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WHO MAY WAGE WAR? AN EXAMINATION
OF AN OLD/NEW QUESTION

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INTRODUCTION

The question "who may wage war?" featured prominently in early writings regarding the justifiability of recourse to force in pursuit of external political objectives. The scholarly interest in this question, however, declined markedly following the emergence of the modern state system. The concentration of national decision-making authority in the hands of the sovereign had rendered the issue far less relevant by substituting a monopolistic power structure for a fragmented one. The direction of change, though, has not shifted exclusively from the decentralized to the centralized end of the political spectrum. Post World War II national decision-makers enjoyed a narrower latitude with respect to the use of military might than that enjoyed by state officials in the preceding phases of the modern state era. The question of who may wage war has not necessarily regained its early significance, but it is perceived as more relevant than at any time since the advent of centralized state politics. This article explores the partial resurrection of this question.

A general presumption against the use of force has always existed, even in the nineteenth century when states indulged in war as a matter of sovereign right. At the same time, theorists and practitioners alike generally realized that violence was part of human life and could not be wholly suppressed or denied. The formulation of a doctrine resulted that dealt with the problem of force in international relations not through a total ban, but via a system of limitations and restraints, on both ends and means. Consequently, the legitimacy and justness of war depended on meeting specific conditions, namely if undertaken by the lawful authority, with the intention of promoting good and removing evil, for causes deemed just, and if the means employed were proportional to the ends of war.

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A series of sub-conditions qualified these broadly-stated conditions, articulating a more systematic and coherent scheme with changing degrees of emphasis laid on the various conditions at different periods of time. The present article, however, examines only conditions related to the question "who may wage war?". This question refers primarily to the authority responsible for the decision to wage war. Because wars are seldom confined to two parties directly confronting one another, but affect third parties in various ways, it is also necessary to consider here the issues of neutrality and collective self-defense. Both principles confer rights and impose obligations on potential actors in the context of international conflicts and thus either circumscribe or broaden the definition of the "legitimate authority."

II. ANALYTICAL HISTORICAL SUMMARY

A. LEGITIMATE AUTHORITY

To qualify as "just," war must be waged by the legitimate public authority or *auctoritas principas*. Historically, this principle pertained primarily to offensive wars since these professedly served as an instrument of justice and were, therefore, an exercise of "divinely" authorized judicial and executive power. In antiquity, given the assumption of an unlimited and omnipotent state, the supreme authority of the state possessed the exclusive power to wage wars.¹ Such a posture continued during the third and fourth centuries, at a time when Christianity was linked with the secular power of the Emperor. St. Augustine contended that the natural order most favorable to peace among men demanded that the decision and power to declare war was the preserve of the sovereign; if he decided that war was necessary, he had the right to initiate hostilities, and the soldiers and citizens under his command

1. Plato's writings demonstrate the view that the waging of war could not be a prerogative of any subordinate power in the state, nor of a section thereof or an individual, because no one has the right to imperil the good of the state (as is common in war) except the juridical guardian of the common good. Indeed, the penalty of death awaited "any person" and "any section of the state" making peace or war with any parties independently of the commonwealth. PLATO, *THE LAWS* 507, bk. XII (J. Saunders trans. 1970); see also Aristotle, *Politics* 179, bk. IV, ch. XIV, in *THE BASIC WORKS OF ARISTOTLE* (R. McKeon ed. 1941) (discussing the Kurion's (supreme body) responsibility for making war). Ancient Roman doctrine vested the ultimate political decision to wage war in the Senate (see Cicero, *DE LEGIBUS*, bk. III, ch. III, at para. 8 (J. Vahlen trans. 1883)) subject, however, to a certification by the College Fetiale as to the existence of a just cause of war. *Id.* bk. II, ch. IX, at para. 21. This was in conformity with the Roman belief that political power, considered abstractly, flowed from the gods and that human agents could properly exert political authority when that authority was divinely sanctioned.

were obligated to obey his orders whether or not they agreed with his judgment.² In the Middle Ages, the church imposed limits on the sphere of state influence. As a result, the power to wage a lawful war shifted into the hands of the papacy.³ Be it the Roman Church or the sovereign Prince, medieval legists, occupied as they were with the political-ecclesiastical organization, paid particular attention to the requirement that a just war be waged by the legitimate authority.⁴ This emphasis contrasted with that of earlier churchmen, who had concerned themselves with the underlying moral question of whether or not a specific war had a just cause.

The original significance of the *auctoritas principis* criterion was closely connected with the legal distinction between public and private wars and was designed to exclude the latter from the domain of the *bellum justum* doctrine; private feuds and revolutions were to be proscribed. Hence, if a prince did not lawfully have the right to order a war for a public purpose, he could have no right to levy a just war.

Such a requirement, however, grew steadily less important as the Church's hold on individual rulers weakened, and became more of a formality when, in the fifteenth century and onwards, it coincided with the emergence of the patrimonial state and the idea of absolute sovereignty. The notion of sovereignty as the crucial factor in the application

2. St. Augustine, *Contra Faustum Manichaeum* (trans. of 398 text by Stothert), in *WORKS OF AURELIUS AUGUSTINE* 450, ch. XXII, para. 75 (M. Dods ed. 1878); see also H. DEANE, *THE POLITICAL AND SOCIAL IDEAS OF ST. AUGUSTINE* 148-49 (1963).

3. See J. Lignano, *De Bello, De Represalis et De Duello*, in *CLASSICS OF INTERNATIONAL LAW* 231-32 (J. Brierly ed. 1917). Other views were, however, common (e.g., power-sharing between independent secular monarchies, with each ruler having the authority to defend his own patria and punish those who resisted his jurisdiction or invaded his rights and territories; power-sharing amongst all feudal lords). See F. RUSSELL, *THE JUST WAR IN THE MIDDLE AGES* 299 (1975). Some form of indirect power-sharing between the Prince and the Church was also advocated. See T. AQUINAS, 'ON WAR,' *SUMMA THEOLOGIAE*, II-II, Quaest 40, art. 2, obj. 3 and ad. 3 (Fathers of the English Dominican Province trans. 1919) (a balance between *regnum* and *sacerdotium*, acknowledging the indirect authority exercised by the Church through "inducement," "disposal," and "counselling" of secular princes to wage war); F. VICTORIA, 'ON THE LAW OF WAR,' *DE INDIS ET DE IURE BELLI* 158, 173, para. 21 (1917) (Church authorities to be consulted by the Prince in the ascertainment of justness of a cause); Victoria, 'On the Indians,' *id.* at 158, sec. III, para. 14 (control by the Church in cases which involved Christians or possible damage to the Church); B. AYALA, *DE IURE ET OFFICIIS BELLICIS ET DISCIPLINA MILITARI* III 19, 27, ch. II (1912) (Pope's modes of restraint over kings who abuse their position); Suarez, *Defenso Fidei Arersus Anglicanae Sectae Errorers*, cited in Nussbaum, *Just War—A Legal Concept?*, 42 *MICH. L. REV.* 453, 463 (1943) (discussing the Pope's authority to release subjects from duty of obedience to an "incorrigibly wicked," "schismatic" or "stubborn heretic" king).

4. See W. BALLIS, *THE LEGAL POSITION OF WAR: CHANGES IN ITS PRACTICE AND THEORY FROM PLATO TO VATTTEL* 49-58 (1977) (classifying wars as just or unjust according to authority and organization).

of the just war doctrine (or, specifically, the laws of war) had nonetheless survived the changes, and private warfare continued to be excluded. Indeed, classic writings of international law invariably emphasized that only full sovereign states possessed the required legal qualifications entitling them to belligerent status and the attendant rights and duties in war.⁵ In practice, however, the fact that a given entity was not a fully sovereign state did not prevent it necessarily from becoming a belligerent, if it possessed military forces and resources and evinced a desire to go to war.⁶ The rules of international law applied in such circumstances, even in the absence of the required legal qualifications.⁷ By a similar reasoning (distinguishing between legal qualifications and the actual power to wage war), insurgents could become a belligerent power through recognition. Once an insurgent group was recognized as a belligerent entity by other states, in response to the existence of certain factual elements,⁸ the insurgents enjoyed a temporary, limited status of belligerency.⁹

At the same time, the condition of legitimate authority also assumed a constitutional dimension in that the domestic legal framework determined the identity of the sovereign within the state. Thus, according to Wolff:

[i]n a monarchy and in an aristocracy the right of war depends altogether on the decision of the rulers of the state, but in mixed states the same can depend either on the decision of the ruler of the state, or on the will of the people or of the nobles, or for beginning or ending a war the ruler of the state is bound at least to seek the consent either of the people or of the nobles. But in a democracy or a popular state since the sovereignty rests with the entire people, the right of war also rests with the people.¹⁰

5. See 1 J. MOORE, DIGEST OF INTERNATIONAL LAW § 59-71 (1906) (discussing recognition of belligerency throughout the nineteenth century).

6. See 2 L. OPPENHEIM, INTERNATIONAL LAW 248 (1952) (stating that although semi-sovereign states are not legally qualified to become belligerent, possession of armed forces makes it possible to enter a war and become belligerent). An example of such belligerency occurred in 1876 when Serbia and Montenegro, vassal states under Turkish suzerainty, declared war on Turkey. *Id.* at 248-49; see also T. BATY, INTERNATIONAL LAW IN SOUTH AFRICA 67-68 (1900) (recognizing the possibility of war between suzerain and vassal).

7. 2 L. OPPENHEIM, INTERNATIONAL LAW 249 (1952).

8. *Id.* at 249-50. Certain conditions create a right and a duty of other states to recognize belligerency, including: (1) the existence of a state of general hostilities; (2) an orderly occupation by the insurgents of a substantial part of the national territory; (3) the insurgents' observance of the rules of war; and (4) a practical necessity for other states to clarify their attitude toward that particular insurgency. *Id.* at 249.

9. See W. HALL, A TREATISE ON INTERNATIONAL LAW 30-32 (1917) (urging that belligerent communities, having no established independence and therefore no rights, cannot legally demand recognition).

10. 2 Wolff, *The Law of Nations Treated According to a Scientific Method*, in

Furthermore, attributing responsibility for the initiation of war necessitated the identification of the sovereign.¹¹ The complexity of modern state organization, however, rendered it rather difficult to identify particular individuals as the authors of war.¹² Indeed, post-World War I instruments outlawing war such as the Covenant of the League of Nations¹³ and the 1928 Kellogg-Briand Peace Pact¹⁴ did not include criminal sanctions applicable to persons who might be deemed responsible for acts of waging war.¹⁵

Yet, the criterion of legitimate authority presupposes the rest of the just war criteria since it determines who is primarily responsible for judging whether the other criteria are met. Thus, a decision by the legitimate authority that war is justified creates in turn a presupposition for the subjects and soldiers that the authority, being legitimate, has followed the proper procedures and has decided correctly, hence obligating them to fight.

B. OTHER PARTICIPANTS

1. *Neutral States*

Generally, approaches to the question of third parties' decisions to remain neutral, to intervene, or to support a particular party, have corresponded to the varying positions on war throughout history. For instance, while neutrality had manifested itself to some extent in the politics of ancient Greece, it was by necessity antagonistic to Rome's imperialist policy. Traditional just war concepts naturally forced a dis-

CLASSICS OF INTERNATIONAL LAW 314 (J. Scott ed. 1934); see E. VATTEL, *THE LAW OF NATIONS* 292 (1863) (noting that only sovereign power has authority to make war); H. WHEATON, *ELEMENTS OF INTERNATIONAL LAW* 313 (1936) (stating the right to make war belongs to supreme power of state).

11. See E. VATTEL, *supra* note 10, at 302 (asserting that the sovereign who wages unjust war is responsible for its consequences).

12. See *Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties*, 14 AM. J. INT'L L. 95 (1920) (discussing the liability of those responsible for initiating war in an historical context).

13. COVENANT OF THE LEAGUE OF NATIONS (1919).

14. General Treaty for the Renunciation of War as an Instrument of Foreign Policy (Kellogg-Briand Peace Pact), Aug. 27, 1928, 46 Stat. 2343, T.S. No. 796, 94 L.N.T.S. 57.

15. See Williams, *Sanctions Under the Covenant*, 17 BRIT. Y.B. INT'L L. 130, 131-33 (1936). The League of Nations Covenant imposes no criminal punishment on a member of the League who engages in war in disregard of its covenants. *Id.* at 132. The purpose of article 16 of the Covenant, deemed the "sanctions" article, is to act as a deterrent for member states contemplating war. *Id.* Article 16 imposes various economic measures, such as the severance and prohibition of all commercial or financial intercourse, against a member state that resorts to war in disregard of the provisions of the Covenant. *Id.* at 131 n.1.

criminy stand on third parties, whereas a condition of abstention from hostilities (whether these were deemed justly or unjustly undertaken) became recognized, with the passing of the Middle Ages, as a possible posture for other states to adopt. The latter response is commonly explained in the light of the newly-assumed independence of states and their acquired right of non-interference from their neighbors.¹⁶ By the seventeenth century, states regularly practiced neutrality and it gradually became clear that if war raged between two states, neutral states had peculiar rights against, and owed peculiar duties to, the states at war with one another.¹⁷ Despite this, no well-defined duty of third states to go to war became established in that period. Grotius implied, however, that third states had a duty to help a state that was waging a just war by pointing out that:

[i]t is the duty of those who keep out of war to do nothing whereby he who supports a wicked cause may be rendered more powerful, or whereby the movements of him who wages a just war may be hampered In a doubtful matter, however, those at peace should show themselves impartial to either side in permitting transit, in furnishing supplies to troops, and in not assisting those under siege.¹⁸

Eighteenth century writers, such as Wolff and Vattel, while recognizing the ultimate discretion of third parties as to whether to intervene or not (a decision determined primarily by prudence and expedience), appear at the same time to acknowledge an obligation on the part of third parties to aid a state waging a just war and refrain from helping its opponent.¹⁹ The law of neutrality in the nineteenth century, however, founded on the absolute right of states to resort to war, reflected the basic premise of flexibility of alignment; it permitted and encouraged non-participation as a function of balancing of power.

A change in attitude arose in the early twentieth century in view of the prevalent policy of punishing law-breakers proportionally, according to their guilt. Consequently, the neutral's valuation of the merits of

16. See G. BUTLER & S. MACCOBY, *THE DEVELOPMENT OF INTERNATIONAL LAW* 231 (1928) (stating that until the nineteenth century no theory supported states demanding to remain neutral).

17. W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 43 (1924).

18. 2 Grotius, *On the Law of War and Peace*, in *CLASSICS OF INTERNATIONAL LAW* 786 (J. Scott ed. 1925).

19. Compare E. VATTEL, *supra* note 10, at 324 (articulating a duty to aid in a just war if it causes no harm to the assisting state) and Wolff, *supra* note 10, at 337 (suggesting that states who can contribute their aid are bound to assist) with Wolff, *supra* note 10, at 347 (stating that if contrary to its best interest, a state is not bound by nature to give assistance) and 2 Bynkershoek, *Questions of Public Law*, in *CLASSICS OF INTERNATIONAL LAW* 61 (T. Frank trans. 1930) (suggesting that both custom and reason prescribe state assistance to belligerents).

the conflict or the justice of the cause influenced the relationship of non-participants to a belligerent.

The League of Nations was founded on this principle. Affected particularly by World War I's destructive influence on neutrality, the theory which subsequently emerged assumed that the interests of humanity and civilization demanded that no state declare itself neutral and disinterested. War was considered a crime and the state who started it was the criminal. No member of the world society was justified in denying concern when a crime was committed next door. Such things could only happen in lawless society; in the civilized world of the twentieth century neutrality and disinterest would no longer be tolerated. Consequently, every state had the obligation of exercising police power over nations that were found guilty of aggression, or nations that tried to improve their position by attacking their neighbors.²⁰

The Kellogg-Briand Pact embodies a similar concept, based on the right of collective defense and the notion of war as a sanction, by treating a state's violation of its obligations as a violation of the rights of all other contracting parties. This permits the latter to take any measures they considered appropriate, to the exclusion of the duties of neutrality. Neither the Covenant of the League of Nations nor the Kellogg-Briand Pact abolished neutrality²¹ or in any way brought about the expected evolution in international relations. In fact, given the absence of an obligation to the contrary and the lack of objective authority to determine the illegality of war, states could still invoke the strict impartiality concept of neutrality at their expedience.

2. *States Acting Collectively in Self-Defense*

Notwithstanding the existence of a duty of participation or the privilege of abstention, third parties could become involved in a war waged by other states through alliances, or by an extended form of defense that embraced a war fought against unjust attackers. Indeed, in ancient

20. N. ORVIK, *THE DECLINE OF NEUTRALITY 1914-1941* 120 (2d ed. 1971).

21. There existed, nonetheless, a considerable divergence of opinion among authors of that period as to the influence of both the Covenant and the Kellogg-Briand Pact on neutrality. See, e.g., Warren, *Troubles of a Neutral*, 12 FOREIGN AFF. 377, 377 (1934) (stating the impossibility of remaining neutral when either document is violated); Spitzer, *Small Nations and the Economic and Social Council*, 109 WORLD AFF. 133, 133 (noting the Covenant regarded war as a legitimate instrument of national policy while the Pact renounced the right to make war but failed to define or provide means to prevent violations); see also Moore, *An Appeal to Reason*, 11 FOREIGN AFF. 547, 550 (1933) (discussing the purported sanctions in the Covenant against a state that commits an "act of war").

Greece, the custom of establishing confederations and alliances²² limited strict observance of neutrality, imposing upon the members an obligation to help a fellow member waging war against an outside power.

Later years bore evidence to the proposition that self-defense, invariably regarded as a just cause, also encompassed the "assistance to neighbors in their defense;"²³ the "defense of friends and allies;"²⁴ "assistance to nations against unjust oppressors;"²⁵ and action to maintain the "balance of power."²⁶ Literature of the early twentieth century in particular reflected the common perception that self-defense, when legitimate, was not necessarily restricted to one's own defense but could extend to the defense of states unjustly attacked.²⁷ Additionally, state practice during the life of the League of Nations, and in subsequent years, provides numerous illustrations of mutual assistance pacts concluded among nations to defend members against the unlawful use of force.

Nonetheless, while collective action as a means of enforcing legal or political standards of international conduct was traditionally recognized, the concept of "collective self-defense," as tied to the strict requirements of the lawful exercise of the right of self-defense, did not exist in classical international law.

III. CONTEMPORARY APPLICATION OF THE CRITERION

A. LEGITIMATE AUTHORITY

Insofar as large-scale, conventional war is concerned, the issue of competent authority bears less relevance in modern times than it did in the thirteenth century. Given the decentralization of the medieval political system—in which overlapping public, private, and criminal violence resulted in a variety of private wars—it was expected that only wars declared by order of public authorities, for public purposes, should be regarded as "just." In today's world, with the concentration of the material capacity to wage large-scale, modern, conventional war in the

22. W. BALLIS, *supra* note 4, at 15 (giving examples of alliances and confederations, including the Athenian leagues, the Peloponnesian confederacy under the leadership of Sparta, the Achaean league, and the Aetolian league).

23. T. AQUINAS, *supra* note 3, at qu. 188, art. 3, para. 110.

24. B. AYALA, *supra* note 3, at 10.

25. A. GENTILI, *ON THE LAW OF WAR*, bk. I, 68-69 (1933). "We are bound by a natural law . . . to aid one another . . . [T]he defence of one's own people and of strangers is equally necessary." *Id.*

26. von Elbe, *The Evolution of the Concept of the Just War in International Law*, 33 AM. J. INT'L L. 665, 667 (1939); E. VATTEL, *supra* note 10, at 312 (discussing the propriety of waging war to maintain the "equilibrium of power").

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

hands of national policy-makers, private wars have ceased to pose a serious problem.

In a sense, however, the "legitimate authority" condition, which historically limited the military activities of lesser feudal lords and justified violence only when it could be claimed to be politically necessary, presently has an analogous function, even in respect to the major powers. In choosing war or peace, the government of any state arguably acts as a surrogate for a higher international authority and, as such, the international (public) quality of its purposes ought to constrain its decisions. At the same time, what constitutes an internationally acceptable purpose, as pursued by internationally recognized competent authorities, is not clearly defined under modern international law. Organizations and individuals who do not have the authority and capacity to wage war in the conventional sense frequently claim rights of insurgency, yet wage revolutionary war, often on an international scale. A discussion of the contemporary application of the "legitimate authority" prerequisite must address the question of whether one can draw a distinction amongst parties waging war. As suggested by Potter, distinctions exist between the "violence of bandits and looters, who serve only their own interest," and would-be patriots organized in guerrilla bands in the service of a provisional government or a government in exile, intent on establishing or re-establishing a political constitution and a new commonwealth.²⁸

Indeed, the traditional statement of the principle that war must be conducted by a legitimate authority left the question of the relationship between power and authority largely unexplained: the ruler was the legitimate authority simply because he was a ruler.²⁹ It is possible to assert, however, as O'Connor does, that in democratic theory, for instance, authority is never simply a given quality; it must be supported by various forms of power, depending on such diverse elements as political force, charisma, and consensus.³⁰ Arguably the ultimate locus of authority in a democracy resides with the people, hence, wars not supported by a fair spectrum of the population are not conducted under proper authority.³¹ Attention must thus focus on another contemporary

28. Potter, *The Moral Logic of War*, in *PEACE AND WAR* 7, 13 (C. Beitz & T. Herman eds. 1973).

29. See generally J. Stamey, *Christian Ethics and Violent Conflict: The "Just War" as an Ethical Model* 393 (1968) (unpublished Ph.D. dissertation available at Boston University library).

30. O'Connor, *A Reappraisal of the Just War Tradition*, 84 *ETHICS* 167, 170 (1974).

31. *Id.* at 171.

problem raised with respect to the "legitimate authority" criterion: namely, whether a particular official or organ of state has the constitutional competence to initiate war, or whether a war unconstitutionally waged might be considered "unjust" in that it possibly violated the condition of legitimate authority. The ultimate question of legitimate authority cannot be resolved by resorting to external criteria alone (for instance, Israel and South Africa do not enjoy universal recognition, yet could possibly wage just wars). It is necessary, therefore, to find some internal, and generally acceptable, criteria of what constitutes a "legitimate authority." Obviously, the question cannot be decided, for example, solely on the basis of whether a government is democratically elected, for most countries are not governed by democratic institutions in the Western sense of the term. "Power" may be such a criterion, but in today's unstable world, power is often an elusive factor, and changes among power holders occur frequently, particularly in the Third World. Ascertaining who exercises political power also poses difficulties. Equating power with authority is dangerous, for those in positions of authority may not be the real power-holders (for instance, China's paramount leader, Deng Xiaoping dominates Chinese politics but does not hold any formal position of power).

Another component of the "legitimate authority" requirement, as important a safeguard today as it was under the classical tradition, concerns the responsibility of waging a war. The concept that only a lawful authority can wage war reinforces the perception that war affecting the entire political community creates a right on behalf of members of the community to be protected by clear procedures focusing on responsibility for the initiation of war. Failure to observe due process amounts to a disenfranchisement of the citizens, rendering war not an act of the political community but an "enterprise of a usurping minority upon whom guilt must rest."³²

This point of view is perhaps inspired by idealistic considerations, which are not necessarily universally shared and which may pose practical difficulties. Concern with "due process" may conflict with the need to adhere to norms of efficiency, and democratic outcomes are not always "just" outcomes. Provided that one accepts the limitations of due process criteria and is willing to seek compromise between procedurally correct and efficient government, due process norms may be seen as one of the many values germane to the issue of legitimate authority. The difficulty, of course, is that "due process" is not easy to define, and the international community is not likely to come to an agreement in this

32. Potter, *supra* note 28, at 13.

respect. Yet, this should not militate against advocacy of procedural yardsticks as a general goal in determining who may wage war.

1. *Revolutionary Organizations*

As indicated earlier, certain developments in the contemporary era have brought to the fore the issue of identifying the current, internationally relevant decision-makers. Given the proliferation of authority-dispensing political entities, such as guerrilla groups, liberation fronts, provisional governments, and terrorist brigades that operate freely across state boundaries, the question arises whether modern international law recognizes bodies other than sovereign, territorially-bound states as legitimate authorities who may wage a just war.

It is generally evident that the "state" as such is no longer an organizationally unifying norm. As pointed out by Bozeman, "the integrity of the classical concept of the state is critically impaired today because it is being associated indiscriminately with political establishments that are too different to be comparable and equal in terms of both international law and power politics."³³ In addition, the attributes once firmly ascribed to the state now seem to have been transferred on the one hand to "government" and on the other to the "world society," neither of which is definable in uniform, trans-culturally valid ways.³⁴

Concurrently with the erosion of the concept of the "state," demands to accord to non-state entities *locus standi* in world affairs have arisen. In particular, the recognition of revolutionary or liberation movements as the "properly constituted authority" necessary for the justification of their wars has legitimized "private international violence."³⁵

The right of self-determination provides the basis for such legal sta-

33. Bozeman, *On the Relevance of Hugo Grotius and De Jure Belli Ac Pacis for Our Times*, 1 GROTIANA 65, 73-74 (1980). In a stimulating analysis, Bozeman points out the varied application of the concept amongst the world's powers. Thus, an unqualified and deliberate inversion of all major values, norms, and institutions together constitutes the Western design of the world society. The Soviet Union represents a "new model of managing human affairs"; similarly, the Chinese model of a world society is a unique intellectual and political challenge to that brought forth in the Occident. The occidental idea of the state received essentially reductive versions in the Middle East, whereas the modern African state may be indispensable only in the context of the United Nations and not in Africa proper. *Id.* at 73-74.

34. *Id.* at 83.

35. The "international" character may stem from the intensity of the warfare which threatens to spill over into territories of other states; rebels may be seeking to overthrow a regime that consistently engages in gross violations of fundamental human rights norms; or states outside the area of immediate armed conflict threaten to intervene. Often, of course, the international dimension is effected by the actual intervention of outside states.

tus claims. Significant in this respect are the Declaration on the Granting of Independence to Colonial Countries and Peoples;³⁶ Article I of the International Covenant on Civil and Political Rights;³⁷ and the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations.³⁸ More recent United Nations resolutions bearing on wars of liberation seem to have extended the principles embodied in the Friendly Relations resolution, although without the support of the principal Western powers. Most notably, the Declaration on the Grant of Independence to Colonial Countries and Peoples,³⁹ recognizes the legitimacy of the struggle of colonial peoples and peoples under alien domination to exercise their right to self-determination and independence by all possible means.⁴⁰

These resolutions merely codified a right already recognized in international law, the right of internal revolution.⁴¹ More controversial, however, are the provisions dealing with the existence and scope of the duty of states not to suppress revolutions for self-determination, freedom, and independence as well as those dealing with the nature of other states' participation.⁴² Indeed, disputes still prevail as to what constitutes "self-determination," "freedom" and "independence." Such controversy in this regard arose in the context of the drafting of a definition of aggression, now embodied in United Nations General Assembly Resolution 3314.⁴³ Unresolved problems remain, however, such as the legal criteria for identifying the "people," (*i.e.* the "self" that is entitled to "determine" itself) and balancing competing self-determinations when these struggles are accompanied by armed hostilities over long historical periods. These conflicts and cross-purposes surround the permitted limits of such conflicts.⁴⁴

36. G.A. Res. 1514, 5 U.N. GAOR Supp. (No. 16) at 66, 66-67, U.N. Doc. A/4684 (1960).

37. G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966).

38. G.A. Res. 2625, 25 U.N. GAOR Supp. (No. 28) at 121, 121-24, U.N. Doc. A/8082 (1970).

39. G.A. Res. 2908, 27 U.N. GAOR Supp. (No. 30) at 2-3, U.N. Doc. A/L.677 Add.1 (1972).

40. *Id.* at 3.

41. Sudima, *The Right of Revolution: Implication for International Law and Order*, in *INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE* 167-69 (M. McDougal & W. Reisman eds. 1981).

42. Stone, *Hopes and Loopholes in the 1974 Definition of Aggression*, 71 *AM. J. INT'L L.* 224, 235-37 (1977).

43. G.A. Res. 3314, 29 U.N. GAOR Supp. (No. 31) at 142, U.N. Doc. A/9631 (1974).

44. *Id.* at 232 (discussing the 1973-74 Cyprus affair as an illustration of the imme-

Nor did the "Consensus Definition" of aggression eliminate the ambiguities and indeterminacies surrounding the question of whether aggression is only a "state-to-state" relation which has remained a "bitter focus of conflicting interpretations . . . as between the main blocs of states." Specifically, Western states continue to oppose a special dispensation to non-state entities to use armed force. Third World states persist in drawing a distinction between aggressors and their victims, the former referring merely to "states" whereas the latter include non-state entities (peoples). The Soviet Union and the Soviet Bloc appear content to accept that international aggression is the use of armed force by a *state* against the sovereignty, territorial integrity, or political independence of another *state*, yet support the use of force in wars of national liberation. There is also the extreme view equating "people" with "state."⁴⁵

Regardless of whether it is an internationally recognized right, legally enforceable under contemporary international law⁴⁶ or a mere "operative principle of the United Nations . . . operating within certain limits and subjected to the prevailing international climate,"⁴⁷ self-determination as a norm of international law endows the "peoples" with a certain international personality.

Non-state entities have traditionally been accepted in particular circumstances and for specific purposes as subject to a legal framework similar to that of states. Situations may occur, for instance, where interests of the governments concerned (*e.g.*, political and commercial interests, protection of nationals, mitigation, or the conduct of hostilities) favor the granting of belligerent rights to rebels. States (either the lawful government or third states) may recognize a state of "insurgency," thus indicating that the insurgents are no longer to be identified with pirates and law-breakers. In effect, such recognition means "acknowledgement of the existence of an armed revolt of grave character and the lawful government's incapacity, at least temporarily, to maintain public order and exercise authority over all the parts of the national territory."⁴⁸

Whether a foreign state may concede to an insurgent body the exer-

ciate invocation of aggression).

45. See, *e.g.*, Spain, U.N. Doc. A/AC.6/SR.1472, at 15.

46. Abi-Saab, *Wars of National Liberation and the Development of Humanitarian Law*, in DECLARATIONS OF PRINCIPLES: A QUEST FOR UNIVERSAL PEACE 93-117 (1977).

47. Sinha, *Has Self-Determination Become a Principle of International Law Today?*, 14 IND. J. INT'L L. 332, 360 (1974).

48. Castren, *Recognition of Insurgency*, 5 IND. J. INT'L L. 443, 445-46 (1968) (presenting general remarks on the recognition of insurgency).

cise of certain belligerent rights against itself cannot, however, be answered in unequivocal terms.⁴⁹ Some support exists for the view that regards the exercise of war rights by insurgents within the territorial limits of their own country as an unquestionable right. Thus, in 1858 Attorney General Black of the United States declared that "the parties to a civil war have the right to conduct it with all the incidents of lawful war within the territory to which they both belong."⁵⁰ Recognition of insurgency, if forthcoming, can imply the existence of a limited international personality. Furthermore, under traditional international law, and when particular conditions are met,⁵¹ third states recognize a civil struggle as a belligerency, thus entitling the factions involved in that conflict respective customary rights and privileges.

Indeed, the move to enlarge the category of potential beneficiaries of humanitarian legal regulations is also reflected in conventional international law, commencing with the Hague Regulations appended to the Hague Convention No. IV of 1907.⁵² Article 4(A) of the Geneva Prisoners of War Convention of 1949,⁵³ which extends Article 2 of the Regulations, accords a belligerent status to a *levée en mass*, legally defined as:

[t]he inhabitants of a territory not under occupation who, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having had the time to organise themselves in accordance with Article 1 [(i.e., into regular armed units) provided that] they carry arms openly and if they respect the laws and customs of war.⁵⁴

Thus, under the international law of war, the rights of waging war and engaging in armed combat generally devolve on the armed forces of *states* with the exception of individuals who, by analogy and conces-

49. See T. CHEN, *THE INTERNATIONAL LAW OF RECOGNITION* 405-06 (1951) (discussing whether a rebelling civil body can exert authority in order to engage in a blockade).

50. See 2 J. MOORE, *DIGEST OF INTERNATIONAL LAW* § 329, at 1078 (1906) (distinguishing the right of rebels to claim rights as a separate power on the high seas from the unquestioned right to exercise authority within the landed areas they control).

51. H. LAUTERPACHT, *RECOGNITION IN INTERNATIONAL LAW* 176 (1947). A civil struggle is recognizable as a belligerency by third-party states when: (1) an armed conflict of a general character exists; (2) the insurgents occupy and administer a substantial portion of the national territory; (3) they are internally organized and conduct hostilities in accordance with the rules of war; and (4) circumstances prevail that make it necessary for outside states to define their attitude by means of recognition of belligerency. *Id.*

52. The Hague Convention (No. IV), Oct. 18, 1907, Annex of Regulations, 36 Stat. 2277, T.S. No. 539, 1 Bevans 631.

53. Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949, art. 4(A), 6 U.S.T. 3316, T.I.A.S. No 3364, 75 U.N.T.S. 135.

54. *Id.* at art. 4(A)(6).

sion, have been *assimilated* to such armed forces.

In recent years, however, attempts have intensified to bestow lawful combatant status on fighters operating for specific political motives such as "wars of national liberation," "anti-colonial" or "anti-racist," and "peoples' wars." In 1968, for instance, a United Nations Conference on Human Rights held in Teheran passed a resolution according belligerent rights to persons struggling against "racist or colonial regimes."⁵⁵ Similarly, General Assembly Resolution 3103 on the Basic Principles of the Legal Status of the Combatants Struggling Against Colonial and Alien Domination and Racist Regimes⁵⁶ proclaimed that:

[t]he armed conflicts involving the struggle of peoples against colonial and alien domination and racist regimes are to be regarded as international armed conflicts in the sense of the 1949 Geneva Conventions and the legal status envisaged to apply to the combatants in the 1949 Geneva Conventions and other international instruments are to apply to the persons engaged in armed struggle against colonial and alien domination and racist regimes.⁵⁷

Article 1(4) of the Additional Protocol I to the Geneva Conventions of August 12, 1949⁵⁸ incorporated a similar provision. National liberation movements were conferred *a priori* a belligerent status absent recognition of, and without reference to, the actual dimensions of the rebellion.

Yet, a large body of opinion considers that:

"[w]hatever the basic argument may be (*i.e.*, the right of self-determination, self-defense) the factual elements are those which characterize internal conflict. If a conflict exists, it is precisely because the lawful government intends to exercise sovereignty over the territories in question, a sovereignty which an international organization cannot deny to this government. So long as the insurgents have not succeeded in creating a stable territorial basis, there is no *de facto* entity to which international law could attribute all the rights and duties derived from the laws of war."⁵⁹

The relevant considerations according to this view are thus "geo-mili-

55. U.N. Doc. A/Conf. 32/41], reprinted in 90 INT'L REV. OF THE RED CROSS 472-74 (1968).

56. G.A. Res. 3103, 28 U.N. GAOR Supp. (No. 30) at 142, 142-44. U.N. Doc. A/9030 (1973).

57. *Id.*

58. U.N. Doc. A/Conf. 32/41, reprinted in 90 INT'L REV. OF THE RED CROSS 472-74 (1968).

59. Binderscheller-Robert, *A Reconsideration of the Law of Armed Conflict*, in THE LAW OF ARMED CONFLICTS 52 (Carnegie Endowment for Int'l Peace 1971); cf. INTERNATIONAL COMMITTEE OF THE RED CROSS, REPORT ON THE WORK OF THE CONFERENCE 52-56 (1971) (analyzing criteria proposed at the Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts in Geneva from May 24 to June 12, 1971, for characterizing internal struggles to determine whether international rules of war and conduct apply to the immediate parties and third-party nations).

tary." The recognition of rebels as a belligerent party is not contingent on the justice of their cause, but on the magnitude of the rebellion (in terms of the area subject to the rebels' control, the degree of their organization, and the extent of the hostilities). As emphasized by Dinstein, "if the rebels have failed to gain effective control over a significant portion of their territory, if they are not led by a responsible quasi-governmental authority, and if hostilities are limited to episodic hit-and-run incidents, there is simply no point in pretending that the laws of interstate warfare can be implemented by them."⁶⁰

In contrast with arguments based on the degree of effective territorial control are the views of the proponents of divergent criteria, or at least a more flexible interpretation of the "effectiveness" test. "Effectiveness" should not be restrictively defined in terms of formal territorial control, but should include consideration of various factors such as the control and allegiance of the population, the shifts in territorial control, and the elements excluded from governmental control.⁶¹ Further, the legal status of a party as a belligerent entity at the international level may result from practice and consensus within the framework of international organization. Wars of national liberation, for instance, have achieved such status on the basis of the self-determination principle.⁶² The extent to which international opinion is fragmented on the definition of "international armed conflicts" (as set forth in article 2 common to the four Geneva Conventions of 1949) is illustrated in the debates in the 1974-77 Diplomatic Conference on the Reaffirmation and Development of the International Humanitarian Law.⁶³ Delegations from Western countries presented extensive arguments against characterizing wars of national liberation as interstate conflicts.⁶⁴ Objections included doubt as to a national liberation movement as an "enduring phenomenon;"⁶⁵ reservations as to the dilution of the fundamental distinction between "international armed conflicts" and "conflicts not of an international character"—a distinction which un-

60. Dinstein, *The New Geneva Protocols: A Step Forward or Backward?*, 33 Y.B. WORLD AFF. 265, 267-68 (1979).

61. See Abi-Saab, *supra* note 46, at 97.

62. *Id.* at 143.

63. 8 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS, Geneva, CDDH/I/SR.1-6 (1974-77) [hereinafter 8 OFFICIAL RECORD OF THE DIPLOMATIC CONFERENCE].

64. See 8 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE, *supra* note 63, CDDH/I/SR.2, at 11-40 (providing statements from various delegations opposing the characterization of wars of national liberation as international armed conflicts).

65. See *id.* at 11 (statement of J. de Breucker, Belgium) (stating wars of liberation were anachronisms which would soon end).

derlies the entire system of the Geneva Conventions;⁶⁶ and the danger of endless political debates regarding the characterization of any individual war as an "international armed conflict."⁶⁷

Most vociferous were the objections grounded in what Abi-Saab calls "propriety and opportunity from the standpoint of legislative policy."⁶⁸ The key assertion in this respect was that the fundamental conception of the Geneva Conventions, the Hague Regulations, and other relevant instruments was incompatible with a machinery of legal and humanitarian protection that varied according to the motives of those engaged in a particular armed struggle⁶⁹ or other political and expedient considerations.⁷⁰ Generally, it was felt that the classification of armed conflicts on the basis of non-objective, non-legal criteria was contrary to the spirit and very essence of humanitarian law.⁷¹ Similar arguments focused on the discrimination introduced by conferring an international character on one particular type of conflict (*i.e.*, wars of national liberation), thus undermining the humanitarian requirement of equal protection to all concerned.⁷²

Finally, a series of objections to the assimilation of wars of national liberation to international wars stemmed from feasibility or practicability considerations. It was thought that the law of international armed conflicts was ill-suited to armed conflicts involving non-state parties and that its application to the latter would result in the circumvention of

66. See *id.* at 13-14 (statement of G.I.A.D. Draper, United Kingdom) (arguing the importance of the distinction).

67. See, *e.g.*, *id.* (statement of G.I.A.D. Draper, United Kingdom) (noting that terms used in the proposed amendment were too vague to be used as a basis for law-making); *id.*, CDDH/I/SR.4, at 27 (statement of C. Lysaght, Ireland) (arguing that terms used in the amendment were too vague to be useful in a legal instrument); *id.*, CDDH/I/SR.14, at 106 (statement of M. Balken, West Germany) (stating that the character of wars of national liberation was often a controversial political issue).

68. See Abi-Saab, *supra* note 46, at 43 (discussing criticisms of the amendments based on propriety and opportunity from the standpoint of legislative policy).

69. See, *e.g.*, 8 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE, *supra* note 63, CDDH/I/SR.2, at 13 (statement of G.I.A.D. Draper, United Kingdom) (arguing against assimilating wars of national liberation to interstate conflicts); *id.*, CDDH/I/SR.3, at 19 (statement of J. Caron, Canada) (arguing the protection of victims of conflicts should not depend upon the motivations of such conflicts).

70. See, *e.g.*, *id.*, CDDH/I/SR.2, at 14 (statement of C. Girard, France) (stating that humanitarian law must provide protection for all war victims and should not be subordinated to subjective considerations); *id.* (statement of G. Prugh, United States) (stating political concepts should not be allowed to obscure the goal of the Convention); *id.* at 20 (statement of E. Rodriguez Roman, Spain) (arguing humanitarian law should protect all mankind without distinction).

71. *Id.*, CDDH/I/SR.3, at 19 (statement of F. Pictet, Switzerland).

72. See *id.*, CDDH/I/SR.2, at 14 (statement of G. Prugh, United States) (arguing political concepts should not be allowed to obscure the goal of improving humanitarian protection to people involved in war).

the notion of reciprocity between juridically equal entities (states) that underpins the laws of war.⁷³ This argument reflected the perception that the application of the law of international armed conflict hinges on the capabilities, the domestic law, and the responsibility of states which—together with the threat or use of reprisals in a reciprocal manner—combine to ensure compliance. As a corollary, the lack of resources enjoyed by weaker non-state combatants was seen as a factor which might lead to non-observance of the law.

Another significant practical constraint highlighted by Western critics concerned the question of authoritative determination of conflicts in which people are fighting against their own government. Put simply, no state is ever going to admit it is a racist regime or exercising alien or colonial domination.⁷⁴ Yet, no agreement could be reached for the creation of a new Protecting Power system capable of giving an authoritative judgment as to whether a particular rebellion really constitutes a war of liberation or a certain movement amounts to a movement for self-determination.⁷⁵ Indeed, doubts were expressed about the possibility of making an objective determination in all cases, given the vagueness of the terms "people"⁷⁶ and "right of self-determination."⁷⁷ In conjunction with the definition of these concepts, the issue was raised as to what type of activity undertaken to achieve "self-determination" constituted an "armed conflict" in the sense of the debated provision, or what criteria should be employed to determine whether fighting within a given state has or has not reached the level of an "armed conflict." The definitions of "alien domination" and "racist regimes"⁷⁸

73. See, e.g., *id.* at 11 (statement of J. de Breucker, Belgium) (stating the Convention could not apply to entities which were not states); *id.*, CDDH/I/SR.3, at 22 (statement of A. Cassese, Italy) (arguing the Convention referred to States and not authorities other than States); *id.*, CDDH/I/SR.5, at 40 (statement of E. Noda, Japan) (arguing that attempts to apply the Conventions to armed conflicts involving entities not states would tend to destroy the established system and lead to practical difficulties).

74. N.Y. Times, June 11, 1977, at 5, col. 5.

75. Forsythe, *The Diplomatic Conference on Humanitarian Law*, 69 AM. J. INT'L L. 77, 89 n.29 (1978).

76. See 8 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE, *supra* note 63, CDDH/I/SR.2, at 11-12 (statement of J. de Breucker, Belgium) (noting the vagueness of the term "peoples"); *id.* at 13 (statement of G.I.A.D. Draper, United Kingdom) (same).

77. *Id.* at 25 (statement of G. Prugh, United States); see *id.*, CDDH/I/SR.4, at 26 (statement of C. Lysaght, Ireland) (arguing that the terms "self-determination" and "armed conflicts" were too vague to be useful).

78. See, e.g., *id.*, CDDH/I/SR.2, at 14 (statement of G. Prugh, United States) (noting the problems with using undefined concepts); Graham, *The 1974 Diplomatic Conference on the Law of War: A Victory for Political Causes and a Return to the "Just War" Concept of the Eleventh Century*, 32 WASH. & LEE L. REV. 25, 53-54

were also considered potentially problematic.

The aforementioned objections have been left unanswered to a large extent.⁷⁹ Yet, Third World and Socialist countries mounted a forceful campaign in support of the characterization of wars of national liberation as international armed conflicts. United Nations practice has already recognized the international character of armed conflicts between peoples from colonies and other non-self-governing territories, hence international humanitarian law ought to reflect the consequences of that recognition.⁸⁰ Such recognition could also be implied in the rule that people fighting for their independence are subjects of general international law, whether or not the opposing party recognizes the insurgency.⁸¹ Forcible maintenance of a colonial regime amounts to "permanent aggression," entitling the oppressed people to a right equivalent to that of self-defense in case of an armed attack.⁸² Indeed, the proposed assimilation of wars of national liberation to international armed conflicts merely made explicit a rule which has gradually developed and gained general acceptance over the past quarter of a century.⁸³ The quantitative weight of these views notwithstanding, the Third World failed to provide a "value-free," legal rationale for its proposed distinction between armed conflicts having similar factual properties. As noted by Forsythe, it was not convincingly clear why the struggle in

(1975) (noting the difficulty in defining these concepts and applying them to situations); Ribeiro, *International Humanitarian Law: Advancing Progress Backwards*, 97 S. AFR. L.J. 42, 50-51 (1980) (arguing that the vagueness of these terms would cause legal chaos).

79. *But see* 8 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE, *supra* note 63, CDDH/I/SR.2, at 3-4 (statement of G. Abi-Saab, Egypt) (countering objections to the assimilation of wars of national liberation to international conflicts); Abi-Saab, *Wars of National Liberation and the Development of Humanitarian Law*, in DECLARATIONS ON PRINCIPLES: A QUEST FOR UNIVERSAL PEACE 143 (1977) (same).

80. *See, e.g.* 8 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE, *supra* note 63, CDDH/I/SR.2, at 8 (statement of G. Abi-Saab, Egypt) (arguing humanitarian law should recognize wars of national liberation as international armed conflict); *id.* at 8-9 (statement of M. Cristescu, Romania) (arguing that humanitarian law came within the framework of international law and should conform to its principles); *id.* at 9 (statement of K. Obradovic, Yugoslavia) (arguing that, in accordance with substantive international law, any armed struggle waged to achieve self-determination should be considered an international armed conflict).

81. *See id.*, CDDH/I/SR.5, at 35 (statement of N. Rechetnjak, Ukrainian S.S.R.) (noting that struggling peoples were subjects of international law whether recognized or not).

82. *Id.*, CDDH/I/SR.2, at 12 (statement of B. Graefrath, East Germany).

83. *Id.*, CDDH/I/SR.2, at 9 (statement of K. Obradovic, Yugoslavia); *see also id.* at 12 (statement of B. Graefrath, East Germany) (stating the proposal merely codified customary international law already in force); *id.*, CDDH/I/SR.3, at 17 (statement of V. Boulanenkov, U.S.S.R.) (stating sole object of the proposal was to embody in humanitarian law a rule which was already in existence).

Biafra, for instance, was not as "international" as the struggle in Angola.⁸⁴ Similarly, Cassese questioned, from the vantage point of humanitarian protection, the attempt to distinguish between individuals fighting for national liberation movements.⁸⁵

Given the lack of objective machinery to determine authoritatively the application of the 1977 Protocol Relating to the Protection of Victims of International Armed Conflicts (Protocol I),⁸⁶ the import, in practical terms, of article 1(4) therein remains somewhat questionable. Insofar as states which have accepted the Protocol's provisions are concerned, wars of national liberation may have been "upgraded" to the level of international conflicts—thus conferring the full status of lawful combatants on those engaged in them.⁸⁷ In view of the persistent objections from major powers, however, Protocol I cannot be said to codify customary international law in this respect.⁸⁸

Purporting, as it does, to grant privileged belligerent status to national liberation movements *per se* when they are engaged in wars against "colonial" and "racist" regimes and "alien" occupying powers, Protocol I is also morally objectionable. It is true, as argued by Forsythe, that the yardstick of "justness" is not unknown in municipal law where "exceptions are frequently carved out of the domestic jurisdiction of states on the basis of 'justice.'"⁸⁹ The justice applied in the context of Protocol I, however, is of a rather restrictive nature. Besides being an "evil in itself," racial classification as a single consideration for the admission of national liberation movements as entities which have the lawful competence to engage in international armed conflicts introduces a discriminatory clause into the law. Why should legitimacy be conferred on those involved in an armed resistance to a government's oppression that is based on race, but not if such resistance is based, for instance, on ideology?

84. See Forsythe, *supra* note 75, at 82 (discussing the failure to develop a system able to distinguish a war of liberation from a mere rebellion).

85. See Ciobanu, *The Attitude of the Socialist Countries*, in *THE NEW HUMANITARIAN LAW OF ARMED CONFLICT* 399 (A. Cassese ed. 1979) (commenting on views expressed by delegates from the Soviet bloc that mercenaries are "criminal" and should be punished as such).

86. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), at annex I, 1 U.N. Doc. A/32/144 (1977), reprinted in 16 I.L.M. 1391 (1977) [hereinafter Protocol I].

87. Cassese, *The Status of Rebels Under the 1977 Geneva Protocol on Non-International Armed Conflicts*, 30 INT'L COMP. L.Q. 416, 417 (1981).

88. Dinstein, *supra* note 60, at 281 (stating that both Protocols revise and modify customary international law). Consequently, those states which desire not to be bound by either Protocol, may regard it as *res inter alios acta*. *Id.*

89. Forsythe, *supra* note 75, at 83.

The 1977 Protocol Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)⁹⁰ has taken a more acceptable approach with respect to "dissident armed forces or other organized armed groups." Protocol II extends to these rebels certain basic protections of the laws of war. In conformity with traditional international law,⁹¹ revolutionary belligerents in this category satisfy the "competent authority" requirement only when they "under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement [the laws of war]."⁹² Relying on pragmatic criteria which are reasonably easy to ascertain—namely, degrees of organization, control by responsible commanders, and political and military success—constitutes a more satisfactory strategy. Reference to the covert character of modern revolutionary movements often renders it difficult to judge their claim to qualify as the legitimate authority for oppressed people. Equally difficult is the task of distinguishing between revolutionaries entitled to legitimate acceptance and ordinary criminals.

Added to these constraints is the tendency of revolutionaries to follow the Leninist model of political leadership with its centralized justice elite which is empowered to make all the decisions concerning the just revolutionary cause. The unreliability of factors such as the support for the revolutionary leadership, often obtained by means of coercion and recognition of foreign powers and is commonly influenced by subjective political policies, also justifies use of the criteria enumerated by Protocol II.

In light of the above reservations, and the mainstream developments in the positive law of belligerency (as reflected in article 1 of Protocol II),⁹³ insofar as treating revolutionaries as belligerents in war is concerned:

the ultimate answer lies in the character, magnitude and degree of success of the revolutionaries. If they can organize a government that carries on their war in a controlled fashion (assuming a magnitude requiring counter-measures that more

90. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), annex II, 5 U.N. Doc. A/32/144 (1977), *reprinted in* 16 I.L.M. 1442 (1977) [hereinafter Protocol II].

91. Convention Concerning the Laws and Customs of War on Land, Oct. 18, 1907, annex, sec. I, ch. I, arts. I-III, 36 Stat. 2277, T.S. No. 539, 205 Parry's T.S. 277 (listing requirements for belligerent status); Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 4, 6 U.S.T. 3316, 3320-23, T.I.A.S. No. 3364, U.N.T.S. 135 (defining "protected persons" entitled to prisoner of war status).

92. Protocol II, *supra* note 90, at art. 1(1).

93. *Id.*

resemble war than ordinary police operations), and if the conflict continues for an appreciable time, the revolutionaries may have won their right to be considered a competent authority for purposes of just war.⁹⁴

A question nonetheless arises as to *who* has the right to speak for the revolution, to initiate or terminate the revolution, to determine the strategies and tactics of revolutionary war. A simple answer, and possibly the most pragmatic one, is that whoever has the power to mount revolutionary activity on a significant and sustained scale also has the legitimate authority to compel participation of the people in their fight for the revolutionary cause. Such an answer, however, overlooks the distinction between "power" and "authority," leaving unresolved the fundamental issue of whether the just war criterion of *auctoritas principis* requires, besides a formal control of power properly acquired, *legitimacy* in the sense of commanding the allegiance of people to the government in power as being the most appropriate for their society. Put another way, should there exist a certain measure of affinity between the people in general and the institution of the government in power, so that allegiance naturally results without the use of coercion, before a war can be said to have been waged by the "legitimate authority"?

2. *The Legitimacy Factor*

As noted earlier, no clear rule has emerged in international law with respect to the relationship between power and authority in the context of the just war criterion of "legitimate authority." As a matter of self-evident truth, however, "war without the consent of the warrior is impossible."⁹⁵

The modern democratic tradition is unequivocal in its insistence on the principle that the government's authority over the people is not absolute. This authority must remain subordinate in the final reckoning, both morally and empirically, to the authority that the people hold over the government. Human rights must predominate the government's.

94. W. O'BRIEN, *THE CONDUCT OF JUST AND LIMITED WAR* 19 (1981); see Draper, *Wars of National Liberation and War Criminality*, in *RESTRAINTS ON WAR* 135, 148-50 (M. Howard ed. 1979) (stating that national liberation movements in internal armed conflicts must reach a certain level of organization and intensity to be within the ambit of the Protocols).

95. See Lipset, *Some Social Requisites of Democracy: Economic Development and Political Legitimacy*, 53 *AM. POL. SCI. REV.* 69, 86 (1959) (defining legitimacy as the capacity of a political system to engender and maintain the belief that existing political institutions are the most appropriate or proper ones for the society").

96. Somerville, *Democracy and the Problem of War*, 27 *HUMANIST* 77, 78 (1959).

This is the irreducible meaning of the sovereignty of the people.⁹⁷ The corollary is that as "legal" as a government may be in terms of its title to power, it cannot exercise its war-making power as a matter of right, nor can it legitimately compel participation of individuals at war. The additional element of acquiescence of the people is necessary in order to comply with the requirements of the "legitimate authority" criterion.⁹⁸

As in the case of the "due process" yardstick discussed earlier, there are of course considerable practical difficulties in applying democratic principles. Democracy is not the sole value relevant to the waging of war and there can be values which should, at least in certain circumstances, take precedence over it. Democratic practices also do not lend themselves easily to a definition in operational terms and are subject to conflicting interpretations. Still, democracy may be valuable as a general norm, even if it cannot be translated into specific requirements.

3. The "Constitutional" Aspect

The importance of popular consent in waging war is duly reflected in the constitutional theories of states. In the United States, for example, there are explicit legal provisions to the effect that a decision to engage the country in a war should be taken by the legislative branch of the government, the national Congress (which is composed of elected officials from every section of the community), by majority vote of its members after having had the opportunity to discuss and debate the issue of war.⁹⁹

History shows, however, that this theory has failed to work on many occasions.¹⁰⁰ From the earliest years of the American Republic, exam-

97. *Id.*

98. See *infra* notes 176-206 and accompanying text (discussing the importance of the "legitimacy" factor in the context of the relationship between third parties and states experiencing civil strife).

99. U.S. CONST. art. I, § 8, cl. 11. The President, however, retains the power to "conduct" war (as distinct from making or declaring war) (*id.* at art. II, § 2, cl. 1), and the responsibility to engage the armed forces in a national emergency created by an attack upon the United States. War Powers Resolution § 2, 50 U.S.C. § 1541(c) (1982). Nonetheless, it should be noted that under the War Powers Resolution of 1973, the President must report promptly to Congress any introduction of armed forces into ongoing or imminent hostilities. *Id.* at § 1543. Congress must vote to sustain the President's use of the American Armed Forces within a sixty-day period. *Id.* at § 1544(b). Clearly, Congress can also govern the use of armed forces through its control of appropriations.

100. See generally R. Russell, *The U.S. Congress and the Power to Use Military Force Abroad 64-89* (1967) (unpublished manuscript available in the Fletcher School of Law and Diplomacy library); *Background Information on the Use of United States Armed Forces in Foreign Countries*, 82d Cong., 1st Sess. 1 (1951) (stating that the

ples can be found of presidential use of the armed forces without congressional approval.¹⁰¹ Yet it is arguable that in several of these cases the President was acting in the general context of a popular consensus in the country that the United States should assume a forceful posture. As suggested by Rogers, "[w]hatever the reason for presidential initiatives . . . they seem to have been responsive to the times and to have reflected the mood of the Nation."¹⁰² An implied acquiescence may be inferred from the fact that certain measures were taken under the United Nations Charter that the President was empowered to execute.¹⁰³ On other occasions, reliance was placed on the "principles of justice and international law on which peace and stable international order depend"¹⁰⁴ and to which presumably the people generally pledge their support. A basic approval by the nation of the President's use of war powers was also claimed to be a feature of any action undertaken in accordance with the principles enunciated in the OAS Charter.¹⁰⁵

The above attempts to rationalize war initiatives by the President indicate that the electorate is perceived as the ultimate restraint on the use of war powers. As recognized by President Nixon in his "State of the World" message: "Our experience in the 1960's has underlined the fact that we should not do more abroad than domestic opinion can sustain."¹⁰⁶ On practical grounds alone, of course, the authority waging war must be sensitive to the people's willingness to suffer the potential physical, economic, and political costs of military actions. Indeed, that such a notion was at the foundation of the drafting of article I, section 8 of the United States Constitution is revealed in a statement made by

broad Constitutional allocation of war powers between the President and the Congress invites struggle between these two branches); Frye & Sullivan, *Congress and Vietnam*, in *THE VIETNAM LEGACY* 194, 205-15 (A. Lake ed. 1976) (discussing the relationship between Congress and the President in the area of foreign affairs since the enactment of the War Powers Resolution of 1973).

101. See Rogers, *Congress, the President and War Powers*, in *Current Foreign Policy*, Department of State Publication No. 8591, General Foreign Policy Series 255, at 3-5 (June 1961).

102. *Id.* at 3.

103. Pertinent is the explanation given by the Truman administration with respect to President Truman's committal of United States forces to a war in Korea without congressional authorization. Truman, *The President's News Conference at Key West*, 1951 PUB. PAPERS 189 (Mar. 15, 1951).

104. See Statement made by President Eisenhower in justification of the sending of United States troops into Lebanon without seeking specific congressional approval, 104 CONG. REC. 13,865 (1958).

105. See Johnson, *Commencement Address at Baylor University*, 1965 PUB. PAPERS 593 (May 28, 1965) (urging Americans to support the dispatch of United States marines into the Dominican Republic without congressional approval).

106. Nixon, *United States Foreign Policy for the 1970's: Building for Peace*, 7 WEEKLY COMP. OF PRES. DOC. 305 (Feb. 25, 1971).

an early Justice of the United States Supreme Court, Joseph Story:

The power of declaring war is not only the highest sovereign prerogative; but it is in its own nature and effects so critical and calamitous, that it requires the utmost deliberation and the successive review of all the councils of the nation; War, in its best state, never fails to impose on the people the most burdensome taxes and personal sufferings. It is always injurious and sometimes subversive of the great commercial, manufacturing and agricultural interests. Nay, it always involves the prosperity, and not unfrequently the existence, of a nation This reasoning appears to have great weight with the convention, and to have decided its choice. Its judgment has hitherto obtained the unqualified approbation of the country.¹⁰⁷

The reasons which compelled the framers of the United States Constitution to place the power to declare war in Congress appear as compelling today as when the Constitution was written. The issue becomes whether the rationales offered by former Presidents to commit the nation to war and the varied degrees of compliance with the requirement for congressional authorization are genuine or "fraud practiced by the government." Apparently, the need to have public approval is always presumed,¹⁰⁸ and it is the "national interest" that the war-making authorities ought to serve.

Similarly, constitutional directives are designed to provide added restraints within the domestic structure on the use of force in international society. It is a fact that most states today, even authoritarian ones, have specific constitutional provisions for the declaration and determination of war.¹⁰⁹ A transgression of these provisions by an official

107. 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 87-88 (4th ed. 1873).

108. See Somerville, *supra* note 96, at 77 (stating that war can be conducted only if individuals agree to participate).

109. See generally CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (A. Blaustein & G. Flanz eds. 1971) (compiling the constitutions of the countries of the world).

The Constitution of Argentina empowers the Congress "[t]o authorize the Executive Power to declare war and make peace." ARGEN. CONST. ch. IV, art. 67, para. 21.

The Constitution of Australia vests the Queen with the power to declare war and the Governor-General, as the Queen's representative, with the power to implement. AUSTL. CONST. ch. II, § 68.

Under the Constitution of Belgium, the King commands the armed forces and declares war, but must advise the House of Representatives, as soon as security permits. BELG. CONST. ch. II, § 1, art. 68.

The Constitution of Chile empowers the President of the Republic to "declare war, with the prior authorization of law, leaving on record that the National Security Council has been heard in this regard." CHILE CONST. ch. IV, art. 32, § 21.

The 1982 Draft Constitution of the People's Republic of China gives the National People's Congress the power to "decide on questions of war and peace." P.R.C. CONST. (DRAFT) ch. III, § 1, art. 60, para. 12.

The Constitution of France provides that the President of the Republic takes war measures after consultation with the Premier, the Presidents of the assemblies, and the

or state organ would arguably deprive them of their legal power to declare and wage war. Stated differently, a war undertaken without the appropriate constitutional authority fails to meet the "who" criterion of just war and therefore may be deemed illegal and unjust.¹¹⁰ No direct support can be found for this assertion in positive international law. Indeed, in light of judicial support of the rule that municipal law cannot limit the scope of a state's obligations on the international plane,¹¹¹ it is reasonable to assume that requirements under internal law do not act to increase a state's international liabilities. Yet, the constitutional validity of the powers used to wage war should feature in the overall assessment of its "justness."

Constitutional Council. FR. CONST. tit. 11, art. 16. In practice, however, parliamentary control of foreign policy has declined in France. Cot, *Parliament and Foreign Policy in France*, in *PARLIAMENTARY CONTROL OVER FOREIGN POLICY* 11, 11 (A. Cassese ed. 1980). General De Gaulle, for example, considered foreign policy "a private affair of the head of state and thus an affair which should not stimulate political debate." *Id.* at 14.

The Constitution of the Federal Republic of Germany provides that "[w]hen the determination of the existence of a state of defense has been promulgated" by the *Bundestag* (Federal Parliament), with the consent of the *Bundesrat* (the Council of Constituent States), by a two-third majority of votes cast, "and if the federal territory is being attacked by armed force, the Federal President may, with the consent of the *Bundestag*, issue internationally valid declarations regarding the existence of such a state of defense . . ." W. GER. BASIC LAW § Xa, art. 115a, para. 1, 5 (1949) (amended 1968).

The Constitution of Mexico provides that the President of Mexico has the power "to declare war in the name of the United Mexican States, pursuant to a previous law of the Congress of the Union." MEX. CONST. tit. III, § 3, art. 89, para. VIII.

In the United Kingdom, the declaration of war is part of the area of executive discretion inherent in the crown, meaning the cabinet and the civil service. Brownlie, *Parliamentary Control over Foreign Policy in the United Kingdom*, in *PARLIAMENTARY CONTROL OVER FOREIGN POLICY* 1, 4 (A. Cassese ed. 1980). See generally J. CHITTY, *A TREATISE OF THE LAW OF THE PREROGATIVES OF THE CROWN* 43-50 (rev. ed. 1968) (giving a historical perspective of the war prerogative of the English King).

The cabinet and individual ministers, however, are accountable to Parliament for decisions implemented. Brownlie, *supra* at 4. History suggests that on a few occasions the British government took decisions in the area of foreign policy after "secret planning" and without much regard to Parliament's debates. *Id.* at 9.

110. See Halperin, *American Military Intervention: Is it Ever Justified?*, in *INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE* 1030-31 (M. McDougal & W. Reisman eds. 1981) (stating that an American decision to intervene in an international conflict must coincide with the American constitutional process).

111. Alabama Claims Arbitration, 1 J. MOORE, *HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY* 496, 656 (1898); Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory (Pol. v. Danzig), 1932 P.C.I.J. (ser. A/B) No. 44, at 24 (Advisory Opinion of Feb. 4) (stating that a state cannot rely, as against another state, on the provisions of the latter's municipal laws, but uniquely on international law); Free Zones of Upper Savoy and the District of Gex (Fr. v. Switz.), 1932 P.C.I.J. (ser. A/B) No. 46, at 167 (Judgment of June 7) (stating that France cannot rely on her domestic legislation to limit the scope of her international obligations).

Instructive in this respect is the controversy which surrounded President Johnson's non-compliance with the constitutional requirement of congressional approval for the United States military involvement in the Vietnam war. Critics vehemently questioned the war's constitutionality, contending that the executive had exceeded its authority and in effect usurped congressional power to declare war.¹¹² It was further asserted that citizens had a constitutional right to protection under the municipal law of the United States,¹¹³ giving rise to a corresponding duty on the part of the President. In discharging his duty the President must, however, observe constitutional limits. Indeed, a right of resistance is established against the ruler who had unconstitutionally usurped power (whether under national or international law) coupled with a basic right to challenge the obligation to participate in a war declared by such a ruler through recourse to the courts.¹¹⁴

In fact, even supporters of the American administration who defended the position that the President had the necessary power to commit American forces to a war in Vietnam did not reject the criterion of "legitimate authority."¹¹⁵ Rather, they sought to establish that such an authority derived from a variety of alternative sources.¹¹⁶

112. L. VELVEL, UNDECLARED WAR AND CIVIL DISOBEDIENCE: THE AMERICAN SYSTEM IN CRISIS 3-10 (1970) (arguing that the President has exceeded his executive power beyond constitutional limits regarding the Vietnam War); Velvel, *The War in Vietnam: Unconstitutional, Justiciable and Jurisdictionally Attackable*, in 2 THE VIETNAM WAR AND INTERNATIONAL LAW 651-710 (R. Falk ed. 1969) (providing an in-depth analysis of this issue); see also I.F. Stone, *International Law and the Tonkin Bay Incidents*, in THE VIET-NAM READER 307-15 (M. Raskin & B. Fall eds. 1965) (stating that the Tonkin Bay incidents breached international law).

113. See Wormuth, *The President versus the Constitution*, in 2 THE VIETNAM WAR AND INTERNATIONAL LAW, *supra* note 112, at 711, 754-55 (noting the recognition of this right by President Washington in his Neutrality Proclamation of 1793 and by the United States Supreme Court in the *Slaughter-House Cases*); see also *The Butchers' Benevolent Ass'n of New Orleans v. Crescent City Live-Stock Landing & Slaughter House Co. (Slaughter-House Cases)*, 83 U.S. 36, 52-53 (1872) (recognizing a citizen's right to protection under the municipal law); *In re Neagle*, 135 U.S. 1, 15-16 (1889) (recognizing a citizen's constitutional right to protection under the municipal law and the President's corresponding duty); 1 MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1908, 156 (J. Richardson ed. 1968) (providing statements by President Washington regarding this right).

114. See generally Gottlieb, *Vietnam and Civil Disobedience*, in 2 THE VIETNAM WAR AND INTERNATIONAL LAW, *supra* note 112, at 611, 615 (holding that citizens have a right to resist illegitimate authority); L. VELVEL, *supra* note 112, at 183-250 (arguing for and detailing the legitimate use of civil disobedience in protesting against the Vietnam War).

115. See Moore, *The National Executive and The Use of Armed Forces Abroad*, in 2 THE VIETNAM WAR AND INTERNATIONAL LAW, *supra* note 112, at 811 (supporting the power of the President to commit American forces without congressional approval when necessary).

116. Velvel, *The War in Vietnam: Unconstitutional, Justiciable and Jurisdiction-*

Nonetheless, the practical legal consequences with respect to the unconstitutionality of the power to wage war are rather limited, both in public international law and in domestic law. In the municipal context, courts have demonstrated a general reluctance to rule on the legality of war, relying either on the argument that individuals have no standing to challenge the war or that their claims are a "political question" whose resolution is entrusted exclusively to the Executive.¹¹⁷ At the international level, while the International Court of Justice has occasionally pronounced on matters involving the use of force,¹¹⁸ it may be legitimately observed that "[t]he record of I.C.J. force cases is a series of denials, revocations or reservations of jurisdiction, nonappearances before the court and refusals to comply with court directives."¹¹⁹

ally Attackable, in 2 THE VIETNAM WAR AND INTERNATIONAL LAW, *supra* note 112, at 655-81 (summarizing arguments based on these alternative sources and individually rejecting them as having little or no merit). Some of these sources include the power to repel attack, the President's power under treaties, the President as chief executive, the commander-in-chief clause, the President's general foreign policy power, the President as a representative of all the people, the *fait accompli* argument, lack of formal congressional disapproval, and the Gulf of Tonkin resolution. *Id.*

117. See Note, *The War Powers Resolution: A Tool for Balancing Power Through Negotiation*, 70 VA. L. REV. 1037, 1049 (1984) (noting that even the passage of the War Powers Resolution in 1970 has not changed the stance of the United States). "[S]hort of a constitutional *impasse* over the appropriate balance of power between the executive and legislature, the political question doctrine still bars judicial involvement in executive decisions to commit United States troops without congressional authorization." *Id.*; *Crockett v. Reagan*, 558 F. Supp. 893, 898-99 (D.D.C. 1982) (holding that the judiciary will not become involved in executive decisions unless a constitutional *impasse* appropriate for judicial resolution was involved). *But see* Velvel, *The War in Vietnam: Unconstitutional, Justiciable and Jurisdictionally Attackable*, in 2 THE VIETNAM WAR AND INTERNATIONAL LAW, *supra* note 112, at 681-705 (concluding that the question of legitimate authority is a critical one that the courts should decide in the exercise of their traditional function of assessing where the divisions of power lie in the federal government); A.W. Thomas & A.J. Thomas, Jr., *Presidential War-Making Power: A Political Question?*, 35 SW. L.J. 879, 882-97 (1981) (analyzing the specific issue of the political question in the context of the exercise of war powers).

118. See *United States Diplomatic and Consular Staff in Teheran* (U.S. v. Iran), 1980 I.C.J. 3 (Judgment of May 24) (analyzing the taking of American hostages by Iran); *Nuclear Tests (Austl. v. Fr., N.Z. v. Fr.)*, 1974 I.C.J. 253, 453 (Judgment of Dec. 20) (involving complaints by Australia and New Zealand against France regarding atmospheric tests of nuclear weapons by the French government in the Pacific Ocean area); *The Corfu Channel (U.K. v. Alb.)*, 1949 I.C.J. 4 (Judgment of Apr. 9) (settling dispute between the United Kingdom and Albania regarding damage done to British warships due to Albania's mining of the Corfu Channel).

119. Note, *Separation of Powers Within the United Nations: A Revised Role for the International Court of Justice*, 38 STAN. L. REV. 165, 167-68 (1985) (stating that when the International Court of Justice has "attempted to adjudicate use of force cases, respondent governments have denied or revoked jurisdiction, have refused to appear, and have balked at complying with court orders"); *cf. U.S. Withdrawal From Proceeding Initiated by Nicaragua in the I.C.J.*, 85 DEP'T ST. BULL. 64 (March 1985) (stating that the United States based its decision to withdraw from the proceedings initiated by Nicaragua in the International Court of Justice on the contention that the

4. The "Lawful Authority" to Request Intervention

The relevance of the *auctoritas principas* criterion manifests itself more clearly when discussing the legitimacy of a government's invitation for third-party intervention. Generally, only a competent authority in the incumbent regime may invite and accept foreign intervention. Applying this principle, however, often stirs great controversy, because the core of the conflict in such a situation usually involves a struggle for power and authority. For instance, identifying the locus of authority in S. Vietnam as the N.L.F., the rightful claimants to political power, proved difficult.

Questions also arise as to the duration of the incumbent regime's authority. Specifically, the issue of authority is raised at the point where revolutionary resistance is so successful, and/or the regime's counter-insurgency measures are so unsuccessful, that the regime appears to lack both the political-military base and the legal-moral legitimacy to warrant its continuation of a counter-insurgency campaign. Arguably, at that point the incumbent regime also loses its competence to invite external assistance.¹²⁰

Less controversial, however, are situations involving no insurgency or internal revolt. Consensus has prevailed among international lawyers on the legality of an external intervention occasioned by an explicit invitation genuinely extended by the legitimate government of a state.¹²¹ Yet, doubts may emerge concerning the status of that government as the legitimate authority under international law. Generally, the invitation or consent must be given freely, without pressure, by the duly constituted and representative government, and it must reflect the true will of the people of that state. Indeed, criticisms of the interventions in Hungary in 1956 and in Afghanistan in 1979 reflect the application of these criteria. Thus, with respect to the former, Quincy Wright argued that "unless Hungary, through the voice of an *adequately established* government requested Soviet aid . . . the Soviet action was aggression."¹²² Wright further argued that "the consent of a state cannot be deduced from the request of a puppet government acting in its name but set up

dispute is "an inherently political problem and is not appropriate for judicial resolution" and the World Court is "patently unsuited" to decide it).

120. See W. O'BRIEN, *supra* note 94, at 159, 334 (expressing the alternate view that a regime may invite intervention at any time in the course of a civil war unless it is so clearly tyrannical and lacking in support and acceptance as to forfeit that right).

121. See R. HIGGINS, *THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS* 210-13 (1963) (analyzing the argument that a claim to use force is legal when it is based on an invitation from another state).

122. Wright, *Intervention, 1956*, 51 AM. J. INT'L L. 257, 275 (1957).

by foreign intervention."¹²³ In a similar vein, the United States ambassador to the United Nations asserted with regard to the Soviet intervention in Afghanistan, that if any invitation was received by the Soviets it had been issued by the Communist Party rather than the government of Afghanistan, and that the regime of the day had no legitimacy in the eyes of the Afghan people.¹²⁴ Interestingly, the Soviet jurists also employed the same test when expressing the view that the request by South Vietnam for American military assistance derived merely from consent given by an unrepresentative government under undue pressure.¹²⁵

A more recent event which highlights the relevance of the "legitimate authority" criterion is the Grenada invasion on October 25, 1983. The United States government legally justified the invasion by contending that Grenada's own government invited external intervention into its domestic affairs.¹²⁶ Specifically, the Reagan administration emphasized the legal and political importance of the Governor-General's invitation in regard to the decision by the United States, and other countries of the joint force, to intervene. The Governor-General remained the sole source of governmental legitimacy on the island in the wake of the tragic events. The United States and the member countries of the Organization of Eastern Caribbean States accorded his appeal exceptional moral and legal weight, because the invitation of lawful governmental authority constitutes a recognized basis under international law for foreign states to provide requested assistance.¹²⁷ While opinions differ as to whether the Governor-General was indeed vested with the appropriate legal authority to request an external intervention,¹²⁸ it is ap-

123. *Id.*

124. See J. Kirkpatrick, *Afghan Situation and Implications for Peace*, 82 DEP'T ST. BULL. 57, 58 (Jan. 1982) (stating that the Soviet Union was invited to intervene in Afghanistan not by the Afghan government but rather by the Afghan Communist Party).

125. Butler, *Soviet Attitude Toward Intervention in LAW AND CIVIL WAR IN THE MODERN WORLD* 381, 391 (J. Norton Moore ed. 1974).

126. Statement by Kenneth W. Dam, Deputy Secretary of State before the House Committee on Foreign Affairs (Nov. 2, 1983), *reprinted in* 78 AM. J. INT'L L. 200, 203 (1984).

127. *Id.*

128. See Joyner, *The US Action in Grenada, Reflections on the Lawfulness of Invasion*, 78 AM. J. INT'L L. 131, 138-39 (1984). "Whether Governor-General Scoon in fact 'remained the sole source of governmental legitimacy' on Grenada after October 24, 1983 is both arguable and unclear. That he alone possessed sufficient legal and constitutional authority at that time to legitimate an official invitation for US and OECS military forces to intervene also seems polemical." *Id.*; see also Vagts, *International Law Under Time Pressure: Grading the Grenada Take-Home Examination*, 78 AM. J. INT'L L. 169, 170-71 (1984) (adopting an equally critical approach). *But see* Moore, *Grenada and the International Double Standard*, 78 AM. J. INT'L L. 145, 159-

parent that the "legitimate authority" criterion is commonly adopted in evaluating the justification of a military offensive.

5. *The "Responsibility" Element*

The significance of the *auctoritas principas* criterion also becomes evident when ascertaining responsibility for initiating the war. From the perspective of both the international community and the nationals of the individual state, it is essential to identify the "legitimate authority" in order to attribute responsibility. This aspect has become particularly relevant since the Charter of the Nuremberg International Military Tribunal defined "crimes against peace" as including the "planning, preparation, initiation and waging of a war of aggression or a war in violation of international treaties, agreements or assurance, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing."¹²⁹ Given the criminality of the act of war—regardless of whether it is indeed a crime susceptible to legal proof and judicial determination¹³⁰—it is even more important that the legitimate authority that undertakes war appropriately account for any transgression of accepted norms.

Yet, the legitimacy of the authority waging the war—or, for that matter, the ultimate justice or injustice of the war—is irrelevant to the criminality of the actions of individual combatants. Those who fight in "unjust" wars and abide by the laws of war should not be subject to prosecution under any construction of the Nuremberg principles. Similarly, the fact that a soldier acted in pursuance of orders issued by the "legitimate authority" would not free him from criminal responsibility.¹³¹ Further, superior officers are not relieved from such responsibility because they did not give the illegal orders to their subordinates.¹³² Stated differently, international law attributes no specific legal significance to the "legitimate authority" criterion in this context. This does not, however, obviate the need to identify the leaders responsible for the exercise of war powers in order to make value judgments with re-

61 (1984) (expressing strong support for the view that the Governor-General enjoyed such an authority).

129. See I. BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 185-94 (1963) (presenting evidence that crimes against peace, as defined in the Charters of the International Military Tribunals at Nuremberg and Tokyo, have been accepted as a part of positive law since 1946).

130. See Warnke, *Individual Responsibility in Warfare*, in *LAW AND RESPONSIBILITY IN WARFARE* 187-93 (P. Trooboff ed. 1975).

131. CHARTER OF THE INTERNATIONAL MILITARY TRIBUNAL art. 8.

132. *Id.*

spect to their actions. Furthermore, given that one can seldom establish responsibility in absolute terms, the question of "legitimate authority" may prove useful in seeking to establish the balance of culpability.

Domestically, it is desirable that members of the community, the principal victims of the suffering induced by war, be assured of a clear identification of the war-making authority that would bear the guilt. Indeed, the public's acquiescence in war is arguably conditioned by the knowledge that its leaders must answer to the nation should those leaders wrongly embark upon a war. Recent cases in point are the strong public reactions to the exercise of authority during the wars in the Falklands¹³³ and Lebanon¹³⁴ respectively.

6. *Action by United Nations Organs*

Thus far the discussion of "legitimate authority" has focused on war-making powers employed by national authorities. In the context of evaluating this criterion of just war, however, are other sources of authority which lie outside the jurisdiction of the individual state and which are sanctioned under contemporary international law. Particularly relevant are actions specified in chapter VII of the United Nations Charter which empowers the Security Council, when it considers that non-military enforcement action is "inadequate," to "take such action by air, sea or land forces as may be necessary to maintain or restore international peace and security." Thus, the Charter confers on the Security Council the authority to determine the existence of a valid cause and to use force accordingly. Such a broad authority stands in marked contrast to the decision-making process under the Covenant of the League of Nations,¹³⁵ which allowed member states to decide for themselves whether another member state had resorted to war in violation of its obligations under the Covenant. Nonetheless, the United Nations Charter appears to reflect a greater sense of political realism, given the divergence of states' interests, loyalties, and perceptions.

133. 23 KEESING'S ARCHIVES 32553A (Dec. 1983).

134. Questions were raised, for example, by members of the Knesset (the Israeli Parliament) as to "whether the army acted on the basis of decisions consistent with constitutional provisions?" Protocol of the 10th Knesset, 3d Sess., 214th Sitting, 15.6.83, at 46. The answer given to this query reaffirmed the need for authoritative decision by the duly constituted government with respect to "the aims of the war and military moves of special importance, especially when the Prime Minister considers these moves to have political ramifications." *Id.* at 407. It was not, however, viewed as desirable that the cabinet as a whole should deal with tactical military details which did not concern matters of strategic principle. *Id.* at 47.

135. See LEAGUE OF NATIONS COVENANT art. 10, para. 1 (establishing the policy of making decisions in the League of Nations).

At the same time, nothing in the United Nations Charter or in the machinery of the international system limits a state's right to determine for itself whether an act of aggression has occurred or force has been used illegally. In practice, the Security Council is virtually precluded by its voting rules from making such a determination. Indeed, the failure by the permanent members to agree on the availability of armed forces has rendered the decision-making authority of the Council, regarding the use of force, null.¹³⁶ In the absence of special agreements concluded between the Council and member states, the Council has been unable to make binding decisions to use force. Any measures taken by the United Nations or under its auspices requiring the use of armed forces have been based on voluntary contributions, hence the concept of a Security Council acting in concert and supported by a permanent peace-keeping force contemplated under the Charter has not met expectations.

The stalemate in the Security Council has encouraged attempts to extend the power to use armed force to the General Assembly. Indeed, the constant pressure of a large number of states (particularly third world and non-aligned states) for further expansion of independent General Assembly activity, at the expense of that of the Security Council, in matters of maintaining, restoring and enforcing international peace and security, has become a conspicuous feature of United Nations politics.

Arguably, article 24 of the Charter gives the Security Council merely the "primary responsibility for the maintenance of international peace and security," and hence does not preclude the General Assembly from exercising a secondary or residual responsibility. The International Court of Justice in fact endorsed such an argument in its advisory proceedings on *Certain Expenses of the United Nations*,¹³⁷ which upheld to a certain degree the 1950 Uniting for Peace Resolution.¹³⁸ This resolution, in turn, enhanced the General Assembly's ability to

136. See U.N. CHARTER arts. 43-47 (establishing the United Nations agreement regarding the involvement of armed forces to maintain peace, the determination of when to sue this force, the utilization of armed force in an emergency situation, and the creation of a committee to oversee the application of military force).

137. *Certain Expenses of the United Nations*, 1962 I.C.J. 151, 162-63 (Advisory Opinion of July 20).

138. See G.A. Res. 377, 5 U.N. GAOR Supp. (No. 20) at 10, U.N. Doc. A/1775 (1950) (establishing a resolution to unite nations in order to maintain security and peace by developing the Security Council as a functioning body responsible for ensuring a peaceful environment); *Proposals for Strengthening World Peace*, 1950 U.N.Y.B. 193-95 (recognizing the General Assembly's obligation to adhere to the United Nation's responsibility of maintaining international peace and security and recommending proposals to unite nations in peaceful harmony).

discharge its secondary or residual responsibility by streamlining the procedure for calling special sessions of the General Assembly. Further, if the Security Council failed in its primary responsibility for maintaining international peace and security, the General Assembly should consider the matter immediately, with a view to making recommendations for collective action, including the use of armed force when necessary.

At the same time article 11(2) of the Charter stipulates that "any . . . question on which action is necessary shall be referred to the Security Council by the General Assembly . . ." ¹³⁹ thus implying that the Security Council is granted a "monopoly" on "action." In the *Expenses*¹⁴⁰ case, the International Court of Justice further interpreted "action" to mean "enforcement action"—an interpretation employed in explaining why the United Nations Emergency Force in the Middle East—established in 1956 by the General Assembly and not designed to take enforcement action—had not conflicted with article 11(2). The court's opinion thus lends itself to the construction that the General Assembly would have acted illegally had it set up a force designed to take enforcement action. Put another way, the United Nations Charter restricts the General Assembly to the recommendation of measures which are not coercive, namely ones which are of a "peace-keeping" rather than of a "collective security" nature.

The issue of "legitimate authority" in the context of the United Nations collective measures is, however, by no means resolved. The divergence of opinions in this respect manifested itself, for instance, during the debates preceding the adoption of the Principles of International Law Concerning Friendly Relations and Co-operation Among States.¹⁴¹ The sensitivity of the Soviet Union and other East European socialist countries regarding this question, evident in their opposition to

139. See U.N. CHARTER art. 11, para. 2 (recognizing the authority of the General Assembly to ensure global peace and security).

140. *Certain Expenses of the United Nations*; 1962 I.C.J. 151, 165, 171-72 (Advisory Opinion of July 20).

141. See U.N. Doc. A/5356 (Agenda Item 75), at 1-28 (1962) (reporting on the proposal of the Consideration of Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations). The declaration contains nineteen objectives for the following purposes: 1) maintaining peace; 2) settling disputes; 3) prohibiting the use of force; 4) prohibiting the use of force for mass destruction; 5) contemplating total disarmament; 6) prohibiting war propaganda; 7) discussing collective bargaining; 8) examining state sovereignty; 9) determining territorial inviolability; 10) noting state's independence; 11) recognizing sovereign equality; 12) participating in states' rights regarding international relations; 13) examining non-intervention; 14) discussing self-determination; 15) elimination of colonialism; 16) dealing with human rights elements; 17) cooperating in economic, social and cultural fields; 18) observing international obligations; and 19) examining states' responsibility. *Id.* at 2.

such a concept, and traceable to the adoption of the Uniting for Peace Resolution, split the committee considering the issue. The socialist group¹⁴² vehemently argued that the decision to set in motion the mechanism of coercion lay exclusively within the jurisdiction of the Security Council. Other states contended that the recommendations of the General Assembly in accordance with articles 10 and 11¹⁴³ of the Charter, with respect to the maintenance of international peace and security, might also furnish an institutional vehicle for applying force should the Security Council find itself unable to act.¹⁴⁴ Accordingly, many proposals at the Conference were couched in broad terms to provide for the use of force "on the basis of the decision by a competent organ of the United Nations."¹⁴⁵ No agreement, however, was reached on whether the Security Council is the only United Nations organ competent to authorize the lawful use of force, or whether the General Assembly was also competent.¹⁴⁶ The Definition of Aggression did not resolve this issue. In fact, as suggested by Stone, "[t]he new definition of aggression . . . has surrounded the whole area of peace enforcement with an ever denser entanglement of doubts and ideologically and economically based conflicts of interpretation about the limits of lawful use of force."¹⁴⁷ Stone himself nonetheless forecasts that "there is

142. See *Special Committee on Principles of International Law Concerning Friendly Relations and Co-operation Among States*, U.N. Doc. A/AC.125/SR.26, at 4 (1966) (recognizing Czechoslovakia's legitimate right to control as the country so chooses); *Special Committee on Principles of International Law Concerning Friendly Relations and Co-operation Among States*, U.N. Doc. A/AC.125/SR.62, at 9 (1967) (stressing the Security Council's obligation to take forceful action, specifically in Czechoslovakian matters, in exerting its control over international conflicts); see also *Special Committee on Principles of International Law Concerning Friendly Relations and Co-operation Among States*, U.N. Doc. A/AC.125/SR.88, at 6 (1968) (recognizing the importance of a principle of cooperation with Romania, the involvement of the Security Council, and the Romanian delegation's contribution to this concept).

143. See U.N. CHARTER arts. 10, 11 (determining the General Assembly's function and power with respect to any situation, specifically the maintenance of universal security and peace).

144. See *Special Committee on Principles of International Law Concerning Friendly Relations and Co-operation Among States*, U.N. Doc. A/AC.119/L.34/Add. 1, at para. 7 (1964) (defining the term "force" in the context of political or economic pressure).

145. See *Special Committee on Principles of International Law Concerning Friendly Relations and Co-operation Among States*, U.N. Doc. A/AC.119/L.15, at para. 3 (1964) (recognizing the joint proposal of Ghana, India, and Yugoslavia to use armed force when permitted by the United Nations).

146. See *Special Committee on Principles of International Law Concerning Friendly Relations and Co-operation Among States*, U.N. Doc. A/5746, at 51 (1964) (recognizing the lack of consensus with respect to the sole authority granted to the Security Council, that is the responsibility of permitting the lawful use of force).

147. See Stone, *supra* note 42, at 246 (noting the problems regarding the concept of aggression in dealing with international conflicts).

likely to be a continuing if not an increasing shortfall of Security Council performance in this area and therefore room for extension of the General Assembly's activity by analogy with that under the Uniting for Peace Resolution after 1950.¹⁴⁸

Apart from the general question of the competence of the General Assembly in matters concerning recourse to force, the application of the "legitimate authority" criterion to actions authorized by a United Nations organ involves also problems of constitutionality. The latter arise particularly when resolutions of either the General Assembly or the Security Council fail to comply with the requirements laid down in the Charter. Indeed, critics¹⁴⁹ emphasized this aspect in challenging the legality of the war in Korea, or, specifically, Security Council resolutions of June 25¹⁵⁰ and 27¹⁵¹ and July 7, 1950,¹⁵² which purported to provide the formal basis for enforcement action.

It was contended that the June 25, 1950 resolution calling for immediate cessation of hostilities and withdrawal by the North Korean authorities of their armed forces could not constitute a legitimate authorization of "enforcement action" under the United Nations Charter. Rather, it merely applied article 40 and called on the parties concerned to comply with the "provisional measures" it deemed necessary. Similarly, the June 27, 1950 resolution failed to comply with the required authorizing procedure, employing instead the form of recommendation normally reserved for non-military measures under article 39 of the

148. See *id.* (recognizing the reduction of the Security Council's ability to enforce peace among nations).

149. See H. KELSEN, RECENT TRENDS IN THE LAW OF THE UNITED NATIONS 927-49 (1951) (describing the United Nations action in the Korean situation specifically involving the resolutions adopted by the Security Council); J. STONE, LEGAL CONTROLS OF INTERNATIONAL CONFLICT 228-37 (1954) (assessing the obligations of United Nations to comply with Security Council resolutions in the Korean crisis); Kunz, *Legality of the Security Council Resolutions of June 25 and 27, 1950*, 45 AM. J. INT'L L. 137, 138 (1951) (noting the ineffectiveness of the Security Council's resolution to rectify conflicts arising from the Korean War); Gross, *Korea: A Study of U.S. Policy in the United States* (Book Review), 52 AM. J. INT'L L. 163, 165 (1958) (discussing the lack of authority given to the United Nations with respect to enforcement actions in Korea).

150. See Resolution Concerning the Complaint of Aggression Upon the Republic of Korea, U.N. Doc. S/1501 (1950) (establishing United Nations jurisdiction over the Korean situation and developing requests to be implemented upon Korea).

151. See Resolution Concerning the Complaint of Aggression Upon the Republic of Korea, U.N. Doc. S/1588 (1950) (recognizing the Security Council's responsibilities over the Korean situation and supporting their efforts in this matter).

152. See Resolution Concerning the Complaint of Aggression Upon the Republic of Korea, U.N. Doc. S/1511 (1950) (recommending that the United Nations follow its Resolutions of June 25 and 27, 1950 in order to resolve the Korean conflict).

Charter.¹⁵³ The resolution of July 7, 1950 also failed to provide the necessary authorization for United Nations enforcement action in view of its classification of the action taken by United Nations members in Korea as "collective self-defense." Had the Security Council subsequently intervened, characterization of the enforcement action would have been constitutionally inappropriate.

Similarly, the General Assembly resolution of February 1, 1951 was *ultra vires* to the Uniting for Peace Resolution under which it had purportedly been drafted¹⁵⁴ and hence could not furnish the legal authorization necessary for enforcement action under the United Nations Charter. Such constitutional problems may also give rise to a related complication, stemming from an allegedly *ultra vires* conduct by forces acting with the authority of an apparently valid resolution.¹⁵⁵ While it is questionable whether the United Nations acting *ultra vires* might be guilty of aggression,¹⁵⁶ some states regarding such an act as illegal would render aid in collective defense to the state that committed the initial aggressive act.¹⁵⁷ Again, the situation does not lend itself to easy solutions but at the same time it reinforces the significance of the "legitimate authority" criterion and the need for its careful application with a view to minimizing opportunities for recourse to force.

7. Action by Regional Organizations

Of equal importance is the "legitimate authority" criterion in the context of use of force pursuant to action of a regional organization "relating to the maintenance of international peace and security" as provided in Chapter VIII of the United Nations Charter.¹⁵⁸ Generally, regional peacekeeping operations consistent with the purposes and principles of the United Nations are lawful so long as they are undertaken

153. See U.N. CHARTER art. 39 (stating the Security Council's obligations with respect to breach of or threats to peace and the Council's authority to maintain international peace).

154. See KELSEN, *supra* note 149, at 986-90 (comparing the implications of the Uniting for Peace Resolution to the February 1, 1951 resolution).

155. See I. BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 334-36 (1963) (discussing the validity of Security Council resolutions, specifically to the Soviet criticism of the United Nations' action in the Congo in 1960).

156. See *id.* at 335 (discussing the problems arising from the Security Council acting *ultra vires* in certain situations).

157. See Certain Expenses of the United Nations, 1962 I.C.J. 151, 168 (Advisory Opinion of July 20) (recognizing that third parties may defer to the Security Council acting *ultra vires* with respect to the internal operations of the United Nations).

158. See U.N. CHARTER arts. 52-54 (establishing the function of the regional organizations to maintain peace in their region as well as in a global nature).

at the initiative of a genuinely independent regional arrangement.¹⁵⁹ The identification of an arrangement as a "regional" one, however, presents difficulties, particularly since this concept is not defined in the United Nations Charter. Disagreements result as to whether regional character should be determined on the basis of membership, geographical position, or the subject-matter regulated by the arrangement.¹⁶⁰ Such a controversy surrounded the recognition of the North Atlantic Treaty Organization (NATO). The absence of reference to "enforcement measures . . . in case a conflict between two or more members of the Union"¹⁶¹ added to the controversy. The NATO Treaty, however, fulfilled all the requirements of a regional agreement under chapter VIII.¹⁶² While attempts to construe strictly permissible sources of lawful uses of force, the Charter seems to allow contradictory interpretation.¹⁶³

Further problems stem from uncertainty concerning the extent of the authority of a regional arrangement and its compatibility with arrangements of the Security Council. Diverging views—that parallel the disagreement concerning actions by United Nations organs¹⁶⁴—also manifest themselves in the conflicting constructions of the relevant clauses of the Charter, and particularly article 53 which stipulates:

The Security Council shall, where appropriate, utilise . . . regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorisation of the Security Council

Western states have narrowly interpreted the term "enforcement ac-

159. See U.N. CHARTER art. 52, para. 1 (stipulating the existence of regional committees to ensure international peace and security). The Charter states:

Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.

Id.

160. See Akehurst, *Enforcement Action by Regional Agencies with Special Reference to the Organization of American States*, 42 BRIT. Y.B. INT'L L. 175, 175-76 (1967) (discussing the problems of determining what constitutes a regional arrangement and the other factors related to distinguishing regional agencies).

161. See W. BECKETT, *THE NORTH ATLANTIC TREATY, THE BRUSSELS TREATY AND THE CHARTER OF THE UNITED NATIONS* 21 (1950) (stating the provision in the North Atlantic Treaty bringing to the forefront regional arrangements).

162. See Kelsen, *Is the North Atlantic Treaty a Regional Arrangement?*, 45 AM. J. INT'L L. 162, 163 (1951) (quoting the North Atlantic Treaty's role in restricting the exercise of certain powers).

163. *Id.* at 166.

164. See *supra* notes 159-62 and accompanying text (discussing the varying points of view with respect to the regional arrangements authority).

tion" with a view to extending the authority of regional organizations. The United States and most of its fellow members of the Organization of American States (OAS) advocated such an interpretation, in relation to the Dominican Republic intervention¹⁶⁶ and the Cuban quarantine.¹⁶⁸ A similar interpretation also found expression in the discussions¹⁶⁷ about the Principles of International Law Concerning Friendly Relations and Cooperation Among States¹⁶⁸ and the Definition of Aggression,¹⁶⁹ although the "Thirteen Powers" took a contrasting stand in their Draft Definition of Aggression.¹⁷⁰ It appears, however, that the latter proposal presumed to rewrite article 53 of the Charter, first by inserting the proviso that governs not only article 53 "enforcement action" but "any use of armed force" by regional agencies, as governed by article 53, and second, by specifying that states may resort to such expanded use of force only "if there is a decision to that effect by the Security Council". The definition of aggression nonetheless proved yet again unviable for resolving differences of the kind surrounding the

165. See 15 U.N. SCOR (983d mtg.) at 9, 12, 13 UN Doc. S/PV. 893 (1960) (expressing the USSR's support of the Security Council's involvement in the Dominican Republic); see also *id.* at 46 (stating the United Kingdom's position with respect to the Dominican Republic's situation).

It is the view of my delegation that when Article 53 refers to 'enforcement action[,] it must be contemplating the exercise of force in a manner which would not normally be legitimate for any State or group of States except under the authority of the Security Council. Other pacifying actions under regional arrangements as envisaged under Chapter VIII of the Charter which do not come into this category have simply to be brought to the attention of the Security Council under Article 54.

Id.

166. See Chayes, *The Legal Case for U.S. Action on Cuba*, 41 DEP'T ST. BULL. 763, 764 (1962) (comparing the actions of the regional organizations to the United Nations obligations to control the use of enforcement action, specifically in the Cuban quarantine situation); Meeker, *Defensive Quarantine and the Law*, 57 AM. J. INT'L L. 515, 519-20 (1963) (illustrating how the regional organization duties, augmented while under the obligations of the Security Council, diminished during the Cuban quarantine).

167. See U.N. Doc. A/Ac.119/L.B, at 2, para. 5 (1964) (describing the legal authority of the United Nations, based on the power granted by the Charter, to apply forceful means to situations of international strife). "Use of force . . . pursuant to decisions of or authorizations by . . . regional organizations consistent with the Charter of the United Nations . . ." *Id.*

168. *Id.*

169. Special Committee on the Question of Defining Aggression Draft Proposal submitted by Australia, Canada, Italy, Japan, the United Kingdom of Great Britain and Northern Ireland, and the United States of America, A/AC.134/L.17 and Add. 1 & 2 (1969) (limited series not for deposit).

170. Special Committee on the Question of Defining Aggression, Draft Proposal Submitted by Colombia, Cyprus, Ecuador, Ghana, Guyana, Haiti, Iran, Madagascar, Mexico, Spain, Uganda, Uruguay, and Yugoslavia, A/AC.134/L.16 and Add. 1 & 2 (1969).

construction of article 53.

The Grenadan operation affords a recent illustration of the persistent disagreement in this domain of international law. Arguments put forward in justification of that operation underscore a rather subtle point: that actions of the type involved in Grenada are not directed against a government as sanctions, but instead are focused on restoring order and orderly processes of self-determination. Such actions do not amount to "enforcement action" under article 53 and may be undertaken without the Security Council's approval.¹⁷¹

In fact, the United States presented a similar argument during the Security Council debate on the 1965 OAS Dominican Republic crisis, another instance where regional peacekeeping actions occurred.¹⁷² Additional support for this point may be found in the I.C.J. decision in *Certain Expenses of the United Nations*,¹⁷³ which considered peacekeeping actions not directed against, but undertaken with the permission of the constitutional authorities, not to be enforcement actions.¹⁷⁴

Whether classified as "peacekeeping" or "enforcement," the Grenada operation touches on another key aspect of "authority," namely the identification of the "designated regional organization." One view expressed recognizes the OAS as the "only collective agency mandated by the regional community of states to maintain international peace and security for the Western Hemisphere in accordance with the purposes and principles of the UN."¹⁷⁵ Accordingly, members of the Organization of Eastern Caribbean States (OECS) could not lawfully au-

171. See Moore, *Grenada and the International Double Standard*, 78 AM. J. INT'L L. 145, 155-56 (1984) (justifying the United States invasion into Grenada as a reasonable peacekeeping action). The United Nations would not condone the invasion as it was executed, in response to a request for assistance, nor as a crusade to further the hegemony of a foreign state. *Id.*

172. See 20 U.N. SCOR (1220th mtg.) at 56-60, U.N. Doc. S/P.V.1220 (1965) (recognizing that the purpose of the involvement of the Inter-American Force in the Dominican Republic was not to intervene but rather to establish an atmosphere of peace, cooperation, and protection of human rights); 20 U.N. SCOR (1222d mtg.) at 22, 27, U.N. Doc. S/P.V.1222 (1965) (arguing that the United Nations Charter clearly gave the OAS authority to take action in the Dominican Republic crisis).

173. *Certain Expenses of the United Nations*, 1962 I.C.J. 151, 197 (Advisory Opinion of July 20).

174. See Moore, *supra* note 171, at 155 (noting that regional peacekeeping actions taken pursuant to constitutional authorities, such as those in the Dominican case, are not "enforcement actions" under article 53 of the Charter).

175. See Boyle, Chayes, Dore, Falk, Fenrider, Ferguson, Fine, Nunes & Weston, *International Lawlessness in Grenada*, 78 AM. J. INT'L L. 172-73 (1984) (suggesting that the OAS was the only collective agency mandated by the regional community of states to maintain international peace and security for the Western Hemisphere).

thorize the United States invasion of Grenada,¹⁷⁶ a conclusion which may engender further controversy.

B. OTHER PARTICIPANTS

1. *Neutral States*

Examining the nature of neutrality and its place in the doctrine of war shows that this principle effectively removes certain actors from the arena of international warfare and thus curtails their war-making powers and maneuverability. Neutrality, which is conventionally expressed in the language of rights, is an aspect of state sovereignty. Impliedly, in any prospective or ongoing conflict between two other parties, states have the right to adopt the position of "thirdness" and benefit from the neutral rights that accompany the status. Neutrality is thus a voluntary act which a state may undertake at will with respect to any war. Generally, neutrality may exist without reference to the moral character of the belligerent powers or to the probable outcome of the war. Rather, it stems from the conviction that the coercion inherent in war should not extend beyond the limits dictated by the material causes of the conflict and the military organization of the states involved. At least one group of people, citizens of the neutral state who do not choose to risk their lives, should be protected from the effects of armed conflict.

For these reasons, violations of neutral rights are normally considered a particularly reprehensible kind of aggression, lending support to the popular view that it is worse to strike out at uninvolved states than at states with which one is at war. The status of neutrality, however, is not sacred or inviolable. History furnishes numerous illustrations of the vulnerability of neutral rights to claims of just and unjust belligerents.¹⁷⁷ Infringements of such rights in the name of "necessity," "supreme emergency," or "higher aims"¹⁷⁸ have been particularly

176. See Treaty Establishing the Organization of Eastern Caribbean States, June 18, 1981, 20 I.L.M. 1166 (1981) (noting that article 8, paragraph 4 of the Treaty prevents member nations of the OECS from authorizing an invasion such as the U.S. invasion of Grenada). The Treaty limits the power of member states to authorize an invasion only in situations amounting to "external aggression." *Id.* Even in such situations, the states may act only in accordance with the right of individual or collective self-defense as recognized by the OAS Charter, as well as article 51 of the U.N. Charter.

177. See M. WALZER, JUST AND UNJUST WARS 240-50 (1980) (referring to the German violation of Belgian neutrality in 1914 as an act not to protect Germany's survival, but merely to improve their odds of victory).

178. See *id.* at 245 (justifying the British intervention into neutral Norway in 1940 as an act necessary to protect the independence of all the smaller European countries).

common.

Generally, if third parties believe that one of the belligerents is an aggressor or that the conflagration is likely to bring calamity, they are more likely to become involved. Statements reflecting this assumption have often been made since World War II by moralists who ponder: "How can any state stand and watch the destruction of a neighbor? How can the rest of us respect its right to stand and watch if, by violating this right, we might avert the destruction?"¹⁷⁹

Such a moral stand is particularly emphasized in the context of a great power's campaign of conquest, aimed not merely at a particular state, but at a larger ideological or imperial goal. In fact, a common argument is that "aggression anywhere threatens everyone" and thus no state can assume a neutral posture and reap the benefits of other states' efforts to contain, at a substantial cost, hostilities.

President Wilson embraced this position in his war message of April 2, 1917 when he proclaimed that "[n]eutrality is no longer feasible or desirable when the peace of the world is involved and the freedom of its people."¹⁸⁰ Wilson's statement drew considerable support, particularly from the highly regarded scholar Kunz who asserted that the "law of neutrality . . . broke down in the world war and did not protect the neutrals Neutrality is no more possible in fact and no more desirable in law."¹⁸¹

Nor did the situation appear to have changed in the post Second World War era. With aggression an international crime, neutrality became a connivance in this crime.¹⁸² Indeed, the emphasis on war guilt and the proceedings of the Nuremberg trial, which gave effect to the principle of collective security embodied in the League of Nations Covenant, the Kellogg Pact, and the United Nations Charter, further dis-

Churchill argued that, given the exigent circumstances that Germany's aggression created, Norway's neutral rights would have to temporarily "fade away." *Id.*

179. See *id.* at 233 (noting that although states certainly possess the right to remain neutral, they often make a moral decision to become involved in armed conflict, in order to help protect their neighbors from an aggressor).

180. See STAFF, SOCIAL SCIENCES I, UNIV. CHICAGO, THE PEOPLE SHALL JUDGE - READINGS IN THE FORMULATING OF AMERICAN POLICY 354, 361-67 (1949) (urging the United States to relinquish its 1914 policy of neutrality and instead become aligned with other democratic nations in an effort to maintain worldwide peace).

181. See Kunz, *Covenant of the League of Nations and Neutrality*, 29 AM. SOC'Y INT'L L. PROC. 36, 36-42 (1935) (recognizing that although the reasons for neutrality are manifold, it is no longer realistic or practical for a nation to remain neutral in a world of international solidarity and interdependent communities).

182. See Korovin, *The Second World War and International Law*, 40 AM. J. INT'L L. 742, 753 (1946) (realizing that the concept of neutrality is no longer applicable to contemporary international disputes; neither a great power nor a weak country can remain on the "outside").

couraged any notion of indifference to the causes of war. Furthermore, the high degree of interdependence which characterizes the present international system has rendered the pursuit of genuine neutrality a difficult task. As Orvik has elaborated:

With trade, industry, communication and ideologies woven tightly together, the problem becomes basically the same all over the world. No nation is a world by itself; all are smaller or greater parts of the same whole. Thus no state can truthfully declare that the problems of other states are none of its concern. Such a declaration would be an outright denial of facts. Any state regardless of how small and insignificant it may appear to be, is nevertheless a part of the whole world system, and as a member of the world community it has a duty to make up its mind as to the solution of the problems that will determine the future of the world . . . In the realistic interrelated world of today, a true, impartial and legal neutrality is impossible.¹⁸³

Thus, a community-wide interest exists in controlling military conflict, and even states not directly involved in a dispute have a duty to support the side whose cause is deemed just.

Apart from the moral unacceptability of noninvolvement in the face of aggression and the nonfeasibility on practical grounds of such a posture, the extent to which neutrality applies in contemporary conventional international law appears limited. Clearly, United Nations members cannot maintain neutrality (at least of the traditional type) if the Security Council imposes military or economic sanctions under Chapter VII of the Charter. In principle, no member of the United Nations is entitled, at its discretion, to remain neutral in a war in which the Security Council has found a particular state guilty of a breach of the peace or of an act of aggression and called upon the member of the United Nations concerned either to declare war upon that state or to take military action indistinguishable from war. This duty is the cumulative effect of article 2(5) of the Charter,¹⁸⁴ in which members undertake to give the United Nations every assistance in any action it takes in accordance with the Charter; of article 25,¹⁸⁵ in which members undertake to accept and to comply with the decisions of the Security Council; and of the provisions of chapter VII of the Charter involving

183. See N. ORVIK, *THE DECLINE OF NEUTRALITY 1914-1941* 277 (1971) (noting that because of the current tendency for states to function as groups, bound together by economic, cultural, and ideological ties, they rarely are able to follow independent policies such as neutrality).

184. See U.N. CHARTER art. 2, para. 5 (stating that all member nations shall undertake to give the United Nations assistance in any action it takes in accordance with the Charter).

185. See U.N. CHARTER art. 25 (stating that all member nations agree to accept and to comply with the decisions of the Security Council).

"enforcement action."¹⁸⁶ Thus, when an authorized, and therefore lawful force is being used against an aggressor state, neutrality toward that state would violate the positive obligations assumed by members under the Charter.¹⁸⁷

Reasonably cogent arguments do nonetheless favor establishing a continuing scope for neutrality within the United Nations Charter.¹⁸⁸ The formal prescriptions of the Charter against neutrality leave many gaps through which states may pursue permissible non-participation. First, neither the Charter nor resolutions of the United Nations bind non-members, who can thus maintain a neutral status regardless of Security Council decisions. Furthermore, a binding obligation for United Nations members arises only in the context of "decisions" (as distinct from "recommendations") by the Security Council, preserving, therefore, the option of neutrality in cases where the Security Council cannot arrive at decisions. The possibility of neutrality is also not ruled out when measures imposed by the Security Council under article 41 or 42 are solely of an economic nature. In fact, so long as the Security Council has not concluded any agreements on armed forces in accordance with article 43, there is no obligation to participate and the opportunity of neutrality is still available. By the same token, a country may find itself free to take a neutral stand if exempted by the Security Council under article 48 from participation in military measures.

Some scholars¹⁸⁹ attempt to demonstrate not only that a considerable legal scope for neutrality exists within United Nations law, but also that its importance in practice has substantially increased in view of the failure of the security system envisaged in the Charter to become an effective force in the management of international conflict. Yet, neu-

186. See U.N. CHARTER arts. 39-51 (giving the Security Council power to call upon its members to take collective action against nations who threaten peace or act aggressively). Article 41 allows the Security Council to call upon members to sever diplomatic ties and completely interrupt economic relations and all means of communication with belligerent nations. *Id.* at art. 41. Article 42 gives the right of passage and makes the territory of all member states available to the Security Council forces. *Id.* at art. 42. Finally, article 45 provides that the Security Council may undertake to hold national air force contingents immediately available for combined international action. *Id.* at art. 45.

187. See N. ORVIK, *supra* note 183, at 252 (noting that the Security Council has the right as well as the duty to determine when and by whom peace is threatened). If such a determination is made, *all* member nations are then required to cooperate with the Security Council in administering any form of sanctions against, or a severance of diplomatic ties with the aggressor nation. Thus, the concept of neutrality is no longer feasible. *Id.*

188. See Scheuner, *Neutrality in Public International Law Today*, 7 L. & STATE 53, 53-72 (1973).

189. *Id.*

trality as traditionally conceived may not be compatible with other commitments, short of enforcement action, which states incur under current international law through membership in international organizations or in the community of nations in general. This incongruity, in fact, has given rise to a concept of "differential neutrality"¹⁹⁰ which retains the element of non-participation in armed conflict but permits political or economic support. The use of the term "neutrality," however, to describe this hybrid status is somewhat misleading since the selective support it implies manifestly contradicts the reciprocal balance between the rights and obligations of belligerents and neutrals which lies at the root of neutrality. Technically, therefore, a country which makes such a distinction is acting outside the rules of neutrality and exposing itself to the risk of countermeasures by the party discriminated against.

Diverging opinion in this respect supports disposing of terms such as "neutral" and "belligerent," which continue to carry connotations both of law and fact existing in an earlier era as officials and scholars have moved to substitute the more factually descriptive term "armed conflict" for "war." We might well also begin to use the terms "combatant" and "noncombatant state" or "fighting" and "nonfighting state" to reduce the risk of confusing description of conduct with legal outcomes of decision regarding permissible acts of state.¹⁹¹

At the same time, appraising an evolving concept should not occur merely through a change of terminology. Rather, acceptance of the perception that each state has the responsibility to support international public order may transform the existing notion that neutrality is

190. See D. BOWETT, *SELF-DEFENSE IN INTERNATIONAL LAW* 174-75 (1958) (noting that increased use of the terms "qualified neutrality" or "nonbelligerency" indicates a movement away from the traditional notion of neutrality); I. BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 402-04 (1963) (discussing that absent an authoritative decision by a competent organ of the United Nations, states are free to determine whether they will adopt a policy of absolute neutrality); M. GREENSPAN, *THE MODERN LAW OF LAND WARFARE* 530 (1959) (discussing the legal consequences of being a nonbelligerent as opposed to neutral nation); L. OPPENHEIM, *INTERNATIONAL LAW* 648-49 (H. Lauterpacht 7th ed. 1952) (noting that terms such as "qualified neutrality" or "nonbelligerency" have come to replace the concept of neutrality); R. TUCKER, *THE LAW OF WAR AND NEUTRALITY AT SEA* 191-93 (1955) (discussing the decline of neutrality and the subsequent rise of nonbelligerency); Wilson, *Nonbelligerency in Relation to the Terminology of Neutrality*, 35 *AM. J. INT'L L.* 121-23 (1941) (illustrating that the term nonbelligerency does not refer to complete neutrality, but implies various shades of partiality).

191. See Williams, *Neutrality in Modern Armed Conflicts: A Survey of the Developing Law*, 90 *MIL. L. REV.* 9, 13 (1980) (stating that a switch from such references as "neutral" and "belligerent" to "noncombatant state" and "fighting," respectively, reduces the risk of confusing descriptions of conduct with legal outcomes).

an exercise of free choice. Community policy arguably demands the widest necessary assumption of state responsibility in the world community to ensure that sufficient power is mobilized and employed to overcome a belligerent that has resorted to the unlawful use of armed force or has violated other fundamental principles of international law.

In this respect the characterization of a belligerent's conduct as unlawful should generate the widest participation in placing the required resources at the disposal of those acting on behalf of the international community to apply sanctions against an unlawful belligerent.¹⁹² Yet, states ought to discriminate in favor of the belligerent acting for the community, in a form varying from military activity to economic and other non-military assistance. Similarly, states should actively defend threatened values.¹⁹³ Such a policy results from the process of weighing the risks involved in permitting intervention for the protection of basic values against the risk of insulating genocidal acts and other fundamental abuses of human rights from effective response.

Some community policies favor intervention as a state's contribution to the maintenance of global order. Other community policies, however, emphasize minimum necessary consumption or destruction of human and material resources. The latter emphasis would, in certain circumstances, promote neutrality to protect values at stake. Article 48 of the United Nations Charter,¹⁹⁴ as noted above, makes such allowance in recognizing the possibility that various member states might remain neutral in the event of United Nations action to maintain international peace and security. Additional guidelines suggest that:

the nature of each state's participation in community action against an aggressor, or in other community use of force, should vary, depending on that state's capabilities; the requirements for assistance present in the particular situation (e.g. base facilities, rights of transit, provision of supplies, or perhaps, merely diplomatic support), and other factors.¹⁹⁵

192. *See id.* at 15-16 (noting that once the Security Council characterizes a belligerent's conduct as unlawful, the principle of community responsibility is applicable and member states are required to act together in applying sanctions against the unlawful belligerent).

193. *See Moore, Toward an Applied Theory for the Regulation of Intervention*, in *LAW AND CIVIL WAR IN THE MODERN WORLD* 3, 14, 25 (J. Norton Moore ed. 1974) [hereinafter J. Norton Moore, *LAW AND CIVIL WAR*] (noting that the United Nations Charter recognizes unilateral force in defense of major values, but prohibits force used for the purpose of imposing values on others).

194. *See U.N. CHARTER* art. 48 (stating that all members of the United Nations or some of them may undertake actions required to carry out the Security Council's efforts to impose sanctions against a belligerent nation).

195. *See Williams, supra* note 191, at 16-17 (suggesting that not all the members of the United Nations need to participate in discrimination against an unlawful belligerent in the absence of an all-encompassing global conflict).

Another constraint is introduced by the notion that "humanitarian intervention" is a matter to be dealt with at the initiative of international bodies or regional organizations set up in accordance with the Charter's provisions, rather than by individual nations.¹⁹⁶

Applying such standards a great majority of states could, as a matter of practice, abstain from any form of involvement in international conflicts. Encouragement of neutrality could contribute to the maintenance of world order, particularly through facilitating humanitarian efforts. Neutral states provide the necessary infrastructural supports for the implementation of humanitarian laws of armed conflict such as mediation, channels of communication between opposing belligerents, "Protecting Powers" under the Geneva Conventions, or locations for negotiation.¹⁹⁷

In addition, the institution of neutrality performs a useful service in maintaining a sphere of peace from which efforts to end war can arise. Neutral states provide an objective, neutralizing influence against the modern tendency toward ideological escalation of war and uncontrolled build-up of national passions. Another function of neutrality is its physical containment of areas of potential conflict. Neutrality creates buffer zones and secures peaceful areas which limit the destructive outcomes of armed conflicts.

Notwithstanding the perceived value of neutrality in the maintenance of international peace and security and the opportunities apparently available for assuming a neutral posture amidst the world's conflicts, the question remains whether the present trend of decision-making has moved beyond the existence of a duty not to assist an aggressor state or the right not to assist any belligerent and has moved toward the development of community expectations based upon common interest. This development is evident in the establishment of a duty of "affirmative partiality," an obligation to provide an affirmative assistance to belligerents combating unlawful disputes of world order.

196. *See id.* at 17-18 (noting that a permanently neutral state may serve a positive function such as a "security buffer" between states that fear attack from one another). The neutral state may help to improve relations between warring nations by serving as a mediator, an impartial channel of communication, or by providing a location for negotiation. *Id.*

197. *Id.* at 26 (noting that the trend under the United Nations Charter is for the Security Council to make a "recommendation" to states that they exercise passive discrimination against an unlawful belligerent nation, allowing each state to use its own discretion as to whether or not they will support the community effort); *see also* M. McDUGAL & F. FELICIANO, *LAW AND MINIMUM WORLD PUBLIC ORDER: THE LEGAL REGULATION OF INTERNATIONAL COERCION* 430 (1961) (noting that the United Nations encourages countries to exercise a policy of "permissive discrimination" against belligerent nations).

A brief survey of highly selected decisions suggests that the current position is similar to that under the League of Nations. At most, a duty of passive discrimination exists, that is, non-assistance to a state characterized by the United Nations as an unlawful belligerent.¹⁹⁸ One commentator suggests:

[a]bsent an *ad hoc* concurrence of interests of the permanent members of the Security Council, sufficient to allow a controlling decision under article 39, which in the foreseeable future will be a rare event, states will provide assistance on a discriminatory basis to states engaged in armed conflict in support of international peace and security. They will be free to be impartial towards all belligerents, or to choose on the basis of individual characterization to discriminate against the side viewed as an aggressor.¹⁹⁹

Reference to states' behavior during the United Nations involvement in Korea and in the course of the Arab-Israeli wars, supports the adoption of "impartial neutrality." Nonetheless, a major dimension of states' involvement in armed conflicts stems from politically motivated internal violence, which bears significantly on general norms of international law pertaining to international armed conflicts.

Particularly interesting in this respect is the effect of General Assembly resolutions which, apart from prohibiting assistance to the incumbent administration, call for active support of insurgents. Some of these resolutions invite all United Nations members "to provide material and moral assistance to the national liberation movements in Colonial Territories,"²⁰⁰ or "to offer moral, material and any other assistance to all peoples struggling for the full exercise of their inalienable right to self-determination and independence."²⁰¹ Other relevant resolutions specify that "peoples subject to colonial oppression are entitled to seek and receive all support in the struggle which is in accordance with the purposes and principles of the Charter."²⁰² Though neither legally binding, nor universally supported politically, these series of resolutions on decolonization may have contributed to a growing state practice of "af-

198. See Williams, *supra* note 191, at 19-27 (asserting that under most circumstances nations are free either to comply with Security Council recommendations or to remain impartial toward all belligerents).

199. *Id.* at 26.

200. G.A. Res. 2105, 20 U.N. GAOR Supp. (No. 14) at 3, U.N. Doc. A/6014 (1965); see also G.A. Res. 2908, 27 U.N. GAOR Supp. (No. 30) at 75, U.N. Doc. A/8730 (1972) (providing "maximum humanitarian and material assistance" to the peoples in the territories under Portuguese administration).

201. G.A. Res. 3070, 28 U.N. GAOR Supp. (No. 30) at 78, U.N. Doc. A/9030 (1973).

202. G.A. Res. 2160, 21 U.N. GAOR Supp. (No. 16) at 4, U.N. Doc. A/6316 (1966); G.A. Res. 2625, 25 U.N. GAOR Supp. (No. 28) at 121, U.N. Doc. A/8082 (1970).

firmative partiality" and to a certain measure of acceptability of this phenomenon in the international arena.²⁰³

This current trend in the attitude of governments illustrates a general reluctance on the part of states to rely on the customary law of neutrality for ideological reasons. Because aggressive war is outlawed, belligerent states have justified their conduct of armed hostilities by recourse to other principles of international law thought more compelling, that is, each has made its cause a *bellum justum* and its war a just one.²⁰⁴ Such normative claims, which are often phrased in absolute terms, do not readily admit strict impartiality and abstention for third parties. Thus, although a legal duty on the latter to "take sides" cannot be firmly grounded in positive international law, the institution of neutrality appears nonetheless to have undergone the corresponding transformation expected in this era of "traditional just war revisited,"²⁰⁵ namely, toward the notion that every state should discriminate between the just and unjust belligerent.

At the same time, in situations not involving United Nations enforcement measures or in wars which do not directly concern international values, however, some form of neutrality may prevail. Thus, for instance, most countries²⁰⁶ chose to remain oblivious during the Falklands War. The larger-scale conflict between Iran and Iraq is another war in which most countries have remained neutral, although a recent

203. See Chatterjee, *Some Legal Problems of Support Role in International Law: Tanzania and Uganda*, 30 INT'L & COMP. L. Q. 755, 758-59 (1981) (citing several examples of situations where a country lent support to another country involved in a "liberation movement," in particular Tanzanian support for the Ugandan effort to overthrow Idi Amin).

204. Norton, *Between the Ideology and the Reality: The Shadow of the Law of Neutrality*, 17 HARV. INT'L L.J. 249 (1976) (examining the law of neutrality since the signing of the United Nations Charter, in particular how the clash between the ideology and reality of the law of neutrality has contributed to its erosion).

205. Claude, *Just Wars: Doctrines and Institutions*, 95 POL. SCI. Q. 83, 94 (1980) (employing the label "traditional just war revisited" in pointing out that since 1960, the world has returned to the idea that it is permissible or even mandatory to fight to promote justice and overturn evil).

206. Freedman, *The War of the Falkland Islands, 1982*, 61 FOREIGN AFF. 196, 200 (1982). *But cf.* 82 DEP'T ST. BULL. 87, 88 (June 1982) (Statement of Secretary of State George Schultz).

[I]n the light of Argentina's failure to accept a compromise, we must take concrete steps to underscore that the United States cannot and will not condone the use of force to resolve disputes. The President has, therefore, ordered the suspension of all military exports to Argentina, the withholding of certification of Argentine eligibility for military sales and the suspension of new Export-Import Bank credits and guarantees. The President has also directed that the United States will respond positively to requests for material support for British forces.

Id.

trend is showing states favoring Iraq.²⁰⁷

Thus, the loose international system of today cannot sustain a highly coherent body of international law governing the rights and obligations of neutrals that applies to all armed conflicts, regardless of how they originate or regardless of who participates in them.²⁰⁸ Indeed, to the degree that the rules of neutrality have survived, specific practical interpretations have refashioned such rules to fit the special demands of modern warfare and the present world configuration.

2. States Acting Collectively in Self-Defense

A non-attacked state does not have any inherent right, established by natural law, to assist an attacked state.²⁰⁹ The concept of "collective self-defense" is nonetheless embodied in treaties and conventional law. More importantly, collective self-defense is expressly recognized in article 51 of the United Nations Charter.²¹⁰ The scope of application of this institution is not, however, without controversy. What had originated as a "linguistic problem"²¹¹ has turned into one which has polarized opinions along ideological or political lines. Essentially, three positions predominate in this matter:

A. That all states which purport to exercise the right of collective self-defense must have a valid independent claim; no state may defend another state unless each state could have legally exercised a right of individual self-defense in the same circumstances.²¹²

B. That "collective self-defense" is basically the "defense of another state" by states which come to the assistance of the victim of an armed attack.²¹³ That is, any group of states are free to treat an attack on one

207. Sterner, *The Iran-Iraq War*, 62 FOREIGN AFF. 128 (1984) (the author points to the possible spillover effects of the war and the danger perceived by moderate Arab states of the spread of the Iranian revolution as the reason for the quiet shift of several countries to the Iraqi side).

208. M. KAPLAN & N. KATZENBACH, *THE POLITICAL FOUNDATIONS OF INTERNATIONAL LAW* 224-25 (1961) (explaining that the law of neutrality applied to a period when wars were limited to security objectives that did not affect the interests of other states whereas today strong state interests often support non-neutral activities).

209. H. KELSEN, *supra* note 149, at 797.

210. U.N. CHARTER art. 51 (protecting the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations).

211. H. KELSEN, *supra* note 149, at 792 (noting the term "collective self-defense" is not quite correct because it involves action by states which are not attacked but only assist the attacked state against its aggressor).

212. Bowett, *Collective Self Defence Under the Charter of the United Nations*, 32 BRIT. Y.B. INT'L L. 130, 150 (1955-56).

213. Skubiszewski, *Use of Force by States, Collective Security, Law of War and Neutrality*, in *MANUAL OF PUBLIC INTERNATIONAL LAW* 769 (M. Sprensen ed. 1968) (pointing out that most collective self-defense treaties stipulate, usually with a refer-

as an attack on all.

C. That where an attack on one state threatens a substantial security interest of another, the latter may come to the assistance of the former.²¹⁴

Proponents of the "attack-on-one-attack-on-all" formula tend to view collective self-defense as an exercise of the residual obligation of members under article 1, paragraph 1 of the Charter, to act in the best way possible to maintain peace and security. Given the Security Council's inability to undertake decisive action, only arrangements for collective self-defense can fulfill the first principle of the United Nations to take effective collective measures to prevent threats to peace and to suppress acts of aggression.²¹⁵ Such an interpretation of collective self-defense comports with states' practice, particularly the multitude of bilateral and multilateral treaties of alliance which explicitly refer to article 51.²¹⁶ These treaties provide for aid by one party to another when the latter has been attacked by a third state, irrespective of whether the aggressor harbors any hostile intentions toward the former party as well.²¹⁷

Opponents of the "attack-on-one-attack-on-all" theory argue that this view openly invites states to intervene in any conflict between other states anywhere in the world.²¹⁸ Because states invariably justify re-

ence to article 51, that a party will come to the defense of another if the latter is attacked by a third party).

214. M. McDOUGAL & F. FELICIANO, *supra* note 197, at 252.

215. BECKETT, *supra* note 161, at 35 (citing the North Atlantic Treaty as an example of a collective self-defense organization which fulfills the "first principle of the United Nations").

216. Skubiszewski, *supra* note 213, at 769; *see also id.* at 770 (listing the principal collective alliances since 1945).

217. *See* North Atlantic Treaty, April 4, 1949, art. 5, T.I.A.S. No. 1964, 34 U.N.T.S. 243 (stating in part that "the Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all; and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defense recognized by Article 51 of the Charter of the United Nations, will assist the Party or Parties attacked by taking forthwith, individually and in concert with the other Party, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area."); *see also* Warsaw Pact, May 14, 1955, art. 4, 219 U.N.T.S. 3 (stating in part that "in the event of an armed attack in Europe on one or more of the Parties to the Treaty by any state or group of states, each of the Parties to the Treaty, in exercise of its right of individual or collective self-defense in accordance with article 51 of the Charter of the United Nations Organization, shall immediately, either individually or in assistance of the state or states attacked, respond with all means as it deems necessary, including armed force.").

218. Bowett, *Interrelation of Theories of Intervention and Self Defense*, in *LAW AND CIVIL WAR IN THE MODERN WORLD*, (J. Norton Moore ed. 1974) [hereinafter Bowett] at 46 (citing Memorandum of the Department of State justifying United States involvement in the Vietnam War as collective self-defense resulting from South

course to force as self-defense, such a position encourages unilateral assessment of the merits of competing claims, and may thus exacerbate potential global conflict by reducing the incentives for recourse to collective judgment within the structure of the United Nations.

Opponents of the "attack-on-one-attack-on-all" doctrine also assert that it confuses collective self-defense with collective security—two distinct institutions.²¹⁹ What distinguishes collective self-defense from security is that the former, the right to intervene, stems from the threat to the state's own security. Absent such a threat, the state shares the general interest of state members of the collective security system to maintain international peace. This must, however, take the form of participation in collective security action authorized by the competent organs and not constitute unilateral action.²²⁰

This argument, however, overlooks the fact that defensive alliances, which must fulfill the requirements of article 51,²²¹ exist and function not within but parallel to the United Nations system. Defensive alliances generally yield to United Nations intervention only when the United Nations is in a position to take measures which replace the action commenced in collective self-defense. These extraneous defensive alliances are thus arguably distinguishable from collective security measures, as well as from regional arrangements concluded under article 52.²²²

The above line of reasoning fails to consider whether a treaty can constitute a right of collective self-defense. A treaty cannot create or confer a greater right, but only recognize a pre-existing right and make provision for its effective implementation. Accordingly, the existing right must find its basis in a threat to the security of the intervening state. Thus, if state A attacks state B, the latter has a right of self-

Vietnam's right to self-defense); see also Memorandum of the Department of State on the Legality of United States Participation in the Defense of Vietnam, 5 I.L.M. 565 (1965).

219. J. STONE, *supra* note 149, at 264. "As distant from each other as order is from chaos, as modern England from the England of Wars of the Roses, as a society from a leaderless robber band struggling amongst themselves for dominance, as the administration of justice from a duel; in short as ordered living from the anarchic struggle to survive." *Id.*

220. Bowett, *supra* note 218, at 47.

221. U.N. CHARTER art. 51 (requiring that "measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council . . . to take such action as it deems necessary in order to maintain or restore international peace and security").

222. *Id.* at art. 52 (stating that regional arrangements are not subject to being superseded by United Nations action unless the Members of the regional arrangement refer the dispute to the Security Council).

defense. If in all the circumstances that attack also creates a threat to the security of another state, that other state has an independent right of self-defense which it may exercise in concert, or collectively, with state B.²²³

This basis, as indicated earlier, does not find support in the practice of states, in either the international or domestic²²⁴ spheres. Additionally, either the exercise of collective self-defense under a defense pact lies within article 51 of the Charter. Indeed, if the term "[or] collective" is to have any independent meaning at all, it should be interpreted in the light of state practice and the prevalent doctrine. These entail both the right of the attacked state to seek help pursuant to the treaty and the right, in fact obligation, of a party to that treaty, which does not have the individual right of self-defense, to assist the attacked state.

This is not to suggest that the notion of collective self-defense is a liberal one. Since such a right is an exception to the prohibition of article 2(4) of the Charter, the treaty under which it arises should be given a restrictive interpretation. The right of the assisting state is essentially "derivative or secondary," thus its exercise is "wholly dependent on, and in its scope identical to, the individual right of the attacked state."²²⁵ In particular, aid must lie within the limits of the defense of a third state, and the joint action should be consonant with the requirement of proportionality. The assisting state must not pursue any political goals of its own, or engage in any measures that are not indispensable for the effective military effort. That is, the assistance must be given under conditions that satisfy article 51, including the stipulation of immediate reporting to the Security Council. Given these restric-

223. Bowett, *supra* note 218, at 48.

224. See, e.g., MODERN PENAL CODE § 3.04, 3.05 (1962) (justifying the use of force in the reasonable protection of oneself or of others). In *Commonwealth v. Martin*, 341 N.E.2d. 885 (Mass. 1976), the court held that "an actor is justified in using force when (a) a reasonable person in the actor's position would believe his intervention to be necessary for the protection of the third person, and (b) in the circumstances as that reasonable person would believe them to be, the third person would be justified in using such force to protect himself." *Id.* In an English case, *Regina v. Duffy*, 1 Q.B. 63, 67 (Crim. App. 1967), the court recognized the right to intervene in a fight for the purpose of rescuing a person being attacked, even if the persons involved are strangers. *Id.* French law similarly authorizes "legitimate defense" of oneself or another. C. PÉN. art. 328.

225. Rohlik, *Some Remarks on Self-Defense and Intervention: A Reaction to Reading "Law and Civil War in the Modern World,"* 6 GA. J. INT'L & COMP. L. 395, 426 (1976).

tions, the fears of "wholesale intervention"²²⁶ and "expansion of conflict"²²⁷ become largely unwarranted.

Finally, relying on collective self-defense treaties seems pragmatic in a world in which the collective security system under the Charter has proved grossly inadequate.²²⁸ The "paralysis" of the Security Council in wake of the Permanent Members' "veto" power has made it necessary to fall back on looser cooperative forms of collective peace enforcement that depend ultimately for their efficacy on the initiative and effort of individual member states. Admittedly, misuse of alliances, in the form of intervention by a dominant member in the internal affairs of other members under the pretext of the threat of an attack by an outside power, is a common phenomenon.²²⁹ Yet, collective self-defense treaties do offer some guarantee to small nations and thus contribute to a better balance of power, enhancing in the process the overall stability of the international system. This said, there still is considerable scope for the introduction of effective safeguards, for instance, shorter duration of treaties and their frequent review²³⁰ to minimize abusive interventionary policies.

IV. CONCLUDING REMARKS

Historically, the principle of "legitimate authority" developed in response to the proliferation of private warfare and the adverse consequences of overly decentralized political practices. At present, this problem is no cause for concern, but with the emergence of the factor of national liberation movements, it may be said to exist in a different form. As a result, considerable attention has been accorded to the issue of whether and under what circumstances do non-state entities qualify as the "legitimate authority" for the purpose of the just war criteria.

226. Bowett, *supra* note 218, at 49 (expressing the fear that a too liberal interpretation of the concept of self-defense would allow wholesale intervention and threaten the rule of non-intervention and the collective security system). A restrictive view of self-defense is therefore essential.

227. Farer, *Law and War*, in *THE FUTURE OF INTERNATIONAL LEGAL ORDER* 15, 67 (C. Black & R. Falk eds. 1971) (explaining that since states almost always justify resort to force as self-defense, collective self-defense measures often endorse unilateral perceptions of competing claims, which in turn lead to an expansion of the conflict).

228. A. RIFAAT, *INTERNATIONAL AGGRESSION* 192-93 (1979).

229. Rohlik, *supra* note 225, at 424 (describing situations where major powers assemble various smaller states under their spheres of interest and link them to themselves under the treaty system).

230. *Id.* at 430 (contending that in order for the United States to make its international commitment credible, it should in the future seek bilateral self-defense treaties concluded for a span of three to five years, at the end of which Congress would review the treaty rather than automatically renew it).

This issue is highly controversial and has spawned a great variety of views, underpinned by intense ideologies and strong interests.

Another question that looms large in the contemporary discussion of the "who" criterion is the legitimacy and competence of a particular officer or organ of state to initiate war. Given the development of democratic institutions and the fact that state powers are not as absolute as they used to be, observers ponder to what extent rulers are free to exercise war-making powers on behalf of the ruled, and how to ensure accountability on the part of the former to the latter. Still, no clear legal guidelines have emerged in this respect, despite lip-service paid to lofty constitutional principles.

Consideration has also been given to the authority of other decision-making bodies, namely regional and international organizations. Both types of organizations, which have proliferated in the twentieth century in the wake of the growing interdependence of states, have featured prominently in international conflicts, and the various claims made with respect to their powers to use force warrant examination.

Also worthy of examination is the issue of neutrality. Notwithstanding its theoretical importance, the principle of neutrality is no longer as viable as it was previously. Neutral status, however, still imposes limits on war-making powers, and its ramifications continue to merit discussion in the context of the question "who may wage war?"

Another phenomenon that impinges on the same question is that of collective self-defense. Again, this is a domain characterized by considerable ambiguity, and the war powers exercised under this category defy clear delineation.

In sum, although important guidelines as to who may wage war have evolved over the years, no unequivocal means are available for implementing them in practice. The criterion of the "legitimate authority" itself may nonetheless serve to identify relevant issues and provide a general tool for evaluating a given use of force with a view to possibly circumscribing it.