the infrastructure of the Palestinian Liberation Organization (PLO); de facto peace with Lebanon; and the tipping of the balance within Lebanon in favor of conservative, as distinct from radical elements. From the Lebanese perspective the war appeared to have enhanced the long-term prospects for independence and internal stability, which could lead to the resumption of economic growth. With respect to the region as a whole it can be said that the war has pushed the Soviet Union to the sidelines and has contributed to the isolation of Syria, the most belligerent member state of the Arab-Israeli core. Viewed from a global perspective, the war has brought about a greater involvement on the part of Western powers in the management of strife-ridden Lebanon. At least part of the international community seems less willing to let the explosive situation there deteriorate below a certain level, whereas in the past it remained largely indifferent to the destruction and chaos engulfing Lebanon.

In addition, the above values should have been juxtaposed with the values sacrificed through the war. Comprised in the latter category are the heavy losses of life incurred by Israel, the substantial economic cost of the war and the ensuing occupation, the damage to Israel's image and its estrangement from the international community, the intensification of ideological conflict within the country, and the raising of the level of unrest among Israel's Arabs and the inhabitants of the occupied territories. On the Lebanese side one cannot ignore the heavy casualties and physical destruction caused by the war. In the regional context the war increased the probability of Israeli-Syrian confrontation and has drawn Syria and the Soviet Union closer to each other. In fact, Soviet involvement in Syrian defense build-up has grown to such an extent that the Soviet Union could conceivably become directly involved in regional hostilities.<sup>367</sup> In terms of global implications one could perhaps argue that the war has brought the superpower confrontation into a sharper focus. The

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the Palestine National Covenant, namely the liquidation of the state of Israel. In addition, belief in the PLO's ability to liberate Palestine and to destroy Israel encouraged terrorist acts by Arabs in Israel, the occupied territories, and Jordan.

367. See, e.g., Sciolino, *Behind the Rigid Facade, Damascus Has a Softer Side*, N.Y. Times, Feb. 16, 1986, at 18, col. 3; Gwertzman, *U.S. Denies Plan to Attack Syria*, N.Y. Times, Nov. 8, 1983, at 1, col. 6.

Soviet Union resents the reemergence of the United States as a regional broker and is apparently willing to take greater risks in its commitment to its Syrian ally.<sup>368</sup> This situation possibly contains the seeds of superpower involvement in a future conflict.

It is obviously difficult to aggregate the large number of costs and benefits enumerated above. The value of the exercise, however, lies in providing a sounder basis for appraisal. In the process of identifying the relevant factors on both sides of the ledger, one becomes aware of the exact nature of the aspect of the war that is singled out for criticism. This awareness allows more precise evaluation and hence facilitates overall judgment.

### 3. Probability of Success

Closely linked to the condition of proportionality — indeed referred to at times as the “second consideration of proportionality”<sup>369</sup> — is the requirement that a state waging a war should have a reasonable probability of success. Success in this context has been interpreted in traditional political-military terms as “winning the war.”<sup>370</sup> In just war terms success is said to mean “repelling the attack and establishing just peace”<sup>371</sup> or the “repression of unjust action.”<sup>372</sup> According to McKenna, victory today:

[C]annot mean . . . , if it ever did, the categorical imposition of the winning side's will upon the loser. The erosion of the victor's comparative advantage vis-à-vis the vanquished in both [w]orld [w]ars demonstrates this; even after an atomic clash the co-operation of the defeated country will be worth bargaining for. Success can mean, at best, the accomplishment of limited objectives.<sup>373</sup>

368. See *supra* note 367 and accompanying text.

369. Murray, *supra* note 128, at 80. Brandt, for example, expresses the probability of success in a formula designed to facilitate the calculation of proportionality. According to Brandt:

A military action is permissible only if the utility . . . of victory to all concerned, multiplied by the increase in probability if the action is executed, on the evidence (when the evidence is reasonably solid, considering the stakes) is greater than the possible disutility of the action to both sides multiplied by its probability.

R. BRANDT, *Utilitarianism and the Rules of War*, in *WAR AND MORAL RESPONSIBILITY* 37 (M. Cohen, T. Nagel & T. Scanlon eds. 1974).

370. Wells, *How Much Can "the Just War" Justify?*, 46 *J. PHIL.* 819, 821 (1969).

371. Partill, *On the Just War*, 1 *SOC. THEORY & PRAC.* 97, 98 (1971).

372. Murray, *supra* note 128, at 80.

373. McKenna, *Ethics and War: A Catholic View*, 54 *AM. POL. SCI. REV.* 647, 651-52

At the same time success is deemed to be broader than victory. In Childress's opinion "success" encompasses "witnessing the values as well as achieving goals."<sup>374</sup> Thus, even if a nation has a good reason to believe that it will be defeated, its spirited resistance may preserve significant values — such as self-respect — beyond the number of lives lost and retention of territory and sovereignty.

### a. *The Moral Calculus*

Again, there appears to be a strong tendency to view this requirement of just cause in terms of moral values. The emphasis on morality is evident in Murray's assertion that "the condition of probable success is not, of course, simply the statesmen's classical political calculus of success."<sup>375</sup> It is the moral calculus that is enjoined in the traditional theory of rebellion against tyranny.<sup>376</sup>

This moral dimension is explored by those writers who focus upon the just war requirement of probability of success. Childress, for instance, maintains that only a strong commitment and a reasonable prospect to achieve fundamental values can override the prima facie duties not to injure or kill others, duties binding on states as well as on individuals.<sup>377</sup> Totally useless, pointless, or self-indulgent warfare, in which reasonable people would not expect to achieve goals or express values, is excluded by the criterion of probability of success. Furthermore, according to Potter, this criterion flows from the moral ban upon suicide and the fundamental principle that political leaders are stewards of the welfare of the nation and the life of each citizen.<sup>378</sup> War, therefore, must be a "politically purposeful act made barely tolerable by the necessity of defending the innocent. It can never be justified by the main desire to avoid admitting an error in past judgment, a refusal to acknowledge changing circumstances or an extravagant or misplaced sense of

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(1960) [hereinafter McKenna].

374. Childress, *Just-War Theories: the Bases, Interrelations, Priorities and Functions of their Criteria*, 39 THEOLOGICAL STUD. 427, 437 (1978) [hereinafter Childress].

375. Murray, *supra* note 128, at 80.

376. Murray, *supra* note 128, at 80.

377. Childress, *supra* note 374, at 437.

378. R. POTTER, *The Moral Logic of War*, in PEACE AND WAR 7, 14 (C. Beitz & T. Herman eds. 1973) [hereinafter R. POTTER].



heroism."<sup>379</sup> Childress concludes that "[i]t is immoral to expose other men to death to save one's political face."<sup>380</sup> Since these types of hostilities cannot justifiably be chosen as an end, they can only justifiably be entered into with a reasonably high probability that they constitute a means to achieving an objective that is worth pursuing. Presumably, if defeat is certain, hostilities will only aggravate the injustice that precipitated them in the first place.

### b. *The Effectiveness Calculus*

There is also a more secular element of effectiveness. A statesperson with a just cause should choose means of coercion that have a reasonable chance of success.<sup>381</sup> Lacking the will or the resources to succeed, a statesperson should not undertake the action. This is a rule of simple prudence. For example, the type of sacrifice expressed by the famous Patrick Henry slogan "[g]ive me liberty or give me death" is more appropriate for an individual patriot than for a responsible head of state.<sup>382</sup> In Hoffmann's opinion an ineffective use of force is also unethical for "the ethics of foreign policy behavior is an ethics of consequences; no policy is ethical, however, generous its end, if success is ruled out."<sup>383</sup> Hence, if the costs appear to be high and the probability of success low or highly uncertain, morality, prudence, and ethics counsel against initiating a military action.

Indeed, such a yardstick was employed to criticize the 1982 Israeli action in Lebanon in that the objective sought — the destruction of the PLO — was unrealizable and hence Israel stood no chance of success in attaining its ultimate aims. This criticism, however, has little validity for the prospects for neutraliz-

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379. R. POTTER, *supra* note 378, at 14.

380. Childress, *supra* note 374, at 437.

381. For an example of the high value placed on the criterion of probability of success in relation to the legality of a military action, see Y. BEN-PORAT, E. HEBER & Z. SCHIEF, *ENTEBBE RESCUE* 253-54 (1977). The authors cite the Israeli Minister of Justice's advice to the Ministerial Crisis Management Team to the effect that "[t]he question is not what Zionism and our sovereignty can expect if we don't rescue the hostages. The question is whether there is a plan for a military rescue — one with high probability of success." *Id.*

382. See Lefever, *The Just War Doctrine: Is it Relevant to the Nuclear Age?*, 4 *WORLDVIEW* 7, 10 (1961).

383. S. HOFFMANN, *Vietnam and American Foreign Policy*, in 2 *THE VIETNAM WAR AND INTERNATIONAL LAW* 1134, 1160-61 (R. Falk ed. 1968) [hereinafter S. HOFFMANN, *Vietnam and American Foreign Policy*].

ing the PLO's military capability, destroying its organizational infrastructure, and removing its territorial base appeared to be quite good when Israel embarked upon military action.

Criticism based on the lack of probability of success is more appropriate in the case of the Vietnam War where disproportionality existed between the costs of the war (human losses, physical destruction, and social dislocation of the Vietnamese people) and its ends.<sup>384</sup> O'Brien,<sup>385</sup> for instance, maintains that by approaching the problem from a purely military perspective, American strategists estimated that the United States could avert the collapse of South Vietnam and then rebuild it to a point where the North Vietnamese and Vietcong would have no hope of victory and be forced to desist from fighting. Two non-military variables were thus omitted from the equation, namely, the will and power of resistance of the North Vietnamese and Vietcong leadership, and the loyalty and the durability of their rank and file. Secondly, United States defense planners greatly overestimated the willingness of key American elites to support the war. As a corollary, it may be argued that the United States failed to grapple with the issue of probability of success, overlooking critical factors such as the internal dynamics of various areas; the particular type of intervention involved, whether an open battle or otherwise; and the limits of its own power.<sup>386</sup>

What is considered reasonable, however, in terms of the probability of success depends on the situation in which the actors must make responsible decisions. Retrospective judgments by others should include only what the actors could and should have foreseen.<sup>387</sup> Ironically, only upon termination of hostilities

384. See Falk, *International Law and the U.S. Role*, in 2 *THE VIETNAM WAR AND INTERNATIONAL LAW* 362, 399 (R. Falk ed. 1968) [hereinafter Falk, *International Law*]; S. HOFFMANN, *Vietnam and American Foreign Policy*, *supra* note 383; W. O'BRIEN, *U.S. MILITARY INTERVENTION LAW AND MORALITY* 70 (1979) [hereinafter W. O'BRIEN, *U.S. MILITARY INTERVENTION*].

The strategic tunnel vision on the part of United States defense planners also militated against the action's possible success.

385. W. O'BRIEN, *U.S. MILITARY INTERVENTION*, *supra* note 384, at 93-94.

386. S. HOFFMANN, *supra* note 124, at 116. Murray comments on a general inability of United States authorities to reckon with a possibility of failure or be prepared to accept it, which is a corollary of the requirement of the probability of success. Citing the 1958 Senate decision to deny governmental funds to persons or institutions proposing or actually conducting a study regarding the surrender of the government of the United States, Murray condemns an attitude that supports the subjugation of political aims to military action, with the only legitimate aim being victory regardless of any calculus of proportional moral costs. Murray, *supra* note 128, at 84-86.

387. Childress, *supra* note 374, at 437.

can this criterion be properly applied. It is sufficient to establish, however, that the decision-makers, after giving due consideration to all the factors known and perceived as relevant, had come to the conclusion that there was a high degree of probability of success. By the same token it is apparent that an initial estimate of probability of success and proportionality of evil to good effects may be substantially modified by the course of the conflict. Thus, a just belligerent should continuously monitor developments in order to reevaluate the probability of success and the proportionality of the war to the just cause.

c. *Wars of Self-Defense*

The requirement of probability of success is nonetheless subject to an important qualification that reflects the distinction between "offensive" and "defensive" wars. It is thus contended that a war of self-defense may be entered upon irrespective of the prospects of success, particularly if there is a considerable threat to continued existence and fundamental values.<sup>388</sup> Evidently, so strong is the presumption in favor of the right of self-defense that the requirement of probable success may be waived.

Yet the limits, if any, of this qualification are unclear. It is postulated that a desperate, if not hopeless, defense is permitted if fundamental moral values are manifestly threatened by the aggressor.<sup>389</sup> This is also the view expressed by McKenna, who employs the case of Belgium in 1914 to illustrate that in extreme circumstances the moral value of national martyrdom may compensate for the material destruction of unsuccessful wars.<sup>390</sup> Generally, McKenna maintains that a nation defending itself against attack may be more inclined to assume the risks inherent in the option to fight, as Finland did in 1939, than a nation on the offensive.<sup>391</sup> A state may, of course, choose not to respond to force with counterforce because of the military supremacy of the attacking country, since recourse to war in self-defense is a right and not a duty, and a state need not exercise that right even when it is entitled to. Be that as it may, it cannot be expected to surrender if this would result in the destruction of the

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388. See W. O'BRIEN, *supra* note 89, at 31.

389. See W. O'BRIEN, *supra* note 89, at 31.

390. McKenna, *supra* note 373, at 651.

391. McKenna, *supra* note 373, at 651.

nation or its primary cultural values.<sup>392</sup>

#### 4. Last Resort

##### a. *Exhaustion of Peaceful Means*

War cannot rationally be supported as a legitimate means of settling disputes because of the enormous social costs it entails. Thus, it is well-understood that the justification of war requires evidence that peaceful methods had been fully explored and that war was embarked upon only as a last resort. The importance of this requirement has been greatly enhanced since the inception of the United Nations, given the fact that one of the basic purposes of the organization is "to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace."<sup>393</sup>

Specifically, articles 2(3) and 2(4) of the Charter<sup>394</sup> contain two parallel obligations requiring all members to "settle their international disputes by peaceful means in such a manner that international peace and security and justice, are not endangered"<sup>395</sup> and "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 [p]urposes of the [United Nations]."<sup>396</sup> These principles have been elaborated in the Declaration on Friendly Relations.<sup>397</sup>

Accordingly, an extensive machinery for the peaceful settlement of disputes has been established under the Charter with the intention of rendering unnecessary the recourse to war as a means of self-help and confining the need for collective enforcement action to extreme cases of breaches of international law and order. States have also assumed similar obligations within regional arrangements<sup>398</sup> as well as under bilateral treaties for

392. See Struckmeyer, *The "Just War" and the Right of Self-defense*, 82 ETHICS 48, 53-54 (1971).

393. U.N. CHARTER art. 1.

394. U.N. CHARTER arts. 2(3), 4.

395. *Id.* at art. 2(3).

396. *Id.* at art. 2(4).

397. See Declaration on Friendly Relations, *supra* note 159.

398. For examples of these regional arrangements, see The Protocol of the Commission of Mediation, Conciliation and Arbitration of the Organization of African Unity, adopted July 1964, Cairo, Res. CM/Res.42/III; The European Convention for the Peace-

the settlement of international disputes.<sup>399</sup> The existing instrumentalities for the peaceful settlement of disputes, in conjunction with an increasing recognition of the irrationality and grave consequences of war, may thus be said to have contributed to the emergence of the normative principle that international violence must be deferred until every conceivable alternative has been fully explored.<sup>400</sup>

Indeed, it appears that the international community of jurists and statespeople has adopted a "rough rule of thumb;"<sup>401</sup> a state failing to exhaust available peaceful remedies before opting for war is presumed to be an aggressor. An implicit expression of this idea may be found in article 40 of the Charter, which provides in the context of the Security Council's function with respect to threats to the peace, breach of the peace, or acts of aggression, that account shall be taken "of failure to comply with . . . provisional measures."<sup>402</sup> The implications of a lack of readiness to accept peaceful recommendations in regard to the responsibility of states for breaches of the peace or acts of aggression are elaborated further in General Assembly Resolution 378(V) on the Duties of States in the Event of the Outbreak of Hostilities.<sup>403</sup> In fact, refusal by states to comply with provi-

ful Settlement of Disputes of Apr. 29, 1957, 298 U.N.T.S. 267, 5 Eur. Y.B. 587, 1979 Gr. Brit. T.S. No. 15 (Cmd. 7460); The American Treaty on Pacific Settlement of Apr. 30, 1948 (Pact of Bogota), 30 U.N.T.S. 55.

399. For example, see arbitration and conciliation bipartite treaties entered by the United States with 48 countries in 1913 and 1914. These treaties became known as the "Bryan treaties" because they generally were signed by William Jennings Bryan for the United States.

400. The "exhaustion of peaceful means" requirement features in most criteria proposed by legal scholars for the evaluation of the use of force. See, e.g., Falk, *International Law*, *supra* note 384, at 415, 444-42; Lillich, *supra* note 201, at 347-51; J. Moore, *supra* note 122, at 264; Nanda, *supra* note 196, at 475. The accepted view is that rejection of community procedures for peaceful settlement is highly relevant both in assessing objectives in the use of coercion and in assessing responsibility for the continuation of coercion.

Excluded, however, by their very nature are wars of self-defense under article 51 of the Charter in which states are not obliged to first seek redress by peaceful methods. At the same time, it should be noted that customary law requires as a condition to permissible armed reprisals that reasonable efforts be made to secure a peaceful remedy to the alleged international delinquency and that the machinery for peaceful settlement of disputes provided by the Charter and general international law be exhausted. See J. BRIERLY, *supra* note 173, at 398, 402.

401. The term is employed by O'Brien. W. O'BRIEN, *supra* note 89, at 31.

402. U.N. CHARTER art. 40.

403. Most notably, General Assembly Resolution 378(V) of 1950, naming the People's Republic of China an aggressor, made specific reference to the nonadherence of the latter to "[United Nations] proposals to bring about a cessation of hostilities in Korea

sional measures, such as cease-fire orders, generally precedes condemnation or indictment by United Nations organs. Moreover, states are eager to point out their compliance with "community procedures" as evidence of their "reasonable conduct."<sup>404</sup> It is also reasonable to conclude that the reference to "other relevant circumstances" in article 2 of the Definition of Aggression encompasses the factor of prior attempts at peaceful settlement of a conflict.<sup>405</sup> Finally, legal scholars tend to agree that "the relative willingness of the contending parties to accept community intervention for the cessation of violence and [nonviolent] procedures for settlement" should be considered as a factor in the designation of a coercive action as permissible or non-permissible.<sup>406</sup>

Underlying this concept appears to be a series of assumptions about the nature of war.<sup>407</sup> It is postulated, for instance, that war is chosen as a settlement device because of the passions aroused by disputes. Hence, there exists cooling off rationale furnished by the various peaceful procedures so that tempers may subside and temperate judgment prevail in order to allow the pursuit of rational nonviolent solutions. The second relevant assumption is that war is often the outcome of ignorance and misunderstanding of facts involved in an international crisis. The pacific settlement provisions are designed thus to provide an impartial and informed mode of inquiry. It is further posited that war results from pride of governments and peoples who are too immersed in these situations to be able to seek a more reasonable and less drastic solution. Pacific settlement, therefore, offers to inject into the dispute a disinterested party that might

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with a view to peaceful settlement." G.A. Res. 378(V), 5 U.N. GAOR (308th plen. mtg.), U.N. Doc. A/C.1/615 (1950).

404. For illustrations, see Higgins, *supra* note 304, at 269, 298.

405. *Definition of Aggression*, *supra* note 107, at art. 2.

406. See McDougal & Feliciano, *International Coercion and World Public Order: The General Principles of the Law of War*, 67 YALE L.J. 771, 821 (1958). In this connection, see also Quincy Wright's proposition that "refusal to accept an armistice proposed in accordance with a procedure which [a state] has accepted to implement its no-force obligation" may be taken as a test of aggression. Wright, *The Concept of Aggression in International Law*, 29 AM. J. INT'L L. 373, 395 (1935). J. Verzijl too is of the opinion that "[a] state that proceeds to the use of violence against a fellow state without previously resorting to the available means of conciliation or arbitral (judicial) settlement designated for that purpose, whether compulsory or otherwise, is per se in the wrong." J. VERZIJL, 1 INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE 230 (1968).

407. The following discussion draws on Inis C. Claude's analysis of peaceful settlement of disputes. I. CLAUDE, JR., SWORDS TO PLOWSHARES: THE PROBLEMS AND PROGRESS OF INTERNATIONAL ORGANIZATION 217 (1971) [hereinafter I. CLAUDE, JR.].

help the rival states to extricate themselves from psychological dead end streets.

These two assumptions, while occasionally warranted, cannot provide a viable basis for decision-making in all cases of armed conflict. Nor is the application of the peaceful settlement option free from difficulties. War is a highly complex phenomena and its outcome is not wholly dependent on the availability, actual or potential, of pacific settlement agencies.

It is evident, for instance, that "states generally have not been willing to risk their most vital interests on the outcome of international processes beyond their control."<sup>408</sup> Past experience suggests that while comparatively minor matters may be referred to international institutions, the most vital interests tend to be protected by states with the threat or use of force. Where peaceful settlements of matters of vital interest did take place, it was often the outcome of traditional diplomatic negotiations supported by recourse to arms, either actual or potential. It is equally clear that issues which constitute the core of conflict do not always lend themselves to formulation in terms of disputes that can be subjected to peaceful resolution. Some controversies are in fact just "minor symptoms of a fundamental hostility that is not definable by the solution of the disputes."<sup>409</sup>

It follows that when such irreconcilable differences exist and no evidence can be adduced for a likely fundamental change in attitudes of the states involved, the last resort criterion may be satisfied at a rather early stage.<sup>410</sup> Put another way, the last resort criterion should not be interpreted to mean that all alternatives to war should be exhausted if there is no reasonable expectation that they would be successful.

Another problem arising in the context of the adherence to the requirement of exhaustion of peaceful alternatives stems

408. W. O'BRIEN, *supra* note 89, at 31.

409. I. CLAUDE, JR., *supra* note 407, at 242. Thus, for instance:

The crucial antagonisms that brought about World War II were not matters capable of being dealt with primarily by a transfusion of calm rationality, or by injection of level-headedness and deliberateness into the situation; they were eruptions of the deep-seated malignancy of the human situation, outcroppings of force, manifestations of drives and symptoms of irrationalities of power politics that lie essentially beyond the range of pacific settlement techniques.

*Id.* The protracted Arab-Israeli conflict provides another illustration of an intense confrontation whose underlying causes are apparently not amenable to peaceful means of settlement.

410. Nonetheless, willingness to use the institutions of peaceful settlement must be clearly demonstrated.

from the technical deficiencies of the United Nations peacekeeping system and the ineffectiveness of United Nations organizations as dispute-settlement agencies.<sup>411</sup> Indeed, because the United Nations is not a supranational organization with independent powers to control international violence, and given the highly political nature of its decision-making process,<sup>412</sup> it has failed to foster a sense of confidence among political minorities with respect to its ability to dispense justice in matters concerning their security.<sup>413</sup> The politicization of the Security Council and the built-in bias characterizing its decisions have prompted one writer to conclude that, "the tendency of Israeli leaders to opt for military 'solutions' may stem, in part, from a consciousness of Israel's increasing isolation and vulnerability."<sup>414</sup> Nor is it just a question of politicization and bias with respect to Israel. The general record of the Security Council in resolving international disputes is rather poor. An analysis of its past performance has clearly demonstrated the organization's impotence and

411. The limited applicability of the Great Powers Veto to Pacific Settlement Action in the Security Council is an obvious handicap. Even more damaging is the fact that the major members of the Security Council are so deeply embroiled in conflict that they transform the council from an organ of conciliation into an arena for playing their own mutual antagonisms. See P. HASLUCK, *WORKSHOP OF SECURITY* 94 (1948).

412. Security Council members have all too frequently assumed positions and proposed policies on the basis of their various national interests rather than in accordance with the objective principles enshrined in the Charter. A case in point is the massive strategic and economic advantages of collaboration with the Arab oil-producing states that have inevitably influenced the stance of certain Security Council members towards the Arab-Israeli conflict. The conspicuous shift in Soviet and French policies in favor of the Arabs is evidence of this trend.

413. The lack of confidence in the system's integrity is reflected in a statement by Israel's former representative to the United Nations, Yehuda Blum:

One of the most disturbing aspects of the Middle East conflict — disturbing as much to the cause of 'world order' as to the cause of Israel — is the fact that on one single occasion over the past fifteen years has Israel been able to get satisfaction from the political organs of the [United Nations] on her complaints against neighboring Arab states. The Soviet veto that has been made available to the Arabs, to block any decision by the Security Council which the latter regarded as unfavorable to them, ensured that such a decision even if it received the requisite number of votes in the Council, would not be adopted. This fact (in turn) was naturally taken into account by other members of the Security Council more favorably disposed to Israel and largely conditioned the very tone and formulation of any watered down draft resolutions concerning Israeli complaints, since it was realized that the submission of a draft resolution giving satisfaction to Israel was bound to become an exercise in futility.

Blum, *The Beirut Raid and the International Double Standard*, 64 *AM. J. INT'L L.* 73, 98 (1970).

414. Pogany, *The Destruction of Osirak: A Legal Perspective*, 37 *WORLD TODAY* 413, 418 (1981).



ineffectiveness throughout major international conflicts.<sup>415</sup>

The achievements of another organ of dispute settlement, the International Court of Justice, are equally unimpressive. Apart from the general reluctance of states to submit their disputes to the International Court of Justice as a measure of peaceful settlement, the judicial approach is also limited by the fact that a judgment does not always constitute a settlement. Indeed, the authoritative statement of legal rights and wrongs may even impede settlement in some situations by encouraging self-assertive rigidity on one side and self-defensive rigidity on the other, attitudes which are clearly not conducive to the spirit of political compromise that is required for the solution of critical problems marring the relationships between states. As a corollary, an assessment of compliance with the requirement of exhaustion of peaceful alternatives should take into account the partiality and ineffectiveness of the dispute-settlement institutions in the present time. This assessment should consider the possibility that the requirement of last resort may be fulfilled by default of the international system.

In this context the question may arise as to whether a state loses its right to employ force in self-defense when a dispute is brought before the Security Council and when the latter is actively involved in its settlement. According to Dugard, article 51 only envisaged the unilateral use of force pending Security Council action or "until the Security Council has taken measures necessary to maintain international peace and security. It cannot, therefore, be invoked in a situation which is considered by the Security Council."<sup>416</sup> A similar opinion was expressed by Murphy who asserted that "[w]hen the [c]ouncil assumed jurisdiction over the Falklands controversy on April 3, [1982,] the principles of peaceful settlement enshrined in the Charter took precedence over coercive actions and precluded the British from using force to retake the islands."<sup>417</sup> It should be emphasized, however, that article 51 refers to the Security Council taking "measures necessary to maintain international peace and security"<sup>418</sup> and it is a known fact that not all Security Council resolutions constitute such effective measures. Furthermore,

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415. See J. MURPHY, *THE U.N. AND THE CONTROL OF INTERNATIONAL VIOLENCE: A LEGAL AND POLITICAL ANALYSIS* (1982).

416. Dugard, *supra* note 244, at 144, 151.

417. *N.Y. Times*, May 19, 1982, at A26.

418. U.N. CHARTER art. 51.

Dugard's and Murphy's contention that once the Security Council assumes jurisdiction over a dispute member states lose their right to use force in self-defense, has rather dangerous implications for the maintenance of peace. The effect of this theory is that states would be reluctant to bring disputes before the council lest they lose their freedom to use force. Hence, the last resort requirement may be met when recourse to peaceful means has not resulted in an *effective* solution of the dispute.

*b. The Requirement of Necessity*

It should, nonetheless, be pointed out that besides the imperative to exhaust peaceful means, the last resort criterion embraces another related aspect, namely that of necessity. It is thus maintained that only strict necessity can legitimate recourse to arms and hence preventive war cannot be justified. This element of necessity is often discussed in relation to wars of self-defense and has been the core of considerable disagreement and controversy regarding anticipatory self-defense.

Under one interpretation of article 51, the justifying conditions of necessity for self-defense should be limited to an antecedent armed attack. According to this view, the responding coercion must in all circumstances be deferred until lawful coercion escalates into destructive violence and cannot be invoked by the mere threat of, or preparation for, attack.<sup>419</sup> This interpretation was viewed as consistent with the overriding policy of the United Nations: the restriction of the right of states to use force unilaterally. As asserted by Quincy Wright:

The obligation of states to refrain from threats to the peace under [a]rticle 2 paragraph 4 and the competence of the [United Nations] to take action in case of a threat to the peace under [a]rticle 39 were not intended to give a unilateral right of military self-defense in case of such threats. For that reason, self-defense against threats was excluded in [a]rticle 51 and states were explicitly obliged to submit disputes or situations which they think threaten peace, to the [United Nations] and

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419. For a discussion of Jessup's contention that under the Charter alarming military preparations by a neighboring state would justify recourse to the Security Council but would not justify resort to an anticipatory force by the state that believes itself to be threatened, see P. JESSUP, *supra* note 156, at 166. Similarly, Brownlie concluded that "[t]he beginning of an armed attack is a condition precedent for resort to force in self-defense." Brownlie, *The Use of Force in Self-defense*, 37 BRIT. Y.B. INT'L L. 183, 266 (1961).

to refrain from unilateral use of force.<sup>420</sup>

Furthermore, the limitation inherent in the expression "if an armed attack occurs" in article 51 is, according to Henkin, "comparatively clear, objective, easy to prove, difficult to misinterpret or fabricate."<sup>421</sup> Henkin cautions that:

To permit anticipation may virtually destroy the rule against the use of force, leaving it to every nation to claim anticipation and unleash fury. Nations will not be prevented or deterred by the fear that later — if there is anyone left to judge — someone may determine that there had in fact been no threat of armed attack legitimately anticipated.<sup>422</sup>

Another school of thought has advanced arguments in favor of a more liberal interpretation of article 51 and in support of an anticipatory right of self-defense. Reference is often made by those who subscribe to this position to a statement by United States Secretary of State Webster in the *Caroline* case,<sup>423</sup> which allegedly stands for the proposition that military defensive action was permissible in case of an instant and overwhelming necessity. This condition of necessity is said to "have never been restricted to 'actual armed attack.'"<sup>424</sup> Rather, "imminence of attack of such high degree as to preclude effective resort by the intended victim to nonviolent modalities of response has always been regarded as sufficient justification."<sup>425</sup> The implication is that article 51 should be interpreted to mean that a state may use military force when it "regards itself as intolerably threatened by the activities of another."<sup>426</sup> "To read [a]rticle 51 otherwise," maintains Waldock, "is to protect the aggressor's right to the first strike."<sup>427</sup>

It is further argued that such a construction is necessary in the nuclear age because to delay defensive action until an actual

420. Wright, *The Cuban Quarantine*, 51 AM. J. INT'L L. 546, 559 (1963).

421. Henkin, *Force, Intervention and Neutrality in Contemporary International Law*, PROC. AM. SOC. INT'L L. 147, 151 (1963) [hereinafter Henkin, *Force, Intervention and Neutrality*]. See also U.N. CHARTER art. 51.

422. Henkin, *Force, Intervention and Neutrality*, *supra* note 421, at 151.

423. The *Caroline*, J. MOORE, 2 DIGEST OF INTERNATIONAL LAW 412 (1906).

424. *Id.*

425. McDougal, *The Soviet-Cuban Quarantine and Self-defense*, 57 AM. J. INT'L L. 597, 598 (1963).

426. McDougal, *Intervention from the Floor*, PROC. AM. SOC. INT'L L. 164 (1963).

427. Waldock, *The Regulation and Use of Force by Individual States in International Law*, 81 RECUEIL DES COURS 455, 499 (1952) [hereinafter Waldock].

nuclear attack occurs would be suicidal. Interpreting article 51 literally to apply only after an armed attack has taken place would be against all reason and absurd as a practical matter. As Waldock points out, "to cut down the customary right of self-defense beyond even the *Caroline* doctrine does not make sense in times when speed and power of weapons of attack has enormously increased."<sup>428</sup> A similar conclusion was reached by Kaplan and Katzenbach who considered this limitation on an armed attack to be both "naive and futile in an atomic age, or for small states, in an age of jet planes and fast tanks."<sup>429</sup> In their opinion:

It would be unreasonable to expect any state to permit another the advantages of military build-up, surprise attack and total offense against which there may be no defense, particularly when given the possibility that a surprise nuclear blow might bring about total destruction, or at least total subjugation, unless the attack was forestalled.<sup>430</sup>

Moreover, Osgood and Tucker maintain that:

If speed and destructive power of modern weapons may defeat the purpose of self-defense in the absence of a right to take anticipatory measures against an imminent attack, it is these same characteristics of modern weapons that must also render a right to take anticipatory measures particularly dangerous and subject to abuse.<sup>431</sup>

Attempts to resolve the dilemma posed by modern weaponry have resulted in a compromise formula emphasizing the distinction between an "attack" and the "actual preparation for the mounting of the attack."<sup>432</sup> Taking into account that "in nuclear warfare time is the very essence," Singh introduced a conception of "armed attack" that would permit the target state to respond with force at some time before an attack is actually felt

428. Waldock, *supra* note 427, at 498.

429. M. KAPLAN & N. KATZENBACH, *THE POLITICAL FOUNDATIONS OF INTERNATIONAL LAW* 212 (1961) [hereinafter M. KAPLAN & N. KATZENBACH].

430. M. KAPLAN & N. KATZENBACH, *supra* note 429, at 212. See also D. BOWETT, *supra* note 157, at 191-92. Bowett asserted that: "[n]o state can be expected to await an initial attack which, in the present state of armaments, may well destroy the state's capacity for further resistance and so jeopardize its very existence." *Id.*

431. E. OSGOOD & W. TUCKER, *supra* note 342, at 297.

432. Singh, *The Right to Self-Defense in Relation to the Use of Nuclear Weapons*, 5 INDIAN Y.B. INT'L AFF. 3, 25 (1956) [hereinafter Singh, *The Right to Self-Defense*].

in its political or territorial domain.<sup>433</sup> As he elaborated:

[I]f the provisions of [a]rticle 51 are carefully examined, it would appear that what is necessary to invoke the right of self-defense is an armed attack and not the actual physical violation of the territories of the state . . . As long as it can be proved that the aggressor state with the definite intention of launching an armed attack on a victim member-state has pulled the trigger and thereby taken the last proximate act on its side which is necessary for the commission of the offense of an armed attack, the requirements of [a]rticle 51 may be said to have been fulfilled even though physical violation of the territories by the armed forces may as yet have not taken place.<sup>434</sup>

The criterion of the last irrevocable act proposed by Singh has, however, been criticized as imposing an unreal and arbitrary distinction. McDougal and Feliciano argue that with the advent of modern technology (such as submarines, aircraft, and guided missiles) there may in fact be no last irrevocable act short of dropping or exploding a nuclear weapon.<sup>435</sup> Thus, the test suggested by Singh would compel a state to defer its reaction until it would no longer be possible to repel an attack and avoid damage to itself. Similarly, where weapons are used

whose trajectory is traversed in matters of minutes and against which effective repulsion measures have yet to be devised, it should be even clearer that to require postponement of response until after the 'last irrevocable act' is in fact to reduce self-defense to the possible infliction, if enough defenders survive, of retaliatory damage upon the enemy.<sup>436</sup>

United Nations practice has also not proved of much assistance in suggesting solutions to the problem of anticipatory self-defense. While relevant claims have been advanced and debated before the organization, there is still considerable uncertainty as to the legality, scope, and limits of the exercise of such a right. According to Higgins, the attitude of the United Nations in such cases has been that of discouraging reliance on anticipatory self-defense. Higgins, however, hastens to add that:

[T]his does not . . . warrant the assumption that [a]rticle 51 has restricted the right as laid down in the *Caroline*; there has

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433. Singh, *The Right to Self-Defense*, *supra* note 432, at 25.

434. Singh, *The Right to Self-Defense*, *supra* note 432, at 25.

435. McDougal & Feliciano, *supra* note 110, at 1150.

436. McDougal & Feliciano, *supra* note 110, at 1150.

merely been a reluctance on the part of the [United Nations] to encourage it for fear it may be too fraught with danger for the basic policy of peace and stability.<sup>437</sup>

Indirectly, it may be possible to read a recognition of the possibility of factual situations, in which a preemptive strike against imminent attack may be justified, into General Assembly Resolution 3314, according to which the first use of armed force is to be regarded only as *prima facie* evidence of an act of aggression.<sup>438</sup>

Whether or not article 51 permits anticipatory self-defense, states have assumed that it does. Analysts of international conflicts tend to evaluate individual cases in the light of their particular circumstances, especially if a state reasonably believed that it was about to be attacked. Employing such a yardstick, most commentators agree, for instance, that the 1967 Six Day War provides a clear illustration of a "truly [preemptive action] in the strict sense."<sup>439</sup> On the other hand, it is generally believed that most other cases of allegedly preemptive use of force were the product of circumstances in which the imminence of a crippling attack by the other side was less apparent.<sup>440</sup>

In sum, although the validity of arguments favoring a restrictive interpretation of article 51 may be acknowledged, the cogency of arguments in support of a more liberal interpretation of this article cannot be overlooked. The concept of anticipatory self-defense, despite its vulnerability to abuse, whether intentional or accidental, is a viable one in the nuclear age subject, however, to stringent limitations and safeguards. By extension it is reasonable to argue that the requirement of last resort may also be satisfied in first-strike cases as long as a careful assessment is undertaken of all relevant factors. According to Shapira, these factors include

the chronology, extent and nature of the military mobilization, deployment, build-up and movements of the adversaries; the respective over-all military potential, including available re-

437. Higgins, *supra* note 304, at 302.

438. See *Definition of Aggression*, *supra* note 107.

439. See Franck, *Who Killed Art. 2(4) or: Changing Norms Governing the Use of Force by States*, 64 AM. J. INT'L L. 809, 821 (1970); Rohlik, *Some Remarks on Self-defense and Intervention: A Reaction to Reading Law and the Civil War in the Modern World*, 6 GA. J. INT'L & COMP. L. 395, 421 (1976) [hereinafter Rohlik].

440. Rohlik, *supra* note 439, at 421. Included in the latter category are the Cuban Missile Crisis, the Goa Incident, and the 1968 invasion of Czechoslovakia.

sources of man-power and equipment, of the adversaries; the political, diplomatic and public relations manoeuvres of the adversaries; the reaction of the international community, particularly the big powers; and the likelihood of the [United Nations], primarily the Security Council, promptly and effectively taking preventive or remedial measures.<sup>441</sup>

The point is that the presence of these factors would justify a decision to use force in self-defense. Doubtless, no precise formula or a reliable test is possible. Nevertheless, a set of guiding considerations, such as the ones discussed above or criteria proposed by other jurists,<sup>442</sup> may provide a sensible framework for analysis and decision-making.

### C. Formal Declaration of War

The condition that war should be preceded by a formal declaration appears to carry less significance in the contemporary era than the other criteria for the justification of war. On the one hand, the signatories of the 1907 Hague Convention Relative to the Opening of Hostilities<sup>443</sup> are still bound by the duty to

441. A. SHAPIRA, *The Six Day War and the Right of Self-defense*, in 2 *THE ARAB-ISRAELI CONFLICT: READINGS* 205, 215 (J. Moore ed. 1974).

442. Consider, for example, McDougal's and Feliciano's reference to the "realism of expectation created in the target-state by the intensity and proportions of the coercion threatened or exercised as to the necessity or imminence of necessity of resort to countercoercion for the maintenance of its freedom of decision-making and of its territorial base." McDougal & Feliciano, *supra* note 110, at 821.

Moreover, Rohlík's test provides that:

The danger of obliteration of the threatened state must be real, the threatening state must be in a position to obliterate the threatened state, the threatening state must have the means to obliterate the threatened state, and there must be sufficient evidence to support the belief of the intended victim that the threatening state made the decision to attack.

Rohlík, *supra* note 439, at 419.

443. The binding character of the Hague Convention III was invoked at the trials before the International Military Tribunals in both Nuremberg and Tokyo. Convention Relative To The Opening of Hostilities, *signed at The Hague, Oct. 18, 1907, T.S. 538* (codified at 36 U.S.C. § 2259 (1982)). The Judgment of the Nuremberg International Tribunal made specific findings that during the Second World War, the German invasion of Norway, Denmark, Greece, Yugoslavia, and the Soviet Union were started without previous warnings. Absence of a previous declaration of war is specifically cited by the judgment as aggravating the crime against peace in the case of Germany's attack on the Soviet Union on June 22, 1941. 1 *TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, 14 NOV. 1946 - 1 OCT. 1946*, at 214, 215 (1947). In his opening statement on June 4, 1946, before the Tokyo Tribunal, the United States Chief of Counsel argued that "undeclared wars and treacherous attacks were branded as international crimes." U.S. DEP'T OF STATE, *TRIALS OF THE JAPANESE WAR CRIMINALS, DOCUMENTS 27* (Far E. Series 1946).

deliver a prior declaration of war and state practice does not reveal the existence of the necessary contrary *opinio juris* of all parties for the rule to be abrogated by disuse. On the other hand, state practice also demonstrates that the duty to declare war has not become part of universal customary international law. Since World War II there has not been a single war that was preceded by declaration of war<sup>444</sup> although in some cases states that were attacked subsequently asserted that they were at war.<sup>445</sup> Nonetheless, the latter were declarations primarily for internal consumption and did not quite meet what are generally deemed as the requirements of international law for a valid declaration of war.<sup>446</sup>

The requirements for a valid declaration of war, however, have not been clearly formulated. No explicit reference is contained in the Third Hague Convention<sup>447</sup> or in any other international document, for instance, as to the time in which a declaration of war should be issued. This prompted one writer to state cynically that "so far as international law lays down a rule, the declaration may be issued even after the war is ended and the treaty of peace signed."<sup>448</sup> It is equally apparent that the failure to perform the obligation under the Third Hague Convention would not preclude the existence of a state of war and would not entitle one to claim damages for such a failure.<sup>449</sup>

That nations are increasingly reluctant to resort to formal declarations of war may be seen as the result of the complex nature of contemporary war. The effective waging of war now hinges on elements such as maximum surprise and overwhelming speed, and the sophisticated technology that underpins defense postures renders slow declaratory acts counterproductive.<sup>450</sup> From a political perspective the aversion to formal declarations of war may be attributed to the proscription of

444. See N.Y. Times, May 19, 1966, at 11, col. 2.

445. This was asserted, for example, in the Suez conflict, 1956; in the Indo-Pakistan conflicts, 1965 and 1971; and in the Iran-Iraq war, 1980.

446. For a detailed discussion of these requirements, see Eagleton, *supra* note 80, at 19.

447. See generally Hague Convention for the Pacific Settlement of International Disputes, signed at The Hague, Oct. 18, 1907, 36 Stat. 2199, 1 Bevans 577.

448. Eagleton, *supra* note 80, at 29.

449. Eagleton, *supra* note 80, at 29.

450. See *contra* U.S. DEPT. OF THE ARMY, FIELD MANUAL 27-10 (1956). "Surprise is still possible. Nothing in the foregoing rule requires that any particular length of time shall elapse between a declaration of war and the commencement of hostilities." *Id.* at art. 5.



force in article 2(4) of the Charter and to the danger inherent in formal declarations of war in the nuclear age,<sup>451</sup> particularly since such declarations may trigger the treaty obligations of nations aligned against the declaring state.

Recent discussions refer also to what has become known as the outmoded argument.<sup>452</sup> It is contended that whereas declarations of war were appropriate in earlier periods, because the wars fought then were total in nature, today, when it is common to fight limited wars for limited objectives, a declaration of war is outmoded for it would mislead other nations as to the objectives of the declaring state.<sup>453</sup> This argument may nonetheless be countered by pointing out that there is no reason why a declaration could not specify that the war declared was limited, stating what the limited objectives were, even setting limits to the amount of force that could be employed to achieve those objectives. Moreover, time limits could be placed on the period during which force could be used.

An additional argument is advanced in an attempt to emphasize the limited usefulness of declarations of war in the contemporary era. It is asserted that while a requirement that war be formally declared might have been viable in earlier centuries — when the line between peace and war seemed clear and a declaration of war was seen as marking the “disruption” of peace and the descent into war — it is not viable in the era of the Cold War where the distinctions between states of peace and war are more blurred.<sup>454</sup>

In any event a legally recognized state of war comes into existence when hostilities are actually initiated, even without a formal declaration of war. Although there may have been a time when the issuance of a declaration constituted a legal act with potentially profound consequences,<sup>455</sup> countries have long engaged in undeclared hostilities which, in terms of the effort in-

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451. See Note, *Congress, the President and the Powers to Commit Forces to Combat*, 81 HARV. L. REV. 1771, 1772-73 (1968) [hereinafter Note, *Powers to Commit Forces*].

452. See *infra* note 453.

453. See L. VELVEL, *The War in Vietnam: Unconstitutional, Justiciable and Jurisdictionally Attackable*, in II THE VIETNAM WAR AND INTERNATIONAL LAW 651, 662-63 (R. Falk ed. 1969) (statements of the Under Secretary of State Katzenbach during the National Commitment Hearings).

454. See D. WALLACE, JR., *The War Making Power: A Constitutional Flaw?*, in IV THE VIETNAM WAR AND INTERNATIONAL LAW: THE CONCLUDING PHASE 662, 685 (R. Falk ed. 1976).

455. See Eagleton, *supra* note 80, at 20, 32-35.

volved, the impact on citizens, and the effect on domestic and international relations, are often indistinguishable from a formally declared war.<sup>456</sup> Indeed, article 3 of the Definition of Aggression recognizes that a declaration of war is no longer a prerequisite for determining that aggression had taken place.<sup>457</sup>

Yet, even if one essentially concurs with the conclusion that "the only function [that] uniquely remains for the formal declaration of war is largely that of a solemn act of state which serves as a means of arousing popular support at home and abroad,"<sup>458</sup> it is nonetheless possible to qualify it on a number of grounds. Specifically, it is arguable that the interests of the international community as well as the legal and moral position of the "victim" (and, as the case may be, the victim's collective helpers) are still better served if the victim and its helpers issue a reasoned declaration of war on their own. Since it is often difficult to determine which side actually initiated war, the state that claims *not* to have started it should explain and justify the claim in its own reasoned declaration of war. Given the disapprobation of aggressive war and its acknowledgement as an international crime, it appears all the more important for the victim-defending state to demonstrate the defensive character to its side of the war. Indeed, according to Greenspan:

The necessity for a formal declaration of war has assumed particular significance in view of the modern concept of the crime of aggressive war, first formulated judicially in the judgment of the Nuremberg Tribunal . . . Today the very fact that war is launched without formal declaration may furnish one of the elements of proof that such a war is a war of aggression and as such a crime against peace. It is difficult to envisage circumstances where an innocent state waging a lawful war would be prevented from issuing a formal declaration of war in accordance with the Hague Convention III. War must be declared in order to rebut the presumption of unlawful war.<sup>459</sup>

From the point of view of internal politics a declaration of war may also fulfill a useful role. This is because decision-makers within one nation are often divided themselves and thus, the cause of peace could only benefit if those who claim self-defense

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456. See Note, *Powers to Commit Forces*, *supra* note 451, at 1772 nn.9 & 11.

457. *Definition of Aggression*, *supra* note 107, at art. 3.

458. *Definition of Aggression*, *supra* note 107, at art. 3.

459. M. GREENSPAN, *THE MODERN LAW OF LAND WARFARE* 37-38 (1959).

would first prove the claim to those who deny it.

Finally, support may be adduced for some form of announcement — if not a formal declaration — for reasons of “decent regard for mankind” and “public good faith,” which require that a government explain and justify its departure from peace.<sup>460</sup> Given the strong presumption against the use of force, one may agree with Childress that “[a] failure to announce the intention and reasons for waging war is a failure to exercise the responsibility of explaining and justifying exceptional action to those involved, including the citizens of one’s own country, the enemy, and third parties who have to decide how to respond.”<sup>461</sup>

It should be added that where a particular state’s constitution requires a formal declaration of war, a failure to comply with such a requirement would raise the issue of competence. In such a case the public official concerned may be said to have exceeded his authority in mobilizing the people and conducting the war — an issue that may affect the question of competent authority and is subsumed under the question *who* may wage war?

#### IV. CONCLUSION

The proliferation of criteria pertaining to the question of when war may be waged stands out as perhaps the most problematic feature of the contemporary analysis of this question. Specifically, no consensus has been reached as to what weight should be accorded to the various criteria, what are the interrelationships between them, and in what collective form they should be applied in practice.

Some writers maintain that satisfying each criterion is necessary for a just war and that all criteria are thus collectively sufficient.<sup>462</sup> The implication is that inability to satisfy any single criterion, such as proportionality, renders a war unjust. A second possible approach allows greater latitude in judgment in that it assumes that a just war must more or less satisfy or approximate the criteria. No particular criterion is absolutely necessary, but at least several must be satisfied for a war to be just

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460. See Childress, *Francis Lieber’s Interpretation of the Laws of War: General Order No. 100 in the Context of His Life and Thought*, 21 AM. J. JURIS. 34, 49 (1976) (reference to Lieber’s defense of the necessity of a declaration).

461. Childress, *supra* note 374, at 437.

462. See, e.g., Johnson, *Just War Theory: What’s the Use?*, 19 WORLDVIEW 41, 42, 46 (July-Aug. 1976).

and justified. This approach offers the advantage of flexibility, which makes it useful in policy-making contexts, but does not identify the degree of approximation that is sufficient to make a war just and justified. A third approach entails a serial or lexical ordering of the criteria, stipulating that the satisfaction of some must precede that of others. This third approach differs from the first and the second approaches in that it does not apply the criteria *en bloc* but seeks to establish the hierarchical relationships amongst them. A fourth approach reduces the criteria to mere guidelines, employed in an open-ended fashion in a judgmental process oriented toward ascertaining in general terms whether a given war produces the greatest good. This approach, however, lacks the prescriptive focus of its predecessors.

Additional approaches are theoretically possible<sup>463</sup> that serve to illustrate the difficulties inherent in combining the criteria into a viable decision rule. Most moral philosophers employ the criteria in a manner consistent with the fourth approach, relying on them to provide an overall framework within which to conduct ethical debates.<sup>464</sup> It appears, however, that traditional theorists envisaged a more rigidly integrated set of criteria and expected them to be consistently followed in decision-making contexts.

The greater proclivity on the part of modern theorists toward ad hoc use of the criteria notwithstanding, it is arguable that the rigorous demands exemplified by the first approach are more applicable to contemporary attitudes to war. The requirement that all conditions must be satisfied is consistent with the prevalent view that war in the nuclear era must be effectively restrained, if not totally eliminated. Furthermore, it is becoming increasingly apparent that there is no evident hierarchy amongst the criteria.<sup>465</sup> On the contrary they form a comprehensive whole, although, as demonstrated by O'Brien, different times and circumstances may thrust one or the other of the criteria into a more focal role.<sup>466</sup>

Perhaps the most viable conclusion under contemporary cir-

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463. See Childress, *supra* note 374, at 441.

464. See, e.g., J. HARE & C. JOYNT, *ETHICS AND INTERNATIONAL AFFAIRS* 68 (1982); O'Connor, *supra* note 126, at 173; R. POTTER, *supra* note 378, at 15-16.

465. At the same time, contemporary analysis suggests that if there is one element in the just war calculus that is most important, it may be that of just cause. See W. O'BRIEN, *supra* note 89, at 348.

466. W. O'BRIEN, *supra* note 89, at 348.

cumstances is that judgment must be exercised on a case-by-case basis with all the just war criteria being given careful consideration. This solution may fall short of meeting the stringent requirements built into the first approach but may be perceived as a pragmatic version of it.